No. _____

In The

Supreme Court of the United States

ALPHONSO MYERS,

Petitioner,

v.

KNIGHT PROTECTIVE SERVICE, INC., AND WILLIAM THOMPSON, AN INDIVIDUAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit weigh the evidence in favor of Respondents and fail to consider Petitioner's version of the facts in conflict with this Court's precedent?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit.

The Petitioner here and Appellant below is Alphonso Myers.

The Respondents here and Appellees below are Knight Protective Services, Inc., and William Thompson, an individual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, CONSTITUTIONAL AMENDMENTS

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Myers v. Knight Protective Serv., Inc.*, 774 F.3d 1246 (10th Cir. 2014). The opinion is reprinted in the Appendix hereto, pp. 1a-6a. The orders from the district court granting summary judgment were not reported but are reprinted in the Appendix hereto, pp. 7a-18a.

JURISDICTION

The Court of Appeals for the Tenth Circuit entered its judgment on December 22, 2014. Appendix, pp. 1a-6a. Petitioner Alphonso Myers ("Myers") now seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTES INVOLVED

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training,

and other terms, conditions, and privileges of employment.

42 U.S.C.A. § 12112

STATEMENT OF THE CASE

A. Summary of Facts

Myers worked as an armed security guard with Knight Protective Services ("KPS") starting in June 2009. At the time he was interviewed for the position, Myers informed Captain Mike Strider ("Strider") that Myers had issues with his neck and pain and that he was on a 10-pound weight limit. Strider asked Myers if he could observe and report, and Myers responded affirmatively. He then explained to Myers that he would have to pass all tests and the background check, but that if he did so, he could have the job with those duties. After Strider's comments, Myers understood that the essential functions of the job were observing and reporting, although there were other functions that were listed in the job description. Based upon that understanding, Myers answered the medical examination questions truthfully that there was nothing that would interfere with his performance. For the evaluation, Myers was able to perform each task that he was asked to perform.

Myers was performing his work satisfactorily and was never advised that he was not doing his job. Another employee at KPS, William Thompson ("Thompson") never informed Strider that Myers

could not perform his job. According to the documentation completed by KPS's own agents or employees, Myers could perform the essential security job functions without any limitations.

On October 9, 2009, Myers had finished his work and was closing the building down when he felt some pain after walking multiple flights of stairs, and rubbed his neck. Thompson saw him and asked if he was okay to which Myers responded that he had some pain, but that he would be okay. Thompson, however, advised Myers to take a second physical and that Myers should not work until he did so. On that same day, Thompson filed an "Incident Report" regarding Myers' pain.

Captain Strider testified that the incident report Thompson filed regarding Myers' pain was unusual. And, although Strider would have more than likely contacted Thompson upon receiving the incident report related to Myers' pain, he did not do so in this matter. Strider was unaware of any other circumstances where an Incident Report was submitted based upon someone's alleged pain on the job. Ultimately, Thompson had the authority to send Myers home for a reason if he so chose, but not the authority to terminate.

Pursuant to Thompson's instructions, Myers turned in his keys and supplies and waited to hear from Thompson about a second physical so he could return to work. However, Myers never heard from Thompson until December 2009, months later, when

Thompson informed Myers that the company was changing from .38 revolvers to .40 caliber automatics, and that as a result, Myers would have to take the new gun test. In response, Myers enrolled and was scheduled to take the new gun test on December 23rd. However, on the date Myers was scheduled to take the test, it was cancelled due to inclement weather. The next thing Myers heard was that he was to bring his uniform and license to the Federal building, and he was terminated soon thereafter.

Thompson indicated that Myers would have to take a second physical, saying that it was a decision approved by Captain Strider. However, Strider testified that, because Myers passed the first physical, there was no need to take a second one, and Strider never informed Myers that he had to take a second physical. Strider further informed Myers that he never told Thompson that Myers had to take a second physical in order to return to the workplace. Strider also testified that Thompson never indicated to him in any way that Myers needed to take a second physical.

Moreover, Thompson wrote a letter on behalf of Myers and indicated that he had consulted with Strider about writing the letter. However, Strider knew nothing about the letter. The letter also falsely claims that Myers and Thompson mutually agreed that it was best for Myers to resign. Strider testified that the next thing he heard about Myers, after being informed that Myers experienced some pain on the job, was Thompson telling him that Myers had resigned

his position. Thompson told Strider that Myers quit, when, in fact, Myers never indicated that he wanted to quit his job.

B. Course of Proceedings Below

Myers filed suit, alleging claims for race and disability discrimination in August 2010. He also brought claims against Thompson individually for tortious interference. The district court found in favor of Respondents, and Myers appealed to the Tenth Circuit. The Tenth Circuit found that Myers had no claim for disability discrimination because he indicated on a form for social security benefits that he could not work, and that he could not provide justification for the contradiction.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In granting summary judgment in favor of the Respondents, the Tenth Circuit evaluated the evidence under an erroneous view of the applicable summary judgment law governing employment discrimination cases based upon circumstantial evidence and the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 668 (1973) as applied in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L. Ed. 2d 105 (2000) and *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011). The

Tenth Circuit failed to rely on *Reeves*, and instead, inappropriately weighed the evidence, failed to view the record most favorably to Mr. Myers, and failed to draw reasonable inferences in Mr. Myers' favor from the circumstantial evidence presented.

I.

Review is Warranted Because the Majority Opinion Wrongfully Weighed the Evidence in Favor of Respondents and Failed to Consider Facts in the Record Supporting Petitioner's Claims

The Tenth Circuit relied, almost exclusively, upon Myers' representation before the Social Security Administration and Respondents' version of the facts to find that he cannot maintain a claim for disability discrimination. In doing so, the Tenth Circuit ignored the disputed facts present in the record, favorable to Myers, which is in direct conflict with this Court's long-standing precedent that a court must disregard all evidence favorable to the moving party and give credence to the evidence favoring the nonmovant. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 (2000). In other words, the evidence of the party opposing summary judgment is to be believed and all justifiable inferences are to be drawn in the light most favorable to that party. *Reeves*, 120 S.Ct. at 2101.

Despite this clear mandate, the Tenth Circuit apparently failed to consider Myers' evidence. The Opinion relied only upon Thompson's version of the

events to find, conclusively, that "[a]s part of the application process, Knight asked Mr. Myers a number of questions about his physical condition. Each time, Mr. Myers said he suffered no relevant disabilities." Appendix, p. 2a. This is an improper factual conclusion reserved for the jury and is contrary to an examination of the evidence that should be viewed favorably towards Myers.

The record shows that, at the time he was interviewed for the position, Myers informed Captain Strider that Myers had issues with his neck and pain and that he was on a 10-pound weight limit. Therefore, while Thompson may not have known about Myers' medical status, KPS, through Strider did. Captain Strider hired Myers with that knowledge. This fact, in large part, provides support for Myers' explanation of the apparent contradiction between his statements. Ultimately, KPS, through Strider, told him he could perform the job, even with knowledge of the limitations spelled out in the application for SSDI.

Moreover, the facts, seemingly ignored by the Tenth Circuit, also show that Strider found that Myers did not have to take a second physical because he had already passed the first one. Strider never told Thompson that Myers had to take another physical, although Thompson claimed that Strider did. Yet, the Court only cites facts favoring Thompson while silent on these other facts in the record, which if considered would also provide support for Myers' "cat's paw" theory under *Staub v. Proctor Hospital,* 131 S.Ct. 1186 (2011).

The Tenth Circuit also stated, "Mr. Thompson grew concerned that Mr. Myers wasn't up to the job of an armed guard, that someone might grab Mr. Myers's weapon or, even worse, take him hostage." Appendix, pp. 2a-3a. The record from Myers tells a different story, and clearly indicates that Myers had been performing his job tasks satisfactorily until Thompson regarded Myers' outward sign of discomfort as him being unable to do anything. See *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1242 (10th Cir. 2001) ("regarded as" claim needs evidence that Defendant "misperceived the extent of Plaintiff's limitation"; perception of Plaintiff cannot be based on speculation, stereotype or myth). In other words, Myers was doing the job, yet the Tenth Circuit fails to recognize any of this evidence favorable to Myers.

In that respect, the Tenth Circuit sided completely with Respondents' version of the events around Myers' employment duties, without even acknowledging the evidence in the record supporting Myers' claims:

> As he acknowledged in his written employment application with Knight, the essential functions of his job as an armed security guard required him to engage in frequent and prolonged walking, standing, and sitting; to react quickly to dangerous situations; to subdue violent individuals; and to lift heavy weights.

Appendix, p. 4a.

Once again, the record provides facts to dispute this slanted version of this matter. Specifically, the record shows that the job for which Myers was hired was not onerous or physically demanding, and therefore, his 10-pound restriction, the basis for his claim for disability, was irrelevant. Myers was informed that the job would simply involve him observing and reporting, and that these were the essential functions of the position. Therefore, he was informed that if he could pass the necessary tests and physical based upon these functions, then he could have the job, and this is exactly what he did. Notwithstanding Respondents' biased opinion, if Myers passed the necessary tests given by KPS, then he was, per se, qualified for the position.

So, the facts provide a controversy as to what duties constituted Myers' job with KPS. Moreover, the inference should be made that even if the essential functions are as set out in the Tenth Circuit's Opinion, KPS and Strider made sufficient reasonable accommodations for Myers in order to allow him to perform the job with his disability.

This accommodation, ignored by the Tenth Circuit, is important in supporting Myers' sufficient justification for the contradiction between his job at KPS and his representations as included on the application for social security benefits. The Tenth Circuit has previously held:

> The Social Security Act, on the other hand, does not take into consideration whether an

> accommodation would render the individual able to perform a job. Therefore, a statement that a person is disabled for purposes of obtaining social security disability benefits – a determination made without regard to accommodation – is not necessarily inconsistent with a statement that a person has been discriminated against in the workplace on the basis of her disability – a determination made only after giving due regard to accommodation.

Rascon v. U.S. West Commun., 143 F.3d 1324, 1330-31 (10th Cir. 1998).

The Tenth Circuit's own precedent states that summary judgment is inappropriate when the evidence presented by the parties is susceptible of different interpretations or inferences by the trier of fact. *Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995). "[A]t the summary judgment stage the judge'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." *Id.* at 453.

Yet, the Tenth Circuit weighed the evidence and found no evidence that Thompson "bore any unlawful animus." It stated, "[t]he only reasonable interpretation of Mr. Thompson's actions available on this record is that he was concerned about protecting his employer's interests." Appendix, p. 5a.

There are several examples of the Tenth Circuit making factual conclusions in favor of Respondents and contrary to some of the obvious facts contained

within the record that support Myers' claims. Instead of disregarding all evidence favorable to the moving party and giving credence to the evidence favoring Myers, and drawing all inferences in the light most favorable to Myers, the Majority Opinion decided this matter in conflict with precedent from this Court and it should be reversed.

This Court should accept this writ to prohibit this growing and disturbing trend drifting away from years of established precedent. Quite simply, although the nonmovant is supposedly given wide berth to prove that a factual controversy exists, in practice, plaintiffs are really only allowed a narrow pathway to deftly maneuver in order to survive summary judgment and proceed to trial. In reality, it appears that summary judgment is increasingly becoming more akin to an abbreviated, sterile bench trial.

Petitioner finds it disheartening and discouraging that summary judgment has become such a rigorous and steep climb for a plaintiff to prove his or her case. It is not easy, nor should it be, but it also should not be so onerous that a plaintiff must present a complete mini-trial in order to get to the real trial. Without the benefit of seeing the witnesses testify, the Court is left with emotionless, expressionless words spread across hundreds of pages. It is essentially impossible for a Court to fully and accurately determine whether an employer "honestly believed" an action. That is why it is the jury's role to make these determinations.

The Tenth Circuit in *Randle* stated it best:

> It is not the purpose of a motion for summary judgment to force the judge to conduct a "mini trial" to determine the defendant's true state of mind. So long as the plaintiff has presented evidence of pretext (by demonstrating that the defendant's proffered non-discriminatory reason is unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial. Judgments about intent are best left for trial and are within the province of the jury. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) ("at the summary judgment stage the judge'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").

Randle, 69 F.3d at 453. Yet, in order for this language to mean anything, it must be followed, and it was not in this matter. This Court should intervene in order to curb this distortion of the summary judgment standard.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALPHONSO MYERS, Plaintiff-Appellant, v. KNIGHT PROTECTIVE SERVICE, INC.; WILLIAM THOMPSON, an individual, Defendants-Appellees.	No. 12-6056

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 5:10-CV-00866-C)

(Filed Dec. 22, 2014)

Submitted on the briefs:*

Scott F. Brockman of Ward & Glass, LLP, Norman, Oklahoma; Ken Feagins of Winningham, Stein &

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist 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.

Basey, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Angela Caywood Jones and John M. Nelson, of Park, Nelson, Caywood, Jones, LLP, Chickasha, Oklahoma, for Defendant-Appellee William Thompson.

Before **GORSUCH**, **O'BRIEN** and **PHILLIPS**, Circuit Judges.

GORSUCH, Circuit Judge.

After Alphonso Myers suffered a workplace injury, he sought and obtained social security disability benefits on the ground that he was unable to work. But while claiming as much before the Social Security Administration it turns out Mr. Myers was also applying for and winning a job as an armed security guard with Knight Protective Service. As part of the application process, Knight asked Mr. Myers a number of questions about his physical condition. Each time, Mr. Myers said he suffered no relevant disabilities. These answers, he now admits, were false.

Soon enough one of Mr. Myers's supervisors, William Thompson, noticed that Mr. Myers seemed to be in pain. When Mr. Thompson asked if he was alright, Mr. Myers confided that he had undergone a number of neck and back surgeries and that he experienced recurring pain. Mr. Thompson grew

concerned that Mr. Myers wasn't up to the job of an armed guard, that someone might grab Mr. Myers's weapon or, even worse, take him hostage. Mr. Thompson told Mr. Myers that he couldn't return to work without passing a physical examination. Mr. Myers waited months, expecting the company to schedule the exam. But that never happened. As Mr. Myers saw it, he was effectively terminated and he decided to sue.

In this suit, Mr. Myers alleged that Knight and Mr. Thompson engaged in race and disability discrimination and committed various torts. The district court, however, dismissed some claims and granted summary judgment to the defendants on the rest. Mr. Myers now appeals, asking us to revive his claims of federal discrimination against the company and tortious interference with contract or business relations against Mr. Thompson.

Invoking the Americans with Disabilities Act, Mr. Myers alleges that Knight discriminated against him on the basis of his physical disabilities. *See* 42 U.S.C. § 12112(a). He also claims the company violated Title VII by firing him on account of his race. *See id.* § 2000e-2(a)(1). But to make out a discrimination claim under the ADA, an employee must, among other things, show he is "qualified, with or without reasonable accommodation, to perform the essential functions of the job." *EEOC v. C.R. England, Inc.,* 644 F.3d 1028, 1037 (10th Cir. 2011) (internal quotation marks omitted). Absent direct evidence of discrimination, a Title VII plaintiff similarly must show he is

"qualified for the position at issue." *Khalik v. United Air Lines,* 671 F.3d 1188, 1192 (10th Cir. 2012).

This much Mr. Myers cannot do. As he acknowledged in his written employment application with Knight, the essential functions of his job as an armed security guard required him to engage in frequent and prolonged walking, standing, and sitting; to react quickly to dangerous situations; to subdue violent individuals; and to lift heavy weights. Yet in representations Mr. Myers made to the Social Security Administration he conceded that during the period in question he was in pain all the time, could stand for only twenty minutes, and could walk for just ten or fifteen minutes. Sometimes, Mr. Myers told the agency, his pain was so severe that he needed to stay at home and lie down. It's undisputed, too, that since 2005 he's been unable to lift more than ten pounds.

To be sure, we won't always find a discrimination claim barred because an individual applies for or receives social security benefits. *See Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 805 (1999). But when a plaintiff makes seemingly inconsistent statements like those before us he must offer a "sufficient explanation" for the apparent contradiction. *Id.* at 806. That Mr. Myers has failed to do. Neither, in any event, has he offered any competent evidence to support his allegation of disparate treatment on the basis of race. As the district court recognized, a plaintiff's unsupported allegations of disparate treatment are not enough to establish a triable claim.

See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994).

Mr. Myers complains that the district court failed to address his "cat's paw" theory that Mr. Thompson bore unlawful animus against him and influenced his supervisors' decision to terminate him. *See generally Lawrence v. Sch. Dist. No. 1,* 560 F. App'x 791, 795-96 (10th Cir. 2014). But our review of the record reveals that the district court didn't address the theory because it wasn't fairly presented. In any event, we don't arrive at the point in the analysis where the theory might become relevant: as we've explained, Mr. Myers failed to establish even a prima facie case of discrimination by anyone. Neither, for that matter, has he produced evidence that might allow a reasonable factfinder to draw the inference that Mr. Thompson bore any unlawful animus. The only reasonable interpretation of Mr. Thompson's actions available on this record is that he was concerned about protecting his employer's interests.

That observation disposes as well of the tortious interference claim against Mr. Thompson. As the district court observed, under Oklahoma law an employee alleged to have tampered with a contract between his principal and the plaintiff can be held liable only for acting outside the scope of his employment to further his own interests. *See Martin v. Johnson,* 975 P.2d 889, 896-97 (Okla. 1998). And here, again, the evidence before us fails to suggest anything along those lines.

The motion to seal certain medical records is granted. The judgment of the district court is affirmed.

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

ALPHONSO MYERS, Plaintiff, vs. KNIGHT PROTECTIVE SERVICE, INC., and WILLIAM THOMPSON, an individual, Defendants.	)	Case Number CIV-10-866-C

MEMORANDUM OPINION AND ORDER

(Filed Jan. 17, 2012)

Plaintiff filed the present lawsuit against Knight Protective Service, Inc. ("KPS") and William Thompson ("Thompson") alleging that they discriminated against him on the basis of his race and disability. Plaintiff brought tort claims against Defendant Thompson. Arguing that the undisputed material facts establish that they are entitled to relief, Defendants KPS and Thompson have filed separate motions for summary judgment.

The following facts are undisputed unless otherwise noted:

Plaintiff was injured while working for the Oklahoma Transportation Authority in May 2005. As a result of that injury, Plaintiff was placed on a permanent restriction of a ten-pound weight limit.

That restriction continues through the present. On April 29, 2009, Plaintiff applied for employment with KPS for the position of armed security guard. On May 15, 2009, Plaintiff's medical records reflect that his pain was so severe he might not be able to handle a full-time job. During Plaintiff's pre-employment physical for KPS which occurred on June 15, 2009, Plaintiff circled "NO" on the question asking whether he had decreased function in his neck or lower back. Plaintiff also checked "NO" to the question of whether he had any problems performing security guard work in the past. Plaintiff has since admitted that those answers were false. Plaintiff was hired by KPS as an armed security guard in June of 2009. On October 9, 2009, Defendant Thompson informed Plaintiff that he could not work any more until he got a second physical. Plaintiff felt the decision to make him take the second physical was racial. However, he admits that no one ever made any comments or jokes about his race nor did anyone act "racial" to Plaintiff. On November 5, 2009, Plaintiff's medical records reflect that his ten-pound weight limit, due to his injuries and surgeries, impacted his ability to sustain employment.

While Plaintiff was off work awaiting the second physical, Defendant Thompson called Plaintiff and said he had work he thought Plaintiff could do. Plaintiff refused the assignment and said he needed to look for another job. On December 16, 2009, Defendant Thompson telephoned Plaintiff and told him that KPS's contract was ending and a new company was

taking over. Defendant Thompson advised Plaintiff that the uniforms would be changing and everyone would be turning in their equipment or gear on January 31, 2010, and that everyone would have to requalify with an automatic weapon instead of a revolver. Neither Defendant Thompson nor any of Defendant Thompson's supervisors told Plaintiff he was terminated. In March of 2010, Captain Strider told Plaintiff that Sergeant Thompson told him Plaintiff had quit his job. Captain Strider then told Plaintiff he still had his job as long as he could qualify with the firearm training. Plaintiff declined Captain Strider's offer.

On May 19, 2010, Plaintiff testified under oath at his Social Security disability hearing. Following that hearing, the Social Security Administration determined that Plaintiff was totally disabled from July 11, 2008, through the date of the decision, February 8, 2011. The decision further reflected that Plaintiff could not perform any past relevant work, for example, working as a security guard. Plaintiff is still receiving disability benefits.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established

the absence of any genuine issue as to a material fact." *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977). The movant bears the initial burden of demonstrating the absence of material fact requiring judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the movant carries this initial burden, the nonmovant must then set forth "specific facts" outside the pleadings and admissible into evidence which would convince a rational trier of fact to find for the nonmovant. Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324. Such evidentiary materials include affidavits, deposition transcripts, or specific exhibits. *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). "The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the district court." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

1. Defendant KPS

Plaintiff has filed a brief in response to each Defendant's summary judgment motion. However, the Court's review of each brief finds that Plaintiff's response falls well short of the information needed for meaningful consideration of his claims. Although Plaintiff offers a cursory consideration of the facts which Defendants set forward as undisputed, his analysis or application of those facts to the relevant law is non-existent. Indeed, each portion of Plaintiff's response brief concludes with the only factual analysis which is the statement that "[t]he evidence before the Court shows numerous genuine issues of material fact remain regarding Defendant Thompson's actions and underlying motivations for his actions. Summary judgment is not appropriate."[1] (Dkt. No. 76, at 4). Plaintiff then offers a cite to Exhibit 1 which is the entire deposition of Plaintiff and/or Exhibit 2 which is the deposition of Captain Strider.[2]

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[1] Although Plaintiff references Defendant Thompson's actions, this language is found in his response brief to Defendant KPS. Nowhere in that response brief does Plaintiff reference actions by KPS which would serve a basis for the claims brought against that Defendant. Rather, Plaintiff's focus is solely on the alleged misdeeds of Defendant Thompson.

[2] The Court notes that Plaintiff has offered more specific record citations in his supplemental brief. However, even review of those portions of the record offer no meaningful support for Plaintiff's claims.

A. Race Discrimination Claim

As KPS notes, Plaintiff has offered no direct evidence of race discrimination. Therefore, the analysis of his claims proceeds under the burden-shifting scheme created by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To prevail on a case of race and color discrimination under Title VII, Plaintiff must offer evidence that (1) he was a member of a protected class, (2) he suffered an adverse employment, and (3) there was disparate treatment among similarly situated employees. Defendant argues that Plaintiff cannot satisfy the second and third elements.

In setting forth the basis for his claims of discrimination, Plaintiff testified that he "believed" he had been discriminated against based on his race because he did not get hours or because Defendant Thompson told him to take a second physical. Plaintiff offers no concrete evidence of comments, actions, or other incidents which could be attributed to race. Rather, Plaintiff offers the unsupported speculation that certain actions were taken because of race. A plaintiff's unsupported allegations or feelings alone do not establish a genuine issue of material fact on a topic. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 871-73 (1990) (a nonmovant cannot avoid summary judgment with only conclusory allegations or unsubstantiated assertions). Thus, Plaintiff has failed to demonstrate that he was treated differently than other employees based on his race

and has failed to satisfy the third prong of the prima facie case.

Even were the Court to accept Plaintiff's arguments and determine that he had satisfied his prima facie case, Defendant has proffered a legitimate, non-discriminatory reason for his unemployment. That is, that Plaintiff never satisfied the requirements to return to work or, alternatively, that Plaintiff resigned from his employment. Plaintiff has failed to come forward with any evidence from which a reasonable jury could find that that reason was a pretextual basis to cover up the fact that Defendant KPS discriminated against him. Likewise, Plaintiff has failed to offer any evidence to refute his admission that he had resigned or to establish that he was constructively discharged. Accordingly, the Court finds that Defendant is entitled to summary judgment on Plaintiff's race-based claim.

B. Disability Discrimination Claim

Plaintiff also brings a disability discrimination claim arguing that KPS discriminated against him because it perceived him as disabled. Specifically, Plaintiff argues that he is an individual with a disability and that he passed his training and was medically certified to perform the armed security guard position without any limiting conditions and that he satisfactorily performed his essential job functions without any accommodations and that he did not ask KPS for any accommodation. Indeed, Plaintiff

testified during his deposition that he could perform the essential functions of his job without accommodation. In contrast to this assertion, Plaintiff testified before the Social Security Administration, while represented by an attorney, that he was unable to engage in meaningful employment. As Defendant notes, in order to survive summary judgment, the Plaintiff must adequately explain the patent inconsistencies in previous sworn statements to the Social Security Administration and his claims in this lawsuit. That is, Plaintiff "cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his . . . previous sworn statement." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999).

Plaintiff offers no response whatsoever to Defendant's arguments and clearly offers no argument or evidence to explain the inconsistencies between his assertions here and his sworn testimony before the Social Security Administration. Accordingly, the Court finds Defendant KPS is entitled to summary judgment on Plaintiff's disability claims.

C. Burk Claims

Plaintiff also sought to bring *Burk*[3] tort claims for the alleged racial and disability based discrimination.

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[3] *See Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24.

For the reasons noted above, KPS's motion for summary judgment will be granted on those claims.

2. Defendant Thompson

Plaintiff also brings claims against Defendant Thompson. The first claim brought against Defendant Thompson is for interference with economic relationships. Plaintiff argues that Thompson interfered with Plaintiff's economic relationship with Defendant KPS because he did not schedule a second physical examination and because Thompson believed that Plaintiff had quit. The elements for a tortious interference claim are: "1) interference with a business or contractual right; 2) malicious and wrongful interference that is neither justified, privileged, nor excusable; and 3) damage proximately sustained as a result of the interference." *Tuffy's, Inc. v. City of Okla. City*, 2009 OK 4, ¶ 14, 212 P.3d 1158, 1165. The element of malice has been defined as "an unreasonable and wrongful act done intentionally, without just cause or excuse." *Id*.

Defendant Thompson also notes that under Oklahoma law one who is acting in a representative capacity for a party cannot be liable for wrongfully interfering with a contract or business relationship with that party unless he is acting outside the scope of his agency or employment. *Voiles v. Santa Fe Minerals, Inc*., 1996 OK 13, ¶ 18, 911 P.2d 1205, 1210. Further, it requires more than simply exercising poor

or bad judgment on the part of the agent/employee to extend such liability. *Id*.

As he did with his responses to Defendant KPS's summary judgment, Plaintiff offers no meaningful discussion of the facts which demonstrate a dispute.[4] Rather, he simply offers his apparently stock language of "[b]ecause numerous genuine issues of material fact remain regarding Defendant Thompson's actions and underlying motivations for his actions, summary judgment is not appropriate." (Dkt. No. 77, at 7.)

The Court simply finds that no reasonable jury could agree that Defendant Thompson's actions were outside the scope of his responsibilities with Defendant KPS. The circumstances giving rise to the conduct of which Plaintiff complains – the need for a second physical and/or the understanding that Plaintiff had quit his employment with Defendant KPS – are clearly set forth in the evidentiary materials before the Court. There is no evidence from which a reasonable jury could find that Defendant Thompson's actions were taken with an intent to interfere

[4] The Court finds Plaintiff's attempt to supplement its response to Defendant Thompson's Motion improper. Defendant raised no new argument or law in its Reply brief. Therefore, Plaintiff is not entitled to file additional briefing. *See Doebele v. Sprint/United Mgmt. Co*. 342 F.3d 1117, 1139, n. 13 (10th Cir. 2003). Even were the Court to consider the supplement, the arguments raised therein would not overcome the determination that Defendant Thompson is entitled to judgment in his favor.

with Plaintiff's employment outside of Defendant Thompson's responsibilities as Plaintiff's supervisor. Indeed, the undisputed material facts before the Court clearly establish that Defendant Thompson noticed Plaintiff in pain and having difficulty performing the required elements of his job. Based on that conduct, Defendant Thompson determined that Plaintiff should receive a second physical. Defendant Thompson notified Plaintiff of that fact and notified the higher-ups in his chain of command of that need. Once those actions took place, the undisputed facts clearly establish that the matter was out of Defendant Thompson's hands. Whether or not the physical was scheduled was a matter for other employees of KPS, not Defendant Thompson.

As for the belief that Plaintiff had quit his job, the undisputed material facts establish that Plaintiff, in fact, informed Defendant Thompson that he would not accept an alternative assignment and that he needed to look for another job. Under these facts, no reasonable jury could find that Defendant tortiously interfered with the terms of Plaintiff's employment. For these reasons, the Court finds that Defendant Thompson is entitled to summary judgment.

CONCLUSION

For the reasons set forth herein, Defendant Knight Protective Service, Inc.'s Motion for Summary Judgment (Dkt. No. 57) is GRANTED. Likewise, Defendant William Thompson's Motion for Summary

Judgment (Dkt. No. 60) is GRANTED. Plaintiff's Motion for Leave to Supplement Plaintiff's Response in Opposition to Defendant Thompson's Motion for Summary Judgment (Dkt. No. 87) is DENIED. A separate judgment will issue.

IT IS SO ORDERED this 17th day of January, 2012.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge