

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**September 15, 2021**

**Christopher M. Wolpert**  
**Clerk of Court**

JACK M. DELANEY,

Plaintiff - Appellant,

v.

LOWE’S HOME CENTER, LLC,

Defendant - Appellee.

No. 20-1438  
(D.C. No. 1:19-CV-02481-NYW)  
(D. Colo.)

**ORDER AND JUDGMENT\***

Before **HARTZ, PHILLIPS, and EID**, Circuit Judges.

Jack M. Delaney, proceeding pro se, appeals from the district court’s decision granting summary judgment in favor of Lowe’s Home Center on his complaint alleging employment discrimination based on age and disability. We affirm.

I. Background

The parties are familiar with the factual background and it is set out in detail in the district court’s decision. We will only briefly summarize it here.

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Lowe's hired Mr. Delaney when he was 75 years old. He worked at one of its home improvement stores without incident for almost five years until he injured his right knee. When he returned to work after knee replacement surgery, Mr. Delaney made several requests for accommodations and submitted evaluations from medical providers that detailed his work restrictions. Based on his work restrictions, Lowe's ultimately determined that no reasonable accommodations could allow Mr. Delaney to perform the essential functions of his position as a Sales Specialist in the Millwork Department.

Mr. Delaney was told not to work in the Millwork Department while Lowe's looked for a vacant position that could accommodate his workplace restrictions. Lowe's initially determined that the store did not have any positions that could accommodate Mr. Delaney's restrictions and it further determined that a continuous leave was the only accommodation it could offer him. But after learning that some of his work restrictions might be temporary, Lowe's subsequently offered Mr. Delaney a temporary reassignment as a Front End Customer Service Associate at the same salary as his Sales Specialist position. He did not accept the reassignment, but he did not resign. Instead, Mr. Delaney went on Americans with Disabilities Act (ADA) leave on the advice of his physician and received short-term disability benefits. He did not return to work at Lowe's after his leave ended.

Mr. Delaney filed a charge of discrimination with the Equal Employment Opportunity Commission and obtained a right-to-sue letter. He then filed the underlying pro se complaint alleging that Lowe's violated the Age Discrimination in

Employment Act (ADEA) and the ADA. The district court granted summary judgment in favor of Lowe's on both claims and Mr. Delaney now appeals.

## II. Discussion

We review de novo the district court's decision granting Lowe's motion for summary judgment. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1118 (10th Cir. 2014). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

In considering Lowe's motion for summary judgment, the district court construed Mr. Delaney's complaint as alleging disparate treatment, failure to accommodate, and retaliation under the ADA. The court considered Mr. Delaney's ADA claim using the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under that framework, the plaintiff carries the initial burden of establishing a prima facie case of discrimination. *See id.* at 802.

The district court first determined that Mr. Delaney failed to establish a prima facie case of disparate treatment because he could not demonstrate that he was qualified to perform the essential functions of the Sales Specialist position with or without accommodation based on his documented physical restrictions. The court next determined that Mr. Delaney failed to establish a prima facie case that Lowe's failed to provide reasonable accommodations for his disability because it did approve his requests for additional monthly absences and offered him a temporary

reassignment to a vacant position that did not result in a decrease in pay. Although Mr. Delaney requested a captioned phone and did not receive it, the court explained that he did not put forth any evidence that the captioned phone was required to perform the essential functions of the Sales Specialist position.

Finally, the court determined that Mr. Delaney failed to establish a prima facie case of retaliation because there was no evidence that Lowe's retaliated against him for requesting accommodations. The court noted that Mr. Delaney refused to accept Lowe's offer to be temporarily reassigned to a different position and presented no evidence that the reassignment constituted an adverse employment action. Because Mr. Delaney could not establish a prima facie case of disparate treatment, failure to accommodate or retaliation, the district court granted summary judgment in favor of Lowe's on his ADA claim.

On appeal, Mr. Delaney argues: (1) Lowe's "misdefined the essential functions of the [Sales Specialist] job," Aplt. Opening Br. at 2;<sup>1</sup> (2) Lowe's "did not abide by [a] ruling" from the Central District of California about how to handle ADA

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<sup>1</sup> Mr. Delaney refers in this first issue to the need for Lowe's to offer a reasonable explanation for an action that "may be related to the *age* or disability of the plaintiff." Aplt. Opening Br. at 2 (emphasis added). This stray reference to age is the only reference in Mr. Delaney's opening brief that could be linked to his ADEA claim, but it does not adequately explain how the district court erred in granting summary judgment in favor of Lowe's on that claim. Accordingly, Mr. Delaney has forfeited appellate review of the district court's ruling on his ADEA claim. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."); *id.* ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.").

accommodations, *id.*; (3) he was informed by a court officer that he could not present any evidence that contradicted his own evidence, *id.* at 3<sup>2</sup>; (4) Lowe's did not have a legitimate justification for not complying with his timely requests for a captioned phone; (5) Lowe's did not provide a captioned phone to Mr. Delaney, which "was mandated by the VA and FCC" and "Lowe's has not addressed why they violated this mandate and how their behavior fit within the regulations of these agencies," *id.* at 4; and (6) "when Mr. Delaney was removed from his position, he was still covered by the Worker's Compensation Authority" and "[h]is removal did not comply with Worker's Compensation Regulations," *id.* (boldface omitted).

We liberally construe Mr. Delaney's pro se filings, but we do not "take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby, Connor, Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). We agree with Lowe's that Mr. Delaney is raising several new

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<sup>2</sup> This issue appears to be based on Mr. Delaney's belief that the medical records he submitted as part of his Accommodation Request Assessment Forms do not accurately reflect his physical abilities. In his request for oral argument, he states "it is pertinent that the court is able to see the plaintiff and allow for his physical state to be accounted for, regardless of what the medical records state." Aplt. Opening Br. at 5. He also attaches a document to his brief that he states "is not being presented as evidence" but "as an example . . . of the information [he] might have provided if [he] had not been misled during the discovery phase . . . when it was alleged that [he] cannot see." Addendum to Aplt. Opening Br. We have not considered the document in the Addendum because our "inquiry is limited to the summary judgment record before the district court when the motion was decided." *West Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1157 (10th Cir. 2009) (internal quotation marks omitted).

issues for the first time on appeal that he did not raise in his response to summary judgment; specifically, his second, third, fifth, and sixth issues. Because Mr. Delaney failed to preserve these issues in district court and fails to argue for plain-error review on appeal, we deem these issues waived and we decline to review them. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (“When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise.”).

As for his remaining issues, Mr. Delaney has not shown that the district court committed reversible error in granting summary judgment in favor of Lowe’s on his ADA claim. Instead, we agree with the district court’s thorough and well-reasoned analysis in its Memorandum Opinion and Order, and we affirm the judgment for substantially the same reasons stated in that decision.

Entered for the Court

Allison H. Eid  
Circuit Judge