

Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, but denies that Defendant is liable to Plaintiff under Title VII or the ADEA. Defendant denies the allegations in paragraph 5 of Plaintiff's Amended Complaint.

6. Defendant admits that Plaintiff's action is brought pursuant to Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, but denies that Defendant is liable to Plaintiff under Title VII or the ADEA. Defendant denies the remaining allegations of paragraph 6 of Plaintiff's Amended Complaint.

7. Defendant denies the allegations of paragraph 7 of Plaintiff's Amended Complaint.

8. Defendant admits that venue is proper in this Court and denies the remaining allegations of paragraph 8 of Plaintiff's Amended Complaint.

9. Defendant admits that this action is brought by Plaintiff, a former employee of U.S. Customs and Border Protection (CBP) and that Plaintiff's mailing address is P.O. Box 42-1502, Miami, Florida 33242-1502. Defendant denies the remaining allegations in paragraph 9 of Plaintiff's Amended Complaint.

10. Defendant admits that Plaintiff has brought this action against Janet Napolitano, in her official capacity as Secretary of the United States Department of Homeland Security and denies the remaining allegations in paragraph 10 of Plaintiff's Amended Complaint.

11. Defendant denies the allegations in paragraph 11 of Plaintiff's Amended Complaint.

12. Defendant admits that on December 8, 2008, Plaintiff contacted an EEO counselor and denies the remaining allegations in paragraph 12 of Plaintiff's Amended

Complaint.

13. Defendant admits that on February 23, 2009, not February 22, 2009, Plaintiff filed an EEO complaint and denies the remaining allegations in paragraph 13 of Plaintiff's Amended

Complaint.

14. Defendant admits the allegations in paragraph 14 of Plaintiff's Amended Complaint.

15. Defendant admits the allegations in paragraph 15 of Plaintiff's Amended Complaint.

16. Defendant lacks knowledge as to Plaintiff's motivation for bringing the present action, and therefore denies the allegations in paragraph 16 of Plaintiff's Amended Complaint.

17. Defendant denies the allegations in paragraph 17 of Plaintiff's Amended Complaint.

18. Defendant denies the allegations of paragraph 18 of Plaintiff's Amended Complaint.

19. Defendant denies the allegations of paragraph 19 of Plaintiff's Amended Complaint.

20. Defendant denies the allegations of paragraph 19 of Plaintiff's Amended Complaint.

21. Defendant denies the allegations of paragraph 19 of Plaintiff's Amended Complaint.

22. Defendant states that on November 12, 2008, Plaintiff was assigned desk duty as a result of two separate altercations he had with airline and Miami-Dade employees within a ten-day period that resulted in numerous complaints against Plaintiff and the necessity of Miami-

Dade police officers having to be dispatched to the location of the incident. Defendant denies the remaining allegations in paragraph 22 of Plaintiff's Amended Complaint.

23. Defendant states that on November 12, 2008, Plaintiff was assigned desk duty as a result of two separate altercations he had with airline and Miami-Dade employees within a ten-day period that resulted in numerous complaints against Plaintiff and the necessity of Miami-Dade police officers having to be dispatched to the location of the incident. Defendant denies the remaining allegations in paragraph 23 of Plaintiff's Amended Complaint.

24. Defendant denies the allegations of paragraph 24 of Plaintiff's Amended Complaint.

25. Defendant denies the allegations of paragraph 25 of Plaintiff's Amended Complaint.

26. Defendant denies the allegations of paragraph 26 of Plaintiff's Amended Complaint.

27. Defendant denies the allegations of paragraph 27 of Plaintiff's Amended Complaint.

28. Defendant denies the allegations of paragraph 28 of Plaintiff's Amended Complaint.

29. Defendant denies the allegations of paragraph 29 of Plaintiff's Amended Complaint.

30. Defendant denies the allegations of paragraph 30 of Plaintiff's Amended Complaint.

31. Defendant lacks knowledge as to what Plaintiff swore to in the Winter of 1999 and therefore denies the allegations in paragraph 31 of Plaintiff's Amended Complaint.

32. Defendant admits that Plaintiff took an oath of office upon his admission as an employee of CBP and denies the remaining allegations in paragraph 32 of Plaintiff's Amended Complaint.

33. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 33 of Plaintiff's Amended Complaint.

34. Defendant admits that Plaintiff commenced the EEO process on December 8, 2008. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 34 of Plaintiff's Amended Complaint.

35. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 35 of Plaintiff's Amended Complaint.

36. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 36 of Plaintiff's Amended Complaint.

37. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 37 of Plaintiff's Amended Complaint.

38. Defendant denies the allegations in paragraph 38 of Plaintiff's Amended Complaint.

39. Defendant denies the allegations in paragraph 39 of Plaintiff's Amended Complaint.

40. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 40 of Plaintiff's Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of Plaintiff's Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of Plaintiff's Amended Complaint.

43. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 43 of Plaintiff's Amended Complaint.

44. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 44 of Plaintiff's Amended Complaint.

45. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 45 of Plaintiff's Amended Complaint.

46. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 46 of Plaintiff's Amended Complaint.

47. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 47 of Plaintiff's Amended Complaint.

48. Defendant states that the attachments to Plaintiff's Amended Complaint speak for

themselves and denies the remaining allegations in paragraph 48 of Plaintiff's Amended Complaint.

49. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 49 of Plaintiff's Amended Complaint.

50. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 50 of Plaintiff's Amended Complaint.

51. Defendant denies the allegations in paragraph 51 of Plaintiff's Amended Complaint.

52. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 52 of Plaintiff's Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of Plaintiff's Amended Complaint.

54. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 54 of Plaintiff's Amended Complaint.

55. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 55 of Plaintiff's Amended Complaint.

56. Defendant denies the allegations in paragraph 56 of Plaintiff's Amended Complaint.

57. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 57 of Plaintiff's Amended Complaint.

58. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 58 of Plaintiff's Amended Complaint.

59. Defendant denies the allegations in paragraph 59 of Plaintiff's Amended Complaint.

60. Defendant denies the allegations in paragraph 60 of Plaintiff's Amended Complaint.

61. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 61 of Plaintiff's Amended Complaint.

62. Defendant denies the allegations in paragraph 62 of Plaintiff's Amended Complaint.

63. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 63 of Plaintiff's Amended Complaint.

64. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 64 of Plaintiff's Amended Complaint.

65. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 65 of Plaintiff's Amended

Complaint.

66. Defendant denies the allegations in paragraph 66 of Plaintiff's Amended Complaint.

67. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 67 of Plaintiff's Amended Complaint.

68. Defendant denies the allegations in paragraph 68 of Plaintiff's Amended Complaint.

69. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 69 of Plaintiff's Amended Complaint.

70. Defendant denies the allegations in paragraph 70 of Plaintiff's Amended Complaint.

71. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 71 of Plaintiff's Amended Complaint.

72. Defendant denies the allegations in paragraph 72 of Plaintiff's Amended Complaint.

73. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 73 of Plaintiff's Amended Complaint.

74. Defendant denies the allegations in paragraph 74 of Plaintiff's Amended Complaint.

75. Defendant states that the attachments to Plaintiff's Amended Complaint speak for themselves and denies the remaining allegations in paragraph 75 of Plaintiff's Amended Complaint.

76. Defendant denies the allegations in paragraph 76 of Plaintiff's Amended Complaint.

77. Defendant denies the allegations in paragraph 77 of Plaintiff's Amended Complaint.

78. Defendant denies the allegations in paragraph 78 of Plaintiff's Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of Plaintiff's Amended Complaint.

COUNT I

80. Defendant hereby incorporates by reference her responses to paragraphs 1 through 33 of Plaintiff's Amended Complaint as if fully set forth herein.

81. Defendant hereby incorporates by reference her responses to paragraphs 34-39, 42, 44, 46-48, 50, 52-60, and 62-76 of Plaintiff's Amended Complaint as if fully set forth herein.

82. Defendant denies the allegations in paragraph 82 of Plaintiff's Amended Complaint.

83. Defendant denies the allegations in paragraph 83 of Plaintiff's Amended Complaint.

COUNT II

84. Defendant hereby incorporates by reference her responses to paragraphs 1 through 33 of Plaintiff's Amended Complaint as if fully set forth herein.

85. Defendant hereby incorporates by reference her responses to paragraphs 34-39, 42, 44, 46-48, 50, 52, 54-60, and 62-76 of Plaintiff's Amended Complaint as if fully set forth herein.

86. Defendant denies the allegations in paragraph 86 of Plaintiff's Amended Complaint.

87. Defendant denies the allegations in paragraph 87 of Plaintiff's Amended Complaint.

88. Defendant denies the allegations in paragraph 88 of Plaintiff's Amended Complaint.

89. Defendant denies the allegations in paragraph 89 of Plaintiff's Amended Complaint.

90. Defendant denies the allegations in paragraph 90 of Plaintiff's Amended Complaint.

COUNT III

91. Defendant hereby incorporates by reference her responses to paragraphs 1 through 33 of Plaintiff's Amended Complaint as if fully set forth herein.

92. Defendant hereby incorporates by reference her responses to paragraphs 35-37, 40-43, 45, 49-51, 57-59, 61, and 67 of Plaintiff's Amended Complaint as if fully set forth herein.

93. Defendant denies the allegations in paragraph 93 of Plaintiff's Amended Complaint.

BASIS FOR EQUITABLE RELIEF

94. Defendant denies the allegations in paragraph 94 of Plaintiff's Amended Complaint.

95. Defendant denies the allegations in paragraph 95 of Plaintiff's Amended Complaint.

96. Defendant denies the allegations in paragraph 96 of Plaintiff's Amended Complaint.

97. Defendant denies the allegations in paragraph 97 of Plaintiff's Amended Complaint.

Any allegations in Plaintiff's Amended Complaint not specifically admitted are hereby denied.

AFFIRMATIVE DEFENSES

Having responded fully to all the allegations in Plaintiff's Amended Complaint, Defendant asserts the following Affirmative Defenses:

First Affirmative Defense

Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

Plaintiff's claims must be dismissed because Defendant did not aid, abet, ratify, condone, encourage or acquiesce in any alleged discriminatory conduct.

Third Affirmative Defense

Plaintiff failed to mitigate his damages.

Fourth Affirmative Defense

Any award of back pay or front pay should be offset based upon benefits and payments received from any collateral source, including a federal source.

Fifth Affirmative Defense

Any adverse employment actions or decisions by Defendant in connection with Plaintiff's employment were based upon legitimate, non-discriminatory reasons.

Sixth Affirmative Defense

Plaintiff failed to exhaust his administrative remedies on certain of his Title VII and ADEA claims.

Seventh Affirmative Defense

Plaintiff's Conspiracy to Obstruct Justice Act claim is preempted by Title VII.

Eighth Affirmative Defense

Plaintiff cannot recover compensatory, emotional distress damages under the ADEA.

Ninth Affirmative Defense

Plaintiff is not entitled to a jury trial on his ADEA claim.

Tenth Affirmative Defense

Plaintiff cannot recover punitive damages against the United States Government.

Dated: October 24, 2011

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: s/ Christopher Macchiaroli
Christopher Macchiaroli (No. A5501305)
Assistant United States Attorney
Email: Christopher.Macchiaroli@usdoj.gov
United States Attorney's Office
99 N.E. 4th Street, Suite 300
Miami, Florida 33132
Tel. No. (305) 961-9420
Fax No. (305) 530-7139

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2011, a copy of the foregoing “Defendant’s Answer to Plaintiff’s Amended Complaint” was served upon the following party by U.S. First-Class Mail:

Kenneth D. Humphrey
PO Box 42-1502
Miami, Florida 33242-1502

Plaintiff

/s/Christopher Macchiaroli
Christopher Macchiaroli
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 11-cv-20651-O'SULLIVAN

[CONSENT]

_____)
KENNETH D. HUMPHREY,)
)
<i>Plaintiff,</i>)
v.)
)
JANET NAPOLITANO, Secretary,)
United States Department of Homeland)
Security,)
)
<i>Defendant.</i>)
_____)

**DEFENDANT'S NOTICE REGARDING THE NOTICE OF
PENDING ACTION FILED WITH THE COURT ON NOVEMBER 7, 2011 (D.E. 35)**

Defendant Janet Napolitano, Secretary, United States Department of Homeland Security, by and through the undersigned Assistant United States Attorney, hereby notifies the Court that the related and similar action, *Humphrey v. Napolitano, et al.*, No. 11-cv-23977-Ungaro/Torres that formed the basis of Defendant's Notice of Pending Action dated November 7, 2011 (*see* D.E. 35) was terminated by Order of the Court dated November 9, 2011. A copy of the Court's Order of Dismissal is attached hereto as Exhibit 1.

Dated: November 10, 2011

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: s/ Christopher Macchiaroli
Christopher Macchiaroli (No. A5501305)
Assistant United States Attorney
Email: Christopher.Macchiaroli@usdoj.gov
United States Attorney's Office
99 N.E. 4th Street, Suite 300

Miami, Florida 33132
Tel. No. (305) 961-9420
Fax No. (305) 530-7139

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2011, a copy of the foregoing was served upon the following party by U.S. First-Class Mail:

Kenneth D. Humphrey
PO Box 42-1502
Miami, Florida 33242-1502

Plaintiff

/s/Christopher Macchiaroli
Christopher Macchiaroli
Assistant United States Attorney

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.11-23977-CIV-UNGARO

KENNETH D. HUMPHREY, *et al.*,

Plaintiffs,

v.

JANET NAPOLITANO, *et al.*,

Defendant.

ORDER DENYING *IN FORMA PAUPERIS* AND ORDER OF DISMISSAL

THIS CAUSE came before the Court upon Plaintiff's Application to Proceed *in Forma Pauperis* (D.E. 3) and upon a *sua sponte* examination of Plaintiff's Complaint, filed on November 3, 2011 (D.E. 1).

THE COURT has reviewed the Application, the Complaint, and being otherwise fully advised in the premises, and accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's Application to Proceed *In Forma Pauperis* (D.E. 3) is DENIED. It is further

ORDERED AND ADJUDGED that the Complaint is hereby DISMISSED pursuant to 28 U.S.C. § 1915, for the reasons set forth below.

Section 1915(e)(2) authorizes a court to dismiss an *in forma pauperis* complaint if the action is "frivolous or malicious" or "fails to state a claim on which relief may be granted" 28 U.S.C. §1915(e)(2). The United States Supreme Court has held that a

complaint is frivolous “where it lacks an arguable basis in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A court may dismiss claims under Section 1915(e)(2) where the claims rest on an indisputably meritless legal theory or are comprised of factual contentions that are clearly baseless.¹ *Id.* at 327. In *Denton v. Hernandez*, 504 U.S. 25, 33 (1992), the Supreme Court held that “a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them.”

Mindful of these principles, the Court is convinced that this claim has no arguable basis in law or in fact, and therefore the Complaint must be dismissed. *Pro se* Plaintiff, Kenneth D. Humphrey was employed as a U.S. Customs and Border Protection (“CBP”) Officer. He brings this lawsuit, on behalf of himself and others similarly situated, against Janet Napolitano, Secretary of the United States Department of Homeland Security; Joseph Lieberman, Chairman of the United States Senate Committee on Homeland Security & Governmental Affairs; Susan Collins, Ranking Member of the United States Senate Committee on Homeland Security & Governmental Affairs; Peter King, Chairman of the United States House of Representatives Committee on Homeland Security; and Bennie Thompson, Ranking Member of the United States House of Representatives Committee on Homeland Security. (D.E. 1.) Against these Defendants, the Complaint purports to allege claims for breach of fiduciary duty (Counts I-IV); violation of the False

¹ The 1996 Amendments to 28 U.S.C. § 1915 redesignated former subsection (d) as (e). Pub. L. 104-134, 110 Stat. 1321.

Claims Act, 31 U.S.C. § 3729-3733 (Count V); violation of the Whistleblower Protection Act and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Counts VI and VIII); and violation of the Conspiracy to Obstruct Justice Act, 42 U.S.C. § 1985 (Count VII). (D.E. 1.) Each of Plaintiff's claims arises out his belief that Defendants have grossly mismanaged the CBP and the Department of Homeland Security ("DHS") to the detriment of CBP employees and the American public. While Plaintiff's belief may be sincere, his claims are baseless and must be dismissed.

First, Plaintiff cannot state a claim against Defendants for breach of fiduciary duty arising out of the performance of their official duties. The legislature Defendants are absolutely immune from such liability, *see Dombrowski v. Eastland*, 387 U.S. 82, 87 (1967); *Tenney v. Brandhove*, 342 U.S. 367, 372 (1951), and even if cabinet member Defendant Napolitano is not entitled to absolute immunity, Plaintiff has not alleged any facts to demonstrate that her qualified immunity should be disregarded. *See Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985).

Second, Plaintiff fails to allege a violation of the False Claims Act, 31 U.S.C. § 3729 (the "FCA"). The FCA provides a penalty and treble damages against any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment." 31 U.S.C. § 3729(a)(1)(A). The FCA allows a private cause of action only by means of a *qui tam* suit to recover "for harm done to the Government." *See Woods v. Empire Health Choice, Inc.*, 574 F.3d 92, 97 (2d Cir. 2009). Here, Plaintiff attempts to state a claim for violation of the FCA by citing a string of "gross public deceptions"

perpetuated by Defendants, but does not allege anywhere any false claims for payment submitted to the government by any Defendant. (*See* D.E. 1 ¶ 105.) Plaintiff's allegations clearly do not support a claim for violation of the FCA.

Plaintiff also fails to state claims for violation of the Whistleblower Protection Act ("WPA") and Federal Employee Anti-Discrimination and Retaliation Act. Plaintiff's allegations in support of these counts are nothing more than policy arguments as to why the Acts are inadequate to protect whistle blowers.² Plaintiff does not allege any facts to demonstrate that he suffered an adverse employment action as a result of a disclosure protected by the WPA or that he was retaliated against by Defendants. Moreover, to bring a WPA claim, a plaintiff must first exhaust his administrative remedies. *See Fleeger v. Principi*, 221 F. App'x 111, 115 (3d Cir. 2007). Plaintiff does not allege in his Complaint that he has done so.

Finally, Plaintiff does not allege facts sufficient to support a claim for conspiracy to obstruct justice by interference with civil rights (Count VII). To state such a claim, a plaintiff must allege a conspiracy that was motivated by "racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *Lucero v. Operation Rescue Birmingham*, 954 F.2d 624, 628 (11th Cir. 1992). The basis of Count VII is that Defendants conspired to "dupe the General Public"

² Plaintiff's Count VIII, like Count VI, purports to state a claim for violation of the Federal Employee Antidiscrimination and Retaliation Act of 2002, 5 U.S.C. § 2302. However, the allegations set forth in support of Count VIII are nothing more than a series of hypothetical answers Plaintiff would give if questioned by Congress. Even liberally construed, these allegations fail to state a claim.

and “fleec[e] the American taxpayers” as to the “protections being provided by Homeland Security.” (See D.E. ¶¶ 121, 127.) Plaintiff does not make any allegations demonstrating any racial animus on the part of Defendants in the alleged conspiracy.

In sum, Plaintiff has presented this Court with a series allegations that are generally unclear, unintelligible, and conclusory and fail to support any of the causes of action set forth. Accordingly, it is further

ORDERED AND ADJUDGED that the Clerk of Courts SHALL administratively close this case.

DONE AND ORDERED in Chambers at Miami, Florida, this _9th_ day of November, 2011.



URSULA UNGARO
UNITED STATES DISTRICT COURT JUDGE

Copies to: Counsel of record,
pro se Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 11-cv-20651-O’SULLIVAN

[CONSENT]

_____)
KENNETH D. HUMPHREY,)
)
<i>Plaintiff,</i>)
v.)
)
JANET NAPOLITANO, Secretary,)
United States Department of Homeland)
Security,)
)
<i>Defendant.</i>)
_____)

**DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT AND INCORPORATED
STATEMENT OF MATERIAL FACTS AND MEMORANDUM OF LAW**

Pro-se Plaintiff Kenneth Humphrey — a former U.S. Customs and Border Protection officer — brings the present discrimination action after he was assigned desk duty as a result of two physical and verbal altercations he had within a ten-day period. For the following reasons, Defendant is entitled to summary judgment.

First, Plaintiff cannot establish a *prima facie* claim of discrimination because he did not suffer an adverse employment action. At *no* time during Defendant’s investigation into Plaintiff’s altercations was Plaintiff disciplined, demoted, or suspended without pay. In fact, at the conclusion of Defendant’s investigation, Plaintiff’s base salary *increased*, he remained employed for another thirteen months without incident, and retired with a monthly pension of \$578.00.

Second, Plaintiff cannot establish a *prima facie* claim of discrimination because he cannot identify an employee — not of his race or age classification — who was treated differently based on *nearly identical* conduct.

Third, even if Plaintiff could establish a *prima facie* claim of discrimination — which he cannot — Defendant is entitled to summary judgment because Plaintiff has failed to rebut Defendant’s legitimate non-discriminatory reasons for temporarily assigning Plaintiff to desk duty. Moreover, Plaintiff has failed to offer *any* evidence establishing that Defendant’s reasons for its actions were false and were a pretext for discrimination.

Finally, Plaintiff’s Conspiracy to Obstruct Justice Act claim fails as a matter of law because: (i) Title VII governs all claims of discrimination in the employment context; (ii) the intracorporate conspiracy doctrine — as applied to governmental entities — bars Plaintiff’s claim of a conspiracy by Defendant and its employees to violate Plaintiff’s rights; and (iii) Plaintiff has failed to offer *any* evidence establishing a conspiracy by anyone to discriminate against him.

For all these reasons, Defendant’s Motion for Summary Judgment should be granted in its entirety.

STATEMENT OF MATERIAL FACTS

1. Plaintiff Kenneth D. Humphrey was employed by U.S. Customs and Border Protection (CBP) from January 2000 to May 2010 and was assigned to the Miami International Airport (MIA). *See* Am. Compl. at ¶ 2 (D.E. 32). Plaintiff retired in May 2010 and receives a monthly pension of \$578.00. *See* Humphrey Tr. at 14:11-24 (A79).¹

November 12, 2008 Incident

2. On November 12, 2008, at approximately 5:25 p.m., Marcnel Pierre — Plaintiff’s first-line supervisor — was notified of an altercation between Plaintiff and two Miami-Dade Aviation Department (MDAD) officers. *See* M. Pierre Email at 1 (A7); Internal Report of Investigation (ROI) at 2 (A23); Blanco Decl. at ¶ 3 (A1-A2); Mattina EEO Decl. at

¹ Accompanying this submission is an Exhibit Appendix (*see* D.E. 37-2). All exhibit citations begin with the prefix “A” and refer to the specific page of the Exhibit Appendix.

2 (A62).²

3. The altercation began when Plaintiff confronted MDAD officer Jose Andino (Andino), who was walking up the stairs from the tarmac to the jetway. *See* M. Pierre Email at 1 (A7); Blanco Decl. at ¶ 4 (A2). Plaintiff told Andino that he did not belong there, took Andino's airport ID badge, and instructed him to call his manager to the scene. *See* M. Pierre Email at 1 (A7); Blanco Decl. at ¶ 4 (A2) ("Mr. Humphrey confiscated the Miami-Dade Airport Security IDs . . . contrary to CBP regulations and policy"); ROI at 2-3 (A23-A24); Mattina EEO Decl. at 2-3 (A62-A63).

4. MDAD supervisor Nicholson Pierre — no relation to Plaintiff's supervisor — responded to the scene. *See* M. Pierre Email at 1 (A7). Pierre tried to explain to Plaintiff why Andino was at the jet way, but Plaintiff refused to listen and then requested Pierre's ID badge. *See id.* (A7). In response, Pierre requested that the Miami-Dade Police Department (MDPD) be dispatched to the scene. *See id.* (A7); Mattina EEO Decl. at 3-4 (A63-A64). The MDPD dispatched six police officers who were able to defuse the situation. *See* M. Pierre Email at 1 (A7); Blanco Decl. at ¶ 4 (A2); Mattina EEO Decl. at 3-4 (A63-A64). After questioning witnesses, the MDPD issued an incident report. *See* MDPD Incident Report at 1 (A36).

5. Plaintiff's supervisor Marcnel Pierre, upon being called to the scene, returned all airport identifications to their respective owners and informed Chief Marta M. Blanco (Blanco) of the incident. *See* M. Pierre Email at 1 (A7) ("After listening to Miami Dade Police Officer Lopez, [] Andino, and [] Nicholson Pierre, I made the decision to return both badges to Mr. Andino and Mr. Pierre").

6. After this altercation, Plaintiff observed that some passengers from the arriving flight were waiting in the jetway for a stroller. *See* M. Pierre Email at 1 (A7);

² EEO administrative declarations are made under "penalty of perjury" in accordance with the "provisions of 28 U.S.C. § 1746" (*see* A61).

Mattina EEO Decl. at 3 (A63). Plaintiff told the Airline Crew Chief to get the stroller so that the family could clear U.S. Customs. *See* M. Pierre Email at 1 (A7). The Crew Chief told Plaintiff that he had no authority to tell him what to do. *Id.* (A7); Blanco Decl. at ¶ 5 (A2) (“Mr. Bayley-Hay stated that he would be filing a formal complaint against Mr. Humphrey because he did not believe Mr. Humphrey had the authority to order him to do anything.”).

November 2, 2008 Incident

7. Only ten-days earlier, on November 2, 2008, while assigned to the Antiterrorism Contraband Enforcement Team (A-TCET), Plaintiff became involved in an incident with employees from Continental Airlines. *See* Blanco Decl. at ¶ 11 (A3-A4); Mattina EEO Decl. at 4 (A64).

8. Plaintiff and his partner stopped two Continental employees in their vehicle and asked to see their airport identifications. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17). One individual, Ernesto Vega (Vega), provided his ID and allegedly began to walk up the stairs to the concourse to check in for work because he was late. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17). Plaintiff told Vega that he could not leave and the two became involved in a heated discussion that resulted in Plaintiff threatening to arrest him. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17). Thereafter, another Continental employee, John Reinoso (Reinoso), arrived at the scene in a golf cart. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17); Mattina EEO Decl. at 4-5 (A64-A65). Plaintiff also got into an argument with Reinoso, which resulted in Plaintiff threatening to arrest him as well. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17); Mattina EEO Decl. at 4-5 (A64-A65).

9. Plaintiff made Reinoso put his hands on top of the golf cart and spread his legs

while Plaintiff ran his identification for outstanding warrants. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17). Both Vega and Reinoso submitted formal complaints regarding Plaintiff's conduct. *See* Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17).

10. The complaints detailed how Plaintiff: (i) detained them for no valid reason; (ii) asked Vega for his social security number and told him that he would stay until he gave him a number or would be arrested; (iii) told Reinoso, who was sitting in a golf cart, that he was "getting arrested;" and (iv) then told Reinoso to get out of his vehicle, stand with his hands behind his back, spread his legs, lean against the vehicle, and asked that if he went back to Cuba would he have to go through Customs. *See* Blanco Decl. at ¶ 11 (A3-A4); Vega Ltr. at 1 (A16); Reinoso Ltr. at 1 (A17); Mattina EEO Decl. at 4-5 (A64-A65).

11. When showed Vega and Reinoso's statements, Plaintiff refused to look at them and angrily referred to them as "garbage." *See* Humphrey Tr. at 57:20-58:9 (A84) ("Q. Take a look at Humphrey Exhibit 4. A. I don't want to read that. Q. Sir -- A. I'll give it to her. I don't want to read this garbage. Q. Just so we are clear, you are referring to Humphrey Exhibit 4, which is the letter by Ernesto Vega, a Continental Airlines technician. And that's a complaint against you, sir. A. Uh-huh."); *id.* at 73:6-13 (A85) ("I don't want to see it. Q. Are you referring to Humphrey Exhibit 5, a letter of complaint made by John Reinoso of Continental Airlines, maintenance department, on November 3, 2008, as garbage? A. It is garbage. It is totally garbage.").

Management's Response

12. In light of the incident of November 2, 2008 and circumstances as reported on November 12, 2008, Chief Blanco decided that Plaintiff "would be removed from the field for the remainder" of November 12, 2008 — a decision that Assistant Port Director (APD) Thomas Mattina (Mattina) thought was appropriate. *See* Blanco Decl. at ¶ 6 (A2); *id.* at Ex.

2 (A9) (“I instructed SCBPO Pierre to keep Officer Humphrey inside and not to put him out in the field or he could take leave and go home.”); Mattina EEO Decl. at 2-3 (A62-A63).³

13. On November 13, 2008, Chief Bello “issued an email message to all A-TCET managers advising them that ‘Effective immediately Officer Humphrey will be assigned to desk duty; he cannot be assigned to the field either on regular time or overtime.’” Blanco Decl. at ¶ 9 (A17); *id.* at Ex. 4 (A13); Mattina EEO Decl. at 3 (A63). That same day, the incidents of November 2 and 12 were referred to the Joint Intake Center (JIC) for investigation and Plaintiff was assigned desk duty until an investigation could be completed. *See* Blanco Decl. at ¶ 14 (A4); *id.* at Ex. 3 (A11); Nov. 13, 2008 Email at 1 (A76); Joint Intake Transmittal at 1-4 (A34-A37); Mattina EEO Decl. at 5 (A65).

14. On January 13, 2009, a Labor and Employee Relations (LER) employee contacted the JIC to find out the status of the investigation. *See* Jan. 13, 2009 Email at 1 (A33). The LER employee learned that the JIC did not have the November 2008 referral and the material was resent on January 13, 2009. *See* Jan. 13, 2009 Email at 1 (A32).

Bid Rotation

15. In late 2008, CBP held its annual bid rotation where every CBP employee at MIA would list the top four jobs that they preferred to be assigned to during the upcoming year. *See* Bid Policy at 4-5 (A45-A46). Plaintiff submitted his bid and requested to continue working at A-TCET. *See* Humphrey Bid Request at 1-4 (A54-A58). However, the Bid, Rotation and Placement Policy excludes employees who are “the subject of an investigation of alleged misconduct” from participating in the bid process. *See* Bid Policy at

³ Even prior to the events of November 12, 2008, Plaintiff was required to provide a “statement regarding [his] encounter with [the] Continental employees.” Blanco Decl. at ¶ 12 (A4); *id.* at Ex. 5 (A15). Plaintiff responded to the email by demanding that CBP provide him the statements of the Continental Airlines employees prior to Plaintiff having to respond. *See* Blanco Decl. at ¶ 12 (A4); *id.* at Ex. 5 (A15). Plaintiff also stated that if he determined any of the statements were false, he would demand an internal investigation be lodged against the Continental employees and polygraphs be administered. *See* Blanco Decl. at ¶ 12 (A4); *id.* at Ex. 5 (A15).

1 (A42); Jan. 27, 2009 Email at 1-2 (A72-A73). Because Plaintiff was the subject of an investigation, his bid was not considered by the Bid Committee. See Jan. 27, 2009 Email at 1-2 (A72-A73). Because Plaintiff could not be given his preferred assignment through the bid process, on February 1, 2009, the universal assignment start date for this bid, he was assigned to “passenger processing,” one of CBP’s core operations. See Bid Policy at 6, ¶ 10 (A47).⁴

16. On March 11, 2009, one month after his transfer to “passenger processing,” CBP’s investigation was completed and management decided not to take any action against Plaintiff. See No Action Dec. at 1 (A20). CBP followed its internal policy when it kept Plaintiff in passenger processing after its investigation was closed. See Bid Guidance at 2 (A60) (“[I]f the employee is clear to resume normal duties in between the bid cycle, the employee will return to the port’s core operations, e.g., primary or passenger processing, until the next opportunity to bid.”).

No Adverse Action

17. As a result of CBP’s investigation, Plaintiff suffered no adverse employment action. Plaintiff was not disciplined, suspended, or demoted because CBP took no action on the charges alleged against him. See No Action Dec. at 1 (A20). Moreover, during the period of its investigation, Plaintiff’s salary *increased*. See A39-A41 (detailing how Plaintiff’s total salary increased from \$64,996 to \$67,496 from December 2008 to April 2009 and how he remained Grade 11, Step 5 throughout the entire investigation process). Moreover, CBP’s investigation did not prevent Plaintiff from continuing his employment until his retirement in May 2010 and did not prevent him from receiving a monthly pension

⁴ While Plaintiff’s Union filed a grievance relating to Plaintiff’s bid rotation (see Feb. 18, 2009 Ltr at 1-2 (A74-A75)), the Union withdrew its grievance after CBP provided information in support of its actions (see Mar. 10, 2009 Ltr. at 1 (A77)).

of \$578.00. *See* Humphrey Tr. at 14:11-24 (A79).⁵

Allegations of Discrimination

18. On February 22, 2009, Plaintiff filed a formal EEO Complaint relating to conduct that took place in November 2008. *See* EEO Compl. (D.E. 14-2).⁶ Plaintiff attributes his purported discrimination to a self described Cuban-American conspiracy against him:

except when it got to [Chief] Marta Blanco and her Cuban American syndication. When that came in, it was just Cuban American, Cuban American, Cuban American, Cuban American. . . . This is just Cuban American, Cuban American, getting paid where they can manipulate their work hours, overtime hours. All Cuban Americans get top overtime hours first, and then everybody else -- Q. You think it's a Cuban American conspiracy? A. All the witnesses that I will bring into trial will tell you that it's Cuban American. It's a Cuban American conspiracy. Cuban American -- you have a Cuban American dictating his own overtime. He sets up -- he allocates overtime for everybody else, but he sets up his work schedule to get the top overtime assignment. He sets up the work schedule for his buddy to get the next top overtime assignment. This goes on week after week after week after week, that Cuban Americans get the first choice of overtime assignments and everybody else gets the scraps.

Humphrey Tr. at 120:21-122:3 (A86-A87).

19. To date, Plaintiff has commenced twelve separate civil rights/discrimination actions in this Court and has filed charges of discrimination against four former employers. *See* D.E. 35-1 (detailing prior federal court actions); Humphrey Tr. at 29:24-37:10 (A81-83) (detailing charges of discrimination against Continental Airlines, Federal Express, and

⁵ In recent years, Plaintiff has been the subject of numerous debt collection and foreclosure proceedings. *See* Humphrey Tr., Ex. 13 at 2 (A92); Humphrey Tr. at 146:22-150:13 (A88-A89) (discussing Humphrey Ex. 13).

⁶ On November 16, 2010, Administrative Judge (AJ) Ana M. Lehmann — without the necessity of a hearing — found that Plaintiff did not establish that he was the victim of either race or age discrimination and entered judgment for CBP. *See* Nov. 16, 2010 Dec. at 9 (D.E. 14-4). A final agency decision — adopting the AJ's findings — was issued on December 5, 2010. *See* Dec. 5, 2010 CBP Dec. at 1 (D.E. 14-5).

Pergamon Press); *id.* at 33:8-11 (A82) (“Q. When you filed the claim of discrimination against Continental, did you also assert race discrimination? A. Sure did, yeah.”); *id.* at 30:12-14-31:12 (A81) (“Q. “What kind of complaint did you file against Federal Express? A. Discrimination. . . . They put me on suspension because I gave a Valentine’s gift to about 11 office receptionists that I had on my route. . . . I bought a little cheap Valentine’s gift. It was just a little garter belt with a Valentine’s on it”).

Federal Court Action

20. On February 25, 2011, Plaintiff commenced the present federal court action against CBP and the United States Equal Employment Commission (EEOC) pursuant to five different federal statutes. *See* Compl. (D.E. 1). In addition to claims of discrimination, Plaintiff alleged violations of the False Claims Act and the Whistleblower Protection Act of 1989. On September 28, 2011 — while granting Defendant’s Motion to Dismiss in its entirety (*see* Sept. 28, 2011 Order at 1 (D.E. 29)) — this Court afforded Plaintiff leave to file an Amended Complaint in order to allege additional facts that could possibly support claims of race and age discrimination and a claim under the Conspiracy to Obstruct Justice Act.

21. After filing his Amended Complaint, Plaintiff filed a separate civil rights action before the Honorable Ursula Ungaro that again raised the same violations of the False Claims Act and the Whistleblower Protection Act of 1989 that were previously dismissed by this Court. *See* Def.’s Notice at 1 (D.E. 35) (discussing *Humphrey v. Napolitano, et al.*, No. 11-cv-23977-UU). In a November 9, 2011 decision, Judge Ungaro dismissed Plaintiff’s new action in its entirety. *See* Def.’s Notice at Ex. 1 (36-1).

ARGUMENT

I. PLAINTIFF CANNOT ESTABLISH A *PRIMA FACIE* CLAIM OF DISCRIMINATION

Title VII prohibits an employer from discharging or otherwise discriminating against a person based on the person's race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e, *et seq.* Under Title VII, absent direct evidence of an intent to discriminate, a plaintiff may prove his case through circumstantial evidence, using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Ekokotu v. Boyle*, 294 F. App'x 523, 525 (11th Cir. 2008); *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272-73 (11th Cir. 2002). This "framework applies equally to discrimination claims under Title VII, the ADEA, and sections 1981 and 1983." *Armbrester v. Talladega City Bd. of Educ.*, 325 F. App'x 877, 879 n.4 (11th Cir. 2009) (citations omitted); *see Ostrow v. GlobeCast Am. Inc.*, No. 10-cv-61348, 2011 WL 4853568, at *11 n.9 (S.D. Fla. Oct. 13, 2011) ("The Eleventh Circuit has applied the order and allocation of proof in cases arising under Title VII to those of age discrimination. Consequently, this Court cites opinions involving Title VII cases to the same extent as those regarding ADEA cases.") (citation omitted).

To establish a *prima facie* case of disparate treatment, Plaintiff "must demonstrate that (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) his employer treated similarly situated employees outside of his protected class more favorably than he was treated; and (4) he was qualified to do the job." *See Smalley v. Holder*, No. 09-cv-21253, 2011 WL 649355, at *3 (S.D. Fla. Feb. 22, 2011) (citing *Burke-Fowler v. Orange County*, 447 F.3d 1319, 1323 (11th Cir. 2006)).

A. Plaintiff Was Not Subject To An Adverse Employment Action

An adverse employment action is defined as a "tangible employment action [that] constitutes significant change in employment status such as hiring, firing, failing to promote,

reassignment with significantly different responsibilities or a decision causing a significant change in benefits.” *Webb-Edwards v. Orange County Sheriff’s Office*, 525 F.3d 1013, 1031 (11th Cir. 2008) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, (1998)); see *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (“[A]n employee must show a *serious and material change* in the terms, conditions, or privileges of employment.”) (emphasis in original); *Jeudy v. Holder*, No. 10-cv-22873, 2011 WL 5361076 (S.D. Fla. Nov. 7, 2011) (same) (quoting *Davis*, 245 F.3d at 1239); *Pizzini v. Napolitano*, No. 10-cv-61498, 2011 WL 5373801, at *11 (S.D. Fla. Nov. 1, 2008) (“In disparate treatment [cases], an employer discriminates against a worker ‘with respect to his [] compensation, terms, conditions, or privileges of employment, because of’ the individual’s membership in a protected category.”) (citations omitted).

The clear weight of authority establishes that an investigation of an employee that does not lead to any action taken against the employee is not an adverse employment action sufficient to state a claim for disparate treatment. See, e.g., *Diaz v. Miami Dade County*, No. 09-cv-21856, 2010 WL 3927751, at *7 n.9 (S.D. Fla. Aug. 17, 2010) (“The Court has considered Lt. Diaz’s argument that he suffered an adverse employment action by virtue of the fact that the PCB investigated him regarding Sgt. Owens’s PCB complaints that Lt. Diaz misused his authority[.] . . . These investigations, however, are not adverse employment actions because the [] complaints were not sustained, and Lt. Diaz, therefore, suffered no harm.”) (citation omitted); *Rademakers v. Scott*, No. 2:07-cv-718, 2009 WL 3459196, at *2 (M.D. Fla. Jan. 22, 2009) (finding an “investigation into alleged misconduct, even one that is a ‘sham,’ as [plaintiff] alleges, does not constitute a tangible employment action for the purposes of Title VII. . . . [because . . .] an employer must be permitted to investigate allegations of employee misconduct without facing the possibility that the investigated employees will bring a lawsuit”) (citations omitted); *Nichols v. S. Ill. Univ.-Edwardsville*,

510 F.3d 772, 786-87 (7th Cir. 2007) (finding paid administrative leave pending an investigation not to constitute a materially adverse action); *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004) (“[A] suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.”); *Yerdon v. Henry*, 91 F.3d 370, 378 (2nd Cir. 1996) (holding that charges of wrongdoing in the workplace cannot be adverse employment actions because “if the charges were ultimately dismissed, [the plaintiff] would not have suffered any adverse effect from them”).⁷

In this case, Plaintiff has failed to establish that he was subjected to an adverse employment action. While Plaintiff was temporarily transferred to desk duty pending an investigation into his conduct, it is undisputed that: (i) Plaintiff’s salary *increased*, rather than decreased (*see Peltier*, 388 F.3d at 988; *Stewart*, 2008 WL 3086760, at *7); (ii) Plaintiff did not lose rank (*see Peltier*, 388 F.3d at 988; *Diaz v.*, 2010 WL 3927751, at *7); (iii) Plaintiff was not disciplined (*see Diaz*, 2010 WL 3927751, at *7 n.9); and (iv) Plaintiff remained in his position until his retirement over a year later. *See* Statement of Material Fact (SMF) No. 17. Accordingly, Defendant is entitled to summary judgment because Plaintiff cannot establish a *prima facie* claim of discrimination.

⁷ *Accord Grice v. Baltimore County, Md.*, No. JFM 07-1701, 2008 WL 4849322, at *8 (D. Md. Nov. 5, 2008) (finding a suspension with pay pending an investigation not to constitute an adverse employment action); *Stewart v. Loftin*, No. 2:06cv137-KS-MTP, 2008 WL 3086760, at *7 (S.D. Miss. Aug. 4, 2008) (finding paid administrative leave pending an investigation — where plaintiff’s position and salary were not impacted — not to constitute an adverse employment action); *Mack v. Strauss*, 134 F. Supp. 2d 103, 114 (D.D.C. 2001) (finding that “mere investigations by plaintiff’s employer cannot constitute an adverse employment action because they have no adverse effect on plaintiff’s employment”). Moreover, the “clear weight of authority holds that a lateral transfer (or denial of a transfer request) is ordinarily not regarded as an adverse employment action under Title VII merely because the employee subjectively finds one position preferable to the other, absent some evidence that the plaintiff suffered a material loss of pay, prestige, or other quantifiable benefit.” *Richardson v. Jackson*, 545 F. Supp. 2d 1318, 1327 (N.D. Ga. 2008) (listing cases) (citations omitted).

B. Plaintiff Has Failed To Establish That He Was Treated Differently Than Similarly Situated Employees

For purpose of disparate impact analysis, the comparator employees Plaintiff identifies must be similarly situated “*in all relevant respects.*” *Daniels v. Hale*, 350 F. App’x 380, 385 (11th Cir. 2009) (quoting *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004)) (emphasis added); *Dawson v. Miami-Dade County*, No. 07-cv-20126, 2008 WL 1924266, at *9 (S.D. Fla. Mar. 11, 2008) (same) (citing *Phillips v. Aaron Rents, Inc.*, 262 F. App’x 202, 208 (11th Cir. 2008) and *Wilson*, 376 F.3d at 1091); *Ashmore v. Fed. Aviation Admin.*, 11-cv-60272, 2011 WL 5433924, at *6 (S.D. Fla. Nov. 8, 2011) (quoting *Dawson*, 2008 WL 1924266, at *8-9).

“[T]he quantity and quality of the comparator’s misconduct [must] be nearly identical [in order] to prevent courts from second-guessing employers’ reasonable decisions and confusing apples with oranges.” *Saridakis v. South Broward Hosp. Dist.*, 681 F. Supp. 2d 1338, 1349 (S.D. Fla. 2009) (punctuation omitted) (quoting *Escarra v. Regions Bank*, No. 09-11073, 353 F. App’x 401, 404 (11th Cir. 2009) and *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999)); *Gonzalez v. Florida Dep’t of Highway Safety*, 237 F. Supp. 2d 1338, 1364 (S.D. Fla. 2002) (same); *see also Martinez v. Mercedes Home Realty, Inc.*, No. 6:04-cv-1467-ORL, 2005 WL 2647884, at *9 (M.D. Fla. Oct. 17, 2005) (“To be deemed similarly-situated, the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it”) (citation and punctuation omitted).

In this case, Plaintiff has failed to offer any evidence of *any* CBP employees — with the same supervisors — who had multiple verbal and physical altercations with non-employees of Defendant within a *ten-day* period and were not investigated for their conduct.

Consistent with existing precedent, because Plaintiff has failed to establish that CBP treated similarly situated employees — not of his race and age classification — more favorably than him, Plaintiff cannot establish a *prima facie* claim of discrimination. *See, e.g., Bentley v. Orange County, Fla.*, 11-11617, 2011 WL 5119522, at *2 (11th Cir. Oct. 28, 2011) (“Although the individuals that [plaintiff] named as comparators were not members of her protected class, none of them were engaged in nearly identical conduct — in which she misrepresented the nature of her plans to take a cruise, and then failed to follow proper procedures for notifying officials of the duration of that absence. . . . Because [plaintiff] failed to offer appropriate comparators, she failed to make out a *prima facie* case.”); *East v. Clayton County, GA*, No. 10-15749, 2011 WL 3279197, at *3 (11th Cir. Aug. 1, 2011) (affirming summary judgment for defendant because plaintiff “presented no evidence that similarly situated employees under 40 were treated more favorably, as he had no evidence of any younger lieutenants who were accused of engaging in ‘nearly identical’ conduct”); *Miller-Goodwin v. City of Panama City Beach, Fla.*, 385 F. App’x 966, 973 (11th Cir. 2010) (“Having viewed the evidence in [plaintiff’s] favor, we find she has failed to identify any similarly situated male employee who engaged in misconduct nearly identical to hers, but who received less severe disciplinary sanctions. Accordingly, as [plaintiff] has failed to present proper comparators, we find that she has failed to establish a *prima facie* case with regard to her discriminatory discipline claim”); *Daniels*, 350 F. App’x at 385 (affirming summary judgment for defendant on African-American’s race discrimination claim because “white male [] comparator” “did not receive the continuing complaints or make the errors that [plaintiff] had”).⁸

⁸ In *Gross v. FBL Financial Services, Inc.*, the U.S. Supreme Court held that a plaintiff bringing an age discrimination claim under the ADEA must show that age was the “but-for” cause of the complained of employment action. 557 U.S. ----, 129 S. Ct. 2343, 2350-52 (2009). At his deposition, Plaintiff discussed in detail his belief that he was discriminated against because of a purported Cuban-American conspiracy. *See* SMF No. 18 (citing Humphrey Tr. at 120:21-122:3