[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10063
Non-Argument Calendar

D.C. Docket No. 4:18-cv-00231-MW-CAS

ROBERT SHARMAN, JR.,

Plaintiff-Appellant,

versus

CITY OF TALLAHASSEE,
MIKE TADROS,
Individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(October 14, 2020)

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and BRASHER, Circuit Judges.

PER CURIAM:

Robert Sharman Jr., a former construction crew chief in the Wastewater Treatment Division of the Underground Utilities and Public Infrastructure Department for the City of Tallahassee, appeals the summary judgment against his amended complaint against the City, and the Manager of the Department, Mike Tadros. Sharman complained that the City and Tadros fired him in retaliation for exercising his right to free speech under the First Amendment by refusing to sign an oath of loyalty and by sending a supervisor photographs of wastewater workers violating safety rules. 42 U.S.C. § 1983. Sharman also complained that the City fired him in retaliation for sending the photographs in violation of the Florida Public Employee Whistleblower Act, Fla. Stat. § 112.3187, and because of his age in violation of the Florida Civil Rights Act, *id.* § 760.10(1)(a). The district court ruled that Sharman's complaints of retaliation failed because no "causal link existe[d] between his termination and either his refusal to sign a loyalty oath or his texting of workplace safety violation photos" and because "a reasonable jury could only find that the Defendants would have terminated [him] even in the absence of these activities." The district court also rejected Sharman's claim of discrimination on the ground that "no record evidence—other than the fact that a 49-year-old assumed [his] job functions once his position was eliminated—. . . [established] that [the City] discriminated against [him] based on [his] age" of 54. Because Sharman failed to prove that the legitimate business reason the City proffered for

eliminating his position in the Division was a pretext for unlawful retaliation or discrimination, we affirm.

The City hired Sharman in 1991, and through promotions, he eventually served as one of two construction crew chiefs at a water reclamation station. On July 20, 2017, the Manager of the Wastewater Treatment Division, Joseph Cheatham, fired Sharman, his fellow crew chief Danny Brown, and two other employees at the reclamation station. Cheatham told Sharman that the City eliminated the positions to make the Division more efficient and cost-productive. Troy Kinsey, a mechanic who had served more than 6 years as a pump station foreman at the reclamation station, assumed Sharman's and Brown's duties.

Sharman alleged that the City and Tadros fired him, in large part, based on two past events. The first event occurred in November 2014 when Sharman refused to sign a written oath to act professionally and honestly as a public servant and instead wrote on the form, "I signed at start date." The second event occurred in September 2015 when Sharman texted to Michael Corrigan, a safety specialist in the human resources department, photographs taken by another city employee that showed three wastewater workers in raw sewage at a pump station wearing hard hats when the situation required a full scuba suit. Corrigan emailed the photographs to his supervisor, Jennifer Hill, who forwarded the photographs to

Tadros. Sharman alleged that testimony from himself, Corrigan, and Kinsey concerning Tadros's response to the photographs evidenced his retaliatory animus.

After the City and Tadros moved for summary judgment, Sharman submitted a response to which he attached new evidence to support his complaint of age-based discrimination. Sharman's new evidence consisted of charges filed with the Equal Employment and Opportunity Commission and lawsuits filed against the City by nine City employees.

The City and Tadros moved to strike Sharman's evidence of the employment actions against the City and to strike certain deposition testimony concerning Tadros. The City and Tadros sought to exclude the evidence about other employment actions based on their belated disclosure, *see* Fed. R. Civ. P. 26, 37, and on their unsworn allegations, *see Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980). They also sought to exclude as inadmissible hearsay the second- and third-hand statements by Sharman, Corrigan, and Kinsey concerning Tadros's outrage about the photographs, his demands to unmask the photographer and the distributor, and his desire to dismiss Sharman. *See* Fed. R. Evid. 801(c), 802, 805. The district court granted the motion "to the extent it sought to strike evidence not 'reducible to admissible form' at trial."

Sharman has abandoned any challenge he could have made to the adverse evidentiary ruling. "[A]n appellant abandons a claim when he . . . raises it in a

perfunctory manner without supporting arguments and authority." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682 (11th Cir. 2014); *see, e.g.*, Fed. R. App. P. 28(a)(8)(A). Sharman makes a cursory argument that, "[t]o the extent the District Court excluded any testimony . . . detailed in [his] statement of facts, . . . all such referenced hearsay is either reduceable to admissible form, or was not offered to prove its own truth." Because Sharman fails to identify what hearsay testimony is admissible or to discuss how the district court erred, we deem abandoned any argument that Sharman might have made to use the second- and third-hand statements that he, Corrigan, and Kinsey made about Tadros. We also deem abandoned any argument that Sharman might have made that the district court erred by excluding his records of other employment actions against the City.

We review a "summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party," Sharman. *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020) (en banc) (alteration adopted and internal quotation marks omitted). As movants, the City and Tadros must "show[] that there is no genuine dispute as to any material fact and [that they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Sharman cannot defeat summary judgment with a "mere scintilla of evidence," *Gogel*, 967 F.3d at 1134 (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)), or with self-

serving allegations not supported by personal knowledge, *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 851 (11th Cir. 2000).

Sharman complained of retaliation for speech protected by the First Amendment, 42 U.S.C. § 1983, and made as a whistleblower in public employment in Florida, Fla. Stat. § 112.3187, and of discrimination based on his age, *id.* § 760.10(1). Federal law prohibits employers from firing employees in retaliation for engaging in speech protected by the First Amendment. *Alves v. Bd. of Regents*, 804 F.3d 1149, 1159 (11th Cir. 2015). In Florida, the Whistleblower Act prohibits a government entity from dismissing an employee to retaliate for his disclosure of information concerning "[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance . . . or gross neglect of duty committed by an employee of an agency." Fla. Stat. § 112.3187(4)(b), (5)(b). Florida law also makes it unlawful for an employer to discharge an employee because of his age. *Id.* § 760.10(1)(a).

We apply two separate burden-shifting tests for Sharman's complaints. With respect to Sharman's complaint of retaliation in violation of the First Amendment, if Sharman establishes that his speech is protected and that his speech played a substantial role in the decision to discharge him, the burden shifts to the City to prove by a preponderance of the evidence that it would have made the same employment decision absent Sharman's protected speech. *See Akins v. Fulton Cty.*,

420 F.3d 1293, 1303 (11th Cir. 2005). As to his complaints of retaliation in violation of the Whistleblower Act and of age-based discrimination in violation of the Florida Civil Rights Act that are based on circumstantial evidence, we apply a version of the burden-shifting test provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that test, if Sharman establishes a prima facie case of retaliation or discrimination, his employers are given an opportunity to offer nonretaliatory or nondiscriminatory reasons for his termination, and then he bears the ultimate burden of proving that the reasons proffered are pretextual. *See Griffin v. Deloach*, 259 So. 3d 929, 931–32 (Fla. Dist. Ct. App. 2018) (Whistleblower Act); *Lin v. Demings*, 219 So. 3d 124, 125 (Fla. Dist. Ct. App. 2017) (Florida Civil Rights Act).

Undisputed evidence established that the City and Tadros eliminated Sharman's position as part of restructuring the Division to perform more efficiently. City officers Reese Goad, Ricardo Fernandez, and Robert Wigden testified that the City began a reorganization program in 2015 that continued through 2017. Wigden stated that Tadros, the Manager of the Utilities and Infrastructure Department, envisioned merging the Public Works and Utilities Divisions, and personnel forms showed that, in July 2016, Tadros hired Lynn Coller as the Manager of Wastewater Operations to streamline the Department. Official records reflected that, for fiscal year 2017, the City eliminated 49

positions, 11 of which were vacant. The idea to eliminate Sharman's position originated in an email that Coller sent to his supervisor, Cheatham, in May 2017 that proposed eliminating the four construction crew chiefs in the Division and "to accomplish all maintenance functions" with two foremen to supervise and to supplement the work of three wastewater treatment mechanics. Cheatham and Tadros recalled that Cheatham agreed with Coller's plan and submitted it to Tadros, who approved the plan after confirming that the restructuring would not affect operations at Sharman and Brown's reclamation station.

Even if we assume that Sharman established prima facie cases of retaliation for both acts that he identifies as speech protected by the First Amendment and of retaliation in violation of the Whistleblower Act, he failed to prove that the reason proffered for his termination was pretextual. The City and Tadros established that, regardless of Sharman's refusal to sign the employee oath and his forwarding of photographs, his position would have been eliminated to achieve the goal of having a more productive and cost-effective workforce. *See Akins*, 420 F.3d at 1303. Sharman argues that a budget shortfall was a false excuse for his dismissal because Wigden testified that the restructuring was not a "budgetary exercise," but Wigden, Goad, and Fernandez testified that City officials ordered managers to find ways to save their departments money and the officials acknowledged that might require a reduction in the workforce. Coller, Cheatham, and Tadros testified consistently that

eliminating an unnecessary layer of supervision made the Division more effective and efficient. Sharman argues that the City and Tadros used the restructuring plan to eliminate employees they deemed troublemakers, but Sharman identifies no evidence that the architect of the plan, Coller, knew of protected activities engaged in by any City employee, much less of Sharman's deeds, which preceded Coller's employment with the City. Sharman also argues that the restructuring was a pretext because he was not offered an alternative position with the City, but Sharman submitted no evidence that, when he was fired, a position was available for which he was qualified or that he had, as required by the City layoff policy, requested an alternative position. Sharman argues to infer pretext from the hearsay evidence of Tadros's outrage at the photographs, but we will not consider second- and third-hand statements and rumors that the district court excluded and that Sharman does not dispute is inadmissible hearsay. *See Sapuppo*, 739 F.3d at 682. Because no material factual dispute exists about the reason for Sharman's termination, the district court did not err by entering summary judgment against his complaints of retaliation.

Sharman also failed to prove that his termination was a pretext for discrimination based on his age. "A reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *Brooks v. Cty. Comm'n of Jefferson Cty., Ala.*, 446 F.3d 1160, 1163 (11th

Cir. 2006) (internal quotation marks and emphasis omitted). Sharman offered no direct evidence that he was discriminated against based on his age. In fact, he testified that no one who worked for the City ever commented on his age. Sharman argues that he was dismissed because his job responsibilities were assumed by a less qualified man, but Sharman "cannot prove pretext by simply arguing or even by showing that he was better qualified than the person who received the position he coveted," *id.* (quoting *Alexander v. Fulton Cty.*, 207 F.3d 1303, 1339 (11th Cir. 2000)). Sharman assumed that his age was the cause for his termination because a list he saw reflected that most of the employees fired in 2017 were over the age of 40, but his speculation and belief are insufficient to prove pretext. *See Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1313 (11th Cir. 2016) ("Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext."). And Sharman's assumption that eliminations were based on age is negated by his testimony that his successor, Kinsey, was between 49 and 50 years old. Sharman's theory about age-based discrimination also was belied by a report from an expert for the City, Dr. Benjamin Shippen, stating that, because roughly three-quarters of City employees were over the age of 40, no significant "difference [existed] between the actual and expected number of terminations for employees age 40 and older." Sharman mentions in passing his evidence of other employment actions against the City, but the district court stuck that evidence. *See*

Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991). The district court did not err by entering summary judgment against Sharman's complaint of age-based discrimination because no material factual dispute existed about whether the reasons for Sharman's termination were nondiscriminatory or legitimate.

We **AFFIRM** the summary judgment in favor of the City and Tadros.