[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10914
Non-Argument Calendar

D.C. Docket No. 2:17-cv-00051-RSB-BWC

RAYFIELD L. BARNEMAN,

Plaintiff-Appellant,

versus

INTERNATIONAL LONGSHOREMAN ASSOCIATION LOCAL 1423,

Defendant-Appellee,

SSA-COOPER, LLC,

Defendant,

MARINE TERMINAL CORPORATION-EAST,
ATLANTIC RO-RO STEVEDORING, LLC,
APS STEVEDORING, LLC,
GEORGIA STEVEDORE ASSOCIATION, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(January 6, 2021)

Before JILL PRYOR, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Rayfield Barneman appeals *pro se* the district court's order granting summary judgment on his claims under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621–34, in favor of Defendants, International Longshoreman Association Local 1423 (the "Union"); Marine Terminal Corporation-East ("Marine Terminal"), Atlantic Ro-Ro Stevedoring, LLC ("Atlantic Ro-Ro"), and APS Stevedoring, LLC ("APS"), (collectively, the "Port Employers"); and Georgia Stevedore Association, Inc. ("GSA"). For the reasons explained below, we affirm the district court's grant of summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Barneman is a sixty-eight-year-old male who has worked on and off as a longshoreman at the Port of Brunswick in Georgia ("the Port") since 1971. Barneman suffers from a chronic back condition due to a bulging disc, which is aggravated when he sits on hard surfaces. Barneman is a member of the Union, which is the recognized collective bargaining agent for longshoreman at the Port. The Port Employers are all stevedoring companies operating at the Port, and Barneman has worked for each of them at some point during his career. The Port Employers are members of GSA, which acts as a representative for the Port

Employers in negotiating collective bargaining agreements with the Union. The Port Employers can hire longshoremen on a daily, per job basis through the Union's hiring hall. The Port Employers hire individuals to work as "headers" and "field foreman," and those individuals, in turn, hire longshoremen for the specific job.

To handle grievances filed by or against members of the Union, the Union and the Port Employers established a joint labor-management Port grievance committee (the "PGC"), consisting of representatives from the Union and the Port Employers, as well as a non-voting GSA representative. One job that longshoremen perform is the driving of new automobiles back and forth between shipping vessels and a storage area. Once the vehicle arrives at the correct area, shuttle vans transport longshoreman back to either the vessel or a storage area to repeat the process. The shuttle vans have hard seats that lack padding to cushion riders against road bumps. Because he suffered from a chronic back condition, Barneman would often bring a seat cushion when he worked, carrying the cushion with him into both new automobiles and shuttle vans to help ease his back pain when he had to sit.

On March 15, 2016, Norman Massey, the president of GSA, issued a written memorandum stating that longshoremen could not have personal property in the automobiles that they were driving off and on vessels after Massey received complaints by car manufacturers that personal property was being left in new automobiles. A copy of this memorandum was placed in the Union's hiring hall,

and Barneman was aware of the policy. On April 9, 2016, Essie Kitchen, a header, fired Barneman for the workday because Barneman tried to bring a cushion into a vehicle. Barneman never requested a reasonable accommodation from the Port Employers or the Union for his back condition prior to this termination.

Barneman filed a grievance with the PGC concerning his April 9 termination. Before the PGC hearing, in late June 2016, Barneman sent a letter to the Union, Port Employers, and GSA requesting that he be allowed to "carry his seat cushion" while he was on duty. Attached to this letter were two doctors' notes supporting his request for an accommodation. When the PGC heard Barneman's grievance, it informed him that he could not bring a cushion into new automobiles but that he could bring multiple cushions to place in each shuttle van so that a cushion would be available for his use in any van he entered. At some point, Barneman was also informed that he could wear cushioning inside of his clothes.

On August 16, 2016, Kathye Pickens and Michael McDuffie, Union officials, spoke with Barneman about "shirking work by waiting for a specific van instead of getting in the available van to continue work." Although Barneman was not terminated on this date, he filed a grievance with the PGC, alleging that Pickens and McDuffie used threatening and abusive language towards him. Then, on October 17, 2016, while working for Atlantic Ro-Ro, Barneman was terminated for the rest

of his shift by Rodney Howard and James Patterson "for shirking work for waiting for a particular shuttle van with his cushion in it."

Barneman filed a grievance with the PGC contesting the October 17 termination. On November 22, 2016, the PGC held a grievance hearing, at which Barneman was reminded of the accommodations offered at his previous grievance hearing, i.e., that he could place a cushion in each shuttle van or wear a cushion inside of his clothing but could not shirk work by waiting for a specific van. Barneman also filed a charge against the Union and GSA with the Equal Employment Opportunity Commission ("EEOC"), asserting that he was fired because of his age and disability. Barneman only listed the October 17 termination as the basis for his EEOC charge. Subsequently, the EEOC denied his charge, and he obtained a right-to-sue notice.

On May 3, 2017, Barneman, *pro se*, filed his first complaint, and then, on May 22, 2017, filed an amended complaint. In his amended complaint, Barneman claimed that the Union, the Port Employers, and GSA violated the ADA and ADEA when he was terminated on April 9, 2016, and October 17, 2016.[1] Barneman alleged that he had "used a seat cushion for six years to alleviate pain and slow the further degradation of peripheral neuropathy," which "was an acceptable practice" before

[1] Barneman also brought claims against SSA-Cooper, LLC, in his Amended Complaint. SSA-Cooper, LLC, however, was dismissed from the case before the summary judgment stage.

GSA's memorandum was issued, and that there was no cure for his medical condition. On April 2, 2016, Kitchen verbally harassed him about using the seat cushion, and Barneman, in response, asked why a younger employee, Oscar Brown, could bring his backpack into automobiles. On April 9, 2016, he was terminated for the day for using a seat cushion inside automobiles. Barneman submitted doctors' notes stating his medical condition and need for the seat cushion as well as "a formal request for a written reasonable accommodation for the medical condition." After receiving no response, Barneman submitted a second request for a formal written reasonable accommodation to Massey, which was denied, and then filed a grievance with the Union. Barneman was granted reasonable accommodations for his medical condition on July 21, 2016, following a grievance hearing. On August 16, 2016, however, McDuffie and Pickett "accosted" Barneman while he was waiting for a van with his seat cushion and stated that they interpreted his reasonable accommodation letter as requiring Barneman to provide and place a seat cushion in each van himself. Barneman again asked why Brown was permitted to carry a backpack into the vehicles and was told that Brown "had a real medical condition." Barneman subsequently filed a grievance concerning this August 16 incident. Then, on October 17, 2017, Barneman was terminated by Howard, Patterson, and Kenny Thorpe, a Union Executive Board Member, "because he would not get into a van without the medically required seat cushion."

Barneman claimed that the above allegations constituted violations of the ADA and ADEA and requested lost wages, punitive damages, lost retirement credit hours, and injunctive relief. Barneman also attached three written statements from longshoremen Lee Armstrong, Dale Rease, and Rhonda Jimerson to support his allegations. After obtaining counsel, Barneman filed a second amended complaint, which the district court treated as a supplemental complaint. In response, the Union, the Port Employers, and GSA denied liability and asserted affirmative defenses.

Following discovery, the Union filed a motion for summary judgment. In its motion, the Union argued that Barneman could not prove the Union instigated or acquiesced to any allegedly discriminatory conduct or discriminated against him because of his disability. The Union explained that it provided Barneman a reasonable accommodation by allowing him to place cushions in the vans or modify his clothing, which Barneman admitted were reasonable and complied with his doctors' notes. The Union argued that the two incidents following the grant of Barneman's accommodation involved him shirking work. As to the age discrimination claim, the Union claimed that because Barneman alleged the Union terminated him for both his age and disability, his age could not be the "but-for" cause of the adverse employment action. Additionally, the Union asserted that he failed to establish a prima facie case of age discrimination, as the first incident did not involve any disciplinary action and the second incident involved the Port

Employers' agents, not the Union's. The Union also asserted that Barneman failed to identify a valid comparator because he failed to prove the Union knew Brown carried personal items into vehicles and allowed him to do so. The Union further argued that, even if Barneman could establish a prima facie case of age discrimination, he was terminated for shirking work and that there was no evidence that the proffered reason was pretextual.

The Port Employers and GSA jointly filed a motion for summary judgment. The Port Employers and GSA argued that Barneman was provided a reasonable accommodation, a fact that he admitted. They also argued that there was no evidence any employment action was taken against Barneman due to his age and that Barneman admitted he had no evidence that the Port Employers or GSA knew of any different treatment for Brown. As such, they argued that he had not established a prima facie case of age discrimination because he could not show his proffered comparator was treated differently than him regarding personal items in vehicles and that, even if a prima facie case could be established, he had not suggested nor shown any evidence that the employers' proffered reason for his termination was pretextual. GSA also separately argued that it was not an employer under the ADA or ADEA.

In support of their motions, the Union, the Port Employers, and GSA submitted statements of material facts. The Union relied upon an affidavit of Richard Nixon, the Union president, and deposition testimony from Barneman,

Massey, Freddie Sams ("Sams"), Nixon, Kitchen, Pickens, McDuffie, Howard, Thorpe, and Brown. The Port Employers and GSA relied upon an affidavit from Massey as well as deposition testimony from the following individuals: Ben Alexander ("Alexander"), Brown, Joe Clark ("Clark"), Howard, Kitchen, Massey, McDuffie, Nixon, Terry O'Neal ("O'Neal"), Pickens, Sams, and Thorpe. The relevant evidence is summarized as follows.

Massey testified that the no personal item policy in the GSA memorandum had been the policy "[a]s long as [he could] remember" and that he was aware of Barneman's issues with the policy through his grievances filed with the Union. He attended a meeting regarding Barneman's first termination, at which it was determined he could use and place multiple cushions in the vans to avoid waiting for a specific van and, thus, not "avoid[] . . . or shirk[] work." Nixon attested that Barneman "never requested the Union to provide or purchase cushions or padded clothing for him," that "[t]he Union did not object to [him] wearing cushioning inside his clothes or him placing multiple cushions in the shuttle vans," and that he never witnessed Brown place his backpack in a vehicle following the GSA memorandum. In his deposition, Nixon testified as to an incident where Brown was told not to carry his backpack into vehicles that resulted in Brown and his supervisor being terminated for the day. Clark, an APS site manager, testified that he became aware of Barneman's back condition at a grievance hearing, where Barneman was

advised that he could either place cushions in multiple vans or inside his clothing.

Kitchen testified as to Barneman's April 9 termination, explaining that she observed Barneman carry a cushion "in his pants" into an automobile and confronted him. Barneman responded by saying he had a "doctor's excuse," and Kitchen fired him for that day of work. McDuffie and Pickens both testified as to the August 15, 2016, incident with Barneman. McDuffie explained that he told Barneman not "to wait on one certain van to come back with a pillow," as that was "a clear sign of shirking the work" and denied using "curse words" with Barneman. He also spoke to Barneman's supervisors, but Barneman was not terminated that shift. Pickens, the Union's financial secretary, similarly testified that she told Barneman that he was "not allowed to wait around in the parking lot for that particular van" after he was "standing in the field waiting on a particular van that he said his cushion . . . was in." She denied using curse words when speaking to Barneman.

Howard, the field foreman for Atlantic Ro-Ro when Barneman was terminated on October 17, 2016, testified that he and Patterson terminated Barneman for insubordination. Howard told Barneman to go back to work instead of waiting for a particular van with a cushion in it. However, following this conversation, Patterson informed Howard that Barneman did not go back to work. Howard stated that he knew of Barneman's need for cushioning in the vans. Howard also testified he had never seen Brown bring a bag into vehicles.

Brown testified that he was a Union member and had Type-1 diabetes, requiring him to carry an insulin pump. After becoming aware of the no personal item policy, he obtained a letter stating that he could bring personal items into the vehicles. However, after Sams informed him he could no longer bring his "bag into the port," Brown "made adjustments" by acquiring a vest with multiple pockets stitched into it. Nixon never saw Brown carry a bag into a vehicle. Additionally, when a Union officer saw Brown with a bag in vehicle, that officer told him to stop.

Sams, the Union's business agent, testified that the no personal item policy had "been a policy forever," but was "not sure" if it had ever been expressed in writing before the GSA memorandum. Sams stated that he was unaware that Barneman carried cushions into vans before the GSA memorandum was issued and that he had not participated in Kitchen's termination of Barneman. Sams testified that Barneman had asked him why Brown was allowed "to carry a backpack and not him," to which Sams responded by stating he "didn't know that he was carrying one." The next day, Sams told Brown he "couldn't carry his backpack even on the vessel" and that, following that day, he did not see Brown bring his backpack to work. Sams further testified that he never had a conversation with Barneman about needing cushions because of his back condition. Thorpe, the Union's vice president, testified that he never personally saw Brown bring a backpack into vehicles, although the issue was brought to his attention. O'Neal, an operations team leader

at Atlantic Ro-Ro, testified that he never knew of any instances of Brown carrying a backpack into vehicles before Barneman's action. O'Neal also never had any conversation with Brown regarding his need for having a backpack for Brown's medical condition. Alexander, a cargo superintendent for Atlantic Ro-Ro, testified that "when the . . . no cushion thing was enforced, [the Union headers] enforced [Brown] not to be toting his backpack into cars."

In his deposition, Barneman testified that his supervisors on October 17, 2016, "worked for Atlantic Ro-Ro at the time" and that he was fired on that date because he would not get into a van lacking his seat cushion. Barneman admitted that he was told he could bring multiple cushions into the vans and sew cushioning into his clothing, both of which complied with his doctors' notes. He further testified that he did not purchase a cushion for each van because it was his employers' responsibility to do so but that he did not ask his employers to purchase the cushions.

Barneman opposed the motions for summary judgment. Barneman argued that the defendants were all aware of his disability and need for reasonable accommodation, that they shifted the burden of providing the accommodation to him, and that they told him if he had "any disability, he should not work." Thus, Barneman asserted he had established a prima facie discrimination case under the ADA. Barneman also asserted that he was discriminated based on his age because Brown, a younger employee, was permitted to violate the same work rule. Finally,

Barneman claimed that GSA was considered an employer under the ADA and ADEA. Barneman submitted evidence with his response opposing the summary judgment motions but did not cite to any specific portions of the record in support of his response. The Union, the Port Employers, and GSA replied to Barneman's response and attached Barneman's full deposition, in which he admitted that he never asked for an accommodation prior to his April 9 termination, was granted an accommodation, and did not ask his employers to purchase cushions.

On February 12, 2020, the district court granted summary judgment in favor of the Defendants on Barneman's ADA and ADEA claims because Barneman had failed to establish a prima facie case for either claim. The district court first explained that Barneman failed "to provide citations to support most of the factual assertions," other than in a "very general fashion," in his response to the motions for summary judgment, violating Southern District of Georgia Local Rule 56.1. As such, the district court deemed the "material facts admitted where [he] provide[d] no citation to properly dispute them."

Turning to the ADA claim,[2] the district court stated that the Defendants did not dispute that Barneman had a disability or could sit in the shuttle vans with a

[2] The district court noted that Barneman referenced a "hostile work environment" in his ADA claim. To the extent that Barneman sought to raise a hostile work environment claim under the ADA, the district court found that claim failed because: (1) this Circuit had not decided whether a hostile work environment claim was "even cognizable under the ADA"; and (2) Barneman had not exhausted his administrative remedies as to a hostile work environment claim, as his EEOC charge did not allege facts to support that claim.

reasonable accommodation, which the court assumed was an essential function of his job. The district court noted that because Barneman admitted he had not requested an accommodation before his April 9 termination, no duty to provide a reasonable accommodation was triggered. As such, the district court found dismissal proper for any ADA claim relating to that termination.

As to the October 17 termination, the district court noted that Barneman informed the Defendants of his disability in June 2016, that the PGC panel told Barneman he could bring and leave a cushion in each shuttle van, and that, at some point, he was given the option to wear cushions inside his clothing. The district court rejected Barneman's argument that the provided accommodation was "unreasonable," as Barneman admitted that "he thought he had received a reasonable accommodation" and that the accommodation "complied with his doctors' directions concerning his back." The district court recognized that Barneman conceded his October 17 termination occurred because he was waiting for a specific van with his cushion in it, i.e., not in compliance with the provided accommodation. While Barneman asserted that he would prefer other accommodations than the one he received, the district court explained that the ADA does not require an employee to be provided the accommodation he finds most desirable. In addressing Barneman's contention that the Defendants were required to purchase the cushions to provide a reasonable accommodation, the district court noted that Barneman never requested

that any of the Defendants purchase the cushions for the vans and that, therefore, Barneman did not satisfy his burden of identifying the accommodation. The district court therefore found that Barneman failed to demonstrate a prima facie ADA claim.

As to the ADEA claim, the district court noted that only Union officials and Atlantic Ro-Ro employees had spoken to Barneman during the two incidents referenced in his complaint. As such, it granted summary judgment to the other Defendants—Marine Terminal, APS, and GSA. Regarding Atlantic Ro-Ro, the district court found that Barneman had not offered any evidence that Atlantic Ro-Ro was aware that Brown, his proffered comparator, violated the no personal item policy or allowed Brown to do so after the policy issued. Barneman was therefore unable to show that Atlantic Ro-Ro treated Brown differently from him and thus failed to establish a prima facie case of age discrimination. Even assuming that Barneman could establish a prima facie case, the district court found the claim would still fail "to the extent it [was] predicated on his October 17, 2016[,] termination" because: (1) Atlantic Ro-Ro had a legitimate, nondiscriminatory reason for terminating him, i.e., shirking work by waiting for a specific shuttle van with his cushion despite being warned numerous times that he could not do so; and (2) Barneman had not cited any specific evidence that the proffered reason was pretextual and in fact conceded waiting made him less productive.

As to the Union, the district court explained that Barneman did not dispute that Atlantic Ro-Ro, not the Union, terminated his employment. Barneman's claim against the Union therefore could only be based on the August 16 incident. The district court noted that Barneman did not respond to the Union's argument that threatening to fire someone does not constitute an adverse employment action and that "several circuit courts ha[d] found that threats and even unfair reprimands are not enough to establish the adverse employment action element of an ADEA claim." The district court therefore found that he failed to make a prima facie case of age discrimination against the Union and that, even if a prima facie case existed, the Union offered the same legitimate, nondiscriminatory reason for its action, which Barneman did not rebut as pretextual.

Finally, the district court granted summary judgment in favor of GSA because it was not an employer under the ADA or ADEA.[3] This appeal ensued.

II. STANDARD OF REVIEW

"We review *de novo* a district court's grant of summary judgment, viewing all the evidence, and drawing all reasonable inferences, in favor of the non-moving party." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th Cir. 2005).

[3] Barneman does not challenge the district court's grant of summary judgment in favor of GSA on the basis that it did not qualify as an employer under either the ADA or ADEA. Accordingly, he has abandoned any such argument on appeal. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008).

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

III. ANALYSIS

On appeal, Barneman argues that the district court erred in granting summary judgment for several reasons. First, he contends that the offered accommodation was not reasonable under the ADA because he was not allowed to bring an individual cushion into vehicles and because his employers shifted the burden of providing the offered accommodation to him. Barneman further argues that the district court erred in finding that the August 16, 2016, actions of McDuffie and Pickens were not intentional discrimination due to his disability. Second, he argues that he established a prima facie claim of age discrimination under the ADEA by demonstrating that a valid comparator—Brown, a younger employee—was treated differently regarding a policy prohibiting personal items in cars. Finally, he argues that the district court erred in finding that the defendants acted with a legitimate, nondiscriminatory reason in terminating Brown on October 17, 2016, claiming that the proffered reason was pretextual. We address each issue in turn.

A. ADA Claim

Barneman first contends that the district court erred in granting summary judgment on the basis that the defendants provided him reasonable accommodation.

To establish a prima facie case of discrimination under the ADA, a plaintiff must show that he (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of his disability. *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1255–56 (11th Cir. 2007). For an ADA plaintiff to prove he is a "qualified individual," he "must show either that he can perform the essential functions of his job without accommodation, or, failing that, . . . that he can perform the essential functions of his job with a reasonable accommodation." *Id.* at 1256 (alteration in original) (quoting *D'Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220, 1229 (11th Cir. 2005)). Under the ADA, "[a]n accommodation is 'reasonable' and necessary . . . only if it enables the employee to perform the essential functions of the job." *Id.* "An employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide 'reasonable accommodations' for the disability—unless doing so would impose undue hardship on the employer." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001) (quoting 42 U.S.C. § 12112(b)(5)(A)). However, "[t]he plaintiff bears the burden of identifying an accommodation, and of demonstrating that the accommodation allows him to perform the job's essential functions." *Id.* at 1255–56. Thus, "the duty to provide a reasonable accommodation [under the ADA] is not triggered unless a specific demand for an accommodation has been made." *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999). And the ADA does not require

an employer to accommodate an employee in the manner he desires, as long as the provided accommodation is reasonable. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997).

We find that the district court did not err in determining that, as a matter of law, Barneman failed to establish a prima facie claim under the ADA. Turning first to the April 9 termination, Barneman testified that he never requested an accommodation prior to that date. Thus, no duty to provide a reasonable accommodation was triggered, and the April 9 termination cannot serve as a basis for Barneman's ADA claim. *See Gaston*, 167 F.3d at 1363. Additionally, as Barneman admitted in his deposition, he was granted a reasonable accommodation to either bring multiple cushions to place in the shuttle vans or, alternatively, wear cushioning inside his clothing—two options that complied with his doctors' notes. Barneman asserts that purchasing cushions to place in each shuttle van is not a reasonable accommodation because it "causes uncertainty and undue hardship (expense)." However, as the record establishes, Barneman never requested that the Defendants purchase the cushions for the shuttle vans. *See Lucas*, 257 F.3d at 1255–56; *Gaston*, 167 F.3d at 1363. And while Barneman may have preferred to carry a single cushion with him into the vehicles and shuttle vans, he was not entitled to his preferred accommodation, but rather, only an accommodation that was reasonable.

See Stewart, 117 F.3d at 1285. The district court therefore did not err in finding that Barneman was provided a reasonable accommodation.

Barneman further argues that the district court erred in finding that the actions of McDuffie and Pickens on August 16, 2016, did not constitute intentional discrimination based on his disability. As an initial matter, we note that Barneman did not raise the August 16 incident in his EEOC charge, only the October 17 termination. And a plaintiff must exhaust his administrative remedies before pursuing a claim for discrimination under the ADA. *See Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001) (stating that a plaintiff must exhaust administrative remedies before pursuing a claim for discrimination under Title VII of the Civil Rights Act); *Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 589 n.8 (11th Cir. 1994) (explaining that a plaintiff's complaint asserting a Title VII claim is "limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination"); 42 U.S.C. § 12117 (applying Title VII's procedures and remedies to the ADA).

Moreover, this argument is without merit. To state a disability discrimination claim, a plaintiff must demonstrate he suffered an "adverse employment action" because of his disability. *EEOC v. STME, LLC*, 938 F.3d 1305, 1314 (11th Cir. 2019). Barneman claims that McDuffie and Pickens accused him of "shirking work" while exercising his reasonable accommodation, argued with him about what

constituted his reasonable accommodation, and threatened to have him fired. But none of those actions constitute an adverse employment action. *Id.* Accordingly, the district court did not err in granting summary judgment in favor of the Defendants on Barneman's ADA claim.

B. ADEA Claim

Next, Barneman argues that the district court erred in finding that he failed to state a prima facie case of age discrimination under the ADEA.[4] Under the ADEA, it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "To assert an action under the ADEA, an employee must establish that his age was the 'but-for' cause of the adverse employment action." *Liebman v. Metro. Life Ins. Co.*, 808 F.3d 1294, 1298 (11th Cir. 2015) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)). A plaintiff may prove an ADEA claim through direct or circumstantial evidence. *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010).

[4] Barneman does not challenge the district court's grant of summary judgment in favor of Marine Terminal, APS, or GSA on the basis that those defendants did not employ Barneman on the dates when the alleged discriminatory acts occurred. Because he has abandoned any such argument on appeal, we affirm the district court's grant of summary judgment on the ADEA claim as to those defendants. *See Timson*, 518 F.3d at 874.

For an ADEA claim based on circumstantial evidence, such as the claim before us, we apply the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Liebman*, 808 F.3d at 1298. Under that framework, a plaintiff must establish a prima facie case of age discrimination, i.e., "prove that he or she was: (1) a member of the protected class; (2) qualified for the position; (3) subjected to adverse employment action; and (4) replaced by a person outside the protected class or suffered from disparate treatment because of membership in the protected class." *Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002) (citing *McDonnell Douglas*, 411 U.S. at 802). Of relevance here, the plaintiff must show that he "was treated differently from another 'similarly situated' individual—in court-speak, a 'comparator.'" *Lewis v. City of Union City*, 918 F.3d 1213, 1217 (11th Cir. 2019) (en banc) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258–59 (1981)). For comparators to be similarly situated, they need not be "nearly identical," but rather, "similarly situated in all material respects." *Id.* at 1218.

"Once an employee has established a prima facie case, 'the burden shifts to the employer to rebut the presumption of discrimination with evidence of a legitimate, nondiscriminatory reason for the adverse employment action.'" *Liebman*, 808 F.3d at 1298 (quoting *Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir. 2012)). "If the employer proffers a legitimate,

nondiscriminatory reason, the burden shifts back to the employee to show that the employer's reason is a pretext." *Id.*

Barneman contends that the district court erred in finding that there was no evidence that he was treated differently from his proffered comparator, Brown. We disagree. As to the Union, the district court determined that Barneman did not suffer an adverse employment action under the ADEA because he was not terminated on August 16, 2016—the only alleged incident involving Union officials. Indeed, at most, the Union officials threatened to fire Barneman in an unpleasant fashion, which does not rise to the level of an adverse employment action. *See Crawford v. Carroll*, 529 F.3d 961, 970–71 (11th Cir. 2008) (explaining that, in a discrimination claim, an employee must "demonstrate [he] suffered 'a *serious and material* change in the terms, conditions, or privileges of employment' to show an adverse employment action" (emphasis in original) (quoting *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001))); *see also Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 826 (5th Cir. 2019) ("[A]llegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation." (quoting *King v. Louisiana*, 294 F. App'x 77, 85 (5th Cir. 2008))). The district court therefore did not err in determining that, as a matter of law, Barneman failed to establish a prima facie case of age discrimination against the Union.

As to Atlantic Ro-Ro, even assuming Brown was similarly situated to Barneman in all material respects, Barneman cannot demonstrate that Atlantic Ro-Ro treated him differently than Brown. The Atlantic Ro-Ro employees who testified stated that they were not aware of Brown bringing his backpack into the new vehicles or whether the no personal items policy was enforced with respect to Brown. Brown testified that once he was told to stop bringing his backpack into vehicles, he stopped doing so. Barneman claims that the district court erred in not considering the unsworn written statements from Lee Armstrong, Dale Rease, and Rhonda Jimerson attached to his amendment complaint. Generally, a district court may not consider an unsworn statement when "determining the propriety of summary judgment." *Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980)[5]; *accord Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Because these statements were unsworn, the district court was not required to consider them.

Barneman also asserts that an October 27, 2016, incident involving Samuel Brantley refusing to terminate Brown demonstrates his claim of age discrimination. But this assertion likewise fails as Barneman did not rely on this alleged October 27, 2016, incident in his amended complaint or in his response to the motions for summary judgment. The evidence, even taken in the light most favorable to

[5] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Barneman, shows that Brown was not treated differently from Barneman, and the district court therefore did not err in finding that Barneman failed to make a prima facie case of age discrimination.

Even if Barneman had established a prima facie case of age discrimination against Atlantic Ro-Ro, Atlantic Ro-Ro proffered a legitimate, nondiscriminatory reason for Barneman's October 17 termination, i.e., that he was shirking work. Once Atlantic Ro-Ro proffered that reason, the burden shifted back to Barneman to show that the proffered reason was merely pretextual. *See Liebman*, 808 F.3d at 1298. To demonstrate pretext, a plaintiff "must demonstrate 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)). However, the "plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [his] business judgment for that of the employer." *Id.* (quoting *Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc)).

Here, the district court did not err in finding that Barneman failed to demonstrate any evidence that Atlantic Ro-Ro's proffered reason for the October 17 termination was pretextual. As the district court explained, Barneman fails to set

forth any specific facts as to pretext, and there is no evidence in the record showing that Howard's termination of Barneman was based on the latter's age. Indeed, Barneman conceded in his deposition that he slowed down production while waiting for a specific van with his cushion. Although Barneman notes that there is a discrepancy between Howard's reason for terminating Barneman, i.e., insubordination, and Atlantic Ro-Ro's stated reason of shirking or evading work, it is clear from the record that the insubordination was tied to Barneman continuing to shirk work while waiting for a specific van despite being warned not to do so. Barneman also contends that he was fired for exercising his reasonable accommodation, but, as explained above, the accommodation he received was either to place multiple cushions in the shuttle vans or wear cushioning in his clothing, not to wait for a specific van with his cushion.

Because the district court did not err in finding, as a matter of law, that Barneman failed to establish a prima facie case of age discrimination against any of the defendants, we affirm the district court's grant of summary judgment as to the ADEA claim.[6]

[6] Barneman makes several references to a "hostile work environment" in his brief. To the extent that Barneman seeks to raise a hostile work environment claim, and such a claim is cognizable under the ADA or ADEA, we agree with the district court that the claim fails for failure to exhaust administrative remedies by not alleging facts in his EEOC charge to support that claim. *See Wilkerson*, 270 F.3d at 1317; *Mulhall*, 19 F.3d at 589 n.8. Additionally, Barneman did not reference a "hostile work environment" as to his ADEA claim, and thus cannot now raise it on appeal. *See Access Now*, 386 F.3d at 1331.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's order granting summary judgment in favor of the Union, the Port Employers, and GSA on Barneman's ADA and ADEA claims.

AFFIRMED.