[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12094
Non-Argument Calendar

D.C. Docket No. 0:18-cv-61662-FAM

CAROLYN HICKS-WASHINGTON,

Plaintiff-Appellant,

versus

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE,

Defendant-Appellee,

TAM ENGLISH,

Defendant.

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

(February 12, 2020)

Before JORDAN, NEWSOM and FAY, Circuit Judges.

PER CURIAM:

Carolyn Hicks-Washington, an African-American woman over the age of 40, appeals *pro se* the district court's dismissal of her claims of race, color, and sex discrimination, raised pursuant to Title VII and Florida state law, and its refusal to reconsider that order. She also appeals the district court's grant of summary judgment to her former employer, the Housing Authority of the City of Fort Lauderdale (the "Authority"), as to her remaining claim of age bias under the Age Discrimination in Employment Act ("ADEA"). We affirm.

I. BACKGROUND

Hicks-Washington was employed by the Authority from 2005 to 2015. She was promoted to Assistant Director of Assisted Housing in 2010 and stayed in that position until she was terminated in November 2015. When Hicks-Washington asked why she was being terminated, she was told it was because the Authority was moving in a "different direction." Hicks-Washington learned that her supervisor, Veronica Lopez, also was terminated. Lopez, like Hicks-Washington, was over the age of 55.

Shortly after being terminated, Hicks-Washington applied for the newly created position of Director of Housing Choice Voucher Program ("Director"); however, she did not receive an interview, nor was she hired. The Authority

contracted with the Miami Beach Development Corporation to temporarily fill the position; when the Authority eventually filled the position, it hired Medina Johnson, an African-American woman over the age of 40, who was 12 years younger than Hicks-Washington.[1]

In April 2016, Hicks-Washington submitted an intake questionnaire to the Equal Employment Opportunity Commission ("EEOC") and alleged discrimination based on race, color, national origin, sex, and age. However, the Charge of Discrimination form that Hicks-Washington ultimately signed, verified, and submitted to the EEOC only alleged that she was terminated from her position and not hired as Director because of discrimination based on age. The Authority reported to the EEOC that Hicks-Washington had been terminated and not rehired because of her "harsh management style" that decreased employee morale and resulted in high employee turnover and instability. The EEOC issued Hicks-Washington a Right to Sue letter.

Hicks-Washington filed the present suit in Florida state court. She alleged, in part, claims of race, color, sex, and age discrimination, as well as state tort law

[1] After Johnson left the position in March 2017, Hicks-Washington re-applied for the position and did not get an interview. In May 2017, Barbara Baer, who is four years older than Hicks-Washington, filled the position of Director.

claims against the Authority.[2] The Authority removed the suit to federal court and filed a motion to dismiss. A magistrate judge, in a report and recommendation ("R&R"), recommended granting the motion to dismiss and characterized Hicks-Washington's complaint as a "shotgun" pleading. The district court overruled Hicks-Washington's objections to the R&R and dismissed the complaint with leave to amend. Hicks-Washington objected to the dismissal, stating that she was "aware of the [c]ourt's historical anti-black, anti-poor and pro-employer biases." She also stated that the district court judge should recuse himself if the "legal arguments and evidence presented are meaningless to [him]."

Before the district court could address the objection, Hicks-Washington filed an amended complaint. The revised counts were disparate impact on the basis of race or color, in violation of Title VII, 42 U.S.C. § 2000e-2(k) (Count 1); individual disparate treatment "on the basis of her race, color, and/or sex," and retaliation, in violation of Title VII (Counts 2 and 3); discrimination and retaliation "on the basis of her race and/or color," in violation of 42 U.S.C. § 1981 (Counts 4 and 5); discrimination on the basis of age, in violation of the ADEA (Count 6); retaliation on the basis of age, in violation of the ADEA (Count 7); and discrimination "on the basis of her race, color, sex, and/or age," in violation of the

[2] While Hicks-Washington also named the Authority's Executive Director, Tam English, as a defendant in her initial complaint; English was omitted as a defendant from her amended complaint.

Florida Civil Rights Act ("FCRA") (Count 8). She also alleged that Tam English, the Authority's Executive Director, stated, on multiple occasions, that Hicks-Washington was "getting older" and inquired about who she thought should replace her from within the Authority.

The Authority answered, denied liability, and asserted defenses as to Hicks-Washington's age discrimination claim (Count 6). With respect to the remaining counts, it moved to dismiss her amended complaint and to strike certain paragraphs. The Authority argued, in part, that Hicks-Washington's disparate impact claim (Count 1), Title VII discrimination and retaliation claims (Counts 2 and 3), ADEA retaliation claim (Count 7), and FCRA claims (Count 8) should be dismissed for failure to exhaust administrative remedies because she did not include them in her EEOC charge.

Hicks-Washington opposed the motion to dismiss and, in addition to reiterating her previous arguments, asserted that the administrative exhaustion argument was "frivolous." She admitted that her son had noticed that the EEOC had narrowed the scope of her charge to just age discrimination and had warned her that she would be barred from advancing her other claims in federal court. She stated that she had tried to put the claims back in, but the EEOC investigator verbally told her that she could "only pursue claims of age discrimination." She

stated that while she signed the EEOC charge to prevent further delay, she continued to advance her claims of race, color, and sex discrimination.

The magistrate judge issued a second R&R, recommending that the district court dismiss Counts 1, 2, 3, 7, and 8 because Hicks-Washington failed to exhaust her administrative remedies. It also concluded that Counts 4, 5, and 7 failed to state a claim upon which relief could be granted and recommended dismissing those counts. Hicks-Washington did not formally object to the second R&R; however, in a *pro se* motion and amended motion, she sought to disqualify the magistrate judge and vacate his three most recent decisions due to the appearance of, or actual, bias.

The district court adopted the second R&R after noting that it had "reviewed the entire file and record." While it stated that no objections to the second R&R were filed, it noted that Hicks-Washington's motion to disqualify the magistrate judge and the subsequent amended motion were denied. In a February 2019 order, it dismissed all counts with prejudice except the age discrimination claim (Count 6), explaining that Hicks-Washington had "again failed to allege any facts that would establish a basis for relief"; it also struck certain paragraphs from the amended complaint.

Hicks-Washington filed a motion pursuant to Federal Rule of Civil Procedure 59(e) for the court to reconsider or amend the order adopting the second

R&R. The district court denied the motion, stating that it had considered the motion, the response in opposition, the reply, and pertinent portions of record.

In the meantime, the Authority moved for summary judgment.[3] With respect to Count 6, the age discrimination claim, it argued that, under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), even if Hicks-Washington could establish a prima facie case for age discrimination, it had legitimate, non-discriminatory, non-retaliatory reasons for firing her, specifically a need to "reduc[e] employee turnover, improv[e] employee morale, and facilitat[e] a stable workforce," because she had an "oppressive" management style and could not keep a stable staff. It further argued that Hicks-Washington was unable to rebut its articulated reasons for terminating her, failing to prove that those reasons were pretextual and to show that age discrimination was a "but for" cause of her termination.

Hicks-Washington opposed the motion for summary judgment.[4] She argued, in relevant part, that the Authority never disclosed employee turnover

[3] The Authority filed the motion for summary judgment prior to the district court's dismissal of Counts 1, 2, 3, 4, 5, 7, and 8 and sought summary judgment as to those counts. However, because the district court ultimately dismissed those counts, we do not discuss the arguments concerning them.

[4] Hicks-Washington also moved for partial summary judgment, which the district court denied. Because she fails to challenge that ruling on appeal, any issues in that respect are abandoned. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (recognizing that although we read briefs by *pro se* litigants liberally, issues not briefed on appeal are deemed abandoned).

statistics, and it failed to distinguish between the employees that quit and the employees that were terminated from her department. She argued that the hiring process was not "fair and impartial" because women who were less qualified than her were hired as Director. She also asserted that Johnson resigned so that Barbara Baer, whom Hicks-Washington argued was English's intended replacement all along, could assume the position. She argued that she presented direct evidence of English's age discrimination in his comments about her "getting older." She argued that the Authority's reasons for firing her and not rehiring her were pretextual. Finally, in response to the Authority's argument that her age must have been a "but for" cause, she argued that the ADEA cannot be so narrowly construed that age must have been the sole factor for the adverse employment decision.

The magistrate judge filed a third R&R, recommending that the district court grant summary judgment to the Authority on Hicks-Washington's ADEA discrimination claim. The judge found that there was no direct evidence of age discrimination because English's alleged comments did not rise to the level required, and it applied the modified *McDonnell Douglas* framework for cases where a position was eliminated entirely. The judge found that Hicks-Washington presented a prima facie case of age discrimination, but the Authority proffered legitimate, non-discriminatory reasons for her termination: to reduce employee turnover, improve employee morale, and facilitate a stable workforce. Hicks-

Washington objected; however, after conducting a *de novo* review, the district court adopted the third R&R and granted the Authority's motion for summary judgment.

Following entry of a final judgment in favor of the Authority in May 2019, Hicks-Washington timely filed an amended notice of appeal identifying: (i) the February 2019 order dismissing many of her claims; (ii) the April 2019 denial of her motion for reconsideration; (iii) the grant of summary judgment to the Authority; and (iv) the judges' refusal to recuse or disqualify themselves.

II. DISCUSSION

A. Dismissal of Race, Color, and Sex Discrimination Claims

On appeal, Hicks-Washington argues that the district court erred by dismissing her claims of race, color, and sex discrimination as untimely because she failed to exhaust her administrative remedies.[5] We review *de novo* the district court's grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). We review the denial of a Federal Rule of

[5] On appeal, Hicks-Washington does not expressly challenge the district court's dismissal of Counts 4, 5, and 7; accordingly, any arguments as to those counts are considered abandoned. *See Timson*, 518 F.3d at 874. Likewise, while she argued before the district court that her FCRA age discrimination claim should not have been dismissed, she does not argue that in her initial brief; consequently, that argument also was abandoned. *See id.*

Civil Procedure 59(e) motion for abuse of discretion. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1343 n.20 (11th Cir. 2010). The only grounds for granting a Rule 59(e) motion are newly discovered evidence or manifest errors of law or fact. *See id.* at 1344 (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). A Rule 59(e) motion cannot be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to the entry of judgment. *Id.* *Pro se* pleadings are held to a less-strict standard than counseled pleadings and are liberally construed. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008).

Title VII prohibits employers from discriminating against employees based on their "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Claims under the FCRA are analyzed in the same way as Title VII claims. *See Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004).

Prior to filing a Title VII action, a plaintiff first must file a charge of discrimination with the EEOC. *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004). The purpose of this exhaustion requirement "is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." *Id.* (alteration in original) (quoting *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983)).

We have "noted that judicial claims are allowed if they 'amplify, clarify, or more clearly focus' the allegations in the EEOC complaint, but [have] cautioned that allegations of new acts of discrimination are inappropriate. *Id.* at 1279-80 (quoting *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989)). Therefore, a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination," but "the scope of an EEOC complaint should not be strictly interpreted." *Id.* at 1280 (first quoting *Alexander v. Fulton Cty.*, 207 F.3d 1303, 1332 (11th Cir. 2000); then quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970)).

Although we have allowed an intake questionnaire to function as a charge in limited circumstances, we also have stated that "as a general matter an intake questionnaire is *not* intended to function as a charge." *Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304, 1305 (11th Cir. 2001) (emphasis added). In *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), we held that the circumstances did not support a conclusion that the questionnaire should be considered a charge because the plaintiff clearly understood that the intake questionnaire was not a charge. There, the plaintiff had later filed a timely charge, the EEOC did not initiate its investigation until after the plaintiff had filed his charge, and the questionnaire form did not suggest that it was a charge. *See id.* at 1236, 1240-41.

Hicks-Washington's EEOC charge was undisputedly limited to the age discrimination claim; she admitted that she signed it knowing that doing so would bar her other claims. Similar to *Bost*, this is not a situation in which her intake questionnaire should function as a charge because she signed the charge after filing the intake questionnaire. *See id.* at 1240-41. Because she clearly failed to exhaust her administrative remedies with respect to any claims other than age discrimination, she could not bring her Title VII claims for race, color, or sex discrimination in federal court.[6] *See Gregory*, 355 F.3d at 1279. Similarly, to the extent that Hicks-Washington challenges the denial of her Rule 59(e) motion for reconsideration, the district court did not abuse its discretion by denying relief because she presented no new evidence and there were no manifest errors of law or fact. *See Jacobs*, 626 F.3d at 1344. Therefore, we affirm in this respect.

B. Grant of Summary Judgment on ADEA Claim

Hicks-Washington also argues that the district court erred by concluding that English's comments about her "getting older" did not rise to the level of direct evidence of age discrimination and that the Authority's reasons for terminating her and not rehiring her were not pretextual. We review *de novo* the district court's

[6] Hicks-Washington argues for the first time in her reply brief that her 42 U.S.C. § 1981 and retaliation claims were not subject to the same procedural requirements of administrative exhaustion. Those arguments were not properly raised and therefore are considered abandoned. *Timson*, 518 F.3d at 874 ("[W]e do not address arguments raised for the first time in a *pro se* litigant's reply brief.").

grant of summary judgment and apply the same legal standard used by the district court. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). Summary judgment "is appropriate if the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at 1023 (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). All evidence and factual inferences reasonably drawn from the evidence are viewed in the light most favorable to the party opposing summary judgment. *Id.* The party opposing summary judgment must present more than a scintilla of evidence in support of its position so that a jury can reasonably find for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). We "may examine *only* the evidence which was before the district court when [it] decided the motion for summary judgment" and no subsequent evidence. *Chapman*, 229 F.3d at 1026.

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of [her] age." 29 U.S.C. § 623(a)(1); *Chapman*, 229 F.3d at 1024. ADEA liability depends on whether age actually motivated the employer's decision, i.e., "the plaintiff's age must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." *Chapman*, 229 F.3d at 1024 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2098, 2105

(2000)). "A plaintiff may establish a claim of illegal age discrimination through either direct evidence or circumstantial evidence." *Van Voorhis v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 512 F.3d 1296, 1300 (11th Cir. 2008) (citing *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989)).

Direct evidence of discrimination is evidence which, if believed, proved the existence of a fact without inference or presumption. *Carter*, 870 F.2d at 581-82. However, "not every comment concerning a person's age presents direct evidence of discrimination." *Id*. at 582. "Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, constitute direct evidence of discrimination." *Van Voorhis*, 512 F.3d at 1300 (alterations omitted) (quoting *Carter*, 870 F.2d at 582). For example, a supervisor's statements that he "didn't want to hire any old pilots" and was not going to interview applicants because "he didn't want to hire an old pilot" were held to be direct evidence of age discrimination. *Id.* By contrast, a decisionmaker's comments that "the company needed . . . aggressive young men . . . to be promoted" did not constitute direct evidence of age discrimination. *See Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999).

As the district court correctly found, even assuming *arguendo* that English commented that Hicks-Washington was "getting older," his comments were not among the "most blatant remarks." *See Van Voorhis*, 512 F.3d at 1300. The

Authority explained that any statements about replacing Hicks-Washington would have been in the context of succession planning. Even if viewed as evidence that may lead to an inference of age discrimination, it falls short of the direct evidence requirement. *See Carter*, 870 F.2d at 581-82; *see also Van Voorhis*, 512 F.3d at 1300.

Because Hicks-Washington's case relies on circumstantial evidence, the *McDonnell Douglas* framework applies. *See Chapman*, 229 F.3d at 1024. Under that framework, if a plaintiff establishes a prima facie case of discrimination, and the employer articulates one or more non-discriminatory reasons for its actions, the plaintiff must show that the employer's articulated reasons were pretextual. *Id.* "If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim[s]." *Id.* at 1024-25.

A reason is pretextual only if it is false and the true reason for the decision is discrimination. *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). If the employer's reason is "one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman*, 229 F.3d at 1030. We have repeatedly stated that we will not

second-guess the wisdom of an employer's decision as long as the decision is not for a discriminatory reason. *See id.*

It is undisputed that Hicks-Washington established a prima facie case for age discrimination. The Authority's articulated reason for terminating and not rehiring Hicks-Washington was her "oppressive" management style evidenced by the particularly high employee turnover in her division, negative comments in her supervisor reviews, and four exit interviews from the year in which she was terminated that stated she was a reason that those employees left. Accordingly, the Authority successfully met its burden of proffering a legitimate, non-discriminatory reason for terminating and not rehiring Hicks-Washington and the burden shifted back to Hicks-Washington to demonstrate that the articulated reason was pretextual.

While some of the people hired for the Director position were indeed younger than Hicks-Washington, the person that filled the position in 2017 was four years older than she was. Furthermore, neither the other candidates' ages nor English's alleged comments showed that the Authority's reasons were pretextual. At most, this presents a mere scintilla of evidence of bias, which is insufficient. *See Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. Even if her performance reviews were mostly positive, the evidence and her conclusory assertions were insufficient to show that the Authority's proffered reasons were pretext. Hicks-

Washington's arguments on appeal would lead us to impermissibly second-guess the wisdom of the Authority's decision. *See Chapman*, 229 F.3d at 1030. Therefore, we affirm the grant of summary judgment.

C. Denial of Requests for Recusal or Disqualification

Hicks-Washington also contends that the district court judge and magistrate judge should have recused themselves or been disqualified. We review a district court's denial of a recusal motion for abuse of discretion. *Loranger v. Stierheim*, 10 F.3d 776, 779 (11th Cir. 1994). Under 28 U.S.C. § 144, a judge must recuse himself when a party "files a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. To warrant recusal, "the moving party must allege facts that would convince a reasonable person that bias actually exists." *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000). Similarly, under 28 U.S.C.§ 455(a), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). We look to "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988). A judge's rulings in the same or a related case may not serve as the basis for a recusal motion unless the movant demonstrates "pervasive bias and prejudice."

McWhorter v. City of Birmingham, 906 F.2d 674, 678 (11th Cir. 1990) (holding that allegations of bias stemming from a mere disagreement with rulings at trial did not demonstrate pervasive bias and prejudice).

Here, Hicks-Washington offered no evidence of personal bias by the judges that would sustain a doubt about their respective impartiality. Instead, her allegations of bias stemmed from a mere disagreement with their judicial rulings and her dissatisfaction with the characterization of her complaint as a "shotgun" pleading. *See id.* While the district court stated that there were no objections to the second R&R, it explained that it had reviewed the entire record and noted that Hicks-Washington had filed motions, which were denied. One of those motions contained what could be liberally construed as objections to the second R&R, but these arguments were made in the context of her motion to disqualify the magistrate judge and were not clearly objections. As such, her allegations are not sufficient to cause an objective, disinterested, lay observer to entertain a significant doubt about the court's impartiality. *See Parker*, 855 F.2d at 1524. Therefore, we affirm in this respect.

AFFRIMED.

JORDAN, Circuit Judge, concurring:

I write separately to note that in certain circumstances where the EEOC or a state agency has been negligent in filling out a plaintiff's charge, the plaintiff may be able to rely on an intake questionnaire to show that her claim was properly exhausted. *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1102 (9th Cir. 2002), *as amended* (Feb. 20, 2002).

In *B.K.B.*, the Ninth Circuit concluded that the plaintiff properly exhausted her federal sexual harassment claims based on the checked boxes in her charge, the information in her pre-complaint questionnaire, and the affidavit of the state agency representative who had assisted in preparing the charge. *See id.* at 1103. The plaintiff had checked boxes in her charge indicating that she had been subject to race, national origin, and sexual discrimination as well as harassment, but the defendants argued that her charge allegations were insufficient to support her claims of sexual discrimination and sexual harassment. *See id.* at 1100–01. The Ninth Circuit concluded that the plaintiff's intake questionnaire included examples of harassment that encompassed harassment based on sex and race, and that it provided additional detail to the allegations of which the state agency was on notice. *See id.* at 1101–02. And it noted that the agency official who had assisted the plaintiff submitted an affidavit suggesting that any deficiency in the charge should be attributed to the agency and not the plaintiff. *See id.* at 1103.

B.K.B. provides some persuasive support for the proposition that a plaintiff can present the pre-complaint intake questionnaire to satisfy the exhaustion requirement when the EEOC or state agency negligently or improperly narrows her claims. *See id.* at 1102. But that case does not help Ms. Hicks-Washington here because she knowingly signed a charge that did not check boxes for or provide allegations of discrimination based on race, color, and sex. Indeed, she admits that she was informed that signing a charge of only age discrimination would preclude her from advancing her other claims in federal court.