

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 1:25-cv-23145-LMR

GARY POLAKOVIC,

Plaintiff,

v.

UNIVERSITY OF MIAMI,

Defendant.

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**ORDER GRANTING DEFENDANT’S MOTION  
TO DISMISS FOR FAILURE TO STATE A CLAIM**

**THIS CAUSE** is before the Court on a Motion to Dismiss filed by Defendant for Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6). [ECF No. 7]. Plaintiff filed a Response to the Motion, and Defendant filed its Reply. [ECF Nos. 16, 17]. Upon review of the pleadings, it is **ORDERED AND ADJUDGED** that the Motion [ECF No. 7] be **GRANTED**.

**I. BACKGROUND**

Plaintiff Gary Polakovic filed this action alleging claims for hostile work environment and unlawful termination against his employer, the University of Miami, based on age in violation of the Age Discrimination in Employment Act of 1967 (“ADEA”), and the Florida Civil Rights Act of 1992 (“FCRA”). *See* [ECF No. 1]. Plaintiff is a sixty-six-year-old marketing and communications professional with over forty-one years of experience. [*Id.*]. On January 2, 2024, Defendant hired Plaintiff as the Director of Media Relations and Medical Communications for the University of Miami Sylvester Comprehensive Cancer Center. [*Id.* ¶ 25].

Plaintiff explained he was one of two directors on the 7-member Sylvester marketing and communications team (“the Sylvester marcomm team”) which was part of a larger UHealth

marcomm department of about 53 full-time employees. He alleges that both the other director, Melanie Velasquez, and his supervisor, Melissa Gomez, are three decades younger than him and that he is the oldest and most experienced member of Defendant's marcomm departments. [*Id.* at ¶¶ 30-34, 32, 38].

Plaintiff alleges that shortly after his employment began, Ms. Gomez subjected him to discriminatory treatment based on his age. [*Id.* at 6–13]. The Complaint documents the discriminatory treatment and comments, and the general timing of these events. Plaintiff further alleges that this conduct created a hostile work environment and culminated in his termination on February 10, 2025. [*Id.* at 6–15].

Defendant contends the alleged conduct does not rise to the level of severe or pervasive harassment required to establish a hostile work environment claim and that Plaintiff has not plausibly alleged that age was the but-for cause of his termination. [ECF No. 7 at 7–16]. Defendant attached three exhibits to the Motion to Dismiss: (1) a warning/leadership memorandum from Ms. Gomez to Plaintiff; (2) Plaintiff's response to the warning/leadership memorandum; and (3) the letter terminating Plaintiff's employment. [ECF Nos. 7-1; 7-2; 7-3]. Further, Defendant filed a notice of supplemental authority containing records from the Equal Employment Opportunity Commission ("EEOC"). [ECF Nos. 14; 14-1; 14-2].

## **II. LEGAL STANDARD**

In reviewing the allegations of a complaint at the motion-to-dismiss-stage, a court must take all of plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1347 (11th Cir. 2016). A pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require detailed factual

allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). A plaintiff must articulate “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 181 (2024) (“Because this case comes to us at the motion-to-dismiss stage, the Court assumes the truth of ‘well-pleaded factual allegations’ and ‘reasonable inference[s]’ therefrom.”) (quoting *Iqbal*, 556 U.S. at 678–79).

The plausibility standard simply “calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the required element.” *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (quotations omitted). “And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” *Twombly*, 550 U.S. at 556.

### III. DISCUSSION

#### (i) The Court Will Consider the Exhibits Attached to the Motion to Dismiss

As an initial matter, the Court will consider the documents attached to Defendant’s Motion because they are central to Plaintiff’s claims. “Generally, when considering a motion to dismiss under Rule 12(b)(6), a court is limited to the four corners of the complaint [or counterclaim].” *Wiggins v. FDIC*, No. 2:12-CV-02705-SGC, 2016 WL 8260898, at \*1 (N.D. Ala. Dec. 20, 2016), *report and recommendation adopted*, No. 2:12-CV-02705-SGC, 2017 WL 659928 (N.D. Ala. Feb. 14, 2017). However, “[w]hen assessing the sufficiency of a complaint on a motion to dismiss, a district court has some discretion to decide whether to consider matters outside of the pleadings.” *Sluss v. Bank of Am., N.A.*, No. 23-13949, 2025 WL 1512816, at \*3 (11th Cir. May 28, 2025) (quoting *Jackson v. City of Atlanta, Georgia*, 97 F.4th 1343, 1350 (11th Cir. 2024)). “[T]he court

may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed. In this context, undisputed means that the authenticity of the document is not challenged." *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (quotations omitted). "A document, by definition, is central to a complaint when it is a necessary part of [a plaintiff's] effort to make out a claim." *Kalpakchian v. Bank of Am. Corp.*, 832 F. App'x 579, 583 (11th Cir. 2020) (internal quotations omitted). "[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Indus., Inc.*, 496 F.3d at 1206.

Here, the Court can consider the warning/leadership memorandum from Ms. Gomez to Plaintiff, Plaintiff's response to the warning/leadership memorandum, and the letter terminating Plaintiff's employment—without converting the Motion to a summary judgment motion—because the documents are central to Plaintiff's claims. In his Complaint, Plaintiff states that when he received the warning memorandum he was taken aback by the accusations and that he "became concerned because he recognized that GOMEZ's hostility toward him, comments about his age, and his exclusion from meetings, demonstrated an increased pattern that he, as the eldest member of the Sylvester marcomm team, was being singled out by her." [ECF No. 1 ¶¶ 102–06]. Further, Plaintiff explains he wrote a rebuttal memorandum and then describes its contents. [*Id.* ¶¶ 107–11]. The Complaint further alleges that "on February 10, 2025, GOMEZ called [Plaintiff] into a meeting where he was advised that he was being terminated for reasons related to the press release." [*Id.* ¶ 117]. The termination letter attached to the Motion memorializes the meeting Plaintiff references in his Complaint. See [ECF No. 7-3]. In addition, Plaintiff has not challenged the authenticity of the documents. See [ECF No. 16]. Thus, the exhibits will be considered in the Court's analysis. See *Achon v. Miami-Dade Cnty.*, No. 15-20711-CIV, 2015 WL 12564322, at \*4

(S.D. Fla. June 10, 2015) (considering documents attached to the motion to dismiss when both documents were “discussed at length in the Complaint and [were] central thereto . . . , and their authentication [was] unchallenged.”); *Dormeus v. Miami-Dade Cnty.*, No. 25-CV-22496, 2025 WL 3033595, at \*6 (S.D. Fla. Oct. 30, 2025) (“Notwithstanding Plaintiff’s argument to the contrary, the BWC videos are certainly central to the case as they capture the Plaintiff committing a battery, the moments leading up to Plaintiff’s arrest, and the arrest itself, which form the basis of her false arrest, false imprisonment, malicious prosecution, and failure to intervene claims.”) (footnotes omitted).

(ii) Hostile Work Environment (Counts I and III)

Plaintiff’s Count I and Count III allege that he was subject to a hostile work environment because of his age in contravention of the ADEA and the FCRA. [ECF No. 1 at 15–16, 17–18]. Defendant argues that Plaintiff fails to allege that: (1) he was subjected to harassment based on his age, (2) the harassment was sufficiently severe or persuasive, and (3) Defendant knew or should have known of the harassment and failed to take prompt remedial measures. [ECF No. 7 at 9–13].

“An employer is responsible for a hostile work environment, and therefore violates the ADEA, where ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment.’” *Sclafani v. City of Margate*, No. 22-CV-61126-RS, 2023 WL 4363537, at \*4 (S.D. Fla. July 6, 2023) (quoting *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1152 (11th Cir. 2020)). In order to establish a hostile work environment claim under the ADEA or FCRA, the plaintiff must allege: “(1) he was at least 40 years old at the relevant time; (2) he was subject to unwelcome harassment based on his age; (3) the harassment was sufficiently severe or pervasive to alter the terms of his employment; and (4) the employer knew or should have known of the harassing conduct but failed

to take prompt, remedial action.” *Harvey v. Walmart, Inc.*, No. 23-11213, 2024 WL 1460314, at \*2–3 (11th Cir. 2024) (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) and 29 U.S.C. §§ 623(a)(1), 631(a)).

The plaintiff’s work environment must be one that both a reasonable person would find hostile, and that the victim subjectively perceived to be hostile. *Miller*, 277 F.3d at 1276. “To evaluate the objective severity of the harassment, courts consider the totality of the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Sclafani*, 2023 WL 4363537, at \*4 (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993)).

Here, Plaintiff satisfies the first element as he was sixty-six years old at all relevant times. [ECF No. 1]. However, Plaintiff’s allegations fail to meet the “severe or pervasive” standard required to establish a hostile work environment claim. Plaintiff identifies a handful of incidents over the course of his thirteen-month employment, including comments about his forgetfulness, exclusion from meetings, and criticism of his work performance. *See [id.]*. He alleged in February 2024, he was reprimanded about a published newspaper article that made no mention of Sylvester, and stated, without elaboration, that his “younger similarly situated colleagues” were not reprimanded. [*Id.* at ¶¶ 40-49]. Next, in April 2024, Ms. Gomez “sarcastically blurted out, [h]ow come these health things keep happening to you?” when he told her that he had an age-related, non-treatable, eye injury that “from time to time might impact his work.” [*Id.* at ¶¶ 50-62]. In the Summer of 2024, Ms. Gomez “badgered” him with text messages reminding him to attend meetings and asking what time he would arrive and did not send similar texts to his younger counterparts. He was given heavier workloads without support. He also alleged that Ms. Gomez

questioned in a meeting in front of others “when are we going to start seeing the benefit from all your years of experience?” [*Id.* at ¶¶ 63-79]. He alleged in conclusory fashion that he “was subjected to an increasing series of offensive acts and statements by Gomez made to single out [Plaintiff] based on his age” and that he was singled out for ridicule and reprimands before his younger colleagues. [*Id.* at ¶¶ 85-101]. He also alleged that beginning on December 24, Ms. Gomez excluded him from “all significant strategic meetings” and younger members were included and that he was the only member of the Sylvester marcomm team excluded from a tour of a new building scheduled for mid-January, 2025. [*Id.* at ¶¶ 85-101].

On January 7, 2025, he received the written warning regarding his work performance and on February 10, 2025, was advised he was being terminated because of his failures in the editing of a press release. He alleged the stated reason was a pretext for discrimination as his younger supervisor was not terminated “despite her active involvement in and approval of the draft release.” [*Id.* at ¶¶ 102-120].

The Court finds the allegations, taken as true, describe isolated incidents that, while offensive or insensitive, do not rise to the level of severe or pervasive harassment required to establish a hostile work environment claim. “Not every offensive comment at work qualifies as a hostile work environment.” *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (explaining “Title VII is not a civility code.”). Additionally, some of the allegations, such as the imposition of heavier work assignments or a reprimand regarding a newspaper article, show no direct relationship to his age. Although Plaintiff subjectively perceived the alleged harassment as pervasive or severe, this Court finds that objectively Ms. Gomez’s comments and behavior were infrequent and not so severe as to arise to the level of creating a hostile work environment. *See Thompson v. City of Miami Beach, Fla.*, 990 F. Supp. 2d 1335,

1341 (S.D. Fla. 2014) (dismissing claim where the plaintiff alleged three racial slurs over a two-year period) (“In considering objective severity, the remarks fail to make out a sufficient case of harassment given how infrequently they were uttered over the many months covered by the Amended Complaint, their lack of severity, the absence of any physically threatening conduct, and the absence of any factual allegations showing the remarks unreasonably interfered with [plaintiff’s] job performance.”); *Hall v. Haskell Co.*, No. 3:21-CV-01184-HES-LLL, 2023 WL 12167865, at \*2–3 (M.D. Fla. June 28, 2023) (internal quotations omitted) (finding comments made by supervisor that “his team needed to be morphed into a ‘younger, more dynamic group’ or should be filled with ‘young, go getters,’ and often remarks to plaintiff that ‘a person of your age and experience should be more productive[,]’ not pervasive or severe); *Sclafani*, 2023 WL 4363537, at \*5 (dismissing hostile work environment claims where the plaintiff worked for defendant for over twenty years but “only experienced any alleged episodic hostile events” for a few months; and where the defendant’s conduct never went from offensive comments “to physical threats or intimidation of [p]laintiff. And although the conduct complained of could be labelled as insensitive, it was not of such severity as to alter the terms of [p]laintiff’s employment, or to an extent that a reasonable person would find [p]laintiff’s place of employment a hostile environment.”).

Additionally, Plaintiff’s own allegations undermine his claim. Plaintiff alleges in his rebuttal to the warning memorandum that his work “gets done. It gets done on time. It gets done at a high level.” [ECF No. 7-2 at 2–3]. Plaintiff further alleges that he has received a performance bonus and letters of commendation during his employment. [ECF No. 1 ¶¶ 81–84; ECF No. 7-2 at 1]. These allegations suggest that the alleged harassment did not interfere with his ability to perform his job, further undermining his claim. Courts have dismissed hostile work environment

claims where the plaintiff's own allegations show that the harassment did not impact their job performance. *Louis v. Lasership, Inc.*, No. 8:24-CV-01264-JLB-AEP, 2025 WL 296544, at \*3 (M.D. Fla. Jan. 24, 2025) (internal quotations and citations omitted) (dismissing hostile work environment claim because although plaintiff alleged he “was subjected to different terms and conditions of employment because of his protected status,” he also alleged “he was able to perform the essential functions of his job duties...and at all relevant times [he] performed his job at satisfactory or above-satisfactory levels.”); *Hall*, 2023 WL 12167865, at \*3 (internal quotations omitted) (dismissing complaint for failure to allege a hostile work environment where plaintiff stated “that at all material times he performed his job responsibilities and duties in a satisfactory and exemplary manner.”).

In his rebuttal memorandum, Plaintiff also states “[t]he workload at Sylvester marcomm is heavy and unrelenting. Big secret, right? Seemingly everyone is working portions of nights, weekends, PTO days, sick leave and holidays trying to keep our heads above water[,]” and “[i]t’s difficult to schedule vacation time due to workload. People remain on call and work through their vacations. Upon return, the workload is twice what it was before vacation, which is a deterrent to taking time off in the first place.” [ECF No. 7-2 at 2]. Although, in his Complaint Plaintiff states that he was tasked with producing twenty-nine episodes for digital platforms while his younger counterparts with similar roles were tasked with producing sixteen episodes each, Plaintiff’s statements in the rebuttal memorandum, directly contradict Plaintiff’s assertion that his workload was heavier than his younger counterparts. [ECF No. 1 ¶¶ 67–76].

Because Plaintiff fails to establish that the harassment was so pervasive or severe as to alter the terms of his employment or failed to show the nexus between the alleged harassment and his age, Counts I and III are dismissed.

(iii) Unlawful Termination (Counts II and IV)

To establish a claim of age discrimination, a plaintiff must show that: (1) he was a member of a protected class (i.e., that he was forty years old, or older); (2) he was subjected to an adverse employment action; (3) he was treated less favorably than a younger, similarly situated employee; and (4) he was qualified to do the job. *East v. Clayton Cty.*, 436 F. App'x 904, 911 (11th Cir. 2011). Further, under the ADEA or FCRA, the plaintiff must allege that age was the sole or “but-for” cause of his termination. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (“[T]he ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act.”). The Supreme Court established that the ADEA requires proof that age was the determinative factor in the employer’s decision. *Id.* Similarly, the FCRA is analyzed under the same framework as the ADEA. *Mazzeo v. Color Resols. Int’l, LLC*, 746 F.3d 1264, 1266 (11th Cir. 2014). “At the pleading stage, a plaintiff must plausibly allege that (1) his employer took an adverse employment action against her, and (2) his age ‘was the ‘but-for’ cause of the employer’s adverse action.’” *Dawson v. Wal-Mart Stores E., LP*, 160 F. Supp. 3d 1303, 1306 (N.D. Ala. 2016) (emphasis removed) (quoting *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir.2015)). Nonetheless, a plaintiff need not “establish a *prima facie* age-discrimination case in order to survive a Rule 12(b)(6) motion to dismiss.” *Buchanan v. Delta Air Lines, Inc.*, 727 F. App'x 639, 642 (11th Cir. 2018) (per curiam). Instead, a plaintiff must allege sufficient facts “giving rise to an inference of disparate treatment” or intentional discrimination. *Caraway v. Sec’y, U.S. Dep’t of Transp.*, 550 F. App'x 704, 710 (11th Cir. 2013). Moreover, “[t]he requisite causal connection between age and termination may be sufficiently pled by factual allegations indicating that the plaintiff was replaced by a substantially younger individual or that the plaintiff was treated differently than a similarly situated, substantially

younger individual.” *Muir v. Baptist Pulmonary Specialists, Inc.*, No. 3:21-CV-475-BJD-MCR, 2022 WL 22883187, at \*6 (M.D. Fla. Feb. 15, 2022) (quotations omitted).

Plaintiff again satisfies the first element since he was sixty-six years old at the time of termination. [ECF No. 1 ¶ 10]. The second element is also satisfied because Plaintiff was discharged from his position on February 10, 2025. *See [Id. ¶ 117]; Roberts v. Caterpillar Glob. Mining Am. LLC*, No. 7:15-CV-01586-LSC, 2017 WL 57358, at \*3 (N.D. Ala. Jan. 5, 2017) (“Further, both parties agree that Roberts suffered an adverse employment action because he was discharged from his position in March 2014.”). Additionally, Plaintiff’s allegations satisfy the fourth element based on his job qualifications. [ECF No. 1 at 2–4].

Defendant’s Motion argues Plaintiff failed to allege that age was the sole reason for Plaintiff’s termination. [ECF No. 7 at 14]. Further, Defendant cites several cases from other jurisdictions to support its argument that Plaintiff fails to state a claim for relief under the ADEA and the FCRA because he was hired at sixty-five and terminated at sixty-six; thus—according to Defendant—“[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.” [*Id.*] (quotations omitted). Lastly, Defendant argues the unlawful termination claims must be dismissed because “Plaintiff’s efforts to allege that he was treated differently than his coworkers (none of whom are alleged to be recent hires, like Plaintiff, or to have the same history of performance issues, like Plaintiff) are insufficient to state a claim.” [*Id.* at 15]. In response, Plaintiff states that at the pleadings stage, “the Complaint raises sufficient allegations demonstrating that Plaintiff’s age was the but-for cause of the decision to terminate as the reasons provided by his supervisor were a pretext to discriminate.” [ECF No. 16 at 9].

The Court agrees with Defendant and finds Plaintiff fails to sufficiently allege age was the but-for cause of his termination. Plaintiff generally and conclusory alleges that he was treated differently than his younger counterparts. However, Plaintiff fails to allege that any of his younger counterparts were warned of performance issues, as he was, but not terminated.

Defendant provided Plaintiff with a detailed memorandum identifying a number of performance deficiencies several categories including the inability to perform responsibilities without constant supervision, lack of accountability, and disruptive behavior. [ECF No. 7-1]. The memorandum provided specific examples where Plaintiff's performance fell below expectations. [*Id.*]. Plaintiff's Complaint is devoid of any allegation stating that a younger employee was given a similar warning regarding their performance, yet not terminated. [ECF No. 1]. Therefore, taking the allegations in the Complaint as true, Plaintiff has failed to plausibly allege age was the but-for cause of his termination. *See Mason v. Compass Grp.*, No. 1:23-CV-223 (LAG), 2025 WL 662811, at \*3 (M.D. Ga. Feb. 28, 2025) (finding plaintiff failed to state a claim under the ADEA when he failed to demonstrate that "a younger employee, who was similarly situated, was treated more favorably than Plaintiff[,] and "failed to allege any facts demonstrating that his age played a role in Defendant's adverse employment decision."); *Rhenals v. Fed. Express Corp.*, No. 1:24-CV-22556, 2024 WL 4665254, at \*8 (S.D. Fla. Nov. 4, 2024) ("[Plaintiff's] allegation that he 'would not have been the object of discrimination but for the fact that [he] is over the age of forty (40)' is not supported by facts to establish his age as the but-for cause of the alleged discrimination because it fails to show that he was replaced by a younger individual or treated less favorably than younger [similarly situated] individuals."). As such, Counts II and IV are dismissed.

#### IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss [ECF No. 7] be **GRANTED**.
2. Plaintiff's Complaint is **DISMISSED** without prejudice.
3. The Clerk is Directed to **CLOSE** this case.

**SIGNED** this 20th day of January, 2026.



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LISETTE M. REID  
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record