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CONFIDENTIAL

Before the Judicial Council of the
Eleventh Judicial Circuit

Judicial Complaint Nos. 11-23-90038
through 11-23-90040

ORDER

(Filed Oct. 3, 2023)

Before: NEWSOM, BRANCH, and LAGOA, Circuit Judges; COOGLER and WALKER, Chief District Judges.

Pursuant to 11th Cir. JCDR 18.3, this Judicial Council Review Panel has considered the materials described in JCDR 18(c)(2), including petitioner's complaint, the order of Chief United States Circuit Judge William H. Pryor Jr., and the petition for review filed by petitioner. No judge on this panel has requested that this matter be placed on the agenda of a meeting of the Judicial Council.

The Judicial Council Review Panel hereby AFFIRMS the disposition of this matter by Chief Judge Pryor. The petition for review is DENIED.

FOR THE JUDICIAL COUNCIL:

/s/Kevin C. Newsom
United States Circuit Judge

CONFIDENTIAL

Before the Chief Judge of the
Eleventh Judicial Circuit

Judicial Complaint Nos. 11-23-90038
through 11-23-90040

ORDER

(Filed Apr. 4, 2023)

An individual has filed a Complaint against three. United States circuit judges under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States.

Background

The record shows that in July 2020 Complainant filed a civil action against multiple defendants, and after additional proceedings, he filed a second amended complaint. A magistrate judge later issued a report recommending that various counts be dismissed with prejudice and the remaining counts be dismissed without prejudice but without further leave to amend. Over Complainant's objections, a district judge entered an order accepting the report with clarifications and dismissing the second amended complaint. On appeal, a panel of this Court composed of the Subject Judges

affirmed the dismissal of Complainant's second amended complaint "for the reasons stated in the Magistrate Judge's well-reasoned report and recommendation."

Complaint

Complainant alleges the Subject Judges' issued an "unconscionable" and prejudicial opinion that violated his constitutional rights by failing to provide sufficient reasoning. He also contends the Subject Judges "mad[e] a tacit endorsement of the Magistrate judge in this case," who "was in the news for a recent decision involving" a former political officeholder, and he appears to allege the Subject Judges engaged in partisan political activity. He "demand[s] a new appeal."

Discussion

Judicial-Conduct Rule 4(b)(1) provides in part that "[c]ognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse." The Commentary on Rule 4 explains the rationale for this rule as follows:

> Rule 4(b)(1) tracks the Act, 28 U.S.C. 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into

> question the substance of a judge's decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge—without more—is merits-related.

The Complaint fails to present a basis for a finding of misconduct. To the extent Complainant's allegations concern the substance of the Subject Judges' opinion, the allegations are directly related to the merits of the Subject Judges' decisions or procedural rulings. Judicial-Conduct Rule 11(c)(1)(3). Complainant's remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judges acted with an illicit or improper motive, engaged in partisan political activity, or otherwise engaged in misconduct. Judicial-Conduct Rule 11(c)(1)(D). For these reasons, this Complaint is **DISMISSED**.

/s/ William H. Pryor Jr.
Chief Judge

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11194
Non-Argument Calendar

EUGENE MISQUITH,

Plaintiff-Appellant,

versus

ROBERTO BORREGO,
ST. MARY'S MEDICAL CENTER,
PALM BEACH TRAUMA ASSOCIATES,
PALM BEACH COUNTY HEALTHCARE
DISTRICT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:20-cv-81123-AMC

(Filed Feb. 22, 2023)

Before WILSON, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

Eugene Misquith appeals the district court's dismissal of his second amended complaint against Palm

Beach County Health Care District ("the district"), St. Mary's Medical Center ("St. Mary's"), Robert Borrego, and Palm Beach Trauma Associates ("PBTA") (collectively, "the healthcare providers"), alleging disability discrimination and retaliation under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12112, 12203(a), race, national origin, age, and disability discrimination and retaliation under the Florida Civil Rights Act ("FRCA"), Fla. Stat. § 760.10, and retaliation under the Florida Whistleblower Act ("FWA"), Fla. Stat. § 448.102. He argues that the district court improperly dismissed the 90-page second amended complaint as a shotgun pleading and for failure to state a claim.

After reviewing the briefs and the record, we find no error, and we affirm the dismissal of Misquith's second amended complaint for the reasons stated in the Magistrate Judge's well-reasoned report and recommendation.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 20-81123-CIV-CANNON/Reinhart

EUGENE MISQUITH,

Plaintiff,

v.

ROBERTO BORREGO, ST. MARY'S MEDICAL CENTER, PALM BEACH TRAUMA ASSOCIATES, and **PALM BEACH COUNTY HEALTH CARE DISTRICT,**

Defendants. /

ORDER ACCEPTING WITH CLARIFICATIONS REPORT AND RECOMMENDATION

(Filed Mar. 14, 2022)

THIS CAUSE comes before the Court upon Magistrate Judge Bruce E. Reinhart's Report and Recommendation (the "Report") [ECF No. 94], entered on September 29, 2021. The Report recommends that Defendants' Joint Motion to Dismiss [ECF No. 86] be granted. Specifically, the Report recommends dismissing Counts I–XVIII with prejudice and dismissing Counts XIX–XXI without prejudice but without leave to amend. On October 27, 2021, Plaintiff filed his Objections to the Report [ECF No. 101]. Defendants filed a Notice of No Objection to the Report [ECF No. 95], as

well as a Response in Opposition to Plaintiff's Objections [ECF No. 105]. The Court has reviewed the Report, Plaintiff's Objections, Defendants' Response, and the full record. In light of that review, the Court **ACCEPTS** the Report but offers the following supplementary analysis in response to Plaintiff's objections.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiff Eugene Misquith is a 62-year-old Indian American trauma surgeon with a chronic heart condition [ECF No. 73 ¶ 15]. On September 12, 2018, Plaintiff was suspended from his job with St. Mary's Medical Center ("St. Mary's"), and his trauma staff privileges were subsequently terminated [ECF No. 73 ¶ 81]. Plaintiff alleges that Defendants Roberto Borrego, St. Mary's, Palm Beach County Trauma Associates ("Trauma Associates"), and Palm Beach County Health Care District ("Health Care District") violated a variety of Federal and Florida laws by discriminating against him on the basis of his age, race, national origin, and disability (Counts I–XVI).[1] Plaintiff further alleges that Borrego, St. Mary's, and Trauma Associates violated the Florida Whistleblower Act ("FWA") by retaliating against him after he raised concerns about double-billing (Counts XVII–XVIII). Lastly, Plaintiff alleges that St. Mary's and Health Care

[1] Plaintiff brings discrimination claims under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Florida Civil Rights Act ("FCRA"), 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

District breached their contracts with him (Counts XIX and XXI), and that Health Care District breached the implied covenant of good faith and fair dealing (Count XX).

Plaintiff initiated this action on July 13, 2020 [ECF No. 1]. Plaintiff filed his First Amended Complaint ("FAC") on November 12, 2020 [ECF No. 39]. Defendants filed a Motion to Dismiss the FAC [ECF No. 53], which the Court granted in part [ECF No. 70], dismissing the FAC as a shotgun pleading and giving Plaintiff "one final opportunity to file an amended complaint" [ECF No. 70 ¶ 4]. Plaintiff then filed the Second Amended Complaint ("SAC") on June 16, 2021 [ECF No. 73]. Defendants again moved to dismiss [ECF No. 86]. On September 29, 2021, following referral [ECF No. 88], Magistrate Judge Reinhart entered the instant Report recommending that all of Plaintiff's claims be dismissed [ECF No. 94]. The Joint Motion to Dismiss [ECF No. 86] is ripe for adjudication.

LEGAL STANDARDS

To challenge the findings and recommendations of a magistrate judge, a party must file specific written objections identifying the portions of the proposed findings and recommendation to which objection is made. *See* Fed. R. Civ. P. 72(b)(3); *Heath v. Jones*, 863 F.2d 815, 822 (11th Cir. 1989); *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). A district court reviews de novo those portions of the report to which objection is made and may accept, reject, or modify in whole or in

part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1). To the extent a party fails to object to parts of the magistrate judge's report, the Court may accept the recommendation so long as there is no clear error on the face of the record. *Macort*, 208 F. App'x at 784. Legal conclusions are reviewed de novo, even in the absence of an objection. *See LeCroy v. McNeil*, 397 F. App'x 554, 556 (11th Cir. 2010); *Cooper-Houston v. S. Ry. Co.*, 37 F.3d 603, 604 (11th Cir. 1994).

Federal Rule of Civil Procedure 8(a)(2) requires a pleading to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy the Rule 8 pleading requirements, a complaint must provide the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). While a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that the Rule 8(a)(2) pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). Nor can a complaint rest on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (alteration in original)). The Supreme Court has emphasized that "No survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as

true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570); *see also Am. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1288–90 (11th Cir. 2010).

Complaints that violate Rule 8(a)(2) are referred to as "shotgun pleadings." *Weiland v. Palm Beach Cty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015). The Eleventh Circuit has "identified four rough types or categories of shotgun pleadings," including: (1) a complaint "containing multiple counts where each count adopts the allegations of all preceding counts," (2) a complaint that is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action," (3) a complaint that does "not separat[e] into a different count each cause of action or claim for relief," and (4) a complaint that "assert[s] multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Id.* at 1321–23. More broadly, "[a] dismissal under Rules 8(a)(2) and 10(b) is appropriate where 'it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief.'" *Id.* at 1325 (emphasis in original) (quoting *Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996)).

DISCUSSION

The Report recommends dismissing Plaintiff's discrimination and retaliation claims (Counts I–XVIII)

with prejudice for failure to state a claim and dismissing Plaintiff's common law claims (Counts XIX–XXI) without prejudice, but without further leave to amend, for lack of subject matter jurisdiction [ECF No. 94 p. 25]. Although the Report begins its discussion by acknowledging that the SAC is "replete with irrelevant facts, statements of legal principles, and citations to cases and statutes" and "far from a model of a 'short and plain statement' of [Plaintiff's] claims," the Report does not recommend dismissing the SAC as a shotgun pleading and instead recommends dismissal on other grounds [ECF No. 94 pp. 6–8]. Specifically, the Report avers that dismissal of Plaintiff's ADA, Title VII, ADEA, FCRA, and FWA claims (Counts I–VIII, X–XI, and XIII–XVIII) is warranted because the SAC fails to allege that Defendants had the required minimum number of employees—an essential element of those causes of actions [ECF No. 94 pp. 8–11]. The Report further avers that Plaintiff's discrimination claims against Borrego (Counts II, IV, VI, VIII, XI, XIV, XVI, and XVIII) must be dismissed because the SAC does not adequately allege that Borrego is being sued as an "employer" as defined by the relevant statutes [ECF No. 94 pp. 11–13]. The Report proceeds to point out, correctly, that Plaintiff's ADA, Title VII, FCRA, ADEA, and 42 U.S.C. § 1981 claims (Counts I–XI, XIII–XVI) rely entirely on formulaic and conclusory allegations that do not plausibly establish causes of action [ECF No. 94 pp. 15–20], and that Plaintiff's 42 U.S.C. § 1983 claim (Count XII) fails to allege that an official local-government policy was the moving force behind Plaintiff's injury [ECF No. 94 pp. 20–22]. Following its

analysis of the discrimination and retaliation claims (Counts I–XVIII), and in the absence of any remaining federal claim, the Report recommends against the exercise of supplemental jurisdiction over Plaintiff's common law contract claims (Counts XIX–XXI) [ECF No. 94 pp. 23–24].

This Court agrees that dismissal of the SAC, in its entirety, is warranted. As the Report points out, the SAC is a 90-page pleading that is "replete with irrelevant facts, statements of legal principles, and citations to cases and statutes" [ECF No. 94 p. 6]. For example, the SAC discusses the following matters which have little to no relevance to Plaintiff's claims: a book written by one of Plaintiff's patients about a 2009 mass shooting [ECF No. 73 ¶ 14], a comprehensive account of Plaintiff's personal and professional life leading up to his relationship with Defendants [ECF No. 73 ¶¶ 16–19], Florida's trauma and transfer standards and their underlying policy rationales [ECF No. 73 ¶¶ 71–76], and the Internal Revenue Service's standard for de facto employment [ECF No. 73 ¶ 101]. The SAC is further complicated by Plaintiff's sweeping allegations of de facto employment and joint employment, devoid of particularized factual support [ECF No. 73 ¶¶ 99–115]. In light of the confusing nature of Plaintiff's allegations, the Eleventh Circuit's established opposition to shotgun pleadings, and the Court's previous order dismissing the FAC as a shotgun pleading, dismissal of the SAC is warranted for failure to comply with Rule 8(a)(2). *See Weiland*, 792 F.3d 1321–22.

In addition to this overarching defect, the SAC is plagued by many claim-specific defects.

As the Report discusses at length, Plaintiff does not adequately allege the required minimum number of employees for his ADA, Title VII, ADEA, FORA, and FWA claims. For Counts I, V, X, XIII, XV, and XVII, the SAC alleges, "upon information and belief," that the required minimum number of employees is satisfied [ECF No. 73 ¶¶ 120, 165, 224, 265, 308, 341]. The Report avers that these allegations are "not entitled to a presumption of truth," since they lack specific factual support [ECF No. 94 pp. 10–12], and therefore the SAC fails to plausibly allege an essential element of those claims. *See United Am. Corp. v. Bitmain, Inc.*, 530 F. Supp. 3d 1241, 1261 n.21 (S.D. Fla. 2021) ("While 'information and belief' pleading can sometimes survive a motion to dismiss, a plaintiff must allege specific facts sufficient to support a claim."); *AT&T Mobility LLC v. Phone Card Warehouse, Inc.*, No. 08-CV-1909-ORL-18GJK, 2009 WL 10671270, at *4 (M.D. Fla. June 25, 2009) ("[Plaintiff's 'upon information and belief' allegation] is simply a variation of pleading an element of a cause of action without factual support and will not withstand a motion to dismiss."); *see also Twombly*, 550 U.S. at 557 (holding that "naked assertions, without further factual enhancement, "stop[] short of the line between possibility and plausibility."). Counts II, IV, VI, VIII, XI, XIV, XVI, and XVIII allege even less, stating simply: "[t]o the extent that this Court determines that [Defendants] have [the required minimum number of employees], we would respectfully allege that they are covered [under the

relevant statute]" [ECF No. 73 ¶¶ 133, 153, 179, 201, 235, 289, 325, 357]. Meanwhile, Counts III and VII make no mention of this essential element at all. The Court agrees with the Report: the SAC does not plausibly allege the required minimum number of employees for any of Plaintiff's ADA, Title VII, ADEA, FCRA, and FWA claims. Nor does the SAC plausibly allege that Defendant Borrego is an "employer" as defined by the relevant statutes, as opposed to just an officer or employee acting who acted in his individual capacity [*see* ECF No. 94 pp. 11–13],[2] or that Plaintiff was subjected to adverse employment actions as a result of discrimination [ECF No. 94 pp. 13–20 (listing Plaintiff's allegations of discrimination and highlighting the lack of factual support for the alleged claims)]. On the whole, Plaintiff's ADA, Title VII, ADEA, FCRA, FWA, and 42 U.S.C. 1981 claims rely on "conclusory allegations . . . masquerading as facts," and must be dismissed. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)

Plaintiff's claim under 42 U.S.C. § 1983, too, must be dismissed because the SAC does not plausibly allege that an official policy was the moving force behind Plaintiff's termination [ECF No. 94 pp. 20–22]. In his Objections to the Report, Plaintiff points to the letter of termination that he received and its surrounding circumstances in arguing that the SAC plausibly alleges an official policy [ECF No. 101 pp. 17–19]. However, the letter of termination simply states that Borrego chose to remove Plaintiff from trauma call coverage effective

[2] Plaintiff's brings claims against Borrego in Counts II, IV, VI, VIII, XI, XIV, XVI, and XVIII.

January 1, 2019 [ECF No. 73-3]. Neither the letter nor the surrounding circumstances cited by Plaintiff identifies a formal policy or connects Plaintiff's termination to said policy in any discernable way. Count XII fails to state a claim under 42 U.S.C. § 1983.

Without the accompaniment of any valid federal claims, Plaintiff's common law contract claims must be dismissed for lack of subject matter jurisdiction. In his Objections, Plaintiff argues that, even if the Court were to dismiss his federal discrimination and retaliation claims (Counts I–XVIII), the Court ought to exercise supplemental jurisdiction over the remaining claims (Counts XIX–XXI), because "there are compelling federal interests in [the] case" arising from the fact that "federal taxpayer dollars are used to fund Medicare and Medicaid" [ECF No. 101 pp. 19–20]. Not so. As the Report indicates, dismissal of common law claims is "strongly encouraged or even require[d]" where, like here, the accompanying federal claims are dismissed prior to trial [ECF No. 94 p. 24 (quoting *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984)); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.")]. The attenuated link that Plaintiff offers to justify the continued exercise of supplemental jurisdiction over Plaintiff's state law claims in the absence of any viable federal claims is insufficient.

CONCLUSION

Following a de novo review of the Report's legal conclusions and of the portions of the Report to which an objection has been made, the Court hereby **ACCEPTS** the Report as follows:

1. Defendants' Joint Motion to Dismiss the Second Amended Complaint [ECF No. 86] is **GRANTED**.
2. Counts I–XVIII are **DISMISSED WITH PREJUDICE**.[3]
3. Counts XIX–XXI are **DISMISSED WITHOUT PREJUDICE BUT WITHOUT FURTHER LEAVE TO AMEND**.
4. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 14th day of March 2022.

/s/ Aileen M. Cannon
AILEEN M. CANNON
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

[3] Pursuant to the Court's previous Order [ECF No. 70], the SAC was Plaintiff's final opportunity to plead his claims with sufficient and particularized factual support. Moreover, Plaintiff does not request an additional opportunity to replead in his Objections to the Report [ECF No. 101].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CV-81123-AMC

DR. EUGENE MISQUITH,

Plaintiff,

vs.

PALM BEACH COUNTY HEALTH CARE DISTRICT, ST. MARY'S MEDICAL CENTER, ROBERT BORREGO, and PALM BEACH TRAUMA ASSOCIATES,

Defendants. /

REPORT AND RECOMMENDATION REGARDING JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT (ECF No. 86)

(Filed Sep. 29, 2021)

In his verified Second Amended Complaint (SAC), Plaintiff, Dr. Eugene Misquith, a sexagenarian Indian-American male with a history of heart problems, sues four defendants for employment discrimination and retaliation under both Federal and State law. He also brings common law contract-based claims. The Defendants jointly move to dismiss all counts with prejudice. This matter was referred to me by the Honorable Aileen M. Cannon for a Report and Recommendation. ECF No. 88. For the reasons stated, it is RECOMMENDED that the Motion to Dismiss be GRANTED.

I. PROCEDURAL HISTORY

Dr. Misquith filed this lawsuit on July 13, 2020. ECF No. 1. In a detailed 44-page motion, all four defendants moved to dismiss the original Complaint. ECF No. 26. Rather than responding to the motion, Dr. Misquith filed a First Amended Complaint. ECF No. 39. The defendants moved to dismiss in a 35-page motion that again pointed out potential issues with Dr. Misquith's legal theories. ECF No. 53. After full briefing, Magistrate Judge Brannon recommended dismissing the First Amended Complaint as a shotgun pleading. ECF No. 65. Judge Cannon adopted this recommendation, dismissed the First Amended Complaint without prejudice, gave Dr. Misquith "**one final** opportunity to file an amended complaint" and instructed that the "second amended complaint must avoid incorporating into successive counts all preceding allegations and counts; must clearly identify the particular factual allegations relevant to each count; and must specify in explicit terms the exact cause of action in each count and against whom each cause of action is alleged." ECF No. 70 at 2 (emphasis in original).

Dr. Misquith filed a verified Second Amended Complaint on June 16, 2020. ECF No. 73. It is 90 pages long, comprises 405 separately-numbered paragraphs, and contains over 350 pages of exhibits. *Id.* It alleges claims under (1) the American with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Florida Civil Rights Act ("FCRA"), 42

U.S.C. § 1981, and the Florida Whistleblower Act ("FWA") (collectively "the Anti-Discrimination Statutes"); (2) 42 U.S.C. § 1983; and (3) Florida common law for breach of contract. Defendants once again move to dismiss, raising the same legal arguments asserted in their prior motions. ECF No. 86.

I have reviewed the Motion to Dismiss, the Response, and the Reply. ECF Nos. 90,93. I am fully advised and this matter is ripe for decision.

II. DISCUSSION

This Report and Recommendation does not address every argument made by Defendants in support of their Rule 12(b)(6) motion. This analysis is unnecessary given the multiple grounds discussed below that warrant dismissal of the SAC.[1]

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[1] I note that Defendants make several arguments for dismissal that are not grounded in the SAC. They argue that Dr. Misquith has not satisfied a condition precedent to a Title VII claim against the Health Care District because he has not obtained a Right to Sue letter from the EEOC. ECF No. 86 at 29–30. But, the SAC does not allege a Title VII claim against the Health Care District. At most, it seeks to hold other defendants liable for the actions of the Health Care District.

Similarly, Defendant argue that Dr. Borrego, Palm Beach Trauma Associates ("PBTA), and St. Mary's Medical Center were not parties to the Trauma Physician Agreement that forms the basis of the breach of contract claim in Count XIX. ECF No. 86 at 40–42. That Count is only against the Health Care District, although it seeks to impute liability based on actions by the other defendants.

1. *Motion to Dismiss Under Rule 12(b)(6)*

A pleading in a civil action must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this Rule 8 pleading requirements, a claim must provide the defendant fair notice of plaintiff's claim and the grounds upon which it rests. *See Swierkiewicz v. Sorema N.A.*, 534 U. S. 506, 512 (2002). While a claim "does not need detailed factual allegations," it must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U. S. 662, 678 (2009) (explaining that the Rule 8(a)(2) pleading standard "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation"). Nor can a claim rest on 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U. S. at 678 (*quoting Twombly*, 550 U. S. at 557 (alteration in original)).

On a motion to dismiss under Rule 12(b)(6), the Court must view the well-pled factual allegations in a claim in the light most favorable to the non-moving party. *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016).Viewed in that manner, the factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the claim are true (even if

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Finally, they argue that the Health Care District cannot be sued under the FWA. ECF No. 86 at 35. But, the FWA counts are against St. Mary's, Dr. Borrego, and PBTA, not the Health Care District.

doubtful in fact). *Twombly*, 550 U. S. at 555 (citations omitted). The Supreme Court has emphasized that "[t]o survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 570. In addition, "courts may infer from factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct that plaintiff would ask the court to infer." *Am. Dental Assoc. v. Cigna Corp.*, 605 F. 3d 1283, 1290 (11th Cir. 2010) (citing *Iqbal*, 556 U. S. at 682). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U. S. at 678 (quoting *Twombly*, 550 U. S. at 557). When evaluating a motion to dismiss under Rule 12(b)(6):

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U. S. at 679. Factually unsupported allegations based "on information and belief" are not entitled to the assumption of truth. *See Scott v. Experian Info. Sols., Inc.*, 2018 WL 3360754, at *6 (S. D. Fla. June 29,

2018) (J. Altonaga) ("Conclusory allegations made upon information and belief are not entitled to a presumption of truth, and allegations stated upon information and belief that do not contain any factual support fail to meet the *Twombly* standard.").

2. *Shotgun Pleading*

In addition to Rule 8(a)(2)'s requirement that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), Federal Rule of Civil Procedure 10(b) states in pertinent part, "If doing so would promote clarity, each claim founded on a separate transaction or occurrence – and each defense other than a denial – must be stated in a separate count or defense." "Complaints that violate either Rule 8(a)(2) or Rule 10(b), or both, are often disparagingly referred to as 'shotgun pleadings.'" *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015). Failure to cure a shotgun pleading after having notice of its defects can result in dismissal with prejudice. *Jackson v. Bank of America, N.A.*, 898 F.3d 1348, 1357–58 (11th Cir. 2018) (trial court does not abuse its discretion in dismissing case with prejudice when party fails to cure shotgun pleading after fair notice of pleading's defects and a meaningful opportunity to correct them.).

In *Weiland*, the Court of Appeals noted "four rough types or categories of shotgun pleadings." *Id.* at 1321–23. As relevant here, the categories included (1) the

"mortal sin" of a later count of a complaint incorporating by reference an earlier count, (2) the "venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action," and (3) "the sin of not separating into a different count each cause of action or claim for relief." *Id.* The common theme among all shotgun pleadings "is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.*

Defendants renew their argument that the Second Amended Complaint is a shotgun pleading. As an initial matter, the SAC complies with Judge Cannon's instruction to not incorporate all preceding allegations and counts into successive counts. Each count also identifies the specific facts relevant to that count. The title of each count identifies the cause of action and the named defendant(s). Unfortunately, the SAC is replete with irrelevant facts, statements of legal principles, and citations to cases and statutes.

Defendants argue that the individual counts still fail to clearly identify the named defendant. One reason, they assert, is that the causes of action are based on a "joint employment" theory. They argue that the joint employment theory creates ambiguity about which defendant(s) are named in the count. I disagree. The underlying joint employment theory does not convert an individual count against one named defendant into an impermissible shotgun pleading; rather, it merely makes clear that the count may seek to hold the

named defendant liable for acts committed by other unnamed defendants.

Defendants next allege that Counts XIX-XXI are shotgun pleadings because they are pled "in the alternative to the employment claims previously outlined, and pursuant to FRCP 8(d)(2)." ¶¶ 369 (Count XIX against Health Care District), 385 (Count XX against Health Care District), and 392 (Count XXI against St. Mary's Medical Center).[2] Defendants assert that this language brings the unnamed alleged joint employers into the respective counts. Defendants read too much into this language. It appears merely to be Dr. Misquith's attempt to invoke this Court's supplemental jurisdiction over non-diverse Florida law claims.

Defendants also note that the SAC asks that they be held jointly and severally liable for damages to Dr. Misquith. ¶ 89. Again, this allegation does not create ambiguity about which defendant(s) are named in each count of the SAC. Whether it is legally proper to seek joint and several damages in this case can be addressed at a later phase of the litigation.

In sum, the SAC is far from a model of a "short and plain statement" of Dr. Misquith's claims. Nevertheless, it now sufficiently identifies which legal causes of action are being asserted against each defendant and the factual basis for each cause of action. It puts the

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[2] Paragraphs of the SAC, ECF No. 73, will be cited as "¶." Citations to the pleadings will reference the page number assigned by the CM/ECF docketing system, not the page number inserted by the author.

Defendants on adequate notice to assert defenses and litigate this case. The SAC should not be dismissed as a shotgun pleading.

3. *Substantive Counts*[3]

a. Number of Employees

Defendants correctly argue that Counts I-VIII, X, XI, and XIII-XVIII must all be dismissed because the SAC fails to allege a necessary element of the causes of action – that the putative employer had a required minimum number of employees. The Anti-Discrimination Statutes prohibit certain discriminatory actions by an "employer." *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1). "Employer" is a defined statutory term. One component of the statutory definition is that the putative "employer" have a minimum number of employees. Title VII, the ADA, and the FCRA cover only employers with 15 or more employees, 42 U. S. C. § 2000e-2(b), 42 U. S. C. § 12111(5), Fl. Stat. § 760.02(7); the ADEA covers only employers with twenty or more employees. 29 U.S.C. § 630(b); the FWA covers only employers with ten or more employees. Fl. Stat.§ 448.101(3). The number of employees is a substantive element of each cause of action. *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (Title VII); *Garcia v. Copenhaver, Bell & Assoc., M. D.'s P.A.*, 104 F.3d 1256 (11th Cir. 1997) (ADEA); *Eaton v. Nat'l Older Worker Career Ctr.*,

[3] For purposes of this section, I assume without deciding that Dr. Misquith is an "employee" of all Defendants for purposes of bringing an action under the Anti-Discrimination Statutes.

7:20-CV-00035-LSC, 2020 WL 6585605, at *3 (N. D. Ala. Nov. 10, 2020) (ADA).

The SAC fails to allege that any Defendant is a statutory "employer" because it lacks facts entitled to the assumption of truth that establish the minimum number of employees. For St. Mary's, Count I alleges, "Upon information and belief, Defendant St. Mary's Medical Center has at least fifteen (15) employees, and is therefore a covered employer under the ADA." ¶ 120. This allegation is restated in Counts XIII and XV, *see* ¶¶ 265,308, but is neither restated nor incorporated by reference into Counts III, V, VII, X. Count XVII alleges, "Upon information and belief, Defendant St. Mary's Medical Center has at least ten (10) employees and is therefore covered employers under the FWA." ¶ 341.

For Dr. Borrego and PBTA, the SAC alleges in Counts II, IV, VI, VIII, XI, XIV, XVI, and XVIII, "Defendants' [sic] Dr. Borrego and Palm Beach Trauma Associates have claimed that they have only two (2) employees. To the extent that this Court determines that Defendants Dr. Borrego and Palm Beach Trauma Associates have fifteen (15) or more employees, we would also respectfully allege that they are covered employees [sic] under the ADA." ¶¶133, 153, 179, 201, 235, 289, 320, 325, 357.

In his Response to the Motion to Dismiss, Dr. Misquith concedes that he has not yet pled the proper number of employees. ECF No. 90 at 13–14. He asserts that "upon information and belief' these requirements have been met. He further asserts he "has strong

reason" to believe that PBTA has at least 15 employees. He argues that he expects to obtain the necessary evidence during discovery, so "[t]his is an issue that should be resolved at a motion for summary judgment." *Id.* at 14.

The threshold *Iqbal/Twombly* pleading standard cannot be deferred. "Post-filing discovery is not a substitute for pre-filing investigation and factual development. A Court need not defer ruling on a motion to dismiss 'in order to allow the plaintiff to look for what the plaintiff should have had – but did not – before coming through the courthouse doors.'" *Alvarez Galvez v. Fanjul Corp.*, 20-80123-CIV, 2021 WL 4093469, at *7 (S. D. Fla. Aug. 4, 2021) (J. Reinhart) (quoting *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1216 (11th Cir. *2007)), report and recommendation adopted sub nom. Galvez v. Fanjul Corp.*, 2021 WL 3878322 (S.D. Fla. Aug. 31, 2021) (J. Ruiz). Because the SAC fails to plausibly allege the predicate number of employees – a required element of Title VII, the ADA, the ADEA, the FORA, and the FWA – Counts I-WI, X, XI, and XIII-XVIII fail to state a claim upon which relief can be granted and therefore must be dismissed under Rule 12(b)(6).

Dr. Misquith argues that his Title VII claim (Count VI) can survive against PBTA and Dr. Borrego because "the Eleventh Circuit has held that Title VII extends to the situation in which a defendant controls and has interfered with an individual's employment relationship with a third party." ECF No. 90 at 14, 16 (citing *Scott v. Sarasota Doctors Hospital, Inc.*, 145

F. Supp. 3d 1114, 1124 (11th Cir. 2015)); *see also* SAC ¶ 167 (citing *Scott* and *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir. 1988). The authority cited for this proposition is distinguishable. It does not discuss curing a deficiency in the number of employees alleged in the complaint. Instead, it addresses whether Title VII applies when a defendant-employer interferes with a plaintiffs employment relationship with a third party. *Pardazi*, 838 F.2d at 1156; *accord Scott*, 145 F. Supp. 3d at 1124 (Title VII extends to "rights and obligations . . . beyond the immediate employer-employee relationship."). Here, Dr. Misquith has not alleged that any defendant is an "employer" for purposes of the Anti-Discrimination Statutes.

On this basis, alone, Counts I-VIII, X, XI, and XIII-XVIII must be dismissed. I nevertheless will address other independent grounds to dismiss these Counts.

b. Dr. Borrego as an Individual Defendant

Dr. Borrego correctly argues that Counts II, IV, VI, VIII, XI, XIV, XVI, and XVIII against him, individually, must be dismissed. The Anti-Discrimination Statutes authorize claims against employers. Title VII defines an "employer" to include "one or more individuals" with 15 or more employees. But, a person acting individually – not as an employer – cannot be liable under these laws. *See Albra v. Advan, Inc.*, 490 F.3d 826, 828 (11th Cir. 2007) (individuals cannot be liable for violating the ADA's anti-retaliation or anti-discrimination provisions.); *Mason v. Stallings*, 82 F.3d 1007, 1009

(11th Cir. 1996) (no individual liability under Title VII, AREA, or ADA); Fl. Stat. § 448.102(3) ("An employer may not take any retaliatory action against [a whistle-blower]."). Dr. Borrego argues that the SAC is trying to sue him as an individual. ECF No. 86 at 21–22. Dr. Misquith responds, "Plaintiff is not suing Dr. Borrego as an officer or employee of a separate entity, but as an employer himself." ECF No. 90 at 15.

As Defendants point out in their Reply, there are no factual allegations in the SAC that Dr. Borrego, in his individual capacity, was Dr. Misquith's employer. ECF No. 93 at 3–4. At best, the SAC alleges "upon information and belief, Defendant Palm Beach Trauma Associates is owned and controlled by Dr. Borrego and has served as his alter ego, and management vehicle to manage Dr. Misquith and other doctors in St. Mary's trauma center." ¶ 13. This allegation is not entitled to the assumption of truth for at least two reasons. First, it is based on information and belief. Second, the reference to an alter ego is a factually unsupported legal conclusion.

Dr. Misquith argues that Dr. Borrego nevertheless can be an "employer" under the Anti-Discrimination Statutes because he was the agent of Dr. Misquith's corporate employer(s). ECF No. 90 at 15–16. He notes that the definition of "employer" includes agents of persons otherwise meeting the definition. The Eleventh Circuit rejected this precise argument in *Mason*. *See* 82 F.3d at 1009 (" 'agent' language was included [in the definition of 'employee] to ensure *respondeat superior* liability of the employer for acts of its agents.").

Finally, as discussed above, even if the SAC were attempting to sue Dr. Borrego as an employer, it fails to allege that he employed enough people to implicate the Anti-Discrimination Statutes.

For all these reasons, all counts against Dr. Borrego should be dismissed.

c. The Discrimination Claims

The SAC alleges federal and state law claims for discrimination based on disability, age, race, and national origin. All of the Anti-Discrimination Statutes have the same structure: an employer cannot take an adverse employment action against an employee who falls within a protected category (e.g., disability, race, gender, age, whistleblower) if the adverse employment action is causally connected to the employee's protected status.

A plaintiff can plead an intentional discrimination claim in a variety of ways. One "is by navigating the now-familiar three-part burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Lewis v. Union City, Ga.*, 918 F.3d 1213, 1217 (11th Cir. 2019) ("*Lewis I*") (*McDonald Douglas* applies to Title VII and § 1981); *accord Schultz v. Royal Caribbean Cruises, Ltd.*, 465 F. Supp. 3d 1232, 1265–68 (S. D. Fla. 2020) (J. Torres) (same for ADA); *Liebman v. Metropolitan Life Ins. Co.*, 808 F.3d 1294, 1298 (11th Cir. 2015) (same for AREA); *White v. Purdue Pharma, Inc.*, 369 F. Supp. 2d 1335, 1338 (M.D.

Fla. 2005) (same for FWA); *Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004) ("The [FORA] was patterned after Title VII, and Florida courts have construed the act in accordance with decisions of federal courts interpreting Title VII."). Applying this framework at the Rule 12(b)(6) stage, a plaintiff must allege a *prima facie* case of discrimination by pleading facts plausibly showing that (1) he belongs to a protected class, (2) he was subjected to an adverse employment action, (3) he was qualified to perform the job in question, and (4) his employer treated "similarly situated" employees outside his class more favorably. *Lewis I* at 1220–21. Where a plaintiff attempts to satisfy his burden through comparator evidence, he must show that he and the comparators are "similarly situated in all material respects." *Id.* at 1226.

Another way of pleading intentional discrimination is through a "convincing mosaic" of circumstantial evidence. *Lewis v. Union City, Ga.*, 934 F.3d 1169, 1185 (11th Cir. 2019) *("Lewis II"); Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) "A 'convincing mosaic' may be shown by evidence that demonstrates, among other things, (1) 'suspicious timing, ambiguous statements . . . , and other bits and pieces from which an inference of discriminatory intent might be drawn,' (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual." *Lewis II*, 934 F.3d at 1185 (citations omitted).

The ADEA and § 1981 require more stringent proof of a causal connection – the disparate treatment

based on race or age (respectively) must be the "but for" cause of the adverse employment action, not merely a motivating factor. *Comcast Corp. v. Nat'l Assoc. of African-American-Owned Media*, 140 S. Ct. 1009 (§ 1981); *Gross v. FBL Financial Services, Inc.*, 557 U.S 167 (2009) (ADEA). Here, too, a plaintiff can meet his burden by showing "either a similarly situated comparator who was not treated similarly under similar circumstances, or a 'convincing mosaic' of circumstantial evidence suggesting he was terminated for discriminatory reasons." *See Perry v. Schumacher Grp. of Louisiana*, No: 2:13-cv-36-FtM-29DNF, 2020 WL 3971937, at *7 (quoting *Biggers v. Koch Foods of Alabama, LLC*, 2020 WL 2312033, at *5 (M. D. Ala. May 8, 2020)).

Defendants argue that Counts I, II, V, VI-XI, and XIII-XIV must be dismissed because the SAC fails to plead a plausible claim of *prima facie* discrimination. ECF No. 86 at 33–34. Dr. Misquith responds that the SAC alleges "that he was terminated in a hasty, suspicious, and unusual fashion without explanation [and that] he was replaced by an employee who was not a member of the four protected classes to which [Dr. Misquith] belongs." ECF No. 90 at 25–27.

ADA Discrimination

Counts I and II allege Dr. Misquith's employment termination was "motivated by unlawful discrimination based upon Dr. Misquith's disability and periodic need for time off to recuperate from surgery." ¶¶ 117,

130. Counts II and III do not contain enough facts to support a plausible inference of discriminatory motive. Most notably, they lack any allegations about similarly-situated comparators. The sole allegation of discriminatory motive is:

> • "Plaintiff Dr. Misquith was discriminated against on account of his disability, when the Defendant Dr. Borrego, cut his calls, suspended him on a pre-textual and false claim that he had not completed medical record-keeping while recuperating from heart surgery, and then terminated him, without cause or explanation, three months after he underwent heart surgery for the second time in a year and required medical leave to rest and recuperate." ¶¶ 128, 141.

These facts are not sufficient to suggest that discriminatory motive was more likely that a lawful alternative explanation. In sum, any inference of discriminatory motive is too speculative to rise to the level of a plausible claim.

Title VII and FCRA Race Discrimination

Counts V, VI, VII, and VIII allege discrimination based on race and national origin. They each contain the following identical allegations:

> • "Plaintiff Dr. Misquith's employers treated similarly situated employees, who were not of Indian national origin and outside of his class, more favorably, by not subjecting them to discipline on pre-textual bases, or sudden

termination of privileges without cause or explanation, or due process under St. Mary's Medical Staff Bylaws." ¶¶ 172, 186, 196, 207.

- "For example, upon information and belief, Dr. Borrego, who is Cuban-American, received his full due process rights under St. Mary's Bylaws, when he was investigated and suspended in 1999, for allowing another doctor to perform a surgery at St. Mary's without the requisite training or privileges leading to the death of the patient." ¶¶ 173, 187, 197, 208.

- "In addition, upon information and belief, on or about 2009, Dr. Borrego terminated a Dr. Orlando Morejon, a Cuban-American trauma center doctor, and provided him with three (3) months' notice and his due process rights under St. Mary's Bylaws. In contrast, Dr. Borrego provided Dr. Misquith with approximately one (1) month notice of termination and no due process as required under the St. Mary's Bylaws and the State of Florida Department of Health Trauma Standards." ¶¶ 174, 188, 198, 209.

These allegations are insufficient to plead a *prima facie* case of disparate treatment based on race or national origin. The first allegation is a formulaic, conclusory statement of the law without factual support. The latter two statements are made "upon information and belief" and therefore are not entitled to the assumption of truth. Moreover, even if accepted as true, they do not raise a plausible claim that Dr. Borrego and Dr. Morejon were similarly situated in

all material respects to Dr. Misquith. They are not adequate comparators for purposes of the *McDonald Douglas* analysis, nor do these allegations present a convincing mosaic of discriminatory intent.

42 U.S.C. §1981 Race Discrimination

Count IX alleges discrimination in violation of 42 U.S.C. §1981 because "Dr. Misquith is Indian-American, and is therefore a member of a racial minority." ¶ 213.[4] The relevant allegations of intentional discrimination are:

- "The Defendant St. Mary's Medical Center's intent to discriminate against Dr. Misquith is evidenced by the fact that other trauma surgeons in the St. Mary's trauma center, who were not Indian-American were not similarly disciplined on a pre-textual basis, and/or suddenly terminated without cause or explanation outside of the hospital's Bylaws and ordinary procedures." ¶ 214

- "For example, upon information and belief, Dr. Borrego, who is Cuban-American, received his full due process rights under St. Mary's Bylaws, when he was investigated and suspended in 1999, for allowing another doctor to

[4] The parties dispute whether being "Indian-American" is a cognizable racial classification for purposes of § 1981. *Compare* ECF No. 86 at 34–35 *with* ECF No. 90 at 26–27. Because Count IX fails to state a claim for other reasons, I need not resolve this issue. *But see United States v. Brooks*, 723 Fed. Appx. 671, 675–76 (11th Cir. 2018) (treating Indian-American status as a racial classification for purposes of a *Batson* challenge).

> perform a surgery at St. Mary's without the requisite training or privileges leading to the death of the patient." ¶ 215
>
> • "In addition, upon information and belief, on or about 2009, Dr. Borrego terminated a Dr. Orlando Morejon, a Cuban-American trauma center doctor, and provided him with three (3) months' notice and his due process rights under St. Mary's Bylaws. In contrast, Dr. Borrego provided Dr. Misquith with approximately one (1) month notice of termination and no due process as required under the St. Mary's Bylaws and the State of Florida Department of Health Trauma Standards. Finally, upon information and belief, Dr. Misquith was replaced on the trauma staff by a non-Indian doctor." ¶ 216.

For the same reasons discussed above for Counts V-VIII, these allegations do not allege a plausible claim that Dr. Misquith's race was the but-for cause of any adverse employment action, so Count IX must be dismissed.

Age Discrimination

Counts X and XI seek to establish age discrimination under the ADEA by circumstantial evidence. ¶ 221. As such, the *McDonald Douglas* framework applies. *Liebman v. Metropolitan Life Ins. Co.*, 808 F.3d 1294, 1298 (11th Cir. 2015). Applying this framework to the ADEA, a plaintiff must plausibly allege (1) he was between the ages of 40 and 70, (2) he was subject

to an adverse employment action, (3) a substantially younger person filled the position from which he was discharged, and (4) he was qualified to perform the job from which he was discharged. *Id.*

Counts X and XI allege only, "Following Plaintiff Misquith's termination, upon information and belief, a substantially younger doctor filled his position as a trauma surgeon at St. Mary's Medical Center." ¶¶ 228, 239. These allegations are not entitled to the assumption of truth, so they fail to allege a plausible claim that Dr. Misquith's age was the but-for cause of any adverse employment action. For this reason, Counts X and XI must be dismissed.

FCRA Race, Age, Disability, and National Origin Discrimination

Counts XIII and XIV assert discrimination based on race, national origin, age, and disability, in violation of Florida law. They essentially restate the same legal theories stated in Counts I, II and V-XI. In relevant part, they allege:

- "The Defendants treated similarly situated employees, outside of Plaintiff Dr. Misquith's racial class, more favorably than him. Dr. Misquith was subject to discipline on a pre-textual basis, and suddenly terminated without cause or explanation outside of the hospital's ordinary procedures. Non-Indian trauma surgeons were not. In addition, Dr. Misquith was replaced on staff by a white doctor." ¶¶ 269, 293

- "Following Plaintiff Misquith's termination, upon information and belief, a substantially younger doctor filled his position as a trauma surgeon at St. Mary's Medical Center." ¶¶ 275, 299.

- "Plaintiff Misquith was discriminated against on account of his disability when after undergoing multiple heart surgeries in one year, and taking the medically required time off to heal and recuperate, he was suspended on a pre-textual basis that he failed to complete certain medical records, when the records were, in fact completed. Plaintiff was then notified that his trauma surgery privileges were terminated, a mere three (3) months after his heart final surgery." ¶ 279.

These state law claims fail for the same reasons as the corresponding federal claims.

d. 42 U.S.C. § 1983

Count XII alleges that the Health Care District, acting under color of law, terminated Dr. Misquith's employment based on age, race, national origin, disability, and whistleblower status, all in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and Title VII. ¶¶ 242, 255.[5] The Health Care District argues that

[5] Count XII is titled "Intentional Discrimination in Violation of 42 U.S.C. § 1983 by Palm Beach Health Care District." ECF No. 73 at 56. It seeks to hold the Health Care District liable for

(1) the SAC fails to plausibly allege that the actions allegedly taken against Dr. Misquith were pursuant to a municipal policy, (2) a §1983 claim cannot be predicated on a violation of Title VII, (3) the First Amendment was not implicated because Dr. Misquith was not speaking about a matter of public concern, (4) the SAC fails to plausible allege any action taken by the Health Care District against Dr. Misquith, and (5) age discrimination cannot be the basis for a § 1983 action. ECF No. 86 at 35–40.

A municipal government entity can be liable under § 1983 only if an official local-government policy was the "moving force" that "actually caused" the plaintiff's constitutional injury. *Sosa v. Martin County, Florida*, 20-12781, 2021 WL 4259153, at *15 (11th Cir. Sept. 20, 2021). A municipal entity cannot be found liable on a *respondeat superior* theory. *Underwood v. City of Bessemer*, 19-13992, 2021 WL 3923153, at *11 (11th Cir. Sept. 2, 2021). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "Municipal liability may arise in the termination context 'provided that the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.'" *Gilroy v. Baldwin*, 843 Fed. Appx. 194, 197 (11th Cir. 2021).

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actions of Dr. Borrego, St. Mary's and PBTA. ¶ 251. But it does not seek to hold the other Defendants directly liable under § 1983.

The "first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386 (1989). Here, viewing the SAC in the light most favorable to Dr. Misquith, the allegedly unconstitutional action taken against him was Dr. Borrego's decision to remove him from the trauma call coverage roster. *E.g.*, ¶ 254 (citing ECF No. 73-3). There is no allegation that this action was part of a formal policy or part of a persistent and widespread pattern of behavior by the Health Care District. Nor does the SAC plausibly plead that Dr. Borrego had final authority to establish policy for the Health Care District.[6] Therefore, the SAC fails to satisfy § 1983's threshold requirement of a municipal policy. Count XII should be dismissed with prejudice on this basis.[7]

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[6] Dr. Misquith's Response does not address whether the termination of his employment was part of a municipal policy. Therefore, he has implicitly conceded this issue.

[7] Because the lack of a municipal policy is fatal to Dr. Misquith's § 1983 claim, I do not address defendants' remaining arguments. I do note, however, that Count XII improperly alleges § 1983 liability arising from a non-constitutional violation of Title VII. Section 1983 creates liability only for constitutional violations. In some circumstances, the same conduct may violate both an Anti-Discrimination Statute and the Constitution; there, the plaintiff may pursue concurrent actions under the Anti-Discrimination Statute and § 1983. But, § 1983 does not provide a remedy for a violation of an Anti-Discrimination Statute that does not rise to the level of a constitutional violation. See *Williams v. Pennsylvania Human Relations Comm'n*, 870 F.3d 294, 300 & n 34 (3d Cir. 2017) (Plaintiff "may not seek damages . . . under § 1983 for

e. Common Law Claims

I recommend that the District Court exercise its discretion to decline to exercise subject matter jurisdiction over Counts XIX-XXI. These Counts should be dismissed without prejudice.

Once a plaintiff properly invokes this Court's federal question or diversity jurisdiction, the court "may exercise supplemental jurisdiction over all other claims that are so related to that claim that they form part of the same case or controversy." 28 U. S. C. § 1367(a). State law claims are deemed to be part of the same case or controversy as a federal claim if they "'derive from a common nucleus of operative fact' and are such that one would ordinarily expect them to be tried in one judicial proceeding." *People by Abrams v. Terry*, 45 F. 3d 17, 23 n. 7 (2d Cir. 1995) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). Trial courts are given broad discretion in deciding whether to exercise supplemental jurisdiction because they are in the "best position to weigh the competing interests set forth in 28 U. S. C. § 1367." *Morgan v. Christensen*, 582 F. App'x 806, 808 (11th Cir. 2014).

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statutory violations of either Title VII or the ADA, standing alone."). In sum, as the Fifth Circuit has explained, "Title VII *is* the exclusive remedy for a violation of its own terms. But when a public employer's conduct violates both Title VII and a separate constitutional or statutory right, the injured employee may pursue a remedy under § 1983 as well as under Title VII." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989) (emphasis in original). Here, there cannot be § 1983 liability based solely on a violation of Dr. Misquith's Title VII rights.

The supplemental jurisdiction statute describes instances when the District Court should decline to exercise supplemental jurisdiction because: (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U. S. C. § 1367(c). The Court's discretion is also guided by the factors of judicial economy, convenience, fairness, and comity. *Brookshire Bros. Holding, Inc. v. Dayco Products, Inc.*, 554 F. 3d 595, 601 (5th Cir. 2009).

As the Eleventh Circuit has explained, when all federal claims are dismissed prior to trial, Supreme Court precedent "strongly encourages or even requires dismissal of the state claims." *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984) (citing *Gibbs*, 383 U.S. at 726). *See also, e.g., Page v. Hicks*, 773 Fed. Appx. 514, 517 n. 2 (11th Cir. 2019) (trial court properly dismissed state law claims without prejudice after dismissing all federal claims) (citing *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088–89 (11th Cir. 2004)). That situation exists here, so the common law claims should be dismissed without prejudice.

III. CONCLUSION AND RECOMMENDATION

In her Order dismissing the First Amended Complaint, Judge Cannon warned that the Second

Amended Complaint would be Dr. Misquith's last chance to plead claims upon which relief could be granted. He has failed to do so. Therefore, it is RECOMMENDED that the Motion to Dismiss the Second Amended Complaint be GRANTED. In accordance with Judge Cannon's Order, dismissal of Counts I-XVIII should be with prejudice as to all Defendants. The dismissal of Counts XIX-XXI should be without prejudice but without further leave to amend.

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Aileen M. Cannon, United States District Court Judge for the Southern District of Florida, within **FOURTEEN (14) DAYS** of being served with a copy of this Report and Recommendation. Failure to timely file objections shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016).

If counsel do not intend to file objections, they shall file a notice advising the District Court within FIVE DAYS of this Report and Recommendation.

DONE and SUBMITTED in Chambers at West Palm Beach, Palm Beach County, in the Southern District of Florida, this 29th day of September 2021.

/s/ Bruce Reinhart
BRUCE E. REINHART
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-81123-Civ-Cannon/Brannon

DR. EUGENE MISQUITH,

Plaintiff,

v.

PALM BEACH COUNTY HEALTH CARE DISTRICT, ST. MARY'S MEDICAL CENTER, ROBERT BORREGO, and PALM BEACH TRAUMA ASSOCIATES,

Defendants. /

REPORT AND RECOMMENDATION

(Filed May 7, 2021)

THIS CAUSE is before the Court upon Defendants' Joint Motion to Dismiss Amended Complaint and Motion to Strike ("Motion") [DE 53], which has been referred to the undersigned for a report and recommendation. [DE 64].[1] Plaintiff responded in opposition [DE 55], and Defendants replied [DE 59]. With leave of Court, Defendants' filed supplemental authority in support of their Motion. [DE 62]. For the reasons stated below, the Court respectfully recommends that

[1] This case has been referred to the undersigned for disposition of all pre-trial, non-dispositive motions and for a Report and Recommendation regarding diapositive motions. [DE 64].

the Motion be **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND[2]

In July of 2020, Plaintiff filed suit in the Southern District of Florida against Palm Beach County Health Care District ("District"), St. Mary's Medical Center ("St. Mary's"), Dr. Robert Borrego, and Palm Beach Trauma Associates ("PBTA") (together, "Defendants"). [DE 1]. Plaintiff describes the parties' relationships as follows: The District is the State of Florida's designated Trauma Agency for Palm Beach County, responsible for the organization and management of trauma services offered in Palm Beach County [*Id.* ¶ 27]. St. Mary's is a hospital that houses a Level I Trauma Center. [*Id.* ¶ 28]. At the relevant times, PBTA was a General Partnership, with Dr. Borrego as a principal. [*Id.* ¶ 12]. District subsidizes the patient care of uninsured trauma patients at the Trauma Center. [*Id.* ¶ 31]. St. Mary's contracted with Dr. Borrego to serve as Director of the Trauma Center. [*Id.* ¶ 30]. Plaintiff asserts that Dr. Borrego supervised him while working at the Trauma Center, including setting the call schedule. [*Id.* ¶¶ 38-46]. Plaintiff signed two agreements with the District, one in 1999 and the other in 2009 ("Trauma Physician Agreement") [*Id.* ¶ 34].

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[2] These background facts draw directly from the operative complaint [DE 39] and are taken as true for purposes of evaluating the instant Motion.

Plaintiff asserts fourteen counts against the Defendants: disability discrimination under the Americans with Disabilities Act ("ADA") (Count I); retaliation under the ADA (Count II); race discrimination under Title VII (Count III); national origin discrimination under Title VII (Count IV); race discrimination under § 1981 (Count V); age discrimination under the Age Discrimination in Employment Act ("ADEA") (Count VI); discrimination under § 1983 (Count VII); race, national origin, disability, and age discrimination under the Florida Civil Rights Act ("FCRA") (Count VIII); retaliation under the FCRA (Count IX); retaliation under the Florida Whistleblower Act ("FWA") (Count X); breach of contract (Count XI); breach of the implied covenant of good faith and fair dealing (Count XII); alternative breach of contract (Count XIII); alternative breach of the implied covenant of good faith and fair dealing (Count XIV).

Defendants jointly moved to dismiss the complaint, arguing, inter alia, the complaint fails to comply with Fed. R. Civ. P. 8(a) and 10(c). [DE 53]. The undersigned agrees and recommends dismissing the complaint without prejudice for Plaintiff to plead its case in accordance with Federal Rules of Civil Procedure 8(a)(2) and 10(b).

II. DISCUSSION

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim

showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In the absence thereof, a plaintiff "fail[s] to state a complaint upon which relief may be granted," in which a case a motion to dismiss is proper in lieu of a responsive pleading. Fed. R. Civ. P. 12(b)(6); *see also Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294-96 (11th Cir. 2018) (discussing dismissal of "shotgun" pleadings for violations of Rule 8 in the context of Rule 12(b)(6) motions); *Estate of Bass v. Regions Bank, Inc.*, 947 F.3d 1352, 1356 n.3 (11th Cir. 2020) (in addition to violating Rule 8, "shotgun" pleadings violate the pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

The Eleventh Circuit has repeatedly and unequivocally condemned shotgun pleadings as a waste of judicial resources. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321-23 (11th Cir. 2015); *see Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021) ("We have little tolerance for [shotgun pleadings]") (internal quotation and citation omitted). "Shotgun pleadings, whether filed by plaintiffs or defendants, exact an intolerable toll on the trial court's docket, lead to unnecessary and unchanneled discovery, and impose unwarranted expense on the litigants, the court and the court's para-judicial personnel and resources. Moreover, justice is delayed for the litigants who are 'standing in line,' waiting for their cases to be heard." *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1356-57 (11th Cir. 2018) (quoting *Cramer v. Fla.*, 117 F.3d 1258, 1263 (11th Cir. 1997)). In fact, "[w]hen presented with a shotgun complaint, the district court should order

repleading *sua sponte*." *Ferrell v. Durbin*, 311 Fed. Appx. 253, 259 n.8 (11th Cir. 2009).

There are four rough types or categories of shotgun pleadings. *Weiland*, 792 F.3d at 1321-23.

> The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type, at least as far as our published opinions on the subject reflect, is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against. The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.

Id. (footnotes omitted).

Here, the operative complaint, consisting of 233 paragraphs, forty-seven pages, and fourteen counts, is an impermissible shotgun pleading. For instance, Plaintiff sets forth general allegations in paragraph one through eighty-four. [DE 39 ¶¶ 1-84]. Then, Plaintiff incorporates all of the general allegations into Count I. [*Id.* ¶ 85]. This indiscriminate incorporation of each numbered paragraph of factual allegations, without separating which of those allegations relate to a particular count, results the inclusion of factual allegations that are immaterial to the underlying causes of action. *Barmapov*, 986 F.3d at 1325. Thereafter, with the exception of Count XIII and XIV, beginning with Count II, Plaintiff adopts the allegations in the preceding count(s) in each successive count. [DE 39 ¶¶ 106, 116, 124, 130, 140, 157, 178, 193, 208, 217]. This "incorporation into successive counts all preceding allegations and counts, is a quintessential 'shotgun' pleading." *Keith v. DeKalb Cnty.*, 749 F.3d 1034, 1045 n. 39 (11th Cir.2014). To be clear, Plaintiff may incorporate numbered paragraphs by reference later in the pleading; however, this is only appropriate when the referenced paragraphs are relevant. *Diaz v. Mekka Miami Grp. Corp.*, No. 16-CV-20589, 2016 WL 11201731, at *3 (S.D. Fla. June 21, 2016). Accordingly, the undersigned recommends dismissing the complaint without prejudice on the grounds that the pleading does not comply with Rules 8(a)(2) and 10(b).[3]

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[3] The undersigned encourages a review of the concurring opinion in *Barmapov*, which offers detailed guidance on avoiding shotgun complaints. *Barmapov*, 986 F.3d at 1326-27 (Tjoflat, J.,

III. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, this Court respectfully recommends that Defendants' Joint Motion to Dismiss Amended Complaint and Motion to Strike [DE 53] be **GRANTED IN PART AND DENIED IN PART.** Plaintiffs shall plead its case in accordance with Federal Rules of Civil Procedure 8(a)(2) and 10(b).

IV. NOTICE OF RIGHT TO OBJECT

In accordance with 28 U.S.C. § 636(b)(1) and the Magistrate Rules of the Local Rules of the Southern District of Florida, the parties have fourteen (14) days from the date of this Report and Recommendation within which to file and serve written objections, if any, with the United States District Judge. Failure to file timely objections shall bar the parties from attacking any factual findings contained herein on appeal. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

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concurring). Moreover, with the benefit of having analyzed Defendants' fifty-page Motion seeking to dismiss each and every count, the undersigned is hopeful that Plaintiff's amended pleading will be as specific and clear as possible.

DONE AND RECOMMENDED in Chambers at West Palm Beach in the Southern District of Florida, this 7th day of May, 2021.

/s/ Dave Lee Brannon
DAVE LEE BRANNON
U.S. MAGISTRATE JUDGE