No. 19-

In The
SUPREME COURT of the UNITED STATES

MARK J. SCHWARTZ,
Petitioner

v.

CLARK COUNTY and JACQUELINE R. HOLLOWAY,
Respondents

On Petition For Writ Of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX PART A

Mary F. Chapman, Esq.
Counsel of Record
Law Office of Mary F. Chapman, Ltd.
8440 West Lake Mead Blvd. #203
Las Vegas, Nevada 89128
(702) 202-4223

APPENDIX PART A

TABLE OF CONTENTS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. SCHWARTZ, No. 18-15930

Plaintiff-Appellant, D.C. No. 2:13-cv-00709-JCM-CFV

v.

CLARK COUNTY, MEMORANDUM[1]

Defendant-Appellee

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Submitted August 7, 2019[2]
Anchorage, Alaska

Before: TALLMAN, IKUTA, and N.R. SMITH, Circuit Judges.

---

3. This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

4. The panel unanimously concludes this case is suitable for decision without oral arguments. See Fed. R. App. P. 34(a)(2). § 1291.

Mark Schwartz appeals from the grant of summary judgment and the jury verdict in favor of defendants on his claims or age and disability discrimination under federal and state law. We have jurisdiction under 28 U.S.C.

The district court did not err in concluding that Schwartz's supervisor, Jacqueline Holloway, was entitled to qualified immunity on Schwartz's § 1983 claim, because Schwartz failed to carry his burden of showing it is clearly established that a county official violates an employee's constitutional rights by manipulating job titles to affect the seniority of an employee for purpose of layoff decisions that are alleged to discriminate on the basis of age or disability. See Kisela v. Hughes, 138 S. Ct. 1148, 1152-53 (2018) (per curiam). While our prior order, Schwartz v. Clark Cty., 650 F. App'x

542, 543-44 (9th Cir. 2016), held that Schwartz had raised a genuine issue of material facts as to whether there was a constitutional violation, it did not address whether any alleged constitutional violation was clearly established, and so does not affect our conclusion here.

We reject Schwartz's argument that the district court's statements before the jury deprived him of a fair trial. Reviewing "the trial record as a whole," Kennedy v. L.A. Police Dep't, 901 F.2d 702, 709 (9th Cir. 1990) abrogated on other grounds by Hunter v. Bryant, 502 U.S. 244 (191) (per curiam), the district court's comments related to the quality and relevance of counsel's evidence rather than to counsel's good faith or integrity, and so do not warrant a retrial, see, e.g., Pau v.Yosemite Park and Curry Co., 928 F.2d 880, 885 (9th Cir. 1991); Shad v.

Dean Witter Reynolds, Inc., 799F.2d 525, 531 (9th cir. 1986).

The district court did not abuse its discretion when it refused to instruct the jury that a witness had previously lied under oath because, among other reasons, it otherwise covered witness credibility in its impeachment instruction. See Jones v. Williams, 297 F.3d 930, 937 (9th Cir. 202) (no error when "the judge gave jury instructions that properly covered the law"). Nor did the district court abuse its discretion when it denied Schwartz's request to instruct the jury that pretext could be shown by direct or indirect evidence because it generally instructed the jury that it "should consider both direct and circumstantial evidence." Finally, the district court did not err when it denim Schwartz's request to give a mixed-motive jury instruction and

instead instructed the jury that it must determine whether Schwartz was laid off "because of" his age or disability. The instruction tracked the language of the statute, see N.R.S. § 613.330(1)(a), (b), which prohibits discrimination "because of" an individual's age or disability, and Schwartz failed to point to Nevada case law that would support a mixed-motive instruction in this context. Moreover, the Nevada Supreme Court has held that mixed-motive instructions generally go against Nevada's strong public policy of at- will employment. See Allum v. Valley Bank of Nev., 970 P.2d 1062, 1066 (Nev. 1998). While Nevada courts may look to analogous federal law for guidance with discrimination claims under § 613.330, see, e.g., Liston v. Las Vegas Metro Police Dep't, 908 P.2d 720, 721 n.2 (Nev. 1995), we held that a mixed-motive instruction is not proper

for federal disability discrimination claims, see Murray v. Mayo Clinic, No. 17-16803, slip op. At 10-11 (9th Cir. Aug. 20, 2019).

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

Case No. 2:13-CV-709 JCM (VCF)

MARK J. SCHWARTZ,

Plaintiff(s), ORDER

v.

CLARK COUNTY, NEVADA, et al.,

Defendant(s).

Presently before the court is defendants Clark County's ("County") and Jacqueline R. Holloway's ("Holloway); collectively "defendants") second motion for summary judgment. (ECF No. 71). Plaintiff Mark J. Schwartz ("plaintiff") filed a response (ECF No. 72), to which defendants replied (ECF No. 73).

I. Facts

The instant actions involve allegation of

wrongful termination pursuant to 42 U.S.C. § the American with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"). ECF No.2-2).

Plaintiff began working for county as an auditor on August 17, 1992. (ECF No. 71-1 at 12). In 2000, plaintiff was promoted to senior management analyst in the Clark County business License Department ("BL"). (ECF No. 71-1 at 13). In either 2007 or 2008, plaintiff received an ADA workplace accommodation to adjust the size of his workplace. (ECF No. 71-1 at 19). From 2005-09, plaintiff received regular, positive employment evaluations noting his "meritorious" and "exemplary" performance. (ECF No. 71-1 at 16-18).

In 2008, Clark County Human Resources ("HR") began to review whether the job title,

management analyst, was an appropriate classification and conducted a county-wide "management analyst study" in which plaintiff participated and completed a "job description questionnaire." (ECF No. 71-1 at 20, 45). Subsequently, in August 2009, HR recommended seventeen (17) possible jobs title changes for forty-four (44) employees recognized as management analyst. (ECF No. 17-1 at 45-46). Pursuant to the management analyst study, three of the five management analyst at BL, excluding plaintiff, received new job titles. (ECF No. 71-1 at 38-39).

In February 2010, the county manager sent Holloway, director of business licensing for Clark County, a "mandate" that instructed her " to do a reduction in force" by dismissing employees to decrease BL's budget by 8 percent. (ECF No. 71-1 at

40). To comply with budget reduction, Holloway determined that "between 8 to 12: employees would be dismissed, including

> A manger of finance, a senior management analyst, a business license agent, an office supervisor, [an] office assistant and an IT...
>
> > Support person... [b]ased on [BL's] needs and functions in the department and also functions and duties that could be absorbed by others.

(ECF No. 71-1 at 41-42).

Because his job title had not been changed subsequent to the management analyst study, plaintiff was notified on June 18, 2010, that he would be dismissed as senior management analyst on July 6, 2010. (ECF No. 71-1 at 20). As a member of a union, SEIU Local 1107, which had made a collective bargaining agreement with County, plaintiff appealed his dismissal pursuant to the

process provided under the terms of the agreement. (ECF No. 71- at 15, 23). Upon reviewing plaintiff's "Statements and documents and other information," the layoff review committee affirmed plaintiff's layoff. (ECF No. 71-1 at 24).

Subsequently, plaintiff filed the underlying complaint alleging three causes of action: (1) violation of the ADEA; (2) violation of the ADA; and (3) violation of civil rights under § 1983. (ECF No. 2-2). The court granted defendant's motion for summary judgment (ECF No. 22), finding, inter alia, that plaintiff failed to raise a genuine dispute of material fact as to whether his termination was motivated by his disability or his age, rather than by legitimate budgetary concerns (ECF No. 43). Plaintiff appealed (ECF No. 46), and the Ninth Circuit revered and remanded on May 27,

2016 (ECF No. 58). The Ninth Circuit determined that plaintiff raised a genuine dispute of material fact as to whether his selection for layoff was pretext for unlawful discrimination and that the evidence supporting plaintiff's ADA and ADEA claims raised a triable issue as to his § 1983 claim against defendant Holloway. (ECF No. 58).

II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings depositions answers to interrogatories, and admissions on file, together with the affidavits, if any show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Lujan v. Nat'l Wildlife Fed, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must "set forth

specific facts showing that there is a genuine issue for trial." Id.

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went incontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." C.A.R. Transp. Brokerage Co. V. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). By Contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1)

by presenting evidence to negate an essential element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed t make a showing sufficient to establish an element to that party's case on which that party will bear the burden of proof at trial. See Celotex Corp., 477 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden then shifts to the opposing party to establish that a genuine issue of a material fact exists. See Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986). To establish that existence of a factual dispute, the opposing party

need not establish a material issue of fac conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties" differing versions of the truth at trial." T.W. Elec. Serv., Inc., v. Pac. elec. Contractors Ass'n, 809 F.2d 1040, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. See Celotex, 447 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth,

but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. See id. At 249-50.

III. Discussion

Defendants move for summary judgment based on qualified immunity grounds in the interest of Holloway. (ECF No. 71). In response, plaintiff argues that pursuant to the Ninth circuit's reversal and remand, the "case must be scheduled for a jury trial." (ECF No. 72 at 5). The court disagrees.

When a plaintiff brings a claim under 42 U.S.C. § 1983, government officials sued in their

individuals capacities may raise the affirmative, defense of qualified immunity. See, e.g. Spoklie v. Montana, 411 F.3d 1051, 1060 (9th Cir. 2005); Goodman v. Las Vegas Metro, Police Dep't, 963 F. Supp. 2d 1036, 1058 (D. Nev. 2013). Qualified immunity protects public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

"Qualified immunity balances two important interest–the need to hold public officials accountable when they exercise power irresponsibility, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231

(2009). "The principals of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." Id. At 244. It allows for officials to make reasonable mistakes regarding the lawfulness of their conduct by excusing reasonable mistakes. See id, at 231. Second, the court decides whether the right at issue was clearly established at he time of the defendant's alleged misconduct. Id.

To overcome a claim of qualified immunity, the plaintiff bears the burden of proof on both points. See Cruz v. Kauai County, 279 F.3d 1064, 1069 (9th Cir. 2002).

On appeal, the Ninth Circuit determined that plaintiff "raised a genuine dispute of material fact as to whether his selection for a layoff was ... unlawful" and that "evidence supporting [plaintiff's] ADA and

ADEA claims also raises a triable issue." (ECF No. 58 at 2-4). Accordingly, because the Ninth Circuit determined that whether a constitutional right was violated is a triable issue, plaintiff satisfies the first qualified immunity prong.

The second prong focuses on whether, at the time of the alleged violation, reasonable officer would have known, based on "clearly established" authority, that the conduct at issue violated a constitutional right. See, e.g. Mattos v. Agarano, 661 F.3d 433, 442 (9th Cir. 2011) ("For the second step in the qualified immunity analysis –whether the constitutional right was clearly established at the time of the conduct–we ask whether its contours were sufficiently clear that every reasonable official would have understood tht what he is doing violates that right." (Internal quotation marks and citations

omitted)).

The second "clearly established" prong of the qualified immunity anaylis involves the issue of the "fair warning"–specifically, whether prior decisions gave reasonable warning that the conduct at issue violated a constitutional right. See Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam). "The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: [t]he contours of the right must be sufficiently clear that a rasonable official would understand that what he is doing violates that right." Saucier v. Katz, 553 U.S. 194, 202 (2001) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Thus, the dispositive questions is "whether it would be clear to a reasonable officer that his conduct was unlawful in

the situation he confronted." Id.

The United States Supreme Court recently reiterates "the longstanding principal that "clearly established law" should not be defined "at a high level of generality." White v. Purdy, 137 S. Ct. 548, 552 (2017) (per curiam) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011). "[T]he clearly established law must be 'particularized' to the facts of the a case." Id. (citing Anderson, 483 U.S. at 640).

In the Ninth Circuit, a court begins its inquiry of whether a right is clearly established by looking to binding precedent on the allegedly violated right. Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004). "While [w]e do not require a case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate." Mattos, 661 F.3d at 442 (internal quotation marks

and citation omitted).

In response to defendants' second motion for summary judgment, plaintiff makes two arguments against Holloway's qualified immunity defense: (1) tat the "Ninth Circuit specifically found that issues of triable fact exists as to whether ms. Holloway violated § 1983...and the case must proceed to trial to have the facts determined by the trier of fact:; and (2) that "[m]atters that have been decided on appeal are beyond the jurisdiction of the lower court." (ECF No. 72 at 3-4).

Plaintiff fails to meet his burden of establishing a clearly established right at the time of Holloway's alleged misconduct by citing "existing precedent" that "places the statutory or constitutional question beyond debate." Mattos, 661 F.3d at 442 (internal quotation marks and citation

omitted).

Accordingly, plaintiff fails to satis fy the two-prong inquiry to determine whether Holloway is not entitled to qualified immunity.

IV. Conclusion

In sum, defendants' second motion for summary judgment as to Holloway's qualified immunity on plaintiff's § 1983 claim is granted.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion for summary judgment (ECF No. 71) be, and the same hereby is GRANTED.

DATED June 20, 2017.

/s// James C. Mahan
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. SCHWARTZ,	No. 18-15930
Plaintiff-Appellant	D.C. No.
v.	2:13-cv-00709-JCM-VCF
CLARK COUNTY	District of Nevada
	Las Vegas
Defendant-Appellee	

ORDER

Before: TALLMAN, IKUTA, and N.R. SMITH, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing.

The petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. SCHWARTZ,	No. 14-16365
Plaintiff - Appellant,	D.C. No. 2:13-
v.	cv-00709-JCMVCF

CLARK COUNTY and JACQUELINE R. HOLLOWAY,

Defendants - Appellees.

MEMORANDUM[3]

Appeal from the United States District Court for the District of Nevada

James C. Mahan, District Judge, Presiding

Argued and Submitted May 11, 2016

San Francisco, California

Before: WARDLAW, PAEZ, and BEA, Circuit Judges.

Mark Schwartz appeals the district court's grant of

---

5. This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir R. 36-3

summary judgment in favor of defendants on his Americans with Disabilities Act ("ADA"), Age Discrimination in Employment Act ("ADEA"), and § 1983 claims. The district court held that Schwartz failed to raise a genuine dispute of material fact as to whether his termination was motivated by his disability or his age, rather than by legitimate budgetary concerns. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse.

1. Schwartz has raised a genuine dispute of material fact as to whether his selection for a layoff was pretext for unlawful discrimination. The record evidence shows that Clark County hired Schwartz pursuant to an agreement settling a charge of discrimination he filed with the Nevada Equal Rights Commission. During his eighteen-year tenure in the Business Licensing Department, Schwartz

consistently met or exceeded expectations and was "an exemplary team member," yet was isolated and ignored by the head of the department, Jacqueline Holloway. The record also supports Schwartz's theory that Holloway manipulated the results of the Human Resources ("HR") study to single him out for a layoff: HR initially recommended title changes for only two of the six Management Analysts in the Business Licensing Department. After Holloway became involved, five of the six—all of whom were non-disabled and younger than Schwartz—either received or was offered a title change, while Schwartz remained classified as a Management Analyst. Holloway then laid off all of the Management Analysts in her department pursuant to the reduction in force. Additionally, during her deposition, Holloway repeatedly lied

about her involvement in the HR study and 2 title change process: Holloway testified that she learned of the HR study results just one month before they were finalized, and she had input only as to one "technical note." However, internal memoranda reveal that Holloway received the study results more than nine months before they were finalized, and HR "invite[d] [her] comments or suggestions." Similarly, Holloway testified that she was not aware that S.P. had been offered a title change. But email correspondence shows that Holloway was aware of the proposed change. In fact, when Holloway and Daniel Hoffman received push back from HR for S.P.'s proposed title change, one of Holloway's employees wrote and sent Holloway a statement defending it. A reasonable jury could infer that this false testimony evinced Holloway's

consciousness that she had unlawfully singled Schwartz out for the layoff. Although "the circumstantial evidence relied on by the plaintiff must be specific and substantial" to defeat a motion for summary judgment, "a plaintiff's burden to raise a triable issue of pretext is hardly an onerous one." France v. Johnson, 795 F.3d 1170, 1175 (9th Cir.), as amended on reh'g (Oct. 14, 2015) (citations omitted). Considering this and other evidence in the light most favorable to Schwartz, a reasonable jury could conclude that Holloway's explanation is "unworthy of credence" and that Schwartz was, in fact, terminated because of his disability and/or age. Id.[4]

---

6. The dissent emphasizes that Holloway never made negative comments about Schwartz's disability or age to Schwartz or his co-workers, thereby inferring that Holloway simply "was not particularly fond of" Schwartz. As the Supreme Court has observed, however, contemporary discrimination tends to be more subtle than the "undisguised restrictions" and overt

2. The district court also erred in granting summary judgment on Schwartz's § 1983 claim. The district court held that Schwartz's parallel constitutional claim failed because he "provide[d] no evidence that a discriminatory policy or practice enacted by the municipality existed." But Schwartz asserted a § 1983 claim only against Holloway, arguing that she abused her position to discriminate against him in violation of his rights to due process and equal protection. The evidence supporting Schwartz's ADA and ADEA claims also raises a triable issue as to this claim.

REVERSED AND REMANDED.

---

expressions of bias that were once commonplace. Ricci v. DeStefano, 557 U.S. 557, 620 (2009). And discrimination, "subtle or otherwise," is intolerable and unlawful. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).