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NOT FOR PUBLICATION

AUG 12 2020

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL NEELY, an individual,

No. 19-35449

Plaintiff-Appellant,

D.C. No. 2:16-cv-01791-JCC

v.

MEMORANDUM*

THE BOEING COMPANY, a corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted August 10, 2020 **

Before: SCHROEDER, Trott, and SILVERMAN, Circuit Judges

Michael Neely appeals the district court's judgment in favor of Boeing in Neely's action alleging that Boeing discriminated against him in violation of the Age Discrimination in Employment Act (ADEA) and Washington Law Against

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

Discrimination (WLAD); breached an employment contract; and retaliated against him in violation of the ADEA, WLAD, public policy, and various federal whistleblower statutes. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's dismissal and summary judgment orders *de novo*.

Van Asdale v. Int'l Game Tech., 577 F.3d 989, 994 (9th Cir. 2009); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008). We affirm.

The district court properly dismissed Neely's claims that Boeing violated the Sarbanes-Oxley Act and Dodd-Frank Act by firing him for complaining about safety issues. Regarding Sarbanes-Oxley, Neely failed to plead facts to show an objectively reasonable belief that his complaints "definitively and specifically relate[d] to" covered fraud. *Van Asdale*, 577 F.3d at 996-97, 1001 (listing the covered fraud and requiring an objectively reasonable belief that there was fraud that "approximate[s] the basic elements of" the covered fraud) (internal quotation marks omitted). Neely does not qualify as a whistleblower under Dodd-Frank because he did not file a securities complaint with the Securities and Exchange Commission prior to his termination. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 778 (2018).

The district court did not err by dismissing the breach of contract claim. Neely failed to allege facts to establish that the documents attached to his

complaint created an employment contract. *Manzarek*, 519 F.3d at 1031 (noting that courts are not required to accept as true conclusory allegations contradicted by the relevant documents referenced in the complaint).

The district court properly granted summary judgment for Boeing on Neely's claims that he was terminated because of his age in violation of the ADEA or WLAD. For his direct evidence claim, Neely failed to directly tie his Alabama supervisor's alleged March 2015 discriminatory attitude to Neely's 2016 termination during the reduction in force (RIF). *France v. Johnson*, 795 F.3d 1170, 1173 (9th Cir. 2015). Neely was ranked lowest in the 2016 RIF because his Washington supervisors reported that Neely's inability to work with other workers and suppliers was impeding his ability to perform his job in Washington. For disparate treatment, Neely failed to establish that he was performing his job satisfactorily in light of the undisputed evidence that his personal skills were impeding his performance and that the problems continued after he was counseled by the Washington supervisors. *Cf. Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1208 (9th Cir. 2008) (holding that an individual who continues to violate company policy over an extended period of time after receiving a warning has not demonstrated satisfactory performance). In any event, Boeing came forward with specific and legitimate nondiscriminatory reasons for terminating Neely, a

reduction in force due to decreased funding and Neely's undisputed lack of personal skills, which gave him the lowest score among the engineers considered for termination. Neely failed to come forward with "specific and substantial" evidence that his termination during the RIF was a pretext for age discrimination. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003) (listing the ways to prove pretext).

The district court properly granted summary judgment on Neely's retaliation claims. Even if Neely could prove a causal link between his discrimination complaints and the adverse employment actions,¹ Boeing came forward with specific nonretaliatory reasons for issuing the written warning and poor performance evaluation and terminating Neely in the RIF. For the written warning, Neely admitted that he violated the alcohol reimbursement policy a second time after being warned about the policy. The other three individuals who were warned did not violate the policy a second time. Neely's 2015 employment evaluation accurately reported that Neely's uncontested inability to work with others was interfering with his work in Washington. There was no evidence that the Washington supervisors, who were the source of the adverse performance

¹*Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1188-89 (9th Cir. 2005) (finding no causal link where an adverse performance rating was accurate).

evaluation ratings, knew or suspected that Neely had filed an age discrimination complaint against his Alabama supervisor. Finally, Neely's undisputed inability to work with others gave him the lowest score among the engineers who were considered for termination during the RIF. Neely did not come forward with specific and substantial evidence that the nonretaliatory reasons given by Boeing were pretext for retaliation.

Neely waived his claim that Boeing fired him in violation of WLAD public policy by failing to address the claim in his opening brief filed with this court. *Frank v. Schultz*, 808 F.3d 762, 763 n.3 (9th Cir. 2015) (per curiam). We decline to consider Neely's argument that Boeing fired him in violation of public policy because he reported safety violations. He waived that claim in the district court. *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

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The Clerk is requested to award costs to (*party name(s)*):

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OCT 19 2020

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No. 19-35449

D.C. No. 2:16-cv-01791-JCC
Western District of Washington,
Seattle

ORDER

Before: SCHROEDER, Trott, and SILVERMAN, Circuit Judges.

Appellant's urgent motion to waive or to defer filing fees for his petition for rehearing (Docket Entry No. 52) is denied as unnecessary.

The panel has voted to deny Appellant's petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.