

IN THE SUPREME COURT OF THE STATE OF NEVADA

STAN LAU,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF
TRANSPORTATION, A STATE ENTITY,
Respondent.

No. 59580

STAN LAU,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF
TRANSPORTATION, A STATE ENTITY,
Respondent.

No. 59679

FILED

JAN 21 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from district court orders granting summary judgment and awarding attorney fees and costs in an employment matter. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Stan Lau resigned from his position as an engineering technician after his employer, respondent Nevada Department of Transportation, recommended his termination following a series of failed drug tests. Appellant then filed a complaint in the district court alleging age discrimination and retaliation claims arising from appellant's failure to obtain a promotion after numerous interviews, alleged hostile work environment, and discipline received. Respondent moved for summary judgment, arguing that it had legitimate, nondiscriminatory motives for its employment actions and that appellant

had failed to create a genuine issue of material fact as to whether respondent's reasons were a pretext for discriminatory motives. The district court granted summary judgment in favor of respondent and subsequently awarded respondent costs and attorney fees. These appeals followed.

Having considered the parties' arguments and the record, we conclude that the district court properly granted summary judgment in respondent's favor. See NRCP 56(e) (setting forth the summary judgment standard); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (explaining that this court reviews summary judgments de novo). Appellant's complaint alleged two claims: age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 (2012), and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (2011).¹ Appellant's age discrimination claim appears to arise from his failure to receive promotions into two positions that ultimately went to candidates who were younger than 40 years old.² A plaintiff alleging a

¹While the record indicates that appellant later attempted to raise a gender discrimination claim in his opposition to the motion for summary judgment, he never amended his complaint to include such a claim, and the district court properly declined to consider the argument. See NRCP 15 (providing for amendments to pleadings); see also *Scott v. Dep't of Commerce*, 104 Nev. 580, 586, 763 P.2d 341, 345 (1988) (allowing amended complaints only when the new claim relates back to the original pleadings).

²Appellant's appellate briefs also allege age discrimination arising from a hostile work environment and his discipline received in addition to his failure to obtain a promotion, but the record does not indicate that appellant made allegations below that he was subjected to disparate

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failure-to-promote ADEA violation must first establish a prima facie case of age discrimination. *Shelley v. Geren*, 666 F.3d 599, 608 (9th Cir. 2012). Once a prima facie case is established, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for its action. *Id.* The employer's articulation of a legitimate, nondiscriminatory reason shifts the burden back to the employee to raise a genuine factual question as to whether the proffered reason is pretextual. *Id.* Although appellant established a prima facie case, respondent provided legitimate, nondiscriminatory reasons for selecting other candidates for the positions appellant had sought. Thereafter, appellant failed to present specific facts showing that those reasons were pretext, and thus, summary judgment on appellant's age discrimination claim was appropriate. *See Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (concluding that mere assertions of a discriminatory motivation in failing to promote the plaintiff, without substantial factual evidence, is inadequate to rebut the employer's legitimate, nondiscriminatory reason for its conduct); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1030-31 (explaining that to withstand summary judgment, the nonmoving party must present specific facts demonstrating a genuine issue of material fact supporting his claims).

Appellant also argues that the district court erred in granting summary judgment on his retaliation claim. Similar to an age discrimination claim, if an employee establishes a prima facie retaliation

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treatment or discipline based on his age. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that this court will not consider an issue raised for the first time on appeal).

claim, the burden then shifts to the employer to provide legitimate, nondiscriminatory reasons for its actions. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002) (explaining that a prima facie case requires a showing that the employee engaged in protected activity, suffered an adverse employment decision, and that, by a preponderance of the evidence, there was a causal link between the protected activity and the adverse employment decision). Here, even if appellant established a prima facie retaliation case, respondent presented legitimate, nonretaliatory reasons for each of its actions underlying appellant's retaliation claim. Appellant then failed to present specific facts, beyond general allegations, which present genuine issues of material fact regarding whether respondent's actions were retaliatory in nature, and we therefore find no error in the district court's order granting summary judgment in respondent's favor.

The district court also awarded attorney fees and costs to respondent because appellant had rejected respondent's offer of judgment. *See* NRCPC 68; NRS 17.115(4); *RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41, 110 P.3d 24, 28 (2005) (setting forth the factors to consider in awarding attorney fees based on an offer of judgment). Appellant has not demonstrated that the district court abused its discretion when it found that the factors weighed in favor of awarding attorney fees and costs to respondent. *See RTTC Commc'ns*, 121 Nev. at 40, 110 P.3d at 28 (explaining that this court reviews an attorney fees and costs award for an abuse of discretion); *see also Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994) (noting that

when "the record is as susceptible of one conclusion as another, it will not be presumed that the district court erred").

Accordingly, we affirm the district court's orders granting summary judgment and awarding attorney fees and costs.

It is so ORDERED.³

J. Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Hon. James Todd Russell, District Judge
Robert L. Eisenberg, Settlement Judge
Jeffrey A Dickerson
Attorney General/Transportation Division/Carson City
Attorney General/Las Vegas
Carson City Clerk

³To the extent that appellant's arguments have not been expressly addressed in this order, we conclude that those arguments lack merit.