

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 25 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JEFFREY TONEY,

Plaintiff - Appellant,

v.

THE CLOROX COMPANY,

Defendant - Appellee.

No. 24-2567

D.C. No.

3:22-cv-05730-BHS

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted April 4, 2025
Portland, Oregon

Before: BYBEE and FORREST, Circuit Judges, and RODRIGUEZ, District
Judge.**

Plaintiff-Appellant Jeffrey Toney, a white male, appeals the district court's

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

** The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas, sitting by designation.

grant of The Clorox Company’s summary judgment motion dismissing his claims of age, gender, and racial discrimination under the Washington Law Against Discrimination, Revised Code of Washington § 49.60.180. We have jurisdiction under 28 U.S.C. § 1291 and review the district court’s grant of summary judgment de novo. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1219–20 (9th Cir. 1998) (citations omitted). We reverse the grant of summary judgment as to Toney’s gender discrimination claim and affirm the district court’s grant of summary judgment as to Toney’s age and race claims.

1. In this employment discrimination case, we address the plaintiff’s burden to raise a triable issue of fact as to pretext under the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973) as adopted by Washington courts. *Scrivener v. Clark Coll.*, 334 P.3d 541, 546 (Wash. 2014) (en banc).

Once the defendant has proffered a reason for the termination, a plaintiff may establish pretext “indirectly, by showing that the employer’s proffered explanation is ‘unworthy of credence’ because it is internally inconsistent or otherwise not believable[.]” *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000) (citing *Godwin*, 150 F.3d at 1220–22). Pretext may also be established by showing “that although the employer’s stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer.” *Scrivener*, 334 P.3d

at 544 (citing *McDonnell Douglas Corp.*, 411 U.S. at 792).

Clorox offered the reorganization of its sales staff and concerns about Toney's employment competencies as non-discriminatory reasons for his termination. Specifically, Clorox stated that Toney had issues with strategic leadership, and that he could be difficult to work with. Toney offered evidence that Clorox's reasons for terminating him were internally inconsistent, including positive annual performance evaluations, and minimal pretermination evidence of Clorox's concerns about Toney's performance. A reasonable jury could conclude that Clorox's reasons for firing Toney were internally inconsistent. In addition, the company's IGNITE Strategy, which was in effect at around the time of his termination is circumstantial evidence that Clorox had a goal to increase the number of women managers at the company in order to achieve its gender "representation targets." The evidence is sufficiently "specific and substantial" to defeat Clorox's motion for summary judgment, as it raises material questions of fact concerning Clorox's reasons for firing him. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005).

We conclude that the evidence Toney has offered cumulatively presents genuine issues of material fact as to whether Toney's termination constituted wrongful termination on the basis of gender. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003).

2. We affirm, however, the district court's grant of summary judgment as to

Toney's race and age discrimination claims. Toney has not presented evidence on these claims that would create a genuine dispute of material fact sufficient to demonstrate pretext. Toney offers no evidence of racial discrimination. As to Toney's age claims, the record reflects that Clorox VP Gina Kelly's comments referencing the future were simply part of a list of criteria considered when the employees were evaluated for the new positions. Those comments are not enough to allow a reasonable jury to conclude that Kelly's statements demonstrate pretext or that Toney's age was a substantial motivating factor in the company's decision to terminate Toney.

We affirm the district court's grant of summary judgment on Toney's race and age discrimination claims, reverse the grant of summary judgment on Toney's gender discrimination claim and remand to the district court for further proceedings consistent with this disposition. Each party shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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 electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. 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. 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 or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- 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(d).
- 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. 40-4.

(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*.
- Attorneys must file the petition electronically via the appellate electronic filing 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) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. 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: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

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

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Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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