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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STACEY WATTS,

Plaintiff - Appellant,

v.

STATE OF NEVADA,

Defendant - Appellee.

No. 08-15793

D.C. No. 2:06-CV-00199-HDM-  
GWF

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Howard D. McKibben, District Judge, Presiding

Argued and Submitted September 15, 2009  
San Francisco, California

Before: SCHROEDER, REINHARDT and HAWKINS, Circuit Judges.

Stacey Watts (“Watts”), a former employee of Nevada’s Division of Forestry (“NDF”), appeals the adverse grant of summary judgment on her Title VII sex discrimination and retaliation claims against Nevada, arguing that there are genuine issues of material fact as to whether Nevada’s proffered justification for terminating Watts was pretextual.

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

## **I. Discrimination Claim**

Watts established her prima facie case of sex discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and Nevada has articulated a legitimate, nondiscriminatory reason for terminating Watts. The question is whether Watts has introduced adequate evidence for a reasonable jury to find Nevada's articulated reason pretextual.

Watts has failed to establish a material issue of fact as to discrimination. She has not shown any "clearly sexist, racist, or similarly discriminatory statements or actions by the employer" that "prove[] the fact of discriminatory animus without inference or presumption." *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005) (internal quotations, citations, and alterations omitted).

Similarly, Watts has not raised indirect evidence "showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable." *Fonseca v. Sysco Food Serv. of Ariz., Inc.*, 374 F.3d 840, 849 (9th Cir. 2004) (quoting *Lyons v. England*, 307 F.3d 1092, 1113 (9th Cir. 2002)). As the trial court found, NDF has consistently pointed to Watts's excessive absenteeism and failure to modify her behavior in response to numerous warnings.

Finally, Watts failed to produce any evidence of any other employee who was absent as often as she whom NDF treated differently.

## II. Retaliation Claim

At issue here is whether a reasonable jury could infer that Watts was terminated because of her Title VII protected activity rather than because of her abuse of administrative and sick leave.

Read fairly and as a whole, the record supports the district court's determination that a pattern of leave abuse was the reason for Watts's termination and that this reason was not pretext. Although the interval between the employee's most recent activity and the adverse employment action is relevant, *see, e.g., Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003), the district court relied on the overwhelming weight of evidence in the record in concluding that Watts was terminated for her long series of absences, stretching over more than two years, as well as her incidents of insubordination. Watts failed to "present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). She instead acknowledged her repeated absences and NDF's progressive discipline, which included multiple suspensions.

Watts has not met her burden of providing either direct or indirect evidence that her termination was motivated by discriminatory intent, nor has she raised a material issue in support of her claim that her termination was retaliatory. The termination was

the final step in a long line of progressive discipline for conduct dating back to nearly the beginning of Watts's employment and followed two suspensions of increasing length. Under such circumstances, summary judgment for Nevada on the discrimination and the retaliation claims was proper.

**AFFIRMED.**