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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRISTAN JUSTICE, Plaintiff-Appellant, v. ROCKWELL COLLINS, INC.; NARESH ARGARWAL, Defendants-Appellees.	No. 15-35678 D.C. No. 3:12-cv-01507-AA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted December 18, 2017**

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

Tristan Justice appeals pro se from the district court's summary judgment in his action alleging federal and state law claims in connection with his employment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 639 (9th Cir. 2004). We affirm.

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* 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).

The district court properly granted summary judgment on Justice's federal and state law unpaid wages claims because Justice failed to raise a genuine dispute of material fact as to whether he was denied overtime pay to which he was entitled. *See* 29 C.F.R. § 778.105 ("[A workweek] need not coincide with the calendar week but may begin on any day and at any hour of the day"); Or. Admin. R. 839-020-0030(2)(a) (defining work week as "any" seven consecutive twenty-four hour period).

The district court properly granted summary judgment on Justice's federal and state law sexual harassment claims because Justice failed to raise a triable dispute as to whether the alleged conduct was by a supervisor and whether Rockwell Collins, Inc. ("Rockwell") failed to take prompt and effective remedial action. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441-42 (2013) (discussing employer liability for Title VII claims); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 n.15 (9th Cir. 2003) (setting forth elements of quid pro quo claim under Title VII); *Brooks v. City of San Mateo*, 229 F.3d 917, 923-924 (9th Cir. 2000) (setting forth elements of hostile work environment claim under Title VII); *Mains v. II Morrow, Inc.*, 877 P.2d 88, 93 (Or. Ct. App. 1994) (explaining quid pro quo and hostile work environment claims under Oregon law).

The district court properly granted summary judgment on Justice's federal and state law retaliation claims for complaining about unpaid wages because Justice failed to raise a triable dispute as to whether there was a causal connection between any protected activity and an adverse action. *See* 29 U.S.C. § 215(a)(3); Or. Rev. Stat. § 653.060; *see also Lambert v. Ackerley*, 180 F.3d 997, 1005-07 (9th Cir. 1999) (explaining elements of retaliation claim under the Fair Labor Standards Act).

The district court properly granted summary judgment on Justice's federal and state law retaliation claims for complaining about sexual harassment because Rockwell articulated legitimate, non-discriminatory reasons for ending Justice's contract and Justice failed to raise a triable dispute as to whether those reasons were pretextual. *See Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1034-35 (9th Cir. 2006) (setting forth elements and analysis for retaliation claims under Title VII and Oregon law).

The district court properly granted summary judgment on Justice's retaliation claim for complaining about workplace safety because the claim was barred by the statute of limitations. *See* Or. Rev. Stat. Ann. §§ 654.062(6)(c), 659A.875(1) (one-year statute of limitations).

The district court properly granted summary judgment on Justice's racial discrimination claim under 42 U.S.C. § 1981 because Justice failed to raise a triable dispute as to whether Rockwell discriminated against him on the basis of his race. *See Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1123 (9th Cir. 2008) ("§ 1981 creates a cause of action only for those discriminated against on account of their race or ethnicity").

The district court properly granted summary judgment on Justice's intentional infliction of emotional distress claim against Rockwell because Justice failed to raise a triable dispute as to whether the employees' alleged conduct occurred within the scope of employment. *See Ballinger v. Klamath P. Corp.*, 898 P.2d 232, 243 (Or. Ct. App. 1995) (under Oregon law an employer is liable for an employee's tort if the employee acts within the scope of employment).

The district court properly granted summary judgment on Justice's intentional infliction of emotional distress claim against Argarwal because Justice failed to raise a triable dispute as to whether Argarwal's alleged conduct was extreme and outrageous, or that Argarwal intended to cause emotional distress. *See McGanty v. Staudenraus*, 901 P.2d 841, 849 (Or. 1995) (setting forth elements of intentional infliction of emotional distress claim under Oregon law).

The district court properly granted summary judgment on Justice's claim for punitive damages against Argarwal because Justice failed to raise a triable dispute as to whether Argarwal acted with malice or a reckless and outrageous indifference to a highly unreasonable risk of harm. *See Schwarz v. Philip Morris USA, Inc.*, 355 P.3d 931, 937-38 (Or. Ct. App. 2015) (standard for awarding punitive damages).

The district court did not abuse its discretion in denying Justice's motion to compel discovery, motion for sanctions, and motion to disqualify Argarwal's counsel. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (standard of review for motion to compel); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000) (standard of review for motion for sanctions); *Unified Sewerage Agency of Wash. Cnty., Or. v. Jelco Inc.*, 646 F.2d 1339, 1351 (9th Cir. 1981) (standard of review for motion to disqualify).

The district court did not abuse its discretion in striking portions of Justice's declaration. *See Yeager v. Bowlin*, 693 F.3d 1076, 1081-82 (9th Cir. 2012) (setting forth standard of review and explaining that under the "sham affidavit" rule, "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony" (citation and internal quotation marks omitted)).

Contrary to Justice's contention, the district court was not obligated to hold a competency hearing or appoint a guardian ad litem before dismissing his action because there was insufficient evidence of mental incompetence. *See Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005) (a pro se civil litigant is "entitled to a competency determination when substantial evidence of incompetence is presented").

We reject as unsupported by the record Justice's contention that the district court's improperly considered his deposition testimony.

We do not consider documents not presented to the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

We do not consider arguments and allegations raised for the first time on appeal, or matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright,* 587 F.3d 983, 985 n. 2 (9th Cir.2009).

AFFIRMED.