IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY V. CAMP,
Appellant,
vs.
CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, D/B/A UNIVERSITY MEDICAL CENTER,
Respondent.

No. 44190

FILED

MAY 17 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a complaint in an employment matter. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge. We affirm.

FACTS AND PROCEDURAL HISTORY

Mary V. Camp began employment as a radiology clerical supervisor with University Medical Center (UMC) in Las Vegas. She was subject to termination only for cause.

When UMC hired Camp in March 1995, UMC's personnel policy provided that an employee could appeal a pre-termination hearing decision within ten days of receiving it. Shortly thereafter, UMC subsequently revised its policies and procedures. In September 1995, Camp signed a document acknowledging receipt of the new policies and her responsibility to become familiar with them. One of the revised policies provided that an employee could only appeal a pre-termination hearing decision within three days of its receipt.

In December 2002, UMC suspended Camp without pay pending termination. In short, UMC claimed that Camp approved payment for non-existent work by her employees. Camp disputed the

allegations. The parties attended a pre-termination hearing in late February 2003, and the hearing officer issued a decision recommending termination on March 19, 2003. UMC sent the decision via certified mail to Camp, and an unidentified person signed her name on the return receipt on her behalf on March 22, 2003. Camp's attorney requested an appeal of the decision on April 1, 2003. UMC denied the request, stating that the request was untimely under the revised three-day appeal policy.

Camp filed a complaint against UMC in district court alleging bad faith tortious discharge, among other causes of action. UMC moved under NRCP 12(b)(5) to dismiss based on Camp's alleged failure to timely request an appeal of the pre-termination decision. Documents concerning the termination process, including the untimely written appeal request, were verified via an affidavit from UMC Labor Relations Manager Charles H. Odgers.

Camp opposed the motion, claiming in an affidavit that she never signed, or authorized anyone to sign, the receipt for the termination decision. She further stated that she did not actually receive the written pre-termination decision until February 2004.[1] After considering briefing and oral argument, the district court granted UMC's motion to dismiss.

DISCUSSION

Motion to dismiss

Camp claims, and we agree, that her complaint, on its face, stated claims upon which relief could be granted that would survive dismissal under NRCP 12(b)(5). We note, however, that the district court

[1]Her attorneys filed the appeal on April 1, 2003, after Camp learned from co-workers that UMC was seeking her replacement as radiological clerical supervisor.

considered matters outside the pleadings, namely the Odgers' affidavit. Accordingly, the district court was empowered to treat the motion as one for summary judgment under NRCP 56. In this, NRCP 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Because both parties submitted exhibits or "matters outside the pleadings" with regard to the motion to dismiss, the district court should have treated the motion as a motion for summary judgment.[2]

Camp asserts that the motion could not be treated as one for summary judgment because Odgers lacked personal knowledge of the circumstances in this case detailed in his affidavit.[3] We disagree. Odgers stated in his affidavit that, as labor relations manager for UMC, he was familiar with Camp's file. This averment finds support in a February 14, 2003, letter from Camp's former supervisor, Daniel J. Del Zoppo, mentioning that Odgers attended a meeting between Camp and UMC personnel regarding her suspension. This letter suggests that Odgers had personal knowledge sufficient to submit an affidavit verifying UMC's

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[2]See Stevens v. McGimsey, 99 Nev. 840, 841, 673 P.2d 499, 500 (1983).

[3]Affidavits in support of NRCP 56 motions for summary judgment must be made on personal knowledge; i.e., the affiant must be competent to testify to the matters asserted in the affidavit.

exhibits accompanying its motion. Therefore, UMC sufficiently demonstrated the authenticity of its exhibits to permit consideration of them below. Accordingly, while the district court dismissed the case under NRCP 12, we will treat the dismissal as an order granting summary judgment.

Summary judgment

We review a district court's summary judgment decision de novo.[4] Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file demonstrate that no genuine issue of material fact exists.[5] The nonmoving party may not rest upon general allegations and conclusions, but must set forth specific facts demonstrating the existence of a genuine factual issue, by affidavit or otherwise.[6] "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."[7]

Camp argues that the following issues of fact precluded summary judgment: (1) whether she reasonably relied upon UMC's pre- and post-termination procedures, as set forth in the employment policy presented to her at the time of hire; (2) whether she had three versus ten days from receipt of the pre-termination hearing decision to appeal the

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[4]GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001).

[5]Pegasus v. Reno Newspaper, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (citing NRCP 56).

[6]Id.

[7]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1031 (2005).

decision; and (3) whether she waived her right to a post-termination hearing.

Governing employment policy and corresponding time available to appeal

Camp disputes the enforceability of the revised employment policy providing that an employee had three working days from receipt of a pre-termination hearing decision to appeal her termination. She asserts that she was entitled to rely on the original policy presented to her at the time of her hire, which provided ten days for appeal. We disagree. First, she does not dispute that she received the revised policy. Second, her continued employment following her receipt of the revised policy is sufficient consideration for revision of the policy.[8] We therefore conclude that no issue of fact exists as to whether the revised employment policy—and its provision granting three days for appeal—applies to her case. It does.

Waiver

Camp contends that an issue of fact exists regarding whether she waived her right of administrative appeal. UMC argues that Camp waived her right of appeal by failing to appeal within three days of the hearing officer's determination. Germane to this issue is the disputed date upon which Camp received the pre-termination hearing decision.

Camp claimed in her affidavit that she did not receive the decision until February 2004, almost a year after it was issued on March

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[8]See Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 595, 668 P.2d 261, 261 (1983) (stating that employee's continued employment after formal delivery of handbook provided sufficient consideration for modifying the employment agreement by inclusion of handbook provisions).

19, 2003. UMC, on the other hand, claims that Camp received the decision on March 22, 2003, as indicated by a certified mail return receipt containing Camp's signature, affixed by an unidentified agent. UMC notes that Camp has never disputed the validity of the address specified on the receipt.

We first note that substantive law controls which factual disputes are material and will preclude summary judgment.[9] Because Nevada has no relevant case law on this issue, we look to federal law for guidance. In Rosenthal v. Walker, the United States Supreme Court stated that "if a letter properly directed is proved to have been either put into the post-office or delivered to the postman," a presumption arises that the person to whom it was addressed received it.[10] A stronger presumption exists in the case of certified mail.[11] One way to rebut the presumption is to demonstrate error in the address.[12]

In light of UMC's production of a signed certified mail receipt, we conclude that Camp's sworn assertion that she did not receive the decision is insufficient to rebut the presumption. Camp does not dispute the validity of the address on the receipt, and has produced no other probative evidence supporting her assertion. Therefore, although waiver

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[9]See Wood, 121 Nev. at ___, 121 P.3d at 1031 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)).

[10]111 U.S. 185, 193 (1884).

[11]Salta v. INS, 314 F.3d 1076, 1079 (9th Cir. 2002).

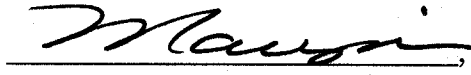
[12]See Busquets-Ivars v. Ashcroft, 333 F.3d 1008, 1010 (9th Cir. 2003).

is generally considered an issue of fact,[13] we conclude that a rational trier of fact could not return a verdict for Camp based on the evidence presented.[14]

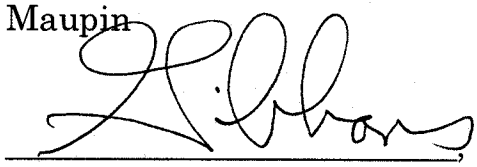
CONCLUSION[15]

We conclude that the district court properly granted summary judgment below. Therefore, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



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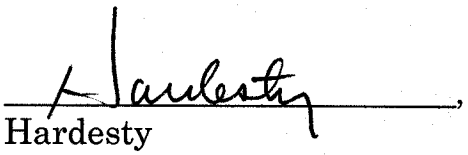

_____, J.
Hardesty

cc: Hon. Jessie Elizabeth Walsh, District Judge
John J. Tofano
Clark County District Attorney David J. Roger/Civil Division
Clark County Clerk

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[13]See Merrill v. DeMott, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045 (1997).

[14]See Wood, 121 Nev. at ___, 121 P.3d at 1031.

[15]Based on our decision that summary judgment was proper, we decline to reach the issue concerning the timeliness of Camp's opposition to the motion to dismiss.

We have considered Camp's other arguments, and conclude they are without merit.