

IN THE SUPREME COURT OF THE STATE OF NEVADA

VERONICA A. PETERSEN,  
Appellant,  
vs.  
THE STATE OF NEVADA EX REL. ITS  
DEPARTMENT OF CORRECTIONS;  
AND ROBIN BATES, AN INDIVIDUAL,  
Respondents.

No. 45858

FILED

FEB 13 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a retaliation and wrongful termination suit. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Veronica Petersen filed the underlying action for retaliation and wrongful termination against her former employer, respondent Nevada Department of Corrections (NDOC). After converting NDOC's motion to dismiss into a motion for summary judgment, the district court granted judgment in favor of NDOC, dismissing each of Petersen's claims. This appeal followed.

Petersen raises three issues on appeal. First, Petersen contends that the district court erred in assigning claim preclusive effect to findings made by an administrative hearing officer (AHO) during the appeal of her termination by NDOC. Second, Petersen argues that the district court erred in converting NDOC's motion to dismiss into a motion for summary judgment and dismissing her claims without allowing for further discovery. Third, Petersen asserts that the district court erred in granting summary judgment because genuine issues of material fact exist in the record with respect to her civil rights, tortious discharge, intentional infliction of emotional distress, and negligence claims.

We will discuss each of Petersen's arguments, in turn, below. The parties are familiar with the facts, and we do not recount them except as necessary to our discussion. For the following reasons, we affirm.

Standard of review

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.<sup>1</sup> Summary judgment is appropriate when the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that "no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law."<sup>2</sup> A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.<sup>3</sup> Thus, "[t]he nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.'"<sup>4</sup>

Claim preclusion

Petersen argues that the district court improperly applied the claim preclusion doctrine. The doctrine of claim preclusion (*i.e.*, *res judicata*) prevents "parties or their privies from relitigating a cause of action which has been finally determined by a court of competent

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<sup>1</sup>Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

<sup>2</sup>Id. (quoting NRCP 56(c)).

<sup>3</sup>Id. at 731, 121 P.3d at 1031.

<sup>4</sup>Id. at 732, 121 P.3d at 1031 (quoting Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

jurisdiction[;] [t]his is particularly true when the prior proceeding is between the same parties regarding the same cause of action.”<sup>5</sup>

The district court never mentioned claim preclusion in the orders from which Petersen appeals, and it did not apply the elements of claim preclusion to Petersen’s case. While the district court examined the substantial record available to it after the administrative proceeding<sup>6</sup> and made a determination that no relevant factual disputes existed based on that record, the district court never gave claim preclusive effect to any part of the AHO’s previous findings. Rather, Petersen had the opportunity to present substantive evidence to the district court in support of each of her claims. Ultimately, the district court found that she had failed to demonstrate the existence of a factual dispute regarding the considerable evidence presented by NDOC in support of its position, including the findings of the AHO; the district court did not preclude Petersen from relitigating her claims (claims that Petersen correctly notes she could not have brought during the administrative appeal of her termination). Thus, we conclude the district court did not apply the claim preclusion doctrine.

Conversion of NDOC’s motion to dismiss into summary judgment motion

Petersen argues that the district court considered inadmissible evidence in the form of the AHO’s findings, ignored Rule 12(b)(5) jurisprudence, and deprived her of the opportunity to perform

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<sup>5</sup>Elliott v. Denton & Denton, 109 Nev. 979, 987, 860 P.2d 725, 731 (1993).

<sup>6</sup>The record before the district court included numerous NDOC personnel documents, e-mails, and forms pertaining to the mold investigation, transfer, and termination. In addition, the district court considered the AHO’s extensive findings of fact and conclusions of law.

discovery when it converted NDOC's motion to dismiss into a motion for summary judgment.

The first two of Petersen's arguments clearly lack merit. First, it was not error for the district court to admit the AHO's findings as evidence in the present action.<sup>7</sup> Second, because the district court considered the AHO's findings and other evidence presented in the administrative proceeding, the court properly treated NDOC's motion to dismiss as one for summary judgment pursuant to NRCP 56.<sup>8</sup> This is precisely the procedure contemplated by Rule 12(b)(5).

Petersen also claims that she did not receive sufficient opportunity to perform discovery. In Nevada, "[a] trial court may, in its sound discretion, refuse to grant summary judgment if the motion is made at an early stage of discovery because the court feels that further development is needed to assist it in its decision."<sup>9</sup> But, "[w]hen a decision lies within the sound discretion of the lower court, this court may overturn that decision only if it is manifestly against the clear weight of evidence."<sup>10</sup> Accordingly, we have upheld summary judgment where the appellant had more than two years to participate in discovery and knew the names and positions of all critical witnesses.<sup>11</sup> On the other hand, we reversed

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<sup>7</sup>See Snow v. Nevada Dept. of Prisons, 543 F. Supp. 752, 755 (D.C. Nev. 1982).

<sup>8</sup>NRCP 12(b)(5); see Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1352-53, 951 P.2d 1027, 1029 (1997).

<sup>9</sup>Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302 n.8, 662 P.2d 610, 622 n.8 (1983).

<sup>10</sup>Id.

<sup>11</sup>Id. at 302.

summary judgment where (1) less than two years passed between the date of the complaint and the date the court entered judgment, (2) the nonmoving party made specific requests for additional time for discovery, and (3) the nonmoving party's affidavits demonstrated that she was not dilatory in conducting discovery.<sup>12</sup>

In this case, we conclude that the district court did not abuse its discretion in granting summary judgment in August 2004. Although only four months passed between the date of the complaint and the date the court granted summary judgment, the parties were intimately aware of the present dispute years before the action commenced. Petersen worked for NDOC for several years before being transferred and eventually terminated, and she was involved in a protracted termination dispute with NDOC before she instituted the present proceedings. In light of this history between the parties, the decision to grant summary judgment was not manifestly against the clear weight of evidence.

Grant of summary judgment on each of Petersen's claims

Petersen contends that the district court erred in granting summary judgment on each of her four claims. For the reasons set forth below, we conclude that Petersen failed to present sufficient evidence to create a genuine issue of material fact as to any of her claims, and therefore, the district court properly entered judgment as a matter of law in each instance.

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<sup>12</sup>Harrison v. Falcon Products, Inc., 103 Nev. 558, 560 746 P.2d 642, 643 (1987).

Section 1983 claim against Warden Bates

In a 42 U.S.C. § 1983 cause of action, the plaintiff must prove two elements: (1) the defendant acted under color of state law, and (2) the defendant deprived the plaintiff of a constitutionally secured right, privilege, or immunity.<sup>13</sup> Thus, in order to avoid summary judgment with respect to her civil rights claim, Petersen had to present some evidence establishing a genuine issue of material fact as to both of these elements.

Because respondent Warden Robin Bates was at least arguably in office and responsible for Petersen's ultimate termination, there is a genuine issue of material fact as to the first element of Petersen's civil rights claim. NDOC does not dispute this point.

With respect to the second element of her claim, however, Petersen failed to demonstrate a genuine issue of material fact. This is because the U.S. Supreme Court has held, in the context of First Amendment disputes between public employees and employers, "the burden [is] properly placed upon [the plaintiff] to show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor' or . . . a 'motivating factor' in the [employer's ultimate] decision[.]"<sup>14</sup> Assuming that Petersen's mold complaint was speech involving a matter of public concern and, thus, that she engaged in protected activity, there is no evidence in the record to suggest that Petersen's mold complaint was a substantial or motivating factor in NDOC's decisions to transfer and

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<sup>13</sup>Cummings v. Charter Hospital, 111 Nev. 639, 647, 896 P.2d 1137, 1142 (1995).

<sup>14</sup>Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

terminate her. Instead, the evidence indicates that NDOC (and Bates) acted properly and without retaliatory motives in dealing with Petersen.

When Petersen made her mold report, NDOC investigated her claim thoroughly and transferred her to its only other facility in Northern Nevada. This facility happened to be in Carson City, which required Petersen to commute a longer distance to work each day. However, NDOC (and Bates) had no choice but to transfer Petersen to Carson City because, based on her symptoms and Dr. Craner's medical advice, Petersen could not continue to work at the Reno facility. Only when Petersen's absences and insubordination became worse in Carson City did NDOC (and Bates) finally terminate her. Although temporal proximity between protected activity and an adverse employment action, such as a termination, may give rise to an inference of retaliatory motive in some cases,<sup>15</sup> we conclude that the closeness in time between Petersen's mold complaint and her termination (approximately one calendar year) does not reasonably raise such an inference in this case. Accordingly, the district court did not err in granting summary judgment in favor of Bates on Petersen's section 1983 claim.

#### Tortious discharge

Petersen asserts that the temporal proximity between her mold complaint and termination creates an inference that NDOC improperly terminated her in violation of public policy. Thus, Petersen contends that there is a genuine issue of material fact with regard to her tortious discharge claim.

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<sup>15</sup>See Coszalter v. City of Salem, 320 F.3d 968, 977-79 (9<sup>th</sup> Cir. 2003).

We have held that “public policy tortious discharge actions are severely limited to those rare and exceptional cases where the employer’s conduct violates strong and compelling public policy.”<sup>16</sup> In light of this standard, we conclude that the district court properly dismissed Petersen’s tortious discharge claim for reasons similar to those stated above as to her civil rights claim. No rational trier of fact could have found that the decision to terminate Petersen violated “strong and compelling public policy” based on the entirety of the record. Thus, the district court did not err in dismissing Petersen’s tortious discharge claim.<sup>17</sup>

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<sup>16</sup>Sands Regent v. Valgardson, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989).

<sup>17</sup>We have also considered Petersen’s contentions with respect to her intentional infliction of emotional distress and negligence claims, and we conclude that the district court did not err in granting summary judgment as to those causes of action.

With respect to Petersen’s claim for intentional infliction of emotional distress, the district court dismissed her claim because she “presented no objectively verifiable indicia of the severity of [her] emotional distress,” as required by Nevada law. See Miller v. Jones, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998).

After reviewing the entirety of the record, we conclude that the district court correctly found a lack of evidence as to the severity of Petersen’s distress. Even assuming that Petersen’s transfer and termination amounted to “outrageous” conduct on the part of NDOC, Petersen has failed to present any evidence that she suffered “severe emotional distress” because of this conduct. Accordingly, we conclude that there was no genuine issue of material fact as to the “severe emotional distress” element of Petersen’s cause of action for intentional infliction of emotional distress.

With respect to Petersen’s claim for negligence, her supporting evidence consisted of medical diagnoses, documents showing the results of tests on her workspace, and e-mails by NDOC officials discussing her

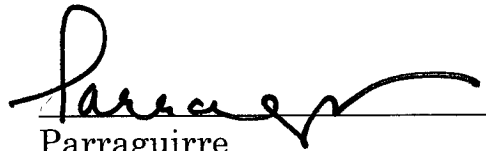
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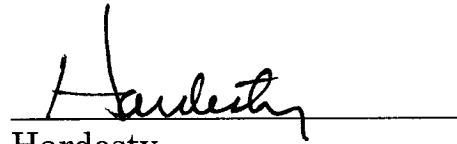


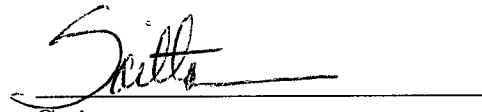
Conclusion

We conclude that the district court did not give claim preclusive effect to the AHO's findings. Furthermore, the district court did not err in treating NDOC's motion to dismiss as one for summary judgment, or in granting summary judgment in NDOC's favor with respect to each of Petersen's claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Parraguirre

 J.  
Hardesty

 J.  
Saitta

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complaint and the threat of mold at NNRC. However, none of this evidence suggests that NDOC acted unreasonably in failing to discover the mold, or in attempting to remedy the situation after Petersen's complaint. In fact, NDOC ran thorough tests once it became aware that mold might have existed at NNRC. In addition, there is no evidence suggesting that NDOC should have known about this threat sooner, and no evidence showing that another employee or inmate at NNRC complained of symptoms similar to Petersen's before or after her complaint. Thus, we conclude that Petersen failed to raise a genuine issue of material fact as to NDOC's alleged negligence in causing her to suffer mold-related health problems.

cc: Hon. Brent T. Adams, District Judge  
Carolyn Worrell, Settlement Judge  
Jeffrey A. Dickerson  
Attorney General Catherine Cortez Masto/Carson City  
Washoe District Court Clerk