

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEBRA BROWN,
Appellant,

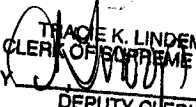
vs.

CALIFORNIA HOTEL AND CASINO, A
NEVADA CORPORATION D/B/A SAM'S
TOWN HOTEL GAMBLING HALL AND
BOWLING CENTER,
Respondent.

No. 48682

FILED

JUN 26 2008

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in an employment matter. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge. As the parties are familiar with the facts, we do not recount them except as necessary for our disposition.

Dismissal of the breach of contract claim and the age, sex, and disability discrimination claims

Pursuant to Coty v. Washoe County, we apply the summary judgment standard of review to this case because the district court considered matters beyond the pleadings.¹ Thus, we review the district court's grant of summary judgment under de novo review.² If a defendant shows that the evidence does not support any element of the plaintiff's prima facie case, summary judgment is proper.³

¹See 108 Nev. 757, 759, 839 P.2d 97, 98 (1992).

²Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

³Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

Brown's breach of contract claim

Appellant Debra Brown argues that respondent California Hotel and Casino, a Nevada Corporation d/b/a Sam's Town Hotel Gambling Hall and Bowling Center (Sam's Town), breached its purported promise to its employees that if they would vote to decertify the union, then they would retain the right to termination only for just cause. She further argues that Sam's Town breached the progressive discipline policy, which she asserts guaranteed that her employment could not be terminated without just cause. We disagree.

In Yeager v. Harrah's Club, Inc., this court concluded that uncorroborated oral promises are insufficient evidence to overcome the at-will employment presumption.⁴ Additionally, an employer may expressly disclaim in an employee handbook any inference that termination procedures in the handbook are part of the employment contract.⁵

In this case, the record indicates that, similar to the appellant in Yeager, Brown failed to produce any evidence to corroborate her assertion that Sam's Town had orally promised that employees could be discharged only for cause. On the contrary, Sam's Town provided an affidavit from its human resources director that no such promise was made. Additionally, Sam's Town's progressive discipline policy expressly provided that none of its provisions should be construed to change the at-will status of employment at Sam's Town. We conclude that pursuant to

⁴111 Nev. 830, 836-37, 897 P.2d 1093, 1096 (1995).

⁵D'Angelo v. Gardner 107 Nev. 704, 708 & n.4, 819 P.2d 206, 209 & n.4 (1991).

Yeager, Brown failed to overcome the at-will presumption. Therefore, the district court properly dismissed Brown's breach of contract claim.

Brown's sex and disability discrimination claims

Sam's Town argues that the district court properly dismissed Brown's sex and disability discrimination claims because she failed to exhaust her administrative remedies and she cannot "bootstrap" them onto her age discrimination claim. We agree.

NRS 613.330(1)(a) provides that it is unlawful for an employer to discriminate against an employee based on, among other reasons, the employee's sex or disability. This court has interpreted NRS 613.420 to "require[] an employee alleging employment discrimination to exhaust [his or] her administrative remedies by filing a complaint with [the Nevada Equal Rights Commission (NERC)] before filing a district court action."⁶ However, an employee may raise a claim in the district court that is reasonably related to the NERC claim.⁷ If the two claims do not have a factual relationship, the employee must "exhaust [his or] her administrative remedies" with the NERC before filing the unrelated claim in the district court.⁸

To determine whether claims are factually related, this court has determined that the United States Court of Appeals for the Ninth Circuit case Shah v. Mt. Zion Hospital & Medical Center is persuasive, in light of the similarities between federal and state anti-discrimination

⁶Pope v. Motel 6, 121 Nev. 307, 311, 114 P.3d 277, 280 (2005).

⁷Id. at 312, 114 P.3d at 280.

⁸Id.

statutes.⁹ In Shah, as the appellant “relie[d] on the same employer actions to demonstrate discrimination under three theories never investigated by the EEOC,” his claim was barred because he failed to exhaust his administrative remedies.¹⁰

In this case, Brown sued for types of discrimination that she did not claim on her NERC and EEOC claim forms. Here, according to the record, Brown’s NERC claim alleged only age discrimination and failed to mention sex and disability discrimination. We conclude that Brown’s age discrimination claim was not reasonably related to the sex and disability discrimination claims because her age discrimination claim was based on her being 43 years old, but the other claims related to her being a woman and her physical limitations, as a result of her neck and shoulder injuries. The record on appeal reveals that, similar to the appellant in Shah, Brown based her district court discrimination claims on the same employer actions as alleged in her NERC and EEOC claims but presented new theories of discrimination, which the NERC and EEOC had not investigated. Therefore, under Shah, her claims are not reasonably related, and the district court properly dismissed her sex and disability discrimination claims for failure to exhaust administrative remedies.

⁹Id. at 311-12, 114 P.3d at 280.

¹⁰642 F.2d 268, 272 (9th Cir. 1981) (holding that the district court lacked subject matter jurisdiction to hear claims of race, color, and religious discrimination when the appellant had raised only sex and national origin discrimination in his EEOC complaint).

Brown's age discrimination claim

Brown argues that the district court erroneously dismissed her age discrimination claim because the EEOC failed to send a right-to-sue letter to her attorney. She further contends that the statute of limitations should be equitably tolled. We disagree.

While NRS 613.430 sets a 180-day statute of limitations on discrimination claims, this court has applied equitable tolling in relation to anti-discrimination statutes.¹¹ In Copeland v. Desert Inn Hotel, the appellant had gone to the NERC to file a complaint during the statutory period, and the NERC representative had told her that "he would 'get back to' her," but he never informed her regarding the filing requirements for her claim.¹² Here, the record indicates that, unlike the appellant in Copeland, Brown was not misled by NERC personnel, and she timely filed her claim with the NERC.

A review of the Copeland factors reveals that this court should not apply equitable tolling. The record reveals that Brown was not diligent because she waited over seven months after she had received the right-to-sue letter, and two years after her discharge, to bring her claim in district court. She had the relevant facts and was not misled because she had the right-to-sue letter, which clearly stated that she needed to bring suit within 90 days. Thus, we conclude that the NERC's failure to notify Brown's attorney, while it actually notified Brown, is an insufficient reason for equitable tolling because Brown received actual notice of her

¹¹Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (listing six factors to consider before applying equitable tolling).

¹²99 Nev. at 825, 673 P.2d at 491.

right to sue and the time limitation thereon. In conclusion, the district court did not err when it concluded that Brown's age discrimination claim was time-barred and the doctrine of equitable tolling did not apply.¹³

Denial of the countermotion and the grant of summary judgment on the retaliatory discharge claim and the IIED claim

As noted above, we review the district court's grant of summary judgment de novo.¹⁴ We apply the abuse of discretion standard when reviewing a district court's decision to accept tardy responses to requests for admission.¹⁵

The requests for admission

Brown argues that the district court improperly refused to deem admitted her requests for admission to Sam's Town because its responses were tardy. Brown contends that because of the tardiness, any matter in the requests for admission is conclusively established as an operation of law. We disagree.

¹³At oral argument, Brown argued that her age discrimination was not time-barred because age discrimination should be a public policy exception to the at-will employment doctrine. We conclude that Brown's argument lacks merit because NRS 613.330(1)(a) prohibits employers from discharging an employee based on age, and NRS 613.430 provides a statute of limitations for a district court action alleging age discrimination after the exhaustion of administrative remedies.

¹⁴Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

¹⁵Wagner v. Carex Investigations & Sec., 93 Nev. 627, 630, 572 P.2d 921, 923 (1977).

The district court may deem admitted tardy responses to requests for admission.¹⁶ We conclude that the matters were not deemed admitted by operation of law, as Brown contends, because the district court has discretion to deem them admitted. As Brown ultimately received the responses and did not suffer prejudice, we conclude that the district court did not abuse its discretion when it refused to deem the matters admitted. Therefore, the district court properly denied Brown's counter-motion for summary judgment.

Retaliatory discharge

Brown argues in her opening brief that the public policy exception to the at-will employment doctrine applies here because Sam's Town fired her for filing workers' compensation claims and being prone to further work-related injuries. We disagree.

For a plaintiff to recover based on a retaliatory discharge claim, he or she "must demonstrate that his [or her] protected conduct was the proximate cause of his [or her] discharge," not merely one of a set of mixed motives.¹⁷ Brown conceded during oral argument that there was no evidence that her filing of workers' compensation claims was the proximate cause of her termination. As Sam's Town had a valid reason to terminate her employment because she had violated company rules, we conclude that the district court did not err when it granted Sam's Town summary judgment on Brown's claim for retaliatory discharge.

¹⁶NRCP 36(a).

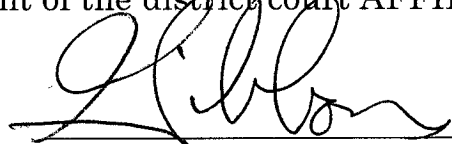
¹⁷Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1319-20, 970 P.2d 1062, 1066 (1998).

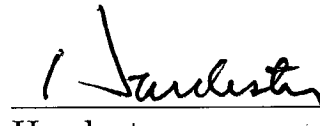
IIED

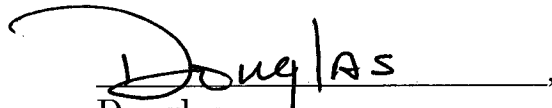
Brown argues that the district court improperly dismissed her claim for intentional infliction of emotional distress (IIED). We disagree.

The elements of a claim for IIED are “(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff’s having suffered severe or extreme emotional distress and (3) actual or proximate causation.”¹⁸ We conclude that the district court properly dismissed Brown’s claim for IIED because such a claim must be derivative of another successful claim,¹⁹ and termination of an employee for violating company rules does not constitute extreme or outrageous conduct. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Hardesty


_____, J.
Douglas

¹⁸Dillard Department Stores v. Beckwith, 115 Nev. 372, 378, 989 P.2d 882, 886 (1999) (quoting Star v. Rabello, 97 Nev. 124, 125, 625 P.2d 90, 92 (1981)).

¹⁹Cf. id. (concluding that a claim for IIED may be predicated on a successful claim for wrongful discharge).

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Janet Trost, Settlement Judge
Cliff W. Marcek
Gugino Law Firm
Eighth District Court Clerk