IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENNEN HARDY,
Appellant,
vs.
KAREN CHROMY, AN INDIVIDUAL; JOHN SIENKO, AN INDIVIDUAL; DONNA DAVIS, AN INDIVIDUAL; STATE OF NEVADA, EX REL. ITS DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MENTAL HEALTH; CARLOS BRANDENBERG, AN INDIVIDUAL; AND HAROLD COOK, AN INDIVIDUAL,
Respondents.

No. 53956

FILED

DEC 20 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a tort action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Pornographic material was found on a computer at a State hospital, and an investigation by the hospital found that the computer was logged into using appellant Brennen Hardy's password. Due to the high number of pornographic pictures found on the hospital computer, all of the computers that Hardy had access to were reviewed by the hospital and the Attorney General's office. Pornography was found on five separate computers, and all of the pornography was viewed under Hardy's username. Some of the pornographic images involved children.

While the Attorney General and hospital investigations were ongoing, respondent Donna Davis, a nurse supervisor at the hospital, had a conversation with two coworkers about the pornographic images

discovered on the hospital computers. Brad Carroll and Christopher Christiano testified about Davis's conversation at their depositions. Carroll stated that "[Davis and the two coworkers] were talking about the fact that there was child pornography and animal porn and, you know, that scum looking at that kind of stuff . . ." in reference to Hardy. Christiano stated that he did not remember from whom he had heard that an investigation about pornography was being conducted.

Following the investigation, the hospital served Hardy with a specificity of charges informing him that he was facing termination for accessing pornographic images on State computers.[1] After a predisciplinary hearing, respondent Dr. Harold Cook notified Hardy of his decision to uphold the decision of termination. Hardy resigned from his employment one day before his termination would have become effective.

Thereafter, Hardy brought suit alleging: (1) defamation of character against the individual hospital employees, including Davis and Dr. Cook; (2) disclosure of private facts that would be offensive to a reasonable person; (3) breach of contract between Hardy and the State; (4) the State breached the implied covenant of good faith and fair dealing implied in Hardy's employment contract; (5) violation of the due process clauses of the Nevada and United States Constitutions; (6) intentional misrepresentation and/or concealment; (7) tortious discharge; and (8) negligent training, supervision and retention of respondents by the State.

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[1]A specificity of charges is the form developed by the State of Nevada Department of Personnel pursuant to NAC 284.656 to inform a state employee of the reasons for disciplinary action and the proposed disciplinary action to be taken against him or her.

Respondents filed a motion for summary judgment that the district court granted.[2]

On appeal, Hardy argues that the district court erred in granting summary judgment on his defamation, misrepresentation, due process, and tortious discharge claims. We disagree, and we therefore affirm the district court's judgment.

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.'" George L. Brown Ins. v. Star Ins. Co., 126 Nev. ___, ___, 237 P.3d 92, 96 (2010) (quoting Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood, 121 Nev. at 729, 121 P.3d at 1029.

> While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor.

Wood, 121 Nev. at 732, 121 P.3d at 1031 (quoting Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986)).

Defamation claim

Hardy contends that the district court erred in finding that Davis's statements to others in the workplace concerning Hardy's viewing

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[2]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

of child and animal pornography was a statement of opinion, not fact. Hardy alleges that the deposition testimony of his coworkers supports his defamation claim.

"A defamation claim requires demonstrating (1) a false and defamatory statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." Pope v. Motel 6, 121 Nev. 307, 315, 114 P.3d 277, 282 (2005) (citing Simpson v. Mars Inc., 113 Nev. 188, 190, 929 P.2d 966, 967 (1997)). "'A statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt.'" Lubin v. Kunin, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001) (quoting K-Mart Corporation v. Washington, 109 Nev. 1180, 1191, 866 P.2d 274, 281-82 (1993), receded from on other grounds as stated in Pope, 121 Nev. at 317, 114 P.3d at 283). Thus, "[i]n reviewing an allegedly defamatory statement, '[t]he words must be reviewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning.'" Lubin, 117 Nev. at 111, 17 P.3d at 425 (second alteration in original) (quoting Chowdhry v. NLVH, Inc., 109 Nev. 478, 484, 851 P.2d 459, 463 (1993)). "Statements of opinion are protected speech under the First Amendment of the United States Constitution and are not actionable at law." Id. at 112, 17 P.3d at 426.

> The test for whether a statement constitutes fact or opinion is: 'whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact.' So long as it is based on true and public information, an evaluative opinion conveys 'the publisher's judgment as to the

> quality of another's behavior and, as such, it is not a statement of fact.'

Id. (quoting Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 342 (1983), and PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 624, 895 P.2d 1269, 1275 (1995)). "'However, expressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist which will be sufficient to render the message defamatory if false.'" Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 714, 57 P.3d 82, 88 (2002) (quoting K-Mart Corporation, 109 Nev. at 1192, 866 P.2d at 282).

We conclude that Hardy failed to show that there was a genuine issue of material fact to preclude summary judgment as Hardy failed to show that the statement made by Davis was defamatory. We further conclude that the district court did not err in granting respondents' motion for summary judgment as Hardy has failed to satisfy the first prong of a defamation claim, namely, a false and defamatory statement made against him by Davis or in the specificity of charges.

Hardy's arguments are without merit as he has failed to show that the statement made by Davis was false and defamatory and has failed to show that Davis was making any reference to him. Specifically, the only evidence that Hardy presents regarding Davis's statement is the deposition testimony of Carroll. Carroll stated that Davis had said to two coworkers that child and animal pornography had been found on hospital computers, an investigation was ongoing, and that only "scum" would look at such images. Davis's statements that certain types of pornography were found on hospital computers and that an investigation was taking place were well-known facts by the hospital's staff, and thus were not defamatory. Further, Hardy has failed to show that Davis was making reference to him specifically in her statement that only "scum" would look

at such images and, thus, this statement is an opinion protected by the First Amendment.

In addition, the statements made in the specificity of charges against Hardy were not false and defamatory, as the investigation conducted by the Attorney General and the hospital revealed pornographic images found under Hardy's username. Even if we treat these statements as defamatory, the common interest privilege applies as the allegations made in the specificity of charges were made in good faith because the images were downloaded under Hardy's username. Further, Hardy has presented no evidence of actual malice on the part of respondents that would overcome the common interest privilege. The common interest privilege "'exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty.'" Lubin, 117 Nev. at 115, 17 P.3d at 428 (quoting Circus Circus Hotels v. Witherspoon, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983)). Therefore, the district court's grant of summary judgment on Hardy's defamation claim was appropriate.

Misrepresentation

Hardy argues that there are genuine issues of material fact regarding potential misrepresentations in the specificity of charges brought against him and whether the chain of custody and the integrity of the hard drives on which the pornography was found were intact.

In Nevada, in order to state a claim for misrepresentation, a party must prove that

> (1) a false representation [was] made by the defendant;

> (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation;
>
> (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and
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> (4) damage to the plaintiff as a result of relying on the misrepresentation.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998).

We conclude that Hardy's arguments are without merit because he has failed to show that respondents made a false representation in any part of the specificity of charges. We also conclude that Hardy failed to present any evidence to support his position that another hospital employee planted the pornography on five separate hospital computers under Hardy's username. The specificity of charges was developed after the hospital conducted its own investigation and received reports from the investigation performed by the Attorney General's office. Hardy presented no evidence that would indicate that respondents had any reason to believe the statements made in the specificity of charges were false or that these statements were indeed false. Therefore, we conclude that the district court did not err in granting respondents' motion for summary judgment on Hardy's misrepresentation claim.

Due process

Hardy contends that his resignation was procured through fraud, giving rise to a due process violation.

Several courts have addressed the issue of whether a resignation from public employment is sufficiently involuntary to trigger

the protections of the due process clause and have stated that "[t]he basic approach in those cases is the obvious one of looking to the circumstances of the resignation to determine whether the employee was denied the opportunity to make a free choice." Stone v. University of Maryland Medical System, 855 F.2d 167, 174 (4th Cir. 1988) (citing Scharf v. Department of the Air Force, 710 F.2d 1572, 1574 (Fed. Cir. 1983)). "Inevitably, particular resignations have been found involuntary, hence, per our analysis, 'deprivations' of property, in two circumstances: (1) where obtained by the employer's misrepresentation or deception, and (2) where forced by the employer's duress or coercion." Id. (citing Scharf, 710 F.2d at 1574-76, and Schultz v. United States Navy, 810 F.2d 1133, 1135-37 (Fed. Cir. 1987)). However, to support summary judgment, plaintiffs must allege facts, not simply conclusions that show the defendant was personally involved in the alleged deprivation of the plaintiff's civil rights. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

Hardy has done nothing more than state a conclusion that it is possible that another hospital employee planted the pornographic images on multiple hospital computers under Hardy's username. Without any facts to show that this conclusion has some semblance of truth, Hardy's conclusory statement is nothing more than mere conjecture that cannot defeat a motion for summary judgment. As we previously concluded that respondents did not make any misrepresentation in the specificity of charges, we further conclude that this issue is without merit as Hardy was neither deceived nor coerced into resigning from the hospital. Therefore, we conclude that the district court did not err in granting respondents' motion for summary judgment on Hardy's due process claim.

Tortious discharge claim

Hardy contends that a reasonable juror could have concluded that there was a factual basis for his assertion that the pornography was a mere pretext for termination. Hardy also argues that respondents' assertion that termination for the pornography was consistent with the handling of other employees caught accessing pornography on hospital computers is a conclusory assertion that is insufficient to support a motion for summary judgment. Hardy further argues that Davis opposed his workers' compensation claim, which is evidence of a motive to retaliate.

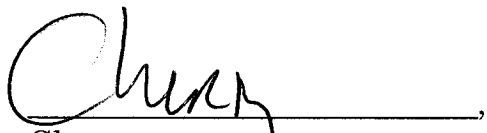
"Where a decisionmaker makes a discriminatory remark against a member of the plaintiff's class, a reasonable factfinder may conclude that discriminatory animus played a role in the challenged decision." Dominguez-Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1038 (9th Cir. 2005). When there is "mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality . . . the temporal proximity must be 'very close.'" Clark County School Dist. v. Breeden, 532 U.S. 268, 273 (2001) (quoting O'Neal v. Ferguson Const. Co., 237 F.3d 1248, 1253 (10th Cir. 2001)). Courts have held that a three-month period and a four-month period were too far apart in temporal proximity to support a claim for tortious discharge. See Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (7th Cir. 1992).

We conclude that Hardy's arguments are without merit as the temporal proximity of Davis opposing his workers' compensation claim and Hardy's resignation after viewing and downloading some 1,250 pornographic images on five separate hospital computers are not so closely

related to support a claim of retaliation. Specifically, Davis opposed Hardy's workers' compensation claim on January 5, 2005, and the specificity of charges that led to Hardy's resignation was served on February 6, 2006, over a year later. Thus, we conclude that accessing pornography was not an unlawful pretext for retaliating against Hardy for previously filing a worker's compensation claim.

In addition, the decision to terminate Hardy was not made or participated in by Davis, but was made by Dr. Cook. Moreover, Dr. Cook acknowledged in his affidavit that accessing pornography at the hospital required dismissal. As such, Hardy has failed to show that there is a genuine issue of material fact regarding his tortious discharge claim. Therefore, we conclude that the district court did not err in granting respondents' motion for summary judgment on Hardy's tortious discharge claim. In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED.



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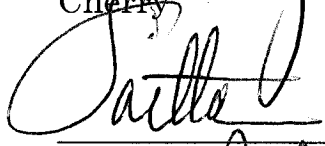

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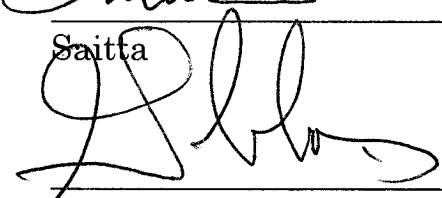

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Gibbons

cc: Hon. Janet J. Berry, District Judge
David Wasick, Settlement Judge
Jeffrey A. Dickerson
Attorney General/Carson City
Washoe District Court Clerk