IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA AINSWORTH; REBECCA SAWYER; AND JACK AINSWORTH,
Appellants,
vs.
NEWMONT MINING CORPORATION,
Respondent.

No. 56250

FILED

MAR 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court final judgment in a tort action. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Appellants Sandra Ainsworth and Rebecca Sawyer[1] filed a complaint in district court against respondent Newmont Mining Corporation alleging claims for tortious discharge in violation of public policy, breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. The claims arose from Ainsworth's and Sawyer's alleged whistleblowing actions against Newmont, their employer. Newmont filed a motion for summary judgment on each of their claims, which Ainsworth and Sawyer opposed. The district court granted summary judgment in favor of Newmont on all of the claims, finding that Ainsworth and Sawyer failed to raise genuine issues of material fact regarding their claims. On appeal, Ainsworth and Sawyer argue that, because there were genuine issues of material fact

[1]While Jack Ainsworth is listed in the caption, his claims were dismissed by the district court for failure to prosecute, and Ainsworth and Sawyer concede that he has "no viable issues on appeal."

that precluded summary judgment on their claims for tortious discharge in violation of public policy, breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress, the district court erred in granting Newmont's summary judgment as to those claims.[2]

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file 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.'" Id. (alteration in original) (quoting NRCP 56(c)). The party opposing a motion for summary judgment must, "'by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.'" Id. at 731, 121 P.3d at 1030-31 (quoting Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id. at 729, 121 P.3d at 1029.

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[2]On appeal, Ainsworth and Sawyer fail to provide proper analysis or cite to any legal authority for their claims regarding breach of the implied covenant of good faith and fair dealing, or for negligent infliction of emotional distress. Thus, we decline to consider those claims. See Medical Device Alliance, Inc. v. Ahr, 116 Nev. 851, 863 n.7, 8 P.3d 135, 142 n.7 (2000) (declining to consider other arguments raised on appeal that were unsupported by any legal authority).

Tortious discharge

Ainsworth and Sawyer argue that their actions were tantamount to a refusal to participate in Newmont's illegal conduct, and thus the district court erred in granting summary judgment in favor of Newmont on their tortious discharge claim. We disagree.

"[T]ortious discharges may arise when an employer dismisses an employee in retaliation for the employee's doing of acts which are consistent with or supportive of sound public policy and the common good." D'Angelo v. Gardner, 107 Nev. 704, 718, 819 P.2d 206, 216 (1991). Tortious discharge claims can arise when an employee is terminated for "whistleblowing;" that is, for reporting an employer's alleged illegal activity to the appropriate governmental authorities. Wiltsie v. Baby Grand Corp., 105 Nev. 291, 292-93, 774 P.2d 432, 433-34 (1989). Whistleblowing is the primary basis for Ainsworth's and Sawyer's tortious discharge claim, as they argue that Sawyer's conversation with a state environmental agency employee was an act of whistleblowing, and that this court should expand its protection of whistleblowing to include internal whistleblowing (reporting within the company).

External whistleblowing

Ainsworth and Sawyer maintain that a conversation Sawyer had with an employee of the Nevada Department of Environmental Protection (NDEP) about a construction project constituted an act of whistleblowing. Specifically, they allege that while Sawyer was on the phone with NDEP, NDEP asked about when plans would be submitted for a quench tank, and Sawyer stated that construction had already started. "This resulted in [NDEP] coming to the site and threatening to shut down construction of the quench tank because there had been no prior approval of its construction."

This court has explained that to receive whistleblowing protection, an employee must affirmatively decide to expose illegal or unsafe practices. Specifically, this court "'believe[s] that whistleblowing activity which serves a public purpose should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged.'" Wiltsie, 105 Nev. at 293, 774 P.2d at 433 (quoting Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986), overruled on other grounds by DeMasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999)). Consistent with this rationale, the United States District Court has explained that "[t]he essence of the Wiltsie public policy exception is that the employee must take affirmative action and contact the appropriate authorities—must blow the whistle—to 'expose illegal or unsafe practices.'" Schlang v. Key Airlines, Inc., 794 F. Supp. 1493, 1504 (D. Nev. 1992) (emphasis added) (quoting Wiltsie, 105 Nev. at 293, 774 P.2d at 433 (internal quotation marks omitted)), vacated as to the punitive damages award by Schlang v. Key Airlines, Inc., 158 F.R.D. 666, 671 (D. Nev. 1994).

Nothing in the record before us, even when viewed in a light most favorable to Sawyer, indicates that Sawyer engaged in an affirmative act "to expose illegal or unsafe practices" by contacting NDEP. Wiltsie, 105 Nev. at 293, 774 P.2d at 433 (internal quotation marks omitted). Furthermore, while "[a] claim for tortious discharge should be available to an employee who was terminated for refusing to engage in conduct that [s]he, in good faith, reasonably believed to be illegal," Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1324, 970 P.2d 1062, 1068 (1998), Sawyer fails to demonstrate that she was aware that any conduct was illegal at the time she reported it to NDEP. In her affidavit supporting the

opposition to Newmont's summary judgment motion, Sawyer simply stated that, in response to a question from the NDEP employee about the quench tank project, she advised NDEP that "construction had already started." She did not state in her affidavit that she was reporting an illegal construction project. In fact, when asked in her deposition whether she "ever file[d] a formal complaint of violation with any governmental authority while [she was] working for Newmont," Sawyer answered no. Further, in her deposition, Sawyer described her interaction with NDEP as "a routine conversation."

Internal whistleblowing

Ainsworth and Sawyer also allege that they reported violations of environmental permits and regulations to Newmont's management on numerous occasions, but that Newmont did not take any action. Based on this argument, Ainsworth and Sawyer urge this court to extend our whistleblower protections to those employees who are terminated for reporting potential permit violations or illegal acts to supervisors and management within their company. Ainsworth and Sawyer contend that there is a nationwide trend to protect internal whistleblowing, which serves the same goal as protecting external whistleblowing: to protect reporting employees from retaliatory discharge. While this court has recognized protections for whistleblowers, such protections are limited to an employee who reports activity to a governmental agency outside the company, see Wiltsie, 105 Nev. at 293, 774 P.2d at 433, and we are not compelled to extend the grounds for a whistleblowing claim beyond the limits set forth in Wiltsie. See Secretary of State v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of stare decisis, [this court] will not overturn [precedent]

absent compelling reasons for so doing. Mere disagreement does not suffice." (internal citations omitted)).

Because Ainsworth and Sawyer have failed to demonstrate that they were terminated in retaliation for their alleged whistleblowing actions, we conclude that the district court did not err in granting summary judgment on their tortious discharge claim.

Ainsworth's and Sawyer's remaining claims

Ainsworth and Sawyer argue that the district court erred in granting summary judgment on their breach of contract claim. However, pursuant to the Newmont employee handbook provisions, Ainsworth and Sawyer were at-will employees. As such, we conclude that this argument is without merit. "Since a claim arising from breach of contract has no application to at-will employment, [when an employee] has not demonstrated that [s]he was other than an at-will employee, a breach of contract cause of action will not lie." Martin v. Sears, Roebuck and Co., 111 Nev. 923, 928, 899 P.2d 551, 554 (1995).

Ainsworth and Sawyer also argue that the district court erred in granting summary judgment on their defamation claim. Their claim is based on an e-mail sent to Newmont employees in Nevada, in which Newmont explained structural changes in one of its departments. Ainsworth and Sawyer have failed to prove the necessary elements for a defamation claim, and we thus conclude that their defamation claim also lacks merit. See Clark County Sch. Dist. v. Virtual Educ., 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (listing the elements of defamation as "(1) a false and defamatory statement . . . ; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages" (alteration in original) (internal quotation marks omitted)); Lubin v. Kunin, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001).

Finally, Ainsworth and Sawyer argue that the district court erred in granting summary judgment on their claim for intentional infliction of emotional distress because they "were not offered other employment, their former co-workers speculated as to the reasons for their terminations, and [they] suffered indignities such as loss of employment, loss of their homes, and subsequent employment far below their abilities." However, they alleged in the district court that the physical symptoms of their emotional distress were limited to stress, sleeplessness and loss of appetite. As we have previously held, these physical symptoms are insufficient to establish severe emotional distress. See Olivero v. Lowe, 116 Nev. 395, 399, 995 P.2d 1023, 1026 (2000).

Because Ainsworth and Sawyer have failed to demonstrate the existence of any genuine issues of material fact, we conclude that the district court did not err in granting summary judgment in favor of Newmont.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

Saitta, C.J.

Douglas, J.

Cherry, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

cc: Hon. Michael Montero, District Judge
Carolyn Worrell, Settlement Judge
Henry Egghart
Sherman & Howard, LLC
Kyle B. Swanson
Humboldt County Clerk