IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASHLEY COOPER,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE,
Respondents,
and
THE M RESORT, LLC, A DOMESTIC LIMITED-LIABILITY COMPANY; AND JOE BRAVO, INDIVIDUALLY,
Real Parties in Interest.

No. 74907

FILED

JUN 18 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order granting partial summary judgment in favor of real parties in interest.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control manifest abuse, or an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Merits Incentives, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 689, 694, 262 P.3d 720, 723 (2011). "A manifest abuse of discretion is [a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *See State v. Eighth Judicial Dist.*

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Court (Armstrong), 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (internal quotation marks omitted).

Writ relief is typically not available when the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.170; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Petitions for mandamus are extraordinary remedies, and it is within the discretion of this court to determine if a petition will be considered. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991). While an appeal is generally an adequate and speedy remedy precluding mandamus relief from orders granting partial summary judgment, this court may exercise its discretion "when an important area of law needs clarification and judicial economy is served by considering the writ petition." *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014).

In the proceedings below, the district court granted partial summary judgment in favor of real parties in interest (collectively referred to herein as M Resort) as to the following claims for relief: (1) wrongful termination pursuant to NRS Chapter 613; (2) negligence and negligent hiring, training, and supervision; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) negligence per se. The district court denied summary judgment as to petitioner Ashley Cooper's remaining claims relating to invasion of privacy, respondeat superior/vicarious liability, and her request for declaratory relief. Cooper asserts that summary judgment was improper. Having considered the petition and supporting documents, we elect to exercise our discretion and consider the petition for a writ of mandamus in the interest of judicial

economy and to control a manifest abuse of discretion. *See Armstrong*, 127 Nev. at 931-32, 267 P.3d at 779-80.

First, the district court manifestly abused its discretion in granting summary judgment in favor of M Resort as to the wrongful termination claim. Nevada's anti-discrimination statutes, which are set forth in NRS Chapter 613, like its federal counterparts, require plaintiffs to exhaust their administrative remedies by filing a complaint with the Nevada Equal Rights Commission (NERC) prior to filing a district court action. *Pope v. Motel 6*, 121 Nev. 307, 311, 114 P.3d 277, 280 (2005). Here, Cooper filed her discrimination claim with the Equal Employment Opportunity Commission (EEOC), not NERC.

"In light of the similarity between Title VII of the 1964 Civil Rights Act and Nevada's anti-discrimination statutes, [Nevada's appellate courts] have previously looked to the federal courts for guidance in discrimination cases." *Id.* (internal citation omitted). And federal courts have held that filing with one entity constitutes filing with both entities, such that Cooper exhausted her administrative remedies by filing her claim with the EEOC. *See Narayanan v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Educ. ex rel. Univ. of Nev., Reno*, No. 3:11-CV-00744-LRH-VPC, 2013 WL 2394934, at *5 (D. Nev. May 30, 2013) ("The Nevada Equal Rights Commission ("NERC") and the federal EEOC operate under a work-sharing agreement such that a right-to-sue letter from the EEOC is sufficient to pursue a claim under Nevada law."); *Pulsipher v. Clark Cty.*, No. 2:08-CV-01374-RCJ-LRL, 2010 WL 3781809, at *5 n.5 (D. Nev. Sept. 20, 2010) ("In states such as Nevada, where the EEOC has a work-sharing agreement with the state equal rights authority . . . exhaustion of administrative remedies with either entity constitutes exhaustion with both

entities."); *Puryear v. Cty. of Roanoke*, 214 F.3d 514, 518 n.4 (4th Cir. 2000) (explaining that regardless of whether a complainant checks the box indicating he or she wants the charge filed with both the EEOC and the state agency, the EEOC forwards the charge to the state agency pursuant to the work-share agreement).

Moreover, NRS 233.160(1) indicates that a discrimination complaint is timely filed with the state commission if it is timely filed with the EEOC. This statute also indicates that if the EEOC adjudicates the complaint, the complainant may not also file with the state commission. NRS 233.160(1). Here, the record indicates that Cooper timely filed her discrimination claim with the EEOC and her complaint does in fact indicate that she wanted the charge filed with both the EEOC and NERC. *See Puryear*, 214 F.3d at 518-19. Thus, Cooper exhausted her administrative remedies pursuant to NRS 613.420[1] by timely filing her discrimination complaint with the EEOC and the district court erroneously applied the law in concluding that Cooper failed to exhaust her administrative remedies. As a result, summary judgment was improper on this claim. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law).

The district court's grant of summary judgment as to Cooper's negligence claims was also clearly erroneous. Specifically, the district court

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[1]We note that NRS 613.420 was amended effective October 1, 2017. *See* 2017 Nev. Stat., ch. 319, § 16, at 1788. However, this amendment does not affect the disposition of this appeal as it was enacted after partial summary judgment was entered in this case.

erroneously concluded that, because Cooper alleged M Resort acted intentionally, she could not also pursue a negligence cause of action. However, Cooper is entitled to plead alternative theories of recovery. *See* NRCP 8(a); *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978) (stating that "[a] single count may allege alternative theories of recovery" in concluding the allegations supported both strict products liability and negligence claims); *Auto Fair, Inc. v. Spiegelman*, 92 Nev. 656, 658, 557 P.2d 273, 275 (1976) ("[NRCP] 8(a) specifically permits a plaintiff to assert inconsistent claims for relief."). Additionally, our review of the record demonstrates that there are genuine issues of material fact remaining as to Cooper's negligence claims. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Similarly, the district court's grant of summary judgment as to Cooper's intentional infliction of emotional distress (IIED) claim was clearly erroneous. "To recover on a claim for IIED, a plaintiff must prove (1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Franchise Tax Bd. of State of Cal. v. Hyatt*, 133 Nev. ___, ___, 407 P.3d 717, 741 (2017) (internal quotations omitted), *petition for cert. filed*, ___ U.S.L.W. ___, (U.S. Mar. 12, 2018) (No. 17-1299).

The district court concluded that M Resort's conduct did not constitute extreme and outrageous conduct, and that Cooper failed to establish that she suffered severe emotional distress due to her lack of treatment and failure to identify any physical or medical condition. However, whether the conduct in question is extreme and outrageous is a factual determination for the jury. *Posadas v. City of Reno*, 109 Nev. 448,

456, 851 P.2d 438, 444 (1993) ("The jury was entitled to determine, considering prevailing circumstances, contemporary attitudes and [the appellant's] own susceptibility, whether the conduct in question constituted extreme [and outrageous conduct]." (internal quotation marks omitted)). Similarly, the district court applied the wrong standard in concluding that summary judgment was proper because Cooper did not provide medical evidence, as Nevada has adopted a sliding scale approach to determine when medical evidence is required. *Franchise Tax Bd.*, 133 Nev. at ___, 407 P.3d at 742 (adopting a sliding scale approach and concluding that "while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered"). Additionally, we note that testimony alone may be sufficient evidence to prove emotional distress. *See id.* (allowing testimony from the plaintiff and his sons, without medical evidence, to demonstrate plaintiff's emotional distress based on the severity of the conduct); *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 374-75, 725 P.2d 234, 236 (1986) (allowing the plaintiff's testimony alone as proof of emotional distress). Thus, summary judgment was improper and the district court must consider the evidence in light of Nevada authority.

As to Cooper's negligent infliction of emotional distress (NIED) claim, unlike the IIED claim, the district court did not abuse its discretion in granting summary judgment and we therefore see no basis for issuance of a writ. *See Olivero v. Lowe*, 116 Nev. 395, 399, 995 P.2d 1023, 1026 (2000) (explaining that for NIED claims, there must be a physical impact or "proof of 'serious emotional distress' causing physical injury or illness"); *Chowdhry*

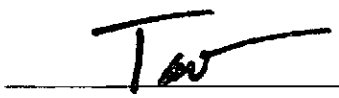
v. NLVH, Inc., 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993) (explaining that a physical impact or physical symptoms are required for NIED claims, and contrasting that with, in the context of IIED, "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness" (internal quotation marks omitted)). We similarly discern no abuse of discretion and therefore decline to issue a writ as to Cooper's negligence per se claim. *See Vega v. E. Courtyard Assocs.*, 117 Nev. 436, 439, 24 P.3d 219, 221 (2001) (explaining that whether a particular statute establishes the standard of care in a negligence action is a question of law); *Hinegardner v. Marcor Resorts, L.P. V.*, 108 Nev. 1091, 1095–96, 844 P.2d 800, 803 (1992) (providing that a violation of a criminal statute is not negligence per se absent evidence of legislative intent to impose civil liability); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1200 (D. Nev. 2009) (stating the same).

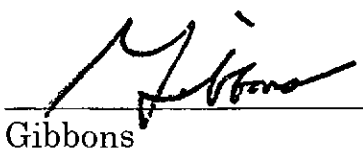
Based on the foregoing, we must conclude that the district court's grant of partial summary judgment constituted a manifest abuse of discretion with regard to Cooper's wrongful termination; negligence and negligent hiring, training, and supervision; and intentional infliction of emotional distress claims and that our extraordinary intervention is warranted with regard to these claims. *See* NRS 34.160; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Accordingly, we

ORDER the petition GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting summary judgment as to Cooper's wrongful termination; negligence and negligent hiring, training,

and supervision; and intentional infliction of emotional distress causes of action.[2]


, C.J.
Silver


, J.
Tao


, J.
Gibbons

cc: Hon. Joanna Kishner, District Judge
Bowen Law Offices
Fisher & Phillips LLP
Eighth District Court Clerk

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[2]We decline M Resort's request to allow additional briefing on the veracity of the district court's denial of summary judgment on the remaining claims. *See* NRAP 21(a); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 229, 88 P.3d 840, 844 (2004) (explaining the limited scope of writ review). We similarly decline M Resort's invitation to apply the doctrine of latches. *See State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 135, 994 P.2d 692, 697 (2000) (explaining that latches is an equitable doctrine that may be applied when certain factors are met).