

IN THE SUPREME COURT OF THE STATE OF NEVADA

TSIGE GESIT BOGALE,  
Appellant,  
vs.  
ST. MARY'S REGIONAL MEDICAL  
CENTER, INC., A NEVADA  
CORPORATION,  
Respondent.

No. 36935

FILED

DEC 11 2002

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

TSIGE GESIT BOGALE,  
Appellant,  
vs.  
ST. MARY'S REGIONAL MEDICAL  
CENTER, INC., A NEVADA  
CORPORATION,  
Respondent.

No. 37437

ORDER OF AFFIRMANCE

Appellant Tsigé Bogale appeals from a district court order granting summary judgment (No. 36935) and awarding attorney fees and costs (No. 37473) to respondent St. Mary's Regional Medical Center.<sup>1</sup> We conclude that Bogale's arguments are without merit, and accordingly, we affirm the district court's orders.

This court's review of an order granting summary judgment is de novo.<sup>2</sup> Summary judgment is appropriate where there exists no genuine issue as to any material fact and that the moving party is entitled

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<sup>1</sup>These appeals were consolidated by order of this court on May 24, 2001.

<sup>2</sup>Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

to judgment as a matter of law.<sup>3</sup> "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."<sup>4</sup>

"[W]hen a motion for summary judgment is made and supported as required by NRCP 56, the [non-moving] party may not rest upon the 'mere allegations of his pleading, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial.'"<sup>5</sup> Evidence offered in support of, or in opposition to, a motion for summary judgment must be admissible evidence.<sup>6</sup> All of the non-movant's statements must be accepted as true, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition.<sup>7</sup>

Bogale, an African-American female, asserts that the district court improperly granted St. Mary's motion for summary judgment on her discrimination claim because it: (1) concluded that Bogale had not presented sufficient evidence to establish a prima facie case of discrimination; (2) weighed the credibility of St. Mary's non-discriminatory reasons for failing to promote Bogale; and (3) ignored Bogale's evidence of

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<sup>3</sup>NRCP 56(c).

<sup>4</sup>Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

<sup>5</sup>Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981) (quoting Garvey v. Clark County, 91 Nev. 127, 130, 532 P.2d 269, 271 (1978)); see also NRCP 56(e).

<sup>6</sup>Posadas, 109 Nev. at 452, 851 P.2d at 442.

<sup>7</sup>Great American Ins. v. General Builders, 113 Nev. 346, 350-51, 934 P.2d 257, 260 (1997).

pretext. Bogale further contends that the district court abused its discretion in awarding attorney fees and costs to St. Mary's because the grant of summary judgment was erroneous and the court failed to consider the factors set forth in Beattie v. Thomas.<sup>8</sup>

NRS 613.330(1)(a), Nevada's anti-discrimination statute, has similar language to its federal counterpart, Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C.A. § 2000e. This court has relied on federal interpretations of Title VII to interpret Nevada's analogous statutes.<sup>9</sup> The United States Supreme Court has delineated the evidentiary burdens carried by each party in an employment discrimination case under Title VII as follows:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of . . . discrimination. This may be done by showing (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

. . . .

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . . [Then, the applicant must] be afforded a fair opportunity to

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<sup>8</sup>99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

<sup>9</sup>Apeceche v. White Pine Co., 96 Nev. 723, 615 P.2d 975 (1980).

show that [the employer's] stated reason for [the applicant's] rejection was in fact pretext.<sup>10</sup>

Nevada has adopted this framework and allocation of proof in employment discrimination cases.<sup>11</sup>

To establish a prima facie case, an employee must "prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."<sup>12</sup> Bogale established a prima facie case of discrimination. She belongs to two protected classes, African-American and female, and possessed the minimum qualifications for the position of lead technologist, but was rejected for the promotion.

The burden of production then shifted to St. Mary's to provide a "legitimate, nondiscriminatory reason for [Bogale's] rejection."<sup>13</sup> St. Mary's satisfied this burden by showing, by competent evidence, that although David Lucero, the person hired for the position of lead technologist, had fewer years of technical experience than Bogale, he had superior leadership and communication skills, a key aspect of the position. Lucero belonged to two protected classes as well, based upon his Hispanic descent and his sexual orientation. Finally, members of the two selection committees that had interviewed the applicants included women and were of diverse ethnic backgrounds.

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<sup>10</sup>McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 802, 804 (1973).

<sup>11</sup>Apeceche, 96 Nev. at 726-27, 615 P.2d at 977-78.

<sup>12</sup>Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

<sup>13</sup>McDonnell-Douglas, 411 U.S. at 802.

After St. Mary's proffered a legitimate, nondiscriminatory reason for failing to promote Bogale, Bogale had to show that the proffered explanation was merely a pretext.<sup>14</sup> As the United States Supreme Court has stated:

This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.<sup>15</sup>

Bogale failed to prove that St. Mary's explanation was merely a pretext. She offered three main arguments to show that St. Mary's proffered reason was not the true reason for its employment decision. First, she argued that she was more qualified than Lucero. However, in her deposition, Bogale admitted that she did not know Lucero's qualifications and based her reasoning solely upon her length of employment at St. Mary's and her technical experience as a "generalist."

Second, Bogale argued that the destruction of the confidential interview sheets used to score the candidates for the position entitled her to an inference of pretext. However, under NRS 47.250, she is not entitled to an inference of pretext based upon the unavailability of the scoring sheets because the statute only raises a disputable presumption that evidence would be adverse if produced where the evidence is willfully suppressed. The deposition testimony of Muthoka Mutua, who destroyed

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<sup>14</sup>Burdine, 450 U.S. at 256.

<sup>15</sup>Id.

the sheets, indicated that he destroyed the scoring sheets shortly after the promotion decision was made and before Bogale raised the issue of discrimination. He testified that the scoring sheets were destroyed per St. Mary's usual procedure. Thus, Bogale has not shown that Mutua "willfully suppressed" the scoring sheets. Although 29 C.F.R. § 1602.14 requires employers to retain records relating to promotion decisions for one year, the deposition testimony of five of the eight interview committee members indicates that the person promoted was the superior candidate who received the highest score and was chosen based solely upon his qualifications.

Third, Bogale argued that Dr. Wen Chuan, a member of the interview committee, told her after the employment decision that she "was lucky to have a job" and that this comment showed that the reason for promoting Lucero instead of her was merely pretextual. Dr. Chuan's deposition testimony indicated, however, that the remark was taken out of context. He made the remark in the context of laboratory restructuring and St. Mary's policy not to lay off employees. Moreover, "'stray' remarks are insufficient to establish discrimination."<sup>16</sup>

To avoid summary judgment, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.<sup>17</sup> Bogale failed to present evidence in support of her claims. The only evidence she offered was her subjective beliefs that she was more

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<sup>16</sup>Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438 (9th Cir. 1990).

<sup>17</sup>NRCP 56(e); see also Bird, 97 Nev. at 70, 624 P.2d at 19.

qualified than Lucero and that she was denied a promotion based upon her gender and race. This is insufficient to demonstrate the existence of a genuine issue of material fact as to the issue of pretext. Thus, the district court properly granted summary judgment.<sup>18</sup>

Bogale next contends that the district court abused its discretion in awarding attorney fees and costs to St. Mary's. She argues first that the order granting summary judgment was improper, and therefore, the award of attorney fees and costs was improper. She next argues that, even if this court upholds the summary judgment order, the award of attorney fees constituted an abuse of discretion because the trial court erroneously concluded that her rejection of St. Mary's offer of judgment was grossly unreasonable or in bad faith. Finally, she contends that St. Mary's failed to provide an affidavit of counsel containing a description of the legal fees incurred and an explanation of why the work was necessary and reasonable. Without such an affidavit, Bogale contends, she was unable to object to the amount of fees in district court.

Because we affirm the district court's order granting summary judgment, Bogale cannot prevail on her first argument. We therefore turn to her second argument.

The district court awarded attorney fees in the amount of \$9,402.50 to St. Mary's based upon NRS 17.115<sup>19</sup> and NRCP 68.<sup>20</sup> In

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<sup>18</sup>Because we hold that Bogale failed to furnish evidence to demonstrate the existence of a genuine issue of material fact, we do not need to reach Bogale's argument that the district court improperly weighed the credibility of St. Mary's evidence.

<sup>19</sup>NRS 17.115(4)(c) and (d) provide:

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Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

....

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay to the party who made the offer any or all of the following:

(1) A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.

(2) Any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment.

(3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.

<sup>20</sup>NRCP 68(f) provides:

(f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,

(1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and

*continued on next page . . .*



exercising its discretion regarding an award of attorney fees under these statutes, the district court must evaluate the factors set forth in Beattie.<sup>21</sup>

These include:

(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.<sup>22</sup>

Both the timing and amount of the offer by St. Mary's were reasonable. St. Mary's made an offer of judgment after sufficient discovery had been done to allow the parties to analyze their respective positions. It offered \$2,500.00 to Bogale, which was reasonable given that Bogale had asserted numerous claims which she subsequently dismissed. Given that Bogale failed to provide any evidence of discrimination on the part of St. Mary's, her rejection of the offer could be viewed as grossly unreasonable. The district court had the discretion to determine whether

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*... continued*

(2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

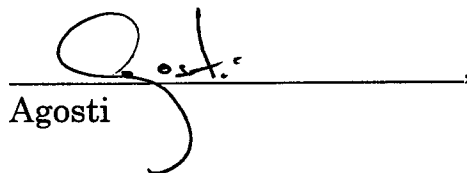
<sup>21</sup>99 Nev. 579, 668 P.2d 268.

<sup>22</sup>Id. at 588-89, 668 P.2d at 274.

the amount of attorney fees was reasonable based upon the affidavit of St. Mary's counsel regarding the number of hours worked, by whom and the hourly rates charged. Bogale did not object to the hours worked or the rate charged in district court. Finally, although the district court did not provide a detailed justification of its award of attorney fees, it did consider the Beattie factors in forming its decision. Therefore, it does not appear that the district court abused its discretion in awarding attorney fees and costs.

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

 \_\_\_\_\_, C.J.  
Young

 \_\_\_\_\_, J.  
Agosti

cc: Hon. Steven R. Kosach, District Judge  
Erwin & Thompson  
Lemons Grundy & Eisenberg  
Washoe District Court Clerk

ROSE, J., dissenting:

The majority correctly states that the language of NRS 613.330(1)(a) is similar to its federal counterpart, and this court has adopted the framework and allocation of proof in employment discrimination cases as established by federal jurisprudence.<sup>1</sup> Because I believe that this federal scheme we have adopted requires the district judge to make far too many factual determinations in the process, I dissent.

The federal scheme requires a plaintiff claiming employment discrimination to present a prima facie case, if challenged before trial, to show he or she was qualified but rejected under circumstances that give rise to an inference of an unlawful employment decision. In ruling on a pretrial motion, the district court makes this determination similar to that made in any other civil case. Normally establishing a prima facie case would permit the plaintiff to present the case to a jury, if a jury was demanded.

The federal scheme we have approved next requires the employer to set forth a legitimate, nondiscriminatory reason for the rejection. Rather than a jury determining whether the employer has made such a showing, the judge again makes this factual determination. And if the district court determines that the employer has made a nondiscriminatory showing, the plaintiff must then establish that the rejection was pretextual to prevent the case from being dismissed. Again, this factual determination is made by the district court.

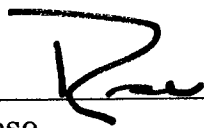
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<sup>1</sup>See Apeceche v. White Pine Co., 96 Nev. 723, 726-27, 615 P.2d 975, 977-78 (1980).

While the federal system may prefer the trial courts to be substantially involved in making factual determinations in cases where a jury trial has been demanded, I believe we should let juries make the factual findings. Our law requires that factual determinations be made by the trier of fact and only questions of law be decided by the judge.<sup>2</sup> The Nevada Constitution guarantees everyone a trial by jury. But, a citizen's right to a trial by jury is eliminated if the important factual determinations are made by the judge before a jury is ever empanelled.

The federal scheme which allocates the burden of proof and requires the district judge to make substantial factual findings runs counter to Nevada's general legal structure and encroaches on a juror's right to make the critical factual determinations in a case. Since the plaintiff has already established that she has a good faith prima facie case, I would reverse the summary judgment and remand for a trial on the merits.

Therefore, I respectfully dissent.

  
\_\_\_\_\_, J.  
Rose

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<sup>2</sup>See NRS 16.110 ("The court shall give instructions only as to the law of the case."); see also, Dechant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000) (noting that the trier of fact weighs evidence and passes on the credibility).