

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN NEADE,  
Appellant,

vs.

JOHN MOTLEY, AN INDIVIDUAL;  
RITE OF PASSAGE, INC.; RITE OF  
PASSAGE/CHARTER; AND RITE OF  
PASSAGE ATHLETIC TRAINING  
CENTERS AND SCHOOLS, INC.,  
Respondents.

No. 37505

**FILED**

JUL 10 2002

WANEY A. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from an order of the district court granting summary judgment pursuant to NRCP 56.

This court's review of an order granting summary judgment is de novo.<sup>1</sup> Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.<sup>2</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>3</sup>

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<sup>1</sup>Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

<sup>2</sup>NRCP 56(c).

<sup>3</sup>Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

When a motion for summary judgment is made and supported as required by NRCPC 56, 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>4</sup> Evidence offered in support of, or in opposition to, a motion for summary judgment must be admissible evidence.<sup>5</sup> All of the non-movant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, 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>6</sup>

Appellant John Neade contends that summary judgment was improper as to six causes of action in his original complaint; namely, his disability discrimination, negligent infliction of emotional distress, fraudulent and negligent misrepresentation, breach of employment contract, constructive discharge, and retaliatory discharge claims, because the exclusive remedy provision of the Nevada Industrial Insurance Act, which provides that an injured employee may only have one recovery for personal injuries sustained in a work-related accident, does not prohibit actions against employers for discrimination or retaliation stemming from the employee's filing of a worker's compensation claim. Neade further

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<sup>4</sup>NRCPC 56(e); see also Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981).

<sup>5</sup>Posadas, 109 Nev. at 452, 851 P.2d at 442.

<sup>6</sup>Great American Ins. v. General Builders, 113 Nev. 346, 350-351, 934 P.2d 257, 260 (1997).

contends that genuine issues of material fact exist as to his contract claims because Rite of Passage's employee handbook is ambiguous.

Worker's compensation laws are not designed to relieve the consequences of losing one's job.<sup>7</sup> Other social legislation and recognized torts provide remedies to individuals wrongfully terminated by employers.<sup>8</sup> Thus, the exclusive remedy provision of the Nevada Industrial Insurance Act does not bar Neade's claims, and the district court erred by granting summary judgment as a matter of law on that basis. For the following reasons, however, we conclude that summary judgment was proper as to all of Neade's claims except his retaliatory discharge claim.

The Americans with Disabilities Act provides that "an employer 'shall not discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges.'"<sup>9</sup> Further, Nevada's Equal Employment Act provides that it is unlawful for an employer to discharge an employee because of his disability.<sup>10</sup> To prevail on such a claim, the employee bears the initial

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<sup>7</sup>Wolber v. Service Corp. Intern., 612 F.Supp. 235, 238 (D. Nev. 1985).

<sup>8</sup>Id.

<sup>9</sup>Morton v. GTE North Inc., 922 F.Supp. 1169, 1178 (N.D. Tex. 1996) (quoting Title I of the Americans with Disabilities Act, 42 U.S.C. § 12112(a) (1995)).

<sup>10</sup>NRS 613.330(1)(a).

burden of establishing a prima facie case of discrimination by proving that: (1) he is a member of a protected class, i.e., he has a disability; (2) he is qualified for the job; (3) he is satisfying the job requirements; (4) he was discharged; and (5) the employer assigned others to do the same work.<sup>11</sup>

Neade's complaint alleges that respondent Rite of Passage, Inc. unlawfully discriminated against him on the basis of his work-related disability by terminating his employment because he could not perform tasks beyond his light duty medical release. There is no evidence, however, demonstrating that Neade has a disability under the federal guidelines. Thus, we conclude that the district court properly granted summary judgment on Neade's disability discrimination claim, albeit for the wrong reason.<sup>12</sup>

This court has recognized a cause of action for negligent infliction of emotional distress for negligent acts committed directly against a victim-plaintiff.<sup>13</sup> To prevail, "serious emotional distress" causing physical injury or illness must be proven.<sup>14</sup> In the context of intentional infliction of emotional distress, this court has stated that "[t]he

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<sup>11</sup>Apeceche v. White Pine Co., 96 Nev. 723, 726, 615 P.2d 975, 977 (1980) (race discrimination case).

<sup>12</sup>See Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (affirming order of the district court if it reached correct result, albeit for different reasons).

<sup>13</sup>Shoen v. Amerco, Inc., 111 Nev. 735, 748, 896 P.2d 469, 477 (1995); Chowdhry v. NLVH, Inc., 109 Nev. 478, 482, 851 P.2d 459, 462 (1993).

<sup>14</sup>Chowdhry, 109 Nev. at 482, 851 P.2d at 462.

less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress."<sup>15</sup>

Here, Neade's emotional distress claim is premised upon his general allegations of harassment by respondent John Motley, including verbal and non-verbal acts and derogatory remarks. In his complaint, Neade alleges that he suffered depression, anxiety, humiliation, stress, and embarrassment as a result of Motley's harassment. However, Neade presented no evidence of serious emotional distress or physical injury or illness, and this court has stated that general physical or emotional discomfort are insufficient to satisfy the physical impact requirement.<sup>16</sup> Accordingly, we conclude that the district court properly granted summary judgment as to Neade's negligent infliction of emotional distress claim, albeit for the wrong reason as well.

Under Nevada law, the plaintiff has the burden of proving every element of a fraudulent misrepresentation claim by clear and convincing evidence:

- (1) A false representation 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
- (4) damage to the plaintiff as a result of relying on the misrepresentation.<sup>17</sup>

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<sup>15</sup>Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).

<sup>16</sup>Chowdhry, 109 Nev. at 482-83, 851 P.2d at 462.

<sup>17</sup>Barmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998).

Further, this court has adopted the definition of negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552:

One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.<sup>18</sup>

In this case, Neade alleges that Motley added a fictitious statement to his signed personnel action form to portray his termination as a resignation. Neade asserts that Motley knew his representation was false and that he and Rite of Passage induced Neade to act upon the misrepresentation. However, Neade did not allege any misrepresentation by Rite of Passage and, even assuming that Motley made the misrepresentation, Neade never specified how he was induced to act upon the misrepresentation, and he asserts that he was terminated and did not resign from Rite of Passage. We therefore conclude that summary judgment was proper as to Neade's fraudulent and/or negligent misrepresentation claims.

With respect to his breach of contract claim, Neade alleges an implied employment contract between him and Rite of Passage and that Rite of Passage breached that contract by terminating his employment based on his disability. The excerpts of Rite of Passage's employee handbook that Neade attached to his opposition to summary judgment outline an employee grievance policy and employee disciplinary

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<sup>18</sup>Barnettler, 114 Nev. at 449, 956 P.2d at 1387.

procedures. However, the employee handbook's express disclaimer clearly states that "this handbook is not an employment contract. Unless you have a written employment contract with Rite of Passage signed by the president of the company, you legally are an at-will employee."

Employees in Nevada are presumed to be employed "at-will" unless the employee can prove facts legally sufficient to show a contrary agreement was in effect.<sup>19</sup> The at-will rule gives the employer the right to discharge an employee for any reason, so long as the reason does not violate public policy.<sup>20</sup> Nonetheless, this court has recognized that employee handbooks which contain disclaimers tending to contradict other promissory language in the handbooks are inherently ambiguous and that, in those cases, the entire handbook, including any disclaimer, should be considered in determining whether the handbook gives rise to an employment contract.<sup>21</sup>

We conclude that, when read together, the employee grievance policy, the employee disciplinary procedures, and the "at-will employment acknowledgment" in Rite of Passage's employee handbook do not create an inherent ambiguity with regard to Rite of Passage's express disclaimer of at-will employment. Moreover, Neade's own deposition testimony indicates that he was an at-will employee and he was unaware of any terms of an employment contract. Finally, the deposition testimony of Rite of Passage's chief executive officer, indicating that he had never

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<sup>19</sup>Dillard Department Stores v. Beckwith, 115 Nev. 372, 376, 989 P.2d 882, 884 (1999).

<sup>20</sup>Id. at 376, 989 P.2d at 885.

<sup>21</sup>Barmettler, 114 Nev. at 451, 956 P.2d at 1388.

instructed his subordinates to terminate an employee for anything less than good cause, is insufficient to create a genuine issue of material fact as to the existence of an implied employment contract. Thus, Neade was an at-will employee, and the district court properly granted summary judgment as to his breach of employment contract claim.

Presumably, although Neade's complaint specifically alleges that he did not resign from Rite of Passage, the complaint alleged a constructive discharge cause of action in the alternative to the retaliatory discharge claim. "Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party."<sup>22</sup> However, summary judgment is proper where "an essential element of a claim for relief is absent."<sup>23</sup> An essential element of a tortious constructive discharge claim is that the employee resigned,<sup>24</sup> yet Neade insists that he was terminated. Thus, although the district court's determination that the exclusive remedy provision barred this claim was erroneous, we conclude that summary judgment as to Neade's constructive discharge claim was proper nonetheless.

Finally, this court has stated that to prevail on a retaliatory discharge claim, "the employee must be able to establish that the dismissal was based upon the employee's refusing to engage in conduct that was violative of public policy or upon the employee's engaging in

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<sup>22</sup>Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990).

<sup>23</sup>Barmettler, 114 Nev. at 447, 956 P.2d at 1386.

<sup>24</sup>Martin v. Sears, Roebuck and Co., 111 Nev. 923, 926, 899 P.2d 551, 553 (1995).



conduct which public policy favors (such as, say, performing jury duty or applying for industrial insurance benefits).”<sup>25</sup> Additionally, other courts have stated that three elements are necessary to establish a cause of action for retaliatory discharge for filing a worker’s compensation: (1) that the employee was engaged in a protected activity; namely, filing a worker’s compensation claim; (2) that the employee suffered an adverse employment decision; namely, termination; and (3) that there was a causal link between the employee’s activity and the employment decision.<sup>26</sup>

In this case, Neade alleges that Rite of Passage terminated his employment because he objected to working conditions that violated his doctor’s restrictions for light duty employment. As discussed above, worker’s compensation laws are not designed to relieve the consequences of losing one’s job.<sup>27</sup> Thus, the district court erred by granting Rite of Passage summary judgment as to this claim based on the exclusive remedy provision of the Nevada Industrial Insurance Act. However, the record reveals that Neade’s employment with Rite of Passage ended in May 1998, yet he continued to receive worker’s compensation benefits for a period of time thereafter. As such, Motley and Rite of Passage contend that Neade has been fully compensated for his alleged damages via his worker’s compensation benefits and that any further award would

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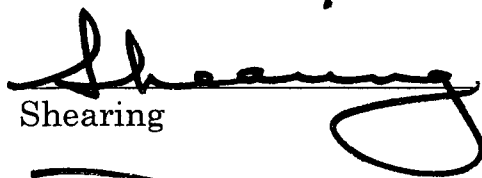
<sup>25</sup>Bigelow v. Bullard, 111 Nev. 1178, 1181, 901 P.2d 630, 632 (1995).

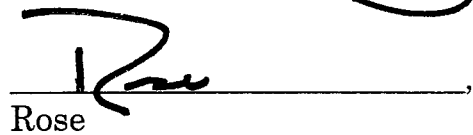
<sup>26</sup>See Trent v. Valley Electric Ass’n Inc., 41 F.3d 524, 526 (9th Cir. 1994); see also Hiatt v. Rockwell Intern. Corp., 26 F.3d 761, 767 (7th Cir. 1994).

<sup>27</sup>Wolber, 612 F. Supp. at 238.

constitute an impermissible double recovery. Because the district court's decision was based on the exclusive remedy provision of the Nevada Industrial Insurance Act, it made no findings on the issue of mitigation of damages and/or the implications of the collateral source rule, and the proper resolution of these issues is unclear from the record before us. These issues must first be fully litigated in the district court. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for further proceedings consistent with this order.

  
Shearing J.

  
Rose J.

  
Becker J.

cc: Hon. David A. Huff, District Judge  
Jack E. Kennedy & Associates  
Kilpatrick Johnston & Adler  
Lyon County Clerk