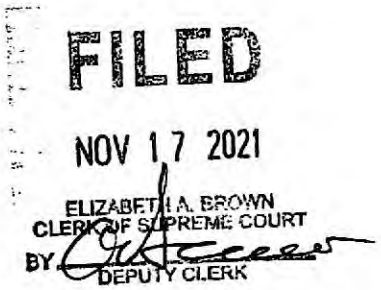
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NADINE RUSSO, AN INDIVIDUAL,
Appellant,
vs.
SHAC, LLC, D/B/A SAPPHIRE GENTLEMEN'S CLUB, A NEVADA LIMITED LIABILITY COMPANY; PETER FEINSTEIN, AN INDIVIDUAL; DAVID MICHAEL TALLA, AN INDIVIDUAL; AND JOHN LEE, AN INDIVIDUAL,
Respondents.

No. 82197-COA



ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Nadine Russo appeals two district court orders granting motions to dismiss.[1] Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Nadine Russo was a bartender and cocktail server at the respondent Sapphire Gentlemen's Club.[2] Respondent John Lee was the general manager at Sapphire and had supervisory control over the managers and other employees. As general manager, Lee would host bi-monthly off-premises "promotional dinners" during which Sapphire employees would attempt to persuade attendees to spend the rest of their night at Sapphire. Sapphire's "promo team" would typically include two or more of the club's female bartenders or cocktail waitresses along with Lee

[1]The Honorable Bonnie A. Bulla, Judge, did not participate in the decision of this matter.

[2]We recount the facts as stated in Russo's complaint.

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and one or more of his subordinate managers. Lee would order his managers to modify schedules in order to "cherry-pick" which female employees attended the promotional dinners. He would then use the off-premises dinners as a pretext to lure the employees into sexual encounters with him or his associates. Lee's conduct was well known to two of Sapphire's ownership group—respondents Peter Feinstein and David Michael Talla.

In December 2014, a few months after Russo was hired at Sapphire, Lee ordered one of his managers to arrange for Russo to attend a New Year's Eve party at the Henderson home of "Dr. Nick," one of Lee's associates and a frequent patron of Sapphire. Shortly after arriving at the party, Russo, who is married, became extremely intoxicated. She has little recollection of the night's events, but does remember Lee performing a sexual act on her in Dr. Nick's bathroom. The following morning, Russo awoke in her own home unable to recall how she had gotten there. When Russo arrived at Sapphire for her shift later that day, she texted Lee to ask if she could meet with him. He invited her into his office and she went to voice her concerns about the previous night's events with Lee and the gaps in her memory. Lee ignored her concerns and instead demanded that she perform a sexual act on him. Afraid of losing her job, Russo complied. Lee then summarily dismissed Russo from his office.

For the next three years, Lee regularly demanded sexual favors including sexual intercourse from Russo, and she acquiesced for fear of suffering repercussions at work. He would often require her to drive to his house or meet him in some isolated location to carry out his desires. Lee would frequently record videos of Russo performing sex acts on him. On one occasion, Lee instructed Russo to sneak away from her husband and drive

to Lee's house where he demanded she have sex with him in his garage. When Russo asked to use Lee's bathroom after the intercourse, Lee refused and instead told her to urinate in his yard. During her shifts at Sapphire, Lee would insist that Russo send him sexually explicit photos of herself, which she did. Lee continued requesting explicit photos until approximately May 2018.

At some point, Russo ceased responding to Lee's demands after her husband found out about the situation, causing turmoil in the home the couple shared with Russo's daughter. After ignoring several of Lee's communications, Russo immediately experienced an increase in write-ups at Sapphire and a decrease in the quantity and quality of the shifts she was assigned. Around May 3, 2018, Russo emailed Sapphire's human resources manager, Brianna Thompson, explaining that Russo was "feeling bullied" at work and requesting a meeting with Thompson. Several days later, the two had a telephone conversation during which Thompson dismissed Russo's complaints and discouraged her from pursuing her grievances any further. Thereafter, management continued to single-out Russo and her income was systematically reduced by 40%. Russo consequently quit her job at Sapphire in May 2018.

On March 28, 2020, Russo filed a civil complaint in district court.[3] As to Sapphire, Russo alleged (1) tortious constructive discharge, (2) intentional infliction of emotional distress (IIED), (3) negligent training, supervision, and retention of Lee, and (4) respondeat superior. As to Feinstein and Talla, Russo alleged negligent training, supervision, and

[3]Russo was joined in the suit by two other female plaintiffs who made similar allegations against Lee and Sapphire, but they are not part of this appeal.

retention of Lee. Finally, as to Lee, Russo alleged IIED and negligence per se. Sapphire, Feinstein, and Talla (hereinafter where applicable, collectively, Sapphire) filed a motion to dismiss for lack of subject matter jurisdiction under NRCP 12(b)(1) and for failure to state a claim upon which relief can be granted under NRCP 12(b)(5). Lee filed a motion to dismiss for failure to state a claim under NRCP 12(b)(5).

Russo opposed Sapphire's motion to dismiss, and Sapphire filed a reply to her opposition. Russo also opposed Lee's motion to dismiss, but her opposition was untimely. At the hearing on the motions to dismiss, Russo requested leave to amend the complaint should the court be inclined to dismiss it. Also at the hearing, the court allowed arguments on the merits of Lee's motion to dismiss (instead of granting the motion based on Russo's failure to timely oppose it).[4]

The district court ultimately granted both Sapphire's and Lee's motions to dismiss. While it never expressly ruled on Russo's oral motion to amend, the court dismissed the complaint with prejudice. Lee's motion to dismiss was granted on the merits. Russo now raises multiple issues on appeal. We address each in turn.

The district court erred in ruling that the statute of limitations barred Russo's IIED claim against Lee

On appeal, Russo argues that Lee's conduct must be viewed in its entirety for the purpose of determining when her claim against him accrued. She argues that it was Lee's sexual misconduct coupled with his retaliatory actions—as her general manager—after she stopped

[4]On appeal, Lee has not asked that we review the district court's decision to rule on the merits of his motion to dismiss and Russo's untimely opposition.

surrendering to his demands, that gave rise to her severe emotional distress. Lee counters that he only could be liable, if at all, for the underlying alleged sexual misconduct and not for Russo's "employment injuries." Because, according to Lee, Russo ceased responding to Lee's demands sometime before January 2018, her March 2020 complaint was untimely.

A defendant's motion to dismiss under NRCP 12(b)(5) is "subject to a rigorous standard of review on appeal." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008) (internal quotation marks omitted). In reviewing dismissal under NRCP 12(b)(5), we recognize all factual allegations in Russo's complaint as true and draw all inferences in her favor. *Id.* at 228, 181 P.3d at 672. Russo's complaint should be dismissed only if it appears beyond a reasonable doubt that she could prove no set of facts, which, if true, would entitle her to relief. *Id.* Because Nevada is a "notice-pleading" jurisdiction, a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has "adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see also Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 308-09, 468 P.3d 862, 878-79 (Ct. App. 2020) (discussing Nevada's liberal notice pleading standard).

The parties agree that a two-year statute of limitations applies to Russo's IIED and negligence per se claims. *See* NRS 11.190(4)(e). "The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). Dismissal of a claim is not appropriate unless the statute of

limitations bar is apparent on the face of the complaint. *See Kellar v. Snowden*, 87 Nev. 488, 491, 489 P.2d 90, 92 (1971) ("When the defense of the statute of limitations appears from the complaint itself, a motion to dismiss is proper."). Taking Russo's allegations as true, *see Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672, at the very least, Lee engaged in a continuous course of conduct including demanding sexually explicit photos from Russo until May 2018. As such, it does not appear from the face of the complaint that the statute of limitations ran before the complaint was filed and a question remains as to whether Russo could have pursued her IIED claim against Lee, based on his alleged sexual misconduct alone, until May 2020. Therefore, dismissal based on the statute of limitations was improper. *See Kellar*, 87 Nev. at 491, 489 P.2d at 92.

In addition, Russo's complaint alleges that, as general manager, Lee would direct his subordinate managers to modify their employees' work schedules to either reward or punish the employees for complying or not complying with his sexual demands. As to Russo's IIED claim, the complaint specifically cites both Lee's sexual misconduct and his abuse of power to punish noncompliant employees at work as the sources of her emotional distress. The complaint states that Russo spoke with the human resources manager around May 3, 2018, to alert her of the misconduct by Lee. Thereafter, Russo alleges that management continued to harass her—presumably at Lee's direction—to the point where her income was reduced by 40%. Lee argues that we must look only to his underlying sexual misconduct because he is not responsible for Russo's "employment injuries." We disagree.

Nevada recognizes IIED in the employment termination context. *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 378, 989 P.2d

882, 886 (1999) (citing *Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469, 476 (1995)); *see also MGM Grand Hotel-Reno, Inc. v. Insley*, 102 Nev. 513, 520, 728 P.2d 821, 825-26 (1986) (holding that a terminated employee's IIED claim could proceed independent of any claims arising under a bargaining agreement).[5] In *Beckwith*, an area sales manager for Dillard's strained her back at work while attempting to move a table. 115 Nev. at 375, 989 P.2d at 884. When she failed to comply with her store manager's demand that she return to work prior to being cleared by her doctor, Beckwith was demoted to an entry-level position. *Id.* In addition to a 40% pay cut, the demotion resulted in multiple instances of humiliation at the hands of management and her coworkers. *Id.* Beckwith fell into a depression for which she was treated with medication and psychotherapy. *Id.* She ultimately resigned from her position. *Id.* There, the Nevada Supreme Court affirmed the jury's $200,000 award on Beckwith's IIED claim. *Id.* at 376, 379, 989 P.2d at 884, 886.

Here, taking Russo's allegations as true, *see Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672, Lee would use his authority as general manager to modify employees' schedules as punishment for refusing his sexual demands. Immediately upon rejecting Lee's sexual demands, Russo experienced a substantial increase in disciplinary action directed at her. She was also given fewer and lower-quality shifts, the result of which was a 40% decrease in her income. As such, she felt compelled to quit her job. Because Lee's retaliatory acts against Russo continued at least into May

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[5]The United States Supreme Court has similarly held that the National Labor Relations Act did not preempt a claim for IIED under state law where the IIED claim could be adjudicated without regard to the underlying labor dispute. *See Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 304-05 (1977).

2018, it does not appear on the face of Russo's complaint that her claim was time-barred as to Lee's workplace conduct and dismissal was therefore improper. *See Kellar*, 87 Nev. at 491, 489 P.2d at 92. Because the district court erred in ruling that Russo's complaint was time-barred under the statute of limitations, we must turn to whether Russo sufficiently pleaded a claim for IIED as to Lee.

Russo sufficiently pleaded a cause of action for IIED against Lee

Russo argues that the district court erred in ruling that Lee's conduct was not so outrageous as to support a claim for IIED. Lee argues that unless Russo can prove that Lee's advances were unwelcome, his actions cannot be extreme or outrageous.[6] Lee also argues that Russo failed to plead severe or extreme emotional distress and that he was not the proximate cause of her distress.

The elements of a cause of action for IIED are "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." *Beckwith*, 115 Nev. at 378, 989 P.2d at 886 (internal quotation marks omitted). Extreme and outrageous conduct is conduct that is outside all

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[6]Lee cites no relevant authority in support of this assertion nor does he cogently argue the point. Therefore, we need not address his assertion that Russo must, in addition to proving the elements of IIED, also prove that his advances were unwelcome. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Nevertheless, taking all inferences from the complaint in favor of Russo, Lee's actions were unwelcome in whole or in part.

possible bounds of decency and is regarded as utterly intolerable in a civilized community. *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998). The more extreme the outrage, the less appropriate it is to require evidence of physical injury or illness from the emotional distress. *See Nelson v. City of Las Vegas*, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).[7]

Taking Russo's allegations as true, *see Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672, for three years Lee would use his authority as the general manager to force Russo into unwanted sexual encounters with him. He would often record Russo performing sex acts on him. He frequently demanded that Russo send him sexually explicit photos of herself while at work and she felt she had to comply. On at least one occasion, Lee denied Russo use of his bathroom thereby forcing her to urinate in his yard after the two had sex in his garage. Once Russo ceased complying with Lee's demands, he immediately used his workplace authority to increase Russo's disciplinary write-ups and to decrease the quality and quantity of the shifts she was assigned. This resulted in a 40% decrease in her income causing her to quit her job.

Additionally, Russo has sufficiently pleaded that Lee intended to cause Russo emotional distress. The supreme court has allowed arguably less severe allegations to proceed to a jury. *See, e.g., Posadas v. City of Reno*, 109 Nev. 448, 456, 851 P.2d 438, 444 (1993) ("Whether the issuance of a press release which could be interpreted as stating that a police officer

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[7]*See also Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826, 854, 407 P.3d 717, 741 (2017), *rev'd on other grounds, Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) ("This court has also impliedly recognized this sliding-scale approach, although stated in the reverse." (citing *Nelson*, 99 Nev. at 555, 665 P.2d at 1145)).

committed perjury is extreme and outrageous conduct is a question for the jury."); *Branda v. Sanford*, 97 Nev. 643, 645, 649, 637 P.2d 1223, 1224, 1227 (1981) (holding that a jury was entitled to determine, considering "prevailing circumstances, contemporary attitudes and [the plaintiff's] own susceptibility," whether verbally accosting a 15-year-old busgirl with sexual innuendos and abusive language constituted extreme outrage). Therefore, Russo's allegations could satisfy the first prong of an IIED claim.

According to the complaint, Lee's conduct caused Russo to suffer from anxiety, sleeplessness, and depression so severe that she had to commence taking anti-anxiety medication. Similarly, in *Beckwith*, the supreme court affirmed the jury's IIED award where Beckwith—as a result of her demotion—fell into a depression and was treated for major depressive disorder with medication and psychotherapy. 115 Nev. at 375, 378-79, 989 P.2d at 884, 886. And the supreme court has allowed cases to proceed with allegations less clearly pled than Russo's. For example, in *Branda*, the supreme court reversed the dismissal of Branda's complaint for IIED where she merely alleged the incident caused her to suffer "severe emotional upset" and "physical symptoms of nervous upset." 97 Nev. at 645, 637 P.2d at 1224-25. And in *Shoen*, the supreme court held that summary judgment was precluded on Shoen's IIED claim where he merely alleged he suffered "emotional distress." *Shoen*, 111 Nev. at 747, 896 P.2d at 477. Additionally, Nevada uses the "sliding-scale approach" for IIED claims whereby a plaintiff can have a lesser showing as to her emotional distress depending on the outrageousness of the defendant's conduct. *See Nelson*, 99 Nev. at 555, 665 P.2d at 1145. Here, based on the outrageousness of Lee's conduct, Russo may arguably be required to prove her emotional distress to a lesser

degree. Therefore, Russo's allegations could satisfy the second prong of an IIED claim.

Finally, Russo's complaint clearly alleges that her severe emotional distress was the "actual and proximate result" of Lee's outrageous conduct. On appeal, Lee argues that Russo's complaint states that Russo only began suffering emotional distress after her marriage began to deteriorate and as such Lee could not be the actual or proximate cause of her distress. However, Lee mischaracterizes the complaint. Russo simply describes her marriage deteriorating as a result of Lee's conduct, in addition to her anxiety, sleeplessness, and severe depression. Additionally, Russo's complaint alleges that her marriage began to deteriorate because her husband found out that she was submitting to Lee's sexual demands. Lee makes no attempt to explain how the deterioration of Russo's marriage, caused by his own conduct, precludes him from being the actual or proximate cause of her distress. Therefore, Russo's allegations could satisfy the third prong of an IIED claim. As such, Russo sufficiently pleaded a cause of action for IIED and the district court erred in ruling that her complaint failed to state a claim upon which relief could be granted.

The district court did not err in dismissing Russo's negligence per se claim against Lee for failure to state a claim upon which relief can be granted

Russo argues that the district court erred in dismissing her negligence per se claim[8] because criminal statutes do not require a civil

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[8]Russo's negligence per se claim was predicated on NRS 200.604—Nevada's voyeurism statute. Under NRS 200.604, it is a gross misdemeanor to knowingly and intentionally capture an image of the private area of another person without the person's consent and under circumstances in which the person has a reasonable expectation of privacy.

component for recovery of damages. She further argues a jury could find that a reasonable person would not be expected to endure Lee's outrageous conduct. Lee counters that the district court correctly dismissed Russo's negligence per se claim because a criminal statute cannot form the basis for a negligence per se claim absent legislative intent to impose civil liability for violating it. In the alternative, he argues that Russo failed to properly plead a violation of NRS 200.604, causation, or damages.

Generally, a statutory violation constitutes negligence per se if the injured party belongs to the class of persons the statute was intended to protect and the injury was of the type the statute intended to prevent. *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 643, 98 P.3d 678, 680 (2004). Whether a particular statute establishes a standard of care in a negligence action is a question of law. *Vega v. E. Courtyard Assocs.*, 117 Nev. 436, 439, 24 P.3d 219, 221 (2001). Absent evidence of legislative intent to impose civil liability, violating a criminal statute is not negligence per se. *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 1095-96, 844 P.2d 800, 803 (1992); *see also Bell v. Alpha Tau Omega*, 98 Nev. 109, 111, 642 P.2d 161, 162 (1982) ("[A]bsent evidence of legislative intent to impose civil liability we shall not conclude that a violation of a statute is negligence per se.").

Preliminarily, Russo has failed to cite any relevant authority in support of her negligence per se argument nor is her argument cogent. Therefore, we need not consider it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Nevertheless, considering her argument on its merits,

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Russo therefore alleged that Lee was liable for negligence per se based on him recording Russo performing sex acts with her breasts and/or genitalia exposed.

NRS 200.604 does not provide for a civil remedy. Russo has not provided any evidence of legislative intent to impose civil liability for violations of the statute. Absent legislative intent to impose civil liability for violations of NRS 200.604, the statute cannot form the basis of a negligence per se claim. *See Hinegardner*, 108 Nev. at 1095-96, 844 P.2d at 803. Therefore, the district court did not err in dismissing Russo's negligence per se claim for failure to state a claim upon which relief can be granted.

The district court did not err in dismissing Russo's tortious constructive discharge claim against Sapphire for lack of subject matter jurisdiction

Russo argues that Lee committed a series of sexual assaults against her and therefore her claims fall outside workplace discrimination. As such, Russo argues she was not required to file a claim with the United States Equal Employment Opportunity Commission (EEOC) or the Nevada Equal Rights Commission (NERC) prior to bringing her lawsuit. Sapphire counters that Russo never argued below that she was the victim of sexual assault. It further argues that Russo's complaint does not state facts sufficient to meet the definition of sexual assault under Nevada law. It therefore concludes the district court did not err in finding that it lacked subject matter jurisdiction based on Russo's failure to exhaust her administrative remedies.

We court review a district court's ruling on subject matter jurisdiction de novo. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). Prior to bringing an employment discrimination claim under NRS 613.420 in district court, a claimant must file a complaint with NERC and have that agency adjudicate the claim. *See* NRS 613.420; *Palmer v. State*, 106 Nev. 151, 153, 787 P.2d 803, 804 (1990). Similarly, administrative exhaustion is required before bringing a claim under Title VII. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)

("To establish federal subject matter jurisdiction, [plaintiff] was required to exhaust her EEOC administrative remedies before seeking federal adjudication of her claims."). "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." *Pope v. Motel 6*, 121 Nev. 307, 311, 114 P.3d 277, 280 (2005) (citation omitted).

Here, Russo concedes she did not file a complaint with either NERC or the EEOC. Therefore, she failed to exhaust her administrative remedies and the district court lacked subject matter jurisdiction over her workplace discrimination claim. *See Palmer*, 106 Nev. at 153, 787 P.2d at 804. Russo nevertheless argues that her tortious constructive discharge claim should proceed under Nevada's narrow public policy exception to the administrative exhaustion requirement. We disagree.

In Nevada, employers have the right to discharge an at-will employee for any reason, so long as the reason does not violate public policy. *Beckwith*, 115 Nev. at 376, 989 P.2d at 885. Where an employee's discharge violates public policy, the law of torts governs both the cause of action and the remedy so there is no need to exhaust administrative remedies. *See Hansen v. Harrah's*, 100 Nev. 60, 64-65, 675 P.2d 394, 397 (1984). However, the supreme court does not recognize a claim for tortious discharge where an adequate statutory remedy already exists. *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 560-61, 216 P.3d 788, 791 (2009). The public policy exception to the at-will doctrine is a "narrow one," *Bigelow v. Bullard*, 111 Nev. 1178, 1181, 901 P.2d 630, 632 (1995), and the supreme court has declined to expand it on multiple occasions. *See, e.g., Chavez v. Sievers*, 118 Nev. 288, 297, 43 P.3d 1022, 1028 (2002) ("[W]e decline to recognize a public

policy exception to the employment at-will doctrine based on race discrimination with respect to small employers."); *Sands Regent v. Valgardson*, 105 Nev. 436, 439-40, 777 P.2d 898, 899-900 (1989) (holding that age discrimination does not fit into the public policy exception to the at-will doctrine—despite Nevada's clear public policy against age discrimination—and noting that the Legislature had defined the extent of the remedy available to individuals injured by such discrimination).

Here, Russo's complaint primarily sounds in sexual harassment. Her complaint describes a hostile work environment and quid pro quo demands from Lee. We agree with Russo that sexual harassment clearly violates Nevada public policy. However, merely pointing to a public policy is not enough to sustain a cause of action for tortious constructive discharge. *See Ozawa*, 125 Nev. at 560-61, 216 P.3d at 791. Russo must also demonstrate that she lacks an adequate statutory remedy. *Id.* Here, NRS 613.420 appears to provide Russo with an adequate statutory remedy. Russo has not argued why Nevada's employment discrimination statutes fail to provide her with an adequate remedy. Therefore, considering Russo's failure to file a complaint with NERC or the EEOC, the district court did not err in dismissing her tortious constructive discharge claim for lack of subject matter jurisdiction.

The district court erred in dismissing Russo's remaining common law tort claims against Sapphire for lack of subject matter jurisdiction

As we have explained, failure to exhaust one's administrative remedies deprives a district court of subject matter jurisdiction over workplace discrimination claims. *See Palmer*, 106 Nev. at 153, 787 P.2d at 804. However, a plaintiff's failure to exhaust her administrative remedies as to her workplace discrimination claim does not bar her other tort claims based on related events and conduct. *See, e.g., Mathirampuzha v. Potter*,

548 F.3d 70 (2d Cir. 2008) (holding that the district court did not err in dismissing plaintiff's workplace discrimination claims for failure to exhaust under Title VII but that the district court erred in dismissing his emotional distress claim arising from the same event); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 746-48 (9th Cir. 2004) (holding that summary judgment was appropriate as to the plaintiff's wrongful discharge claim, in part, because she had failed to exhaust her administrative remedies under Arizona law and holding that summary judgment was appropriate as to her IIED claim, on separate grounds, because she failed to raise a genuine issue of material fact as to whether her employer's conduct was "extreme and outrageous" under Arizona law); *Bolden v. PRC Inc.*, 43 F.3d 545, 552-55 (10th Cir. 1994) (affirming the district court's dismissal of the plaintiff's workplace discrimination claim for failure to exhaust his administrative remedies and holding, on separate grounds, that the plaintiff's allegations were insufficient to sustain a claim of outrage). Similar to the federal circuit court cases under Title VII, we have held that a district court abused its discretion in granting summary judgment in favor of an employer over the plaintiff's workplace discrimination claims for failure to exhaust under NRS Chapter 613 and separately held the district court abused its discretion in dismissing the plaintiff's negligence and emotional distress claims on different grounds. *Cooper v. Eighth Judicial Dist. Court*, No. 74907, 2018 WL 3222743 (Nev. Ct. App. June 18, 2018).

On appeal, Sapphire points to no Nevada case standing for the assertion that Russo could not pursue her common law claims because she had failed to exhaust her workplace discrimination claim under NRS Chapter 613. Therefore, and in light of the forgoing authority indicating the opposite, the district court erred in dismissing Russo's remaining

common law tort claims for lack of subject matter jurisdiction. We therefore must determine whether the district court similarly erred in ruling that Russo's remaining claims should be dismissed for failure to state a claim upon which relief can be granted.

The district court erred in dismissing Russo's IIED claim against Sapphire for failure to state a claim upon which relief can be granted

As to Sapphire, Russo argues she alleged facts that support a cause of action for IIED.[9] She further argues that the Nevada Industrial Insurance Act (NIIA) should not preempt her IIED claim. Russo also argues that Sapphire is liable for Lee's intentional torts under NRS 41.745.[10] Sapphire counters that the NIIA's exclusive-remedy provisions govern

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[9]Russo also argues that the alleged facts support a cause of action for negligent infliction of emotion distress (NIED). However, she did not include an explicit NIED claim in her complaint. Therefore, the district court did not reach that issue and we decline to address it in the first instance. *See 9352 Cranesbill Tr. v. Wells Fargo Bank*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (providing that "this court will not address issues that the district court did not directly resolve"); *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 592 n.6, 262 P.3d 699, 704 n.6 (2011) (declining to address a legal issue that the district court did not reach). Nevertheless, nothing in our disposition shall be construed as making any legal conclusion as to whether Russo could bring a claim for NIED in an amended complaint.

[10]"An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment."

Russo's IIED claim. Even if Russo's claim is not subject to the NIIA, Sapphire continues, her IIED claim would still fail because she has failed to allege that Sapphire deliberately and specifically intended to injure her.

The NIIA provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries "arising out of and in the course of the employment." *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (internal quotation marks omitted); *see also* NRS 616A.020; NRS 616B.612(4). An injury arises out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace. *Wood*, 121 Nev. at 733, 121 P.3d at 1032. "[W]hether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Id.* Employers, however, "do not enjoy immunity, under the exclusive remedy provisions of the workers' compensation statutes, from liability for their intentional torts." *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 874, 8 P.3d 837, 840 (2000) (internal quotation marks omitted). Therefore, claims otherwise subject to the NIIA's exclusive remedy provisions still can be pursued if the plaintiff alleges her employer "deliberately and specifically intended to injure [her]." *See id.* at 875, 8 P.3d at 840.

Here, even assuming arguendo that Russo's IIED claim arose out of her employment, Russo alleged in her complaint that at least some of Lee's conduct occurred off-premises, outside of working hours, and when Russo was not performing her job duties. Therefore, at least some of the allegations in the complaint did not occur during the course of Russo's employment. *See Wood*, 121 Nev. at 733, 121 P.3d at 1032. As such, there

remain questions as to whether Russo's IIED claim falls within the NIIA's purview, *Wood*, 121 Nev. at 732, 121 P.3d at 1031, and the district court erred in ruling that it did.

Even if Russo's IIED claim did not arise within the course of her employment and is therefore not subject to the NIIA, Sapphire may still be liable for Lee's conduct under NRS 41.745. In *Anderson v. Mandalay Corporation*, the supreme court explained that NRS 41.745(1) does not contain an overarching "scope of employment inquiry" and held that Nevada will hold an employer vicariously liable for an employee's intentional tort, even if it occurs outside the scope of employment if that intentional tort was reasonably foreseeable under NRS 41.745(1)(c). 131 Nev. 825, 831-32, 358 P.3d 242, 247 (2015). Assuming arguendo that Lee's conduct was an independent venture and not committed in the course of the very task assigned him, *see* NRS 41.745(1)(a)-(b), a factual question remains as to whether Lee's actions were reasonably foreseeable considering the scope and nature of his employment. *See* NRS 41.745(1)(c). Under NRS 41.745(1), an employee's conduct is reasonably foreseeable "if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and probability of injury."

Russo's complaint alleges that Sapphire knew of Lee's habit of abusing his authority to manipulate his female subordinates into sexual encounters with him. Taking that allegation as true, *see Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672, Lee's conduct was more than reasonably foreseeable—it was known to Sapphire. As such, Sapphire may be liable for Lee's intentional acts under NRS 41.745. Because questions remain as to whether Lee's conduct occurred during the course of Russo's employment and whether Lee's conduct was reasonably foreseeable for the purposes of

NRS 41.745(1)(c), the district court erred in dismissing Russo's IIED claim as to Sapphire for failure to state a claim upon which relief can be granted.

The district court erred in dismissing Russo's negligent training, supervision, and retention claim against Sapphire, Feinstein, and Talla for failure to state a claim upon which relief can be granted

On appeal, Russo argues that Lee's conduct constituting IIED is an actionable tort creating a cause of action for negligent training, supervision, and retention against Sapphire. She also argues that Lee sexually assaulted her and sexual assault constitutes physical harm necessary to recover under a negligent supervision claim. Sapphire counters that an actionable tort underlying a claim for negligent supervision cannot be based upon statutory employment discrimination. It further argues that Russo cannot recover for negligent supervision because she failed to allege physical harm in her complaint or in the proceedings below.

As explained above, the district court erred in dismissing Russo's IIED claim both as to Lee and Sapphire. Therefore, there exists an underlying claim upon which Russo's negligent training, supervision, and retention claim may rest. *See, e.g., Husk v. Clark Cty. Sch. Dist.*, No. 51660, 2009 WL 3189347 (Nev. Sept. 28, 2009) (holding an employer can only be held liable for negligent supervision or training when the employee committed an actionable tort). Although respondents Feinstein and Talla correctly note that a claim of negligent training, supervision, and retention is only proper against an employer, they have failed to cite any relevant authority or cogently argue why neither of them should be considered Russo's employer in this case. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. As the supreme court has explained, "statutes limiting personal liability of members and managers of an LLC for debts and

obligations of the LLC are not intended to shield members or managers from liability for personal negligence." *Gardner v. Eighth Judicial Dist. Court*, 133 Nev. 730, 734, 405 P.3d 651, 655 (2017). A factual question remains as to whether Feinstein and Talla can be held liable for Lee's conduct, based on their roles as members of Sapphire's ownership group. Therefore, dismissal as to Russo's negligent training, supervision, and retention claim as to Feinstein and Talla was premature at this stage in the proceedings, particularly when no discovery has been conducted, and all inferences must be drawn in favor of Russo.

Finally, the question of whether a plaintiff must allege physical harm to pursue a claim for negligent training, supervision, and retention is unsettled under Nevada law. *See, e.g., Robertson v. Wynn Las Vegas LLC*, No. 2:10-cv-00303-GMN-LRL, 2010 WL 3168239, at *3-5 (D. Nev. Aug. 9, 2010) (collecting cases and certifying the question to the Nevada Supreme Court); *see also Wynn Las Vegas, LLC v. Robertson*, No. 56596, 2011 WL 3805921 (Nev. Aug. 26, 2011) (withdrawing acceptance of the certified question because the underlying case had been subsequently dismissed). However, Nevada has recognized tort recovery for non-physical harm. *See, e.g., State, Univ. & Cmty. College Sys. v. Sutton*, 120 Nev. 972, 989, 103 P.3d 8, 19 (2004) (holding that a plaintiff can recover "for all of the natural and probable consequences of the wrong, including injury to the feelings from humiliation, indignity, and disgrace to the person" in an action for breach of implied covenant of good faith and fair dealing). Additionally, the actionable tort underlying Russo's negligent training, supervision, and retention claim—IIED—does not require her to plead physical harm. *See Beckwith*, 115 Nev. at 378, 989 P.2d at 886 (listing the elements of IIED). In the absence of Nevada authority mandating otherwise, we decline to

graft a physical harm requirement onto Russo's claim for negligent training, supervision, and retention.

Russo's complaint alleges that respondents Sapphire, Feinstein, and Talla had a duty to exercise reasonable care in the training, supervision, and retention of their employees. It further alleges that these respondents breached that duty by failing to take any action to deter Lee's conduct and that that breach directly and proximately caused Russo damages. In light of Nevada's notice-pleading standard, these allegations are sufficient to state a claim for negligent training, supervision, and retention. *See Droge*, 136 Nev. at 308-09, 468 P.3d at 878-79. Therefore, the district court erred in dismissing Russo's claim for failure to state a claim upon which relief can be granted.

As to all respondents, the district court abused its discretion in denying Russo leave to amend her complaint

Russo argues she should have been granted leave to amend her complaint to cure any deficiencies.[11] Sapphire counters that the district court did not abuse its discretion in denying her request for leave to amend because she did not explain how amending the complaint would cure its deficiencies and because amending the complaint would be futile. Lee likewise counters that amending the complaint would be futile.[12]

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[11]Although the district court did not ever expressly rule on Russo's oral motion for leave to amend the complaint, it impliedly ruled on the motion by dismissing Russo's complaint with prejudice. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (explaining that the absence of a ruling by the district court on a motion constitutes a denial of the motion).

[12]The district court did not find that allowing Russo to amend her complaint would be futile. We decline to reach that issue in the first instance. *See 9352 Cranesbill Tr.*, 136 Nev. at 82, 459 P.3d at 232 (providing

Absent an abuse of discretion, this court will not disturb a district court's order denying leave to amend. *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 131 (2013). Leave to amend shall be freely given when justice so requires. NRCP 15(a). "[A] request to amend should not be denied simply because it was made in open court rather than by formal motion." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003). Although leave to amend is not appropriate in the face of "undue delay, bad faith or dilatory motive," *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973), "when a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy." *Cohen*, 119 Nev. at 22, 62 P.3d at 734.

Here, Russo requested leave to amend her complaint at an early stage in the proceedings, in response to Lee and Sapphire's motions to dismiss. Therefore, her request was not made in the face of undue delay. *See Cohen*, 119 Nev. at 23, 62 P.3d at 735 (holding that a district court abused its discretion in denying an oral motion to amend a complaint at a hearing on the defendant's motion to dismiss). And nothing in the record suggests Russo's request was made in bad faith or for any dilatory motive. Therefore, the district court abused its discretion in denying her leave to amend her complaint. *See id.*

In conclusion, the district court did not err in dismissing Russo's claim for tortious constructive discharge for lack of subject matter jurisdiction. However, the district court erred in dismissing Russo's claim

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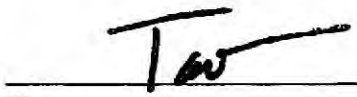
that "this court will not address issues that the district court did not directly resolve"); *Yellow Cab of Reno*, 127 Nev. at 592 n.6, 262 P.3d at 704 n.6 (declining to address a legal issue that the district court did not reach).

for IIED as to both Lee and Sapphire. It also erred in dismissing Russo's claim for negligent training, supervision, and retention as to Sapphire, Feinstein, and Talla. Finally, the district court also abused its discretion in denying Russo's request for leave to amend her complaint. Accordingly, we

ORDER the judgment of the district court AFFIRMED in part, REVERSED in part, AND REMAND for further proceedings consistent with this order. Upon remand, the district court is instructed to permit Russo to amend her complaint except as to the causes of action over which the district court did not have subject matter jurisdiction or are otherwise improper.[13]

_____, C.J.
Gibbons



_____, J.
Tao

cc: Hon. Timothy C. Williams, District Judge
Prokopius & Beasley
Bighorn Law/Las Vegas
Chesnoff & Schonfeld
The Palmer Law Firm, P.C.
Eighth District Court Clerk

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[13]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.