IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN LAVOIE, Appellant, vs. S & R PRODUCTION COMPANY, A NEVADA CORPORATION, Respondent.	No. 40713
BRYAN LAVOIE, Appellant, vs. S & R PRODUCTION COMPANY, A NEVADA CORPORATION, Respondent.	No. 41016

FILED

OCT 0 5 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a final judgment in a wrongful discharge cases and an order awarding attorney fees. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In his complaint, Bryan LaVoie alleged that S & R Production Company wrongfully terminated him for filing a workers' compensation claim following an injury he sustained as an animal handler. LaVoie sought monetary damages for breach of contract, discharge in violation of public policy, and emotional distress. S & R filed a motion for summary judgment, which the district court granted. The district court concluded that: (1) LaVoie failed to rebut the presumption that he was an at-will employee, so he could not bring an action for breach of contract; (2) LaVoie failed to present sufficient evidence to defeat summary judgment on his claim that he was discharged for filing a workers' compensation claim; and (3) LaVoie failed to present competent evidence to create a genuine issue

of material fact as to whether S & R engaged in extreme or outrageous conduct causing him to suffer extreme emotional distress. We agree.

We review an order granting summary judgment de novo.[1] Summary judgment is appropriate when, after a review of the record viewed in a light most favorable to the non-moving party, there remain no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[2] "'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.'"[3]

Breach of contract claim

An at-will employee can be dismissed with or without cause as long as the dismissal does not violate public policy.[4] "The at-will employment relationship is rebuttable if the employee can prove by a preponderance of the evidence that a contract, either express or implied, required termination for cause only."[5] However, an employee's subjective expectations cannot create a contract of employment.[6]

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[1]Mark Properties v. National Title Co., 117 Nev. 941, 945, 34 P.3d 587, 590 (2001).

[2]Id.

[3]Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 211 (2001) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993)).

[4]Barmettler v. Reno Air, Inc., 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998).

[5]Id. at 449, 956 P.2d at 1387-88.

[6]Id. at 449, 956 P.2d at 1388.

Here, LaVoie had no written contract and was informed that he was an at-will employee. LaVoie failed to present any evidence that he was led to believe otherwise. Because LaVoie failed to rebut the presumption of an at-will employment relationship, summary judgment on his breach of contract claim was not erroneous.[7]

Wrongful termination claim

To support a claim for tortious discharge, an employee must produce concrete evidence to establish outrageous conduct that violates public policy.[8] We have held that "not only is the employee's unequivocal statement of outrageous behavior necessary, but that the employee's statement must be supported by independent evidence."[9] Further, "[a]n employee's statements that are conjecture or speculation cannot support a claim of tortious discharge."[10]

LaVoie failed to present independent evidence to support his tortious discharge claim. LaVoie primarily relies on an alleged conversation between his co-workers in which they discussed that he might be faking his injuries. The conversation, however, is inadmissible hearsay, which the district court could not consider when deciding the

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[7]See Martin v. Sears, Roebuck and Co., 111 Nev. 923, 928, 899 P.2d 551, 554 (1995) (concluding that an at-will employee cannot bring a breach of contract action).

[8]State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 151, 42 P.3d 233, 240 (2002).

[9]Id. (emphasis added).

[10]Id. at 151-52, 42 P.3d at 241.

summary judgment motion.[11] Also, LaVoie could not demonstrate that anyone with hiring or firing power at S & R was informed of the suspicion that he was possibly faking his injuries. There is undisputed evidence demonstrating that LaVoie was disciplined several times for behaving in a manner endangering S & R's employees. Thus, S & R's reason for terminating LaVoie—health and safety concerns—is uncontested.

Because LaVoie failed to present anything more than conclusory statements and general allegations, he did not come forward with sufficient evidence to show that he was terminated for filing a workers' compensation claim.[12] Hence, summary judgment on this claim was appropriate.

Intentional infliction of emotional distress claim

We have recognized the tort of intentional infliction of emotional distress (IIED) in the context of employment termination.[13] The elements of a cause of action for intentional infliction of emotional distress are "'(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having

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[11]Russ v. General Motors Corp., 111 Nev. 1431, 1435, 906 P.2d 718, 720 (1995).

[12]See Wayment v. Holmes, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996) (concluding that summary judgment on appellant's tortious discharge claim was proper when respondent's testimony that appellant was terminated for unsatisfactory work performance and insubordination was unchallenged since appellant's version of the facts was nothing more than conclusory allegations and general statements unsupported by evidence).

[13]Dillard Department Stores v. Beckwith, 115 Nev. 372, 378, 989 P.2d 882, 886 (1999).

suffered severe or extreme emotional distress and (3) actual or proximate causation.'"[14] A party opposing summary judgment on an IIED claim cannot just allege wrongdoing and identify the resulting injury because "[i]n the face of a summary judgment motion, it is incumbent upon the party opposing it to produce some admissible evidence to show that the alleged tortfeasor acted negligently or intentionally, or failed to act when required to, and that the conduct or the failure to act is the proximate cause of the injuries complained of."[15]

After a thorough review of the record, we conclude that LaVoie failed to point to any evidence to demonstrate that S & R acted in an extreme or outrageous manner when terminating him or that he suffered from severe or extreme emotional distress as a result. Accordingly, we conclude that summary judgment on his IIED claim was proper.

Attorney fees

LaVoie argues that the district court abused its discretion in awarding S & R attorney fees after finding that (1) LaVoie did not bring his complaint in good faith, (2) S & R's offer of judgment was reasonable, (3) LaVoie acted in a grossly unreasonable manner by rejecting S & R's offer of judgment, and (4) the attorney fees incurred by S & R were reasonable and justified in amount.

A district court's award of attorney fees will not be disturbed on appeal unless the district court abused its discretion in making the

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[14]Id. (quoting Star v. Rabello, 97 Nev. 124, 125, 625 P.2d 90, 92 (1981)).

[15]State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 152, 42 P.3d 233, 241 (2002).

award.[16] A district court is permitted to award attorney fees if authorized to do so by statute, rule, or contract.[17]

The district court awarded attorney fees based on NRCP 68[18] and NRS 17.115.[19] Prior to doing so, the district court properly considered the Beattie v. Thomas[20] factors. We find no error in the district court's consideration of the Beattie factors; therefore, we conclude that the

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[16]U.S. Design & Constr. Corp. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

[17]Id.

[18]NRCP 68(f)(2) states that if a party rejects an offer of judgment and then fails to obtain a more favorable judgment, "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."

[19]NRS 17.115(4)(d)(3) provides if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court may order the party to pay "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."

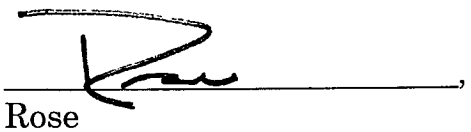
[20]99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) (stating that in evaluating whether an award of attorney fees based on NRCP 68 and NRS 17.115 is appropriate, the district court should assess:

> (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).

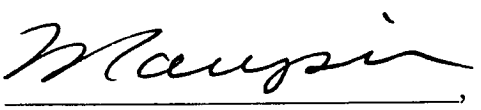
district court did not abuse its discretion in awarding respondent attorney fees in the amount of $51,368.75.[21]

Having considered LaVoie's arguments on appeal and concluding they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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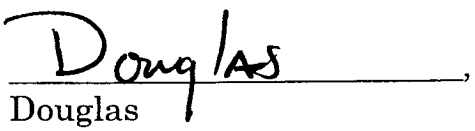

_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Cliff W. Marcek
Littler Mendelson/Las Vegas
Clark County Clerk

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[21]See LaForge v. State, University System, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000) (observing that where the district court properly considers the Beattie factors, the award of attorney's fees is discretionary and will not be disturbed absent a clear abuse of discretion).