IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDA BACHMEIER,
Appellant,
vs.
MARK SHELLINGER AND THE WHITE PINE COUNTY SCHOOL DISTRICT,
Respondents.

No. 41437

FILED

SEP 03 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment on behalf of respondents, former superintendent Mark Shellinger and the White Pine County School District (District). Seventh Judicial District Court, White Pine County; David A. Huff, Judge.

In 1990, the District hired appellant Linda Bachmeier as an elementary school teacher's aide. At this time, Bachmeier was an at-will employee. The District provided Bachmeier no employment benefits except that the District paid into the Nevada State retirement fund on her behalf. Bachmeier admits that she was not guaranteed employment for any specific period of time when the District hired her as a teacher's aide.

In 1991, the District laid off Bachmeier along with other teachers' aides for budgetary reasons. In 1993, the District recalled Bachmeier to work at a middle school as a part-time bilingual teacher's aide. In 1997, the District offered Bachmeier a full-time bilingual teacher's aide position at Mountain High School, located at the Ely State Prison. Bachmeier admits that the District again hired her as an at-will employee when she accepted this teacher's aide position. Bachmeier also admits that she was not specifically included as a covered employee by any collective bargaining agreement.

On July 1, 2000, the District reduced the working hours of all teachers' aides due to budget constraints. At the same time, the District stopped purchasing medical insurance for all teachers' aides. Sometime thereafter, Shellinger met with the Mountain High School teachers' aides to discuss the loss of their insurance. At this meeting, Bachmeier alleges that Shellinger told them "we have always respected people's seniority, just like if you were a union member . . . . But it would be good for you to join the union." Bachmeier alleges that Mountain High School's Principal, Bob Dolezal, also attended this meeting and that his silence indicated his agreement with Shellinger's statements.

On January 22, 2001, Dolezal advised the Mountain High School teachers that some staff positions might be reduced in the future and asked the teachers for input concerning who they preferred as teachers' aides. The record indicates that neither Bachmeier nor Nancy Judd, another teacher's aide at Mountain High School, was named as a preferred teacher's aide. On January 25, 2001, the District advised Bachmeier and Judd that their teacher's aide positions would be eliminated for budgetary reasons.

In Bachmeier's complaint, she alleged that she was not an at-will employee because Shellinger agreed to treat the aides as though they were protected under the union's collective bargaining agreement, even though she was not a union member. She also alleged that the District discriminated against her because she was close to retirement age, because of her Hispanic ethnicity, and because she filed a claim for workers' compensation after becoming injured at work. The district court found that the District hired Bachmeier as an at-will employee. The district court granted Shellinger and the District's motion for summary

judgment because Bachmeier failed to offer evidence that the District discriminated against her because of her retirement status, her race, or her workmers' compensation claim when it decided to discharge her.

When reviewing a district court's order granting summary judgment, this court applies a de novo standard of review.[1] Summary judgment should be granted only when, based on pleadings and discovery, no genuine issue of material fact exists at trial.[2] "A genuine issue of material fact [exists when] a reasonable jury could return a verdict for the non-moving party."[3] "'[C]onclusory statements along with general allegations do not create an issue of material fact.'"[4] In determining whether summary judgment is warranted, the court must view all evidence and reasonable inferences in the light most favorable to the nonmoving party.[5]

On appeal, Bachmeier contends that the district court erred in granting the District's motion for summary judgment. She maintains that the District wrongfully terminated her because she was not an at-will employee and she was entitled to the privileges of the negotiated agreement even though she was not a union member. The negotiated

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[1]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110 825 P.2d 588, 591 (1992).

[2]NRCP 56(c).

[3]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[4]Ortega v. Reyna, 114 Nev. 55, 58, 953 P.2d 18, 20 (1988) (quoting Michaels v. Sudeck, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991)).

[5]Posadas, 109 Nev. at 452, 851 P.2d at 442.

agreement provided that union members were entitled to a seniority-based lay-off structure and a recall procedure for laid-off employees.

All employment in Nevada is presumptively at will and can be terminated at any time, with or without cause.[6] "This presumption may be rebutted by proving, by a preponderance of the evidence, that there was an express or implied contract between the employer and the employee which indicates that the employer would only terminate the employee for cause."[7]

Here, Bachmeier stated that the District advised her several times that she was an at-will employee. Bachmeier stated that the District made her no promises of tenured employment as a teacher's aide. The negotiated agreement between the District and the union provides that teachers' aides are not included, and thus, not protected by the agreement. Shellinger's statements regarding seniority did not convert her status from employment at will to tenured employment. Shellinger made it clear that the aides could not rely upon the agreement unless they were union members.

Thus, Bachmeier was unable to rebut the at-will presumption and failed to show that she was subject to the protections of the negotiated agreement. Therefore, we conclude that the district court did not err in granting the motion for summary judgment because no genuine issue of material fact exists to support her contention that she was not an at-will employee.

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[6]Martin v. Sears, Roebuck and Co., 111 Nev. 923, 926-27, 899 P.2d 551, 553-54 (1995).

[7]Id. at 927, 899 P.2d at 554.

Next, Bachmeier contends that the District discriminated against her because of her Hispanic heritage when it eliminated her teacher's aide position. It is unlawful for an employer to discharge an employee because of her race.[8] "In cases involving an employer's isolated decision to discharge or to alter the terms of employment of an individual employee, the focus of the inquiry is whether the employer is treating some people less favorabl[y] than others because of their race, religion, sex or national origin."[9] In order for an employee to establish a prima facie case of employment discrimination, the employee must prove that: "(1) she is a member of a protected class, (2) she is qualified for the job, (3) she is satisfying the job requirements, (4) she was discharged, and (5) the employer assigned others to do the same work."[10] "Once a prima facie case of discrimination is established, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions."[11]

Here, the District eliminated Bachmeier's position and discharged her as a result of budgetary downsizing. At the same time that the district laid off Bachmeier, the District also laid off Judd, who is not a minority. There is no evidence that the District treated Bachmeier less

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[8]See NRS 613.330(1) ("it is an unlawful employment practice for an employer: (a) . . . to discharge any person, or otherwise to discriminate against any person with respect to his compensation, terms, conditions or privileges of employment, because of his race, color, religion, sex, sexual orientation, age, disability or national origin").

[9]Apeceche v. White Pine Co., 96 Nev. 723, 726, 615 P.2d 975, 977 (1980).

[10]Id.

[11]Id.

favorably than others because of her race. Additionally, there is no evidence that the District assigned others to her previous responsibilities as a bilingual teacher's aide. Therefore, we conclude that the district court did not err in granting summary judgment because Bachmeier failed to demonstrate a prima facie case of discrimination based on her Hispanic ethnicity.

Finally, Bachmeier asserts that the District discriminated against her because of her non-union status. Because Bachmeier raises this argument for the first time on appeal, we decline to address it.[12] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. David A. Huff, District Judge
G. C. Backus
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
White Pine County Clerk

[12]See State of Nevada v. Glusman, 98 Nev. 412, 428, 651 P.2d 639, 649 (1982) (this court refuses to consider issues that appellant failed to raise in the district court).