

10-9-2008

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Brianna F. Issurdutt
Nevada Law Journal

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Recommended Citation

Issurdutt, Brianna F., "Summary of Baldonado v. Wynn Las Vegas, 124 Nev. Adv. Op. No. 81" (2008). *Nevada Supreme Court Summaries*. Paper 401.

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***Baldonado v. Wynn Las Vegas*, 124 Nev. Adv. Op. No. 81 (Oct. 9, 2008)¹**

EMPLOYMENT LAW – ENFORCEMENT OF LABOR STATUTES

Summary

Consolidated appeals from a district court order granting summary judgment on statutory, contract, and declaratory relief claims in a class action employment law matter and from a post-judgment order denying attorney fees and costs.

Disposition/Outcome

Affirmed the district court's summary judgment order and order denying attorney's fees.

Factual and Procedural History

Wynn Las Vegas employs appellants Daniel Baldonado and Joseph Cesarz as table game dealers. Appellants claim that they began working as dealers at Wynn Las Vegas when it first opened for business in April 2005. On March 25, 2005, the Wynn issued a toke² polling and distribution policy describing the manner that employee tokes, or tips, would be collected, calculated, and distributed.³ The March 25 policy provided that any proposed modifications to the policy should be voted on and approved by "Table Games Management" and then by a majority of the voting dealers.⁴ An April 13, 2005, policy generally prohibited managers and supervisors from accepting or receiving any tokes.

However, the Wynn's employee handbook reserved the right to change, supplement, or eliminate any of its policy. This provision was used in August 2006 when the Wynn attempted to remedy an anomaly: table game dealers were earning more than their supervisors when tips were included in the dealers' compensation. The new modification would combine the pit manager and floor supervisor positions to create a "casino services team lead" position and would allow each service team to collect a portion of the daily toke pool. "Box persons" or "craps team leads" also received a portion of the daily toke pool. The remaining portion was then distributed to the dealers.⁵ The modified policy was effectuated on September 1, 2006.

The dealers responded by instituting a class action against the Wynn, claiming that the modified toke policy reduced their compensation and violated NRS 608.160 (unlawful for employers to take employees' tips), NRS 608.100 (unlawful for employers to require employees

¹ By Brianna F. Issurdutt

² The policy defined a "toke(tip)" as "any money, whether coin or cash extended" to an employee in recognition of, or in appreciation for, a job well done."

³ The process was outlined as follows: First, the tips were collected over a 24-hour period and counted by a dealer-elected committee. Then, the tips were distributed amongst the dealers based on hours worked and accrued vacation and sick time.

⁴ "Table Games Management" had the authority to veto any change that was not in the Wynn's best interest.

⁵ The Wynn claims that these policy modifications decreased the dealers' daily toke shares by 10 to 15 percent, which resulted in an overall salary reduction.

to rebate compensation earned and paid), and NRS 613.120 (unlawful for managers and shift bosses to receive gratuities from employees as a condition of employees' employment). The dealers sought compensatory and punitive damages, along with any appropriate injunctive or equitable relief for the alleged statutory violations and breach contract, the contractual and tortious breach of the implied covenant of good faith and fair dealing, and also in relation to their request for declaratory relief.

The dealers then moved for partial summary judgment and a preliminary injunction to declare the modified policy void under NRS 608.160, NRS 613.120, and unenforceable as against public policy. The Wynn moved to dismiss the complaint or, in the alternative, for summary judgment, arguing that no private cause of action existed per the alleged statutory violations because the statutes were only enforceable by the Nevada Labor Commissioner. The Wynn also argued that the dealers were at-will employees with no contractual relationship on which to base their breach of contract claims. The dealers opposed both motions.

The district court heard the parties' arguments and entered an order denying the dealers' motion and granting the Wynn's motion. The district court agreed that the statutes that the dealers relied on provided no private causes of action and noted that the Labor Commissioner enforces the specified statutes. The district court stated that the dealers must follow the administrative process before seeking relief in the district court. Lastly, the court found that the dealers were at-will employees with no written employment contracts and therefore the Wynn had the right to change the tip-pooling policy.

The dealers are appealing from the district court's order dismissing their complaint.⁶ The Wynn moved for attorneys' fees under NRS 18.010(2)(b), claiming that the dealers brought and maintained their claims without reasonable grounds. The dealers opposed the motion. The district court denied the request for fees because it found that the claims were not brought or maintained without reasonable grounds. The Wynn has appealed from that order.⁷

After briefing was completed, the appeals were consolidated and the Transport Workers Union of America and former State Assembly members Donald Mello and Jack Lund Schofield were allowed to file amicus briefs.

For an *en banc* court, Justice Douglass concluded that the district court properly refused to allow the dealers' claims proceed to trial and the district court did not abuse its discretion in denying attorney fees and therefore affirmed the district court's decision.

Discussion

There were 2 main issues for the Nevada Supreme Court to decide: (1) whether the district court properly dismissed the dealers' complaint (specifically, whether NRS 608.160 implies a private cause of action, whether the dealers appropriately sought declaratory relief, whether the dealers demonstrated a viable claim for breach of employment contracts) and (2) whether the district court's order denying attorney fees was correct.

⁶ The appeal was assigned Docket No. 48831.

⁷ The appeal was assigned Docket No. 49241.

(1) Appeal from the district court's order dismissing appellants' complaint

The Court reviewed the summary judgment order *de novo*.⁸ The summary judgment order will stand only if, after reviewing the record in the light most favorable to the appellants, no genuine issues of material facts remained, entitling the Wynn to judgment as a matter of law.⁹

First, the Nevada Supreme Court found that the dealers had no private cause of action to enforce NRS 608.160,¹⁰ NRS 608.100,¹¹ or NRS 613.120¹² in the district court.¹³ Because NRS 608.160 does not expressly mention whether employees may privately enforce its terms, a private cause of action must be implied if the dealers are allowed to pursue their claims under the statute.¹⁴ Whether a private cause of action can be implied is a question of legislative intent.¹⁵ To ascertain the Legislature's intent, the Nevada Supreme Court must examine the entire statutory scheme, reason, and public policy.¹⁶ The Nevada Supreme Court was guided by three factors originally set forth by the U.S. Supreme Court: (1) whether the plaintiffs are "'of the class for whose [e]special benefit the statute was enacted'"; (2) whether the legislative history indicates any intention to create or to deny a private remedy; and (3) whether implying such a remedy is "'consistent with the underlying purposes of the legislative [sch]eme.'"¹⁷ The three factors are not necessarily entitled to equal weight; the determinative factor is always whether the Legislature intended to create a private judicial remedy.¹⁸ Without this intent, the U.S. Supreme Court has stated, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."¹⁹

⁸ *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (Nev. 2005).

⁹ *Id.*

¹⁰ It is unlawful for employers to take employees' tips.

¹¹ It is unlawful for employers to require employees to rebate compensation earned and paid

¹² It is unlawful for managers and shift bosses to receive gratuities from employees as a condition of employees' employment.

¹³ The Court analyzed whether a private cause of action was implied by the statutes by looking closely at NRS 608.160 and then extending that analysis to NRS 608.100 and NRS 613.120 because they were included within the Labor Commissioner's authority in the same manner as NRS 608.160 and because all three statutes dealt with unlawful employer conduct.

¹⁴ NRS 608.160 provides:

Taking or making deduction on account of tips or gratuities unlawful; employees may divide tips or gratuities among themselves.

1. It is unlawful for any person to:

(a) Take all or part of any tips or gratuities bestowed upon his employees.

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon his employees.

2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

¹⁵ *Allstate Ins. Co. v. Thorpe*, 123 Nev. ___, ___, 170 P.3d 989, 993 (Nev. 2007) (citing *U.S. Design & Constr. v. I.B.E.W. Local 357*, 118 Nev. 458, 461, 50 P.3d 170, 172 (Nev. 2002) and *Sports Form v. Leroy's Horse & Sports*, 108 Nev. 37, 40-41, 823 P.2d 901, 903 (Nev. 1992)).

¹⁶ *U.S. Design*, 118 Nev. at 461, 50 P.3d at 172.

¹⁷ *Sports Form*, 108 Nev. at 39, 823 P.2d at 902 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)); see generally *Cal. v. Sierra Club*, 451 U.S. 287, 293 (1981) (explaining that, while congressional intent to create a private right of action is dispositive, that intent can often be determined by considering the *Cort* factors).

¹⁸ See generally *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (explaining that not all of the *Cort* factors are necessarily entitled to equal weight and that the "central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action").

¹⁹ *Alexander*, 532 U.S. at 286-87; but see *id.* at 287 (noting that the function of common-law courts in implying a cause of action might differ from that of federal tribunals).

The absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy.²⁰

The first factor does not clearly favor finding intent to create or intent to deny a private remedy²¹ and, under the second factor, the legislative history is largely silent. Because the statute requires the Labor Commissioner to enforce the statutes and provide an adequate administrative remedy for violations, the third factor of whether a private remedy is consistent with the statutory scheme weighs in favor of finding no private cause of action. Allowing a private cause of action when there is already administrative enforcement could create undesirable inconsistencies. Furthermore, there is an adequate administrative remedy available: the Labor Commissioner has the authority to hold hearings. The Labor Commissioner must render a written decision that sets forth detailed findings of fact and conclusions of law within 30 days of the hearing. The Labor Commissioner's duty to hear and resolve enforcement complaints is not discretionary, however. The Labor Commissioner's decision may then be challenged by petitioning the district court for judicial review and the district court will review it *de novo*. Only after this process can the aggrieved party appeal to the Nevada Supreme Court. Because the dealers did have access to an adequate administrative mechanism, a finding of legislative intent to create a parallel private remedy is precluded. Because no private remedy is implied, the dealers had no right to obtain relief in the district court under NRS 608.160. As a result, the Nevada Supreme Court concluded that summary judgment in favor of the Wynn was proper.

Second, the Nevada Supreme Court found that declaratory relief was not available to the dealers because the dealers sought more than declaratory relief in the district court: they also sought interpretation of the modified policy, injunctive relief, and damages. This was more than simply a determination of rights under a statute because they sought to avoid the policy altogether and to obtain damages. Accordingly, the Nevada Supreme Court concluded that the district court properly denied the dealers' request for declaratory relief.

Third, the Nevada Supreme Court found that the dealers failed to demonstrate the existence of a genuine issue of material fact regarding their breach of contract claim. The dealers argued that the March 28 policy contained two provisions constituting an enforceable written contract, despite admitting that they were at-will employees: (1) the dealers would share tips and (2) the tip-pooling and distribution policy was subject to modification by majority dealer vote. The dealers argued that the Wynn breached the terms of the employment contract when it unilaterally modified the policy. The Nevada Supreme Court has recognized that at-will employers may unilaterally modify the terms of employment and at-will employees have no contractual rights arising from the employment relationship that limit the employer's ability

²⁰ *Richardson Constr. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 23 (Nev. 2007) (citing *Sports Form*, 108 Nev. at 40-41, 823 P.2d at 903); see also *Maldonado v. Dominguez*, 137 F.3d 1, 7 (1st Cir. 1998) (noting that there is a "strong presumption" against inferring a private cause of action); *Vikco Ins. Services, Inc. v. Ohio Indem.*, 82 Cal. Rptr. 2d 442, 447 (Cal. Ct. App. 1999) (explaining that, because courts are not to "insert what has been omitted from a statute," courts will assume that the legislature will make its intent to create a private cause of action clear through direct, understandable, and unmistakable terms).

²¹ The inquiry is not whether appellants would benefit from the statute, but whether the Legislature intended to confer a right on employees as a class. See *Sierra Club*, 451 U.S. at 294; *Cort*, 422 U.S. at 78. Here, NRS 608.160(1) regulates and focuses on the employer's conduct. NRS 608.160 does not entitle each individual employee to the tips and gratuities "bestowed upon" him, since it expressly allows employee tip-sharing agreements. Consequently, while it appears that the statute was enacted at least in part to protect employees, it is less clear from the statutory language that the Legislature intended to confer upon those employees a private remedy.

to prospectively hire and fire employees and to change the terms of employment.²² The Nevada Supreme Court has also recognized that an employer may prevent implied contractual liability by including a disclaimer in their employment handbooks.²³ Therefore, the Wynn was free to modify employment terms with respect to future employment and, because the handbook expressly stated that any policies were subject to unilateral modification, the March 28 policy provisions did not rise to the level of an enforceable contract as a matter of law. As a result, the Nevada Supreme Court concluded that the district court properly granted summary judgment on the dealers' breach of contract claim.

(2) The Wynn's appeal from the district court's order denying it attorney fees

The proper standard of review when a district court orders refusal of attorney fees is the abuse of discretion standard.²⁴ Under NRS 18.010(2)(b), the district court may award attorney fees to a prevailing party when it finds that a claim was frivolous or brought or maintained without reasonable ground or to harass the prevailing party. The district court did not find that the claim was frivolous or brought or maintained without reasonable ground or to harass the prevailing party and thus the Nevada Supreme Court concluded that the district court rightfully refused to award attorney fees. The law in this matter was complex and unsettled so the claims made by the dealers were reasonably supportable. Therefore, the Nevada Supreme Court determined that the district court did not abuse its discretion in refusing to award attorney fees.

Conclusion

Because the Labor Commissioner enforces labor laws in Nevada, there is no parallel private cause of action to enforce NRS 608.160, NRS 608.100, or NRS 613.120. The dealers had no standing to independently seek declaratory relief regarding the aforementioned statutes' application. The dealers' breach of contract claim failed to demonstrate a genuine issue of material fact because it failed to show that the March 28 policy constituted unalterable and enforceable terms of employment. As a result, the district court properly granted the Wynn's motion for summary judgment and denied the dealers' motion for partial summary judgment. Finally, because the dealers had reasonable grounds on which to assert their claims, the district court did not abuse its discretion in refusing to award attorney fees. Consequently, the Nevada Supreme Court affirmed the district court's summary judgment and order denying attorney fees.

²² *Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829 (Nev. 1997); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (Nev. 1983).

²³ *D'Angelo*, 107 Nev. at 708 n.4, 819 P.2d at 209 n.4.

²⁴ *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (Nev. 1998).