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Bisch v. Las Vegas Metropolitan Police Department, 129 Nev. Adv. Op. 36 (May 3, 2013)¹

MISCELLANEOUS - A PEACE OFFICER'S RIGHT TO REPRESENTATION IN A PPA INVESTIGATION AND PROPER CRITERIA FOR DISCIPLINE UNDER CIVIL SERVICE RULE 510.2(G)(1)

Summary

This is an appeal from a district court order denying a petition for judicial review and denying declaratory and injunctive relief in an employment matter.

Disposition/Outcome

The Court affirmed the judgment of the district court in upholding the decision of the Employee Management Relations Board (EMRB). In its review, the Court adopted the federal burden of persuasion for a plaintiff to establish a prima facie case of discrimination under NRS 288.270. Additionally, the Court held that NRS 289.080 only imposes duties on employers, not PPAs, an issue of first impression of Nevada.

Facts and Procedural History

This case arises out of a dog bite of a 17-year-old girl and Bisch's subsequent actions in the ensuing medical treatment. Bisch is a police officer with the Las Vegas Metropolitan Police Department (LVMPD). Bisch ran unsuccessfully for Clark County Sherriff in 2006 and it was well known that she planned to run again in 2010.

In 2008, Bisch's dog bit her daughter's friend. Bisch took the girl to the urgent care facility but was unable to contact the girl's mother. Fearing that the urgent care facility would not provide treatment without the girl's legal guardian present, Bisch represented that the girl was actually her own daughter.

The girl's mother filed a complaint with LVMPD, alleging that Bisch had committed insurance fraud by misrepresenting the girl's identity to the urgent care facility. The complaint lodged an Internal Affairs (IA) investigation. In preparation for the IA interview, Bisch informed her police protective association (PPA) representative that she had retained a private attorney, but requested that a PPA representative also be present. The PPA representative responded that, per the PPA bylaws, the PPA provided representation only when the member did not procure his or her own attorney. The interview proceeded without PPA representation.

The IA investigator determined that Bisch had not committed insurance fraud. However, upon the deputy district attorney's suggestion that Bisch *may* have committed identity theft in violation of NRS 205.463, the IA Investigator recommended sustaining the initial complaint on the ground that Bisch had committed identity theft. Because Bisch could not be found to have committed identity theft, LVMPD sustained the complaint for the lesser violation of LVMPD Civil Service Rule 501.2(G)(1), which forbids "[c]onduct unbecoming an employee." Bisch

¹ By Katelyn J. Cantu

received a formal written reprimand, which was removed, per LVMPD policy, from her employee file eighteen months later.

Following the written reprimand, Bisch filed a complaint with the EMRB against both the PPA and LVMPD. First, Bisch alleged that the PPA had breached its duty of fair representation when it refused to represent her at her IA interview because (1) the refusal was politically motivated by the PPA's endorsement of a different candidate for sheriff in the 2006 election, and (2) the refusal violated her right, pursuant to NRS 289.080, to have two representatives of her choosing at the IA interview.

Second, with respect to LVMPD, Bisch alleged that (1) LVMPD had implemented overly broad disciplinary criteria by disciplining her for off-duty conduct that had no actual effect on her ability to perform her job, and (2) that her written reprimand was a politically motivated attempt to thwart her 2010 campaign for sheriff.

The EMRB held a two-day hearing and denied Bisch's claims in their entirety. The district court likewise denied Bisch's subsequent petition for judicial review, and this appeal followed.

Discussion

Justice Parraguirre delivered the opinion of the court, sitting as a six-justice panel with Justices Gibbons, Hardesty, Douglas, Cherry, and Saitta, who concurred. The Honorable Kristina Pickering, Chief Justice, voluntarily recused herself.

Birsch's Appeal is Not Moot

The Court first addressed the issue of whether Bisch's LVMPD claims are moot following the removal of the written reprimand from Bisch's employee file. In Nevada, a case that presents a real controversy at the time of its institution "may become moot by the happening of subsequent events."² However, despite removal of the written reprimand, the Court found that the alleged political motivation of the reprimand and the potential effect it could have on Bisch's political ambitions demonstrate that an actual controversy still exists. Accordingly, the Court declined LVMPD's request to dismiss the appeal as moot.

The EMRB Properly Rejected Bisch's Duty -of -Fair-Representation Claim

Next, the Court addressed whether NRS 289.080 imposes a duty on Bisch's PPA to provide a representative for an investigatory interview by her employer.

Bisch alleges that the PPA policy violates NRS 289.080(1), arguing that NRS 289.080(1) grants her the right to have *two* representatives of her choosing at the interview. NRS 289.080(1) provides: "[A] peace officer who is the subject of an investigation . . . *may* upon request have two representatives of the peace officer's choosing present with the peace officer during any phase of an interrogation or hearing relating to the investigation."³ In looking at the plain

² NCAA v. Univ. of Nev., 97 Nev. 56, 58, 624 P.2d 10, 11 (1981).

³ NEV. REV. STAT. § 289.080(1) (2011) (emphasis added).

language of the statute, the Court concluded that the statute does not impose any affirmative duties on an entity to provide a representative at the interview. Furthermore, applying the broader statutory scheme, the Court concluded that the duties of NRS Chapter 289 are only imposed on *employers*, not PPAs.⁴

Therefore, the Court found that the protection provided by NRS 289.080 is only in regard to Bisch's employer and does not govern a PPA's responsibility towards its members. Thus, the EMRB correctly concluded that NRS 289.080 did not impose an additional duty-of-fair-representation on the PPA.

The EMRB Properly Upheld LVMPD's Written Reprimand of Bisch

Lastly, the Court addressed whether the EMRB properly upheld LVMPD's written reprimand. Bisch challenged the written reprimand on the grounds that LVMPD had (1) used improper criteria in issuing the discipline under Civil Service Rule 510.2(G)(1) because LVMPD disciplined her for off-duty conduct, and (2) improperly disciplined her for political reasons in violation of NRS 288.270(1)(f).

The Conduct for which Bisch was Disciplined was Sufficiently Related to the Performance of her Duties as a Peace Officer

First, the Court addressed whether LVMPD used improper criteria in issuing the written reprimand under Civil Service Rule 510.2(G)(1). Civil Service Rule 510.2(G)(1) provides: "The term 'misconduct' shall mean not only improper action by an employee in his official capacity, but also any conduct by an employee unconnected with his official duties, tending to bring the Department into public discredit which tends to affect the employee's ability to perform his duties efficiently . . ." ⁵ Because a police officer's job is to uphold the law, the act of lying to an urgent care staff in order to circumvent a perceived parental-consent law could plausibly bear directly upon Bisch's fitness to be an officer.⁶

Substantial Evidence Supports the EMRB's Conclusion that Bisch was not Disciplined for Political Reasons

Next, the Court addressed whether the EMRB properly rejected Bisch's claim that the discipline was politically motivated in violation of NRS 288.270(1)(f). NRS 288.270(1)(f) prohibits discrimination against an employee by a local government employer or the employer's designated representative for "political or personal reasons or affiliation."⁷ To establish a prima facie case of discrimination under NRS 288.270(1)(f), the Court applies the *Transportation*

⁴ NRS § 289.060 states, "Any peace officer aggrieved by an action of the employer of the peace officer in violation of this chapter may, after exhausting any applicable . . . administrative remedies, apply to the district court for judicial relief." NEV. REV. STAT. § 289.060 (2011). Accordingly, the Court found that Nevada law enforcement bill of rights afford peace officers certain procedural protections when dealing with their *employer* in an adversarial setting.

⁵ Las Vegas Metropolitan Police Department, Civil Service Rule 510.2(G)(1).

⁶ For example, the Court notes that Bisch's untruthfulness could be used to impeach her credibility if she were called as a witness to testify at trial.

⁷ NEV. REV. STAT. § 288.270(1)(f) (2011).

Management test used to adjudicate federal prohibited-labor-practice claims under the National Labor Relations Act.⁸ Pursuant to the *Transportation Management* test,

An aggrieved employee must make a prima facie showing sufficient to support the inference that the protected conduct was a motivating factor in the employer's decision. Once this is established, the burden of proof shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. The aggrieved employee may then offer evidence that the employer's proffered "legitimate" explanation is pretextual and thereby conclusively restore the inference of unlawful motivation.⁹

However, since the U.S. Supreme Court has since modified the *Transportation Management* test, the Court adopted the revised *Greenwich Collieries*¹⁰ framework. Under the revised *Greenwich Collieries* standards, it is not enough for the employee to merely put forth evidence that is capable of being believed (burden of production); rather, this evidence must actually be believed by the fact-finding (burden of persuasion).¹¹ Although the EMRB applied the *Transportation Management* test, the Court found that there is substantial evidence to support a determination that the burden of persuasion was satisfied.

The EMRB found that LVMPD had produced enough evidence to satisfy its burden regarding its nondiscriminatory justification, listing four specific reasons. However, the Court focused primarily on the fact that ample evidence in the record supported the conclusion that a violation of Civil Service Rule 510.2(G)(1) actually did occur. Accordingly, the Court concluded that EMRB's conclusion that LVMPD established a nondiscriminatory reason for discipline was supported by substantial evidence.

Thus, the burden shifted back to Bisch, but Bisch provided no factual basis, other than one investigator's reference to the investigation as a "tower caper," and no evidence that continuing the investigation was contrary to any IA policy. Accordingly, the Court found that EMRB was correct to conclude that Bisch did not satisfy her burden to show that the LVMPD's stated reasons for discipline were merely pretextual.

Conclusion

The Court found that the EMRB decision was supported by substantial evidence and affirmed the judgment of the District Court denying a petition for judicial review and denying declaratory and injunctive relief.

⁸ See *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986).

⁹ *Id.* at 1323 (citing *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 383, 403 (1983), *abrogated by* Dir., Office of Workers' Comp. Programs, *DOL v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994)).

¹⁰ Dir., Office of Workers' Comp. Programs, *DOL v. Greenwich Collieries*, 512 U.S. 267 (1994).

¹¹ *Id.* at 276-78.