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Summary of Pope v. Motel 6, 121 Nev. Adv. Op. 31

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Pope v. Motel 6, 121 Nev. Adv. Op. 31, 114 P.2d 277 (2005).¹

**EMPLOYMENT LAW-EMPLOYMENT DISCRIMINATION
&
TORT-INTENTIONAL INFLICTION OF EMOTIONAL
DISTRESS/DEFAMATION**

Summary

On April 5, 1996, Motel 6 hired Juanita Pope as a housekeeper. Within several months, Motel 6 promoted Ms. Pope to the position of head housekeeper. However, within the first fourteen months of Ms. Pope's employment she was written up, warned, and suspended multiple times for tardiness and unsatisfactory job performance.

In June 1997, Victoria Inman, manager of the Motel 6 where Ms. Pope worked, issued a verbal warning to Ms. Pope, telling her that she was to stop gossiping to other Motel 6 employees. Inman explained to Ms. Pope that such conduct was inappropriate for somebody in a management position, such as head of housekeeping. Allegedly, Ms. Pope continued to say negative things about Inman, and Motel 6 in general. Subsequently, after consulting Motel 6's regional human resource manager, Inman terminated Ms. Pope's employment. In support of the decision to terminate Ms. Pope's employment, Inman produced written statements from three other Motel 6 employees, alleging that Ms. Pope spoke poorly of both Inman and Motel 6.

Ms. Pope contended that following her termination, Inman falsely accused both her and her husband, who also previously worked for Motel 6, of stealing several items from Motel 6. In addition, Ms. Pope alleged that Inman falsely accused her and her husband of writing threatening letters to Inman. Ms. Pope claimed that Inman made these false allegations to the local police, as well as a Motel 6 area manager.

After Ms. Pope's employment was terminated, she filed a discrimination charge with the Nevada Equal Rights Commission (NERC). The charge asserted that Motel 6 terminated her employment because of previous incidents with her husband. Ms. Pope claimed that she was fired because her husband, during his employment with Motel 6, had complained about a sexual harassment incident at Motel 6, and because he had filed a NERC charge, alleging retaliatory discharge, after Motel 6 terminated his employment.

After filing a NERC charge, Ms. Pope filed a complaint in district court. In the complaint Ms. Pope alleged several causes of action. In particular, Ms. Pope brought the following claims: (1) wrongful termination based on race or national origin, (2) failure to promote based on race or national origin, (3) retaliatory termination, (4) defamation, and (5) intentional infliction of emotional distress. However, after pretrial discovery, the

¹ By Collin Webster

district court granted summary judgment in favor of Motel 6, dismissing all of Ms. Pope's causes of action. Ms. Pope appealed the district court's ruling.

On appeal, the Nevada Supreme Court held that because Ms. Pope only alleged retaliatory discharge in her NERC charge (with no allegations of discrimination), she had not exhausted all administrative remedies before filing her discrimination claim in district court. Furthermore, the court held that Nevada's anti-retaliation statute did not apply to Ms. Pope because she was not the individual who engaged in the protected activity. In other words, because Ms. Pope alleged retaliatory discharge based solely on her husband's past conduct, she could not prevail on the claim. Lastly, the court held the district court had properly granted Motel 6's motion for summary judgment, regarding Inman's remarks to the police, because Ms. Pope failed to advance any evidence of malice, a requisite element for defamation. However, the court held the district court erroneously granted Motel 6's motion for summary judgment regarding Inman's statements to the area manager. The court reasoned that because Motel 6 failed to show that Inman's comments to the area manager were intracorporate privileged communications, the district court was incorrect in granting summary judgment.

Issues and Dispositions

Issues

1. When an employee files a discrimination claim in district court, before presenting the claim to an administrative agency, has the individual failed to exhaust all administrative remedies?
2. Does NRS 613.340(1), Nevada's anti-retaliation statute, support a retaliation claim when a third party, and not the complaining party, is the one who engaged in the alleged protected activity?
3. Should statements made to the police before proceedings have commenced be subject to an absolute privilege?

Dispositions

1. Yes. If an employee files a discrimination claim in district court, the employee has failed to exhaust all administrative remedies if he or she has not previously presented the claim to the administrative agency, unless the claim being filed is reasonably related to another claim which was filed with the administrative charge.
2. No. Due to the statute's plain language, NRS 613.340 does not support a retaliation claim when the claimant is not the one who engaged in the protected activity.

3. No. Statements made to the police before proceedings have commenced are not subject to an absolute privilege, but, rather, are subject to a qualified privilege.

Commentary

State of the Law Before *Pope*

All three issues raised in *Pope* are issues of first impression for Nevada. First, prior to *Pope*, the Nevada Supreme Court had never decided whether individuals can file claims in district court, adding claims not presented in a previous NERC charge. Before *Pope*, the court was equipped with Nevada's anti-discrimination statutes,² Title VII of the 1964 Civil Rights Act,³ and Nevada and Ninth Circuit⁴ case law. The Nevada Revised Statutes make it unlawful for an employer to discharge employees based on race or national origin.⁵ Further, employees who allege discrimination are required to exhaust all administrative remedies before filing a complaint in district court.⁶ However, the Ninth Circuit recognized that individuals can still file new claims in district court as long as the new claims are "reasonably related to the allegations of the administrative charge."⁷ Although the court had been confronted with discrimination claims, it had never been faced with whether those who *had* sought administrative remedies for some of their allegations had "failed to exhaust" those remedies if the district court complaint contained new claims that were unrelated to the NERC charge.

Second, the court addressed whether Nevada's anti-retaliation statute applied to a third party who did not actually engage in the protected activity. Nevada Revised Statutes explain that the anti-retaliation statutes exist in order to protect individuals who have filed a complaint against their employer, and feel the employer has discharged them for doing so.⁸ While the statute protects an employee who has been discharged after filing a complaint against the employer, the court had never decided whether a third party is protected from retaliation for another person's conduct.

Third, the court addressed whether statements made by an employee to a police officer and a senior employee, before the initiation of any criminal proceedings, deserved absolute or qualified immunity regarding a defamation claim. Nevada law consisted of the traditional elements of defamation,⁹ but the court had never previously decided the issue of immunity as presented in *Pope*. The court had addressed this issue in *K-Mart*

² NEV. REV. ST. § 613.330(1) (2003); NEV. REV. ST. § 613.420.

³ See 42 U.S.C. §§ 2000e-2000e-16 (2000); Although Title VII is a federal statute, the court has looked to Title VII for *guidance* in discrimination cases, due to the similarity between Title VII and Nevada's anti-discrimination statutes.

⁴ See *Shah v. Mt. Zion Hosp. & Med. Ctr.*, 642 F.2d 268 (9th Cir. 1981).

⁵ NEV. REV. ST. § 613.330(1); *Shah*, 642 F.2d at 271.

⁶ NEV. REV. ST. § 613.420.

⁷ *Shah*, 642 F.2d at 271.

⁸ See NEV. REV. ST. § 613.340(1).

⁹ The elements of defamation are (1) a false and defamatory statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *Pope*, 121 Nev. Adv. Op. 31, 114 P.2d 277 (2005); *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

Corporation v. Washington,¹⁰ but failed to ultimately determine which type of immunity was appropriate for communications to the police before criminal proceedings were initiated. In *K-Mart*, the court ended up applying a statutory qualified privilege, but suggested that an absolute privilege might apply.¹¹

Other Jurisdictions

Discrimination Claim

As noted earlier, Nevada courts have looked to federal courts for guidance in discrimination cases.¹² Although the Ninth Circuit made it clear that individuals may not file discrimination claims in district court if they are not reasonably related to the administrative claims, other circuits have elaborated on what constitutes “reasonably related.” In *Harper v. Godfrey Co.*,¹³ the Seventh Circuit explained that in order to be reasonably related, the new claim must, at the least, have a factual relationship to the administrative claim.¹⁴ The court continued to explain that this requires the new claim to “describe the same conduct, and implicate the same individuals.”¹⁵

Third-party Retaliation Claim

Regarding the second issue of third-party retaliation, multiple federal jurisdictions have addressed the issue of third-party protection in discrimination claims.¹⁶ Title VII makes it against the law for any employer to discriminate against an employee “because he has opposed any practice made an unlawful employment practice by Title VII, or because he has made a charge, testified, assisted, or participate din any manner in an investigation, proceeding, or hearing under Title VII.”¹⁷ Federal courts have concluded that the plain language of Title VII precludes courts from granting relief to third parties seeking relief based upon the protected actions of another person.¹⁸ These courts have reasoned that because Title VII uses the terms “he,” and “such individual,” in describing the protection, the only individual protected by the statute is the person who is actually engaged in the protected activity.¹⁹ In *Smith v. Riceland Foods, Inc.*,²⁰ the Eighth Circuit held that holding otherwise would go against the plain language of Title VII, and would create problems in deciding who qualifies for protection under Title VII.²¹

¹⁰ 109 Nev. 1180, 866 P.2d 274 (1993).

¹¹ *Id.* at 1191.

¹² *See* note 3, *supra*.

¹³ 45 F.3d 143, 148 (7th Cir. 1995).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Again, due to the similarity between Title VII and state anti-discrimination statutes, it is helpful to look to federal courts for guidance.

¹⁷ 42 U.S.C. § 2000e-3(a) (2000).

¹⁸ *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3rd Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996).

¹⁹ *Fogleman*, 283 F.3d at 561.

²⁰ 151 F.3d 813, 819 (8th Cir. 1998).

²¹ *Id.*

Despite these federal appellate court holdings precluding third-party retaliation claims, several federal district courts have held otherwise, based on the policy objectives of Title VII.²² According to these courts, third-party claims are still actionable because the purpose of Title VII is “to ensure unfettered access to statutory remedial mechanisms.”²³ However, this policy approach has been expressly rejected by at least one federal appellate court.²⁴

Defamation Claim (question of immunity)

Numerous jurisdictions have considered the issue of whether statements made to a police office *before* the initiation of criminal proceedings receive an absolute or qualified privilege. Most jurisdictions that have considered this issue have held that such communications enjoy only a qualified privilege.²⁵ These courts have held this way in order to balance an individual’s right to enjoy an unblemished reputation against the public interest of full disclosure of facts to the government.²⁶

Although most courts considering this issue have applied a qualified immunity, few jurisdictions have afforded an absolute privilege.²⁷ These courts reason that providing police with information is an initial step in judicial proceedings, and thus are a critical part of the investigation process that deserves absolute protection.²⁸

Effect of *Pope* on Current Law

The holding in *Pope* will result in more clarity regarding all three issues of first impression. In addressing the three issues the court turned to statutes (both federal and state), as well as state and federal case law. Due to the nature of the discrimination claim, it was helpful for the court to compare Nevada law with federal law.

First, after looking at federal courts’ use and interpretation of Title VII, the court made clear that individuals are precluded from raising new claims in district court if those claims were not brought before an administrative agency, assuming they are not adequately related to the claims that *were* brought before an administrative agency. If individuals are aware of this holding they will be better informed, and can file all necessary claims with the appropriate administrative agency before filing a district court claim. If such notice is provided, this will save the individual time and money, and will also help keep courts less cluttered.

²² See, e.g. *Gonzalez v. New York Dept. of Corr. Ser.*, 122 F. Supp. 2d 335, 346-47 (N.D.N.Y. 2000); *E.E.O.C. v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206 (E.D. Cal. 1998).

²³ *Nalbandian Sales*, 36 F. Supp. 2d at 1210.

²⁴ See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3rd Cir. 2002).

²⁵ *Fridovich v. Fridovich*, 598 So.2d 65, 67 (Fla. 1992) (collecting cases); see also *Newark Trust Co. v. Bruwer*, 141 A.2d 615, 617 (Del. 1958); *Indiana Nat. Bank v. Chapman*, 482 N.E.2d 474, 479 (Ind. Ct. App. 1985).

²⁶ *Fridovich*, 598 So.2d at 68.

²⁷ See, *Starnes v. Int'l Harvester Co.*, 184 Ill. App. 3d 199, 539 N.E.2d 1372 (Ill. App. Ct. 1989); *Hott v. Yarbrough*, 112 Tex. 179, 245 S.W. 676 (Tex. Comm’n App. 1922).

²⁸ *Starnes*, 539 N.E.2d at 1374-75.

Second, the court made clear that it will follow the plain language of Nevada's anti-discrimination statutes. By doing so, the court precludes third parties from obtaining relief based on retaliation claims for the protected conduct of another individual.

Thirdly, the court has placed Nevada with the majority of jurisdictions, making clear that an individual's statements made to police, before the initiation of criminal proceedings, will only be afforded a qualified privilege as opposed to an absolute privilege. Although some may argue that this holding may impede police investigations, this seems like a fair balance of reputation versus investigation.

Conclusion

Pope clearly establishes that an individual cannot file a discrimination claim in district court if he or she did not first exhaust all administrative remedies. However, if the individual is *adding* a new claim to a claim which was brought before an administrative agency, the individual may still bring the claim if it is sufficiently related to the first claim. In addition, *Pope* establishes that a third-party is precluded from recovering on a retaliation claim for the protected acts of another individual. Lastly, the Court made clear that an individual's statements to police, before the initiation of criminal proceedings, will enjoy merely a qualified privilege as opposed to an absolute privilege.