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Perry v. Terrible Herbst, Inc., Nev. Adv. Op. 75 (Oct. 27, 2016)

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Perry v. Terrible Herbst, Inc., Nev. Adv. Op. 75 (Oct. 27, 2016)[1]

EMPLOYMENT LAW: STATUTE OF LIMITATIONS

Summary

The Minimum Wage Amendment (MWA) of the Nevada Constitution does not have a specific statute of limitations provision. Because the MWA is closely analogous to recovery for back pay under NRS 608.260, the two-year statute of limitations provision in NRS 608.260 applies, and not the catch-all four-year period from NRS 11.220.

Background

From May 2007 until March 2012, Appellant Deborah Perry worked as a cashier for Terrible Herbst. In July 2014, more than two years after the end of her employment, Perry filed a class action lawsuit against Terrible Herbst alleging violation of the Minimum Wage Amendment (MWA) of the Nevada Constitution. There is no statute of limitations specified in the MWA.

Terrible Herbst filed a motion for judgment on the pleadings, arguing that the relevant statute of limitations was two years under NRS 608.260, which had already run. The district court granted the motion because the right of action created by the MWA most closely resembled that afforded by NRS 608.260[2]. Perry appealed the decision, arguing that since the MWA does not specify a statute of limitations the catch-all four-year limit under NRS 11.220 should apply.

Discussion

The MWA outlines minimum wage requirement for employers, but does not set a concrete statute of limitations for employees to bring suit against their employers.[3] When the MWA passed, Nevada already had a statute in place covering minimum wage law that established a two-year statute of limitations for employees to sue for back pay.[4]

If a statute does not have an express statute of limitations provision, courts look to "analogous causes of action for which an express limitation period is available either by statute or by case law."[5] Both NRS Chapter 608 and the MWA create a cause of action for employees to sue for back pay when an employer allegedly pays less than the minimum requirement. Despite the MWA allowing for a broader range of remedies than NRS 608.260, the underlying claim is for back pay and the methods for determining back pay should not affect the applicable limitation period.

The Court rejected Perry's argument that the MWA impliedly repeals the NRS 608.260. A constitutional amendment repeals a statute if both are "irrevocably repugnant, such that both

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[1] By Wes LeMay Jr.

[2] NEV. REV. STAT. § 608.260 gives employees the right to sue for back pay if their employers fail to pay the minimum wage rate established by the Labor Commissioner regulation.

[3] NEV. CONST.art. XV, §16.

[4] NEV. REV. STAT. § 608.260.

[5] Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex. 1998)

cannot stand."[6] The MWA and NRS 608.260, have no direct conflict, and "are capable of coexistence" because the statute reasonably supplements gaps in the MWA's terms.[7]

Similarly, the Court held in *White Pine Lumber Co., v. City of Reno*[8] that NRS 11.220's catch-all statute of limitations provision did not cover adverse possession because the adverse possession statute had a relevant statute of limitations provision and it did not matter who was performing the adverse possession. If Perry had sued under NRS 608.260, the two-year statute of limitations would have applied without a doubt.

Relying on *Gabriel v. O'Hara*, Perry argued that the catch-all provision of NRS 11.220 existed for this exact situation, "where claims…cannot be made under any other law, [and] for which no limitation is expressly provided." [9] *Gabriel*, however, related to a Pennsylvania Unfair Trade Practices and Consumer Protection Law that covered a wide variety of potential practices and was not nearly as specific as the MWA or NRS 608.260. These two laws closely relate and do not conflict with each other so there is no issue applying the statute of limitations provision from NRS 608.260 to the MWA.

Conclusion

If a statute or Constitutional Amendment does not have an explicit statute of limitations provision, then courts should apply a provision from a similar statute. If none exists, then the catch-all statute of limitations applies. The most closely analogous law to the MWA is NRS 608.260, since they both give a right of action to employees to recover for back pay. Since there was an analogous statute in place, the two-years statute of limitations applied, and not the catch-all four-year statute of limitations provision from NRS 11.220. The Court affirmed the district court's granting of Terrible Herbst's motion for judgment on the pleadings.

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[6] Thomas v. Nev. Yellow Cab Corp., 130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (Nev. 2014)
[7] L.D.G. v. Holder, 744 F.3d 1022, 1031 (7th Cir. 2014).
[8] 106 Nev. 778, 779, 801 P.2d 1370, 1371.
[9] 534 A.2d 488 (Pa. Super. Ct., 1987).