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Freeman Expositions, LLC v. Eighth Judicial Dist. Ct., 138 Nev. Adv. Op. 77 (Dec. 01, 2022)

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Freeman Expositions, LLC v. Eighth Judicial Dist. Ct., 138 Nev. Adv. Op. 77 (Dec. 01, 2022)[1]

CIVIL EMPLOYMENT ACTION: REGARDING MEDICAL CANNABIS, NEVADA EMPLOYEES LACK A CAUSE OF ACTION IN CERTAIN CIRCUMSTANCES FOR TORTIOUS DISCHARGE OR NEGLIGENT HIRING, TRAINING, OR SUPERVISION.

Summary

The Nevada Legislature has clearly distinguished between recreational and medical cannabis use in the employment context. Under NRS 678C.850(3), employees have a private right of action when an employer does not provide reasonable accommodations for the use of medical cannabis off-site and outside of working hours. While employees have a private right of action under NRS 678C.850, they lack a cause of action in such circumstances for tortious discharge or negligent hiring, training, or supervision. Furthermore, pursuant to *Ceballos v. NP Palace, LLC*,[2] employees who use medical cannabis may not bring a claim against their employer under NRS 613.333.

Background

Real party in interest James Roushkolb worked in a journeyman position with petitioner Freeman Expositions, dispatched through a union. In accordance with a collective bargaining agreement that provided for a zero-tolerance drug and alcohol policy, Freeman Expositions terminated Roushkolb after he tested positive for cannabis. At the time, Roushkolb held a valid medical cannabis registry identification card issued by the State of Nevada.

Roushkolb filed suit, asserting five claims against Freeman Expositions: (1) unlawful employment practices under NRS 613.333; (2) tortious discharge; (3) deceptive trade practices; (4) negligent hiring, training, and supervision; and (5) violation of the medical needs of an employee pursuant to NRS 678C.850(3). Freeman Expositions moved to dismiss. The district court dismissed the claim for deceptive trade practices but allowed the other claims to proceed. Freeman Expositions petitioned for a writ of mandamus, seeking dismissal of the remaining claims.

Discussion

The district court properly denied Freeman Expositions' motion to dismiss the claim under NRS 678C.850(3) but erred by not dismissing the claims for tortious discharge; violation of NRS 613.333; and negligent hiring, supervision, and training.

As a matter of first impression, the main issue before the Court is whether Nevada law provides workplace protections to employees who use medical cannabis. Generally, the Court will not consider a writ petition challenging an interlocutory order denying a motion to dismiss; however, the Court will consider petitions denying motions to dismiss "when either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition."[3]

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[1] By Keaunui Harris.

[2] Ceballos v. NP Palace, LLC, 138 Nev., Adv. Op. 58, 514 P.3d 1074 (2022).

[3] Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197–98, 179 P.3d 556, 559 (2008).

Both parties argue that the Court should clarify Nevada's laws regarding medical cannabis in the employment context, and the Court agreed, beginning its analysis with a statutory interpretation of NRS 678C.850.

Under NRCP 12(b)(5), a court treats factual allegations as true and draws all inferences in favor of the nonmoving party.[4] Furthermore, a claim should be dismissed "only if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief."[5]

Whether NRS 678C.850(3) provides a private right of action

Freeman Expositions argues that the district court should have dismissed Roushkolb's NRS 678C.850(3) claim because NRS Chapter 678C does not provide a private right of action. Freeman Expositions also argues Roushkolb did not request an accommodation for his use of medical cannabis. On the other hand, Roushkolb argued below that he had sought an accommodation for using medical cannabis outside of the workplace during nonworking hours. Roushkolb also argued that NRS 678C.850 would be nullified without a private right of action because no administrative agency is empowered to enforce this protection.

Looking to the Legislature's intent, the Court agreed with Roushkolb, ruling that "NRS 678C.850 provides an implied right of action." NRS 678C.850(3) states:

> [An] employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of cannabis if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) prohibit the employee from fulfilling any and all of his or her job responsibilities.

Although NRS 678C.850(3) does not expressly state that an employee has a private right of action when an employer does not attempt to accommodate medical cannabis users, a court may still find an implied right of action if the Legislature intended that a private right of action may be implied.[6] In determining such legislative intent, the Court considers three issues: "(1) whether the plaintiffs are of the class for whose special benefit the statute was enacted; (2) whether the legislative history indicates any intention to create or deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme."[7]

The Court found that all three of these issues favored legislative intent of an implied private right of action. First, Roushkolb is part of the class "for whose benefit the statute was enacted" because he held a valid medical cannabis registry card and was an employee of Freeman Expositions who used medical cannabis. Second, when the Legislature added subsection NRS 678C.850(3) in 2013, it did not express an intention to create or deny a private remedy under the statute; however, the Legislature explained that it "modeled the statute on Arizona's medical cannabis statutes."[8] A federal district court in Arizona found that the Arizona law provided an implied cause of action because one was needed to implement the statutory

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[4] Buzz Stew, LLC, v. City of North Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

[5] *Id.*

[6] Neville v. Eighth Judicial Dist. Court, 133 Nev. 777, 781, 406 P.3d 499, 502 (2017).

[7] Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 958–59, 194 P.3d 96, 101 (2008) (addressing factors set forth by the Supreme Court in Cort v. Ash, 422 U.S. 66, 78 (1975)).

[8] Hearing on S.B. 374 Before the Assemb. Comm. On Judiciary, 77th Leg. (Nev., June 1, 2013).

directive.[9] Finally, the Court found that implying a private cause of action under the statute is consistent with the underlying purpose of NRS Chapter 678C, which is to "allow Nevadans who suffer from certain medical conditions to be able to obtain medical cannabis safely and conveniently."[10] Further, the Court found that no other statute provides medical cannabis users with a cause of action against an employer who violates NRS 678.850(3). As a result, the Court concluded that the "Legislature intended to provide a private right of action to implement its mandate in NRS 678C.850(3)."

The Court also found examples of other states' statutes providing a private cause of action in similar situations, even where the legislators did not include such a remedy.[11] Accordingly, the Court held that the district court's decision to decline to dismiss this claim was proper.

Tortious discharge

Freeman Expositions next argued the district court should have dismissed Roushkolb's tortious discharge claim because an at-will employee can generally be terminated for any reason, unless the dismissal offends "strong and compelling" public policy. Roushkolb argued that his tortious discharge claim was properly allowed to proceed because "allowing an employer to terminate employees using medical cannabis outside of the workplace offends public policy." Because tortious discharge claims are "severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy,"[12] the Court ultimately agreed with Freeman Expositions.[13] Despite recognizing that public policy "supports broader protections for medical cannabis" than for recreational cannabis, the Court found that NRS 678C.850(3) provides protection for medical cannabis users only to the extent that employers must *attempt* to accommodate their medical needs. As a threshold matter, the public policy protected here is not sufficiently "strong and compelling" to support a claim for tortious discharge. Thus, the Court held that Freeman Expositions showed that "writ relief is warranted as to Roushkolb's tortious discharge claim."

Unlawful employment practices under NRS 613.333

Freeman Expositions next argued that the claim for unlawful employment practices should have been dismissed because the statute does not protect an employee's use of medical cannabis. Roushkolb and amicus argued that NRS 613.333 protects medical cannabis users in employment contexts because medical cannabis is a lawful product in Nevada.

While NRS 613.333 provides employment protections for the lawful use of products outside of the workplace, recreational cannabis use is not protected by NRS 613.333 because cannabis possession remains illegal under the federal Controlled Substances Act.[14] Because medical cannabis possession "remains illegal under federal law," the Court extended its

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[9] Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 775–76 (D. Ariz. 2019).

[10] *See* NEV. REV. STAT. § 678A.005(2).

[11] *See Whitmire*, 359 F. Supp. 3d at 781; *see also* Palmiter v. Commonwealth Health Systems, Inc., 260 A.3d 967 (Pa. Super. Ct. 2021); Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 338–40 (D. Conn. 2017).

[12] Sands Regent v. Valgardson, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989).

[13] The Court has recognized three instances in which an employer violated "strong and compelling" public policy: (1) when an employee was terminated for refusing to engage in unlawful conduct; (2) when an employee was terminated for refusing to work in unreasonably dangerous conditions; and (3) when an employee was terminated for filing a workers' compensation claim.

[14] *Ceballos*, 138 Nev., Adv. Op. 58, 514 P.3d at 1077–78; 21 C.F.R. § 1308.11(d)(23).

interpretation of NRS 613.333 to also apply to medical cannabis use. Consequently, the Court concluded that "NRS 613.333 does not provide a basis for a claim that alleges employment discrimination for the use of medical cannabis as a product lawfully used outside of the workplace." Freeman Expositions has shown that writ relief is warranted as to this claim.

Negligent hiring, training, and supervision claim

Lastly, Freeman Expositions argued that the district court erred by failing to dismiss the claim for negligent hiring, training, and supervision because there is no duty for employers to train employees on medical cannabis laws and standards. Roushkolb, on the other hand, argued that Freeman Expositions was negligent because it failed to properly train its employees on medical cannabis and workplace rights. The tort of negligent hiring, training, and supervision imposes a general duty on the employer to use reasonable care to ensure that the employee is "fit for the position."[15] Because the claim for negligent hiring, training, or supervision focuses on liability for an employer "based on injuries caused by a negligently managed employee,"[16] the Court found that Roushkolb's allegation of wrongful conduct relates to the conduct of his employer, not another employee. Accordingly, the Court ruled that Roushkolb failed to state a claim for negligent hiring, training, or supervision, and Freeman Expositions' writ relief was appropriate.

Conclusion

The Nevada Legislature has provided that employers generally "must attempt to make reasonable accommodations for the medical needs of" employees who use medical cannabis outside of the workplace.[17] The Court concluded that NRS 678C.850(3) provides an employee with a private right of action when an employer does not attempt to provide reasonable accommodations for the use of medical cannabis off-site and outside of working hours. Regarding the private right of action under NRS 678C.850, an employee may not assert a claim for tortious discharge for violating public policy concerning the use of medical cannabis. The Court also extended *Ceballos* to rule that an employee who uses medical cannabis may not bring a claim against an employer under NRS 631.333. Accordingly, the district court properly declined to dismiss Roushkolb's claim under NRS 678C.850(3) but erred by not dismissing the claims for tortious discharge; unlawful employment practices under NRS 613.333; and negligent hiring, training, or supervision. The Court granted mandamus relief in part and denied it in part, directing the district court to grant Freeman Exposition's motion to dismiss with respect to the claims for tortious discharge; unlawful employment practices under NRS 613.333; and negligent hiring, training, or supervision.

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[15] *See* Hall v. SSF, Inc., 112 Nev. 1348, 1392–93, 930 P.2d 94, 98–99 (1996).
[16] *See* Restatement of Employment Law § 4.04 (Am. Law Inst. 2015).
[17] NEV. REV. STAT. § 678C.850(3).