

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN ERNAUT,

Appellant,

vs.

JULIA BLEDSOE, AN INDIVIDUAL;
LARRY ENGRSTROM, AN
INDIVIDUAL; ANDREA LENZ, AN
INDIVIDUAL; JANET DAMSCHEN, AN
INDIVIDUAL; TIM MACFARLAND, AN
INDIVIDUAL; HEATHER HARDY, AN
INDIVIDUAL; AND NEVADA SYSTEM
OF HIGHER EDUCATION, A STATE
ENTITY,

Respondents.

JULIA BLEDSOE, AN INDIVIDUAL;
LARRY ENGRSTROM, AN
INDIVIDUAL; ANDREA LENZ, AN
INDIVIDUAL; JANET DAMSCHEN,
INDIVIDUAL; TIM MACFARLAND, AN
INDIVIDUAL; HEATHER HARDY, AN
INDIVIDUAL; AND NEVADA SYSTEM
OF HIGHER EDUCATION,

Appellants,

vs.

STEPHEN ERNAUT,

Respondent.

No. 58285

FILED

MAR 13 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

No. 58478

*ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING*

These are consolidated appeals from a district court summary judgment in an employment matter and from post-judgment orders retaxing costs and denying attorney fees. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant/cross-respondent Stephen Ernaut worked as a theater technician for the University of Nevada Reno (UNR). During his

probationary period, Ernaut suffered a nonwork knee injury and was placed on light duty work. At first, UNR accommodated these restrictions, but then rejected Ernaut's probationary employment, effectively discharging him. Before his discharge, however, Ernaut filed an equal opportunity/affirmative action (EO/AA) complaint alleging sexual harassment by his co-worker, respondent/cross-appellant Julia Bledsoe. That EO/AA complaint was not sustained. After his discharge, Ernaut filed the underlying district court complaint against respondents/cross-appellants (collectively "UNR") alleging tortious discharge, First Amendment violations, Equal Protection violations, disability discrimination in violation of the Rehabilitation Act, and negligence. UNR moved for summary judgment, which the district court granted. Subsequently, UNR moved for attorney fees based on Ernaut's rejection of an offer of judgment. The district court denied UNR's motion and instead granted Ernaut's motion to retax costs. Ernaut appeals from the summary judgment (Docket No. 58285) and UNR (Docket No. 58478) appeals from the post-judgment orders.

Having considered the parties' arguments and the record, we first conclude that the district court properly granted summary judgment in UNR's favor. See NRCP 56(c) (setting forth the summary judgment standard); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (explaining that this court reviews summary judgments de novo). "An employer commits a tortious discharge by terminating an employee for reasons that violate public policy." *Allum v. Valley Bank of Nev.*, 114 Nev. 1313, 1316, 970 P.2d 1062, 1064 (1998). Here, UNR discharged Ernaut after concluding that he could not perform the essential functions of his job. Ernaut argues that summary judgment was improper because a

genuine issue of material fact exists as to whether he could perform the essential functions of his job. But the record demonstrates that Ernaut was under light-duty work restrictions without an end date, his job description included physical functions, and he could not complete his job functions without assistance from student technicians. Furthermore, Ernaut failed to produce any evidence showing that he was able to complete his job's essential functions or any authority requiring UNR to accommodate his restrictions. We therefore conclude that summary judgment was properly granted on the tortious discharge claim. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030-31 (explaining that to defeat a properly supported motion for summary judgment, the nonmoving party must set forth specific facts demonstrating the existence of a genuine issue of material fact for trial).

We also conclude that summary judgment was properly granted on Ernaut's remaining claims because Ernaut's EO/AA complaint alleging sexual harassment by Bledsoe was not a matter of public concern and was therefore not protected speech, *see Pool v. VanRheen*, 297 F.3d 899, 906 (9th Cir. 2002) (explaining that speech addressing individual personnel disputes is not of public concern), Ernaut's position was filled by a male candidate and he did not provide any evidence showing that similarly situated female employees received more favorable treatment, *see Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740, 753 (9th Cir. 2010) (requiring plaintiff to show that "similarly situated employees not in his protected class received more favorable treatment" to establish a prima facie case), and because Ernaut did not show, or even allege, that he was

handicapped for purposes of the Rehabilitation Act.¹ See *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (requiring that plaintiff show that he “was an otherwise qualified handicapped individual” to establish a prima facie case). Because summary judgment was proper on these claims, Ernaut’s negligence claim also necessarily fails. Therefore, we affirm the district court’s summary judgment in Docket No. 58285.

After entering summary judgment, the district court retaxed costs and denied UNR’s request for attorney fees after agreeing with Ernaut that because UNR’s offer of judgment precluded a post-acceptance award of attorney fees, the court must include Ernaut’s pre-offer attorney fees in its comparison of whether a more favorable judgment was obtained. UNR’s arguments about excluding attorney fees from the calculation here appear meritorious. See *McCrory v. Bianco*, 122 Nev. 102, 107-09, 131 P.3d 573, 576-77 (2006) (indicating that attorney fees are excluded from the offer of judgment comparison formula). Furthermore, Ernaut did not provide any authority to support his argument and the Nevada Civil Practice Manual, cited by the district court, is not authoritative. Even assuming attorney fees may be included, Ernaut was not entitled to any attorney fees below so as to add them to the final judgment. Accordingly, we conclude that the district court abused its discretion by including Ernaut’s pre-offer attorney fees in the offer of judgment calculation, and

¹Although the district court granted summary judgment on the ground that Ernaut failed to exhaust the administrative remedies, we decline to address that issue and instead affirm summary judgment based on Ernaut’s failure to make out a prima facie case. See *Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (explaining that this court will affirm a district court decision that reached the right result, but for the wrong reason).

we reverse the post-judgment orders in Docket No. 58478 and remand this matter to the district court to consider whether attorney fees should be awarded to UNR in light of the appropriate factors. *See RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 40-41, 110 P.3d 24, 28 (2005) (explaining that this court reviews an attorney fees award for an abuse of discretion and setting forth the factors to consider in awarding attorney fees based on an offer of judgment).

It is so ORDERED.²

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Chief Judge, Second Judicial District Court
Second Judicial District Court Dept. 10
Jonathan L. Andrews, Settlement Judge
Jeffrey A Dickerson
University of Nevada, Reno, Office of General Counsel
Washoe District Court Clerk

²To the extent that the parties' arguments have not been expressly addressed in this order, we conclude that those arguments lack merit.