


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDEL LANE,
Appellant,
vs.
CLARK COUNTY,
Respondent.

No. 69614

FILED

APR 24 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Randel Lane appeals from a district court order granting summary judgment in a torts action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Lane, the plaintiff below, was employed as a senior storekeeper for respondent Clark County until he was terminated pursuant to a medical separation policy. Lane filed suit alleging negligent supervision, intentional infliction of emotional distress and wrongful termination related to Clark County's conduct in terminating his employment and Lane's allegations of disability based discrimination.¹ Clark County filed a motion for summary judgment based on discretionary immunity under NRS 41.032.

¹Lane initially had a claim for violation of the Americans with Disabilities Act; however, after the case was removed to the United States District Court for the District of Nevada, that court granted Clark County summary judgment on that claim and that decision was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit. *See Lane v. Clark County*, 604 Fed. App'x. 632 (9th Cir. 2015). Lane's case later returned to state court when the federal district court declined to exercise supplemental jurisdiction over his remaining claims.

The motion was granted over Lane's opposition, and this appeal followed.²

On appeal, Lane's sole argument in opposition to the application of discretionary-act immunity is that Clark County's actions in terminating his employment were in bad faith because they failed to follow the medical separation policy by utilizing his own treating physicians' records and opinions rather than sending him to a physician chosen by Clark County. We review a district court's summary judgment order de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

NRS 41.032(2) provides immunity to the State's political subdivisions, including its employees or officers, in relation to their discretionary functions whether or not the discretion is abused. Acts committed in bad faith cannot be within the actor's discretion. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891-92 (1991). "[A]n abuse of discretion occurs within the circumference of authority, and an act or omission of bad faith occurs outside the circumference of authority." *Id.* at 1009 n.3, 823 P.2d at 892 n.3. In other words, "an abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives, whereas an act of bad faith has no relationship to a rightful prerogative even if the result is ostensibly within the actor's ambit of authority." *Id.*

²Lane failed to challenge the grant of summary judgment as to the IIED claim on the basis that intentional torts are exempt from discretionary-act immunity, *See Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 682, 335 P.3d 125, 139 (2014) (holding that intentional torts are exempt from statutory discretionary-act immunity), *vacated on other grounds*, 136 S. Ct. 1277 (2016), and has therefore waived any such challenge. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in appellant's opening brief are waived).

In this matter, there has been no dispute that Lane suffers from depression, social anxiety and panic attacks. Due to these conditions Lane missed substantial amounts of time at work and exhausted his available leave under the Family Medical Leave Act. On a couple of occasions, Lane sought an accommodation pursuant to the Americans with Disabilities Act. Medical certifications provided to Clark County in relation to Lane's reapplication for an accommodation indicated that, due to his conditions, Lane was unable to focus, concentrate, cope with stress, or juggle multiple assignments, and these conditions impaired his ability to communicate and interact at work. In sum, his conditions affected his ability to speak, think clearly, interact with others, learn, perform analytical tasks, concentrate and breathe. This information came from Lane's own medical providers and both providers concluded his impairment was permanent.

Based upon this information and Lane's job description, Clark County determined that Lane had a disability, but that he could not perform the essential functions of his current or any other position with or without an accommodation. Clark County's medical separation policy provided that a medical separation could be initiated when an employee cannot return to full duty for 12 months from the first day of disability. As Lane's condition was permanent, Clark County decided to initiate a medical separation.

On appeal, Lane asserts that it was bad faith for Clark County to utilize the information provided by his state licensed health care providers rather than following its policy, which provides for Clark County to select a state licensed medical provider and schedule an appointment. These alleged deviations from the policy are not the types of actions that would be outside the circumference of Clark County's authority in interpreting and administering its policies. Further, the decision to utilize

medical certifications already provided rather than require Lane to submit to an additional examination to obtain yet another medical certification cannot be said to have no relationship to a rightful prerogative, *i.e.*, Clark County has a rightful prerogative to ensure its employees are fit to perform the functions of their job and utilizing medical certifications from an employee's own medical provider in making a determination as to that employee's fitness is reasonably related to that prerogative. Therefore, we cannot say that Clark County's actions amounted to bad faith and thus, Clark County was properly found to be protected by discretionary-act immunity under NRS 41.032. *See id.*; *see also Vickers v. U.S.*, 228 F.3d 944, 950 (9th Cir. 2000) (stating that courts "have held that decisions relating to the hiring, training, and supervision of employees" involve policy judgments which discretionary-act immunity is intended to shield). Accordingly, we affirm the entry of summary judgment in favor of Clark County.

It is so ORDERED.³



_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

³We have reviewed all of Lane's pending motions and conclude they do not provide a basis for relief. As a result, any relief requested within these filings is denied.

cc: Hon. Ronald J. Israel, District Judge
Kathleen M. Paustian, Settlement Judge
Randel Lane
Clark County District Attorney
Clark County District Attorney/Civil Division
Eighth District Court Clerk