

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN ARMSTRONG,
Plaintiff-Appellant,

v.

TERRY REYNOLDS; STEVE GEORGE;
JESS LANKFORD; LARA PELLEGRINI,
Defendants-Appellees.

No. 20-15256

D.C. No.
2:17-cv-02528-
APG-DJA

OPINION

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted May 3, 2021
Seattle, Washington

Filed January 13, 2022

Before: Danny J. Boggs, * A. Wallace Tashima, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY**

Civil Rights

The panel affirmed in part and reversed in part the district court's dismissal of plaintiff's claims brought pursuant to 42 U.S.C. § 1983 and Nevada state law against four state officials arising from plaintiff's termination from her workplace, Ear Nose and Throat Associates, after she filed complaints with the Nevada Occupational Safety and Health Administration regarding unsafe medical practices at her workplace.

After attempting without success to raise her concerns with her employer, plaintiff Helen Armstrong filed a complaint with the Nevada Occupational Safety and Health Administration (NOSHA). Nevada law supports and encourages such reporting by prohibiting retaliation against whistleblowers who report health and safety hazards. Nev. Rev. Stat. § 618.445. Armstrong alleges that Ear, Nose and Throat Associates (ENTA) retaliated against her, leading her to return to NOSHA to file a second complaint. But when Armstrong withdrew the whistleblowing complaint for fear of further retaliation—before ENTA learned of it—NOSHA notified ENTA about the complaint and, Armstrong alleges, more retaliation followed. When she filed a third whistleblowing complaint, NOSHA scuttled any investigation. Eventually, ENTA fired Armstrong.

The panel first reversed the dismissal of Armstrong's procedural due process claim. The panel held that even

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

though Armstrong conceded that she was an at-will employee, Nevada law has created limited exceptions to at-will employment and protections for whistleblowers that can support a property interest in continued employment. Although the panel agreed with defendants that Armstrong had not plausibly alleged that their conduct as state actors caused her to be fired, citing *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978), the panel noted that the information contained in Armstrong’s briefing suggested that she might be able to plausibly allege a relationship between the defendants and her termination sufficient to sustain either a “direct participation” or “setting in motion” theory. Accordingly, the panel held that Armstrong must be granted leave to amend her complaint.

The panel next considered Armstrong’s contention that, in addition to interfering with her right to continued employment by causing her to be fired, defendants deprived her of a property interest in being reinstated by failing to investigate her retaliation complaint, as they were obligated to do under Nevada law. The panel agreed with Armstrong that Nevada’s statute created a property interest beyond continued employment, but not that that interest extended to reinstatement. Thus, the panel held that the district court erred in holding that Armstrong did not have a property right in the investigation of her whistleblowing complaint because § 618.445 creates a protected property interest in an investigation and in an action brought in court on behalf of those whose claims have merit. The panel further determined that the complaint plausibly alleged that the process Armstrong received was essentially nonexistent and so constitutionally deficient. The panel concluded that with respect to the due process claim, Armstrong demonstrated a protected property interest in an investigation and to some degree, in continued employment.

The panel agreed with the district court that Armstrong had not sufficiently alleged a substantive due process claim based on a liberty interest. Thus, Armstrong had not plausibly alleged that she was unable to pursue an entire occupation, nor did the complaint allege any facts supporting the calculation of 13 years of lost future employment, or otherwise suggest that defendants' actions entirely precluded Armstrong's ability to work as a human resources professional elsewhere. Accordingly, the panel held that the district court did not err in dismissing Armstrong's substantive due process claim and denying Armstrong leave to amend her complaint.

Addressing the negligent infliction of emotional distress claim—that NOSHA official Lara Pellegrini negligently notified plaintiff's employer about her complaint—the panel held that the district court erred in concluding that the claim was subject to Nevada's discretionary function immunity statute. Applying the *Berkovitz-Gaubert* test, the panel held that Pellegrini had offered no cognizable social, political, or economic reason for her allegedly negligent action. Finally, the panel held that the district court did not err in dismissing Armstrong's civil conspiracy claim as barred by the intracorporate conspiracy doctrine, but that the district court abused its discretion in dismissing the claim without leave to amend.

COUNSEL

Phillip Spector (argued), Messing & Spector LLP, Baltimore, Maryland; Noah Messing, Messing & Spector LLP, New York, New York; John Napier Tye, Whistleblower Aid, Washington, D.C.; for Plaintiff-Appellant.

Jeffrey Morgan Conner (argued) and Vivienne Rakowsky, Deputy Assistant Attorneys General; Office of the Attorney General, Las Vegas, Nevada; for Defendants-Appellees.

OPINION

BERZON, Circuit Judge:

Helen Armstrong witnessed unsafe medical practices in her workplace, Ear Nose and Throat Associates (ENTA). After attempting without success to raise her concerns with her employer, Armstrong filed a complaint with the Nevada Occupational Safety and Health Administration (NOSHA). Nevada law supports and encourages such reporting by prohibiting retaliation against whistleblowers who report health and safety hazards. Nev. Rev. Stat. § 618.445.

Armstrong alleges that ENTA did retaliate against her, leading her to return to NOSHA to file a second complaint against ENTA. But when Armstrong withdrew the whistleblowing complaint for fear of further retaliation—before ENTA learned of it—NOSHA notified ENTA about the complaint and, Armstrong alleges, more retaliation followed. When she filed a third whistleblowing complaint, NOSHA scuttled any investigation. Eventually, ENTA fired Armstrong.

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