IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY CEBALLOS, an individual, Appellant, vs. NP PALACE LLC d/b/a PALACE STATION HOTEL & CASINO, a Domestic Limited Liability Company, Respondent.	Case No.: 82797 District Court Case No.: A-20-823119-C

RESPONDENT'S SUPPLEMENTAL BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent, NP Palace LLC d/b/a Palace Station Hotel & Casino ("Palace"), is represented in this proceeding, and was represented in the case below, by the law firm of Fisher & Phillips, LLP. Palace is a wholly-owned subsidiary of Station Casinos LLC, all of the economic interests in which are owned by Station Holdco LLC, the economic interests in which are majority-owned by Red Rock Resorts, Inc., which is a publicly-traded corporation.

Dated this 17th day of March 2022.

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TABLE OF CONTENTS

FISHER & PHILLIPS LLP
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Las Vegas, Nevada 89101

FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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JURISDICTIONAL STATEMENT

Respondent adopts the content of Respondent's Answering Brief (Document No. 21-27942).

ROUTING STATEMENT

Respondent adopts the content of Respondent's Answering Brief and continues to agree with Appellant that all issues should be decided by the Supreme Court.

STANDARD OF REVIEW

Respondent adopts the content of Respondent's Answering Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Supplemental Brief is being filed by Palace pursuant to the Court's Order Directing Supplemental Briefing (Document No. 22-04533) (the "Order") and responds to Appellant's Supplemental Brief (Document No. 22-06872) ("ASB"). Citing two cases,[1] the Order asks for input on the following issues:

1. "[W]hether the complaint states a claim for tortious discharge predicated on a violation of the right to privacy?"

[1] *Anderson v. Ruppco Inc.,* 125 Nev. 1015, 281 P.3d 1150, 2009 WL 1490992 (Nev. January 27, 2009) (unpublished); *Hennessey v. Coastal Eagle Point Oil Company,* 609 A.2d 11 (N.J. 1992).

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2. "[I]f not, whether remand to the district court with directions to grant leave to amend is appropriate?"

The answer to both questions is "No."

STATEMENT OF THE CASE

Respondent adopts the content of Respondent's Answering Brief.

STATEMENT OF FACTS

The Order raises the possibility that the Court could recognize a tortious discharge claim in the context of employee drug testing. While Palace recognizes that in ruling on a motion to dismiss, all the allegations of the Complaint should be accepted as true,[2] it nonetheless urges caution in recognizing any new tortious discharge claim without the evidentiary record that would exist by the summary judgment stage or from a trial.

Some of the *allegations* of the Complaint are designed to appeal to emotions, e.g., that Ceballos was supposedly put into a "holding cell" and then "forced" to submit to testing.[3] A reader might have a different reaction to the Complaint if it said:

> At approximately 2:12 a.m. on June 26, 2020, Security was dispatched to the Team Member Dining. Upon arrival, Ceballos was sitting on

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

[3] Was Ceballos really put in a "cell" and how was he "forced" to take the test? Gunpoint? Held down by burly security personnel and swabbed?

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> the floor by a "Wet Floor" sign and indicated he had slipped and landed on his back and hurt his elbow. After accepting first aid and declining medical transport, Ceballos was taken to a Security Office. After completing a C-1 Notice of Injury form, per policy, and after signing a consent form at approximately 2:40 a.m., Ceballos was given an oral breath test for alcohol and saliva-tested for drug usage. He then returned to work. Quest Diagnostics later provided Palace with a Medical Review Officer Report indicating that Ceballos had tested positive for marijuana, with no other medical information being provided.

SUMMARY OF ARGUMENT

The Complaint, as currently written, does not state a claim for tortious discharge predicated on a violation of the right to privacy and Palace has not been given adequate notice of a claim of this nature. Assertion of such a claim would require leave to amend the Complaint, which should be denied as futile because the requisite violation of public policy necessary to make a rare exception to the at-will employment doctrine does not exist. Indeed, recent enactments of the Nevada Legislature and this Court's prior precedent make it clear that employee drug testing is not contrary to Nevada public policy. To the extent ASB argues that Ceballos should additionally or alternatively be granted leave

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to amend to bring a common law invasion of privacy claim, this should also be denied as futile.

ARGUMENT

THE COMPLAINT DOES NOT STATE A CLAIM FOR TORTIOUS DISCHARGE PREDICATED ON A VIOLATION OF THE RIGHT TO PRIVACY

The Complaint, As Currently Written, Makes No Mention of the Right to Privacy

The Complaint alleges:

> It is Plaintiff's statutory right, under NRS 678D, to engage in adult cannabis consumption pursuant to the Chapter's guidelines. Palace Station terminated Plaintiff for exercising this right in violation of NRS 613.333(1)(b).
>
> Nevada has a strong public policy interest in protecting the statutory rights of its citizens. Even more so, Nevada has a strong public policy interest in ensuring its citizens are not denied the ability to support themselves and their families due to engagement in statutory protected and completely lawful activities.
>
> Palace Station is liable to Plaintiff for tortious discharge . . . by terminating Plaintiff for engaging in a statutorily protected activity.[4]

Presently, the tortious discharge claim is all about Ceballos supposedly having a statutorily-protected right to remain employed after

[4] JA000007 ¶ 43-45 (emphasis removed from original).

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testing positive for marijuana in a post-accident drug test (so long as his marijuana use was on his own time, off the premises and he did not come to work under the influence). No invasion of privacy concern is voiced. In fact, as currently written, the Complaint does not even mention the word "privacy."

The Complaint Does Not Put Palace on Notice That Ceballos' Tortious Discharge Claim Is Based Upon A Legal Theory of Invasion of Privacy

"Ceballos argues that, under Nevada's liberal notice-pleading standard, he has sufficiently [pleaded] a claim for tortious discharge based on an invasion of privacy,"[5] and cites *Liston*[6] as holding that notice pleading "requires plaintiffs to provide facts which support a legal theory, but it does not require them to correctly identify the legal theory relied upon."[7]

Even with notice pleading, a plaintiff must still "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief

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[5] ASB at 1.

[6] *Liston v. Las Vegas Metropolitan Police Department,* 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (citation omitted).

[7] ASB at 2.

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sought."[8] Because (as discussed below) this Court has recognized tortious discharge claims only in rare and exceptional cases, the nature of the alleged public policy violation should be stated with precision. The Complaint does not allege the elements of an invasion of privacy claim, and Ceballos' alleging that he has a statutorily-protected right to engage in cannabis use in compliance with NRS Chapter 678D does not put Palace on notice that the tortious discharge claim is based on "invasion of privacy."[9]

The Complaint does not state a tortious discharge claim based on a violation of the right to privacy. Amendment of the pleading would be required, and for the reasons set forth below, the case should not be remanded to the court below with instructions to grant leave to amend because it could not survive a motion to dismiss and would be futile.[10]

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[8] *Western States Construction, Inc. v. Michoff,* 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992).

[9] In *Liston,* this Court found the failure to use the words "constructive discharge" in the complaint did not preclude recovery because plaintiff "repeatedly set forth facts which supported such a legal theory." *Id.,* at 908 P.2d 723. Here, the public policy rationale for a tortious discharge claim is being changed.

[10] *Nutton v. Sunset Station,* 131 Nev. 279, 289, 357 P.3d 966, 973 (Nev. App. 2015) (citations omitted).

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LEAVE TO AMEND SHOULD BE DENIED AS FUTILE

The Standard for Tortious Discharge Claims

"An employer commits a tortious discharge by terminating an employee for reasons that violate public policy."[11] However, the mere existence of an alleged violation of public policy is not enough for this claim.[12] Only in rare and exceptional cases has this Court recognized exceptions to the at-will doctrine when the employer's conduct violates strong and compelling public policy.[13]

The right of privacy in the tortious discharge context has been addressed by this Court in one fact-specific instance. In *Anderson,* the employee received a diagnosis of Hepatitis C, which she confidentially disclosed to Ruppco's President, Ruppel.[14] Reviewing a grant of summary

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[11] *Allum v. Valley Bank of Nevada,* 114 Nev. 1313, 1316, 970 P.2d 1062, 1064 (1998) (citation omitted).

[12] *See, e.g., Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989) (declining to create such a claim for age discrimination even though such discrimination is clearly against Nevada public policy); *Chavez v. Sievers,* 118 Nev. 288, 43 P.3d 1022, 1025-26 (2002) (declining to recognize a tortious discharge claim for race discrimination in businesses having less than fifteen employees); *Brown v. Eddie World, Inc.,* 131 Nev. 150, 151, 348 P.3d 1002, 1005 (2015) (declining to recognize a third-party retaliatory discharge claim even when the enforcement of gaming laws was implicated).

[13] *Ozawa v. Vision Airlines, Inc.,* 125 Nev. 556, 560, 216 P.3d 788, 791 (2009) (citation omitted).

[14] *Id.,* 2009 WL 1490992 at *1.

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judgment on a tortious discharge claim, a genuine issue of material fact was found to exist "whether Anderson was fired for refusing to disclose confidential medical information, in violation of Nevada's public policy protecting the right to privacy" based on evidence that Anderson "was being pressured by Ruppel to disclose confidential medical information to her co-workers immediately prior to her termination."[15]

Firing an employee for refusing to disclose confidential medical information is an understandable basis for a public policy discharge tort. Holding that employee drug testing violates Nevada public policy would be a completely different matter, and as shown below, at odds with pronouncements of the Legislature and this Court's precedent.

The Hennessey Decision

Ceballos urges that "the balancing test and related principles outlined in *Hennessey* should be adopted by the Court."[16] *Hennessey* involved a company that adopted a policy of *random urine testing*, pursuant to which, Hennessey was randomly chosen for testing and his urine tested positive for marijuana and diazepam, resulting in his termination.[17] The New Jersey Supreme Court addressed "whether a

[15] *Id.*, at *3-4 (citation omitted).
[16] ASB at 20.
[17] *Id.*, 609 A.2d at 13.

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Las Vegas, Nevada 89101

private employer's discharge of an employee who failed a mandatory random drug test violated a clear mandate of public policy, and thus was compensable as a wrongful discharge."[18]

Hennessey claimed two privacy violations – (1) "the forced extraction of urine in the presence of an observer" and (2) a claim "that the testing process potentially gives the employer access to much irrelevant private information about the employee – the presence of epilepsy, for example."[19]

The court found that "mandatory random urine testing by private employers can be an invasion of privacy sufficient to breach public policy," but that "more is needed than simply the breach of public policy affecting a single person's rights to constitute the breach of a 'clear mandate' of public policy [required under New Jersey law]."[20] To "constitute a 'clear mandate of public policy' supporting a wrongful discharge cause of action, the employee's individual rights (here, privacy) must outweigh the competing public interest (here, public safety)."[21] After engaging in a balancing test, the court ultimately affirmed the

[18] *Id.*, 609 A.2d at 12.
[19] *Id.*, at 19.
[20] *Id.*, at 19-20.
[21] *Id.*, at 20.

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dismissal of Hennessy's case, stating: "Because the safety-sensitive nature of Hennessey's employment raises the potential for enormous public injury, the public policy supporting safety outweighs any public policy supporting individual privacy rights."[22]

Substantial differences between *Hennessey* and our case are obvious. Ceballos was not asked to submit to a urine test (in the presence of an observer or otherwise) – he was asked to take a saliva test, which Ceballos admits is less intrusive.[23] He was also not subjected to a random test, but post-accident testing. There is also no allegation in the Complaint that Palace's drug testing yields any information (private medical information or otherwise) beyond whether the employee tests positive or negative for specified drugs.

Most importantly, unlike in our case, there is no indication in *Hennessey* that statutes had been enacted that had a bearing on whether a tortious discharge claim should be recognized.

Nevada Statutory Law (And Opinions of this Court) Make it Clear that Employee Drug Testing Does Not Violate Nevada Public Policy

While ignoring its own advice, the *Hennessey* court wisely stated that "the complex issues of drug-testing in the workplace are better

[22] *Id.*, 609 A.2d at 23.
[23] ASB at 14.

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addressed in the context of legislative action or labor-relations agreements."[24] The Nevada Legislature has signaled its intentions, and they do not support Ceballos' position.

The adult use of cannabis is governed by NRS Chapter 678D, passed in 2019. NRS 678D.510(1)(a) states that "[t]he provisions of this chapter do not prohibit . . . [a] private employer from maintaining, enacting and enforcing a workplace policy prohibiting or restricting actions or conduct *otherwise permitted under this chapter*" (emphasis added). Drug testing is part of enforcing a workplace drug policy.

In 2019, the Nevada Legislature also enacted NRS 613.132(1). With exceptions, the statute makes it unlawful "to fail or refuse to hire a prospective employee [who] submitted to a screening test and the results of the screening test indicate the presence of marijuana." All this statute does is ensure that certain employees[25] are not eliminated from being hired because they have a positive pre-employment drug test for marijuana. It does not preclude drug testing itself (pre-employment or otherwise), nor does it prevent employees, like Ceballos, from being terminated for positive marijuana tests occurring later in their employment.

[24] *Id.*, 609 A.2d at 23.

[25] Those that do not fall within the scope of NRS 613.132(2)(a)-(d).

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Also notable is that NRS 613.132(5) defines "screening test" as "a test of a person's blood, urine, hair or saliva to detect the general presence of a controlled substance or any other drug" without proscribing certain means of testing. Saliva-testing is permissible (as are the urine tests that are problematic in some of the case law outside of Nevada).

Thus, the Legislature has recently weighed in on matters pertaining to marijuana use and employee drug testing and has not deemed such testing to be a violation of public policy. Quite the opposite. It has not stated that testing should only occur in instances of reasonable suspicion, limited post-accident testing, or prohibited random testing. Nor has it seen fit to circumscribe how such testing occurs. The only thing it has done is limited an employer's right to refuse to hire most employees who test positive for marijuana in a pre-employment drug screening (but it has not prohibited screening for marijuana in such tests).[26]

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[26] This Court has also long-expressed that employee drug testing policy is not a violation of public policy. For example, analyzing the tortious discharge claim of an employee who was fired "[for refusing] to a sign a Substance Abuse Employee Agreement . . . which included a provision requiring each subscribing employee to waive his or her constitutional right against self-incrimination," this Court stated: "[W]e are unaware of any prevailing public policy against employers seeking to provide safe and lawful working conditions through testing programs designed to identify and eliminate the use of illicit drugs." *Blankenship v. O'Sullivan Plastics Corporation,* 109 Nev. 1162, 1163-1164, 1166, 866 P.2d 293, 293-295 (1993). *See, also, Nevada Employment Security Department v. Holmes,*

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Conclusion Re: Tortious Discharge

In a case cited by Ceballos, the court noted that the public policy underlying a tortious discharge claim should "be one about which reasonable persons can have little disagreement" and "the issue of whether urinalysis and privacy rights involve public policy interests is one about which reasonable people may, and do, differ."[27]

In Nevada, the Legislature has spoken in favor of employer drug testing policies. Even Ceballos admits "[Palace] has a legitimate interest in maintaining a drug-free workplace."[28] This distinguishes our situation from *Anderson*. There is no debate among reasonable persons about whether an employer should be able to fire an employee who refuses to disclose confidential medical information, and the Nevada Legislature has not enacted statutes making such a practice permissible.

Even if the Complaint as originally drafted had asserted "a claim for

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112 Nev. 275, 284, 914 P.2d 611, 617 (1996) ("we conclude that the cases illustrate this court's general philosophy regarding illicit drugs in the workplace: employers have compelling reasons, both economic and social, to test their employees for drugs"). Marijuana is still an illicit drug under federal law.

[27] *Luck v. Southern Pacific Transportation Co.,* 267 Cal.Rptr. 618, 635 (Cal. App. 1990), Pages 10-11 of ASB suggest *Luck* is among the cases supporting a wrongful discharge claim. However, it found no claim for termination in violation of public policy. *Id.,* at 635.

[28] ASB at 15-16.

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tortious discharge predicated on a violation of the right to privacy," it would have been subject to dismissal and leave to amend should be denied as futile.

Final Comments

Many Nevada employers conduct post-accident drug and alcohol tests such as the one conducted here. Any limitations on such drug testing should be a matter for the Legislature. However, if the Court, over Palace's objection, is inclined to recognize a tortious discharge claim such as urged by Ceballos, it should recognize that when Palace terminated him, there was no basis for it to think that it would be facing a cognizable tortious discharge claim. Therefore, while future litigants could benefit from the position advocated by Ceballos, the claim should still be dismissed as to him because "the public policy must be firmly established at the time of termination."[29]

Finally, also part of this appeal is Ceballos' claim for unlawful discharge under NRS 613.333. Palace has outlined in Respondent's

[29] *Luck,* 267 Cal.Rptr. at 635. *See, also, Hansen v. Harrah's,* 100 Nev. 60, 65, 675 P.2d 394, 397 (1984) (it is "unfair to punish employers for conduct for which they could not have known beforehand was actionable in this jurisdiction"). At an absolute minimum, as in *Hansen*, any remand by this Court should be with instructions that punitive damages are not available as a remedy in this case.

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Answering Brief why the dismissal of this claim should be affirmed. However, if the Court were to reverse the District Court on the NRS 613.333 claim (it should not), then the tortious discharge cannot proceed because this Court has declined to recognize tortious discharge claims when a sufficiently-comprehensive statutory remedy exists.[30] *Shoen* held that the remedy under NRS 50.070(2)(c) was comprehensive enough to preclude a tortious discharge claim.[31] The damages available under NRS 613.333(2) are virtually identical to those under NRS 50.070(2)(c), and thus Ceballos cannot assert a tortious discharge claim as a matter of law if his NRS 613.333 claim is allowed to proceed.

INVASION OF PRIVACY

After spending many pages analyzing the elements of common law invasion of privacy, page 20 of ASB contends "Ceballos has stated sufficient facts in his Complaint to establish a . . . *claim for invasion of privacy* and make it past a motion to dismiss" (emphasis added).[32]

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[30] *Shoen v. Amerco, Inc.,* 111 Nev. 735, 744, 896 P.2d 469, 475 (1995) (citations omitted).

[31] *Id.,* at 745.

[32] That Ceballos is now apparently seeking to assert an invasion of privacy claim as well as a tortious discharge claim based on a purported invasion of privacy is suggested by the subsequent passage stating, "Ceballos has *also* pleaded sufficient facts to support a claim of tortious discharge based on the invasion of his privacy." ASB at p. 21 (emphasis added).

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The Order plainly states that supplemental briefing is requested regarding "whether the complaint states *a claim for tortious discharge* predicated on a violation of the right to privacy" (emphasis added). It is not an invitation for Ceballos to make a case to have the case remanded to the District Court with instructions to allow leave to amend so that a common law invasion of privacy claim can be asserted. Nonetheless, Palace will briefly comment.

There are four species of privacy tort. Only "unreasonable intrusion upon the seclusion of another" is relevant to this case.[33] Not all expectations of privacy are legally-protected; the intrusion must be "highly offensive to a reasonable person" and the expectation of seclusion or solitude must be "objectively reasonable."[34] There is "a reduced objective expectation of privacy in the workplace."[35]

As discussed above, recent enactments to the NRS have indicated that the Legislature has no problems with employee drug testing, or the manner of testing, other than some limits at the pre-hiring stage. An

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[33] *People for the Ethical Treatment of Animals v. Bobby Berosini, LTD.*, 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by*, 940 P.2d 134 (Nev. 1997).

[34] *Id.*, 111 Nev. at 631

[35] *Id.*, at 633 n. 20 (citation omitted).

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actionable intrusion upon one's seclusion cannot be based on conduct implicitly or explicitly authorized by statute.

A few miscellaneous comments. Ceballos likens his drug test to an invasion of home privacy because that is where he claims to have used his drugs.[36] He cites a case which involved viewing and photographing an enclosed residential backyard from an airplane flying 1000 feet above the property.[37] Hardly the same situation.

Ceballos claims his position as a Dealer "was far from safety intensive."[38] This suggests drug testing should primarily or exclusively occur only when the employee performs duties that have a safety aspect. Ignoring that any employee who is impaired at work could potentially present a safety problem regardless of their job duties, there are concerns beyond safety. For example, Palace (and Nevada regulatory authorities) would not want someone under the influence while dealing blackjack. And again, in recent legislation, the Legislature did not seek to limit drug testing to only employees engaged in safety-sensitive positions.

Finally, consent is a defense to invasion of privacy and "consent to a drug test may be inferred when an employee provides a urine sample

[36] ASB, at 14.
[37] *California v. Ciraolo,* 476 U.S. 207, 209 (1986).
[38] ASB, at 16.

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upon request and . . . the inference of consent is not negated by the mere fact that refusal to consent may result in termination."[39] Further, accepting employment in a workplace which has drug testing constitutes an implicit agreement to comply with the policy.[40]

To the extent Ceballos is angling for a remand to the District Court with leave to assert a common law invasion of privacy claim, it should be denied.

CONCLUSION

Noting the lack of legislative intent and no statute prohibiting employee drug testing, a dissenting opinion in a case cited by Ceballos stated:

> How can an attempt to create a drug-free environment be against the public policy of this State?
>
> . . . While I agree a right to privacy exists in this State, it is subject to a private employer's right to ensure that their work place is drug free. I believe that an employer is entitled to know whether his employees are using drugs which

[39] *Frye v. IBP, Inc.,* 15 F.Supp.2d 1032, 1041 (D. Kan. 1998). *See, also, Lunsford v. Sterlite of Ohio, L.L.C.,* 165 N.E.3d 245, 254 (Ohio 2020) ("employee who consents to drug testing cannot claim that the testing was highly offensive and invaded his or her right to privacy").

[40] *Id.* Further, even if a drug testing policy was adopted post-hire, an at-will employer can prospectively change the terms and conditions of employment. *Baldonado v. Wynn Las Vegas,* 124 Nev. 951, 194 P.3d 96, 106 (2008).

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> may affect their work performance and, in some cases, the safety of others at the work place.[41]

Nevada public policy is consistent with the dissenting opinion in *Twigg*. For the reasons set forth herein, and in Respondent's Answering Brief, Palace respectfully requests that this Court affirm the dismissal of the Complaint without any direction to the District Court that Ceballos should be granted leave to amend his Complaint.

Respectfully submitted,

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[41] *Twigg v. Hercules Corporation,* 406 S.E. 52, 57-58 (W. Va. 1990) (dissenting opinion).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3,052 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of March 2022.

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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Respondent's Supplemental Brief was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada and by mailing a true and correct copy, addressed as follows:

Dated: March 17, 2022

By: /s/ Sarah Griffin
An employee of Fisher & Phillips LLP

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