IN THE SUPREME COURT OF

THE STATE OF NEVADA

****

DEFENDANT FREEMAN EXPOSITIONS, LLC,

Petitioner,

v.

The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, In and For the COUNTY OF CLARK, the Honorable TREVOR ATKIN, District Judge, Department VIII

Respondent,

and

JAMES ROUSHKOLB

Real Party in Interest.

Supreme Court Case No.:

District Court Case No.: A-19-805268-C

Trial Date: August 2, 2021
(Five-Week Stack)

FREEMAN EXPOSITIONS, LLC'S PETITION FOR A WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

JACKSON LEWIS P.C.

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PETITIONER'S N.R.A.P. 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Petitioner Freeman Expositions, LLC is a Texas limited liability company. Freeman Holding, LLC is the sole member of Freeman Expositions, LLC. Freeman Holding, LLC is a Nevada limited liability company. Freeman Decorating Co. is incorporated in the State of Iowa and is the owner of Freeman Holding, LLC.

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

possible disqualification or recusal.

1. Freeman Expositions, LLC
   Defendant/Petitioner

2. James Roushkolb
   Real Party in Interest/Plaintiff

3. Paul T. Trimmer, Esq.
   Jackson Lewis P.C.
   Counsel for Defendant/Petitioner

4. Lynne K. McChrystal, Esq.
   Jackson Lewis P.C.
   Counsel for Defendant/Petitioner

5. Christian J. Gabroy, Esq.
   Gabroy Law Offices
   Counsel for Real Party in Interest/Plaintiff

6. Kaine M. Messer, Esq.
   Gabroy Law Offices
   Counsel for Real Party in Interest/Plaintiff

DATED this 8th day of July 2021.

JACKSON LEWIS P.C.

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AFFIDAVIT OF LYNNE K. MCCHRYSTAL, ESQ. IN SUPPORT OF FREEMAN EXPOSITIONS, LLC'S PETITION FOR A WRIT OF MANDAMUS

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

LYNNE K. MCCHRYSTAL, ESQ., being first duly sworn, deposes and says:

1. I am an attorney with the law firm of Jackson Lewis P.C. and one of the attorneys representing Defendant/Petitioner Freeman Expositions, LLC ("Defendant" or "Freeman") in this matter, and have knowledge of the facts discussed herein.

2. Plaintiff James Roushkolb is a former employee of Defendant, where he was dispatched by the Teamsters, Chauffeurs, Warehouseman and Helpers, Local 631, International Brotherhood of Teamsters (the "Union" or "Local 631"), as a journeyman. His employment was terminated on July 11, 2018.

3. On November 12, 2019, Plaintiff filed suit in the Eighth Judicial District Court, Clark County, Nevada, against Freeman, alleging five causes of action for: (1) unlawful employment practices, (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 453A.010 *et. seq*. against Freeman.

4. Defendant removed the matter to the United States District Court for the District of Nevada on December 5, 2020 based on federal question jurisdiction. Defendant filed a Motion to Dismiss on January 21, 2020, and argued that Plaintiff's causes of action were preempted by the Labor Management Relations Act ("LMRA"), because the terms and conditions of Plaintiff's employment were governed by the collective bargaining agreement (the "CBA" or the "Agreement") between Freeman and Local 631. Each of Plaintiff's claims, at its core, is predicated on the allegation that Plaintiff's July 11, 2018 discharge lacked just cause and violated the terms and conditions of the collective bargaining agreement between Defendant and Union. Defendant also argued that Plaintiff failed to state a claim and was seeking to extend the application of Nevada law beyond judicially recognized bounds.

5. On July 2, 2020, the federal court entered an Order remanding to the Eighth Judicial District on the grounds that Plaintiff's claims were not preempted by the LMRA. While the federal court acknowledged the application of the CBA, it found that there was no preemption because Plaintiff "does not challenge any of the policies contained in these sections of the CBA" and accordingly there was not need to consult or interpret the terms of the CBA. The federal court declined to rule on whether Plaintiff's state law claims failed to state a claim.

6. Defendant filed renewed its Motion to Dismiss in state court on July 31, 2020 (the "Motion to Dismiss").

7. In its Motion to Dismiss, Defendants argued that Plaintiff's Complaint, which arose from his termination for marijuana use pursuant to the CBA's drug policy, failed to state a claim for each of the five causes of action on several grounds. Defendant argued that sustain any of Plaintiff's claims, the District Court would also be required to find that employers and labor organizations may not bargain over marijuana usage in Nevada, which directly contradicts the expressed intent of the Nevada legislature to exempt collective bargaining agreements from the prohibition that employers may not discriminate against employees based on drug screening results for marijuana.

8. On September 15, 2020, the District Court held a hearing on Defendant's Motion to Dismiss. After argument from the parties, the District Court dismissed Plaintiff's Third Cause of Action (deceptive trade practices). The District Court denied dismissal as to Plaintiff's remaining causes of action based on the District Court's stated belief that there is a strong public policy in Nevada in favor of medical marijuana use. The District Court did not comment on the conflict presented by the District Court's interpretation of Nevada's policy towards marijuana use and the CBA's drug policy.

9. Defendant has no plain, speedy or adequate remedy at law to compel the District Court to grant Defendant's Motion to Dismiss and dismiss Plaintiff's remaining causes of action.

10. Defendant's Writ Petition is necessary to clarify an important issue of the law and to obtain guidance to the lower courts on issues of general importance affecting other current and future litigants. Many CBAs in Nevada contain drug policies that prohibit marijuana use. Defendant, and other companies, must know if they are able to enforce the contractual provisions of their respective CBAs, which were negotiated with and agreed to by bargaining units such as the Union here.

11. This Petition is proffered and based upon this Affidavit, the Appendices, and the Memorandum of Points and Authorities.

FURTHER AFFIANT SAYETH NAUGHT.

Lynne Mcchrystal
LYNNE K. MCCHRYSTAL, ESQ.

SUBSCRIBED and SWORN to before
me this 8th day of July, 2021.

Kelley D. Chandler
NOTARY PUBLIC

KELLEY D. CHANDLER
Notary Public, State of Nevada
Appointment No. 99-53776-1
My Appt. Expires Jun 11, 2023

MEMORANDUM OF POINTS AND AUTHORITIES

I. ROUTING STATEMENT

The issues presented in this Petition are of the kind typically retained for decision by the Supreme Court in accordance with N.R.A.P. 17(a)(11)-(12).

II. RELIEF SOUGHT

Pursuant to N.R.A.P. 21, N.R.S. 34.160, N.R.S. 34.170, N.R.S. 34.190, and Article 6, Section 4 of the Nevada Constitution, Petitioner/Defendant Freeman Expositions, LLC ("Freeman") seek this Court's resolution, by writ of mandamus, of a number of serious issues in Nevada employment law and collective bargaining for which there is no plain, speedy and adequate remedy in the ordinary course of law:

(1) May Defendant Lawfully Terminate Bargaining Unit Employees for Marijuana Use Pursuant to the Drug Policy Contained in Defendant's Collective Bargaining Agreement?

(2) Did the District Court err by denying Defendant's Motion to Dismiss on Plaintiff's First Cause of Action for "Unlawful Employment Practices" against Freeman?

(3) Did the District Court err by denying Defendant's Motion to Dismiss on Plaintiff's second Cause of Action for Wrongful Termination against Freeman?

(4) Did the District Court err by denying Defendant's Motion to Dismiss on Plaintiff's Fourth Cause of Action for Negligent Hiring, Training, and Supervision against Freeman?

(5) Did the District Court err by denying Defendant's Motion for Summary Judgment on Plaintiff's Fifth Cause of Action for "Violation of the Medical Needs of an Employee Pursuant to NRS 453A.010 *et. seq*" against Freeman?

III. PROCEDURAL HISTORY

On November 12, 2019, Plaintiff initiated this action in the Eighth Judicial District Court, Clark County, Nevada, asserting five state law claims against Freeman, including: (1) unlawful employment practices, (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 453A.010 *et. seq*.[1] Defendant removed this case to the U.S. District Court, District of Nevada, on December 12, 2019.[2] On July 2, 2020, the federal court entered an Order remanding to the Eighth Judicial District on the grounds that Plaintiff's claims were not

[1] Petitioner's Appendix ("PA"), Vol. I, 1-18.

[2] *Id.* at 19-109.

preempted by the LMRA.[3] While the federal court acknowledged the application of the CBA, it found that there was no preemption because Plaintiff "does not challenge any of the policies contained in these sections of the CBA" and accordingly there was not need to consult or interpret the terms of the CBA.[4] The federal court declined to rule on whether Plaintiff's state law claims failed to state a claim.[5]

Defendant filed renewed its Motion to Dismiss in state court on July 31, 2020 (the "Motion to Dismiss").[6] In its Motion to Dismiss, Defendant argued that Plaintiff's Complaint, which arose from his termination for marijuana use pursuant to the CBA's drug policy, failed to state a claim for each of the five causes of action on several grounds.[7] Defendant argued that to sustain any of Plaintiff's claims, the District Court would also be required to find that employers and labor organizations may not bargain over marijuana usage in Nevada, which directly contradicts the expressed intent of the Nevada legislature to exempt collective bargaining

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[3] *Id.* at 240-244.

[4] *Id.* at 243.

[5] *Id.* at 243-244.

[6] PA ,Vol. II, 264-297.

[7] *Id.* at 264-297 (Motion to Dismiss), 366-377 (Reply in Support).

agreements from the prohibition that employers may not discriminate against employees based on drug screening results for marijuana.[8]

On September 15, 2020, the District Court held a hearing on Defendant's Motion to Dismiss.[9] After argument from the parties, the District Court dismissed Plaintiff's Third Cause of Action (deceptive trade practices).[10] The District Court denied dismissal as to Plaintiff's remaining causes of action based on the District Court's belief that Nevada's lawful use statute can be distinguished from Colorado's lawful use statute.[11] Further, the District Court stated that the legislature's "intent was to legalize marijuana for medical purposes and to hold otherwise in this matter for this particular motion would be nullifying the essential intent of the statue."[12] The District Court did not comment on the conflict presented by the District Court's interpretation of Nevada's policy towards marijuana use and the CBA's drug policy.[13]

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[8] *Id.*

[9] *Id.* at 378 (District Court's Minutes of Hearing), 379-388 (Transcript of Hearing).

[10] *Id.*

[11] *Id.* at 387.

[12] *Id.*

[13] *Id.*

IV. STATEMENT OF FACTS

A. Plaintiff's Employment

Defendant Freeman Expositions, LLC is limited liability company organized under the laws of the State of Texas.[14] Freeman employed Plaintiff as a journeyman.[15] As a journeyman, Plaintiff was represented for purposes of collective bargaining by the Teamsters, Chauffeurs, Warehouseman and Helpers, Local 631, International Brotherhood of Teamsters (the "Union" or "Local 631"), and the terms and conditions of his employment were governed by the collective bargaining agreement (the "CBA" or the "Agreement") between Freeman and Local 631.[16]

Plaintiff was hired on and terminated on July 11, 2018, following a workplace accident and subsequent drug test.[17] His termination letter to the Union stated that Plaintiff was ineligible for dispatch.[18]

The terms and conditions of Plaintiff's employment were governed by Freeman's collective bargaining agreement with the Union.[19] Articles 4, 13, 14 and

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[14] PA, Vol. I, 20, ¶ 4.

[15] *Id.* at 6, ¶ 40.

[16] *Id.* at 46-109.

[17] *Id.* at 6-7, ¶ 54; 7, ¶ 63-66.

[18] *Id.* at 197.

[19] *Id.* at 46-109.

15 are specifically relevant to this case.[20] Article 4 vests Freeman with the "right to hire, promote, transfer, suspend, or discharge workers" for just cause.[21] Article 13 sets forth detailed grievance and arbitration procedures for resolving alleged violations of the CBA, including allegedly improper terminations.[22] Article 14 sets forth parallel, but equally mandatory, disciplinary procedures for casual employees such as Plaintiff, including when Freeman may issue a Letter of No Dispatch immediately rather than following the progressive discipline procedure.[23] Article 14 also provides a procedure wherein a casual employee, such as Plaintiff, may challenge a Letter of No Dispatch[24] through his or her Union, which may in turn

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[20] *Id.* at 136-137; 162-174.

[21] *Id.*at 136-137.

[22] *Id.* at 162-165.

[23] *Id.* at 165-169. As described in the CBA, Freeman generally hires "casual employees" on a job-by-job basis by placing a call to the Union hall. The hall fills the labor order by identifying then unassigned journeyman teamsters who are qualified to perform the work described in the work call, and then dispatches the selected journeymen to Freeman. At the conclusion of the work call, the journeyman is released from Freeman's payroll and returns to the Union hall to await another call from Freeman or any other employer who has a collective bargaining relationship with the Union.

[24] Under the terms of the CBA, "regular employees" have seniority and are subject to discipline or discharge for "just cause." "Casual employees," in contrast, do not have seniority because they are employed periodically and then released back to the hall. Similarly, in the event casual employees perform poorly at the jobsite they are not typically subject to discipline or discharge. They are instead released and, when appropriate, Freeman sends to the Union a letter of "No Dispatch," memorializing

present the casual employee's challenge to a Joint Committee.[25] The Joint Committee, which is the "arbitrator" for purposes of resolving the matter, considers and ultimately makes a final determination as to whether the employee engaged in the alleged conduct and if a lesser penalty than a permanent Letter of No Dispatch is warranted.[26]

Article 15 of the CBA contains a collectively bargained Drug and Alcohol Policy (the "Drug Policy").[27] The Drug Policy provides for post-accident testing for illegal drugs, including marijuana.[28] Employees who test above the listed cutoff for marijuana will be considered to have violated the Drug Policy.[29] Any dispute between Freeman and the Union regarding the interpretation or application of the CBA is subject to mandatory arbitration.[30] If an employee disputes disciplinary

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the Company's determination that the employee will not be accepted for future labor calls. Like discipline or discharge, letters of No Dispatch are subject to the CBA's mandatory dispute resolution procedure.

[25] *Id.* at 165-169.

[26] *Id.*

[27] *Id.* at 170-174.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 162-165.

action, including discharge, the CBA requires the employee to lodge a written claim within twelve days of the disciplinary action or the grievance is barred.[31]

V. STANDARD FOR WRIT RELIEF

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station,[32] or to control manifest abuse of discretion.[33] A writ will not issue, however, if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[34]

As this Court explained in *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, the Court may entertain writ petitions based on the denial of 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.[35] Further,

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[31] *Id.* at 167.

[32] N.R.S. 34.160.

[33] *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981).

[34] N.R.S. 34.170; 34.330.

[35] *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-198, 179 P.3d 556, 559, 2008 Nev. LEXIS 18, *5-7, 27 I.E.R. Cas. (BNA) 806, 124 Nev. Adv. Rep. 18.

"this court may consider writ petitions that present matters of first impression that may be dispositive in the particular case."[36]

The instant petition involves a significant and potentially recurring question of law in need of clarification. Namely, this petition inquires whether the parties to a collective bargaining agreement may discharge employees pursuant to negotiated drug policies in light of Nevada's legalization of marijuana use. This issue is novel to the state of Nevada and is of great public importance. Accordingly, Defendant respectfully requests that this Honorable Court exercise its discretion to consider Petitioner/Defendant's Petition for a Writ of Mandamus.

VI. STANDARD OF REVIEW

Respondent's claims seek to create causes of action which implicate several Nevada statutes: NRS § 613.333, NRS 453A.010 *et. seq*, and NRS § 613.132. In the context of a writ petition, statutory interpretation is a question of law that this

[36] *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. Adv. Op. 53, 376 P.3d 167, 170 (2016) (citing *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 86, 312 P.3d 491, 496 (2013)).

court reviews de novo.[37] Statutory language must be given its plain meaning if it is clear and unambiguous.[38]

Nevada Rule of Civil Procedure 12(b)(5) provides, in pertinent part, that the Court may "dismiss a complaint or an individual claim for relief for failure to state a cause of action."[39] According to the Nevada Supreme Court, "[a] bare allegation is not enough" to survive a motion to dismiss; a pleading "must set forth sufficient facts to establish all necessary elements of a claim for relief."[40]

If Plaintiff's allegations fail to raise a plausible right to relief, then Defendant's Motion to Dismiss should be granted.[41]

VII. ARGUMENT

A. The District Court Erred in Denying Dismissal for Failure to State a Claim.

There is no dispute that Freeman terminated Plaintiff because he tested positive for marijuana in a post-accident drug test. Article 15 of Freeman's

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[37] *Western Bank v. Eighth Judicial Dist. Court of Nev*., 132 Nev. 793, 797, 383 P.3d 252, 255, 2016 Nev. LEXIS 683, *6, 132 Nev. Adv. Rep. 78 (2016) (citing *Otak Nev., LLC*, 129 Nev., Adv. Op. 86, 312 P.3d at 498).

[38] *Id.* (citing *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007)).

[39] Nev. R Civ. P. 12(b)(5).

[40] *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672, 674 (1984).

[41] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

collective bargaining agreement[42] with Teamsters Local 631 specifically provides for discharge under such circumstances. It adopts federal Department of Transportation "cut off levels," identifies marijuana as an "illegal drug," and establishes that blood concentrations of more than 50 ng/ml will lead to immediate termination. Respondent's post-accident test exceeded that cut-off level – which is subject to and governed by federal, **not** state law – so he was discharged.

Plaintiff failed to plead that he pursued his rights to challenge his termination as provided by the collective bargaining agreement. He also failed to plead exhaustion of any administrative remedies he may have had with the Nevada Equal Rights Commission relating to an alleged disability. Instead, he cobbled together several novel causes of action which would require the creation of new law to sustain. To be clear, there is no statute that explicitly permits the claims Plaintiff brought in the district court, and no judicial authority that weighs in Respondent's

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[42] Although Plaintiff's Complaint avoids reference to the collective bargaining agreement, this is not dispositve under the "artful pleading" doctrine, and the Court may consider the extensive terms and conditions governing Respondent's employment as expressed therein without converting the Motion to Dismiss to one for summary judgment. *See, e.g., Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048, 1987 U.S. App. LEXIS 7900, *7 (9th Cir. 1987) ("[plaintiff] does not reveal that her employment is governed by a collective bargaining agreement, but this is not dispositive under the "artful pleading" doctrine) *Marcoz v. Summa Corp*., 106 Nev. 737, 748, 801 P.2d 1346, 1354 fn. 9 (1990) (discussing "artful, tactical pleading" and interplay with federal preemption of state law claims.)

favor. Further, to sustain any of Plaintiff's claims, this Court would also be required to find that employers and labor organizations may not bargain over marijuana usage in Nevada, which directly contradicts the expressed intent of the Nevada legislature to exempt collective bargaining agreements from the prohibition that employers may not discriminate against employees based on drug screening results for marijuana.[43]

Nonetheless, the district court declined to dismiss Plaintiff's claims, and committed error in doing so.

1. The District Court Erred in Denying Freeman's Motion to Dismiss as to Plaintiff's First Cause of Action Pursuant to NRS § 613.333.

Plaintiff's first cause of action alleges Freeman unlawfully discharged him in violation of NRS 613.333 *et seq*. The text of the statute does not support his claim. First, this statute was enacted in 1991, prior to the enactment of the medical marijuana legislation cited in Plaintiff's Complaint. It provides:

> It is an unlawful employment practice for an employer to…[d]ischarge or otherwise discriminate against any employee concerning the employee's compensation, terms, conditions or privileges of employment, because the employee engages in the **lawful use in this state of any product** outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the

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[43] *See* NRS § 613.132(4)(a) (the provisions of this section do not apply "[t]o the extent that they are inconsistent with or otherwise conflict with the provisions of and employment contract or collective bargaining agreement").

> employee's ability to perform his or her job or the safety of other employees.[44]

Plaintiff did not specifically allege that marijuana is a "product" contemplated by the statute but does allege that his use of marijuana is lawful.[45] There also is no legal precedent or legislative history (marijuana was not legalized until *after* NRS 613.333 was enacted) to support Plaintiff's repurposing of the statute. Indeed, Plaintiff's theory of relief would import the intent of Nevada's medicinal marijuana decriminalization statute (NRS § 453A), into a statute enacted 10 years prior (NRS § 613.333). It is simply impossible that the Nevada legislature could have intended to provide employees with blanket protection for medical marijuana use, in contradiction with the express terms of a collective bargaining agreement, **ten years before** medical marijuana use was decriminalized in the state.

Critically, Plaintiff's Complaint alleges "[t]here are no laws regulating the use of drug and alcohol testing by private employers currently in effect."[46] This is no longer true as NRS § 613.132, which regulates drug testing by private employers, went into effect on January 1, 2020. This statute, which is the most recent and clear expression of the Nevada state legislature's intent to prohibit marijuana

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[44] NRS 613.333 (1)(b)(emphasis added).

[45] PA, Vol. I, 8, ¶ 71.

[46] *Id.* at 5, ¶ 32.

discrimination in the workplace, **specifically permits employers to use the presence of marijuana in drug screenings in adverse actions where a collective bargaining agreement provides employers that right under the contract.**[47] In other words, the Nevada legislature expressly recognized the importance of exempting drug and alcohol policies in collective bargaining agreements from the prohibition against using marijuana drug screenings to make employment decisions. This Court's analysis need not proceed any farther than recognizing that there is no Nevada statute which permits abrogation of Freeman's collective bargaining agreement with Plaintiff's union, and that the Nevada legislature made a conscious exemption to reinforce the primacy of collectively bargained drug and alcohol testing provisions.[48]

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[47] NRS 613.132 provides:

1. It is unlawful for any employer in this State to fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.
…
4. The provisions of this section do not apply:
(a) To the extent that they are inconsistent or otherwise in conflict with the provisions of an employment contract or collective bargaining agreement.

[48] The Nevada legislature's choice to exempt collective bargaining agreements in this fashion contradicts the District Court's critical finding that dismissal of Plaintiff's claims would nullify the essential intent of "the statute" (it is unclear which statute the District Court was referring to).

Nonetheless, should this Court pursue the issue beyond the clearly expressed intent of the Nevada legislature to exempt collective bargaining agreements from the prohibition against use of drug screens for marijuana in adverse employment actions, analogous cases in the Ninth Circuit reject the idea that a medicinal marijuana user is entitled to any special deference under the law. In *James v. City of Costa Mesa*, 684 F.3d 825, 828 (9th Cir. 2012), the Ninth Circuit analyzed whether the City of Costa Mesa's decision to raid medical marijuana facilities that are authorized under state law violate Title II of the Americans with Disabilities Act ("ADA"). The Court ruled that marijuana, even when legal under state law, still constituted "illegal drug use" under federal law and thus determined that "the ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use."[49]

The Colorado Supreme Court effectively summarized the issue in *Brandon Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 18, 350 P.3d 849, 852 (2013):

> At the time of plaintiff's termination, all marijuana use was prohibited by federal law. *See* 21 U.S.C. § 844(a); *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession); *Ross v. RagingWire Telecommunications, Inc*., 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize

[49] *Id.* at 828, n.3 (*citing* 42 U.S.C. § 12210(a)).

> marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." (citations omitted)). It remains so to date…Plaintiff acknowledges that medical marijuana use is illegal under federal law but argues that his use was nonetheless "lawful activity" for purposes of section 24-34-402.5 because the statutory term "lawful activity" refers to only state, not federal law. We disagree.[50]

As the court in *Coats* explained, it was not required to interpret lawful activity as including activity that is prohibited by federal law but is not prohibited by state law. A similar interpretation of the lawful use statute should be adopted here.

Plaintiff's response in the court below to the foregoing analysis is not persuasive. Plaintiff provided a September 10, 2017 legal opinion from the State of Nevada's Legislative Counsel Bureau.[51] A memo issued years after the statute's enactment is not evidence of legislative intent at the time of enactment. Moreover, the opinion analyzes only whether business may operate a facility at special events where guests are permitted to use marijuana. It does not contain a single reference to NRS § 613.333, nor purport to address the employee/employer relationship.[52] Its analysis of the term "unlawful" is limited to the decriminalization of marijuana use related to the "unlawful sale, gift or use of controlled substance" and accordingly has no bearing on the insufficiency of Plaintiff's NRS § 613.333 claim whether or

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[50] *Id.*
[51] PA, Vol. II, 355-360.
[52] *Id.*

not "lawful use" encompasses marijuana use and overrides the drug policy in the CBA.[53]

Plaintiff also cited to state court cases in Connecticut, Rhode Island, Massachusetts, and Arizona. However, the statutes at issue in those cases are dissimilar to NRS § 613.333.[54] In Connecticut, the Palliative Use of Marijuana Act ("PUMA") "includes a provision that explicitly prohibits discrimination against qualifying patients and primary caregivers by schools, landlords, and employers."[55] NRS § 613.333 does not contain a provision expressly prohibiting discrimination against medical marijuana patients by employers. In Rhode Island, the Hawkins-Slater Act, which addresses medical marijuana use, also has a specific anti-discrimination provision: "[n]o school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder."[56] No similar, express language is present in NRS § 613.333. In Arizona, the Medical Marijuana Act ("AMMA") likewise contains an affirmative

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[53] *Id.* at 358; NRS § 453.316.

[54] PA, Vol. II, 306-308.

[55] *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, 331 (D. Conn. Aug. 8, 2017) (referencing Conn. Gen. Stat. § 21a-408p(b)).

[56] *Callaghan v. Darlington Fabrics Corp.*, 2017 R.I. Super. LEXIS 88, *5-6 (R.I. Super. 2017).

anti-discrimination provision.[57] Again, NRS § 613.333 does not contain a similar provision. Finally, the Massachusetts authority Plaintiff cites in his Opposition,[58] wherein the Massachusetts Supreme Court permitted an employee to bring a claim of disability discrimination based on her medical marijuana use, only serves to highlight what Plaintiff failed to do-exhaust his remedies as to any disability related claim.

There is no judicial precedent or statutory language that authorizes Plaintiff's cause of action for "unlawful employment practices" based on marijuana use, let alone when such use conflicts with the express terms of the CBA agreed to by his Union. As such, Defendant's Motion to Dismiss as to Plaintiff's first cause of action should have been granted.

2. Plaintiff's Allegations do not Support a Cause of Action for Wrongful Termination.

Nevada law is well-settled that an at-will employee can generally be terminated " 'whenever and for whatever cause' without giving rise on the part of

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[57] *Whitmire v. Wal-Mart Stores Inc*., 359 F. Supp. 3d 761, 774 (D. Az. 2019) (AMMA includes an anti-discrimination provision, A.R.S. § 36-2813(B), which provides that an employer may not discriminate based on a registered qualifying patient's positive drug test).

[58] *Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456, 464, 78 N.E.3d 37, 45 (2017).

the employer," provided that the dismissal does not offend Nevada's public policy.[59] While violations of public policy can act as exceptions to the at-will employment doctrine, "these exceptions are 'severely limited to those rare and exceptional cases where the employer's conduct violates ***strong and compelling public policy***.'"[60] Indeed, even where the alleged public policy is explicitly enshrined by the legislature in the Nevada Revised Statutes, this Court has reiterated on several occasions that it will not create an exception to the at-will doctrine based solely on that fact.[61]

It is undisputed that Plaintiff was terminated for testing positive for marijuana during a post-accident drug test, in violation of the drug and alcohol policy in the CBA. Given these facts, there is simply no basis in law that would support a finding

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[59] *Del Papa*, 118 Nev. at 151, 42 P.3d at 240.

[60] *Ozawa v. Vision Airlines, Inc*., 125 Nev. 556, 560, 216 P.3d 788, 791 (2009) (internal quotations omitted) (emphasis added); *Wayment v. Holmes*, 112 Nev. 232, 236, 912 P.2d 816, 818 (1996).

[61] *See, e.g., Chavez v. Sievers*, 118 Nev. 228, 43 P.3d 1022 (2002) (declining to recognize an exception to the at-will doctrine for alleged racial discrimination); *Sands Regent v. Valgardson*, 105 Nev. 436, 777 P.2d 898 (1989) (declining to recognize an exception to the at-will doctrine based upon alleged age discrimination); *see also Smith v. Cladianos*, 104 Nev. 67, 69-70, n.4, 752 P.2d 233 (1988) ("except in narrowly circumscribed circumstances—e.g., where an employer has fired an employee in apparent bad faith, for his own financial advantage, in order to deprive the employee of his promised expectation of employment benefits; or where the employer has fired an employee to retaliate against him for invoking his legislatively established right to SIIS benefits—this Court has never held that an employee can defeat the 'at will' character of an employment contract through the invocation of an allegation of 'retaliation' ").

that Freeman's conduct, in simply applying the terms of the CBA it bargained for with the Union, violated "strong and compelling public policy." This Court has been exceedingly clear that the circumstances and only include when 1) an employee was terminated for refusing to engage in unlawful conduct,[62] 2) an employee was terminated for refusing to work in unreasonably dangerous conditions,[63] or 3) when an employee was terminated for filing a workers compensation claim.[64] Plaintiff's allegations do not fit within any of these protected categories. Given the critical facts of this case, which are undisputed even at this early stage, there is no reason for this Court to expand the narrow exceptions it previously delineated to cover the Plaintiff's marijuana use, particularly since this Court has rejected similar claims on a number of occasions.[65] Nevada courts have never found that terminating an employee for using medical marijuana (in violation of state-adopted federal law and in accordance with the express terms of a collective bargaining agreement)

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[62] *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1321 (1998).

[63] *Western States v. Jones*, 107 Nev. 704 (1991).

[64] *Hansen v. Harrah's*, 100 Nev. 70 (1984).

[65] *See, e.g., Bigelow*, 111 Nev.1178, 1187 (1995).

"constitutes a qualifying public policy violation and warrants an exception to the at-will employment doctrine."[66]

Should this Court analyze Plaintiff's wrongful termination claim further, other jurisdictions have rejected wrongful termination claims premised on the alleged lawful uses of marijuana. In *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 759, 257 P.3d 586, 597 (2011), the Washington Supreme Court noted that plaintiffs have no legal right to use marijuana under federal law pursuant to 21 U.S.C §§ 812, 844(a). The *Roe* court rejected plaintiff's contention that federal drug law could be completely separated from the state tort claim for wrongful discharge, and found that "holding a broad public policy exists that would require an employer to allow an employee to engage in illegal activity" would not be proper when assessing narrow exceptions to the at-will employment doctrine.[67]

For the reasons stated herein, Defendant's Motion to Dismiss as to Plaintiff's second cause of action should have been granted.

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[66] *Whitfield v. Trade Show Servs.*, No. 2:10-CV-00905-LRH-VCF, 2012 U.S. Dist. LEXIS 26790, at *18 (D. Nev. Mar. 1, 2012).

[67] *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 759, 257 P.3d 586, 597 (2011).

3. *Plaintiff's Allegations do not Support a Cause of Action for Negligent Hiring, Training, and Supervision.*

The District Court also erred by failing to dismiss Plaintiff's fourth cause of action for negligent hiring, training, and supervision (hereinafter "negligent hiring") for failure to state a claim. It is well-settled in Nevada that negligent hiring claims such as Plaintiff's are preempted by NRS 613.330, *et seq.*, which provides the exclusive remedy for tort claims premised on illegal employment practices. "NRS § 613.330 *et seq*. provides the exclusive remedy for tort claims premised on illegal employment practices. [This Court], as well as the District Court for the District of Nevada, have held that tort claims premised on discrimination in employment are remedied under the statute."[68]

In *Valgardson*,[69] this Court ruled that an employee could not maintain separate tort claims premised upon discriminatory conduct that was subject to the comprehensive statutory remedies provided by NRS 613.310 *et seq*. This Court subsequently clarified and strengthened this holding in *D'Angelo v. Gardner*,[70] explicitly confirming that the statutory scheme set forth in NRS 613.310 *et seq*. was

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[68] *Brinkman v. Harrah's Operating Co., Inc*., 2:08-cv-00817-RCJ-PAL, 2008 U.S. Dist. LEXIS 123992 at*3 (D. Nev. October 16, 2008); *see also Valgardson*, 777 P.2d at 900.

[69] *Valgardson*, 777 P.2d at 900.

[70] *D'Angelo v. Gardner*, 107 Nev. 704 (1991).

the sole remedy available for claims of discrimination, displacing potentially overlapping common law torts. Because there is an adequate statutory remedy for unlawful discrimination, Nevada courts will not permit a plaintiff to recover in tort for the same claims. The U.S. District Court for the District of Nevada, relying on the standards laid out by this Court, has applied the same rationale and dismissed state tort claims when such claims were premised upon discriminatory conduct covered by state or federal statutes with adequate remedies.[71]

Although Plaintiff argued for a "general negligence" standard in the District Court, such a standard would be entirely inappropriate in the employee-employer context. It would override every other statutory claim and judicial authority

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[71] *See Jackson v. Universal Health Servs.*, No. 2:13-cv-01666-GMN-NJK, 2014 U.S. Dist. LEXIS 129490 (D. Nev. Sept. 15, 2014) (dismissing negligent hiring, supervision and training claim based on alleged race and gender discrimination when there is an exclusive statutory remedy for these claims); *Westbrook v. DTG Operations, Inc.*, No. 2:05-cv-00789-KJD-PAL, 2007 U.S. Dist. LEXIS 14653, at *19 (D. Nev. Feb. 28, 2007) (dismissing negligence *per se* claim based on violations of the Americans with Disabilities Act); *Colquhoun v. BHC Montevista Hospital, Inc.*, No. 2:10-cv-0144-RLH-PAL, 2010 U.S. Dist. LEXIS 57066 (D. Nev. June 9, 2010) (dismissing negligent hiring, supervision and training claim based on alleged discrimination, stating "the fact that an employee acts wrongfully does not in and of itself give rise to a claim for negligent hiring, training or supervision"); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442 (D. Nev. 1996) (the court dismissed the plaintiff's public policy wrongful discharge claim concluding that an available statutory remedy existed under federal law in the Americans With Disabilities Act ("ADA")).

regarding the causes of action applicable to the employee-employer relationship and would be contrary to binding Nevada authority.

The District Court also erred by failing to examine the sufficiency of the allegations in support of Plaintiff's negligent hiring cause of action. Specifically, the allegations in the Complaint – that Freeman failed to ensure that managers are familiar with state marijuana law – do not establish a claim. "The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position."[72] There is no common law duty to hire and/or train employees so that they are aware of the complexities of medical marijuana law under state and federal standards. Indeed, it would be strange, at the least, to hold an employer liable for hiring "unfit" employees when the employer merely acted in accordance with its collectively bargained Drug Policy and federal law. For the reasons stated herein, Defendant's Motion to Dismiss as to Plaintiff's fourth cause of action should have been granted.

4. The District Court Erred in Denying Freeman's Motion to Dismiss as to Plaintiff's Fourth Cause of Action, Which is Not Cognizable Under Nevada Law.

Plaintiff's fifth cause of action is one that is has not been recognized under Nevada law. Plaintiff captions this cause of action as for "Violation of the Medical

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[72] *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996).

Needs of an Employee Who Engages in Medical Use of Marijuana to be Accommodated by Employer." The statutory premise for this claim is NRS 453A.10, *et seq.* However, the allegations in the Complaint do not state a claim. NRS 453A does not contain a private right of action, and Plaintiff's citation to NRS 453A.800(3), which falls under section entitled in part "medical use of marijuana **not required** to be allowed in workplace," conflicts with his contention that his termination for use of marijuana was unlawful.[73] Plaintiff's other allegations, on their face, render a cause of action based on this statute impossible. Plaintiff claims "**he never requested an accommodation** other than a reasonable accommodation not to terminate him, despite a positive indication for medical marijuana…." Plaintiff plainly cannot claim that Freeman violated NRS 453A.800 by failing to grant an accommodation that he admittedly "never requested."

Even if Plaintiff's allegations were reframed and recharacterized to fit with the ambit of the statutory text, the claim still fails. A decision by the Supreme Court of Montana is instructive. In *Johnson v. Columbia Falls Aluminum Co., LLC,*[74] the Supreme Court of Montana held that Montana's Medical Marijuana Act ("MMA")

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[73] *See* 453A.800, Title (emphasis added).

[74] *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N, P5, 2009 Mont. LEXIS 120, *5.

does not provide an employee with an express or implied private right of action against an employer.[75] Instead, the MMA specifically provided that it cannot be construed to require employers to accommodate the medical use of marijuana in any workplace.[76]

NRS 453A.800(2) similarly does not "require an employer to allow the medical use of marijuana in the workplace." NRS 453A.800(3) expressly does not "require an employer to modify the job or working conditions of an employee who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer…." The business purposes of Freeman's Drug Policy are clearly articulated in the CBA and the law does not require accommodation. Sustaining Plaintiff's fifth cause of action would require Freeman to abandon the Drug Policy it bargained for.

Further, Plaintiff's argument in the District Court that the alleged accommodation which implicates NRS § 453A is a "reasonable accommodation not to terminate him" contradicts the text of the statute. NRS § 453A provides: "the employer must make reasonable accommodations for the medical needs of an

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[75] *Id.*

[76] *Id.*

employee."[77] The statute does not contemplate a prohibition against termination for drug policy violations.[78] It does not contain a "penalty" provision or other provision allowing a private right of action against employers.[79] Declining to create new law to allow Plaintiff to circumvent the collective bargaining process and the administrative agency process for the alleged failed accommodation of disabilities would not render NRS § 453A nugatory as Plaintiff argues and the District Court found. NRS § 453A is a primarily a decriminalization and licensing statute and is grouped with NRS Chapter 453-Controlled Substances. There are 13 provisions within NRS § 453A on exemptions from state prosecution, affirmative defenses, and search and seizure. There are approximately 22 provisions on the licensing and operation of medical marijuana establishments and agents and 4 provisions on research. There is a single reference under "Miscellaneous Provisions" regarding employers. Should this Court rightfully correct the District Court's error in allowing Plaintiff to create a new private right of action, where none exists in the text of the statute, the Court would merely be following the express terms of the statute, rather than rendering the statute nugatory. Further, the Court would also merely be

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[77] NRS § 453A.800(3).

[78] *See, generally* NRS § 453A.

[79] *Id.*

recognizing the Nevada legislature's express intent to exempt collective bargaining agreements from laws protecting marijuana use.[80] Plaintiff's fifth cause of action should have been dismissed by the District Court as a matter of law.

VIII. CONCLUSION

Based on the foregoing, Petitioner Freeman Expositions, LLC respectfully requests that this Honorable Court exercise its discretion and consider the instant Writ Petition.

DATED this 8th day of July, 2021.

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer
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[80] NRS 613.132.

IN THE SUPREME COURT OF

THE STATE OF NEVADA

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DEFENDANT FREEMAN EXPOSITIONS, LLC), Petitioner, v. The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, In and For the COUNTY OF CLARK, the Honorable TREVOR ATKIN, District Judge, Department VIII Respondent, and JAMES ROUSHKOLB Real Party in Interest.	**Supreme Court Case No.:** District Court Case No.:A-19-805268-C Trial Date: August 2, 2021 (Five-Week Stack)

NRAP 28.2 CERTIFICATE

1. I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRCP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

> [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point; or
>
> [ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is either:

> [X] Proportionately spaced, has a typeface of 14 points or more, and contains 5,307 words; or
>
> [ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or
>
> [ ] Does not exceed ___ pages.

3. Finally, I hereby certify that I have read this Petition, 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 Petition 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.

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I understand that I may be subject to sanctions in the event that this Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of July, 2021.

JACKSON LEWIS P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 8th day of July, 2021, I caused to be served a true and correct copy of **FREEMAN EXPOSITIONS, LLC'S PETITION FOR A WRIT OF MANDAMUS** to the following:

Via Electronic Mail Christian Gabroy GABROY LAW OFFICES The District at Green Valley Ranch 170 South Green Valley Parkway, Suite 280 Henderson, Nevada 89012 *Attorneys for Plaintiff/Real Party in Interest*	***Via Hand Delivery*** Hon. Veronica M. Barisich Eighth Judicial District Court Department V Regional Justice Center 200 Lewis Avenue Las Vegas, Nevada 89155 *Respondent*

/s/ Wende Hughey
Employee of Jackson Lewis, P.C.