

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Mary Jones v. Terrible Herbst, Inc.

Jones · No. 2:25-cv-02113-JAD-EJY · Decided January 6, 2026

OPINION

1 UNITED STATES DISTRICT COURT 2 DISTRICT OF NEVADA 3 * * * 4 MARY JONES,
Case No. 2:25-cv-02113-JAD-EJY 5 Plaintiff, ORDER ADOPTING 6 v. REPORT AND
RECOMMENDATION 7 TERRIBLE HERBST, INC., 8 Defendants. 9 On 12/15/25, the
magistrate judge entered this report and recommendation [ECF No. 11]: 10 Pending before the
Court is Plaintiff's First Amended Complaint¹ (ECF No. 10).

Plaintiff's 11 application to proceed in forma pauperis was granted on November 5, 2025. ECF
No. 6. 12 I. Screening Standard 13 Upon granting a request to proceed in forma pauperis, a court
must screen the complaint 14 under 28 U.S.C. § 1915(e)(2).

In screening the complaint, a court must identify cognizable claims 15 and dismiss claims that are
frivolous, malicious, fail to state a claim on which relief may be granted 16 or seek monetary
relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). 17 Dismissal for
failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state 18 a claim
under Federal Rule of Civil Procedure 12(b)(6).

Watson v. Carter, 668 F.3d 1108, 1112 19 (9th Cir. 2012). To survive § 1915 review, a complaint
must "contain sufficient factual matter, 20 accepted as true, to state a claim to relief that is
plausible on its face." See Ashcroft v. Iqbal, 556 21 U.S. 662, 678 (2009).

The court liberally construes pro se complaints and may only dismiss them 22 "if it appears
beyond doubt that the plaintiff can prove no set of facts in support of his claim which 23 would
entitle him to relief." Nordstrom v. Ryan, 762 F.3d 903, 908 (9th Cir. 2014) (quoting Iqbal, 24 556
U.S. at 678). 25 In considering whether the complaint is sufficient to state a claim, all allegations
of material 26 fact are taken as true and construed in the light most favorable to the plaintiff.

Wyler Summit P'ship 27 v. Turner Broad. Sys. Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation
omitted). Although the 1 standard under Rule 12(b)(6) does not require detailed factual
allegations, a plaintiff must provide 2 more than mere labels and conclusions. Bell Atlantic Corp.
v. Twombly, 550 U.S. 544, 555 (2007). 3 A formulaic recitation of the elements of a cause of
action is insufficient.

Id. Unless it is clear the 4 complaint's deficiencies could not be cured through amendment, a pro
se plaintiff should be given 5 leave to amend the complaint with notice regarding the complaint's
deficiencies. Cato v. United 6 States, 70 F.3d 1103, 1106 (9th Cir. 1995). 7 II. Analysis of

Plaintiff's FAC 8 In her FAC, Plaintiff alleges discrimination, a failure to accommodation, and retaliatory 9 discharge all under Americans with Disabilities Act (the "ADA").

Plaintiff further alleges race and 10 age discrimination. Plaintiff provides evidence of a Charge of Discrimination and a Right to Sue 11 letter from the Nevada Equal Rights Commission suggesting exhaustion of her administrative 12 remedies.² In addition to these claims, Plaintiff identifies wrongful termination in violation of public 13 policy, a Fourteenth Amendment Due Process claim, and interference with state unemployment 14 benefits.

15 a. The ADA. 16 To state a prima facie claim based on an alleged discriminatory termination under the ADA 17 Plaintiff must allege facts demonstrating: (1) she is a disabled person within the meaning of the 18 ADA; (2) she is a qualified individual; and (3) the Defendant terminated her because of her disability. 19 *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir.

1996). Here, Plaintiff's factual allegations 20 include that she sustained a work related injury, she was placed on light duty, and on one occasion 21 she left work in an ambulance after becoming ill. ECF No. 10 at 2-3. Plaintiff requested ADA 22 paperwork, but says she was allegedly terminated in retaliation before she could return the 23 paperwork completed by her doctor.

Id. at 3. 24 While Plaintiff demonstrates probable exhaustion of a disability discrimination claim, she 25 fails to identify any disability from which she suffers within the meaning of the ADA. Under the 26 ADA, a disability is "a physical or mental impairment that substantially limits one or more of the 27 2 Nevada generally adopts the federal standard for stating and proving discriminatory practices in the workplace.

1 major life activities of such individual." 42 U.S.C. § 12102(2)(A). A relatively short term injury 2 does not qualify as a disability. *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 3 1996) (citing with approval courts that have held that "temporary injury with minimal residual 4 effects cannot be the basis for a sustainable claim under the ADA"); see also 29 C.F.R. Part 1630 5 App., § 1630.2(j) (stating that "temporary, non-chronic impairments of short duration, with little or 6 no long term or permanent impact, are usually not disabilities").

Because Plaintiff's failure to plead 7 facts demonstrating she suffers from a disability as defined by the ADA can be cured, Plaintiff is 8 granted one additional opportunity to amend her pleadings to state facts that establish each element 9 of a disability discrimination claim identified above. 10 To state a prima facie claim for failure to accommodate under the ADA, a plaintiff must 11 show that she "(1) is disabled within the meaning of the ADA; (2) is a qualified individual able to 12 perform the essential functions of the job with reasonable accommodation; and (3) suffered an 13 adverse employment action because of [his] disability." *Samper v. Providence St. Vincent Med.*

14 *Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (quotation and citation omitted). Because Plaintiff has not 15 pleaded facts demonstrating she is disabled within the meaning of the ADA, she has not

stated a 16 failure to accommodate claim. Plaintiff also does not plead facts demonstrating that she could 17 perform the essential functions of her job with an accommodation.

Accordingly, this claim is 18 dismissed without prejudice and with one additional opportunity to amend. 19 To state an ADA retaliation claim, the plaintiff must plausibly allege that (1) “she engaged 20 in a protected activity; (2) suffered an adverse employment action; and (3) there was a causal link 21 between the two.” *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 849 (9th Cir.

2004). Plaintiff 22 alleges she engaged in protected activity by requesting ADA paperwork, she was terminated before 23 she could return the paperwork completed by her doctor, and the termination was in retaliation for 24 requesting the ADA documentation. While this is a bare bones set of facts, Plaintiff pleads facts 25 supporting each element of an ADA retaliation claim.

Thus this claim may proceed. 26 b. Age Discrimination. 27 A plaintiff may establish a prima facie case of discrimination (disparate treatment) based on 1 (1) was at least forty years old; (2) was performing her job satisfactorily; (3) suffered an adverse 2 employment action; and (4) was either replaced by substantially younger employees with equal or 3 inferior qualifications or discharged under circumstances otherwise giving rise to an inference of age 4 discrimination.

29 U.S.C. § 621 et seq. 5 Plaintiff pleads that she is 71 years old and that she was terminated from her job. The 6 termination communication is dated January 3, 2025. ECF No. 10 at 19. Otherwise, Plaintiff 7 references applying for promotions that were given to less qualified individuals under 40. *Id.* at 2. 8 These facts sufficiently state a claim that Plaintiff failed to be promoted based on age; however, 9 Plaintiff pleads no facts supporting that she was terminated due to age.

Thus, Plaintiff’s failure to 10 promote claim may proceed. If Plaintiff is asserting a claim of age discrimination based on 11 termination, this claim is dismissed without prejudice and with one additional opportunity to amend. 12 c. Race Discrimination. 13 To sufficiently allege a prima facie case of race discrimination in violation of Title VII, 14 Plaintiff must allege: (a) she belongs to a protected class; (b) she was subjected to an adverse 15 employment action; and (c) similarly situated employees not in her protected class received more 16 favorable treatment.

Shepard v. Marathon Staffing, Inc., 2014 U.S. Dist. Lexis 76097, at *5 (D. 17 Nev. June 2, 2014) (citing *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006)). Plaintiff’s FAC is 18 silent with respect to facts that would support an inference that any adverse action, including her 19 termination, was motivated in any way by race based animus. ECF No. 10. Even her submission to 20 NERC is silent with respect to the elements of this claim.

Id. at 26. While Plaintiff identifies as 21 Black (*id.* at 8), there are no other facts related to race or race based animus alleged by Plaintiff in 22 the FAC or its attachments. Plaintiff has not met the pleading standards or alleged sufficient facts 23 to establish each element of a race discrimination

claim. 24 The Court outlined the requirement of pleading a race discrimination in its original screening 25 Order.

ECF No. 6. The Court provided Plaintiff with an opportunity to amend her Complaint to 26 state this claim. Plaintiff offers nothing demonstrating an attempt to do so. Plaintiff is given one 27 additional opportunity to amend her Complaint to state this claim. 1 d. Plaintiff's Wrongful Termination in Violation of Public Policy Claim Fails as a Matter of Law.

2 3 Plaintiff's allegations demonstrate that her public policy wrongful termination claim arises 4 from her termination based on disability, age or race discrimination. ECF No. 10 at 5. Nevada law 5 makes clear that such claim cannot be based on discrimination for which Plaintiff has a full panoply 6 of rights under the ADA, Title VII, the Age Discrimination in Employment Act, and Nevada 7 statutory law prohibiting the same.

Chavez v. Sievers, 43 P.3d 1022, 1025-26 (Nev. 2002); Sands 8 Regent v. Valgardson, 777 P.2d 898, 899-90 (Nev. 1989). Accordingly, the Court recommends this 9 claim be dismissed with prejudice. 10 e. Plaintiff's Fourteenth Amendment Due Process Claim. 11 Plaintiff states Defendant "deprived her of [sic] property interest (continued employment, 12 earned benefits, unemployment insurance)" without notice, an opportunity to respond or a fair 13 investigation.

ECF No. 10 at 5. 14 There is no dispute that an individual may have a protected property interest in some forms 15 of private employment, the deprivation of which may serve as a basis for a claim under 42 U.S.C. § 16 1983. See Merritt v. Mackey, 827 F.2d 1368, 1370 (9th Cir. 1987).

However, in order to establish 17 a due process violation, the plaintiff must first show that she had more than a "unilateral expectation" 18 of continued employment; she must also show a "legitimate claim of entitlement." Board of Regents 19 v. Roth, 408 U.S. 564, 577 (1972); Merritt, 827 F.2d at 1371.

The employee must further 20 demonstrate a reasonable expectation based upon some external source such as state 21 law. Merritt, 827 F.2d at 1371. That is, "[t]he right to hold specific private employment and to 22 follow a chosen profession free from unreasonable governmental interference comes within both the 23 'liberty' and 'property' concepts of the ... Fourteenth Amendments," Piecknick v. Commonwealth 24 of Pennsylvania, 36 F.3d 1250, 1259 (3d Cir.

1994), and "it is the liberty to pursue a particular 25 calling or occupation and not the right to a specific job that is protected by the Fourteenth 26 Amendment." Id. at 1262 (citations omitted). 27 The Court finds Plaintiff fails to state and is unable to state governmental interference with 1 to her termination.

The Court's review of Nevada statutory and common law demonstrates it 2 establishes no notice requirements, no opportunity to be heard, and no right to an investigation before 3 termination of

employees such as Plaintiff who are employed at-will by a private enterprise. There is also no federal law creating such obligations when an employee is employed by a private employer such as Defendant.

While a contract for employment could potentially create such rights, there is no violation of the Fourteenth Amendment by virtue of Plaintiff's termination from her job. The Court therefore recommends that this claim be dismissed with prejudice. f. Interference with State Unemployment Benefits. Plaintiff alleges Defendant made false statements to the Employment Security Division ("ESD") in an effort to deny her unemployment benefits.

This claim is based on Defendant's telling ESD Plaintiff was pregnant, which was obviously incorrect given Plaintiff's age. ECF No. 10 at 3. Plaintiff also generally alleges Defendant engaged in misconduct. Id. at 5. The judicial-proceedings privilege provides absolute immunity to statements made in the course of a judicial proceeding "so long as [the statements] are in some way pertinent to the subject of controversy." *Circus Circus Hotels v. Witherspoon*, 657 P.2d 101, 104 (Nev.

1983) ("NRS 16 612.265(7) creates an absolute privilege for all oral or written communications from an employer to the Employment Security Department, provided that the communications are made pursuant to Chapter 612.") (internal citations omitted). This "privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." Id. (internal citations omitted).

Given the unequivocal case law, the Court finds Plaintiff's Interference with Unemployment Benefits claim should be dismissed with prejudice. III. Order IT IS HEREBY ORDERED that Plaintiff's retaliatory discharge claim under the Americans with Disabilities Act and failure to promote under the Age Discrimination in Employment Act may proceed. IT IS FURTHER ORDERED that the following claims are dismissed without prejudice and with one additional opportunity to amend: (i) discrimination and failure to accommodate under the 1 Employment Act and Nevada law; and (iii) Race Discrimination under Title VII of the 1964 Civil 2 Rights Act and Nevada law.

3 IT IS FURTHER ORDERED that if Plaintiff chooses to file a second amended complaint, 4 the document must be titled "SECOND AMENDED COMPLAINT" and must be filed no later than 5 January 12, 2026. The second amended complaint, if filed, must include all claims Plaintiff seeks 6 to assert. Plaintiff must state facts that support the elements of each claim as discussed above.

Any 7 claim not included in the second amended complaint will not go forward. However, Plaintiff should 8 not include the claims that are recommended for dismissal with prejudice as these claims fail as a 9 matter of law. 10 If Plaintiff does not file a second amended complaint, her First Amended Complaint will be 11 the operative complaint and will proceed on her claim of

retaliation under the Americans with Disabilities Act and failure to promote under the Age Discrimination in Employment Act.

13 IT IS FURTHER ORDERED that the Clerk of Court must send Plaintiff one USM-285 form. 14 IT IS FURTHER ORDERED that Plaintiff must complete this form and return it no later 15 than January 12, 2026 to: 16 Gary G. Schofield U.S. Marshal, District of Nevada 17 Lloyd D. George Federal Courthouse 333 Las Vegas Blvd. S., Suite 2058 18 Las Vegas, Nevada 89101 19 Plaintiff is advised to check the Nevada Secretary of State Business Entity Search website for 20 Terrible Herbst, Inc.'s registered agent upon whom service must be made.

Plaintiff should provide 21 that information to the U.S. Marshal Service. 22 IT IS FURTHER ORDERED that the Clerk of Court must issue a Summons for Terrible 23 Herbst, Inc. and send the same to the U.S. Marshal Service together with one copy of Plaintiff's First 24 Amended Complaint (ECF No. 10) and a copy of this Order. 25 IT IS FURTHER ORDERED that the U.S. Marshal Service must attempt service of the First 26 Amended Complaint, the Summons, and a copy of this Order on Terrible Herbst, Inc. within twenty- 27 one (21) days of receipt of Plaintiff's completed USM-285.

1 } IV. Recommendation 2 IT IS HEREBY RECOMMENDED that Plaintiff's claims asserting Wrongful Terminati 3 || in Violation of Public Policy, violation of the 14th Amendment, and Interference with Sta 4 || Unemployment Benefits be dismissed with prejudice as these claims fail as a matter of law. 5 Dated this 15th day of December, 2025. ELA J. YOUGH 8 UNITED STATES MAGTSTRATE JUDGE 9 ORDER 10 The deadline for any party to object to this recommendation was 12/29/2025, and no party 11 || filed anything or asked to extend the deadline to do so. "[N]o review is required of a magistrate 12 || judge's report and recommendation unless objections are filed." United States v. Reyna-Tapia, □□ 13 || F.3d 1114, 1121 (th Cir.

2003). Having reviewed the report and recommendation, I find good 14 || cause to adopt it, and I do. IT IS THEREFORE ORDERED that the Magistrate Judge's Report a1 15 } Recommendation [ECF No. 11] is ADOPTED in its entirety, and plaintiff's claims for wrongf 16 || termination in violation of public policy, violation of the 14th Amendment, and interference 17 || with state unemployment benefits are DISMISSED with prejudice.

18 iors 19 US. District Judge Jennifer A Dorsey 30 Dated: January 6, 2026 21 22 23 24 25 26 27 28