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MEMORANDUM

DATE: February 13, 2003
FROM: Robert I. Correales, Assistant Professor; John Novak, Third-Year Law Student, William S. Boyd School of Law, University of Nevada.
TO: Nevada Senate Committee on Commerce and Labor
RE: Senate Bill 22

Introduction

This testimony is in support of Senate Bill 22, which proposes to lower the threshold of 15 employees to 5 employees for the purpose of establishing what employers are covered by N.R.S. §613.330(1)(a). That statute prohibits employers from discharging or otherwise discriminating against any person with respect to his compensation, terms, conditions or privileges of employment because his race, color, religion, sex, sexual orientation, age, disability or national origin.

In *Chavez v. Sievers*, 43 P.3d 1022, the Nevada Supreme Court refused to recognize a common law cause of action for wrongful discharge in violation of public policy on the basis of racial discrimination because N.R.S. §613.330(1)(a) already provides a cause of action for racial discrimination in employment. However, even while noting that the statute is inapplicable in cases involving employers with less than 15 employers, the Court emphatically pronounced that racial discrimination is "fundamentally wrong and undoubtedly against Nevada's public policy." See, Chavez at p. 1025-26. The same can be said for all kinds of discrimination prohibited by the statute. Discrimination in employment can have devastating effects upon the citizens of this state, whether it comes from large corporations or small employers. According to the Nevada Supreme Court, Nevada's public policy is reflected most effectively in the acts of its legislature. It is thus incumbent upon this body to continue eradicating discrimination in employment.

Testimony

To help inform this committee's deliberations on Senate Bill 22, I have been asked to provide responses to the following questions:

1. Why do the federal employment discrimination laws apply only to employers over a certain number of employees?

Most federal anti-discrimination statutes contain thresholds of 15 or more employees. The principal stated reason is to lessen burdens on small businesses. However, the federal statutes do not prohibit states from enacting statutes that provide coverage that is equal to or better than the federal statutes. To date, 26 jurisdictions have passed employment discrimination laws with thresholds of less than 15 employees. We could find no study demonstrating an adverse economic impact of such laws.

2. If the definition of employer were changed in Nevada, what type of damages would employers potentially face?

Employers found to be discriminating in violation of the statute could be liable for up to 2 years backpay, plus fringe benefits and reinstatement where appropriate. It is important to note that, unlike the federal statutes, punitive and non-economic damages (such as emotional distress) are not available under the Nevada statute. Of interest here may be that some of the federal statutes and a number of state statutes tailor the maximum size of awards to the size of the employer.

3. Apparently some 120,000 businesses in the Las Vegas area alone would fall between 5-15 employees. A concern exists regarding the potential financial cost of requiring these businesses to provide a "reasonable accommodation" to employees with disabilities. In that regard, a concern was expressed regarding building ramps, etc. To what degree are these concerns valid?

Our first task here was to check the accuracy of the statement that 120,000 businesses exist in the Las Vegas Area that fall between 5-15 employees. Figures from the Census Bureau from the year 1999 revealed that, in that year, in the entire state of Nevada there were:

15,942 firms with 1-4 employees, employing a total of 32,677 individuals;
6,383 firms with 5-9 employees, employing a total of 42,089 individuals; and,
4,123 firms with 10-19 employees, employing a total of 54,436 individual;
8,254 firms with 20+ employees, employing a total of 1,201,546. (Those figures can be accessed at http://www.census.gov/epcd/susb/1999/nv/NV--.HTM)

Based on those figures, our conclusion is that the figure of 120,000 businesses with 5-15 employers in the Las Vegas area alone is erroneous.

We secondly considered the concern about the potential cost of "reasonable accommodations" for employers with disabilities. Here, it is important to understand the meaning of the term "reasonable," especially as it applies to small businesses.

In a nutshell, a covered entity is prohibited from discriminating against "otherwise qualified" individuals with disabilities. The term "otherwise qualified" means that the worker must be able to perform the essential functions of a job "with" or "without" an accommodation (no employer is required to hire unqualified job applicants). If he can, then he may request an accommodation, but the accommodation must be reasonable. An accommodation does not have to be provided if it would constitute an "undue burden" on the employer. Whether an accommodation constitutes an "undue burden" is determined by the cost of the accommodation and its effect on the operation of the business, not only economically but also administratively. No covered entity is required to go broke to provide an accommodation.

Early in the history of the Americans With Disabilities Act concerns were raised regarding the potential devastating impact to employers of providing "reasonable accommodations" to employees with disabilities. We could find no study confirming these fears. In fact, there are several studies to the contrary. A recent study commissioned by Sears revealed that 69% of the accommodations provided by that company cost nothing, 28% cost less than $1000, and 3% more than $1000. Sears spent less than $50 per recent accommodation request; a study by the Cerebral Palsy Association found that 73% of all accommodation made by businesses in 1993 cost less than $100; another study done by the president's Committee on Employment of People with disabilities found that since October of 1992, 67% of the accommodations made for workers with disabilities cost less than $500; (See, Miller, *EEOC's Enforcement of the ADA in the Second Circuit*, 48 Syracuse L. Rev. 1577 (1998).

It is our opinion that the benefits of employing people with disabilities and protecting them from discrimination far outweigh the potential costs of providing "reasonable accommodations." Fuller employment will have a beneficial impact on state resources dedicated to people with disabilities. It will also add to consumer spending and contribute to the State's tax base.

4. Are people who suffer discrimination limited to administrative actions with NERC? Is there a right to file an affirmative action in state court?

Employees who allege discrimination must first file their complaints with the Nevada Equal Rights Commission. NERC's role is investigative and conciliatory. It is designed to reach informal resolutions of employment disputes while minimizing cost to both employers and employees. Upon determination by NERC that the person has suffered discrimination in violation of the statute, NERC attempts to conciliate between the parties to reach a mutually satisfactory solution. If this informal mechanism does not succeed NERC will issue to the complaining employee a Notice of a Right to Sue, allowing the employee to pursue the case in state District Court in cases brought under the state statute.

5. What have other states done re these issues?

The trend in other states is to reduce the number of employees from 15 to a lower number. As stated above, federal statutes do not preempt state statutes with remedies equal to or greater than those provided by the federal statutes. The following states and the District of Columbia apply their discrimination statutes to employers with fewer than 15 employees.

1 or more employees	Alaska, D.C., Michigan, Minnesota, Montana, Oregon, South Dakota, Vermont
2 or more	Wyoming
3 or more	Connecticut
4 or more	Delaware, Kansas, New Mexico, New York, Ohio, Pennsylvania, Rhode Island
5 or more	California, Idaho
6 or more	Indiana, Missouri, New Hampshire
8 or more	Tennessee, Washington
9 or more	Arkansas
12 or more	West Virginia

In closing, we believe that it is important that the Committee consider the following:

Any concern over a sudden surge in the numbers of complaints as a result of this proposal must take into account the fact that employment discriminations statutes are not designed to be civility codes. That means that the statutes are designed to get at the worst kind of discriminatory conduct.

In addition, as a result of the employment at will doctrine, which prevails in Nevada, employers enjoy a great deal of control over decisions of who they hire and who they choose to dismiss. The employment at will doctrine holds that employers are free to choose who they will hire, and that employers may dismiss any employee for a good reason, a bad reason, or no reason at all. The only impediments to the employment at will doctrine are found in anti-discrimination statutes and in cases deemed to violate public policy. Thus, even with the employment at will doctrine in effect, employers are not permitted to discharge employees because of their race, sex, sexual orientation, age, religion, color, or national origin. They are also prohibited from discharging or acting against employees because they have engaged in activities such as serving on jury duty.

Because of the employment at will doctrine, there are many ways to select employees and to dismiss them without running afoul of the discrimination statutes. Ideally employers will be moved to dismiss only those who are unproductive or whom they cannot afford to continue to employ for economic reasons. And that is indeed what happens in the vast majority of cases. However, the employment at will doctrine gives

employers a great deal of added discretion. They may dismiss employees for a good reason, a bad reason or no reason at all, as long as the dismissal is not discriminatory under the statute, or violates public policy. Examples of those practices include wearing the wrong color shirt to work, being late, or just merely "not liking" the person at all.

It is our opinion that the employment at will doctrine, the lack of compensatory and punitive damages in the Nevada statute, and the limited backpay remedies available under that law, provide a natural disincentive for attorneys to take cases that appear shaky on the facts. In addition, the role of NERC helps to filter out at an early stage many cases through dismissal or settlement. Those components of the Nevada system help to ensure that meritorious claims take the front seat. In such cases, any concerns about burdening small employers must be set aside.