

**MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY**

Seventy-Seventh Session

March 4, 2013

The Senate Committee on Commerce, Labor and Energy was called to order by Chair Kelvin Atkinson at 1:42 p.m. on Monday, March 4, 2013, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Kelvin Atkinson, Chair
Senator Moises (Mo) Denis, Vice Chair
Senator Justin C. Jones
Senator Joyce Woodhouse
Senator Joseph P. Hardy
Senator James A. Settelmeyer
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Tick Segerblom, Senatorial District No. 3

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Policy Analyst
Dan Yu, Counsel
Wayne Archer, Committee Secretary

OTHERS PRESENT:

James P. Kemp, Nevada Justice Association
Keith M. Lyons, Jr., Nevada Justice Association
Keith Uriarte, American Federation of State, County and Municipal Employees
Local 4041
Jack Mallory, Southern Nevada Building and Construction Trades Council
Tray Abney, The Chamber, Reno-Sparks-Northern Nevada

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Craig Madole, The Associated General Contractors of America Inc., Nevada
Chapter
Scott Greenberg, Assistant General Counsel, Clark County School District

Chair Atkinson:

I will open the hearing on Senate Bill (S.B.) 180.

SENATE BILL 180: Requires a court to award certain relief to an employee injured by certain unlawful employment practices under certain circumstances. (BDR 53-561)

Senator Tick Segerblom, Senatorial District No. 3:

I have submitted a slide presentation on S.B. 180 ([Exhibit C](#)).

Senate Bill 180 amends chapter 613 of the *Nevada Revised Statutes* (NRS) to provide additional relief for employees who file complaints over unlawful employment discrimination. While cases involving unlawful employment practices may be filed in either State or federal court, the equitable relief available in State court is incomparable to the relief available in federal court. Under federal law, plaintiffs alleging injury as a result of unlawful employment practices may be awarded damages for lost wages and benefits, attorney's fees, punitive damages and emotional distress. In State court, the sole remedy to plaintiffs in such cases is 2 years of wages. As a result, the vast majority of cases involving employment discrimination are filed in federal court. This inequity is particularly troublesome since the injuries protected against employment discrimination in NRS 613 are stronger than those found in federal law. For example, discrimination based on sexual orientation or age is not unlawful under federal law. Therefore, such cases must be tried in State court. Senate Bill 180 would provide the same relief available in federal court to all cases of employment discrimination filed in State court.

Senator Hutchison:

Are you concerned State courts may lack the experience or expertise to try these cases?

Senator Segerblom:

I am not concerned. These types of cases are generally decided on questions of fact, and as long as State courts can deny on summary judgment, there should be no problem. State juries are more experienced than federal juries.

Senator Hutchison:

Senate Bill 180 would bring State law into conformity with federal law. The wording of the S.B. 180 is explicit. Section 1 of S.B. 180 instructs the courts that they “shall award the employee any legal or equitable relief.” However, the amount of those damages under federal law is discretionary.

Senator Segerblom:

Absolutely. In federal courts, prevailing parties are entitled to attorney’s fees, and the lodestar method is used to calculate the amount of those fees.

Senator Hutchison:

Would S.B. 180 nullify the lodestar method or suggest a different standard should be used to calculate attorney’s fees?

Senator Segerblom:

Absolutely not. The intent is to make any relief available in federal court available in State court.

Senator Hutchison:

Are you saying the only remedy for State employees alleging injuries as a result of discrimination based on age or sexual orientation is 2 years back pay?

Senator Segerblom:

Yes. The United States Supreme Court ruled in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) that State employees may not sue for monetary damages in federal court. It is very difficult to file a complaint in federal court if attorney’s fees cannot be recovered. As a result, State employees must file these cases in State court, which limits damages to 2 years back pay.

Senator Hardy:

The language in section 1 of S.B. 180 describes an employee “injured by an unlawful employment practice.” Does this mean this is a workers’ compensation bill? For instance, could employees injured while working on scaffolding bring a suit if the scope of their work only permitted them to work on the ground, but the employer forced them to work on the scaffolding?

Senator Segerblom:

Senate Bill 180 only amends chapter 613 of NRS; it only covers employment discrimination. Everything under NRS 613 is under the jurisdiction of the Nevada Equal Rights Commission (NERC), which only deals with discrimination.

James P. Kemp (Nevada Justice Association):

The Nevada Justice Association supports S.B. 180 because it brings conformity and consistency between State and federal antidiscrimination law. The remedies available under State law only include 2 years of back pay and possible reinstatement. Under federal law, plaintiffs may recover attorney's fees.

While federal law provides punitive damages and damages for emotional distress, there are caps to damages. By modeling State law after Title VII of the Civil Rights Act of 1964, smaller employers would be subject to a smaller cap. Small employers will be protected by the \$50,000 cap. The cap for employers with more than 501 employees will be \$300,000.

Since sexual orientation and gender identity are not recognized expressly under federal law, individuals may be suffering similar discrimination but do not have these remedies available to them under State law. Making federal and State law match up will protect Nevadans from illegal conduct in the workplace.

Senator Hardy:

In cases where the perpetrator and target of discrimination have the same gender identity, as was the case in the war story you describe in your testimony, would both parties be protected under S.B. 180 regardless of their sexual orientation?

Mr. Kemp:

There is no individual liability under S.B. 180. Only employers would have liability. In such circumstances, Title VII does have some protections, but plaintiffs must show there is stereotyping as a matter of fact. The individual would have to behave in a way one might expect a person of that gender to behave.

Under S.B. 180, a plaintiff would need to show as a matter of fact discrimination was based on real or perceived gender identity or sexual

orientation. I doubt a court would interpret the statute as broadly as you described.

Keith M. Lyons, Jr. (Nevada Justice Association):

I practice family and employment law. Senate Bill 180 would protect Nevada families and should not negatively impact businesses in Nevada. Employers have been given several protections under NRS 613. Like the federal statutes prohibiting unlawful employment discrimination, punitive damages are limited based upon the size of the employer.

Senate Bill 180 does not remove the dual jurisdiction. Plaintiffs may file complaints in State court if defendants do not remove these cases to federal court. Not all defendants remove these cases to federal court. Senate Bill 180 allows State courts to impose the same damages available under federal law.

While S.B. 180 does expand protections to additional areas, plaintiffs will have to show a very particular set of facts, such as sexual orientation. There was a landmark case involving male workers on an oil rig who threatened to rape a male coworker in the shower. The United States Supreme Court ruled that discrimination involving sex was protected under federal law, even though the perpetrators were of the same gender and the victim's sexual orientation was not an issue. Senate Bill 180 gives workers the ability to pursue in State court cases which they previously could not pursue because they did not have the expertise or attorneys could not afford to pursue.

Senator Hutchison:

As I read section 1 of S.B. 180, it is clear the remedies under federal law would become available in all State court actions involving discrimination. The presentation Senator Segerblom submitted to the Committee deals with issues of sexual orientation and age discrimination for State employees and caregivers, [Exhibit C](#). I do not interpret section 1 as being limited to those specific classes. Does this bill increase the remedies available under State law for protected classes, such as race or religion? If not, why was there no specific language?

Mr. Lyons:

Senate Bill 180 specifically protects individuals harmed by an unlawful employment practice within the scope of NRS 613.310. It particularly protects those individuals who previously could only receive 2 years of back pay. The remedies for the same violation will be the same under both State and federal

law, and the caps will apply to both. The damages available to a plaintiff suing an employer with 16 employees under Title VII would be capped at \$50,000 for both compensatory and punitive damages and attorney's fees. It is not \$50,000 for each. Under State law the only remedy is the 2 years back pay. Plaintiffs can offer alternative judgments which may cover some attorney fees, but those are hard to get.

I do want to address the cost of attorney's fees. Attorney's fees are discretionary under Title VII. However, case law provides that prevailing plaintiffs "shall" be awarded reasonable attorney's fees and costs. On the other hand, a prevailing defendant "may" be awarded reasonable attorney's fees and costs if the case is determined to be frivolous. The State does not have the lodestar method. I assume State courts will follow the standard set in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), which the courts currently use when calculating attorney's fees.

Senator Segerblom:

Senator Hutchison, I thought it would be inappropriate to segregate the damages based on the various classes of protections.

I would also make the distinction that the damages for age discrimination are limited to back pay under State law. Plaintiffs may not be awarded damages for emotional distress. Under S.B. 180, plaintiffs could be awarded damages for emotional distress in State court.

Senator Hutchison:

Are the full federal remedies available for those categories under State law—discrimination based on race, age, religion?

Senator Segerblom:

No.

Senator Hutchison:

Senate Bill 180 would make it clear the damages available under federal law would apply to all of the categories under Title VII filed in State court.

Senator Segerblom:

Yes. Most states have similar statutes, but Nevada has not updated its process since the 1960s.

Senator Hardy:

May plaintiffs file complaints and receive judgments in both State and federal court?

Senator Segerblom:

No.

Senator Settlemeyer:

Do you know how many more lawsuits would be filed if S.B. 180 passes?

Senator Segerblom:

Realistically, cases might increase by 1 percent or 2 percent. With the exception of cases involving discrimination based on sexual orientation and age, these cases are already being filed in federal court. The cases would move to State court. The only new cases would be cases of discrimination based on age or sexual orientation, which are not unlawful under federal law.

Keith Uriarte (American Federation of State, County and Municipal Employees Local 4041):

State employees deserve equal protection and equal remedies as other employees have. State employees do not deserve second-class employment status. The AFSCME Local 4041 supports S.B. 180.

Jack Mallory (Southern Nevada Building and Construction Trades Council):

We support S.B. 180 because of the additional protections it would establish. Senate Bill 180 will give plaintiffs greater opportunity to resolve these issues in a timely manner.

Senator Hardy:

Mr. Uriarte, are you saying State employees have sovereign immunity?

Mr. Uriarte:

As you heard in previous testimony, damages awarded to State employees are limited to 2 years back pay.

Senator Hardy:

If S.B. 180 passes, would it affect State employees in a different manner than it would employees of a private employer with more than 15 employees?

Mr. Uriarte:
No.

Tray Abney (The Chamber, Reno-Sparks-Northern Nevada):

The Chamber is concerned S.B. 180 will increase the caseload for employers. There are sufficient protections under federal law. The Chamber is especially concerned with the phrase "without limitation" in section 1 of S.B. 180. The limitation applies to damages and attorney's fees, and liability may extend to the attorney as well. Every dollar employers spend on litigation is one less dollar they have to hire people.

Craig Madole (The Associated General Contractors of America Inc., Nevada Chapter):

We oppose S.B. 180 because it will increase the penalty filing in State court for cases involving age discrimination. It will also extend other damages, including damages for emotional distress, which are not available under federal law.

Senator Hardy:

Would employers be required to purchase a different insurance policy to cover these cases?

Mr. Madole:

I am not an expert on insurance, but I doubt this would make insurance cheaper.

Senator Hutchison:

Leaving aside discrimination cases involving sexual orientation and age for State employees, do you anticipate S.B. 180 would expose employers to more litigation?

Mr. Abney:

The Chamber is concerned about any increase in litigation. I cannot tell you how much it will increase, but we are certainly concerned damages and attorney's fees will be unlimited.

Senator Hutchison:

You do not interpret the phrase "to the extent consistent with Title VII of the Civil Rights Act" in section 1 of S.B. 180 to be limiting language? Rather, you interpret this as one example of the relief a court may grant. Can you give the

Committee an example of an award the courts may grant beyond what is identified in S.B. 180?

Mr. Abney:

No.

Scott Greenberg (Assistant General Counsel, Clark County School District):

As a public entity, the Clark County School District (CCSD) opposes S.B. 180. The point of S.B. 180 is to raise the damages for tort claims for three causes of action which do not fall under Title VII. Senate Bill 180 is silent as to the State tort cap which is in NRS 41.035. The CCSD anticipates S.B. 180 would have a significant monetary impact. It would certainly raise the cap in those three cases where damages do not currently exist as torts. Available relief under State law includes back wages and benefits but not pain and suffering, compensatory damages and punitive damages.

Employment law caseloads in federal court are significant. Senate Bill 180 will likely move these cases from federal court to State court. These cases must go through the administrative process first, either through the United States Equal Employment Opportunity Commission (EEOC) or the NERC. The caseload was so heavy, the EEOC opened an office in Las Vegas. The NERC has jurisdiction over these types of cases as well.

Federal courts have great experience with unlawful employment practice cases. The Early Neutral Evaluation process required by the EEOC resolves many cases early in the process. Well over 50 percent of cases are resolved before they reach court. This process does not exist in State court.

Senator Hardy:

I did not understand the abbreviations. Are you saying S.B. 180 would eliminate CCSD's sovereign immunity?

Mr. Greenberg:

The federal government does not consider CCSD to be a State entity. Employees of CCSD may sue for discrimination based on sexual orientation or age discrimination in State court, but damages are limited to \$100,000 in State court. This would possibly triple CCSD's liability in such cases.

Plaintiffs may not collect punitive damages from a public entity. It is not clear S.B. 180 would be consistent with Title VII in this regard for torts. These cases should be treated as any other tort case.

Senator Hardy:

Does CCSD have an amendment that would alleviate its concerns, or does it oppose S.B. 180 regardless?

Mr. Greenberg:

The CCSD would oppose S.B. 180 regardless, but an amendment to make it consistent with State tort claims would certainly make it better.

Senator Hutchison:

Is it your understanding these cases would have to go through the Nevada Equal Rights Commission as opposed to going through the Equal Opportunity Commission?

Mr. Greenberg:

There is a work-sharing agreement between the EEOC and the NERC, but I do not know what the EEOC would do if S.B. 180 were to pass.

Senator Hutchison:

Are you concerned the State will have to increase staffing and funding for the NERC if the EEOC will not accept these cases?

Mr. Greenberg:

The NERC takes longer to process these cases. Witnesses often go away, and memories can fade. The NERC does the best it can within its budget, but each new case it has to handle will make the process even worse. These cases will still be required to go through the administrative process.

Senator Segerblom:

I want to correct a statement from CCSD. The \$100,000 cap on damages in tort cases does not apply under Title VII. There is no cap when schools are sued in federal court under Title VII. Schools would be liable up to \$300,000.

Senator Hutchison:

Senator Segerblom, can you discuss the concerns about the caseloads for the NERC and the EEOC? Will these cases have to go through the NERC instead of the EEOC?

Senator Segerblom:

I do not know. Realistically, there may be a small increase.

Senator Hardy:

It appears damages in federal court are capped at \$300,000 and wages are capped at 2 years.

Senator Segerblom:

The sole remedy available in unlawful employment discrimination cases filed under NRS 613 is back pay, which is limited to 2 years. Under federal law, damages for emotional distress are limited to \$300,000. There is no limit to back pay.

Chair Atkinson:

I will close the hearing on S.B. 180. The Committee will now move to our work session. I have removed S.B. 87 from consideration. We will start with S.B. 114 ([Exhibit D](#)).

SENATE BILL 87: Repeals certain provisions relating to unlawful employment practices. (BDR 53-104)

SENATE BILL 114: Revises provisions relating to the filing of rates for insurance. (BDR 57-146)

Marji Paslov Thomas (Policy Analyst):

Senate Bill 114 was sponsored by Senators Atkinson and Michael Roberson, and heard in Committee on February 25. This bill requires insurers and rate service organizations to file rate requests with the Commissioner of Insurance. Unless disapproved by the Commissioner, rate filings would become effective 30 days after submission. The Commissioner would be required to submit notice of disapproval within 30 days. Insurers or rate service organizations may request reconsideration of the disapproval, and the Commissioner must approve the reconsideration within 30 days after receipt of the request.

SENATOR HARDY MOVED TO DO PASS S.B. 114.

SENATOR HUTCHISON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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Chair Atkinson:

We will now proceed to the work session on S.B. 162 ([Exhibit E](#)).

SENATE BILL 162: Revises provisions governing the practice of medicine.
(BDR 54-108)

Ms. Paslov Thomas:

Senate Bill 162 prohibits the Board of Medical Examiners (Board) from issuing a license by endorsement to practice as an administrative physician except for limited purposes.

Senate Bill 162 expands the grounds for disciplinary action or denial of licensure for certain acts committed by a person licensed by the Board or the State Board of Osteopathic Medicine to those acts committed knowingly or willfully.

Senate Bill 162 revises provisions relating to a summary suspension of a licensee by the Board or the State Board of Osteopathic Medicine pending the conclusion of a hearing to consider a formal complaint against the licensee. The bill requires the respective boards to reinstate the license under certain circumstances. Senator Hardy has proposed to amend section 11 of S.B. 162 to allow complaints to be signed by the chair or any member of the investigative committee rather than requiring complaints to be signed by counsel.

Senator Hardy:

I want to propose an amendment to my amendment.

On page 4 of the bill, lines 20 through 25, it states: "The Board shall not issue a license by endorsement to practice as an administrative physician except for the limited purpose of practicing as an administrative physician as an: (a) Officer or employee of a state agency; or (b) Independent contractor pursuant to a contract with the State." That same language depending on how the

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Legislative Counsel Bureau wants to put it into NRS 633 as a new section where the State Board of Osteopathic Physicians would meet that same requirement.

SENATOR HUTCHISON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 162 WITH THE AMENDMENTS PROPOSED BY SENATOR HARDY.

SENATOR SETTELMAYER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Chair Atkinson:

We will conclude the work session and adjourn at 2:39 p.m.

RESPECTFULLY SUBMITTED:

Wayne Archer,
Committee Secretary

APPROVED BY:

Senator Kelvin Atkinson, Chair

DATE: _____

<u>EXHIBITS</u>				
Bill	Exhibit		Witness / Agency	Description
	A	1		Agenda
	B	5		Attendance Roster
S.B. 180	C	4	Senator Tick Segerblom	Handout
S.B. 114	D	1	Marji Paslov Thomas	Work Session Document
S.B. 162	E	1	Mari Paslov Thomas	Work Session Document