

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Eighth Session  
March 2, 2015**

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:10 p.m. on Monday, March 2, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E 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 Greg Brower, Chair  
Senator Becky Harris, Vice Chair  
Senator Michael Roberson  
Senator Scott Hammond  
Senator Ruben J. Kihuen  
Senator Aaron D. Ford

**COMMITTEE MEMBERS ABSENT:**

Senator Tick Segerblom (Excused)

**GUEST LEGISLATORS PRESENT:**

Senator Pat Spearman, Senatorial District No. 1

**STAFF MEMBERS PRESENT:**

Patrick Guinan, Policy Analyst  
Nick Anthony, Counsel  
Cassandra Grieve, Committee Secretary

**OTHERS PRESENT:**

Bob Ostrovsky, Nevada Resort Association  
Marlene Lockard, Nevada Women's Lobby

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Stacey Shinn, Progressive Leadership Alliance of Nevada; National Association  
of Social Workers, Nevada Chapter  
Elisa Cafferata, Nevada Advocates for Planned Parenthood Affiliates  
Jonathan Solares, Consolidated Students of the University of Nevada,  
Las Vegas  
Jon Sasser, Legal Aid Society of Southern Nevada; Washoe Legal Services  
Yvanna Cancela, Culinary Workers Union Local 226  
Jacki Ramirez, President-Elect, National Association of Women Business Owners  
Southern Nevada  
Carrie Hughes, Personnel Analyst, Division of Human Resource Management,  
Department of Administration  
Gail Tuzzolo, Nevada State AFL-CIO  
Don Soderberg, Director, Department of Employment, Training and  
Rehabilitation  
Kara Jenkins, Administrator, Nevada Equal Rights Commission  
Janice Flanagan  
Kent Ervin  
Gary Schmidt

**Chair Brower:**

I will open the hearing of the Senate Committee on Judiciary with  
Senate Bill (S.B.) 167.

**SENATE BILL 167:** Revises provisions relating to employment. (BDR 18-265)

**Senator Michael Roberson, Senatorial District No. 20:**

The Nevada Equal Rights Commission (NERC) accepts employment  
discrimination complaints alleging unlawful discriminatory practices. Any  
individual who believes that his or her rights have been violated may file a  
charge of discrimination with NERC. If NERC determines an unlawful practice  
has occurred, it may order the person engaging in the practice to cease and  
desist. For a case involving an unlawful employment practice, NERC may restore  
all benefits and rights to which the aggrieved person is entitled.

Senate Bill 167 will strengthen existing State employment discrimination laws  
by implementing the Lilly Ledbetter Fair Pay Act of 2009. By incorporating the  
tenants of the Fair Pay Act, Nevada would provide an employee, who believes  
he or she has been discriminated against in the workplace, more time to bring  
forward a claim for employment discrimination. To remind the Committee,

discrimination can be based on a person's race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin.

Senate Bill 167 would increase the remedies available to NERC and to an aggrieved employee when employment discrimination has been found to have occurred.

Senate Bill 167 will implement key provisions from both U.S. Senator Barbara Mikulski's Paycheck Fairness Act in the 113th Congress and U.S. Senator Dean Heller's End Pay Discrimination Through Information Act in the 114th Congress. These provisions prohibit employer retaliation if an employee inquires about, discusses or discloses information about wages of another.

Senate Bill 167 would require NERC to issue an employee a notice of right to sue if it determines that an unfair employment practice has occurred.

Finally, S.B. 167 would extend the time an employee may bring a claim before NERC to 90 days after the issuance of a notice of right to sue.

I would like to address the components I just summarized.

Section 1 of S.B. 167 revises provisions governing the filing of complaints alleging compensation discrimination. This provision requires that the complaint be filed within 300 days after any date on which a decision or practice resulting in discriminatory compensation is adopted, a person becomes subject to such a decision or practice, or a person is affected by an application of such a decision or practice.

Section 1 also addresses the problem associated with *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Ms. Ledbetter had been discriminated against for decades, but she did not know until after the statute of limitations had tolled. The Fair Pay Act passed by Congress gives aggrieved employees, who may find years later that they were discriminated against, the opportunity to bring claims so long as the discrimination and the effects of such discrimination are continuing to occur. I am arguing that this same legislation should be implemented into Nevada law.

Section 2 of S.B. 167 revises the powers of NERC to order remedies for unlawful employment practices. The bill also extends the amount of back pay

that an aggrieved employee will be awarded, authorizing NERC to award back pay for a period beginning 2 years before the date of filing an unlawful employment practice complaint and ending on the date NERC issues an order regarding the complaint. Senate Bill 167 will also order a civil penalty of up to \$10,000 for an unlawful employment practice determined to be willful.

Section 3 of S.B. 167 prohibits an employer, employment agency or labor organization from discriminating against any person with respect to employment or membership, as applicable, for inquiring about, discussing or disclosing information about wages, unless the person has access to information about the wages of other persons as part of his or her essential job functions and discloses the information to someone who does not have access to that information. An example of this exclusion would be someone who works in human resources or personnel talking about confidential wage information.

In *Ledbetter*, Lilly Ledbetter did not know for 20 years that she was being discriminated against when it came to her pay because there was a policy in place where employees could not talk to each other about what they were paid. Senate Bill 167 seeks to change this situation so the free speech rights of individuals in the work place are not infringed upon.

If NERC concludes that an unfair employment practice has not occurred, section 12 of S.B. 167 requires the Commission to issue a letter saying so to the person who filed the complaint. The letter must notify the person of his or her right to apply to the district court for an order relating to the alleged unfair employment practice.

Section 13 of S.B. 167 extends the period of time by which a claimant can bring a case before NERC. Section 13 provides that, in addition to the existing authority to apply to a district court for relief up to 180 days after the date of the alleged act, a person may apply to a district court for relief pursuant to section 12 up to 90 days after the issuance date of the letter.

There are at least three proposed amendments to this bill from the Nevada Equal Rights Commission, the Nevada Resort Association and Senator Pat Spearman. I am looking forward to working with Senator Spearman and the other parties to arrive at a bill where we can get bipartisan support on this issue.

**Chair Brower:**

I invite Senator Spearman to testify on S.B. 167.

**Senator Pat Spearman (Senatorial District No. 1):**

I commend Senator Roberson on making a good faith effort to make sure that pay discrimination is not a part of what we do in Nevada. As Nevada citizens, we are better than that.

I am testifying neutral on S.B. 167. I have introduced my own bill, S.B. 190, that seeks to give women in Nevada a strong state-based remedy for pay discrimination. Senate Bill 190 is cosponsored by 25 of our colleagues in both the Assembly and the Senate.

**SENATE BILL 190**: Revises provisions relating to employment. (BDR 18-785)

The issue of equal pay for equal work is near to my heart. Pay discrimination affects women and their families, both in my district and across the State. Introducing S.B. 190 fulfilled a promise I made to my constituents to do everything I could to force the issue of equal pay to the front and center.

When I introduced S.B. 190, I had a conversation with Senator Roberson about both bills. I promised him I would compare both pieces of legislation and consider becoming a cosponsor of S.B. 167.

I would be happy to sign onto S.B. 167 provided the bill is amended. The amendment I submitted gives the bill more teeth and makes it more likely that low- and middle-income women may take advantage of equal pay protections ([Exhibit C](#)).

The first part of the proposed amendment holds that, rather than a flat civil penalty, a tiered system of civil penalties be instituted that progressively increase if an employer is found to have multiple instances of pay discrimination within a 5-year period. I propose \$10,000 for a first offense, \$15,000 for a second offense, and \$25,000 for the third offense.

The second part of the proposed amendment increases the time that a claimant may file in district court from 90 to 180 days. It requires the Commission to proactively notify claimants of the time limits. My amendment to S.B. 167 will help cut down on procedural confusion on the part of the claimant.

The third part of the proposed amendment allows for compensatory damages and reasonable attorney fees to be awarded. For cases where there is a finding of malice or reckless indifference, the amendment allows for punitive damages to be awarded. These allowances are similar to the remedies available under Title VII of the Civil Rights Act of 1964 and are critical for making claims feasible for middle- and lower-income women.

The fourth part of the proposed amendment changes the definition of unlawful employment practice. The amendment alters the definition of "bona fide occupational qualification" to prohibit a qualification based solely on sex or gender. The amendment also prohibits a qualification demand when the affected person has presented an alternative that would achieve the same purpose without producing differential treatment based on sex.

The idea here is to encourage employers to make reasonable accommodations and to prevent employers from using qualifications that look innocuous on the surface but are actually a means for pay discrimination.

With those changes, S.B. 167 would be better able to achieve its stated goal of encouraging equal pay for equal work. The bill would give women a remedy when they face pay discrimination. If these changes were made, I would be happy to sign on to S.B. 167 as a cosponsor.

**Chair Brower:**

Senator Roberson is happy to work with you to make the two bills into one good one.

**Senator Spearman:**

If we can agree that these amendments can be a part of S.B. 167, I will sign on to the bill right now.

**Chair Brower:**

We will go through the rest of the testimony today before making any decisions.

**Senator Kihuen:**

I support the idea behind both bills.

**Chair Brower:**

I also support the idea behind both bills. I look forward to getting the language right and devising a bill that can pass both Houses. I will continue to take testimony in support of S.B. 167.

**Bob Ostrovsky (Nevada Resort Association):**

We support S.B. 167. We have proposed an amendment ([Exhibit D](#)). We have also spoken with the bill's sponsor about our proposed amendment.

**Chair Brower:**

I encourage you to speak to Senator Spearman as well.

**Mr. Ostrovsky:**

We have noticed the bill's language is different than the language in the Fair Pay Act. In our proposed amendment, we ask that the language in section 1 mirror the federal language to eliminate confusion for people who may face litigation in this area.

**Senator Ford:**

I noticed, too, that the federal language is different from what is in S.B. 167. It may be because the bill needs to comport more with our statutes in Nevada. The language may have to be written this way. If the language must be this specific way, are you amenable to disregarding this part of your proposed amendment?

**Mr. Ostrovsky:**

Yes. If there is a reason why the bill's language does not mirror the federal law, we would remain in support of S.B. 167. We do not want definitions to get in the way of achieving a good goal.

In section 2, the bill's penalty is excessive and subjects employers to double penalties, one at the State level and one at the federal level. Our proposed amendment suggests a \$500 penalty, although we are open to discussions about that amount.

The bill also allows that penalty apply to any person who impedes the Commission, not just the employer, so it could be applied against numerous individuals or corporations involved. We would like to discuss the amount of the

penalty. Senator Spearman seems to feel stronger penalties would be more applicable; we think smaller penalties would lead to less litigation.

In section 2, subsection 4, there is confusion regarding the date at which penalties are incurred. The subsection talks about "all unlawful practices which occur during that period and which are similar or related to an unlawful practice in the complaint." The phrase "all unlawful practices" should apply to those who are brought forward in the complaint or the amended complaint, if there is one. The time period references need to be made more clear. The language needs improvement.

In section 3, we propose that verbatim language from the Fair Pay Act be used. As Senator Ford commented earlier, we will work with the bill's sponsors to see why the language in the bill differs from the federal law. It would be easier for litigants if the definitions were the same at both the State and federal level. If there is a reason the wording needs to be different in Nevada, we will take that into consideration.

In section 12, the bill's language departs from federal law again. We propose to clarify the language and track federal procedure at the State level. This section pertains to at what point litigation can be filed. Our proposed changes would make clear that litigation follows the receipt of the notice of right to sue from the NERC, regardless of its findings. The way S.B. 167 is drafted, there may be an inability to file that right to litigate before the right to sue notice is issued. We request the language be clarified.

In section 13, we propose the bill's language remain at 90 days, because 90 days has been the rule under Title VII of the Civil Rights Act since 1964. It works. We would like to meet with the concerned parties to understand why more time is needed. The time period and the ability to file has not been an issue among the legal community. If there is a reason this time period is a problem in the U.S. District Court, District of Nevada, as opposed to the federal courts, we will listen but propose that the legislation remain as 90 days.

Our proposed amendment differs in the penalty section more than anywhere else. We are willing to meet with the concerned parties to address our amendment.



**Marlene Lockard (Nevada Women's Lobby):**

We support S.B. 167, but we would like it to incorporate the stronger provisions of S.B. 190.

**Stacey Shinn (Progressive Leadership Alliance of Nevada; National Association of Social Workers, Nevada Chapter):**

We support S.B. 167, but also support Senator Spearman's amendment.

**Elisa Cafferata (Nevada Advocates for Planned Parenthood Affiliates):**

We support S.B. 167. We raised our concerns about the timings set out in the bill in our statement ([Exhibit E](#)).

**Jonathan Solares (Consolidated Students of the University of Nevada, Las Vegas):**

We support S.B. 167. Coming from a diverse campus and varied background, I think the bill is an important component that allows for better representation and a move toward equality for those of varying races and creeds. I have witnessed unequal pay, and it seems as though no one takes issue with those in higher authority. Unequal pay is a pertinent issue both statewide and in our modern society. Often claims of unlawful employment practices are overlooked. If S.B. 167 passes, it will improve our diverse State.

**Jon Sasser (Legal Aid Society of Southern Nevada; Washoe Legal Services):**

We support S.B. 167. We hope there is a resolution worked out with Senator Spearman's amendment and S.B. 190 so we can move forward in a bipartisan manner.

**Yvanna Cancela (Culinary Workers Union Local 226):**

We represent approximately 55,000 workers on the Las Vegas Strip and downtown area. I commend Senator Roberson and Senator Spearman for working together on such an important issue as equal pay for equal work—something the labor movement has been working to address for decades. We support this bill because it helps secure basic workplace protections and punishes bad actors. I am hopeful that both parties will work together to make this bill as strong as possible.

**Jacki Ramirez (President-Elect, National Association of Women Business Owners Southern Nevada):**

Businesses owned by Nevada women generate over \$12 billion in annual sales and employ more than 63,000 employees. I thank the Committee for having this conversation on equal pay and promoting bipartisan interest in doing something to address this issue. The pay gap problem puts women at an economic disadvantage. Many women are the sole breadwinners in their families, and it puts their children and families at an economic disadvantage.

I am testifying neutral on this bill because I want to support the concept behind S.B. 167, but the bill should be stronger. I am happy to hear that Senator Roberson is interested in working with Senator Spearman in hopes that this bill is made stronger.

**Carrie Hughes (Personnel Analyst, Division of Human Resource Management, Department of Administration):**

We are seeking clarification on several points relating to section 3. Portions of the State and its political subdivision are excluded under *Nevada Revised Statutes* (NRS) 613. While State salaries are not confidential, will State agencies be included or excluded from section 3 of this bill?

**Chair Brower:**

We may not provide an answer for that question today, but that is something the Administration Department should discuss with the bill's sponsor and Senator Spearman, given her similar bill. With the help of staff, we will make sure to answer your questions.

**Ms. Hughes:**

I have two other questions. How is the term "wages" defined in S.B. 167? Would an employee who has access to wage information be protected under section 3 if he or she discloses that wage information to someone who does not have access?

**Chair Brower:**

I urge you to contact the bill's sponsor, as well as Senator Spearman's office, to get specific answers to your questions.

**Gail Tuzzolo (Nevada State AFL-CIO):**

We are neutral to S.B. 167. We support the concept of equal pay for equal work and this bill is a good start, but we would like to see it stronger. We encourage the sponsors of both S.B. 167 and S.B. 190 to work together in order to do that.

**Don Soderberg (Director, Department of Employment, Training and Rehabilitation):**

The Department of Employment, Training and Rehabilitation (DETR) has submitted an amendment to S.B. 167 ([Exhibit F](#)). We have had conversations with both Senator Roberson and Senator Spearman regarding our proposed amendment. As the administrative agency that would enforce most of what is in S.B. 167, DETR is neutral. After looking at the bill, we developed refinements that would enhance our ability to deter and prevent bad behavior but not impact the already-stressed General Fund.

Our proposed amendment addresses section 2, subsection 3. Imposing punitive damages would take a mainly administrative process and create a level of litigiousness that would not be productive. Our amendment would create an administrative penalty.

When there are compensatory damages, a bounty is created; handling that bounty is something the courts do well. The Nevada Equal Rights Commission is an administrative agency; it has only 15 employees and no hearing officers or full-time attorneys. The Commission uses services from the Attorney General's Office and pays a fee for those services. The NERC is largely funded by a contract with the U.S. Equal Employment Opportunity Commission (EEOC). That contract is negotiated ahead of time; if there is an overage, DETR pays for that out of the General Fund. There is no other funding source.

We are worried that if the penalty incents people to file, it would turn an administrative process into a litigious process at the administrative level.

We know this change in policy will have a financial impact at DETR, but we cannot write a fiscal note because it would be speculative.

It has been my experience that unless there is some quasi-judicial apparatus, administrative agencies generally do not handle damages well. It is difficult and expensive to defend terms like "willful" at the district court level.

As you heard, NERC neither has a full-time attorney on staff nor any full-time hearing officers to create the type of record necessary.

We propose an administrative penalty instead of damages. Having an administrative penalty—something created by all the involved parties—would establish a defensible standard. This change to the bill would avoid making our administrative process litigious.

Most cases are resolved by settlement. The NERC will investigate a case; if a prima facie finding indicates a violation of law, the parties are brought together in an attempt to make a settlement. Sometimes the settlement route does not work for the parties involved, but when it does work, we avoid a litigious process at the administrative level.

We prefer this route over using the willful concept. Almost every agency director who uses this argument at district court regularly fails to prove “willful.” Every district court in this State applies and interprets the term “willful” differently. If the legal community and advocacy groups could establish a standard, then the agency would be held to this standard, and when the Commission imposes a ruling, that ruling will be stronger and more defensible.

The next part of our proposed amendment is an addition to S.B. 167. The staff at NERC stated its biggest problem is not the ability to apply existing law; its biggest problem is dilatory tactics by attorneys. For example, in the initial phase of an investigation, NERC will ask parties to respond by specific dates and many attorneys do not.

For a small agency without an in-house lawyer, NERC staff then needs to stop its day-to-day work to get a subpoena, which requires the signature of an EEOC chairman; the EEOC is a body that meets maybe quarterly. Often, the required documents appear just about the time staff has again stopped work in order to file the subpoena at district court. Upon further research, I learned that many of these dilatory tactics are performed by attorneys who represent highly regulated industries in this State.

We propose a modest penalty, allowing NERC to penalize dilatory tactics that impede an investigation. We anticipate penalizing those entities only once. We are now in an era when State agencies talk with each other and get information through the State Controller’s Office. When the agency down the street knows

who we fine and compares that with who it fines and that person or entity has a privileged license, we believe companies would not appreciate their attorneys purposely not filing documents on time. If dilatory practices are stopped, increased costs that the NERC may face by enforcing S.B. 167 may balance out.

In section 2, subsection 4, we seek to clarify the expansion of Nevada law in the area of sex discrimination. Most sex discrimination cases are sent to the EEOC. When we first read S.B. 167, we thought we needed to hire a lot more people. We then realized that in fiscal year 2014, NERC only referred eight cases to the EEOC. This fiscal year, we have referred five cases.

If we were to attach a fiscal note to S.B. 167, we would calculate for eight cases, maybe rounding up to ten. If NERC picks up more cases, the cost of those extra cases may be balanced if we have the ability to prevent dilatory tactics.

**Chair Brower:**

Please walk us through a typical claim. For example, a claimant believes she is a victim of discrimination with respect to pay. She comes to your office and states her complaint. How does your office respond? Do you have her fill out a form? Where does it go from there?

**Kara Jenkins (Administrator, Nevada Equal Rights Commission):**

If someone came to us with a complaint of discrimination on the basis of sex and pay inequities, we would refer that case to the Equal Employment Opportunity Commission. Once referred, the NERC is done with that case.

The EEOC frames the complaint as two charges. One charge is a discrimination charge under the Equal Pay Act of 1963 and the other charge is a sex-based wage discrimination charge under Title VII.

**Chair Brower:**

The hypothetical situation I offered was a woman making a pay discrimination claim. You stated those are transferred to the EEOC. Is that true of all claims?

**Ms. Jenkins:**

No, only the sex-based wage discrimination claims are sent to the EEOC. The NERC takes any other complaints of discrimination—those based on race, national origin, gender identity or expression, age and disability.

**Chair Brower:**

Do you investigate those other types of claims yourselves?

**Ms. Jenkins:**

Yes, we do.

**Chair Brower:**

But pay discrimination cases are referred to the EEOC?

**Ms. Jenkins:**

Yes, per our contract with the EEOC, we send the sex-based pay discrimination cases to them. We have a work-share agreement with the EEOC.

Continuing with the hypothetical situation regarding equal pay, the EEOC frames two charges. With the Equal Pay Act, claimants have a prima facie burden to establish the discovery that their pay is significantly different than someone who has a similar role in their company.

The charge is then framed under the Equal Pay Act and also under a Title VII discrimination complaint on the basis of sex. The EEOC then takes a parallel approach with the claim because the Equal Pay Act has different provisions not provided for under Title VII. For example, claimants can go right to federal court under an Equal Pay Act claim; they do not have to go through the administrative process of filing a complaint and having the EEOC investigate.

The EEOC will then push those cases to the forefront because they are limited by a 180-day statute. Claimants are still protected under the Title VII wage-based discrimination complaint where the provisions are different and time is not tolled pending the investigation. Once the Nevada Equal Rights Commission—or any kind of administrative agency like the EEOC—gets a claim, the time is tolled, meaning it is paused, on the length of time on which complaints can be file in court.

The NRS should reflect the Equal Pay Act, and this is established in our proposed amendment to section 3, subsections 1 and 2. We need to use the Equal Pay Act as the foundation before the bill gets to the issue of retaliation or discrimination against individuals who discuss or disclose pay.

We wrote subsections 2 and 3 to state:

No labor organization, or its agents representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

Except as otherwise provided in subsection 3, it is unlawful to discipline or otherwise retaliate against an employee who has discussed, or disclosed his or her wages or the wages of another in connection with a claim brought under subsection 1.

By inserting these subsections into S.B. 167, the wording of the Equal Pay Act is first, and the provisions for retaliation follow.

**Chair Brower:**

Are you reading from your proposed amendment?

**Ms. Jenkins:**

Yes. The Paycheck Fairness Act has not been passed by Congress; however, President Barack Obama issued an Executive Order in April 2014 addressing this issue. Because it is not yet federal law, the EEOC uses the "implied spirit" of the retaliation section of the Paycheck Fairness Act to handle discussions on how claimants became aware they were not earning equal pay.

**Chair Brower:**

I hear you saying that DETR and the NERC are neutral on S.B. 167. You have proposed amended language to clarify and improve the bill.

**Mr. Soderberg:**

That is correct.

**Ms. Jenkins:**

The Nevada Equal Rights Commission prides itself on settling cases. Often, the people who come to us do not have the time or the money to take their cases to federal court.

If we fail to conciliate a case, we get the claimant a notice of right to sue for the EEOC. It can take 2 to 3 years for a case to get to federal court, and people do not have time to wait that long to be compensated.

The NERC prides itself on being a relatively small State agency that can settle cases. Last fiscal year, NERC settled about \$1.3 million for Nevadans. If we can keep these cases at the settlement level so people can get what they need, we are happy to entertain any kind of suggestions to the bill.

The bill intent is amazing and we are happy to see it at NERC, but we want to balance the practical nature of how we implement these changes, continue providing great customer service and get people settled as soon as possible.

**Senator Harris:**

Do you measure the degree of satisfaction that the aggrieved party has with regard to his or her settlement? We are talking about a vulnerable portion of our community. These people who have already faced discrimination come to NERC to get redress—and that is a wonderful thing. But what kind of satisfaction and fairness is there with regard to the settlement? I would like to make sure that we do not settle legitimate claims better heard at the district court level.

**Ms. Jenkins:**

Claimants seeking punitive damages for willful employment discrimination can only do so in federal court, not district court. Senate Bill 167 makes redress more accessible for people at the State level.

The answer to your question depends on the needs of the claimants. What is their economic climate? How soon do they want to get reimbursement? Are they having a difficult time in securing other employment?

Claimants who file with NERC have already been terminated from their employment, and they suspect discrimination on the basis of those categories we spoke of earlier: race, sex, sexual orientation, national origin, disability, etc.



Because they have already lost their jobs, claimants have to mitigate their damages. They have to get jobs; they have to make ends meet. It takes approximately 2 years to close a case, so when settlements have been reached, claimants are ready to be done; they are ready to accept the settlements and move forward with their lives. If a claimant has time to wait, then perhaps a bigger settlement may be reached. When settlement is reached at our level, it is most likely not for the amount to which claimants feel entitled, but claimants typically no longer have a job at this point and need to take that into consideration.

Additionally, keep in mind that the case is based on something personal to claimants, such as their race or a disability. The entire situation revolves around factors that should not come into play when meeting the essential functions of a job. Most of our clients are emotional for these reasons. I cannot say if our clients are satisfied at settlement, but they are relieved.

At the Commission, we outreach and train employers. We conduct training on fair employment practices at no cost to the employer. Sometimes we wiggle a requirement into a settlement that we will give training to the organization or agency. Doing this makes employers more comfortable with NERC because they realize we are not always out to get them. This a neutral agency; our mission is to foster the spirit of equal employment in the State as well as in places of public accommodation and housing.

**Senator Ford:**

Does your amendment propose administrative penalties in lieu of compensatory damages?

**Mr. Soderberg:**

Yes, Senator Spearman's bill and S.B. 167 provide for damages to be awarded to the claimant as a deterrent to bad behavior.

We believe the passage of either bill will make the process more litigious and create extra costs for us that we cannot calculate. Those extra costs would come from the General Fund. The DETR receives \$650 per case from the EEOC on contract for a specific number of cases. When we have gone over the number of cases specified in the contract, the EEOC has said that is okay—and then come next year, they will not pay for the same amount of additional cases. We cannot rely on history to predict what the EEOC will do.

If we want to deter bad behavior rather than encourage it, implementing an administrative penalty is a better way. It will not complicate the system to add an administrative penalty because it will not benefit the claimant or a contingency-based attorney.

**Senator Ford:**

The bills are meant to be more than deterrents; they are meant to recompense someone who has been aggrieved, and an administrative penalty would not be sufficient. Do other civil rights statutes have administrative penalties?

**Ms. Jenkins:**

No. One of the difficult things with the passage of S.B. 167 is to have NERC, an administrative agency, be responsible for securing a finding of willful intent to discriminate. Such a finding would then have to go to court to ensure the judgment NERC rendered is confirmed for the claimant. This is tricky.

Money from the administrative penalty would go to the Gift Fund, a trust account set up for NERC designated for outreach and training. We would rather let the district courts deal with willful intent and punitive damages.

**Senator Ford:**

I am not adverse to an administrative penalty in lieu of but in addition to, especially in view of dilatory tactics and attorneys impeding investigations.

Mr. Soderberg, NERC has no attorney on staff and only eight cases in the past year and five this year. One intended or unintended consequence of passing laws is emboldening people who have been aggrieved. I would anticipate that enacting this law would bring more cases from folks who have been aggrieved by pay discrimination. You may well need to get an attorney on staff.

Why does Nevada contract its cases to the EEOC? Is it because we do not have laws effectuating the comparable statute in Nevada?

**Ms. Jenkins:**

Yes, that is partly correct. Nevada also has a work-share agreement, so the EEOC takes these cases under our contract. The reasons have never been negotiated.

**Senator Ford:**

Mr. Soderberg, your desire to create a standard for willful intent would be problematic. I am sure caselaw defines what willful means. The Committee would be interested in hearing about your ideas in that regard.

**Mr. Soderberg:**

We do not have any ideas. I have learned through experience as a public servant that if a rule is made, some sort of standard has been created.

Clearly, caselaw is out there, yet agencies that have to prove willful intent find they are consistently second-guessed by the courts. While I do not mind being second-guessed by a court, I do mind spending a lot of money to get second-guessed.

If we devise a written standard through the Nevada Administrative Procedure Act and have all involved parties participate, we would have something firmer, easier to apply and more defensible.

**Chair Brower:**

I agree with Senator Ford that if this bill passes, there may be a rise in pay discrimination claims. Will you continue to pass these claims on to the EEOC?

**Ms. Jenkins:**

The EEOC is excited about S.B. 167 and seems open to renegotiating our contract so NERC could take those cases. We do not know if the EEOC will continue to pay for additional cases generated by S.B. 167 or if DETR will have to pull from the General Fund.

The goal of NERC is mediation. When we get into conversations of willful intent, all we need to do is frame a probable cause charge to bring people to conciliation. We inform the offending employer of his or her discrimination against an employee based on sex because that employee was not paid equally. We urge the employer to conciliate so the case does not go to federal court.

We always try to conciliate the matter because claimants do not have time to wait for the federal court. If conciliation efforts fail, then NERC has the right to determine what is willful. Such cases then go to another phase where the Equal Rights Commission Board, NERC's Governor-appointed, five-member Commission, conducts hearings. The Board then determines willful intent.

**Senator Kihuen:**

Why does Nevada send its pay discrimination cases to the EEOC?

**Ms. Jenkins:**

I do not know the exact reason why Nevada does this. It may be because Nevada law does not cover such issues. The EEOC defines state agencies like NERC as Fair Employment Practice Agencies. We contract with the EEOC to close cases of pay discrimination, and we are paid for each case we close under Title VII. If S.B. 167 became law, we would look to amend our contract and see if the EEOC would allow us to process these cases.

**Senator Kihuen:**

I am looking at NRS 613.330, enacted in 1967, and subsection 1, paragraph (a) states,

To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin.

Under this statute, does NERC not already have the responsibility to do this?

**Ms. Jenkins:**

Yes, we do, but it is an implied responsibility. I saw that statute when I researched this bill. That provision does allow us to take wage-based sex discrimination cases under Title VII, but not under the Equal Pay Act. The Equal Pay Act is a different law entirely.

Both laws aim to achieve the same goal. By pursuing both alternatives at the same time, the EEOC allows the aggrieved individual two opportunities to prevail, using either the Equal Pay Act or Title VII with a sex-based wage discrimination complaint.

**Senator Kihuen:**

Senate Bill 167 would bring clarification to this issue?

**Ms. Jenkins:**

Yes, it would.

**Chair Brower:**

Would anyone like to testify in opposition to S.B. 167?

**Janice Flanagan:**

I have been fighting all my life for equal pay for equal work and it would be splendid if Nevada enacted a law to codify that. I am against S.B. 167, but I am for it if Senator Spearman's amendment is added. Senator Spearman's amendments significantly strengthen the bill.

The bill as presented is toothless, and employers' feet need to be held to the fire. As Senator Kihuen stated, though this has been law since 1967, it has not been enforced. I would like to have strong enforcements in the bill. People would not be charged a penalty if they did not discriminate. I appreciate that Senator Roberson is working with Senator Spearman. I hope Nevada will have a strong bill protecting equal pay for equal work.

**Kent Ervin:**

Nevada has great public policy statements in its statutes about antidiscrimination, but the Nevada Equal Rights Commission does not have a lot of power. The \$10,000 penalty for big corporations would only be a cost of business. There needs to be some real teeth added to the bill.

I am here for myself, but I work for a public entity and my salary is posted on TransparentNevada.com. Although I am not too happy about my salary being available for everyone to see, everyone knowing everyone else's salary is great for understanding the differences. It is often a reason for an employer to do the right thing, and the transparency helps protect employers from allegations of discrimination. From experience, I can say that having salaries published for all to see is a good thing.

Earlier testimony said the average settlement time is 2 years. The bill should be amended to make it easier for claimants to get a faster resolution.

**Chair Brower:**

You are a public employee?

**Mr. Ervin:**

Yes.

**Chair Brower:**

Yet you are unhappy about the public knowing your compensation?

**Mr. Ervin:**

I accept it, but it is slightly problematic for identity theft and those kinds of things. Anyone in the world can know my salary.

**Chair Brower:**

Well, that is true for the President of the United States on down.

**Mr. Ervin:**

I understand, but on a personal level, it is disconcerting.

**Gary Schmidt:**

From a small businessman's point of view, a \$10,000 penalty could close a lot of businesses. The vast majority of employment in the United States is from small businesses, which are generally defined as fewer than 500 employees. I have had businesses from 1 to 75 employees. I do not consider 500 employees to be a small business; nevertheless, a graduated penalty might be a better way.

I support the principles of S.B. 167 and its intended effect, but the \$10,000 penalty for a true small business can close a business down.

**Chair Brower:**

I would remind the Committee that the proposed language is "not more than \$10,000," so that would be the maximum penalty. No small business, or any business, in the State will be required to pay a fine unless it is proven that the business engaged in an unlawful, discriminatory employment practice.

We would advise employers in Nevada to not discriminate on the basis of any of the categories protected under Nevada law. An allegation may have to be litigated, but if Nevada bureaucrats do their jobs, no penalty will have to be paid.

We will hear final remarks from Senator Spearman.

**Senator Spearman:**

Testimony given to us by NERC and those who support the reason why this bill must be strengthened say claimants are satisfied with their settlements, yet this does not make those people whole.

My amendment takes into account not just the back pay these people have at stake but also their retirement, because their 401(k)s should be accruing.

I am not interested in doing something just for the sake of it and giving a slap on the wrist. People who have been wronged need to be made whole. Nevada is better than this. We should never allow discrimination in any form or fashion. We should never allow dollars to come between us and doing the right thing.

I will close with a biblical verse from Micah which asks, what doth the Lord require of thee? The answer is to do justice, to have mercy and to do good. The provisions of my amendment would do justice, have mercy and do good.

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**Chair Brower:**

Seeing no more business or public comment, I adjourn the meeting of the Senate Committee on Judiciary at 2:20 p.m.

RESPECTFULLY SUBMITTED:

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Cassandra Grieve,  
Committee Secretary

APPROVED BY:

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Senator Greg Brower, Chair

DATE: \_\_\_\_\_



<b>EXHIBIT SUMMARY</b>				
<b>Bill</b>	<b>Exhibit</b>		<b>Witness or Agency</b>	<b>Description</b>
	A	1		Agenda
	B	5		Attendance Roster
S.B. 167	C	9	Senator Pat Spearman	Proposed Amendment No. 9723
S.B. 167	D	12	Nevada Resort Association	Proposed Amendment
S.B. 167	E	2	Nevada Advocates for Planned Parenthood Affiliates	Letter
S.B. 167	F	11	Department of Employment, Training and Rehabilitation	Proposed Amendment