MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eighty-first Session
February 18, 2021

The Senate Committee on Judiciary was called to order by Chair Melanie Scheible at 1:00 p.m. on Thursday, February 18, 2021, Online. Exhibit A is the Agenda. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Melanie Scheible, Chair
Senator Nicole J. Cannizzaro, Vice Chair
Senator James Ohrenschall
Senator Dallas Harris
Senator James A. Settelmeyer
Senator Ira Hansen
Senator Keith F. Pickard

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nicolas Anthony, Counsel
Pat Devereux, Committee Secretary

OTHERS PRESENT:

James P. Kemp, Nevada Justice Association
Alexandria Dazlich, Nevada Restaurant Association
Brett Sutton
Robert Ostrovsky, Nevada Resort Association
Gina Bongiovi, Vegas Chamber
David Edelblute, Henderson Chamber of Commerce
Paul Enos, CEO, Nevada Trucking Association
Alexis Motarex, Associated General Contractors, Nevada Chapter
Brian Reeder, Nevada Contractors Association
Bryan Wachter, Senior Vice President, Retail Association of Nevada
Steven Cohen

CHAIR SCHEIBLE:
I will limit testimony on each bill and each position to 20 minutes to allow the Committee ample time to ask questions of the presenters and subject matter experts. Anyone intending to testify today may submit written comments. Each person will have two minutes to testify; you may also simply state you agree with a former testifier. When the hearings for the bills are concluded, there will be time for public comment. To submit written testimony during or after the meeting, the email address is SenJUD@sen.state.nv.us.

We will open the hearing on Senate Bill (S.B.) 107.

SENATE BILL 107: Makes various changes relating to the statute of limitations for certain causes of action. (BDR 2-872)

SENATOR JAMES OHRENSCHALL (Senatorial District No. 21):
There is a proposed conceptual amendment to S.B. 107 from the Nevada Justice Association. The bill will clarify *Nevada Revised Statutes* (NRS) 11.190 and perhaps result in less litigation.

JAMES P. KEMP (Nevada Justice Association):
You have the proposed conceptual amendment (Exhibit B) to S.B. 107 from the Nevada Justice Association. The bill deals with two related issues concerning limitations of actions, also known as statute of limitations. The catchall statute, NRS 11.220, for this allows for a four-year statute of limitations. Section 1, subsection 1, paragraph (e) of S.B. 107 allows for a four-year statute of limitations for wrongful termination under common law.

Unless a worker has a contract for a specific time or one specifying termination for an identified cause, generally employment in Nevada is at will. Either party may end the employment relationship at any time for any or no reason. Dismissal may be arbitrary and harsh on the employee.

Exceptions to the at-will doctrine have developed to ameliorate some of its arbitrariness, harshness and lack-of-worker recourse. Those exceptions are both statutory and through common law.

The Nevada Supreme Court has recognized common law exceptions because the doctrine must give way to certain public policy matters. The Court calls those exceptions rare and narrow. In *Hansen v. Harrah's*, 100 Nev. 60, 675

P.2d 394 (1984), an employer retaliated against an employee who had filed a workers' compensation claim while pursuing that right under the Nevada Industrial Insurance Act. Other Court caselaw involved retaliation against whistleblowers, when an employee complains to a government agency that has regulatory oversight over something illegal the employer is doing. If a whistleblower is fired, he or she has basis for a common law action for retaliatory discharge.

The refusal by an employee to do something unsafe or illegal is a basis for a common law action. The Court ruled people do not have to put themselves in jeopardy or resort to crime to earn a livelihood. In *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206 (1991), a department store manager was accused of selling outdated camera film at a discount. He was accused of extending an unauthorized discount and terminated. In *Western States Minerals v. Jones*, 107 Nev. 116, 807 P.2d 1392 (1991), the mining employer insisted an employee work with cyanide when he had an open cut that could become contaminated. The employee refused and was fired. The Court agreed it was a compelling reason to refuse work and found an exception to the at-will doctrine.

Statutory exceptions primarily involve illegal discrimination. The at-will doctrine is set aside for discrimination on the basis of age, race, religion, color, national origin or sexual orientation. Retaliatory firing for reporting harassment by coworkers because the employee has protected status is also grounds to pursue action as an exception to the at-will doctrine. There are also at-will doctrine protections for pregnancy, leaving work for jury duty, testifying truthfully as a witness in a court or administrative proceeding against your employer and for conducting business with a person or business which your employer does not want you to patronize.

The principal protection we are concerned with in S.B. 107 involves discrimination cases, which require administrative exhaustion before going to court. If you are sexually harassed or fired for being part of a protected class, you cannot just file a lawsuit. You must file a charge with the State or federal government. The State agency is the Nevada Equal Rights Commission (NERC); the federal agency, the Equal Employment and Opportunity Commission (EEOC).

The proposed amendment, Exhibit B, comes into play because of the process requiring the discrimination charge. You can file with either NERC or EEOC; they have a work-sharing agreement because they both enforce antidiscrimination

laws. If you file with one agency, it will automatically be filed with the other agency for you.

The EEOC has an intake questionnaire on its website for reporting employer offenses. The NERC will set up an interview with you. The time limit after the incident to file charges is 300 days from the alleged discrimination. This is the problem: it takes four to five months after the intake questionnaire is received for an interview to be scheduled. That indicates how busy the NERC staff is.

At the employee interview, alleged discrimination charges are recorded and then an informal settlement meeting is held. If the case is settled by that meeting, the charge is over; if not, an investigation begins. It may take many months to investigate if the termination resulted from probable cause. If not, you are issued a closing letter saying you have 90 days to file a lawsuit.

If probable cause is found, the employer and employee enter into a formal resolution process, called conciliation, with NERC staff. There may be administrative hearings, but in most cases, a final decision is issued of probable cause with the recommendation to file suit.

The statute of limitations for wrongful termination creates tension between two processes. There is no administrative process for common law cases; they must be taken to court in a timely manner. The NERC process sometimes takes three to four years. Paradoxically, the stronger a discrimination case is, the longer the process takes.

I was involved in the lead-up to *Patush v. Las Vegas Bistro, LLC,* 135 Nev. 353 (2019). Las Vegas Bistro is the corporate name for Larry Flint's Hustler Club. After she tripped and fell, office manager Ms. Patush's workers' compensation claim took about three years to resolve, and she asked me to file a lawsuit after she was fired. The federal courts decided that the statute of limitations was two years, even though no limitations existed in NRS 11 for such a claim. Many such cases end up in federal court because of claims brought under Title VII, the Civil Rights Act of 1964, along with state cases. Under the federal question jurisdiction, employers may remove the case to federal court. The Court never determined the statute of limitations for Ms. Patush's wrongful termination claim.

Nevada Revised Statutes 11.220 is a catchall that stipulates if there is no other statute of limitations listed, it is four years. When we argued that, the Court said, "Well, we see your point, but now we're going to go with two years." The two-year limitation comes from the personal injury and wrongful death statute, NRS 11.190, subsection 4, paragraph (e): "An action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another." I scratched my head and thought, "No reasonable Nevada citizen would read that statute and conclude they were fired for no reason because they only had two years to file a claim."

The problem is, if it takes three or four years to go through the NERC process and you have both a retaliatory-discharge common law claim and a statutory discrimination claim, you will need to go to court long before that process is finished. Lawsuits must be filed and money spent before you even get to the point where you know if conciliation is possible. A settlement may be reached while the case is still in the administrative process. That is why section 1, subsection 2 of S.B 107 would change the limitation in NRS 11.190 to four years.

Under the proposed conceptual amendment, Exhibit B, a two-year limitation would apply to a common law retaliatory wrongful discharge. However, the limitation would "not commence until any pending related state or federal administrative agency charge or complaint has been exhausted, or any related industrial insurance claim [workers' compensation] ... has been closed." If the workers' compensation ends and the employee cannot return to his or her original position, would the employer provide another job? That avoids the expense of vocational rehabilitation and retraining. If an employer puts someone back to work, there would be no reason to file a lawsuit.

We would like to see NRS 11.220 clarified so if there is no other statute of limitations, it is four years. The Court and several other jurisdictions have ruled if there is no other limitation, the court will apply an analogous statute of limitations. Termination for intentional interference with prospective business or economic advantage has no statute of limitations. In one case, the Court analogized it to be like fraud, with a limitation of three years. In another case, the Court analogized it to be like contract interference, which is four years. People would have increased stability if they knew the Court would not apply a different limitation.

SENATOR PICKARD:
I could not reconcile the four- and two-year limitation, but I agree with the proposed amendment, Exhibit B. *Nevada Revised Statutes* 11.220 is not a catchall if courts still have to figure out analogies. I recognize some NERC and EEOC claims take more than four years. Without the four-year limitation, we lose the ability to pursue a judicial review if the administrative process is exhausted. I agree with the Court's reasoning that a shorter limitation inflicts financial and reputational injuries. Why extend it from two to four years, particularly if a case has been developed through administrative action?

MR. KEMP:
The reason we are proposing four years is because of how long the administrative process may take. I have a case that took NERC just over three years to find probable cause for my client's 2017 termination. We went through the administrative process but could not find a resolution so had to go to litigation. We thought four years would be an appropriate period to accomplish everything before resorting to litigation. Under the proposed conceptual amendment, Exhibit B, an employee would not have to worry about rushing off to court without going through the administrative or resolution process. Many cases involving Occupational Health and Safety Administration whistleblowing or if an employer requires an employee to do something illegal or unsafe do not go through the administrative process. The two-year statute of limitations makes sense in those situations. Many times, people do not learn their rights have been violated and legal action must be instigated until long after the fact.

SENATOR PICKARD:
Would the proposed conceptual amendment, Exhibit B, reinstate the two-year limitation after the exhaustion of administrative remedies?

MR. KEMP:
Yes.

SENATOR SETTELMEYER:
I am concerned the administrative process may take up to 300 days before an employee can file a wrongful termination claim. The bill could put filing on hold for up to four years. I have been told it can take a while to find witnesses to the situation. Local government officials have told me this could extend civil rights litigation of 42 USC Section 1983 cases. Is that correct?

MR. KEMP:
Section 1983 cases are statutory claims, which is why we specified S.B. 107 only covers tort claims or common law wrongful termination claims. Section 1983 is a federal statute; by definition, it would not apply.

SENATOR HANSEN:
If a person's unlawful discrimination case goes through the federal administrative process with up to four years to complete, if it is unsuccessful, can he or she get another bite of the apple on the State level? Does the case against the employer start all over again? Theoretically, could a case be strung out for six years or more?

MR. KEMP:
In extreme cases, that could happen, but a resolution would happen sooner than that in most cases. In terms of an employer's concerns about corroborating documents, evidence and witnesses disappearing, generally that information would be collected in the administrative process. In order for a case to be addressed by NERC, employees must file a mission statement. Generally after 60 days of receipt of the statement, it must be answered by the employer, who must preserve the evidence. Most of the cases involve firing, so there is basically a common-nucleus-of-operative-fact test. The employer would have knowledge of that, even though the administrative process could extend to a lengthy period before a claim is filed.

SENATOR HANSEN:
Would the concept of common-nucleus-of-operative-fact test apply to all cases? An employer could potentially be dragged through an administrative process lasting several years and a resolution might not be reached. With S.B. 107, is it possible an employee could turn around and have a three- or four-year window to submit an employer to another lengthy process?

The concept of speedy trials and having cases resolved within a reasonable period is probably why the Court used the two-year limit. The common-nucleus-of-fact test would apply equally to the client and attorney. If there are several possible conflicting ways to sue an employer, the attorney would pursue the strongest case. If that fails in the federal administrative process, would he or she not restart the process under Nevada law? That could be carried out for many years, which is unreasonable. The two-year statute of limitations seems reasonable.

SENATOR OHRENSCHALL:
After the Court set the limit at two years, many workers may have rushed to file an action through the federal or State administrative process in hopes of a resolution. A lawsuit would never be filed. If the compromise bill S.B. 107 is passed, less litigation will result.

SENATOR SETTELMEYER:
I never thought of S.B. 107 as dealing with workers' compensation. A long time ago, the concept of workers' compensation was called the "grand remedy." How will the bill affect workers' compensation claims?

MR. KEMP:
Under the grand bargain of workers' compensation, employees trade the right to sue for personal injuries for statutory benefits. The first Court case to recognize an exception to that doctrine was *Hansen v. Harrah's*, as mentioned earlier. The claim was ruled outside of the workers' compensation process because typically personal injuries—like a 7-Eleven clerk being held up at gunpoint—include mental damage like post-traumatic stress disorder. You get treatment and benefits under workers' compensation. However, if an employer says, "You filed a claim against us and that will cost us money. You're fired," that creates a chilling effect on other employees filing workers' compensation claims. In *Hansen v. Harrah's*, the Court ruled that was insupportable: people have the right to benefits, and employers cannot intimidate them into not filing claims. Workers have the right to sue and recover punitive damages from employers.

SENATOR SETTELMEYER:
The bill does not extend any new issues within workers' compensation, instead dealing with wrongful termination, which is already an exception to NRS. Is that correct?

MR. KEMP:
Yes. Senate Bill 107 touches on the vocational rehabilitation offered by workers' compensation but does not affect its benefits. If a worker cannot return to his or her job or lacks marketable skills and the employer does not offer other employment, the worker is entitled to vocational rehabilitation. *Nevada Revised Statutes* 11.190 governs intentional retaliatory termination.

SENATOR CANNIZZARO:
In regard to the proposed conceptual amendment, Exhibit B, the statute of limitations does not begin until exhaustion of the administrative process. Is there a requirement that wrongful termination cases must be brought before an administrative body? Or does the litigator choose whether to pursue a lawsuit instead of an administrative route?

MR. KEMP:
Common law claims are not subject to an administrative process per se. However, there are often companion theories that require administrative exhaustion through a State or federal agency to determine probable cause and whether the dispute resolution process is in order. The EEOC does not produce many cases which an employee would join. I have a case that we had to bring to court after two years—even though the matter is still in the administrative process—or my client would lose the claim. Attorneys must pursue all available theories for clients.

SENATOR HARRIS:
What is the time limit to file after the disposition is received from NERC? A client would not have to necessarily wait for the 2 years, but once there is an adjudication, would he or she have, say, 90 days?

MR. KEMP:
After the administrative process plays out and there is no resolution, the worker is notified the agency has gone as far as it can and is closing the file. He or she then has 90 days to file suit under the statutory claim.

SENATOR HARRIS:
Would S.B. 107 affect the 90-day requirement?

MR. KEMP:
No. That is covered in NRS 613 and federal discrimination statutes. The bill specifically addresses common law court actions for discrimination.

SENATOR OHRENSCHALL:
The proposed conceptual amendment, Exhibit B, to S.B. 107 stipulates, "the running of such limitation period must be tolled and not commence until any pending related state or federal administrative agency charge or complaint has been exhausted." This will help employees avoid litigation. I agree with

Senator Settelmeyer that we should not specify the number of years of limitations in statute. That would give State and federal agencies a better chance to resolve the claim, rather than a lawsuit being filed.

ALEXANDRIA DAZLICH (Nevada Restaurant Association):
The Nevada Restaurant Association opposes S.B. 107 because it would be a disaster for the restaurant industry. The industry is made up of thousands of small business owners who pour their hearts, souls and life savings into their businesses. They hire employees whom they entrust to keep their businesses and dreams alive.

Requiring restaurant owners to take on additional business liability insurance will be expensive, and responding to claims will take considerable time and could result in costly damage payments. Extra costs will impose a further burden on restaurants struggling to keep their doors open and employees on payroll. Employees who believe they have been wrongfully terminated have the right to file claims and take action. However, allowing employees two additional years to fight wrongful termination when thousands of Nevadans have lost jobs to the Covid-19 pandemic will have a devastating impact on small businesses.

BRETT SUTTON:
I practice employment law and am on the leadership council of the Division of Financial Institutions, Department of Business and Industry. I oppose S.B. 107 because the Court determined two years is the appropriate statute of limitation for wrongful termination claims. Before that, a State district court reached the same conclusion; California has the same limitation. When establishing the EEOC administrative process, the federal government used 300 days. Extending the limitation to four years would be unnecessary, unprecedented and beyond that of other states.

Mr. Kemp stated many claims do not go through the administrative process. The argument may be made that when an employee files an EEOC claim, many claims are instead common law. If the limitation is extended to four years, many employers will be caught off guard and unable to find co-employee witnesses, documents will be lost and memories will have faded.

ROBERT OSTROVSKY (Nevada Resort Association):
The Nevada Resort Association opposes S.B. 107. We agree with the Court's unanimous decision to impose the two-year limitation.

GINA BONGIOVI (Vegas Chamber):
I am chair of the Vegas Chamber Board of Trustees. As an attorney who represents many small businesses, I am concerned about the provisions of S.B. 107 and agree with previous objections. Small businesses do not succeed unless their employees succeed. Employers take wrongful termination lawsuits seriously. Terminating an employee is often not an easy decision. Wrongful termination cases are expensive for employers to defend themselves against, take a long time to respond to and may result in costly damage payments. Senate Bill 107 will make that process even more expensive. Small business owners would be required to retain records for a longer time, creating additional administrative burdens and increasing the cost of business liability insurance. We are barely seeing the light at the end of the pandemic tunnel, so now is not the time to burden job creators with additional costs that may make putting Nevadans back to work a prohibitive proposition.

DAVID EDELBLUTE (Henderson Chamber of Commerce):
You have my written opposition statement (Exhibit C) to S.B. 107 on behalf of the Henderson Chamber of Commerce. As an attorney who represents a variety of businesses, including small, family-owned ones, I see many challenges presented by S.B. 107. Increasing the statute of limitations for wrongful termination will negatively impact businesses when they desperately need legislators' support.

By increasing the limitations period to four years, section 1 of S.B. 107 doubles employers' exposure to liability and create conflicts with State and federal laws. *Nevada Revised Statutes* 608.115 requires employers to maintain wage records for two years. The Fair Labor Standards Act of 2020 requires employers to maintain pay records for two years and all other files for three years. Under S.B. 107, the likelihood of claims filed without wage or other records will increase—defeating the purpose of a longer limitations period.

Section 2 of S.B. 107 would increase the limitations period for other claims. Minimum-wage violation claims have a two-year statute of limitations; fiduciary duty claims, three years.

PAUL ENOS (CEO, Nevada Trucking Association):
The Nevada Trucking Association opposes S.B. 107 for the same reasons as previous testifiers. It will create additional burdens on employers.

ALEXIS MOTAREX (Associated General Contractors, Nevada Chapter):
Associated General Contractors, Nevada chapter, opposes S.B. 107.

BRIAN REEDER (Nevada Contractors Association):
As a major employer in southern Nevada in small and large businesses, Nevada Contractors Association opposes S.B. 107 and extending the statute of limitations to four years.

BRYAN WACHTER (Senior Vice President, Retail Association of Nevada):
Retail Association of Nevada opposes S.B. 107 for the same reasons as the Nevada Restaurant Association, Nevada Resort Association and Vegas Chamber.

STEVEN COHEN:
I oppose S.B. 107 for the reasons expressed earlier. Claims against state government employers are almost impossible to litigate under the unity clause, the Eleventh Amendment to the U.S. Constitution. Workers' compensation vocational rehabilitation is a misnomer.

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CHAIR SCHEIBLE:
We will close the hearing on S.B. 107. Seeing no more business before the Senate Committee on Judiciary, this meeting is adjourned at 2:04 p.m.

RESPECTFULLY SUBMITTED:

Pat Devereux,
Committee Secretary

APPROVED BY:

Senator Melanie Scheible, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit Letter**	**Begins on Page**	**Witness / Entity**	**Description**
	A	1		Agenda
S.B. 107	B	1	James P. Kemp / Nevada Justice Association	Proposed Conceptual Amendment
S.B. 107	C	1	David Edelblute / Henderson Chamber of Commerce	Opposition Statement