



# Labor & Employment Law Section Newsletter

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## 2015 Legislative Update

**AB 16:** Existing law provides that a prisoner who: (1) is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation of the Department of Public Safety or residential confinement; and (2) voluntarily engages in sexual conduct with another person is guilty of a category D felony. Under federal regulations adopted pursuant to the Prison Rape Elimination Act of 2003 (42 U.S.C. §§ 15 601 et seq.), which set forth national standards relating to the Act, an agency with direct responsibility for the operation of any facility that confines inmates, detainees or residents is authorized to discipline an inmate in an adult prison or jail or a resident of a community confinement facility or juvenile facility for sexual contact with a staff member of the agency only if the staff member did not consent to the contact.

Section 7 of this bill revises existing law to provide that a prisoner who voluntarily engages in sexual conduct with a person who is not an employee of or a contractor or volunteer for a prison is guilty of a category D felony. Existing law also provides that a person who voluntarily engages in sexual conduct with a prisoner who is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation or residential confinement, is guilty of a category D felony. Section 6 provides that an employee of or a contractor or volunteer for a prison who volun-

tarily engages or attempts to engage in certain acts with such a prisoner, regardless of whether the prisoner consents to the act, commits either sexual abuse of a prisoner or unauthorized custodial conduct, depending on the type of act. Such an employee, contractor or volunteer who commits: (1) sexual abuse of a prisoner is guilty of a category D felony; (2) unauthorized custodial conduct by engaging in certain acts is guilty of a gross misdemeanor; or (3) unauthorized custodial conduct by attempting to engage in certain acts is guilty of a misdemeanor.

The definitions of the terms "sexual abuse" and "unauthorized custodial conduct," are based on the definition of the term "sexual abuse" as it is used for purposes of the federal regulations adopted pursuant to the Prison Rape Elimination Act. Effective October 1, 2015

**AB 89:** This bill authorizes a private employer to adopt an employment policy that gives preference in hiring to a veteran or the spouse of a veteran. This bill also authorizes the Nevada Equal Rights Commission to review the uniform application of such an employment policy upon receiving a written complaint from a prospective employee of the employer and requires the employer, upon a finding by the Commission that the policy has not been applied uniformly, to

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## Nevada Supreme Court Rejects State Tort Claim for Third-Party Retaliatory Discharge

In the recent case of *Brown v. Eddie's World, Inc.*, a unanimous Nevada Supreme Court ruled that an employee has no state common law claim for tortious discharge in violation of public policy (retaliatory discharge) where the employee was discharged in alleged retaliation for the actions of a closely associated third party.

At issue was the termination of Karen Brown, an assistant manager of a candy and nut store, Eddie's World, Inc., after her fiancée filed a complaint with the Nevada Gaming Control Board (GCB) regarding some of the slot machines located in a nearby hotel-casino. Both companies were under common ownership and management. Ms. Brown's fiancée never worked for either company, but management knew he was engaged to Karen Brown. According to Ms. Brown, after her fiancée complained to the GCB, her employer began to assign her job duties to other employees and then fired her. Contending that her discharge was in retaliation for her fiancée's GCB complaint, Ms. Brown brought a state

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## Labor and Employment Law Section Executive Board



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Government Employment Law

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revise his or her employment policy in accordance with the recommendations of the Commission.

Existing law generally provides for preferential employment in public employment and the construction of public works for certain veterans. Under existing law, before a person can be issued a commercial driver's license by this State, the person is required, among other things, to pass a driving skills test for driving a commercial motor vehicle. This bill provides an exemption to this requirement for certain persons who have experience driving a commercial motor vehicle because of their service in the Armed Forces of the United States.

Existing law also generally provides for the regulation of professions in this State. This bill authorizes certain qualified physicians, podiatrists and other providers of health care and professionals to obtain an expedited license by endorsement to practice their respective professions in this State if the physician, podiatrist or other provider of health care or professional: (1) holds a valid and unrestricted license to practice in the District of Columbia or another state or territory of the United States; (2) is an active member or veteran of, the spouse of an active member or veteran of, or the surviving spouse of a veteran of, the Armed Forces of the United States; and (3) meets certain other requirements. Specifically, an expedited license by endorsement may be obtained from the Board of Medical Examiners, the State Board of Nursing, the State Board of Osteopathic Medicine, the State Board of Podiatry, the State Board of Optometry, the Board of Examiners for Audiology and Speech Pathology, the State Board of Pharmacy, the State Board of Physical Therapy Examiners, the Board of Occupational Therapy, the Board of Massage Therapists, the Board of Psychological Examiners, the Board of Examiners for Marriage and Family Therapists and Clinical Professional Counselors, the Board of Examiners for Social Workers and the Board of Examiners for Alcohol, Drug and Gambling Counselors. This bill requires a regulatory body to develop opportunities or reciprocity of licensure for such persons who hold a professional license

that is not recognized by this State.

This bill adds the Board of Examiners for Social Workers to the list of persons and governmental entities to whom records of criminal history must be disseminated by an agency of criminal justice upon request. This bill establishes procedures under which the state has authority to withhold or suspend, or to restrict the use of professional, occupational, and recreational licenses of persons who: (a) Have failed to comply with a subpoena or warrant relating to a proceeding to determine the paternity of a child or to establish or enforce an obligation for the support of a child; or (b) Are in arrears in the payment for the support of one or more children, are repealed by the Congress of the United States.

This section of the bill becomes effective becomes effective on the date on which the provisions of 42 U.S.C. § 666 become effective. All other sections of the bill became effective July 1, 2015.

**AB 172:** Existing law requires that mechanics and workers employed on certain public works be paid at least the wage prevailing for the type of work that the mechanic or worker performs in the locale in which the public work is located. This bill prescribes the manner in which the Labor Commissioner must determine the prevailing wage for such a public work. Senate Bill No. 119 of this legislative session exempted public works of school districts and the Nevada System of Higher Education from the requirement to pay prevailing wage. Section 6.7 of this bill repeals those provisions of Senate Bill No. 119, thereby making school districts and the Nevada System of Higher Education subject to that requirement. The Labor Commissioner must set the prevailing wage on these public works at 90 percent of the rate of prevailing wage on other public works. Under existing law, any contract for a public work whose cost is \$100,000 or more is subject to the prevailing wage requirements. This bill raises the threshold for the applicability of prevailing wage requirements from \$100,000 to \$250,000. Section 3 also exempts charter schools from prevailing wage requirements. This bill provides that the amendatory provisions of this bill do not apply to a public work awarded before the effective

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date of this bill. Effective June 9, 2015

**SB 62:** Existing law provides that certain state employed promotional appointees who fail to attain permanent status in the position to which they were promoted, or who are dismissed for cause other than misconduct or delinquency, must be restored to the positions from which the appointees were promoted. This bill requires the Personnel Commission to adopt regulations requiring that a promotional appointee who fails to attain permanent status in the promoted position must be: (1) restored to the position from which he or she was appointed unless doing so would displace another employee with greater seniority; (2) placed in a comparable position for which a vacancy exists; or (3) if no such positions exist, appointed to an equal or lower position for which a vacancy exists or placed on an appropriate reemployment list. This bill authorizes the Commission to adopt regulations that provide for filling positions in the classified service without competition by the appointment of current employees with disabilities to certain positions. This bill requires an appointing authority to also consider whether an employee with a disability can be appointed to a position at or below the grade level of the employee's current position before considering separation from service or disability retirement.

This bill eliminates the requirement for delivery in person or by mail and requires the Commission to adopt regulations setting forth the procedures for properly notifying a classified employee of dismissal, involuntary demotion or suspension. This bill authorizes the Commission to adopt regulations setting forth the circumstances under which a person who holds a valid registry identification card to engage in the medical use of marijuana is subject to disciplinary action or required to be referred to an employee assistance program. This bill authorizes an appointing authority to ask an employee who admits to consuming marijuana for proof that the employee holds a valid registry identification card to engage in the medical use of marijuana. This bill adds an additional circumstance to authorize an appointing authority to request that an employee submit to a screening test if the employee has or is involved in a work-

related accident or injury. This bill authorizes the Commission to adopt regulations relating to applicants for such positions whose screening test indicates the presence of marijuana and who hold valid registry identification cards to engage in the medical use of marijuana. Effective date: July 1, 2015 or upon passage of the regulations.

**SB 340:** Existing law authorizes the Labor Commissioner to impose an administrative penalty against a person who violates certain provisions related to contracts for public works in this State. A person against whom such an administrative penalty is imposed may not be awarded a contract for a public work for a period of 3 years, and upon a second or subsequent offense, for a period of 5 years. In addition to the prohibition on being awarded a contract for public works, such a person is also subject to the suspension of his or her contractor's license by the State Contractors' Board for the length of the prohibition. Under federal law, a contractor may be excluded for a period of time from receiving contracts from the Federal Government if the contractor is debarred. This bill provides that, if a contractor is excluded for a period of time from receiving contracts from the Federal Government as a result of being debarred, the contractor may not be awarded a contract for a public work in this State for the term of the debarment. Effective October 1, 2015

### **Service Animals**

**AB 157:** Service animals and service animals in training. This bill revises the definition of the terms "service animal" and "service animal in training" to include only dogs and miniature horses trained or being trained to do work or perform tasks for the benefit of a person with a disability. Existing law in Nevada: (1) authorizes a person who is blind, deaf or has a physical disability to use a service animal. This bill revises those provisions of existing law to include a person with any type of disability. This bill also provides that an employer is not required to allow an employee to keep a service animal that is a miniature horse with him or her, and a place of public accommodation or common carrier is not required to admit a service animal or service animal in training that is a miniature horse, if it would be unreasonable to comply, using criteria for determining reasonableness set forth in federal regulations.

Effective date: October 1, 2015

### **Medical related bills**

**SB 447:** Medical marijuana. Existing law does not require an employer to modify the job or working conditions of an employee who engages in the medical use of marijuana, but does require that an employer must attempt to make reasonable accommodations for the employee under certain circumstances. This bill provides that a law enforcement agency is not prohibited from adopting policies or procedures that preclude an employee from engaging in the medical use of marijuana. Effective date: July 1, 2015

### **Petitions for Judicial Review**

**AB 53:** This bill codifies into statute the definition of "substantial evidence" in case law for purposes of the standard for judicial review. (See, e.g., *State Empl't Sec. Dept. v. Hilton Hotels Corp.*, 102 Nev. 606 (1986)). This bill specifies that a petition for judicial review must be served upon: (1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and (2) The person serving in the office of administrative head of the named agency; and (d) Be filed within 30 days after service of the final decision of the agency. The bill further provides that within 45 days after the service of the petition for judicial review or such time as is allowed by the court (a) The party who filed the petition for judicial review shall transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency. (b) The agency that rendered the decision which is the subject of the petition shall transmit to the reviewing court the original or a certified copy of the remainder of the record of the proceeding under review. Effective July 1, 2015

### **Ethics**

**AB 60:** Investigations of public officer or employee ethics. Provides that within 45 days after the Ethics Commission receives a third party request for an opinion regarding the conduct of a public officer or employee, the Commission shall determine whether it has jurisdiction concerning the request, unless the public officer or employee waives the time limit. If the Commission determines that it has jurisdiction concerning the request, the Executive Director

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must complete the investigation and make a recommendation regarding the request within 70 days after the jurisdictional determination, unless the public officer or employee waives the time limit. The investigative file relating to a request for an opinion, which includes any information obtained by the Commission during the course of an investigation related to the request, is confidential. The bill of the Ethics Law is a willful violation. The Commission may consider other factors in the disposition of the matter if they bear a reasonable relationship to the determination of the severity of the violation. Effective date: May 27, 2015

### Peace officers

**AB 162:** Peace officers. Authorizes certain peace officers to wear a portable event recording device while on duty; requires certain law enforcement agencies to adopt policies and procedures governing the use of portable event recording devices. This bill provides that establishes that any record made by a portable event recording device is a public record which may be: (1) requested only on a per incident basis; and (2) inspected only at the location where the record is held if the record contains confidential information.

This bill exempts the use of portable event recording devices from the provisions governing the interception of certain communications. With certain exceptions, this bill prohibits the surreptitious electronic surveillance on: (1) the grounds of any facility owned or leased by the State of Nevada; (2) the property of a public school; or (3) a campus of the Nevada System of Higher Education.; and provides other matters properly relating thereto. Effective date: January 1, 2016

### Military matters

**AB 388:** Military service pay. This bill revises provisions of NRS 281.145 and requires a public officer or employee who is an active member of the National Guard or a reserve component of the Armed Forces of the United States to be relieved from his or hers duties as a public officer or employee to serve under orders for training and deployment for 15 days in a 12-month period without loss of the employee's state compensation.

This bill also amends the statute to

provide that if the employee's schedule includes a Saturday and/or Sunday the employee will be relieved from his or her duties to serve under orders for training that is scheduled on a Saturday or Sunday. If the employee's military pay is less than his or her state pay, the employee will be eligible to receive just the difference between his or her state pay and military pay. Effective date: July 1, 2015

### Pay related bills

**AB 24:** Travel charge cards. Authorizes payroll offsets to recover delinquent balances on state issued travel charge cards. Effective date: October 1, 2015

**AB 466:** Payroll deductions. This bill authorizes payroll deductions for loans or other distributions to state officers or employees from the Renewable Energy Account. Effective date: June 4, 2015

**SB 26:** Withholding of pay. Authorizes the State Controller to withhold income from the wages of a person who owes a debt to a state agency after a judgment has been obtained against the person; and requires the Administrator of the Employment Security Division of the Department of Employment, Training and Rehabilitation to furnish to the State Controller, upon request, the name, address and place of employment of any person listed in the records of the Division. Effective date: May 6, 2015

**SB 146:** Existing law requires an employer to pay an employee wages for each hour the employee works. (NRS 608.016) Existing federal regulations allow employees who work shifts of 24 hours or more to agree to not be paid for a sleeping period not to exceed 8 hours under certain circumstances. (29 C.F.R. § 785.22) This bill provides that an employee who is employed in a certain residential facility and who works for 24 hours or more may agree to not be paid for a sleeping period not to exceed 8 hours if adequate sleeping facilities are provided by the employer. Effective July 1, 2015

**SB 224:** Section 16 of Article 15 of the Nevada Constitution defines the term "employee" and requires each employer to pay a certain minimum wage to each employee. Existing law imposes certain additional requirements relating to compensation, wages and hours of employees. This

bill establishes a conclusive presumption that a person is an independent contractor, rather than an employee, if certain conditions are met. This bill excludes the relationship between a principal and an independent contractor from those relationships that constitute employment relationships for the purpose of requiring the payment of a minimum wage.

The provisions of this bill apply to any action or proceeding to recover unpaid wages pursuant to a requirement to pay a minimum wage in which a final decision has not been rendered as of the effective date of this bill. Effective June 2, 2015

### Reporting

**SB 83:** Report of abuse, fraud, or waste. The Division of Internal Audits of the Department of Administration has a telephone hotline at which a person may report to the Division of Internal Audits concerns relating to abuse, fraud or waste with respect to public money received and used by an Executive Branch agency or certain contractors. This bill designates as confidential any information reported through the telephone hotline, including the identity of the person who reported the information. This bill also prohibits the Division from disclosing the confidential information with certain limited exceptions. Effective date: May 6, 2015

### Worker's compensation

**SB 153:** Workers' compensation. This bill revises the circumstances under which certain occupational diseases are conclusively presumed to arise out of and in the course of employment. It also limits the compensation to which a person is entitled to receive for certain occupational diseases. This bill also provides that a person who files a claim for the disease after he or she retires from employment as a police officer, firefighter or arson investigator is not entitled to receive any compensation for that disease other than medical benefits.

A person who files a claim for a disease of the heart after he or she retires from employment as a firefighter, arson investigator or police officer is not entitled to receive any compensation for that disease other than medical benefits. This bill provides that frequent or regular use of a tobacco product within 1 year, or a material departure from a physician's prescribed plan of care by a person within 3 months,

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immediately preceding the filing of a claim for compensation excludes a person who has separated from service from the benefit of the conclusive presumption provided in subsection 5 of the bill. Effective date: Varying effective dates starting June 8, 2015.

**SB 231:** Controlled substances. This bill sets forth that a provider of health care (not including a pharmacist or hospital) may dispense only an initial 15-day supply of a schedule II or III controlled substance to an injured employee. This bill requires that an insurer pay or deny a bill within 45 days after receipt.

This amendment requires that an employee injured on the job not receive compensation whenever an injury occurs to the employee while the employee is intoxicated or under the influence of a controlled or prohibited substance, unless the employee can prove by clear and convincing evidence that his or her intoxication or being under the influence of a controlled or prohibited substance was not the proximate cause of the injury. This bill provides that the employee is intoxicated or under the influence of a controlled or prohibited substance for the purposes of not receiving compensation whenever the employee meets or exceeds the limits for intoxication or use of a controlled or prohibited substance as set forth in NRS 484C.110, which prescribes such limits in the context of driving under the influence. The results of any alcohol or drug test performed as a result of an injury must be made available to an insurer or employer upon request. Effective date: Upon passage of the regulations or January 1, 2016

**SB 232:** Workers' Compensation. This bill revises NRS 616C.390 to provide that an employee has 1 year to file an application to reopen a claim if the employee was not incapacitated from earning full wages for at least 5 consecutive days or 5 cumulative days within a 20-day period.

This bill provides that an employee who has sustained more than one permanent partial disability may not receive compensation for any portion of an injury that is based on a combined permanent partial disability rating for all the employee's injuries that exceeds 100 percent. Effective date: January 1, 2016.

### Anti-SLAAP

**SB 444:** Anti-SLAAP. Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned."

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is immune from civil liability for claims based upon that communication. Existing law also provides that if an action is brought against a person based upon such good faith communication, the person may file a special motion to dismiss the claim. If a special motion to dismiss is filed, the court must first determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

If the court determines that the moving party has met this burden, the court must then determine whether the person who brought the claim has established by clear and convincing evidence a probability of prevailing on the claim. While the court's ruling on the special motion to dismiss is pending and while the disposition of any appeal from that ruling is pending, the court must stay discovery. This bill revises provisions governing a special motion to dismiss a claim that is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

This bill increases from 7 days to 20 judicial days the time within which a court must rule on a special motion to dismiss. This bill replaces the determination of whether a person who brought the claim has established by clear and convincing evidence a probability of prevailing on the claim and instead requires a court to determine whether the person has demonstrated with prima facie evidence a probability

of prevailing on the claim.

This bill also authorizes limited discovery for the purposes of allowing a party to obtain certain information necessary to meet or oppose the burden of the party who brought the claim to demonstrate with prima facie evidence a probability of prevailing on the claim. This bill requires the court to modify certain deadlines upon a finding that such a modification would serve the interests of justice. Effective date: June 8, 2015

### Forged or fraudulent liens

**SB 197:** Forged or fraudulent liens. Prohibits a person from filing, registering, recording or presenting, in any public office, a lien or other encumbrance against the property of a public officer, candidate for public office, public employee or participant in an official proceeding or a member of the immediate family of such persons, if the lien or encumbrance is forged or fraudulently altered, contains a false statement of material fact or is filed, registered, recorded or presented in bad faith for the purpose of harassing or defrauding such persons. Additionally it provides for punishment and fines if such action occurs. Effective date: October 1, 2015

### Liability

**SB 223:** Existing law makes an original contract or liable for any indebtedness incurred by a subcontractor for labor costs, including benefits payable to a trust established by a collective bargaining unit.

This bill provides that a prime contractor is not liable for the labor costs of a subcontractor to the extent those costs are: (1) interest, liquidated damages, attorney's fees or costs resulting from a subcon-

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## Disclaimer

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## State Tort Claims

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common law claim for tortious discharge in violation of Nevada public policy. Nevada has long recognized a limited number of common law claims for tortious discharge in violation of public policy, including where the terminated employee complained about suspected illegal conduct to gaming authorities or other regulatory/law enforcement agencies.

Yet, the Nevada Supreme Court had not previously addressed whether an employee fired in retaliation for another person's report to law enforcement could bring a state tort law claim for retaliatory discharge. In considering whether to recognize such a claim, the Court acknowledged that a number of federal fair employment statutes prohibiting retaliatory discharges, such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, have

been interpreted to encompass similar third-party retaliation claims - such as the termination of one spouse in retaliation for protected conduct of the other spouse. See KZA Employer Report of December 11, 2011.

However, the Court declined to expand Nevada tort law to include claims of third-party retaliatory discharge, noting that state "tortious discharge actions are severely limited," and require an employment relationship with the person whose acts led to the challenged retaliation. In the Court's view, recognition of Ms. Brown's claim would result in the theory of third-party retaliatory discharge having "no logical stopping point."

The four "take-aways" from the Brown decision for employers are:

- The Nevada Supreme Court continues to view the common law claim for retaliatory discharge in violation of public policy as severely

limited to rare and exceptional situations where the employer's conduct violates strong and compelling public policy.

- An employee who is treated adversely cannot base a common law tort claim upon retaliation for a non-employee's "whistleblowing."
- An employee can sue under applicable federal fair employment statutes when he or she has suffered an adverse employment action in retaliation for the actions of a closely associated third-party that are protected under such statutes.
- The Nevada Supreme Court's ruling left open the possibility that an employee who is retaliated against because of the actions of another closely associated employee can maintain a state law tort claim for retaliatory discharge.

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tractor's failure to pay contributions or other payments to, or on behalf of, an employee; or (2) any amounts for which the prime contractor did not receive adequate notice. This bill reduces the statute of limitations period applicable to commencing an action against a prime contractor for the recovery of wages or benefits due to an employee of a subcontractor. Existing law also provides that a mechanics' or materialmen's lien claimant must provide a notice of right to lien to an owner of property upon which work has been performed unless the claimant is a person who only performed labor on the project.

This bill requires a prime contractor or subcontractor

who participates in a health or welfare fund, or other plan for the benefit of employees, to provide to the fund or plan notice of the name and location of the project upon the commencement of work on a project. This bill excludes from the exemption to the notice provisions of NRS 108.245 an express benefit trust which receives a portion of the compensation paid to a laborer.

This bill requires an administrator of a Taft-Hartley trust that does not receive a benefit payment required to be made to the trust by a general contractor or subcontractor, within 75 days after the required payment is deemed delinquent, to provide notice to the general contractor and subcontractor that the benefit payment has not been received. Effective October 1, 2015.

## Recent EMRB Decisions

A1-046108; [Las Vegas City Employees Association and Val Sharp v. City of Las Vegas](#).

Val Sharp was a former president of the LVCEA, and at the time of the incidents in question, was a representative for that union. He was assigned to represent two painters who worked for the City. In meeting with them he inquired about the

person who had complained about them.

In inquiring about that third party, he asked about the third party's sexual orientation, whether she was fat, whether she was a deaf/mute and whether she grunted to communicate.

Apparently the painters were offended by the questions and reported Sharp's actions to the City, who initially did nothing

because Sharp had been acting in his capacity as a representative.

In bringing the situation to the union's attention, to see if it would act, the current president stated to Human Resources "you guys need to take care of it" and "you need to do what you need to do to address the

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## Recent EMRB Decisions

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issue.”

The City thereupon suspended Sharp for one day. This was followed by the union and Sharp filing a prohibited practice complaint, alleging that the City had interfered in internal union business.

In this opinion the Board found that the City had not committed a prohibited practice and that it did not interfere in the union's internal administration because the City's actions were prompted by the union's invitation for the City to discipline Sharp. The Board specifically made no findings on the issue of whether the City's actions would have been permissible in the absence of the Association's invitation.

### **Item 807; AI-046068; Elko County Employees Association v. Elko County.**

Marcey Logsden and Richelle Rader were both paramedics for the Elko County Ambulance Service, which is an enterprise fund operation. Both employees had hourly wage rates significantly higher than those of their co-workers, who were in lower graded classifications.

From 2009 to 2012 the service operated at a significant deficit. Since 2010 the County limited Logsden and Rader opportunities to work both extra overtime shifts and to work scheduled overtime. The association thereupon filed the instant complaint, alleging that the County discriminated against the two paramedics based upon personal reasons and/or on the basis of sex.

The County countered that overtime was given to employees who made a lesser hourly rate in order to minimize the amount of overtime paid in order to reduce the amount of the deficit. The Board found that personal reasons does not include the wage rate that is paid to an employee and thus the County did not discriminate on the basis of personal reasons.

With respect to sex, the Board found that the women had made a prima facie case but that the County had articulated a legitimate non-discriminatory reason for its actions based upon financial concerns. It should be noted that Chairman Larson dissented in the decision and wrote a

lengthy statement of dissent, who believed that the two women had been discriminated against by the County.

### **AI-046116; David O'Leary v. Las Vegas Metropolitan Police Department.**

O'Leary was a captain who had worked at Metro for almost 25 years with a clean record. In the summer of 2013 he was approached by a friend, DJ Ashba, the lead guitarist for Guns N' Roses, who was looking for a helicopter ride to the Grand Canyon for part of a marriage proposal to his girlfriend. O'Leary learned that a private company could not do this.

However, an employee in Metro's air unit volunteered a fly-along for this purpose as the department had done a number of fly-alongs for individuals. A few days after the fly-along Ashba posted a statement on social media about the event. The story ended up going viral. That same day O'Leary received a telephone call from his immediate supervisor about the posting. Metro alleged that O'Leary had acted inappropriately in arranging the fly-along, among other things.

After refusing requests to resign, O'Leary later was only sustained on the charge that the fly-along brought discredit to the department and that he used his department vehicle to transport passengers.

In December O'Leary was again asked to resign or else be demoted. O'Leary thereupon resigned. Later he claimed a unilateral change and discrimination based on political or personal reasons. The Board denied the unilateral change allegation as Metro's breach was an isolated incident. However, the Board agreed that O'Leary was discriminated against for political reasons; namely the fallout from the social media posting and how that affected the department's attempt to get the More Cops tax passed. O'Leary was thereupon reinstated with back pay.

### **Case No. 2015-002, RTC of Washoe County v. AFSCME.**

AFSCME represents three bargaining units, one of which is an administrative unit of 11 employees. Eight of these 11

employees filed a petition with their employer, requesting that the employer withdraw its recognition of AFSCME as their exclusive representative.

So the RTC filed a petition with the EMRB requesting permission to withdraw its recognition.

AFSCME did not file a response to this petition. Accordingly, the Board granted the RTC's request, noting that it appeared AFSCME no longer enjoyed majority support of the unit. The employees thus will become non-union at this time.

The following two cases were brought by union members against their respective unions, alleging that their union breached its duty of fair representation. As the recognized bargaining agent, a union owes a duty of fair representation to the employees in the bargaining unit it represents. **Rosequist v. Int'l Ass'n of Firefighters Local 1908, 118 Nev. 444, 49 P.3d 651 (2002).** A union breaches its duty of fair representation when it acts in a manner that is arbitrary, discriminatory or in bad faith towards the employees it represents. **Weiner v. Beatty, 121 Nev. 243, 116 P.3d 829 (2005).**

A union's actions are arbitrary only if the union's conduct can be fairly characterized as so far outside a "wide range of reasonableness that it is wholly 'irrational.'" **Bybee & Gingell v. White Pine County School District, Item No. 724B (2011).** A union's actions are discriminatory when they are intentional, severe, and unrelated to legitimate union objectives. **Crom v. Las Vegas-Clark County Library District, Item No. 752E (2013).** Furthermore, bad faith occurs when there is evidence of fraud, deceitful action or dishonest conduct. *Id.*

With this as the background, we now turn to the two cases:

### **Case No. AI-045847 through AI-045864, Deborah Boland et al v. SEIU, Local 1107 (Item No. 802).**

SEIU, Local 1107 represented various units at UMC and its Quick Care centers. One of these was a physicians' unit, which became recognized in 1999. SEIU subsequently negotiated a collective bargaining agreement, which expired in 2002. As it sought a successor agreement,

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problems developed. Testimony elicited at the hearing revealed that the physicians' group on several occasions disregarded the strategy developed by SEIU. Instead, the physicians' group met privately with Clark County Commissioners and also appeared on a political television show.

They further advocated for protecting their own employees by eliminating positions in other bargaining units or nurses and ancillary staff. These comments upset not only the other employees, but also the staff at SEIU, which ultimately made the decision to withdraw as the physicians' bargaining agent. The physicians then filed a breach of the duty of fair representation over the withdrawal, the failure to negotiate a successor agreement, and for not continuing to represent them on outstanding grievances.

The Board held that SEIU had the right to withdraw and that its decision was not arbitrary, discriminatory or in bad faith given the circumstances as presented. SEIU's decision that it could no longer act on behalf of the physicians was not "so far outside a wide range of reasonableness to be irrational". Furthermore, by withdrawing, SEIU was under no legal obligation to continue bargaining for a successor agreement.

However, the Board did find that SEIU breached its duty to process the grievances outstanding at the time of its withdrawal, especially after it stated in writing that it would do so for grievances filed before June 30, 2002. Using concepts related to attorneys withdrawing representation of a client, the Board held that "where an employee organization voluntarily withdraws as the bargaining agent, and is not replaced by a new bargaining agent, the withdrawing organization breaches the duty of fair representation when it abandons the existing grievances or does not otherwise take steps to eliminate any material adverse effects."

Here, the Board noted that SEIU basically abandoned the outstanding grievances and accordingly ordered SEIU to take steps to ensure no material adverse effect by processing the grievances or relinquishing the grievances to the employees, if so requested by them.

### **Case No. AI-046111, Justin Simo v. Henderson Police Officers Association (Item No. 801).**

Justin Simo was a member of the SWAT team for the City of Henderson. On February 27, 2013, he was driving his SWAT vehicle home when the vehicle hit a median on I-15. Instead of pulling off to the side of the road to inspect the damage, Simo continued to drive the vehicle. A passerby noted sparks coming from one of the wheel rims. Simo made it to the gate of his community, where the vehicle caught fire, totally destroying the vehicle and some of its contents. At this time his employer also opened an investigation into a 2012 vehicle accident. The City of Henderson ultimately terminated Simo for untruthfulness over his 2012 accident, untruthfulness related to his 2013 accident, and for willfully damaging

department property related to his 2013 accident. Simo requested his union file grievances for each accident. The HPOA's grievance committee met and reviewed the case files as presented by the department and decided to file a grievance over the 2012 accident but not the 2013 accident.

Simo filed a breach of the duty of fair representation against his union. The duty of fair representation requires that a union conduct some minimal investigation before deciding whether to file a grievance. *Vos v. City of Las Vegas*, Item No. 749 (2014). The Board found that HPOA had met this requirement by reviewing the employer's case file and thus its decision was not arbitrary. However, the Board did find that the HPOA was arbitrary by not filing a grievance over that portion of the 2013 accident that accused Simo of being untruthful.

A union breaches its duty of fair representation if it ignores a meritorious grievance. *Vaca v. Sipes*, 386 U.S. 171 (1967). Here, there was testimony from a union official that he believed Simo had not lied about this accident. Moreover, when a police officer is accused of untruthfulness, he/she is labelled a "Brady cop", which essentially kills that person's career in law enforcement. Given both the statement supporting Simo, as well as the important significance of not challenging this label, the Board found that the HPOA was arbitrary in not pursuing that portion of the 2013 grievance related to Simo's honesty. The Board thereupon ordered the HPOA to process that portion of the 2013 grievance on Simo's behalf and to also post a notice at its union office for a period of 30 days.

*Please note that summaries of recent decisions are provided for informational purposes only and are not intended to substitute for the opinions of the Board. These summaries should not be cited to or regarded as legal authority. The EMRB will provide copies of the decisions upon request. They also may be found on our website.*

## Corrections and Clarifications

In the March 2015 issue of the Labor & Employment Section Newsletter, the article entitled "High Court Says No Pay for Security Check Time" stated "[w]hile the particular activity at issue in *Busk* was found not to be compensable under the FLSA or Nevada law, the result may be different depending upon the activity. Therefore, prudent Nevada employers should check with their counsel before relying on and applying the decision in their contexts." As a clarification, the holding in *Busk* did not make any specific finding under Nevada Revised Statutes Chapter 608.