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TESTIMONY SUPPORTING SB 22

Senate Finance Committee
March 26, 2003

Chairman Raggio and members of the Committee, for the record I am Jon Sasser representing Washoe Legal Services, Nevada Legal Services and the Washoe County Senior Law Project. Each of these programs represent low income individuals who are denied equal opportunities in employment. We support SB 22's proposed changes to Nevada's employment discrimination laws and applaud Sen. Neal for introducing this bill.

Under current N.R.S. 613.310(2) employers who have less than 15 employees are not required to comply with Nevada's employment discrimination laws. I suppose the rationale is to protect the "little guy" from expensive litigation which may drive him/her out of business.

In my experience with the statute, the "little guy" isn't necessarily so little. While I don't have extensive practice experience in this area, I did have one case which embodied both of the issues in SB 22. I filed suit in federal court a few years ago alleging that my client had been discharged from his employment due to his age and/or perceived disability in violation of both state and federal law. My client's employer was a corporation with less than 15 employees. However, the principal owner/executive of that corporation also owned another corporation with some interlocking employees. Both companies did business in the same building which he also owned. Between the two corporations there were over 20 employees. I argued that the two companies should be considered as a single entity for purposes of N.R.S. 613.310(2). Although NERC Initially agree with me, the court felt otherwise and I lost the case.

I felt badly for my client because he did not suffer any less from the alleged discrimination than an employee of a slightly larger company. Due to the

financial health and insured status of the employer, I also do not believe that there was any financial inability to pay the damages sought.

This limited state remedy should not cause a great burden on smaller employers. NERC damages are limited by NRS 233.170 to economic damages (with a 2 year limit on back pay) plus interest. By contrast, Federal Court where virtually all of these cases are brought today has no 2 year limit on back pay, can award non-economic damages like emotional distress and punitive damages.

Attached to my testimony are several documents provided by LCB staff to the Senate Commerce Committee for its February 14th and March 7th work sessions. Included is a chart showing that many other states have lowered their exemptions below 15 employees. Also included are two statements to the Committee from Boyd School of Employment Law Professor Rob Correales which conclude that SB 22 would not create an unreasonable burden on small business.

Also attached is a fiscal note from the Nevada Equal Rights Commission (NERC) seeking $444,579 for the biennium. The note is based on a projected caseload growth of 180 cases annually and an additional 12 public hearings a year needing Attorney General time. These projections are highly speculative and are based upon questionable assumptions. They assume that persons with state law claims only against smaller employers will behave similarly to current complainants who are largely utilizing NERC as a necessary procedural first step on the way to the more lucrative prospects of federal court.

The fiscal note also ignores the delay in implementing the law. An act of discrimination by an employer of 5-14 employees would not become unlawful until the effective date of the Act (10/1?). The victim of discrimination would then have 180 days to file a complaint with NERC (see NRS 613.430). Under NRS 233.170, NERC must then complete its informal meeting, investigative and mediation/reconciliation processes before a case could go to public hearing. It is highly doubtful that any case could go to public hearing within the biennium and even more doubtful that an additional DAG could be justified.

We ask you to eliminate the current "license to discriminate" by passing SB 22. I would also ask you to reject the fiscal note as too speculative. If and when NERC can document that SB 22 has created any additional costs, then it can seek an appropriation.

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KENNY C. GUINN
Governor

STATE OF NEVADA

MYLA C. FLORENCE
Director

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DIRECTOR'S OFFICE
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February 27, 2003

MEMORANDUM

TO: Senator Randolph Townsend
Chairman, Senate Commerce and Labor

John P. Comeaux, Director
Department of Administration

FROM: Martin Ramirez, Chief Financial Officer
Department of Employment, Training and Rehabilitation

SUBJECT: Revision Fiscal Impact of SB22

It has come to our attention that our supporting document on the fiscal impact of SB22 had a slight calculation error. The 0,000.00 for Public Education, to inform the employers of their responsibility should SB22 become law, was duplicated in the last line of our memorandum. It should read "Total fiscal impact of SB22 for the 2003-2005 biennium would be $444,579 with ADA or $371,643 without ADA." Enclosed is the revised attachment.

If you have any questions, please feel free to contact my office at (775) 684-3977.

mr/lb

Enclosure

cc: Linda Chandler Law, Office of the Governor
Myla C. Florence, Director
Lynda Parven, Administrator, NERC

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STATE OF NEVADA
DEPARTMENT OF EMPLOYMENT, TRAINING, AND REHABILITATION
NEVADA EQUAL RIGHTS COMMISSION
S.B. 22 FISCAL IMPACT

1.5 New Investigator Positions - Grade 32 WITH AB74

	SFY04	SFY05
Salary	70,530	74,057
Furniture (Professional setup)	5,376	0
Computer (Including software)	3,800	0
Non-State Owned Rent	5,220	5,220
Misc. Operating costs	5,268	5,268
Travel	200	200
Training	220	220
Advertising (Public Education)	1,000	1,000
Deputy Attorney General	117,000	117,000
Department Cost Allocation	16,500	16,500
Total	**225,114**	**219,465**

1.0 New Investigator Positions - Grade 32 WITHOUT AB74

	SFY04	SFY05
Salary	47,020	49,371
Furniture (Professional setup)	2,688	0
Computer (Including software)	1,900	0
Non-State Owned Rent	2,610	2,610
Misc. Operating costs	3,512	3,512
Travel	100	100
Training	110	110
Advertising (Public Education)	1,000	1,000
Deputy Attorney General	117,000	117,000
Department Cost Allocation	11,000	11,000
Total	**186,940**	**184,703**

Since the Federal Equal Employment Opportunity Commission will not participate in discrimination cases involving employers with less than 15 employees, the source of funding for S.B. 22 would require a General Fund Appropriation.

The current 8,281 employers with 15 or more employees have a total of 916,573 employees. Based on the Nevada Equal Rights Commission's (NERC) current workload (approximately 1,860 cases), .20 percent of the employees file a claim. S.B. 22 introduces 11,039 additional employers with 90,164 employees to NERC's possible workload. Based on the percentage (.20%) for employers with 15 or more employees, this would result in approximately 180 additional cases (.0020 X 90,164). Disability cases make up approximately 14% of the current caseload (265 of 1860 cases); therefore, without including disability as a basis, the number of cases would increase by

approximately 155 cases. The average number of case resolutions per investigator is 11 per month or 132 per year.

In addition, as there would be neither federal remedy nor right-to-sue option for these additional complainants, they would have no other option than a NERC public hearing. Based on an estimate of 24 probable cause cases per year (13% X 180), NERC would need to hold at least 12 public hearings per year, resulting in the need for one additional full-time Deputy Attorney General at a cost of $117,000 per year.

Total fiscal impact of SB22 for the 2003-2005 biennium would be $444,579 with ADA or $371,643 without ADA.

NATIONAL CONFERENCE OF STATE LEGISLATURES
EMPLOYMENT AND INSURANCE PROGRAM

Job Discrimination Employer Size Exemptions
State Statute Chart

State	Citation	Job Discrimination Exemption by Employer Size
Alabama	§25-1-20 Age discrimination only	Fewer than 20 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Alaska	§18.80.300 (4)	No exemption
Arizona	41 §1461(2)	Fewer than 15 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Arkansas	§16-123-102(5)	Fewer than 9 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
California	Gov. Code §12926(d)	Fewer than 5 employees
Colorado	§24-34-401	No exemption
Connecticut	§46a-51(10)	Fewer than 3 employees
Delaware	§19-710(2)	Fewer than 4 employees
District of Columbia	§1-2542	No exemption
Florida	§760.02 (7)	Fewer than 15 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Georgia	§34-5-2(4) Public employees only except disability	Fewer than 15 or more employees within the state for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Hawaii	§378-1	No exemption
Idaho	§67-5902	Fewer than 5 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Illinois	§775-5/2-101(B)(1)	Fewer than 15 employees within Illinois during 20 or more weeks within the calendar year of or preceding the alleged violation; none for physical or mental disability
Indiana	§22-9-1-3 §22-9-2-1	Fewer than 6 employees, except for age-no exemption
Iowa	§216.6.6	Fewer than 4 regular employees
Kansas	§44-1002, 1100	Fewer than 4 employees
Kentucky	§§344.030(2)	Fewer than 8 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year; fewer than 15 employees for discrimination regarding disability
Louisiana	§23-302	Fewer than 20 employees within the state for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Maine	§5-4553	No exemption
Maryland	§49B-15(b)	Fewer than 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Massachusetts	§151B-1(5)	Fewer than 6 employees
Michigan	§37.2201(a)	No exemption
Minnesota	§363.01(17)	No exemption
Mississippi	No provision	
Missouri	§213-010(7) §213.070	Fewer than 6 employees within the state, except for age-applies to state public employers only with no exemption
Montana	§49-2-101	No exemption
Nebraska	§48-1102(2)	Fewer than 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year

Nevada	§613.310(1)	Fewer than 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
New Hampshire	354-A:2(vii)	Fewer than 6 employees
New Jersey	§10:5-5	No exemption
New Mexico	§28-1-2	Fewer than 4 employees
New York	Exec Law §292(5)	Fewer than 4 employees
North Carolina	§143-422.2	Fewer than 15 employees
North Dakota	§14-02.4-02(6)	No exemption
Ohio	§4112.01	Fewer than 4 employees
Oklahoma	§25-1301	Fewer than 15 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Oregon	§659.010	No exemption
Pennsylvania	§43-954	Fewer than 4 employees
Puerto Rico	§29.151	No exemption
Rhode Island	§28-5-6	Fewer than 4 employees
South Carolina	§1-13-30	Fewer than 15 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
South Dakota	§20-13-1 No provision for age discrimination	No exemption
Tennessee	§4-21-102	Fewer than 8 employees
Texas	Commission on Human Rights Act	Fewer than 15 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Utah	§34A-5-102	Fewer than 15 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Vermont	§21-495d	No exemption
Virginia	§2.1-725.B Repealed §51.5-3 Disability only	No exemption
Washington	§49.60.040	Fewer than 8 employees
West Virginia	§5-11-3	Fewer than 12 employees for each working day in each of 32 or more calendar weeks in the current or preceding calendar year
Wisconsin	§111.32	No exemption
Wyoming	§27-9-102	Fewer than 2 employees

November 2001
Sources: Research Institute of America *Employment Coordinator*
National Conference of State Legislatures
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MEMORANDUM

DATE: February 24, 2003

TO: Chairman Randolph J. Townsend and Members of Senate Commerce and Labor

FROM: Scott Young, Principal Research Analyst
Research Division

SUBJECT: **Different Employee Thresholds for Unlawful Employment Practices**

Senate Bill 22 was heard in the Senate Committee on Commerce and Labor on February 7, 2003. The bill lowers the minimum number of employees a business must have before it becomes subject to the prohibitions against certain unlawful employment practices from fifteen to five employees. A question arose regarding whether any state had different minimum numbers of employees for unlawful practices involving employees with disabilities.

States with a Higher Minimum Number for Disability

Kentucky has a higher minimum number of employees for purposes of unlawful employment practices based on disability. *Kentucky Revised Statutes* 344.030(2) provides in relevant part:

> For the purposes of KRS 344.030 to 344.110:
>
> (2) "Employer" means a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year and an agent of such a person, except for purposes of determining discrimination based on disability, employer means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of that person, except that, for two (2) years following July 14, 1992, an employer means a person engaged in an industry affecting commerce who has twenty-five (25) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding year, and any agent of that person. For the purposes of determining discrimination based on disability, employer shall not include:

(a) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
(b) A bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c) of the Internal Revenue Service Code of 1986.

Georgia also has a different threshold for application of unlawful employment practices based on disability. Pursuant to *Code of Georgia* 34-5-2(4), an employer is defined as someone with ten or more employees for purposes of sex discrimination in employment. However, under *Code of Georgia* 34-6A-2(2), an employer is defined as someone with 15 or more employees for purposes of disability discrimination.

States with a Lower Minimum Number for Disability

Illinois law establishes a minimum number of 15 employees for unlawful employment practices in general but lowers the threshold to one employee for purposes of disability. *Illinois Complied Statutes* 775-5/2-101(B) provides in relevant part:

(B) Employer.
(1) "Employer" includes:
(a) Any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation;
(b) Any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental handicap unrelated to ability or sexual harassment;

CONCLUDING REMARKS

Attached to this memorandum for your review is a chart prepared by the National Conference of State Legislatures entitled "Job Discrimination Employer Size Exemptions State Statute Chart" compiled in November 2001. Please let me know if you want further research on this topic.

SY/k:W32195
Enc.

MEMORANDUM

DATE: February 26, 2003
FROM: Robert I. Correales, Assistant Professor; John Novak, Third-Year Law Student, William S. Boyd School of Law, University of Nevada.
TO: Chair, Nevada Senate Committee on Commerce and Labor
RE: Senate Bill 22

This memorandum responds to the following question:

Does reducing the number of employees from 15 to 5 for purposes of the Nevada statute on employment discrimination mean that those employers will suddenly have to face significant added costs to conduct their businesses?

This question was raised in the context of required accommodations for employees with disabilities. In that context a witness before this committee posed a concern that he did not want see employers with 5 or less employees all of a sudden have to provide accommodations in the form of an elevator between a first and second floor of a small business for an employee with a mobility impairment.

The answer to that question is that such a situation is extremely unlikely, so as to be almost non-existent. First, unlike the Americans with Disabilities Act, which had a compliance schedule for public accommodations, no such compliance schedule exists in the Nevada statute for employers. We have found no cases in any state that required employers of this size to install elevators for mobility-impaired employees.

Again, for a more effective understanding of this issue, it is useful to revisit some of the fundamental aspects of what constitutes a "reasonable accommodation." Employees with disabilities who can perform the essential functions of a job with or without an accommodation cannot be discriminated against on the basis of their disability in employment. Of course, the employer is free to choose whoever he or she wishes to occupy a particular position as long as the decision does not violate the law. The law does not impose an affirmative duty on the employer to hire people with disabilities.

The few people with mobility impairments who can perform the essential functions of a job with or without an accommodation can request a "reasonable accommodation" upon being hired. That accommodation does not have to be provided if it would constitute an undue economic or administrative burden on the employer.

We cannot envision a case where a court or administrative agency would insist that a small employer, particularly one who is struggling for its own existence as a business, provide high-cost accommodations to an individual employee with a mobility impairment. Most accommodations in such cases would come in the form of flexibility in setting schedules to the extent to which such schedules could be reconciled with the employer's reasonable need to run its business. Even something as simple as setting a flexible schedule would yield in the face of real-world time constraints brought about by customer availability and regular business hours.

MEMORANDUM

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

Introduction

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

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

Testimony

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. What have other states done re these issues?

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

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

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

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

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

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

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

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