NEVADA'S SPECIAL DISCRIMINATION LAW FOR LOCAL GOVERNMENT EMPLOYEES

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I. Introduction

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.[2]

These are the words from the Civil Rights Act of 1866, the first federal law prohibiting discrimination based on race[3]. After passage of the Reconstruction Amendments[4], no further discrimination statutes were passed by Congress for almost a century. However, since 1964 a number of federal statutes have been enacted. The earliest of these was Title VII of the Civil

[1] Commissioner, Local Government Employee-Management Relations Board (EMRB). The views and conclusions expressed herein are those of the author based upon his review of the law, regulations and decisions of the Board and are not necessarily those of the three-member EMRB. The EMRB, a Division of the Department of Business and Industry, fosters the collective bargaining process between local governments and their employee organizations (i.e., unions), provides support in the process, and resolves disputes between local governments, employee organizations, and individual employees as they arise.

[2] 42 U.S.C. § 1981.

[3] 42 U.S.C. § 1981.

[4] The Thirteenth, Fourteenth and Fifteenth amendments to the U.S. Constitution are commonly referred to as the Reconstruction Amendments.

Rights Act of 1964[5], which prohibits discrimination on the basis of race, color, religion, sex, or national origin.[6]

This was followed by the Age Discrimination in Employment Act of 1967, which prohibits similar discrimination for those at least forty years old.[7] Congress then passed the Rehabilitation Act in 1973, which prohibits discrimination on the basis of disability for employers who were recipients of federal grants or programs.[8] The capstone of the federal discrimination laws is the Americans With Disabilities Act of 1990, which also prohibits discrimination on the basis of disability, but which extends coverage to countless more employers.[9]

Since the passage of Title VII, not only did the federal government pass a number of laws prohibiting discrimination, but most states passed similar laws, thus creating a patchwork of laws and agencies administering them. Here in Nevada chief among the discrimination laws is the law administered by the Nevada Equal Rights Commission, which not only prohibits discrimination on the same bases as federal law, but which also prohibits discrimination on the basis of sexual orientation and gender identity or expression.[10]

But Nevada's general purpose discrimination statute is not the only such statute adopted by the Nevada legislature. The Local Government Employee-Management Relations Act[11] (EMRA) also has two provisions prohibiting discrimination for certain employees working in

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[5] 42 U.S.C. § 2000e. *et seq*.

[6] 42 U.S.C. § 2000e-2(a).

[7] 29 U.S.C. § 621 *et seq*.

[8] 29 U.S.C. § 704 *et seq*.

[9] 42 U.S.C. § 12101 *et seq*.

[10] NRS 613.310 et seq. (first adopted by the Nevada legislature and signed into law in 1965).

[11] NRS 288.010 *et seq*.

Nevada. This paper discusses EMRA's discrimination provisions, comparing and contrasting them with the more widely known aforementioned statutes. The paper also discusses why an attorney might file a case under the EMRA in lieu of or in addition to other actions under these other statutes.

II. The Local Government Employee-Management Relations Act

The EMRA was originally enacted into law in 1969. Commonly known as the "Dodge Act", after State Senator Dodge, the law was a response to widespread picketing on the Strip by school teachers seeking better wages and working conditions.

A. EMRA's Prohibited Practices

As originally enacted into law, the EMRA did not contain any unfair labor practices. A number of unfair labor practices were added in 1971 by AB 178.[12] The EMRA was significantly amended in 1975 by AB 572.[13] The 1975 amendments eliminated the bargaining over "wages, hours, and conditions of employment"[14] and instead provided a laundry list of subjects of mandatory bargaining. Another change was to add a sixth type of prohibited practice to NRS 288.270(1):

> (f) Discriminate because of race, color, religion, sex, age, physical or visual handicap, national origin because of political or personal reasons or affiliations.[15]

[12] Legislature, State of Nevada, Fifty-Sixth Session (1971). (Enacted into law as Chapter 643, the unfair labor practices were called prohibited practices by the statute. *See* NRS 288.270(1). Also enacted were unfair labor practices that could be committed by local government employees and employee organizations. *See* NRS 288.270(2).).

[13] Legislature, State of Nevada, Fifty-Eighth Session (1975). (Enacted into law as Chapter 539).

[14] NRS 288.150(1).

[15] Laws of Nevada, Fifty-Eighth Session, p. 924.

A similar provision prohibiting local government employees or employee organizations from committing acts of discrimination was also passed as part of the same amendments.[16] There is little legislative history for the bill, with only one reference to this provision:

> "The committee next discussed the last page of the bill. It was decided that the language should be "race, color, religion, sex, age, physical or visual handicap or national origin or because of political or personal reasons or affiliations."[17]

As currently constituted, there are six types of unfair labor practices affecting local governments and four types affecting local government employees and employee organizations.[18]

B. Jurisdictional Issues

The Local Government Employee-Management Relations Board (EMRB), which administers the EMRA, is a limited jurisdiction administrative agency.[19] NRS 288.110(2) reads in part:

> The Board may hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of this chapter by any local government employer, local government employee or employee organization.[20]

Accordingly, any complaint filed with the EMRB must allege that each party to the complaint is either a local government employer, local government employee or employee organization as the agency has no jurisdiction over any other entities.

The act defines each of the three entities over which it does have jurisdiction. A local government employer is:

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[16] *See* NRS 288.270(2)(c).

[17] *See* Minutes of the Assembly Government Affairs Committee, April 23, 1975, p. 3.

[18] For the full list see NRS 288.270(1) for the six types affecting local governments and NRS 288.270(2) for the four types affecting local government employees and employee organizations.

[19] *See, e.g.,* NRS 288.110(2).

[20] NRS 288.110(2).

> [A]ny political subdivision of this State or any public or quasi-public corporation organized under the laws of this State and includes, without limitation, counties, cities, unincorporated towns, school districts, charter schools, hospital districts, irrigation districts and other special districts.[21]

The EMRB currently has 170 local governments which annually file with the agency. There is a notable carve-out as the EMRB has held several times that courts are not local government employers.[22] Moreover, unlike various federal and state statutes that include employers who only meet a minimum threshold of employees, there is no minimum employee requirement for a local government employer to be a covered employer. Indeed, a number of Nevada's local governments have less than 15 employees.

A local government employee is "any person employed by a local government employer."[23] Here it must be noted that the employee need not be a member of an employee organization or even in a bargaining unit and yet not a member. Rather, the person must only be employed by a local government employer. Although there are no known cases involving hourly or part-time employees, the literal definition of local government employee would presumably include such persons. There are more than 80,000 local government employees in Nevada.

Finally, the term "employee organization" (i.e., union) is defined as "an organization of any kind having as one of its purposes improvement of the terms and conditions of employment of local government employees."[24] Here, it should be noted that the employee organization need not

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[21] NRS 288.060.

[22] See, e.g., *Clark County Deputy Marshals Assoc. v. Clark County*, Item No. 793 (2014); *In the Matter of the Petition for Recognition by the Clark County Deputy Sheriff Bailiff's Assoc*., Item No. 504A (2002); *Washoe County Probation* Employees' Assoc. v. Washoe County, Item No. 334, (1994); and Operating Engineers Local #3 v. County of Lander, Item No. 346A (1995).

[23] NRS 288.050.

[24] NRS 288.040.

be recognized by the local government employer.[25] The EMRB currently has more than 200 employee organizations which annually file with the agency.

C. Procedural Issues

A complaint must be filed within six months from the date of the occurrence which is the subject of the complaint.[26] The Respondent then has 20 days to file an answer or dispositive motion once it is served by certified mail.[27] All parties are then required to file pre-hearing statements 20 days after the filing of the answer.[28] Once all the documents have been filed and any dispositive motions resolved by the Board, the case then enters a queue of cases waiting for a hearing date. Once the Board decides to hear a case, it must begin the hearing within 180 days.[29] Once a hearing date has been assigned, a Notice of Hearing is issued and a pre-hearing conference held.[30]

The EMRB has no provisions for discovery. It does, however, require parties to exchange proposed exhibits five days prior to the pre-hearing conference[31] and the pre-hearing statements

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[25] *See UMC Physicians v. Nev. Serv. Empl. Union*, 124 Nev. 84, 178 P.3d 709 (2008).

[26] NRS 288.110(4). Though outside the scope of this paper, this statute of limitations recognizes several so-called exceptions. Foremost, the limitations period does not run until the complainant receives unequivocal notice of a final adverse decision. *City of North Las Vegas v. EMRB*, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011). The EMRB also recognizes the doctrine of equitable tolling, *see, e.g., Frabbiele v. City of North Las Vegas*, Item No. 680I (2014), as well as forgiveness to a party that brings a timely complaint, but does so before a court that lacks jurisdiction. *See, e.g., Simo v. City of Henderson and Henderson Police Officers Assoc*., Item No. 796 (2014).

[27] NAC 288.220.

[28] NAC 288. 250.

[29] NRS 288.110(2). If the case also has an allegation of bad faith bargaining, then the hearing must begin within 45 days. This is a new requirement contained in SB 241 (2015).

[30] NAC 288.273.

[31] NAC 288.273.

contain lists of witnesses.[32] The EMRB does have subpoena authority and witnesses can be required to bring pertinent documents with them to the hearing.[33]

D. Remedies Available

The EMRB may order any person found to have committed an unfair labor practice to refrain from the action complained of or to restore to an aggrieved party any benefit of which he/she may have been deprived.[34] The former is usually done by requiring the employer to post a notice to its employees. The latter includes restoration of the job and the awarding of back pay and benefits.[35] The Board may not go beyond restoring the status quo when ordering a remedy and does not have the ability to issue punitive damages.[36] The Board, however, can award attorneys' fees and costs to the prevailing party.[37]

III. Bases of Discrimination

A. Traditional Bases of Discrimination

As previously mentioned, the EMRA prohibits discrimination on the basis of race, color, religion, sex, and national origin.[38] These are the same prohibitions under the Civil Rights Act of 1964 and the Nevada Equal Rights Act.

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[32] NAC 288.250.

[33] NAC 288.279.

[34] NRS 288.110(2).

[35] *See, e.g., Reno Police Protective Assoc. v. City of Reno*, 102 Nev. 98, 102, 715 P.2d 1321, 1324 (1986).

[36] *See Nev. Serv. Empl. Union v. Orr*, 121 Nev. 675, 119 P.3d 1259 (2005).

[37] NRS 288.110(6).

[38] NRS 288.270(1)(e) and NRS 288.270(2)(c).

The EMRA also prohibits discrimination on the basis of age.[39] It must be noted that unlike the Age Discrimination in Employment Act, the Local Government Employee-Management Relations Act has no definition of age. Presumably the Board might follow the dictates of federal law and define discrimination on the basis of age to only affect covered employees over forty years of age; but to-date there has been no decision on point. Thus the possibility exists for an attorney to make a case that an employee may have been the subject of discrimination because he/she was too young.

Finally, under the traditional bases of discrimination the EMRA also prohibits discrimination on the basis of some disabilities. Unlike the Americans With Disabilities Act, the Local Government Employee-Management Relations Act only covers "handicaps" that are physical or visual.[40]

Based upon a prior ruling by the Board, discrimination based upon sexual orientation is specifically excluded and not subsumed under the category of discrimination based upon sex.[41] However, as detailed below, a claim for sexual orientation discrimination may possibly be pled as discrimination based on personal reasons.

How do the discrimination provisions of NRS 288 interact with those of federal and state law? In *Balisquide v. Las Vegas Valley Water District*, the Respondent filed a motion to dismiss, claiming the case should instead be heard by the Nevada Equal Rights Commission.[42] The Board denied the motion, stating that the claims were made under NRS 288 and that, therefore, the

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[39] *Id.*

[40] *Id*.

[41] *See Heitzinger v. Las Vegas-Clark County Library District*, Item No. 782C (2012).

[42] *Balasquide v. Las Vegas Valley Water District*, Item No. 708 (2009), 1.

Board had jurisdiction to hear the case. [43] The decision noted that the Board does not have jurisdiction over federal claims of discrimination but that the discrimination provisions of NRS 288 are independent of any federal or state claims.[44]

1. Standard and Proof

The Board often looks to federal and state law in its decisions, and in particular, to decisions rendered by the courts on the interpretation of those statutes. Nowhere is this more evident than when the Board uses the traditional *McDonnell Douglas* framework.[45] Under this framework the Complainant must show a *prima facie* case of discrimination. This is done by showing the employee (1) belongs to a protected class; (2) they were qualified for the position and/or were performing satisfactorily; (3) that the employee was subjected to an adverse employment action; and (4) that similarly situated employees not in the employee's protected class received more favorable treatment.[46]

Once the Complainant makes the showing of a *prima facie* case the burden then shifts to the Respondent to articulate a legitimate non-discriminatory reason for its actions.[47] This burden, which shifts to the Respondent, only requires the Respondent to rebut the presumption of

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[43] *Id*. at 2.

[44] *Id*. at 2 (citing Kilgore v. City of Henderson, Item No. 550H (2005) and Harrison v. City of North Las Vegas, Item No. 558 (2003), (Both supporting the proposition that the Board does not have jurisdiction over claims arising out of any other law but that this does not prevent the EMRB from having jurisdiction over its own statute).

[45] *See, e.g., McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). (All of the cases filed with the EMRB have alleged disparate treatment. None have alleged a disparate impact theory of discrimination). *See also Apececche v. White Pine County*, 96 Nev. 723, 726, P.2d 975, 977 (1980) for a Nevada Supreme Court decision using the same framework as *McDonnell-Douglas*.

[46] *Id*. This framework need not be employed when there is direct evidence of discrimination.

[47] *Id*.

discrimination.[48] If the Respondent meets this burden, then the burden shifts back to the Complainant to show that the proffered reason articulated by the Respondent is pretextual.[49]

2. Examples of Discrimination Cases Based on Traditional Bases

In 2005 the Las Vegas Police Protective Association Civilian Employees filed a complaint against the Las Vegas Metropolitan Police Department, alleging that the police department had violated NRS 288.270(1)(f) by discriminating against the Law Enforcement Support Technicians (LEST's) by restricting their ability to transfer to another position to a greater degree than that of other civilian employees.[50] The police department filed a Motion to Dismiss, claiming that the LEST's were not a protected class under NRS 288.270(1)(f).[51] The Board agreed that Respondent had treated the LEST's differently than other civilian employees but noted that this was not discrimination based upon any of the enumerated categories in NRS 288.270(1)(f) and therefore granted the motion.[52] In essence, the job classification of LEST is not a protected class.

Officer Boykin was a probationary police officer who worked for the City of North Las Vegas. He was non-confirmed after being accused of violating the Department's policy on truthfulness.[53] Boykin made several claims, including that he had been terminated due to his race, African-American. Finding that Boykin had made a *prima facie* case, the burden then shifted to the City to offer a legitimate, non-discriminatory reason for its actions. To this end the

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[48] *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981).

[49] *McDonnell Douglas*, 411 U.S. 792.

[50] *Las Vegas Police Protective Association v. Las Vegas Metropolitan Police Department*, Item No. 620 (2006).

[51] Id. at 1.

[52] Id, at 3.

[53] *Boykin v. City of North Las Vegas*, Item No. 674E (2010), 2.

City offered that Boykin had violated the policy on truthfulness, which then shifted the burden back to the Complainant. In this case the Board did "not find credible substantial evidence to support a finding that the City's legitimate reason was pre-text for racial discrimination.[54]

In 2013 the Board issued an order in the case of Ajay Vakil v. Clark County in which Mr. Vakil, an engineer, alleges the County discriminated against him on the basis of his age, 63, when the County laid him off as a result of the Great Recession.[55] Again applying the burden shifting test, the Board found that Vakil had made a *prima facie* case. The County's offered legitimate non-discriminatory reason was that it laid employees off solely on the basis of seniority and produced evidence to support that assertion. The Board then went on to state that Mr. Vakil did not present any evidence refuting the County's explanation and thus found in favor of the County.[56]

Finally, Pamela Vos was a Senior Corrections Officer for the City of Las Vegas. The Senior Corrections Officers (among other employees) were laid off in 2010. At that time she elected not to bump back to her prior Corrections Officer position.[57]After losing her job, Vos then filed a complaint alleging her union breached its duty of fair representation and that the City had violated a number of federal and state laws, discriminated against her on the basis of her age and race (white), discriminated on the basis of personal reasons, committed bad faith bargaining, and committed breach of contract. With respect to her age and race discrimination claims, the Board held Vos did not make out a *prima facie* case in that she could not point to any employee

[54] *Id*. at 7-8. It should be noted that Boykin was reinstated to his prior status of suspended with pay pending an investigation, which was based on other counts in the complaint.

[55] *Vakil v. Clark County*, Item No. 768A (2013), 6.

[56] *Id*. at 7-8.

[57] *Vos v. City of Las Vegas and Las Vegas Peace Officers Association*, Item No. 749 (2014), 2-3.

in her job classification who was treated more favorably than her. Moreover, the City had applied the layoffs according to the contractual terms of using seniority.[58]

B. Discrimination Based Upon Personal Reasons or Affiliations

The EMRA also prohibits discrimination on the basis of "political or personal reasons or affiliations."[59] This prohibition is unique among both the National Labor Relations Act and all state acts affecting public sector employees. This leads to the issue of what is meant by the phrase "political or personal reasons or affiliations." In 1959 the State of Nevada passed a law requiring that all actions concerning personnel are to be based on merit and fitness. This law was expanded over time. Sections 1 and 2 currently state:

> 1. All personnel actions taken by state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof must be based solely on merit and fitness.
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> 2. State, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment or discriminate against any person in compensation or in other terms or conditions of employment because of the person's race, creed, color, national origin, sex, sexual orientation, gender identity or expression, age, political affiliation or disability, except when based upon a bona fide occupational qualification.[60]

Although not explicitly referenced elsewhere one might conclude that this law was the genesis for the EMRA's inclusion of a prohibition of discrimination based on political or

[58] *Id*. at 9. (The Board found all her other claims were without merit and specifically noted that it did not have jurisdiction over any alleged federal or state law violations).

[59] NRS 288.270(1)(f) (for local government employers) and NRS 288.270(2)(c) (for local government employees and employee organizations).

[60] NRS 281.370(1) and (2).

personal reasons or affiliations in that the EMRA covers some of the same public sector employees as NRS 281.370 and also includes a prohibition on political affiliations.

Over time the Board has adopted a formal definition of "personal reasons". Noting that the legislative history did not indicate any reasoning or intent behind the 1975 amendment adding discrimination prohibitions, the Board then stated "we are left with the task of determining, in the context of this case. . . the meaning of 'personal reasons or affiliations.'"[61]

The Board then referred to Black's Law Dictionary, stating:

> Black's Law Dictionary defines "Personal" to mean "[appertaining to the person; belonging to an individual. . . " Black's Law Dictionary 702 (6th ed. 1991). Additionally, the term "political or personal reasons or affiliations" is preceded in NRS 288.270(1)(f) by a list of factors, "race, color, religion, sex, age, physical or visual handicap, national origin," that can best be described as "non-merit-or-fitness" factors, i.e., factors that are unrelated to any job requirement and not otherwise made by law a permissible basis for discrimination. The doctrine of *ejusdem generis* states that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to those things of the same general class as those enumerated. Black's Law Dictionary 357 (6th ed. 1991). Thus, the proper construction of the phrase "personal reasons or affiliations" includes "non-merit-or-fitness" factors, and would include the dislike of or bias against a person which is based on an individual's characteristics, beliefs, affiliations, or activities that do not affect the individual's merit or fitness for any particular job.[62]

Since 2005 this has been the definitive definition of discrimination based upon personal reasons.[63]

1. Standard and Proof

[61] *See Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of North Las Vegas v. Glazier,* Case No. 50781 (unpublished 2010)).

[62] *Id*. at 9.

[63] *See Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of North Las Vegas v. Glazier,* Case No. 50781 (unpublished 2010)).

Unlike cases brought for traditional bases of discrimination, in which the EMRB has always employed the *McDonnell Douglas* analysis[64], the analysis of cases brought for political or personal reasons or affiliations has varied over time. As detailed below, the EMRB used to employ the *McDonnell Douglas* test but since the *Bisch*[65] case in 2013 has used a modified *Wright Line* burden shifting test.[66] In *Bisch* the Board cited to a previous decision in *Reno Police Protective Assoc. v. City of Reno,* in which it concluded that a Complainant must first present credible evidence that protected conduct was a motivating factor in Respondent's actions. If so, the burden then shifts to the Respondent to prove by a preponderance of the evidence that it would have taken the same against even in the absence of any protected conduct. The employee may then offer evidence that the proffered reason is pretextual.[67] In *Bisch* the Court then adopted this standard for resolution of personal and/or political reasons cases.[68]

Most of the cases brought to-date have alleged personal reasons or affiliations. These are first discussed below, followed by the political reasons cases.

2. Examples Where Discrimination Was Substantiated

The first Board decision on the basis of personal reasons was not issued until 1988. In that case three Clark County juvenile officers assigned to Child Haven had received written reprimands after two children had run away. In that case the Board employed the *McDonnell*

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[64] *See McDonnell Douglas*, 411 U.S. 792.

[65] *Bisch v. Las Vegas Metropolitan Police Department*, 302 P. 3d 1108 (Nev. 2013).

[66] *National Labor Relations Board v. Wright Line*, 662 F.2d 899 (1981).

[67] *See Bisch v. Las Vegas Metropolitan Police Department*, 302 P.3d 1108 (Nev. 2013). (*citing Reno Police Protective Assoc. v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986). (The confusion over the standard remains to this day. For instance, post-hearing briefs filed by both attorneys in a case alleging personal reasons discrimination both use the McDonnell-Douglas framework).

[68] *Id*.

Douglas tripartite analysis.[69] One employee, a supervisor, claimed he received a reprimand because he would not go along with the discipline meted out against the other two employees. A second employee claimed there was personal animus against him because he had cooperated with the police in an investigation at Child Haven and that his cooperation had maligned management. A third employee claimed he was disciplined because of his association with the second employee.[70] In the end, the Board concluded that the proffered reasons as put forth by the County were pretextual, primarily because the children who had escaped were not under the supervision of the employees and that conversely those more directly responsible were not disciplined.[71]

The following year the Board decided a case involving Frank Kay, an employee who worked for Lyon County.[72] He claimed that he was the subject of personal animus by his supervisor after he had traded with his supervisor an alternator that did not work, who then held that action against him.[73] Kay specifically noted that his supervisor thereafter refused to talk to him, give him multiple simultaneous assignments, would not allow Kay to talk at work, and that other employees were not to associate with Kay, among other things.[74] At the hearing witnesses for the county gave conflicting reasons for Kay's termination, including abuse of sick leave, filing a false document, and not following instructions.[75] The Board noted that not only was Kay able to show that the reasons were pretextual but that the conflicting reasons themselves gave

[69] McDonnell Douglas, 411 U.S. at 802.

[70] *Clark County Public Employees Assoc. v. County of Clark*, Item No. 215 (1988), p. 4-5.

[71] *Id*. p. 10.

[72] *Stationary Engineers, Local 19 and Frank Kay v. County of Lyon*, Item No. 231 (1989).

[73] *Id*. at 4.

[74] *Id*. at. 4-5.

[75] *Id*. at. 5-6.

them pause as to their credibility.[76] Note that by finding the reasons pretextual the Board was using a form of the *McDonnell Douglas* test.[77]

In 1991 the Board decided a case between the Esmeralda County Classroom Teachers Association and the Esmeralda County School District, in which the school district refused to retain a teacher who submitted her signed contract for the upcoming year to the school district three days late.[78] The teacher claimed that the Superintendent first retaliated against her for having testified on behalf of another teacher at an arbitration hearing and for being the chair of the negotiating team and secondly that the Superintendent had discriminated against her for personal reasons as an outgrowth of those actions.[79] With respect to the discrimination allegation, the Board noted it was apparent that the Superintendent disliked her based on the statements he made about her at the Board's hearing, noting he obviously did not approve of her and considered her to be a troublemaker.[80]

Thomas Glazier was a long-term police officer for the City of North Las Vegas. While employed with North Las Vegas, Glazier's wife, Laura, had an affair with Captain Scott who was in Glazier's chain of command.[81] During this time Glazier applied for the position of Lieutenant. In this instance the appointment process was changed and Scott ended up serving on

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[76] *Id*. at 5-7.

[77] Likewise in *Fraley v. City of Henderson and Henderson Police Officers Association*, Item No. 547 (2004), the Board found Respondent City's reason pretextual and thus found in favor of the Complainant without ever explicitly referring to *McDonnell Douglas*.

[78] *Esmeralda County Classroom Teachers Assoc. v. Esmeralda County School District*, Item No. 273 (1991), p. 3.

[79] *Id*. At 2-3.

[80] *Id*. at 7.

[81] *Glazier v. City of North Las Vegas*, Item No. 624A (2007), 13.

Glazier's oral examination board.[82] Even so, Glazier placed high on the appointment list but was never hired as a Lieutenant.[83] Later Scott's days off and rate of pay were changed. Scott also participated in a discipline that Glazier received.[84] Testimony revealed that the Chief of Police knew of the affair and yet did nothing to stop it.[85] In this case the Board found that Glazier had been denied a promotion based on discrimination for personal reasons.[86] It is important to note that nowhere in this case does it cite the legal standard for personal reasons discrimination. Rather, the decision just declares that the acts recited amount to discrimination based on personal reasons.

3. Examples Where Discrimination Was Not Substantiated

In 1994 the Board decided a case filed by the Water Employees Association against the Las Vegas Valley Water District on behalf of Ron Rivero, an employee who had been quite active in the union, including his serving as its President.[87] Rivero claimed he had been terminated both because of his union involvement and for personal reasons.[88] Noting that the Complainant had made a *prima facie* case the Board then assessed the legitimate, nondiscriminatory reason offered by the employer; namely that Rivero had not received his federally mandated Commercial Driver's License for one year after first being required to do so

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[82] *Id.*

[83] *Id*. at 13.

[84] *Id*. at 14.

[85] *Id*. at 15.

[86] *Id*. at 14.

[87] *Water Employees Association v. Las Vegas Valley Water District*, Item No. 326 (1994), p. 1.

[88] *Id*. at 2.

and after being offered numerous assistance during that year.[89] The Board then noted that the "ultimate burden of persuading the trier of facts that the Respondent intentionally discriminated against the Complainant remains at all times with the Complainant."[90] The Board then went out to hold that the Complainant had not met his burden to prove that the employer's proffered reason was pretextual.[91] This case obviously employed the *McDonnell Douglas* test.[92]

The Board decided a key case with respect to alleged discrimination on the basis of personal reasons in 2005.[93] Kilgore, who had been a union President and who was ultimately terminated, claimed his termination was in violation of both NRS 288.270(1)(a), for his union involvement, and in violation of NRS 288.270(1)(f), for discrimination based upon personal reasons.[94] As mentioned previously, it was this case in which the Board analyzed the legislative history behind the 1975 amendments.[95] The Board thereupon applied the *McDonnell Douglas* test and found that the City of Henderson had legitimate, non-discriminatory reasons for its termination of Kilgore. These included leaving the jurisdiction while on duty, repeated tardiness, repeated absences, use of a City vehicle for personal use, unauthorized use of a cemetery prop, failing to respond to calls, unauthorized excuse from mandatory shooting qualifications, etc.[96]

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[89] *Id*. at 4.

[90] *Id*. (referencing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

[91] *Id*.

[92] See also *Bott v. City of Henderson*, Item No. 560A (2005), in which the decision and order of the Board details over two pages the *McDonnell Douglas* framework, citing a litany of supporting cases involving this framework.

[93] *See Kilgore v. City of Henderson*, Item No. 550H (2005).

[94] *Id*. at 1. (This analysis only covers the claim based upon personal reasons).

[95] *Id*. at 8-9..

[96] *Id*. at 11-18.

Leon Greenberg was an applicant for an Attorney I position with Clark County, who filed two complaints against the County when he was not hired for that position. He claimed several violations of the EMRA, including discrimination based on NRS 288.270(1)(f).[97] Greenberg offered into evidence his "outstanding qualifications", that there had been a delay in grading his application, and that the County continued to recruit for the position after he had submitted his application, among other reasons.[98] The Board granted the County's Motion to Dismiss, noting several times that Complainant had failed to allege anything "more than a bare suspicion" that he was not hired for unlawful reasons and that the complaint cannot rest on mere suspicion but must make a *prima facie* case showing sufficient to support an inference that the employer's conduct was motivated by an unlawful reason.[99]

The case involving Cynthia Thomas is interesting in that it shows the interplay between grievance arbitration and the resolution of complaints filed with the EMRB. Thomas was discharged by the Las Vegas Metropolitan Police Department after having made an unauthorized inquiry of criminal history on a politician and for being untruthful about the incident.[100] Her grievance ultimately went to binding arbitration, where she lost. Thereupon the employer filed a Motion to Dismiss her separate EMRB complaint, requesting that the Board defer to the arbitrator.[101] The Board accordingly reviewed the five-factor test as to whether they should defer to the arbitrator and ultimately decided to accept the facts as determined by the arbitrator and then apply those facts to a *McDonnell-Douglas* analysis of Thomas' personal reasons claim of

[97] *Greenberg v. Clark County*, Item No. 577C (2005), 3.

[98] *Id*.

[99] *Id*. at 6-7.

[100] *Thomas v. Las Vegas Metropolitan Police Department*, Item No. 588 (2005), 7.

[101] *Id*. at 1.

discrimination.[102] Upon reviewing the evidence as determined by the arbitrator, the Board then decided that LVMPD met its burden of production under *McDonnell-Douglas* and dismissed the complaint.[103]

Ron Williams was a police officer who worked for the Las Vegas Metropolitan Police Department, which had suspended him for 120 hours for driving a department vehicle after he had been drinking. Williams' complaint alleged he had a disability, alcoholism.[104] LVMPD filed a Motion to Dismiss, claiming that Williams would not be protected under the Americans With Disabilities Act.[105] Williams' Reply stated that the discrimination fell under "personal reasons."[106] The Board granted the Motion to Dismiss, but not on the grounds sought by LVMPD. The Board first noted that it only had jurisdiction under NRS 288 and not under federal law.[107] It then applied the definition of "personal reasons" as anything not related to merit or fitness of duty and determined that Williams had not met his burden as consuming alcohol and then driving an employer's vehicle adversely affected his ability to carry out his work.[108] This case is important as it shows both the interplay between NRS 288 and federal law as well as how personal reasons can be used as a "catch-all" category of discrimination.

The *Larramendy* case is an example where an employee did not make out a *prima facie* case of discrimination. In 2005 Larramendy's job classification was changed. When this

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[102] *Id*. at 5-6.

[103] *Id*. at. 9 (since the Board considered the evidence as determined by the arbitrator it actually treated the Motion to Dismiss as a Motion for Summary Judgment).

[104] *Williams v. Las Vegas Metropolitan Police Department*, Item No. 619 (2006), 1.

[105] *Id*.

[106] *Id.* at 1-2.

[107] *Id*. at 7.

[108] *Id.* at 8.

occurred the City of Las Vegas did not include in her classification seniority time spent in a prior classification.[109] In 2010 she noticed the time was not included and thereupon filed a grievance, which the City refused to process, claiming it was untimely.[110] She thus filed a complaint, alleging that the City's refusal to process the grievance was discrimination based on personal reasons.[111] In its decision the Board stated that all the evidence did not support an inference that discrimination for personal reasons was a motivating factor.[112]

Just as in Larramendy Daniel Jennings also did not make out a *prima facie* case. Jennings was a newly-promoted Lieutenant in the Boulder City police department, who disagreed with the Police Chief as to assigning a certain officer to head up a warrant unit.[113] Unbeknownst to the Police Chief this heated discussion had been surreptitiously taped by Jennings. When this fact came out Jennings was demoted back to Sergeant and suspended.[114] Jennings thereupon claimed personal reasons discrimination. The Board disagreed. At the hearing Jennings stated his claim for discrimination rested on his disagreement over whether a certain officer should head the warrant unit.[115] The Board found that the incident was job-related and not based on any characteristic, belief, affiliation or activity unrelated to merit or fitness for duty.[116]

C. Discrimination Based Upon Political Reasons or Affiliations

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[109] *Larramendy v. City of Las Vegas*, Item No. 741A (2011), 5.

[110] *Id.* at 6.

[111] *Id* at. 1.

[112] *Id*. at 7.

[113] *Jennings v. City of Boulder City*, Item No. 780 (2012), 2.

[114] *Id*. at 4.

[115] *Id.* at 5.

[116] *Id*. at 6.

There have only been two substantive decisions that alleged discrimination based upon political reasons or affiliations. The standard of proof is that modified *Wright Line* standard (see III.B.1 above) that was approved by the Nevada Supreme Court.[117]

The first case was Bisch v. Las Vegas Metropolitan Police Department and Las Vegas Police Protective Association.[118] Bisch claimed that her union discriminated against her based on political reasons when it did not provide a representative at an investigatory hearing, despite her having her own private attorney present[119], and that her union did so because she was a candidate for sheriff and that the union instead was supporting another candidate.[120] The Board stated that the union presented substantial evidence that it had been the policy of the union not to provide concurrent representation and that this policy had been uniformly applied. Therefore, it denied the claim against Bisch.[121]

With respect to her employer, Bisch claimed that she had been disciplined because of her running for sheriff. Here the Board found that Bisch had provided sufficient evidence raising an inference of political discrimination.[122] However, the Board then concluded that LVMPD would

[117] *Bisch v. Las Vegas Metropolitan Police Department*, 302 P. 3d 1108 (Nev. 2013).

[118] *Bisch v. Las Vegas Metropolitan Police Department and Las Vegas Police Protective Association*, Item No. 705B (2010). (The employee raised a number of claims but the two relevant ones here are allegations of discrimination based on political reasons against both her employer and employee organization).

[119] *Id*. at 3.

[120] *Id*. at 8.

[121] *Id*.

[122] *Id*. at 9.

have issued the same discipline against Bisch regardless of any political activity.[123] The Board thereupon dismissed also dismissed this claim of discrimination.

The other political discrimination case also involved the Las Vegas Metropolitan Police Department.[124] 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.[125]

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 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.[126] 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

[123] *Id*. (Bisch had been disciplined for taking a neighbor's daughter that had been bitten by her dog to an urgent care facility and then claiming to staff that the neighbor's daughter was her daughter and filing an insurance claim related under this false pretense).

[124] *O'Leary v. Las Vegas Metropolitan Police Department*, Item No. 803 (2015) (This case is currently in District Court under a Petition for Judicial Review).

[125] *Id*. at 15-16.

[126] *Id*. at 16-17.

reasons;[127] namely the fallout from the social media posting and how that affected the department's attempt to get the More Cops tax passed. Specifically, applying the test as enunciated by the Nevada Supreme Court in the *Bisch* case (see III.B.1 above) the Board found that LVMPD had not met its burden of proof to show that it would have taken the same action against the Complainant in the absence of the political reasons as detailed in the case.[128] O'Leary was thereupon reinstated with back pay.

IV. Why File a Complaint for Discrimination with the EMRB?

Filing a discrimination claim with the U.S. Equal Employment Opportunity Commission or the Nevada Equal Rights Commission does have its advantages. First, both agencies will investigate the allegations, thus giving the Complainant (and his/her attorney) and independent opinion on the allegations. Secondly, at the conclusion of the investigation the Complainant can receive the investigatory file, thus providing a fair amount of "discovery" on the case. Thirdly, if and when a case if filed in court the Complainant also has the ability to conduct further discovery in the form of interrogatories, requests for admissions, requests for the production of documents and from the taking of depositions.

However, there are also significant disadvantages in using the above process. Foremost is the cost. There are filing fees and depositions can run into the thousands of dollars. Also, both the investigation period and the time spent in court can consume years of litigation.

If the client is a local government employee the EMRB can be a useful alternative. First, there are no filing fees. Secondly, pre-hearing discovery is not allowed. Thus there are no depositions or written discovery, also reducing the cost. Secondly, cases filed with the EMRB

[127] *Id*. at 19.

[128] *Id*.

are often heard more quickly. A typical case from the filing of a complaint to resolution by the Board usually takes about a year.[129]

It should be noted that many cases do not require a lot of discovery as the Complainant may already possess needed evidence. Additionally, there are workarounds to the lack of discovery. For instance, needed records may be obtained through the Public Records Act[130] since local governments are public agencies subject to that act. Also, a number of cases filed with the EMRB also involve the filing of a grievance, which may have ultimately ended in arbitration. Much documentary and testamentary evidence can be obtained through the arbitration record.

V. Conclusion

Nevada local government employees have an additional discrimination law available to them to redress alleged discriminatory actions taken against them by their local government employers. Unique among other laws is the provision allowing for claims based on political or personal reasons or affiliations. Compared to litigating in federal or state court, the process with the EMRB can be both less expensive and also quicker. The process may not be best for a case needing significant discovery. However, attorneys representing local government employees should consider this alternative, especially when a client may have limited funds for litigation.

[129] The agency is under a mandate to conduct a hearing within seven months of the filing of the pre-hearing statement, which takes place about two months after the filing of the complaint. This mandate is set to be reduced by one month per year in future years.

[130] NRS 239.001 et seq.