

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN W. NEVILLE Jr., on behalf of himself and
all others similarly situated,

Petitioner-Plaintiff,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA, in and for the
COUNTY OF CLARK; and the HONORABLE
ADRIANA EXCOBAR, DISTRICT JUDGE,

Respondents,

And

TERRIBLE HERBST, INC.,

Real Parties in
Interest-Defendant.

No. 70696

Appeal from the Eighth Judicial District Court
THE HONORABLE JUDGE ADRIANA ESCOBAR, District Judge
District Court Case No. A-15-728134-C

**BRIEF OF AMICUS CURIAE
NEVADA RESTAURANT ASSOCIATION
(Brief Supports Affirmation)**

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Nevada Restaurant Association is a domestic non-profit corporation without stock and there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED: November 10, 2016

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Nevada Restaurant Association (“NvRA”) was founded in 1982 with the mission of supporting and protecting Nevada’s rapidly growing restaurant industry. The restaurant industry in Nevada includes more than 5,200 restaurants and food service outlets, provides jobs to roughly 200,000 people, and produces over \$6 billion in sales each year. NvRA members represent many different facets of the industry including restaurants, hotels, casinos, taverns, and vendors of restaurant goods and services. As a part of the restaurant industry, all NvRA members face an increasingly complex and challenging regulatory and economic environment.

Therefore, the NvRA is uniquely situated to understand the tremendous impact the issues before the Court will have on the restaurant industry—an industry that is vital to Nevada’s economic growth and well-being. A majority of the restaurant employees in Nevada are non-exempt and therefore are eligible to receive overtime wages. Accordingly, the issue of whether or not employees have a private right of action to enforce claims of unpaid overtime wages will affect nearly every restaurant in the state. Such claims are more efficiently adjudicated through the Office of the Labor Commissioner as provided by the statutory design.

STATEMENT OF THE CASE

NvRA adopts the Statement of the Case and Statement of Issue set forth in the Answering Brief filed by the Defendant, Terrible Herbst, Inc.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The District Court's conclusion that there is no private right of action under NRS 608.018 is correct because the plain language of the provision does not provide for one. Implying a private right of action where such a right is not expressly provided is inconsistent with the legislative scheme of Chapter 608 and goes against public policy.

I. ARGUMENT

A. This Court Should Uphold the District Court's Determination That There is No Private Right of Action For Enforcement of NRS 608.018

In *Neville v. Terrible Herbst, Inc.*, the District Court determined that there is no private right of action for employees to recover overtime wages under NRS 608.018. The Court's decision should be upheld in order to respect the Nevada Legislature's choice to entrust enforcement of that section to the Labor Commissioner and to support public policy.

1. Under the Plain Language of the Statute There is No Private Right of Action Given to Employees.

"When a statute is facially clear, this court will give effect to the Statutes' plain meaning and not go beyond the plain language." Sonia F. v. Eighth Judicial

Dist. Court, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009). The language of NRS 608.018 is facially clear— there is no private right of action given to the employee for the enforcement of overtime wages.

NRS 608.018 provides that under certain circumstances an employer shall pay an employee additional wages for overtime hours worked. As the Respondent correctly asserts in its answering brief, NRS 608.018 is completely silent as to whether a private right of action exists to enforce its terms. ***See Answering Brief Page 6.*** The provisions of the Nevada Revised Statutes are the product of legislative action. If the Nevada Legislature did not expressly create a private right of action within the provision, there is a strong presumption against inferring such right exists. Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 959, 194 P.3d 96, 101 (2008).

While the language of NRS 608.018 does not grant employees a private right of action to enforce the payment of unpaid overtime wages, the Legislature did provide a mechanism for enforcement of that section. NRS 608.180 states “The Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced.” This language plainly and unambiguously mandates administrative enforcement of NRS 608.018. NRS 607.160 additionally mandates that the Labor Commissioner shall

enforce all Labor Laws of the state unless specifically and exclusively vested in another officer.

When discussing the issues of statutory construction—specifically when interpreting the plain language of the NRS—the Nevada Supreme Court has stated, “After reviewing the plain language of a statute, this court has concluded that ‘the mention of one thing implies the exclusion of another.’” Sonia F. v. Eighth Judicial Dist. Court, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009). Since Chapter 608 did not provide a private right of action for unpaid overtime wages but did provide such a right for collecting the difference between the minimum wage required and the amount paid—under NRS 608.260—we can conclude that there was no intent to provide for a private right of action under 608.018. Where the Legislature has explicitly applied a rule of enforcement to one type of proceeding, it can be presumed that it deliberately excluded the rule’s application to other types of proceedings. *Id.* The Legislature contemplated where the power of enforcement for unpaid overtime wages should reside, and it did not intend for, nor provide, such enforcement rights to private employees.

Furthermore, other statutes—even within Chapter 608—specifically include language granting a private right of action for employees, while NRS 608.018 does not. For example, NRS 608.260 gives the employee the private right to bring an action to recover the difference between the minimum wage and the amount paid;

employees are not afforded this right when it comes to overtime pay. As evidenced by 608.260, clearly the Nevada Legislature has the ability to articulate under which circumstances it intended to provide for a private right of action. It would have been a very simple matter for the Legislature to provide for a private right of action for overtime wages, but it has not done so.

The language of NRS 608.018 is clear and unambiguous and because of that clarity there is no reason to look beyond the express language of the statute. Looking at Chapter 608 as a whole it is obvious that the Legislature contemplated where the power to enforce various provisions of the Chapter should reside. The Legislature exercised its discretion and gave the power to enforce overtime wage claims to the Labor Commissioner.

2. Even if the Plain Language of NRS 608.018 is Considered Ambiguous, There Is No Legislative Intent to Provide a Private Right of Action to the Employee

Even if the Court were to determine that the language of NRS 608.018 is ambiguous, which it is not, there is still no evidence to suggest that the Legislature intended to provide employees with a private right of action to enforce the section. “To interpret an ambiguous statute, we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy.” State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). “Whether a private cause of action can be implied is a question of legislative intent, and to ascertain the

Legislature's intent in the absence of plain, clear language, appellate courts examine the entire statutory scheme, reason, and public policy, and in so doing, appellate courts are guided by three factors: (1) whether the plaintiffs are of the class for whose special benefit the statute was enacted; (2) whether the legislative history indicates any intention to create or to deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme.” Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 194 P.3d 96 (2008).

The simple fact that NRS 608.018 creates a standard that benefits private employees does not in itself suggest that the Court should imply a private right of action to enforce the provision. The three factors considered are not entitled to equal weight, legislative intent is the determinative factor. *Id* at 959. Absent legislative intent, the U.S. Supreme Court has stated, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Alexander*, 532 U.S. at 286–87, 121 S.Ct. 1511.

As expressed in *Baldonado*, legislative history on NRS 608.018 is largely silent. *Baldonado*, at 960. We must therefore analyze if it is consistent with the purpose of the legislative scheme to imply a private right of action for unpaid overtime wages from the lack of express language granting such a right.

The underlying purpose of NRS Chapter 608 and Nevada labor laws in general is to protect the health and welfare of Nevada employees. “Although a private cause of action arguably could further this purpose, other courts have recognized that implying private remedies when the state Legislature has already contemplated administrative enforcement could create undesirable inconsistencies.” *Id* at 961. The Nevada Legislature not only contemplated administrative enforcement but provided for such a process in that the clear scheme of Chapter 608 is that the Labor Commissioner is to enforce legislation concerning the payment and collection of wages and other benefits. Leaving the right to enforce NRS 608.018 to the Labor Commissioner not only provides an available and adequate remedy for violations but it also promotes consistency of enforcement and eliminates inconsistent results.

It is clear that the Legislature intended to have the Labor Commissioner protect the rights of Chapter 608. As such, implying that there is a private right of action for NRS 608.018 is inconsistent with the underlying scheme of entrusting enforcement of the section to the administrative office of the Commissioner.

3. Public Policy Supports Leaving Enforcement of NRS 608.018 to the Labor Commissioner

Not only does implying a private right of action under NRS 608.018 go against the legislative scheme of Chapter 608, it also goes against public policy. The Office of the Labor Commissioner is an overall less expensive way to resolve

disputes between an employee and employer while also allowing for additional penalties to be imposed for violations of the Chapter.

a. Giving Exclusive Right of Enforcement to the Labor Commissioner is a More Efficient Means for Resolving Disputes between Employee and Employer

When an employee uses the Labor Commissioner to enforce statutory rights, the employee will not have to hire an attorney and, unlike private attorneys, the Labor Commissioner will not take a percentage of the recovery or charge an hourly fee. . NRS 607.170(3) specifically provides that all money collected for claims for wages will be promptly paid to the person entitled thereto. Enforcement of NRS 608.018 to the Labor Commissioner is thus an overall less expensive solution for every employee.

b. Judicial Economy Favors Administrative Enforcement of NRS 608.018

In addition to being less expensive and providing a higher monetary recovery directly to the employee, leaving enforcement of NRS 608.018 to the Labor Commissioner supports judicial economy. Providing a private right of action under NRS 608.018 will burden the courts with overtime wage claims, which is not in the interest of judicial economy. Conversely, leaving enforcement to the Labor Commissioner allows the Labor Commissioner and her office to sort through the claims and even consolidate certain actions. NRS 607.175 provides that the Labor Commissioner may take assignments of wage claims and bring a single action

against any one employer. Requiring employees with unpaid overtime claims to seek administrative enforcement through the Labor Commissioner prevents crowded dockets with multiple claims for the same violation.

The Nevada Supreme Court has previously recognized that docket congestion is a factor to be considered in evaluating case venue. Mountain View Rec. v. Imperial Commercial, 129 Nev. Adv. Op. 45, 305 P.3d 881, 887 (2013). Docket Congestion is a serious issue and the courts should not be overburdened with claims that the Legislature mandated to be resolved by administrative enforcement.

**c. The Labor Commissioner Can Enforce Additional Penalties
For Violations of NRS 608.195**

Not only is bringing a claim for unpaid overtime wages to the Labor Commissioner less expensive for employees and more judicially efficient, it also provides an additional incentive for employers to follow the wage requirements contained in the NRS. The Labor Commissioner can assess an administrative penalty against the employer when the claims are filed through her office. NRS 608.195(2) provides: “In addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$5,000 for each such violation.”

Even if the Court were to grant employees a private right of action under 608.018, the statute would still not provide the employee with the right to seek the administrative penalty. Making sure that the Labor Commissioner has the exclusive mandate for administrative enforcement of NRS 608.018 will incentivize employers to comply with the Code regulating overtime wages.

II. CONCLUSION

For the reasons stated above, the NvRA respectfully requests this Court uphold the District Court's Order.

Respectfully submitted,

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Date: November 10, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[XX] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[] Proportionately spaced, has a typeface of 14 point or more, and contains _____ words; or

[] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[XX] Does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedures, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Date: November 10, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Sutton Hague Law Corporation, P.C. and that on this 10th day of November 2016, I caused to be served a true and correct copy of the above and foregoing **BRIEF OF AMICUS CURIAE NEVADA RESTAURANT ASSOCIATION** via the Court's Case Management and Electronic Case Filing (CM/ECF) system and U.S. Mail, postage prepaid, properly addressed to the following:

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JUDGE,
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And
TERRIBLE HERBST, INC.,
Real Parties in
Interest-Defendant.

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

The Nevada Restaurant Association (“NvRA”) hereby requests leave of this Court to file an *amicus curiae* brief addressing issues involved in the instant appeal.

The NvRA was founded in 1982 with the mission of supporting and protecting Nevada’s rapidly growing restaurant industry. The restaurant industry in Nevada includes more than 5,200 restaurants and food service outlets, provides jobs to roughly 200,000 people, and produces over \$6 billion in sales each year. NvRA members represent many different facets of the industry including restaurants, hotels, casinos, taverns, and vendors of restaurant goods and services. In carrying out its mission, the NvRA engages in extensive promotion of the restaurant industry, offers access to important informational resources, provides networking opportunities, and provides training and workforce development services to Association members. As a part of the restaurant industry, all NvRA

1 members face an increasingly complex and challenging regulatory and economic
2 environment.

3 Therefore, the NvRA is uniquely situated to understand the tremendous
4 impact that the issues before the Court will have on the restaurant industry—an
5 industry that is vital to Nevada’s economic growth and well-being.

6 One of the questions presented on appeal, the issue of whether or not
7 employees have a private right of action to enforce claims of unpaid overtime
8 wages, will affect nearly every restaurant in the state. On this basis, the NvRA
9 respectfully petitions the Court for leave to file an *amicus curiae* brief in support of
10 upholding the District Court’s decision.

11 The NvRA’s amicus brief supports the District Court’s decision that there is
12 no private right of action under NRS 608.018.

13 First, the NvRA agrees that the plain language of the statute does not
14 provide a private right of action to the employee.

15 Second, the NvRA agrees that the Office of the Labor Commissioner has
16 exclusive authority to enforce NRS 608.018 and it would go against the legislative
17 scheme and public policy to provide a private right of action to the employee.

18 This appeal raises issues of tremendous importance to Nevada employers.
19 Accordingly, the NvRA believes that the interests of justice, as well as the interests
20 of the People of Nevada, would be served by this Court allowing a timely *amicus*
21 *curiae* brief from an organization that represents the very employers who stand to
22 feel the impact of this Court’s decision most acutely. Therefore, the NvRA
23 respectfully requests that the Court grant it leave to file an *amicus curiae* brief.

24 The NvRA’s proposed *amicus curiae* brief is hereby submitted to the Court
25 with the filing of the instant Motion. The NvRA respectfully requests that the
26 Court permit its *amicus curiae* brief to be filed pursuant to NRAP 29.

27 ///

28 ///

Additionally, NvRA respectfully requests the opportunity to participate in any oral argument ordered by this Court.

Dated: November 10, 2016

Submitted by:

/s/ S. Brett Sutton

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