

CASE NO. 76062

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ANTONETTE PATUSH, Appellant

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Elizabeth A. Brown  
Clerk of Supreme Court

v.

LAS VEGAS BISTRO, LLC, Respondent

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APPEAL FROM THE  
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

**APPELLANT'S OPENING BRIEF**

James P. Kemp, Esq.  
Nevada Bar No. 6375  
KEMP & KEMP  
7435 West Azure Drive, Suite 110  
Las Vegas, NV 89130  
(702) 258-1183  
Attorneys for Appellant

### **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellant, ANTONETTE PATUSH (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case;
2. The undersigned counsel of record for Ms Patush is the only attorney who has appeared on her behalf in this matter in this Court. The undersigned and Victoria L. Neal, Esq. both appeared on behalf of Ms. Patush before the District Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 27<sup>th</sup> day of August 2018.

/s/ James P. Kemp  
JAMES P. KEMP, ESQUIRE  
Nevada Bar No. 006375  
KEMP & KEMP  
7435 W. Azure Drive, Suite 110,  
Las Vegas, NV 89130  
(702) 258-1183  
Attorney for Appellant

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### **JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this matter under NRAP 3A(b)(1) because the matter arises from a final order of the District Court and no other proceedings remain below on the discreet issues raised in this appeal.

This appeal is timely as the Notice of Entry of Order (AA 9-12) was served by regular U.S. Mail by the Appellant on May 31, 2018 and the Notice of Appeal (AA 13-14) was filed in the District Court on June 2, 2018 less than 30 days after the written Notice of Entry of Order.

### **ROUTING STATEMENT NRAP 28(a)(5)**

This matter is presumptively assigned to the Supreme Court of Nevada pursuant to NRAP 17(a)(10). This case involves an important issue of first impression in that the District Court dismissed the action ruling that the Plaintiff's claim of Retaliatory Discharge in Violation of Public Policy was barred by the two year limitation of actions set forth in NRS 11.190(4)(e), the personal injury and wrongful death statute of limitations, rather than four years under NRS 11.220 the catch-all statute of limitations. The Supreme Court of Nevada has never addressed the correct statute of limitations applicable to Retaliatory Discharge in Violation of Public Policy claims under the common law of Nevada. Thus, this is an issue of first impression presumptively assigned to the Supreme Court of Nevada.

## **STATEMENT OF ISSUES PRESENTED**

1. Where Respondent Las Vegas Bistro, LLC, discharged Appellant from her job because of, and in retaliation for, her filing and pursuing a workers' compensation claim under the Nevada Industrial Insurance Act, did the District Court commit an error of law by dismissing the civil action under NRCP Rule 12(b)(5) and ruling that the Appellant's single claim of Retaliatory Discharge in Violation of Public Policy was barred by the two year personal injury and wrongful death limitation of action under NRS 11.190(4)(e) rather than correctly applying the four year catch-all limitations period under NRS 11.220?
2. Does the plain language of NRS 11.220 apply to the Retaliatory Discharge in Violation of Public Policy claim to make the limitations period four years, or is this claim a "hybrid" type of claim which would make the catch-all four year limitations period under NRS 11.220 applicable under the reasoning of *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 261-262, 132 Nev. Adv. Op. 75, 132 Nev. (2016)?
3. Is the Retaliatory Discharge in Violation of Public Policy claim more closely analogous to an unwritten contract claim than it is to personal injury and death claims making the four year limitations period under NRS 11.190(2)(c) applicable to the claim?

4. Is applying the two year limitations period under NRS 11.190(4)(e) to Retaliatory Discharge in Violation of Public Policy a violation of constitutional due process of law in that no reasonable person reading the text of that statute would conclude that the action for a retaliatory firing from a job would be related to personal injury or death?

### **STATEMENT OF THE CASE**

The District Court granted the Defendants' NRCP Rule 12(b)(5) motion and dismissed Antonette Patush's Complaint alleging Retaliatory Discharge in Violation of Public Policy. The District Court ruled that the statute of limitations for that claim is set forth in NRS 11.190(4)(e), even though that statute (or any other in NRS Chapter 11) does not mention the employment retaliatory discharge claim, and even though under the plain language of NRS 11.220 the Retaliatory Discharge in Violation of Public Policy claim should fall under the catch-all four year limitations period. Antonette filed her Complaint less than four years after she was fired by Las Vegas Bistro, LLC (which operates Larry Flynt's Hustler Club in Las Vegas) because she had been hurt on the job and filed a workers' compensation claim.

Antonette has appealed the dismissal of her case and alleges that it was an error of law to conclude that the personal injury and wrongful death limitations statute at NRS 11.190(4)(e) is applicable to a wrongful termination of employment



case. Moreover, to apply the two year limitations period set forth in NRS 11.190(4)(e) is a denial of due process under the Nevada and U.S. Constitutions because no reasonable person or average Nevadan reading NRS 11.190(4)(e) would understand it to apply to Retaliatory Discharge in Violation of Public Policy claims because being fired unlawfully from a job is not a personal injury or death.

### **STATEMENT OF FACTS**

The basic facts are set forth in detail in the Complaint (AA 1-6) which is incorporated here in its entirety. The key facts are as follows and are numbered to correspond to the paragraphs of the Complaint:

6. Plaintiff began her employment with Defendant on February 6, 2013 as an Office Manager. Her employment was terminated by Defendant on or about July 4, 2014.
7. Plaintiff sustained a serious on-the-job industrial injury to her knee, cervical spine, lumbar spine, and other body parts on April 10, 2014. On that date the Claimant was working as an Office Manager/Payroll person for Defendant, which may have then been known as National Association of Entertainers, which operates Larry Flynt's Hustler Club in Clark County, Nevada.
8. On the date of injury the Claimant was walking down a hallway near her office in Defendant's premises. She tripped over a rug on the floor in the

hallway and fell hard to the floor. A video recording of the accident was submitted and is part of the record.

9. Plaintiff timely filled out a C-4 form claim for workers' compensation.

10. Plaintiff's workers' compensation claim was duly accepted on May 8, 2014 and benefits were paid on the claim

11. At the time of her termination, set forth herein, Plaintiff was working full duty.

12. Plaintiff was terminated on or about July 3, 2014.

13. Plaintiff was terminated by the General Manager Kelly Jones.

14. General Manager Kelly Jones was hostile, rude, and intimidating when he told Plaintiff that she had too many doctor's appointments. Plaintiff told Jones that the doctor appointments were to treat her workers' compensation injury. Jones said, in a hostile manner, that he did not care and then he fired her. Jones also told Plaintiff that her termination was ordered by Jason Mohny who was the owner of Defendant.

15. The true reason for Plaintiff's termination is retaliation because she was injured on the job and filed and pursued a workers' compensation claim under the Nevada Industrial Insurance Act.

16. Plaintiff, as a manager for Defendant, had attended training where she and others were instructed that they should "say something else" as the reason for

terminating employees with workers' compensation claims even though the real reason was the workers' compensation claim. In other words, the management employees were instructed to come up with pre-textual reasons for terminating workers' compensation claimants in order to be able to avoid liability for retaliatory discharge.

17. Plaintiff was given the false and pre-textual reason of being a "no call/no show" on certain days and with stealing a cell phone from the "lost & found" items held by Defendant (items left by customers). These reasons were false and malicious.

18. Plaintiff's employment was terminated by Defendant in retaliation for her being injured on the job and her filing of a valid Workers Compensation claim and, thus, exercising her rights under the Nevada Industrial Insurance Act.

19. Termination of Plaintiff's employment was in violation of strong public policy of the state of Nevada.

### **SUMMARY OF THE ARGUMENT**

The Supreme Court of Nevada has never held that Retaliatory Discharge in Violation of Public Policy claims are subject to the two year limitations period in NRS 11.190(4)(e). Nor should it do so now. That statute states as follows:

**NRS 11.190 Periods of limitation.** Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:

...

4. Within 2 years:

...

(e) Except as otherwise provided in NRS 11.215, an action to recover damages for *injuries to a person or for the death of a person* caused by the wrongful act or neglect of another. The provisions of this paragraph relating to an action to recover damages for injuries to a person apply only to causes of action which accrue after March 20, 1951.

(Emphasis added)

Meanwhile, the Nevada Legislature has, in NRS 11.220, spoken in plain language with regard to what limitations period applies to a claim which is not otherwise provided for in NRS Chapter 11:

**NRS 11.220 Action for relief not otherwise provided for.** An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

Because the Retaliatory Discharge from employment in Violation of Public Policy claim recognized at common law by the Supreme Court of Nevada in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984) does not have a statute of limitations specified in any other provision of NRS, the applicable limitations period is four (4) years under the plain and unambiguous language of NRS 11.220.

The District Court's order in this case should be reversed and the matter remanded for further proceedings.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Supreme Court of Nevada rigorously reviews *de novo* all district court orders granting an NRCP 12(b)(5) motion to dismiss. *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The Court accepts all of the plaintiff's factual allegations as true and draws every reasonable inference in the plaintiff's favor to determine whether the allegations set forth in the Complaint are sufficient to state a claim for relief. *Id.* Plaintiff's Complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the Plaintiff] could prove no set of facts, which, if true, would entitle [the Plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. The District Court's conclusions of law, including statutory interpretation, are reviewed *de novo*. *Id.*; *Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. \_\_\_, \_\_\_, 302 P.3d 1099, 1101 (2013); *Waldman v. Maini*, 124 Nev. 1121, 1136, 195 P.3d 850 (2008) .

### **II. THE STATUTE OF LIMITATIONS FOR MS. PATUSH'S CLAIM IS FOUR (4) YEARS UNDER NRS 11.220 AND THE DISTRICT COURT ERRED IN RULING THAT THE TWO (2) YEAR LIMITATIONS PERIOD SET FORTH IN NRS 11.190(4)(e) APPLIES TO RETALIATORY DISCHARGE EMPLOYMENT CLAIMS.**

"Limitations are created by, and derive their authority from, statute." *State of Nevada v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 229, (1879) (*quoting People v. Gilbert*, 18 Johns. 227.) For nearly 140 years Nevada law has, in what is

now codified at NRS 11.220, provided that “...if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033[NRS 11.220], and the action must be commenced within four years after the cause of action accrued. **Such is the plain reading of the statute and the evident intention of the legislature.**” *Yellow Jacket Silver Mining Co.*, 14 Nev. at 230 (Emphasis added). Thus, the District Court’s order dismissing Antonette’s action for retaliatory discharge (wrongful termination of employment) constitutes an error of law. Because no limitations period is specified for this claim elsewhere in NRS, the four (4) year limitations period set forth in NRS 11.220 applies. The language of both NRS 11.220 and 11.190(4)(e) is plain and unambiguous. Antonettes’ claim does not pertain to injuries to her person or death. Therefore NRS 11.190(4)(e) by its plain and clear language does not apply and NRS 11.220’s four (4) year period does apply. Because Antonette’s claim was filed with the District Court on March 21, 2018, less than four years after her wrongful discharge from employment claim accrued on or about July 3, 2014, her claim was timely filed.

Respondent argued that Plaintiff’s claim was untimely filed. This is incorrect. The proper statute of limitations applicable to a retaliatory discharge in violation of public policy claim is FOUR YEARS under NRS 11.220 which states as follows:

**NRS 11.220 Action for relief not otherwise provided for.** An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

Nowhere “hereinbefore” NRS 11.220 in NRS Chapter 11 will the Respondent or the Court find a provision for a limitations period for the retaliatory discharge from employment in violation of public policy claim established under the common law in 1984 in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984). Thus, on its face and by its plain language, NRS 11.220’s four year limitations period is what applies. Along with this we must consider the judicial gloss:

Statutes of limitation exist "to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 257, 277 P.3d 458, 465 (2012). The nature of the claim, not its label, determines what statute of limitations applies. *Stalk v. Mushkin*, 125 Nev. 21, 25, 199 P.3d 838, 841 (2009). Typically, "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 518 (Tex. 1998); *see Bellemare v. Wachovia Mortg. Corp.*, 284 Conn. 193, 931 A.2d 916, 921 (2007) ("[W]hen a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon."); *cf. In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (applying the three-year statute of limitations for fraud to an analogous claim for breach of fiduciary duty).

*Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260, 132 Nev. Adv. Op. 75, 132 Nev. (2016). In *Perry* the Supreme Court of Nevada determined that the cause of action for failure to pay minimum wages to employees under the Nevada Constitution

was most analogous to NRS 608.260 (the statutory minimum wage statute of limitations provision) which had a two year statute of limitations; therefore the Court applied a two year statute of limitations to constitutional minimum wage claims rather than the “catch-all” four year limitation under NRS 11.220. No such closely analogous period applies here.

Respondent argued below that NRS 11.190(4)(e) is applicable as the most analogous period. That statute states as follows:

**NRS 11.190 Periods of limitation.** Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:

...

4. Within 2 years:

...

(e) Except as otherwise provided in NRS 11.215, an action to recover damages for *injuries to a person or for the death of a person* caused by the wrongful act or neglect of another. The provisions of this paragraph relating to an action to recover damages for injuries to a person apply only to causes of action which accrue after March 20, 1951.

(emphasis added)

The plain language of this statute shows that it is not applicable and not analogous.

In order to make its argument the Respondent would have the court ignore the language “an action to recover damages for injuries to a person or for the death of a person” and jump straight to the part that says “caused by the wrongful act or neglect of another.” NRS 11.190(4)(e) is for personal physical injury and wrongful death claims. Retaliatory discharge in violation of public policy for



filing or pursuing workers' compensation claim is neither of those. Indeed there are no actionable claims for personal injuries or death covered by workers' compensation as workers' comp is the exclusive remedy for such personal injuries or deaths. NRS 616A.020; *See also Dillard Department Stores v. Beckwith*, 115 Nev. 372, 376-77, 989 P.2d 882 (1999) (holding that exclusive remedy provisions within the Nevada Industrial Insurance Act do not affect or abrogate the retaliatory discharge in violation of public policy claim). Thus it is quite anomalous to argue that NRS 11.190(4)(e) providing a limitation period for personal injuries and wrongful death would apply to a claim that primarily seeks economic damages (lost wages and benefits of employment) because a person was fired from their job illegally.

Respondent below, in its Motion to Dismiss, cited only one case for its argument that a two year statute of limitations under NRS 11.290(4)(e) applies to the retaliatory discharge claim.<sup>1</sup> It is an unpublished U.S. District Court case. There are a few other federal cases out there that have ruled the same as the one cited by Respondent, most of which merely cite to each other if they cite any authority at all. Federal court decisions are not binding on Nevada's state courts.

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<sup>1</sup> Plaintiff notes that Defendant has cited as authority to an unpublished order from the U.S. District Court for the District of Nevada which is not binding authority on Nevada state courts. It is peculiar that NRAP 36 outlaws citation to unpublished orders by Nevada's own Court of Appeals, yet citation to unpublished federal District Court decisions is apparently permissible.

*Blanton v. North Las Vegas Mun. Ct.*, 103 Nev. 623, 633, 748 P.2d 494 (1987). Federal cases that do not properly analyze Nevada law and make a proper “*Erie* prediction” as to what the highest state court would decide on a matter of state law are not even persuasive authority for this Court. Such is the case with the “authority” cited by Respondent. In fact all of the unpublished U.S. District Court decisions that Plaintiff’s counsel could find that address this issue all fail to analyze the legal issues or provide any rationale for their conclusions. The only Supreme Court of Nevada case ever cited by the federal decisions that Plaintiff’s counsel could find is a case called *Palmer v. State*, 106 Nev. 151, 787 P.2d 803, 804 (1990). That very short *per curiam* decision does NOT analyze the issue or hold that a two year statute of limitations under NRS 11.190(4)(e) applies to retaliatory discharge claims. Indeed the case involves the unrelated issue of administrative exhaustion of a statutory discrimination claim and does not even mention NRS 11.190(4)(e). No reasonably intelligent person could read the *Palmer* case and come away with the notion that NRS 11.190(4)(e) imposes a two year statute of limitations for common law retaliatory discharge from employment claims. The case mentions that Ms. Palmer filed her case in court prior to Nevada Equal Rights Commission finishing the processing of her administrative charge in order to avoid a “potential” two year statute of limitations defense against her “tort claim.” The Supreme Court of Nevada never identifies what the “tort claim” was

for (no violation of public policy is discussed<sup>2</sup>), nor does it ever say that Ms. Palmer was correct in her concern that any statute of limitations defense that could have been raised was valid. Thus, *Palmer* is no authority to support the unpublished federal court decisions that are out there including the one cited by Respondent in its motion to dismiss (which does not cite *Palmer* or any employment cases). In short, there is no authority for the Respondent's bald assertion that the Plaintiff's retaliatory discharge in violation of public policy claim is subject to a two year statute of limitations under NRS 11.190(4)(e).

The most closely analogous limitations period would be for unwritten contracts, which is four years under NRS 11.190(2)(c). At-will employment is a contractual relationship governed by the law of contract. *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 369 (1989) ("Employment "at-will" is a contractual relationship and thus governed by contract law. *Smith v. Cladianos*, 104 Nev. 67, 752 P.2d 233. An employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend a public policy of this state. *Ponsock*, 103 Nev. at 47, 732 P.2d at 1369.") Accordingly, the actionable termination of that contractual relationship, as the retaliatory discharge claim is expressly an exception to the at-will employment doctrine, along with the lost

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<sup>2</sup> Based upon the context of the limited amount of factual description the undersigned speculates that it was a defamation claim—we apparently will never know.

wages remedy looking more like contract damages than tort damages makes the four year period for unwritten contracts the most analogous period.

But, as Respondent will correctly point, out the Supreme Court of Nevada has labeled the claim a “tort” and has made the full panoply of tort damages available in a retaliatory discharge claim, including punitive damages. *Hansen v. Harrah's*, 100 Nev. 60, 64-65, 675 P.2d 394 (1984). Accordingly, the retaliatory discharge claim appears to be a hybrid type of claim with multifarious purposes and remedies and is exactly the type of claim that the Supreme Court of Nevada has said should be covered by the “catch-all” limitations period set forth in NRS 11.220. *Perry*, 383 P.3d at 261-62.

Respondent makes much of the fact that the cause of action for retaliatory discharge is a common law “tort” action as stated in a number of cases. This is simply because common law claims are generally either “contract” or “tort.” The Supreme Court of Nevada has termed the retaliatory discharge claim a “tort” even though the remedies include contract-like damages for lost wages and benefits of employment. Respondent implies that because the claim is classified as a “tort” that the two year statute of limitations set forth in NRS 11.190(4)(e) would apply. This is a fallacy. Other non-personal injury/wrongful death tort claims have different and longer statutes of limitations. *See e.g.* NRS 11.190 (3) (fraud, trespass, conversion). Indeed other non-personal injury/wrongful death tort claims

that are not provided with specific limitations periods in NRS have been held to have a four year limitations period under NRS 11.220. (*See e.g. Aldabe v. Adams*, 81 Nev. 280, 286, 402 P.2d 34 (1965) civil conspiracy (overruled on other grounds involving how to calculate when the four year period begins to run in *Siragusa v. Brown*, 114 Nev. 1384, at 1393, 971 P.2d 801 (1998))

As the four year “catch-all” statute of limitations provided for in NRS 11.220 is the applicable law to this case, and as it is undisputed that Antonette Patush filed this action prior to the expiration of the four year limitations period, the granting of the Motion to Dismiss by the District Court was a clear error of law and must be reversed.

**III. THE DISTRICT COURT ERRED BECAUSE NRS 11.190(4)(e) IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO ANTONETTE’S CLAIM IN THIS CASE AND DISMISSAL RESULTS IN AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS.**

NRS 11.190 provides in relevant part as follows:

**NRS 11.190 Periods of limitation.** Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:

...

4. Within 2 years:

...

(e) Except as otherwise provided in NRS 11.215, an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another. The provisions of this paragraph relating to an action to recover damages

for injuries to a person apply only to causes of action which accrue after March 20, 1951.

“Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990) (quoting *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922)). The language of NRS 11.190(4)(e) is plain and unambiguous. It only applies to actions seeking to recover for personal injury and wrongful death. Since the primary damages sought by a retaliatory discharge claim are for lost wages and benefits of employment and not personal injuries or wrongful death, the statute does not apply in this case. Moreover it would be an unconstitutional denial of due process to apply the two year statute of limitations in NRS 11.190(4)(e) to the Plaintiff’s case here. The statute, if it was intended to apply to retaliatory discharge claims (unlikely as the cause of action was recognized in 1984 and the statute was enacted over thirty years prior in 1951), is unconstitutionally vague.

To avoid a vagueness challenge, a statute must provide to a person of ordinary intelligence adequate notice of what conduct is prohibited and sufficient guidelines to preclude arbitrary and discriminatory enforcement of the statute. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982); *Cunningham v. State*, 109 Nev. 569, 570, 855 P.2d 125, 125 (1993). *Erwin v. State*, 908 P.2d 1367, 111 Nev. 1535 (1995).

No person of ordinary intelligence would have adequate notice from reading NRS 11.190(4)(e) that a retaliatory discharge from employment in violation of public policy claim would be subject to a two year statute of limitations under that statute. Thus to apply that statute of limitations to the claim in this case would be an unconstitutional denial of and violation of due process.

On the other hand, if a person of ordinary intelligence read the entirety of the limitation period statutes in NRS Chapter 11, he or she would conclude that there was no specific limitation period provided for the retaliatory discharge claim and would determine that the four year “catch-all” provision in NRS 11.220 applies to this claim. Indeed in the *Yellow Jacket Silver Mining Co.* case, 14 Nev. at 230, the Supreme Court of Nevada held that NRS 11.220 is plain and unambiguous and sets forth that ANY CAUSE OF ACTION that is not given a specific limitations period anywhere else in NRS is subject to a four (4) year limitations period.

Accordingly, to apply the two year statute of limitations period in NRS 11.190(4)(e) rather than the four year limitations period provided for in NRS 11.220 would be an unconstitutional violation of the due process rights of Plaintiff Antonette Patush. This violates U.S. Constitution Amendment XIV’s Due Process Clause as well as Nevada Constitution Article I, Sec. 8(5) in that it deprives Antonette of her liberty and property interests in a recovery of damages from

Respondent without due process of law. The District Court's order dismissing Antonette's claim rests upon a clear error of law and must be reversed.

### **CONCLUSION**

In accordance with the above, the District Court's Order Granting Defendant's Motion to Dismiss pursuant to NRCP 12(b)(5) rests on an error of law. The dismissal of Antonette Patush's Complaint on statute of limitations grounds should be reversed and the case remanded so that it may proceed on the merits.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of August 2018.

/s/ James P. Kemp  
JAMES P. KEMP, ESQUIRE  
Nevada Bar No. 006375  
Attorney for Appellant



**ATTORNEY’S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF  
THE NEVADA RULES OF APPELLATE PROCEDURE**

James P. Kemp, Attorney for Appellant, by signing below herby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

1. 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman size 14 font;

2. 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:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,864 words;

3. 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 Procedure, 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.

DATED this 27<sup>th</sup> day of August 2018

/s/ James P. Kemp  
JAMES P. KEMP, ESQ., Bar No.6375

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 27, 2018, I filed the foregoing Appellant's Opening Brief through the Supreme Court of Nevada's electronic filing system along with the Appellant's Appendix. Electronic service of the foregoing shall be made through the Court's e-flex system in accordance with the Master Service List.

Deanna L. Forbush, Esq.  
Jeremy J. Thompson, Esq.  
CLARK HIL, PLLC  
3800 Howard Hughes Pkwy, Suite 500  
Las Vegas, NV 89169

DATED this 27<sup>th</sup> day of August 2018

/s/ James P. Kemp  
JAMES P. KEMP, ESQ.