**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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ANTOINE SALLOUM,

Appellant.

vs.

BOYD GAMING CORPORATION, d/b/a MAIN STREET STATION, a Delaware corporation,

Respondents.

**Docket No.: 80769**

District Court Case No.: A-19-804678-C



# REPLY BRIEF

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| ANTOINE SALLOUM,<br>Appellant.<br>vs.<br>BOYD GAMING CORPORATION, d/b/a MAIN STREET STATION, a Delaware corporation,<br>Respondents. | **Docket No.: 80769**<br>District Court Case No.: A-19-804678-C<br>**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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Watkins & Letofsky, LLP.

Attorney of Record for Antoine Salloum.

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## I. INTRODUCTION

The history of Mr. Salloum's employment, as summarized by Appellee, is curiously off subject. It does not matter, for example, that the complaint allegedly contained what Appellee describes as a "laundry list of inane grievances" or that the Complaint mentions Appellee's general director and manager. JA003 Paragraph 14; see also JA122-25 (Order granting the Company's motion to dismiss). Neither does it matter that prior to discharging Appellant, Appellee allegedly solicitated statements from four employees and used those statements as justification for its discharge of Mr. Salloum. None of this matters because these factual allegations are not at issue in the instant matter. Witness credibility is not at issue in the instant matter, either. These "head fakes" by Appellee signal its concern that it is on the losing side of the real question.

What is at issue is whether Mr. Salloum timely filed his Charge of Discrimination, whether his case lived within the administrative process until the issuance of the Right to Sue letter, and whether SB177 applies to the instant case because it relates to remedies and procedures. If the answer to any of these questions is "no", then the issue becomes whether any miscalculation by Appellant is excusable under the Doctrine of Equitable Tolling.

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## II. ARGUMENT

### A. Appellant Timely Filed His Charge of Discrimination.

Prior to retaining counsel, Appellant submitted a five-page letter to the EEOC on February 11, 2019, detailing the discrimination and harassment he experienced while in Defendant's employ. (JA30-JA35). Although Appellant did not title the document a "Charge of Discrimination", the letter's format, detail, and request for relief sufficiently meet the elements of a request for relief as required by 29 CFR §1601.12.

EEOC regulations implement the federal workplace discrimination laws and are found in the Code of Federal Regulations (CFR). (www.eeoc.gov/eeoc-regultions). The EEOC's regulations are published annually in Title 29 of the Code of Federal Regulations (CFR). *Id*. Pursuant to 29 CFR §1601.34, the rules and regulations shall be liberally construed to effectuate the purpose and provisions of title VII, the ADA, and GINA.

29 CFR §1601.7 provides that a charge of discrimination may be made by any person, agency, or organization. The person making the charge, however, must provide the commission with the name and contact information of the person on whose behalf the charge is made." *Id*. §1601.12 provides what the charge "*should*" contain: (1) the full name and contact information of the person making the charge (2) the full name and contact information of the person against whom the charge is

made (3) a clear and concise statement of facts (4) the approximate number of employees, if known and (5) a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a state or local agency charged with the enforcement of fair employment practices. 29 CFR §1601.12(a). However, notwithstanding these provisions, a charge is sufficient when the Commission receives . . . "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 CFR 1601.12(b)

Appellant's charge of discrimination substantially complied with these requirements. Appellant's correspondence was addressed to the EEOC. (JA30-JA35). Appellant included his full name and contact information, as well as the full name and contact information for Appellee. *Id*. Throughout five pages, Appellant detailed his discharge, the events leading up to his discharge, and the reasons Appellee gave him for his discharge. *Id*. Appellant then explained why he believed Appellee's stated reasons to discharge him were pretextual – the real reasons being gender and racial/ethnic discrimination. *Id*. Here, Appellant's correspondence contained the elements necessary to constitute a charge of discrimination.

Appellant has consistently maintained that he submitted his complaint with the EEOC on February 11, 2019, the 180th day to do so. *Id*. However, even if Appellant was incorrect in his calculations and filed his Charge on the 183rd day, the

Charge of Discrimination is still considered timely because of the work sharing agreement between the Equal Employment Opportunity Commission and the Nevada Equal Rights Commission.

In jurisdictions such as Nevada, where cases are shared or transferred between the Equal Employment Opportunity Commission and the related state agency, the 180-day deadline is extended – to 300-days. C.F.R. § 1601.13(a)(4)(ii)(A). A Charge of Discrimination filed with the EEOC "is timely if the charge is received within 300-days from the date of the alleged violation." C.F.R. § 1601.13(a)(4)(ii)(A). The EEOC, on its website, provides that the 180-calendar-day filing deadline is extended to 300-calendar days "if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis."

https://www.eeoc.gov/how-file-charge-employment-discrimination last visited March 19, 2021.

The Nevada Equal Rights Commission is the state agency in Nevada that enforces a state law that prohibits employment discrimination. The Nevada Equal Rights Commission, on its website, provides that if an employee has filed a complaint with the EEOC, he does not have to file a separate complaint with NERC.

> The NERC has a work-sharing agreement with the EEOC. Where both NERC and the EEOC have jurisdiction, you can file a complaint with either agency, and the agency where you file first will investigate. If you have already filed a complaint with EEOC, they will file the complaint with NERC. www.detr.nv.gov/Page/Complaint_Process last visited March 19, 2021.

Finally, courts have consistently maintained that, as it relates to the exhaustion of administrative remedies, service upon one agency serves as a constructive filing upon the other. *Ware v. NBC Nevada Merchants, Inc.*, 219 F.Supp. 3d 1040, 1046 (2017). *See also, Green v Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1476 (9th Cir. 1989), holding that if a state agency has a work-sharing agreement with the EEOC, the state agency is an agent of the EEOC for the purpose of receiving charges, and *McConnell v. Gen.Tel. Co. of California*, 814 F.2d 1311, 1315-16 (9th Cir. 1987), holding that work-sharing agreements function to constructively file charges with both agencies at once, thus exhausting a plaintiff's administrative remedies.

Here, for the reasons discussed, Appellant's six-page complaint was a Charge of Discrimination. It was sufficiently precise to identify the parties and described generally the action complained of. 29 CFR 1601.12(b). In light of federal and state policies, the work sharing agreement between the EEOC and NERC, as well as case law, Appellant timely filed his Charge of Discrimination on February 11, 2019.

**B. Appellant's Case Lived Within the Administrative Process Until the Issuance of the Right to Sue Letter.**

As discussed previously, during the time that Appellant's case moved through the administrative process of the EEOC, the Nevada legislature amended NRS Chapter 613. Chapter 613 now provides that a person alleging an unlawful

employment practice must bring an action within 180-days of the act complained of *or more than 90 days after the date of the receipt of the right to sue notice, whichever is later*. NRS 613.420 (2). (Emphasis added.) The changes to NRS Chapter 13 became effective October 1, 2019. Appellant filed his Complaint on November 1, 2019 within the 90-day window he had to file a complaint. (JA001—JA012).

In this case as discussed above, Appellant timely filed his complaint with the EEOC after the adverse employment action. (JA30—JA35). Because Appellant needed a right to sue letter from the EEOC/NERC prior to filing a complaint in district court, and because the EEOC/NERC does not issue right to sue letters until after they complete an interview and issue a charging complaint, it would be impossible for a claimant to have the opportunity to present his/her claim to a jury in district court if he/she did not file the initial complaint with the EEOC/NERC with sufficient time for them to complete the process of receiving the complaint, completing the interview, issuing a charging complaint and providing a right to sue letter. Importantly, the EEOC/NERC does not operate on a set schedule when it comes to the process of completing interviews, issuing charges, and providing right to sue letters. Therefore, any claimant who filed a complaint with the EEOC/NERC in the last days of the 180-day limit to file a complaint in district court, would be precluded from filing in district court, because the right to sue letter would not be returned within the 180-day limit to file a complaint in District Court. The legislature

sought to remedy this procedural quagmire with Senate Bill 177. (JA036—JA041) (JA043—JA046.)

SB177 was silent regarding whether it applies to violations that occurred prior to October 1, 2019 or only those violations that occur after October 1, 2019. However, the Nevada Supreme Court has discussed this issue in the past and has held that a statute is presumed to apply prospectively, **unless it relates to remedies and procedure.** *Friel v. Cessna Aircraft C*o., 751 F.2d 1037, 1039 (1985). See also *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 179 (2007). If a statute relates to remedies and procedure, it will apply to any case pending when it is enacted, because remedies do not alter the conduct that occurred before the change.

> It is a rule of construction that statutes are ordinarily given prospective effect. But when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases. . . The legislative change in no way alters the effect given to conduct before the change." *Id*.

SB177 sought to extend the remedies available under Title VII to the four categories of discrimination that the Nevada Constitution protects but which are not enumerated as discrimination under Title VII — sexual orientation, gender identity or expression, age, and disability. (JA036—JA041) (JA043—JA046.) SB177 also addressed the administrative remedies provision of NRS 613.430 and clarified the relationship of the 180-day filing deadline. *Id*. Because SB177 addressed remedies and procedures, as opposed to specific conduct, the changes to NRS 613.430 applied

to all pending unlawful employment actions – not simply those that have occurred since October 1, 2019. As such, the amendments to Chapter 613 that took effect on October 1, 2019 apply to Appellant's case and are controlling in the instant matter.

Respondent maintains that Appellant's claim was already time-barred when SB177 went into effect and that allowing the claim to survive would be reviving an expired claim. This argument would apply if SB177 had been a substantive bill. However, SB177 was fashioned to address remedies and procedure relating to substantive rights. *Id*. Because SB177 did not add or remove any substantive rights, it only applied to remedies and procedures; and because it only applied to remedies and procedures, SB177 applied to any case pending when it was enacted. Appellant's case was pending at the time it was enacted.

Because the new law went into effect on October 1, 2019, the old provisions of NRS 613 expired on September 30th. Beginning on October 1st, Appellant was under the authority of the Amendments to Chapter 613. Application of the Amendments to Chapter 613 to this case perfectly serves the purpose behind the amendments.

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**C. Appellee's Reliance Upon an Administrative Miscalculation Effectively Denies Appellant His Procedural Due Process.**

SB 177 provides that a right-to-sue notice shall issue, if at least 180 days have passed after the complaint was filed pursuant to NRS 233.160. Appellee maintains that Appellant neither filed pursuant to 233.160, nor did 180 days pass before the Right to Sue letter was issued.

As it relates to Appellee's first contention, that Appellant did not seek recourse pursuant to NRS 233.160, Appellant maintains that the work sharing agreement between NERC and EEOC clearly illustrates an intent for the agencies to work in tandem. In fact, the statute explicitly states that a complaint is timely filed if it is filed with an appropriate federal agency (in this case, the EEOC), within that period.

> A complaint is timely if it is filed with an appropriate federal agency within that period. A complainant shall not file a complaint with the Commission if any other state or federal administrative body or officer which has comparable jurisdiction to adjudicate complaints of discriminatory practices has made a decision upon a complaint based upon the same facts and legal theory. NRS 233.160(1)

As such, any attempt to discredit the application of NRS 233.160 in the instant matter is misplaced.

Secondly, that only sixty-four days – instead of 180 days – passed from the issuance of the Charge of Discrimination until the issuance of the Right to Sue letter, should not be fatal to Appellant's action. In this case, Appellant requested a Right to Sue letter. (JA066). The Commission obliged and issued the Right to Sue. (JA011). When to issue the Right to Sue letter was an administrative decision made by the EEOC. By Appellee's logic, Appellant is therefore barred from pursuing his action, because of an administrative error by a governmental agency. If true, this position infringes upon Appellant's due process rights. U.S. Const. amend. XIV. §1. Nev. Const. art.1, §1. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

**D. Any Miscalculation by Appellant Is Excusable Under the Doctrine of Equitable Tolling.**

As discussed previously, should this Court find that Appellant's Complaint was, in fact, untimely, Appellant requests that this Court find it timely upon the theory of equitable tolling.

In determining whether the doctrine should apply in a given case, this Court noted several factors to consider: (1) the diligence of the claimant; (2) the claimant's knowledge of the relevant facts; (3) the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; (4) any deception or false assurances on the part of the employer against whom the claim is made; (5) the prejudice to the employer that

would actually result from delay during the time that the limitations period is tolled; (6) and any other equitable considerations appropriate in the particular case. *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826 (1983). *See also Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 152, 111 P.3d 1107 (2005) and *City of North Las Vegas v. State Local Government Employee-Management Relations Bd.*, 127 Nev. 631, 261 P.3d 1071, 1077 (2011).

In this instance, Appellant was diligent. He electronically submitted a complaint to the EEOC on Monday, February 11, 2019 – exactly 180-days after his termination. (JA060—JA062) (JA030—JA035). His correspondence contained the elements necessary to constitute a charge of discrimination. It was addressed to the EEOC, it included his full name and contact information, as well as the full name and contact information for Appellee. (JA30-JA35). He detailed his discharge, the events leading up to his discharge, and the reasons Appellee gave him for his discharge. *Id*. He then explained why he believed Appellee's stated reasons to discharge him were pretextual – the real reason being gender and racial/ethnic discrimination. *Id*. Appellant considered this a timely filing, because it substantially complied with the requirements of CFR 1601.12. (JA30-JA35).

Secondly, Appellant timely requested a Right to Sue letter. Appellant received his Right to Sue letter on August 13, 2019. (JA011). Appellant had ninety days from the issuance of the Right to Sue letter to file suit. The 90-day deadline

was November 11, 2019. Appellant acted in good faith upon his understanding of the new law and timely filed suit on November 1, 2019. (JA001—JA012). That an administrative agency issued a right-to-sue letter sooner than it should have should not prejudice Appellant.

Finally, tolling the limitations period would not prejudice Respondent. Statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Am. Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) citing (*Order of Railroad Telegraphers v Railway Express Agency*, 321 U.S. 342, 64 S. C.t 582 (1944). Here, had it not been for the dismissal of the action based on a miscalculation of an amended statute, Appellant would be aggressively prosecuting his case. As such, equitable tolling will not prejudice Respondent.

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## III. CONCLUSION

Appellant timely filed his Charge of Discrimination. His case lived within the administrative process until the issuance of the Right to Sue letter. The amendments to NRS 613.430, which became effective on October 1, 2019, extended the time for Appellant to bring an action to November 13, 2019 (ninety days following the right-to-sue notice) – a deadline which Appellant met. Because SB177 addressed remedies and procedures, as opposed to specific conduct, the changes to NRS 613.430 applied to all pending unlawful employment actions at the time the law was passed and not simply those that occurred after October 1, 2019, the day SB177 became effective.

Alternatively, any miscalculation by Appellant is excusable under the Doctrine of Equitable Tolling.

DATED this 19th day of March, 2021.

WATKINS & LETOFSKY, LLP

*/s/ Daniel R. Watkins*

*By:* _____

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## CERTIFICATE OF COMPLIANCE (NRAP 28.2)

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:

(a) This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font size 14, and double spaced.

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

(a) Proportionately spaced, has a typeface of 14 points or more, and contains 3144 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to unnecessary delay or needless increase in the cost of litigation. 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 22nd day of March, 2021.

WATKINS & LETOFSKY, LLP

*/s/ Daniel R. Watkins*

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## CERTIFICATE OF SERVICE

I certify that I am an employee of Watkins & Letofsky, LLP, and that on this **22nd day of March 2021**, I electronically served the foregoing **APPELLANT'S REPLY BRIEF** on the interested parties in this action via Electronic Service through the Nevada Supreme Court E-filing.

☒ Electronic: by submitting the foregoing document via Electronic Service through the Nevada Supreme Court E-filing System upon the parties/counsel listed on the Court's Electronic Service List pursuant to ADKT 404. The copy of the document electronically served bears a notation of the date and time of service. The original document will be maintained with the document(s) served and be made available, upon reasonable notice, for inspection by counsel or the Court. The document will be served on the following:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

*/s/ Farah Kachermeyer*
Farah H. Kachermeyer
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