

TAKING THE LEAD: The Nevada Gaming Control Board's Efforts to Elevate Protection Against Sexual Harassment

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Sexual harassment, a form of sex discrimination, has long been prohibited under Title VII of the Civil Rights Act of 1964 and under Nevada state law since 1967, when the Legislature added sex-based discrimination to the already existing unlawful employment practice to discriminate because of an employee's race, color, religion, or national origin.¹ While these laws are designed with good intention to prohibit sexual harassment in the workplace, the reality is that many employees endure sexual harassment at work.

Even before the high-profile downfall of industry leaders in

entertainment, media, sports, and gaming, there was a rising awareness of the pervasiveness of sexual harassment in employment. But the 2017 #MeToo movement, as well as local allegations of sexual harassment in the gaming industry, continued to raise the level of awareness that sexual harassment remains widespread but often goes undetected due to the silence, whether voluntary or not, of those affected. The awareness fueled some change, like making it more difficult to prevent the disclosure of factual information under the terms of a settlement agreement involving allegations of discrimination on the basis of sex by an employer or

retaliation for reporting sex-based discrimination.²

But not a lot changed in Nevada in terms of additional protection at work. Nevada gaming licensees most likely already had anti-discrimination and retaliation policies in place long before the amendments to Nevada Gaming Commission ("NGC") Regulation 5 because they were already tasked with following federal and state laws in a general sense,³ which necessarily includes fair employment practices, but employment laws were not a particular focus. It is likely that existing policies provided a

reporting structure so that employers knew about alleged sexual harassment and could undertake an investigation. Whether the focus of those investigations was motivated by a desire to limit liability or to identify and take steps to discipline wrongdoers could be extensively debated,⁴ but even a dual-purposed goal should accomplish both protection of the employee and the employer while also leading to an appropriate disciplinary outcome depending on the severity of the identified conduct.

Within the gaming industry, striking the appropriate balance between promoting an adult “party” atmosphere while maintaining appropriate protections for employees can prove challenging. And with sex-based discrimination charges representing nearly 35 percent of Nevada’s total state charges,⁵ sexual harassment is not an issue that will resolve on its own. It was time for action, and the Nevada Gaming Control Board (“NGCB”), with its first ever female Chairwoman at the helm, Sandra Douglass Morgan, took the lead. What followed were frank discussions that sexual harassment has no place in the gaming industry and licensees must do better to prevent, identify, investigate, and curb this conduct, both from an internal perspective, as well as from an external perspective focused on guests, vendors, and other non-employees.

To that end, effective March 1, 2020, the NGC — regulator of all gaming activities and licenses in Nevada — followed the recommendations of the NGCB and amended Regulation 5.011(1)(h), Grounds for disciplinary action, to expressly include harassment, including sexual harassment:

(h) Failure to comply with or make provision for compliance with all federal, state, or local laws and regulations and with all conditions and limitations approved by the Commission

relating to the operations of a licensed gaming establishment or other gaming business, including, without limitation, those relating to:

(3) Workplace discrimination or harassment of a person based on the person’s race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin, including, without limitation, sexual harassment.

In addition, upon the recommendation of the NGCB, the NGC also added Regulation 5.250 which requires any gaming licensee with 15 or more employees — including casinos, bars and taverns with gaming, slot route operators, manufacturers, and others — to have on-site policies and procedures prohibiting discrimination and harassment, with a special emphasis on sexual harassment. Specifically, NGC Regulation 5.250 states gaming companies:

shall adopt and implement written policies and procedures prohibiting workplace discrimination or harassment of a person based on the person’s race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin, including, without limitation, sexual harassment.

Much of the focus of the new regulation is on reporting and the investigative process that employees can expect. Historically, reporting has been a major issue, not only because of the inherent difficulty for employees to come forward, but also due to how sexual harassment is defined. The revised NGC regulations require licensees to have policies in place to address these issues.

With a purpose similar to Nevada’s amended NGC Regulation 5, Illinois passed the Hotel and Casino Employee Safety Act (“HCESA”),⁶ effective July 1, 2020, that sets forth protections for certain employees working in the hotel and casino industries. Under the HCESA, the definition of “employee” includes full-time employees, part-time employees, and employees of subcontractors.⁷ Similar to NGC Regulation 5, the HCESA requires hotels and casinos to develop and follow a written anti-sexual harassment policy that includes reporting procedures and immediate steps to take in response to perceived harassment. But the HCESA goes even further, providing for the opportunity for temporary work reassignments, as well as the availability of paid time off to contact authorities and participate in later legal proceedings.⁸ The HCESA requires that employers distribute and post copies of the policies in English and Spanish, as well as any other languages spoken by a predominant portion of its workforce.⁹ The HCESA also requires hotels and casinos to provide employees assigned to work alone in a guest room, restroom, or casino floor with a “safety or notification device.”¹⁰ The device will allow an employee to summon for help in a





perceived emergency, including sexual harassment and sexual assault. The HCESA includes anti-retaliation provisions for reasonably using the signaling device; invoking reporting procedures mandated by HCESA; and disclosing, reporting, or testifying about an alleged violation of the HCESA.¹¹ Employees and their representatives may sue in state court to seek any remedy available at law or equity, including injunctive or other equitable relief.¹² Before filing a lawsuit, the employee representative must provide written notification of the alleged violation and “allow the hotel employer or casino employer 15 calendar days to remedy the violation.”¹³ As the law becomes effective, it will be interesting to watch how Illinois hotel and casinos navigate the HCESA both from a compliance perspective and the practical outcome from aggressive remedial provisions that allow employees or their representatives a private right of action in a relatively short timeline.

The message in Nevada: the NGCB and the NGC expect gaming establishments to protect their employees from unlawful discrimination and harassment in any form. In an emailed statement, NGCB chairwoman Sandra Douglass Morgan said the agency’s Tax and License Division “will confirm each applicable licensee’s compliance”

with the regulation changes. “Additionally, the compliance unit of the board’s Investigations Division will continue to monitor the compliance committees of such gaming licensees and evaluate whether their respective compliance plans adequately address the necessary policies and procedures required by Regulation 5.250,” Morgan said.

The takeaway: gaming licensees subject to the new regulations are an essential piece to helping reduce sexual harassment in the workplace. The NGCB’s and NGC’s involvement is helpful, but whether it will lay the groundwork for additional reporting remains to be seen. As a result, gaming licensees should also take a lead role and routinely review whether their written policies and procedures are effective and whether they can be adjusted to facilitate the joint goal: a working environment free from discrimination and harassment.



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¹ 42 U.S.C. § 2000e *et seq.*; Nev. Rev. Stat. § 613.330.

² Nev. Rev. Stat. § 10.195.

³ 42 U.S.C. §§ 2000e *et seq.*; Nev. Rev. Stat. § 613.330; Nev. Gaming Comm’n Reg. 5.011(8) (effective through 2019) previously stated: “Failure to comply with or make provision for compliance with all federal, state and local laws and regulations and with all Commission approved conditions and limitations pertaining to the operations of a licensed establishment including, without limiting the generality of the foregoing, payment of all license fees, withholding any payroll taxes, liquor and entertainment taxes and antitrust and monopoly statutes.”

⁴ Chris Sieroty, *Nevada Gaming Industry Updates Workplace Harassment and Discrimination Policies*, Nevada Public Radio, Dec. 04, 2019, <https://knpr.org/knpr/2019-12/nevada-gaming-industry-updates-workplace-harassment-and-discrimination-policies> (quoting Ann McGinley, director of workplace law program at UNLV’s Boyd School of Law, “most sexual harassment rules are designed to protect employers from lawsuits but they are not designed to stop harassment from happening”).

⁵ Equal Employment Opportunity Commission, FY 2009-2019 EEOC Charge Receipts for NV, <https://www.eeoc.gov/statistics/enforcement/charges-by-state/NV>).

⁶ 820 ILL. COMP. STAT. 325/5-1 *et seq.* (Public Act 101-0221, Art. 5).

⁷ 820 ILL. COMP. STAT. 325/5-5.

⁸ 820 ILL. COMP. STAT. 325/5-10.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 820 ILL. COMP. STAT. 325/5-15.

¹² 820 ILL. COMP. STAT. 325/5-20.

¹³ *Id.*