

AMENDMENTS TO LB 97

(Amendments to Standing Committee amendments, AM893)

Introduced by Flood, 19.

1 1. Insert the following sections:

2 Sec. 2. (1) The following evidence is not admissible
3 in any civil or criminal proceeding involving alleged sexual
4 misconduct except as provided in subsections (2) and (3) of this
5 section:

6 (a) Evidence offered to prove that any victim engaged in
7 other sexual behavior; and

8 (b) Evidence offered to prove any victim's sexual
9 predisposition.

10 (2) (a) In a criminal case, the following evidence is
11 admissible, if otherwise admissible under the Nebraska Evidence
12 Rules:

13 (i) Evidence of specific instances of sexual behavior by
14 the victim offered to prove that a person other than the accused
15 was the source of semen, injury, or other physical evidence;

16 (ii) Evidence of specific instances of sexual behavior of
17 the victim with respect to the accused offered by the accused to
18 prove consent of the victim if it is first established to the court
19 that such behavior is similar to the behavior involved in the case
20 and tends to establish a pattern of behavior of the victim relevant
21 to the issue of consent; and

22 (iii) Evidence, the exclusion of which would violate the

1 constitutional rights of the accused.

2 (b) In a civil case, evidence offered to prove the sexual
3 behavior or sexual predisposition of any victim is admissible if it
4 is otherwise admissible under the Nebraska Evidence Rules and its
5 probative value substantially outweighs the danger of harm to any
6 victim and of unfair prejudice to any party. Evidence of a victim's
7 reputation is admissible only if it has been placed in controversy
8 by the victim.

9 (3)(a) A party intending to offer evidence under
10 subsection (2) of this section shall:

11 (i) File a written motion at least fifteen days before
12 trial specifically describing the evidence and stating the purpose
13 for which it is offered unless the court, for good cause, requires
14 a different time for filing or permits filing during trial; and

15 (ii) Serve the motion on all parties and notify
16 the victim or, when appropriate, the victim's guardian or
17 representative.

18 (b) Before admitting evidence under this section, the
19 court shall conduct a hearing in camera outside the presence of any
20 jury and afford the victim and parties a right to attend and be
21 heard.

22 Sec. 3. For purposes of sections 4 and 5 of this act,
23 offense of sexual assault means sexual assault under section 28-319
24 or 28-320, sexual assault of a child under section 28-319.01
25 or 28-320.01, sexual assault by use of computer under section
26 28-320.02, sexual abuse of an inmate or parolee under sections
27 28-322.01 to 28-322.03, and sexual abuse of protected persons under

1 section 28-322.04.

2 Sec. 4. (1) In a criminal case in which the accused
3 is accused of an offense of sexual assault, evidence of the
4 accused's commission of another offense or offenses of sexual
5 assault is admissible if there is clear and convincing evidence
6 otherwise admissible under the Nebraska Evidence Rules that the
7 accused committed the other offense or offenses. If admissible,
8 such evidence may be considered for its bearing on any matter to
9 which it is relevant.

10 (2) In a case in which the prosecution intends to
11 offer evidence under this section, the prosecuting attorney shall
12 disclose the evidence to the accused, including statements of
13 witnesses or a summary of the substance of any testimony that is
14 expected to be offered, at least fifteen days before the scheduled
15 date of trial or at such later time as the court may allow for good
16 cause.

17 (3) Before admitting evidence of the accused's commission
18 of another offense or offenses of sexual assault under this
19 section, the court shall conduct a hearing outside the presence of
20 any jury and afford the victim and parties a right to attend and be
21 heard. At the hearing, the rules of evidence shall apply and the
22 court shall apply a section 27-403 balancing and admit the evidence
23 unless the risk of prejudice substantially outweighs the probative
24 value of the evidence. In assessing the balancing, the court may
25 consider any relevant factor such as (a) the probability that the
26 other offense occurred, (b) the proximity in time and intervening
27 circumstances of the other offenses, and (c) the similarity of the

1 other acts to the crime charged.

2 (4) This section shall not be construed to limit the
3 admission or consideration of evidence under any other section of
4 the Nebraska Evidence Rules.

5 Sec. 5. (1) In a civil case in which a claim for damages
6 or other relief is predicated on a party's alleged commission of
7 conduct constituting an offense of sexual assault, evidence of
8 that party's commission of another offense or offenses of sexual
9 assault is admissible if there is clear and convincing evidence
10 otherwise admissible under the Nebraska Evidence Rules that the
11 party committed the other offense or offenses. If admissible, such
12 evidence may be considered for its bearing on any matter to which
13 it is relevant.

14 (2) A party who intends to offer evidence under this
15 section shall disclose the evidence to the party against whom it
16 will be offered, including statements of witnesses or a summary of
17 the substance of any testimony that is expected to be offered, at
18 least fifteen days before the scheduled date of trial or at such
19 later time as the court may allow for good cause.

20 (3) Before admitting evidence of a party's commission of
21 another offense or offenses of sexual assault under this section,
22 the court shall conduct a hearing outside the presence of any
23 jury and afford the victim and parties a right to attend and be
24 heard. At the hearing, the rules of evidence shall apply and the
25 court shall apply a section 27-403 balancing and admit the evidence
26 unless the risk of prejudice substantially outweighs the probative
27 value of the evidence. In assessing the balancing, the court may

1 consider any relevant factor such as (a) the probability that the
2 other offense occurred, (b) the proximity in time and intervening
3 circumstances of the other offenses, and (c) the similarity of the
4 other acts to the crime charged.

5 (4) This section shall not be construed to limit the
6 admission or consideration of evidence under any other section of
7 the Nebraska Evidence Rules.

8 Sec. 6. Section 27-404, Reissue Revised Statutes of
9 Nebraska, is amended to read:

10 27-404 (1) Evidence of a person's character or a trait of
11 his or her character is not admissible for the purpose of proving
12 that he or she acted in conformity therewith on a particular
13 occasion, except:

14 (a) Evidence of a pertinent trait of his or her character
15 offered by an accused, or by the prosecution to rebut the same;

16 (b) Evidence of a pertinent trait of character of the
17 victim of the crime offered by an accused or by the prosecution to
18 rebut the same, or evidence of a character trait of peacefulness of
19 the victim offered by the prosecution in a homicide case to rebut
20 evidence that the victim was the first aggressor. ~~In the case of a~~
21 ~~sexual assault case, reputation, or opinion, or other evidence of~~
22 ~~the past sexual behavior of the victim of the sexual assault will~~
23 ~~not be admissible;~~ is governed by section 2 of this act; or

24 (c) Evidence of the character of a witness as provided in
25 sections 27-607 to 27-609.

26 (2) Evidence of other crimes, wrongs, or acts is not
27 admissible to prove the character of a person in order to show

1 that he or she acted in conformity therewith. It may, however,
2 be admissible for other purposes, such as proof of motive,
3 opportunity, intent, preparation, plan, knowledge, identity, or
4 absence of mistake or accident.

5 (3) When such evidence is admissible pursuant to this
6 section, in criminal cases evidence of other crimes, wrongs, or
7 acts of the accused may be offered in evidence by the prosecution
8 if the prosecution proves to the court by clear and convincing
9 evidence that the accused committed the crime, wrong, or act. Such
10 proof shall first be made outside the presence of any jury.

11 (4) Regarding the admissibility in a civil or criminal
12 action of evidence of a person's commission of another offense or
13 offenses of sexual assault under sections 28-319 to 28-322.04, see
14 sections 3 to 5 of this act.

15 Sec. 7. Section 27-1103, Reissue Revised Statutes of
16 Nebraska, is amended to read:

17 27-1103 These rules and sections 2 to 5 of this act may
18 be known and cited as the Nebraska Evidence Rules.

19 Sec. 10. Section 28-318, Reissue Revised Statutes of
20 Nebraska, is amended to read:

21 28-318 As used in sections 28-317 to ~~28-321~~, 28-323,
22 unless the context otherwise requires:

23 (1) Actor means a person accused of sexual assault;

24 (2) Intimate parts means the genital area, groin, inner
25 thighs, buttocks, or breasts;

26 (3) Past sexual behavior means sexual behavior other than
27 the sexual behavior upon which the sexual assault is alleged;

1 (4) Serious personal injury means great bodily injury or
2 disfigurement, extreme mental anguish or mental trauma, pregnancy,
3 disease, or loss or impairment of a sexual or reproductive organ;

4 (5) Sexual contact means the intentional touching of the
5 victim's sexual or intimate parts or the intentional touching of
6 the victim's clothing covering the immediate area of the victim's
7 sexual or intimate parts. Sexual contact shall also mean the
8 touching by the victim of the actor's sexual or intimate parts or
9 the clothing covering the immediate area of the actor's sexual or
10 intimate parts when such touching is intentionally caused by the
11 actor. Sexual contact shall include only such conduct which can be
12 reasonably construed as being for the purpose of sexual arousal or
13 gratification of either party. Sexual contact shall also include
14 the touching of a child with the actor's sexual or intimate parts
15 on any part of the child's body for purposes of sexual assault of a
16 child under sections 28-319.01 and 28-320.01;

17 (6) Sexual penetration means sexual intercourse in its
18 ordinary meaning, cunnilingus, fellatio, anal intercourse, or any
19 intrusion, however slight, of any part of the actor's or victim's
20 body or any object manipulated by the actor into the genital
21 or anal openings of the victim's body which can be reasonably
22 construed as being for nonmedical or nonhealth purposes. Sexual
23 penetration shall not require emission of semen;

24 (7) Victim means the person alleging to have been
25 sexually assaulted;

26 (8) Without consent means:

27 (a) (i) The victim was compelled to submit due to the

1 use of force or threat of force or coercion, or (ii) the victim
2 expressed a lack of consent through words, or (iii) the victim
3 expressed a lack of consent through conduct, or (iv) the consent,
4 if any was actually given, was the result of the actor's deception
5 as to the identity of the actor or the nature or purpose of the act
6 on the part of the actor;

7 (b) The victim need only resist, either verbally or
8 physically, so as to make the victim's refusal to consent genuine
9 and real and so as to reasonably make known to the actor the
10 victim's refusal to consent; and

11 (c) A victim need not resist verbally or physically where
12 it would be useless or futile to do so; and

13 (9) Force or threat of force means (a) the use of
14 physical force which overcomes the victim's resistance or (b) the
15 threat of physical force, express or implied, against the victim or
16 a third person that places the victim in fear of death or in fear
17 of serious personal injury to the victim or a third person where
18 the victim reasonably believes that the actor has the present or
19 future ability to execute the threat.

20 Sec. 28. Section 83-4,143, Reissue Revised Statutes of
21 Nebraska, is amended to read:

22 83-4,143 (1) It is the intent of the Legislature that
23 the court target the felony offender (a) who is eligible and
24 by virtue of his or her criminogenic needs is suitable to be
25 sentenced to intensive supervision probation with placement at the
26 incarceration work camp, (b) for whom the court finds that other
27 conditions of a sentence of intensive supervision probation, in

1 and of themselves, are not suitable, and (c) who, without the
2 existence of an incarceration work camp, would, in all likelihood,
3 be sentenced to prison.

4 (2) When the court is of the opinion that imprisonment is
5 appropriate, but that a brief and intensive period of regimented,
6 structured, and disciplined programming within a secure facility
7 may better serve the interests of society, the court may place an
8 offender in an incarceration work camp for a period not to exceed
9 one hundred eighty days as a condition of a sentence of intensive
10 supervision probation. The court may consider such placement if the
11 offender (a) is a male or female offender convicted of a felony
12 offense in a district court, (b) is medically and mentally fit
13 to participate, with allowances given for reasonable accommodation
14 as determined by medical and mental health professionals, and (c)
15 has not previously been incarcerated for a violent felony crime.
16 Offenders convicted of a crime under sections 28-319 to ~~28-321~~
17 28-323 or of any capital crime are not eligible to be placed in an
18 incarceration work camp.

19 (3) It is also the intent of the Legislature that the
20 Board of Parole may recommend placement of felony offenders at
21 the incarceration work camp. The offenders recommended by the
22 board shall be offenders currently housed at other Department
23 of Correctional Services adult correctional facilities and shall
24 complete the incarceration work camp programming prior to release
25 on parole.

26 (4) When the Board of Parole is of the opinion that
27 a felony offender currently incarcerated in a Department of

1 Correctional Services adult correctional facility may benefit
2 from a brief and intensive period of regimented, structured, and
3 disciplined programming immediately prior to release on parole, the
4 board may direct placement of such an offender in an incarceration
5 work camp for a period not to exceed one hundred eighty days as
6 a condition of release on parole. The board may consider such
7 placement if the felony offender (a) is medically and mentally fit
8 to participate, with allowances given for reasonable accommodation
9 as determined by medical and mental health professionals, and (b)
10 has not previously been incarcerated for a violent felony crime.
11 Offenders convicted of a crime under sections 28-319 to ~~28-321~~
12 28-323 or of any capital crime are not eligible to be placed in an
13 incarceration work camp.

14 Sec. 29. The Revisor of Statutes shall assign sections 2
15 to 5 of this act to Chapter 27, article 4, of the Nebraska Evidence
16 Rules.

17 Sec. 31. Sections 2, 3, 4, 5, 6, 7, 10, 28, 29, and 32 of
18 this act become operative on January 1, 2010. The other sections of
19 this act become operative on their effective date.

20 Sec. 32. Original sections 27-404, 27-1103, 28-318, and
21 83-4,143, Reissue Revised Statutes of Nebraska, are repealed.

22 2. Renumber the remaining sections and correct internal
23 references accordingly.