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UPDATES AND BEST PRACTICES

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying current on these changes is vital to the effective operation of business and to safeguard rights and interests.

This newsletter provides quarterly updates and reminders of best practices for businesses located or operating in the state of Utah.

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THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT ("WARN")

By: Clayton H. Preece

In 1988 Congress passed the Worker Adjustment and Retraining Notification Act ("WARN"). WARN provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to state dislocated worker units so that dislocated worker assistance can be promptly provided.

WARN applies to employers with more than 100 employees (part-time excluded), or 100 or more employees who in the aggregate work at least 4,000 hours per week. WARN requires at least 60 days prior notice to employees before plant closings and mass layoffs. Note that under certain circumstances, less than 60 days prior notice may be permitted.

In other words, WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice.

Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

Plant Closing Defined

A plant closing is defined as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees"

Layoffs Defined

WARN also defines mass layoffs as a reduction in force which (A) is not the result of a plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for (1) at least 33 percent of the employees (excluding any part-time employees); and at least 50 employees (excluding any part-time employees); or (2) at least 500 employees (excluding any part-time employees)

Exceptions

WARN includes two notable exceptions. It does not apply (1) to the closing of a temporary facility or layoffs which are the result of the completion of a particular project and the employees were hired with the understanding that their employment was limited to the duration of the facility or the project, or (2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of WARN.

Notice Requirements

Under WARN, notices must be specific. For employees that have a representative, it must contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

For an employee that does not have a representative, notice must be written in language understandable to the employee and contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of a company official to contact for further information.

Additionally, notice must be provided to the state's dislocated worker unit and the chief elected official of the local government. This notice must contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation, and the anticipated schedule for making separations;

(4) The job titles of positions to be affected, and the number of affected employees in each job classification;

(5) An indication as to whether or not bumping rights exist;

(6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

Notice may be served by any reasonable method of delivery which is designed to ensure receipt of notice of least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

Enforcement

Failure to provide the notice to employees subjects the employer to liability to each aggrieved employee and may include compensation for:

(A) back pay for each day of violation at a rate of compensation not less than the higher of

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of the Act, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer. In such an action, the employees are also able to recover their attorney's fees.

RETALIATION CLAIMS

By James W. Stewart

Many federal and state statutes, including Title VII and the Americans with Disabilities Act, create liability for employers who retaliate against employees who file claims under the respective statute or even just complained about discrimination internally at work, or helping another employee complain about discrimination. Employers are often at greater risk from the claim of retaliation, than from the underlying claim. Indeed, especially when the underlying claim appears to be without merit or baseless, employers are sometimes angry and allow their emotions to prompt actions which can be construed as retaliation. Understanding retaliation claims is of particular importance because they may subject the employer to the same penalties as the underlying claim itself and are often easier to prove.

In employment law, retaliation essentially means an unlawful payback by the employer for something lawful the employee did. Such retaliation can result in a sizeable damages award against the employer. Utah employers have potential liability to employees for retaliation under numerous laws. This article will discuss some of the more prominent retaliation laws.

Retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII").

To make a prima facie claim of retaliation under Title VII, a plaintiff must prove:

(a) the employee engaged in an activity protected by Title VII;
(b) the employee suffered an adverse employment action; and
(c) there was a causal connection between the protected activity and the adverse employment action.

See *Petersen v. Utah Dep't of Corrections*, 301 F.3d 1182 (10th Cir. 2002). Some other courts also make an element of the prima facie case the requirement that "this exercise of protected rights was known to the employer." *Ford v. General Motors Corp., 305* F.3d *545* (6th Cir.2002); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000). Once an employee has established a prima facie case, the burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. Once the employer meets this burden of production, the plaintiff who bears the burden of persuasion throughout the process, must then demonstrate the employer's proffered reason was false. *Id.*

What does "engaging in a protected activity" mean?

For a retaliation claim under Title VII, 42 U.S.C. § 2000e-3 provides, in relevant part, that "it shall be an unlawful employment practice for an 'employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this title, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." There are two retaliation provisions in the statute, sometimes called the "opposition" and "participation" clauses. The "participation" clause protects people who participate in the process of vindicating civil rights under Title VII, such as by filing a charge with the EEOC or filing a lawsuit. The "opposition" clause is more complicated, with various federal courts sometimes disagreeing about what "opposition" activities are protected. If an employee makes a good faith complaint to the employer that his or her rights are being violated under Title VII, then even if the employee is wrong, he or she cannot be subjected to an adverse employment action because of raising the complaint. *Petersen v. Utah Dep't of Corrections*, 301 F.3d 1182 (10th Cir. 2002); *Johnson v. University of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052 (2000). The EEOC has set forth several examples of what it would consider protected "opposition," including complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer - *e.g.*, former employers, union, and co-workers. *EEOC Compliance Manual*, (CCH) P 8006. The EEOC has qualified the extent of the opposition clause, explaining that the manner of opposition must be reasonable, and that the opposition be based on "a reasonable and good faith belief that the opposed practices were unlawful." *Id.* In other words, a violation of Title VII's retaliation provision can be found whether or

not the challenged practice ultimately is found to be unlawful. *Id*. Moreover, the person claiming retaliation need not be the person who engaged in the opposition, such that "Title VII prohibits retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." *Id*.

What is an "adverse employment action"?

The Tenth Circuit, in a recent case, has noted that although an adverse employment action is liberally defined under the law, its existence is determined on a case-by case basis and doesn't extend to a mere inconvenience or alteration of job responsibilities. Being taken out of the information loop and receiving a transfer out of the alleged retaliating supervisor's chain of command, in this particular case, was held not to rise to the level of adverse employment action. Another court, the Sixth Circuit, has stated that the "adverse employment action" under a Title VII retaliation claim must be "materially adverse," explaining that:

> A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidence by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. This Court has consistently held that *de minimis* employment actions are not materially adverse and, thus, not actionable. [Internal citation omitted].

Ford v. General Motors Corp., 305 F.3d *545* (6th Cir. 2002).

Because the "adverse employment action" question is decided on a case-by-case basis, employers cannot be certain they have or have not taken an "adverse employment action" until a court rules on the issue. See *Petersen v. Utah Dep't of Corrections*, *supra*; *White v. Burlington Northern & Santa Fe Railway Co.*, 310 F.3d 443 (6th Cir. 2002), *vacated and reh'g granted* (February 11, 2003). In one case from another Circuit, a court held that a negative performance evaluation could be a materially adverse employment action for purposes of Title VII retaliation claims. *Bostic v. AT & T* of the Virgin Islands, 166 F. Supp. 2d 350 (D. Virgin Islands, 2001). In that case, the district court held that putting a negative performance evaluation in a personnel file could materially affect whether the employee might receive future raises or promotions, and the negative evaluation could have the effect of deterring the employee from opposing unlawful practices. But see *Silk v. City of Chicago*, 194 F. 3d 788 (7th Cir. 1998) (filed under anti-retaliation provisions of Americans with Disabilities Act, finding lower employee performance evaluations were not materially adverse job actions).

When is Coworker Harassment "adverse employment action" sufficient to support a retaliation claim?

Employees who report discrimination or harassment by other employees often fall into disfavor with their co-workers. Many times these complaints will be made when one person is offended by the joking and teasing that occurs between other coworkers. When these coworkers are told to stop, they often blame the complaining party and take it out on them. This conduct can take the form of refusals to talk to the individual, giving them misinformation, excluding them from meetings or social gatherings, etc. The question arises under what circumstances, if ever, this treatment by coworkers constitutes retaliation and if it does, when, if ever, an employer will be held liable for such conduct. Cases to deal in significant numbers with cases regarding the circumstances regarding coworker harassment as retaliation. As a general rule, most courts considering the situation have determined that mere unpleasantness in the workplace, such as not conversing with a co-employee or giving them the "cold shoulder" will not rise to the level of an adverse employment action necessary to support a retaliation claim. See e.g., *Scusa v. Nestle, USA*, 181 F.3d 958 (8th Cir. 1999).

In *Gunnell v. Utah Valley State College, 152* F.3d 1253 (10th Cir. 1998), the United States Court of Appeals for the Tenth Circuit considered allegations that coworker hostility following a harassment complaint constituted

retaliation. The Tenth Circuit decided that an employer could be liable for coworker retaliation in situations where supervisors or management personnel either orchestrate the harassment or know about the harassment and acquiesce to such a degree and manner as to condone and encourage the coworker's actions. See *Knox v. State of Indiana*, 93 F.2d 1327(7th Cir. 1996). (Approved jury instruction which would hold employer liable for co-worker retaliation if committed with knowledge and acquiescence of employer). The Tenth Circuit rejected the possibility that coworkers who, without knowledge of supervisory or management personnel, independently take it upon themselves to harass the plaintiff in retaliation for engaging in protected activity could impose liability upon the employer. See also *Roberts v. Segal Co.*, 84 FEP Cases 1085 (D. D.C. 2000) (Coldness, failure to acknowledge presence, closed office doors and lack of communication by co-workers following complaint insufficient to establish retaliation). *Mattern v. Eastman Kodak Company*, 104 F.3d 702, 707(5th Cir. 1997) (Hostility from fellow employees, having tools stolen and resulting anxiety insufficient to support retaliation claim).

Issues surrounding co-worker retaliation will probably be litigated more often in the future. Employers need to ensure that their policies against discrimination contain provisions prohibiting retaliation against coworkers who may complain of discrimination. While mere ostracism or "cold shoulder" treatment may not currently rise to adverse employment action, employers must be on guard to ensure that coworker ostracism does not rise to the level of becoming severe and pervasive to the point of altering the terms and conditions of the individual's employment or becoming so bad that a reasonable person under the circumstances could not work there any longer so as to constitute a constructive discharge. If harassment reaches that point, arguably under the standard utilized in sexual harassment cases, the employer will be liable if it knew or should have known about such conduct and failed to take prompt remedial action. See *Burlinaton Industries. Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragherv. City of Boca Raton*, 118 S. Ct. 2275 (1998).

How to prove the required "causal connection"?

Retaliation can frequently be difficult to show by direct proof. Thus, plaintiffs must frequently establish the required "causal connection" by circumstantial evidence from which unlawful retaliation can be inferred. Many

plaintiffs argue that retaliation can be inferred because of: (1) the "temporal proximity," or short lapse of time, between the complaint and the adverse act; or (2) a pattern of antagonism linking the complaint and the adverse action. The law in this area reflects two fundamental, common sense approaches: (1) time heals all wounds; and (2) retaliators retaliate, they do not forbear. In other words, the longer the time between the employer learning of the plaintiffs complaint or other conduct and the employer's taking of an adverse employment action, the less an unlawful retaliatory motive can be inferred. On the other hand, the shorter the time, the better the chance for the employee to make the inference successfully.

Temporal Proximity

In *Clark County School District v. Breeden*, 532 U.S. 268,121 S. Ct. 1508,149 L. Ed 2d 509 (2001), the Supreme Court considered both a sexual harassment claim and a retaliation claim under Title VII. In that case, the plaintiff claimed that during a review of job applicant files, a male coworker made a sexually explicit comment. She claimed

that when reading a psychological report regarding a job applicant, it disclosed that the applicant had once stated "I hear that making love to you is like making love to the Grand Canyon." When the plaintiff said she did not understand what that meant, her male co-worker said, "Well, I'll tell you later," then chuckled. She complained to her supervisor and others about the comment, and she later filed a charge of discrimination *(i.e.* she engaged in both "opposition" and "participation"). She claimed that she was thereafter punished by being transferred. In Breeden, the Supreme Court noted that plaintiffs' entire proof of the required causal connection consisted of the "temporal proximity" between her filing of a complaint and her supervisor's disclosure to plaintiffs' union representative that he was contemplating transferring the plaintiff to a different position. However, the proof showed that the employer was not served with the complaint until one day after the supervisor made the statement. The plaintiff then tried to argue that the employer's receipt of notice of her right-to sue letter preceded the decision, but the Court held that this was not a "protected activity" by the plaintiff, particularly since she had no control over it. The Court stated that employers need not suspend previously planned actions upon discovering that a Title VII suit has been filed, and there is no "causality" between consummation of a previously contemplated job action and Title VII charge which was first learned of subsequently. Further, regarding the right-to-sue letter, the Court noted that if that were deemed the trigger of the employer's notice of the employee's complaint, then that was known almost two years prior to the job transfer. The Court reiterated that if "temporal proximity" is used to establish the required causal connection, then that temporal proximity must be "very close," and something the employer learned of twenty months before the alleged adverse decision showed "no causality at all." In other words, in Breeden the Supreme Court followed the common sense rule - if the employer had been motivated to retaliate, it would have done so when it first received notice that the plaintiff had filed a charge, not two years later when it learned that she had filed the lawsuit. In the Tenth Circuit, which oversees Utah federal courts, there has been a very important case that discusses the temporal proximity issue. The Tenth Circuit upheld a jury verdict of illegal retaliation. Adverse action taken against an employee, shortly after the employee's attorney sent a letter to the employer complaining of illegal retaliation, ultimately resulted in a jury verdict of illegal employer retaliation. *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248 (10th Cir. 2001).

Lessons from the O'Neal Case

An employer must never take any adverse action against an employee because an employee engages in "protected activity." "Protected activity" can be the filing of an EEOC charge, bringing alleged discrimination or retaliation to the attention of the employer (including supervisors), an attorney's letter claiming discrimination or retaliation, or other similar actions. The closer in time that an adverse employment action is to the "protected activity," the more likely a court will allow a jury to conclude that the short time period, by *itself*, is sufficient to establish a causal connection between the protected activity and the adverse employment action. Put another way, in the Tenth Circuit, it will be very difficult to avoid having a retaliation claim submitted to a jury, if adverse employment action is taken within a month and one-half (1-1/2) after the protected activity. Even if an employer has legitimate, nondiscriminatory reasons for taking adverse action

against an employee, the risk of being found liable for retaliation by a jury is much greater if the adverse employment action is closely related in time to the employee's protected activity. This O'Neal case is also a reminder that even though an employer may not be found liable for engaging in actual racial or other types of prohibited discrimination, it is still possible to lose the same lawsuit if the employer engaged in "retaliation." Employers should take care to instruct supervisors and management that retaliation is just as illegal and can result in as much damage to the company as an act of actual race, sex, age, disability, religious, or other prohibited discrimination. Regarding the amount of proof necessary to establish a case of retaliation under Title VII, the U.S. Supreme Court case of *Reeves v. Sanderson Plumbing Products. Inc.*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 5. Ct. 2097 (2000) should be kept in mind by plaintiff employees and employers. The case clarified that under federal discrimination law, meeting the *prima facie* case, combined with sufficient evidence for a reasonable fact finder to reject the employer's non-discriminatory explanation for its decision, *is* adequate to sustain a finding of liability for intentional discrimination.

OTHER SIGNIFICANT LAWS CONTAINING RETALIATION PROVISIONS

Many other laws, particularly the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"), have retaliation provisions similar to Title VII, and have similar prima facie cases for retaliation and burdens of proof found in the Title VII cases and sections cited above.

Age Discrimination in Employment Act - 29 U.S.C. § 623(d). The Age Discrimination in Employment Act of **1** 967?s (ADEA) anti-retaliation clause is similar to the retaliation provision contained in Title VII. It also has two prongs, prohibiting both retaliation based upon opposition to discriminatory practices as well as retaliation for making a charge, testifying, assisting, or participating in any investigation, proceeding, or litigation under the ADEA. Case law interpreting Title Vii's retaliation protections equally applies to cases under the ADEA.

Americans with Disabilities Act - 42 U.S.C. *§* 12203.

The Americans with Disabilities Act contains the retaliation provisions under the Americans with Disabilities Act. Similar to both Title VII and the ADEA, the ADA contains prohibitions against retaliation both for opposing illegal conduct under the ADA as well as making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under the ADA.

National Labor Relations Act-29 U.S.C. *§* I *58(a)(4).*

The National Labor Relations Act prohibits an employer from discharging or otherwise discriminating against employees because they filed charges or provided testimony under the NLRA. 29 U.S.C. *§* I 58(a)(3) prohibits discrimination or retaliation for joining a labor union. Employees in a non-unionized setting can exercise rights under the National Labor Relations Act and 29 U.S.C. *§* I *58(a)(l)* prohibits retaliation for exercise of rights of employees to organize, collectively bargain, or engage in concerted activities. As a general rule, relief under the NLRA will be limited to reinstatement and back pay without compensatory or punitive damages.

Fair Labor Standards Act.

The Fair Labor Standards Act has contained an anti-retaliation clause since 1977. 29 U.S.C. § 21 *5(a)(3)* prohibits employers from discharging or in any other manner discriminating against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding related to the Fair Labor Standards Act or has testified or is about to testify in any proceeding under the Fair Labor Standards Act. Damages available for a violation of *§* 21 *5(a)(3)* include reinstatement, lost wages and an additional amount as liquidated damages. 29 U.S.C. § 216(b). Generally, compensatory and punitive damages may not be recovered on a retaliation claim under the Fair Labor Standards Act. *Waldermeyer v. ITT Consumer Financial Com.* 782 F. Supp. 86 (E.D. Mo. 1991).

Family and Medical Leave Act (FMLA).

The Family and Medical Leave Act protects employees from retaliation for exerc1smg their rights under FMLA. 29 U.S.C. § 2614(a)(l) prohibits an employer from interfering with, restraining or denying any exercise of or attempt to exercise any right established under FMLA. Section 2615(a)(2) prohibits the discharge or

discrimination against an individual for opposing any practice made unlawful under FMLA. Section 2615(b) makes it unlawful for any person to discharge or discriminate against an individual because the individual has filed a charge or instituted proceedings under FMLA, has given or is about to give information in connection with any inquiry or proceeding related to any right provided under the FMLA, or has testified or is about to testify in any inquiry or proceeding related to any right provided for under FMLA.

Occupational Safety and Health Act (OSHA).

OSHA prohibits retaliation against employees exercising their rights under OSHA. Specifically, 29 U.S.C. § 660(c) provides that no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related ito OSHA, or has testified or is about to testify in any such proceeding. 29 U.S.C. § 660(c)(2) provides that the employee may file a charge of discrimination with OSHA within 30 days. The Secretary of Labor is specifically authorized to conduct an investigation into any such allegations. While the Secretary of Labor has the ability to institute litigation and seek injunctive relief, as well as all other appropriate relief including rehiring or reinstatement with back pay, an employee does not have a private cause of action for retaliation under OSHA. See *George v. Aztec Rental Center. Inc.*, 763 F.2d 184 (5th Cir. 1985) (Affirming dismissal of retaliatory discharge claims under 29 U.S.C. *§* 660(a)(l) because no private cause of action existed.)

Employee Retirement Income Security Act.

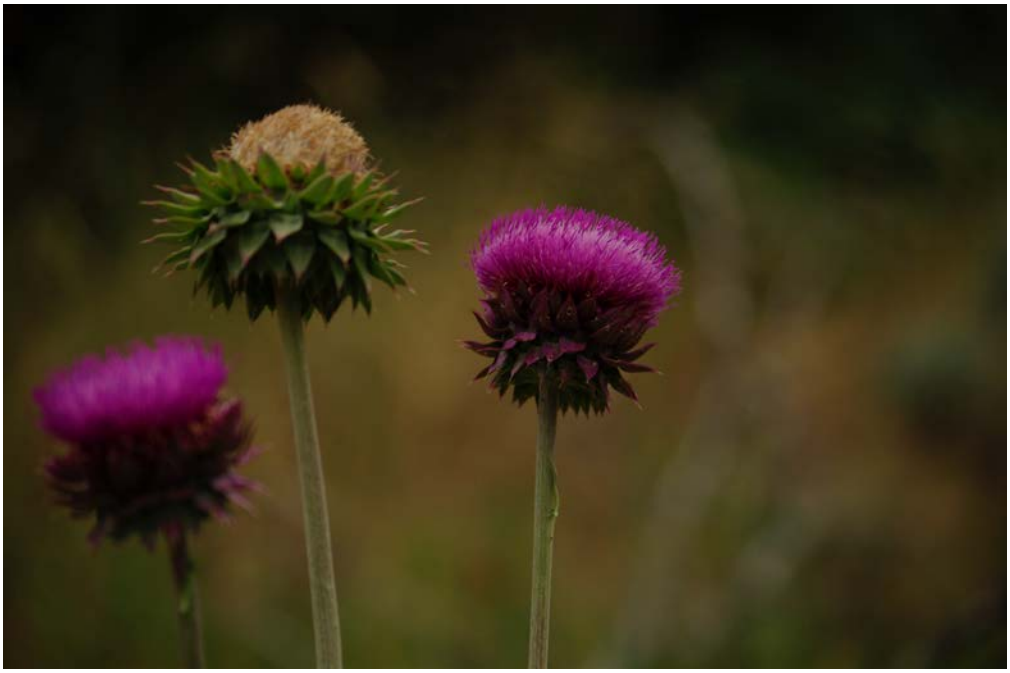
ERISA also contains an anti-retaliation provision. Specifically, 29 U.S.C. § 1140 makes it unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which they are entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of any right to which such participant may become entitled to under such plan. Further, § 1140 prohibits discharge or discrimination against any person because they have given information or have testified or are about to testify in any inquiry or proceeding related to ERISA. ERISA's anti-retaliation provision probably covers any claim that an employee was discharged or discriminated against in order to prevent them from vesting or exercising any pension rights or for exercising rights under any qualified health or employee welfare benefit plan sponsored by an employer. ERISA retaliation damages are limited to "appropriate equitable relief and do not allow for recovery of extra-contractual or punitive damages. *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29 (5th Cir.) cert. denied, 510 US 816 (1993). Uniformed Services Employment and Re-employment Rights Act. The Uniformed Services Employment and Re-employment Rights Act (USERRA), 38 U.S.C. *§* 4301 et seq., provides for certain protections of employees who are called to duty in a uniformed service during their employment. 38 U.S.C. § 4311 prohibits an employer from discriminating or taking any adverse employment action against any person because they have taken an action to enforce a protection afforded under USERRA, has testified or otherwise made a statement in or in connection with any proceeding under USERRA, has assisted or otherwise participated in any investigation under USERRA or has exercised a right provided for by USERRA. 38 U.S.C. § 4311 (c)(2) specifies that a violation of the act occurs if the protected conduct was a motivating

factor in the employment decision, unless the employer can prove it would have taken the adverse action in the absence of the protected conduct. USERRA provides damages which include reinstatement, back pay, and back benefits and an equal amount in liquidated damages, if the violation was willful, plus attorney's fees. 38 U.S.C. § 4323(d).

This is just a sampling of employment-related, federal statutory retaliation provisions.

Utah State Law

Utah has statutes banning discrimination by employers, employment agencies and labor organizations, on the basis of race, color, religion, sex, pregnancy, childbirth or pregnancy related conditions, national origin, age (40 and over), and disability. Utah Code Ann. 34A-5-106. There is also a prohibition in this law against "retaliation" for these protected categories. In practice, this retaliation provision is generally applied as in the Title VII cases discussed above as interpreted by Utah federal courts, and the Tenth Circuit Court of Appeals, so no extensive discussion is provided herein. Also, it is illegal in Utah for an employer to retaliate against an employee for filing a Workers' Compensation Act claim.



Tips to Avoid Retaliation Claims

To avoid retaliation claims under Title VII and other federal discrimination laws, employers should:

1. **Adopt a strong anti-retaliation policy.** This should be an integral part of the employer's discrimination and harassment policies. All employees should be told that retaliation against any employee who makes a discrimination complaint is a serious violation which will not be tolerated. The policy should broadly define retaliation to include any adverse action taken against any employee who has engaged in a protected activity. A complaint procedure should be explained, which should be easy to use and which would circumvent the alleged retaliator. Most importantly, as with any employment policy, this policy should be even-handedly applied at all levels of the company.

2. **Train managers and supervisors.** All individuals having authority to discipline, discharge, layoff, demote or promote should be trained as to what the company's policies and complaint procedures are, as well as what could constitute unlawful retaliation. Examples of "do's" and "don'ts" would be useful.

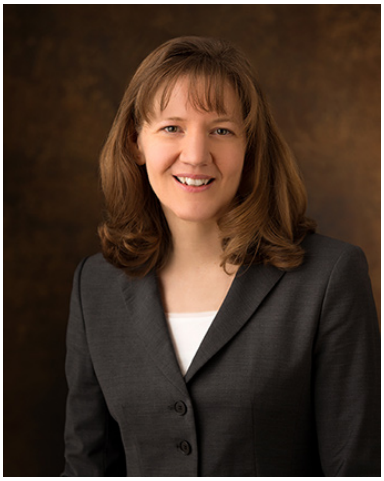
3. **Remove the authority of any alleged discriminator to make employment decisions concerning the accuser.** If possible, separate any accused supervisor and the accusing employee. Require reviews of employment decisions concerning the accusing employee by higher officials. Of course, this could be problematic, depending upon the size of the employer and the identity of the accused discriminator.

4. **Use performance evaluations.** Carefully document all performance-related matters concerning the complainant. It would be advisable to involve the company's legal department or outside counsel. Keep the employee regularly advised of how his performance is going, to avoid surprises. However, avoid merely perfunctory evaluations which do not really tell the employee how he is doing. Instruct supervisors and managers who complete evaluations (not just evaluations of a complainant after a discrimination charge, but all employee evaluations) to not merely check "good" or "satisfactory" without giving thought to whether those terms are correct.

5. **Explain any changes to the employee.** If it is necessary to make any significant changes in the terms or conditions of employment of a complainant, explain the reasons to the employee and, if possible, get him or her to sign a consent or acknowledgment.

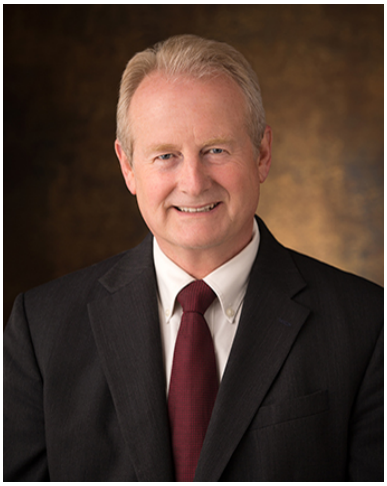
6. **Respond to complaints of retaliation.** Promptly investigate any allegations, but also be thorough. Consider employing a neutral investigator. The investigation should follow the format and procedures for investigations of other types of discrimination, such as sexual harassment. If remedial action is required, take it, and make it effective. Monitor the situation periodically even after issues have been resolved, to prevent a recurrence.

PRACTICE PROFILES



Kathryn J. Steffey

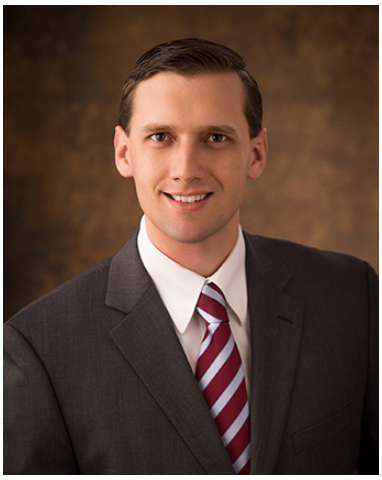
Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Ms. Steffey has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Ms. Steffey has also provided legal counsel and advice to governmental entities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and Labor Division and Utah's Division of Occupational and Professional Licensing.



James W. Stewart

James W. Stewart is of counsel in the law firm of Smith Hartvigsen, PLLC. He is listed by his peers and *Utah Business Magazine* as one of the Legal Elite labor and employment attorneys in Utah. Mr. Stewart has also been listed by the nationwide *Chambers* business publications as one of Utah's key labor and employment attorneys. He represents national, regional, and Utah employers. Mr. Stewart advises employers in virtually all areas of employment law and labor law, and frequently defends employers in court litigation and arbitration in employment disputes at both the trial and appellate level. He has been the director of employment law continuing education programs for the Utah State Bar. Mr. Stewart frequently gives employment law seminars for business. He has written numerous employment law publications and is a former editor of the *Utah Employment Law Letter* and the *Brigham Young University Law Review*. Mr. Stewart has served as a founding member for the First American Inn of Court and has been a board member and president of the Utah Lawyers for the Arts. He earned a Bachelor's of Arts, magna cum laude, a Juris Doctorate, and a Master's in Business Administration from Brigham Young University. Mr. Stewart also served as a judicial clerk to the Honorable Stephanie Seymour, U.S. Federal Court of Appeals for the Tenth Circuit. In addition, Mr. Stewart has substantial experience providing transactional advice to businesses and represents businesses in other corporate and commercial litigation.

For regular updates and best practices relating to labor and employment law, subscribe to the Employment Law for Business Blog at https://employmentlawyerutah.com or subscribe to the twitter feed @UTemploylaw.



Clayton H. Preece

Clayton H. Preece is an associate in the law firm of Smith Hartvigsen, PLLC. He represents businesses and employers in a wide range of litigation matters including labor and employment. Mr. Preece assists both national and local businesses with their labor and employment concerns. Mr. Preece is an author and editor of the Employment Law for Business Blog. Additionally, Mr. Preece represents individuals, businesses, and governmental entities, relating to land use and zoning, construction litigation, commercial litigation, natural resources litigation, and corporate and business transactions. He also serves on the Utah State Bar's Unauthorized Practice of Law Committee and serves the community through the University of Utah's Street Law Clinic. Mr. Preece earned his Juris Doctorate from The George Washington University Law School in Washington, D.C. For his outstanding trial advocacy, Mr. Preece earned a position representing The George Washington University Law School in the American Bar Association's Labor and Employment Trial Advocacy Competition. Mr. Preece also served for two terms as the Chair of the National Religious Freedom Moot Court Competition. Mr. Preece is a former editor of the *Federal Communications Law Journal*. Mr. Preece earned his Bachelor's in Arts from Utah Valley University, graduating summa cum laude and valedictorian, where he also was the editor in chief of the *Intersections Journal*.

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Smith|Hartvigsen is a law firm comprised of attorneys, paralegals, legal assistants, and staff who are dedicated to professionalism and providing quality legal services to our clients. To us, professionalism means using our combined decades of experience to zealously advocate for our clients and to develop creative and effective solutions to our clients' problems. Professionalism means listening to our clients, and working within our clients' budgets to accomplish their goals. Professionalism means promptly responding to our clients' emails and phone calls, and keeping our clients informed regarding all aspects of their case. Professionalism means being big enough to handle large complicated matters, but small enough to provide personal service to each client. Professionalism means always striving to be the most knowledgeable experts in our areas of practice, and practicing law with the highest level of ethics, integrity, and ability. We look forward to meeting your legal needs by serving as your counsel and demonstrating to you our commitment to professionalism. Smith Hartvigsen represents individuals, businesses, and governmental agencies in almost all areas of law, including, Water Law, Family Law & Estate Planning, Municipal, District, and Local Government Law, Real Estate, Land Use and Redevelopment, and both trial and appellate litigation.

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UTAH EMPLOYMENT LAW FOR BUSINESS BLOG

The Employment Law for Business Blog provides general information and updates regarding general business and employment law relevant to businesses and employers in the State of Utah and through the United States.

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying up to date on these changes is vital to the effective operation of business and to safeguard rights and interests. For regular employment law updates follow the Employment Law for Business Blog or subscribe to our Twitter feed.

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