OSHA WHISTLEBLOWER PROTECTION

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Both federal and state occupational safety and health laws prohibit employers from retaliating or taking any adverse action against an employee who has reported, or testified about, workplace safety violations. There is no exhaustive list of prohibited retaliatory or discriminatory actions, however, common retaliatory actions include: termination; demotion; reduced pay; failure to hire; discipline; reassignment; and denial of overtime, promotions or benefits.

An employee, or ex-employee, who feels he or she has been discriminated against, often has only two avenues for relief:

1. Filing an OSHA complaint; or
2. Filing a tort action.

Each of these avenues for relief adheres to different standards and may provide different remedies.

OSHA Complaint

Nevada Revised Statutes (NRS) § 618.445 and 29 USC 660(c) provide that a person "who believes that he has been discharged or otherwise discriminated against" may file a complaint within 30 days of the alleged discriminatory act.[1] Such a person may file the complaint with either Nevada OSHA or federal OSHA, because Nevada is an OSHA-approved state, which means that all complaints filed with federal OSHA will be forwarded to Nevada OSHA for investigation.[2]

Once received, the administrator of Nevada's Division of Industrial Relations has 90 days to investigate the complaint and, if appropriate, "bring an action in the name of the Administrator in any appropriate district court against the person who has committed the violation." NRS § 618.445(3). Remedies for violations are limited to "reinstatement and reimbursement for lost wages and work benefits" (*Id.* § 618.445(4)).

Many of the procedures and standards followed in OSHA investigations are outlined in the Nevada Operations Manual and in the federal OSHA Whistleblower Investigations Manual.[3] A key consideration in any OSHA investigation is whether the employee's report of a safety violation was at least one true "motivating factor" in the employer's adverse action. The U.S. Supreme Court described this standard in *Mt. Healthy City School Board v. Doyle*:

> Initially ... the burden [is] properly placed upon [the employee] to show that his conduct was ... protected, and that this conduct was a "substantial factor" – or, to put it in other words, that it was a "motivating factor" in the [employer's adverse action]. [The employee] having carried that burden, however, the District Court should have gone on to determine whether the [employer] had shown by a preponderance of the evidence that it would have reached the same decision as to [the adverse action] even in the absence of the protected conduct.

429 U.S. 274, 287 (1977) (applying this standard in a mixed-motive case); *see Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1072 (9th Cir. 2012) (describing this standard as the "*Mt. Healthy* but-for causation inquiry"); *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981) (applying the "motivating factor" standard in a pretext case).[4]

Common Law Tort Claim

Because there is no private right of action under NRS § 618.445 or 29 USC 660(c), if an employee does not file an OSHA complaint within the 30-day limit, then the employee's likely remaining avenue for relief is filing a complaint in the appropriate court based on common law torts.[5] *See Crane v. Conoco, Inc.*, 41 F.3d 547, 553 (9th Cir. 1994) ("OSHA violations do not themselves constitute a private cause of action for breach"); *see generally Gomez v. The Finishing Co., Inc.*, 861 N.E.2d 189, 197 (Ill. Ct. App. 2006) ("The provisions of the federal OSHA statute ... do not preempt a claim of retaliatory discharge under state law"). Depending on the circumstances, such complaints may allege, e.g., tortious discharge, tortious constructive discharge, or intentional infliction of emotional distress.[6]

As opposed to OSHA complaints, tort complaints may provide punitive damages. *See e.g.*, *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394, 397 (1984) ("[P]unitive damages are appropriate in cases where employees can demonstrate malicious, oppressive or fraudulent conduct on the part of their employers"). On the other hand, unlike OSHA investigations that may rely on the "mixed motives theory" in seeking a remedy, "recovery for retaliatory discharge under state law may not be had upon a 'mixed motives' theory; thus, a plaintiff must demonstrate that his protected conduct was the proximate cause of his discharge." *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 970 P.2d 1062, 1066 (1998).[7]

Perhaps the most prevalent tort is tortious discharge, or wrongful termination. In Nevada, "[a]n employer commits a tortious discharge by terminating an employee for reasons which violate public policy." *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206, 212 (1991). To illustrate, in *Western States Minerals Corporation v. Jones*,[8] an at-will[9] mineworker filed a complaint for tortious discharge after his employer fired him for insubordination. *Id.* at 213. Apparently, the mineworker had told his supervisor that he would not work in a "cyanide leach pit at a time when he was suffering from an unclosed surgical wound" because he had learned of "the need to protect unhealed wounds from cyanide exposure when he attended one of [the employer's] required safety courses." *Id.*

The court cited Nevada's OSHA statute and concluded, "that it is violative of public policy for an employer to dismiss an employee for refusing to work under conditions unreasonably dangerous to the employee." *Id.* at 216. The court also noted that, while an alternative statutory remedy may preclude some tortious discharge claims,[10] NRS § 618.445 did not provide the mineworker with a comprehensive or mandatory remedy. *Id.* at 217–18. The court reasoned: "That an employee *may* ask the administrator to intervene on his behalf and seek reinstatement and back-pay seems to be a very inadequate remedy for the misconduct involved in trying to force a worker into an unsafe place at the risk of being fired." *Id.* at 217 n.11 (emphasis added).

CONCLUSION

While OSHA complaints and tort claims are not necessarily mutually exclusive remedies, it is possible that recovering on an OSHA complaint will preclude recovery in tort, i.e., possible punitive damages. Each avenue for relief provides different time limits, standards and possible benefits. An attorney must weigh each avenue for relief and implement a strategy best suited to meet the client's goals. ■

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1 *See also* 29 CFR § 1977 (2012) ("Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act of 1970").

2 *See generally* OSHA's Whistleblower Protection Program, http://www.whistleblowers.gov/ (last visited Feb. 5, 2013) (listing some prohibited actions and providing directions for filing a complaint).

3 The Nevada Operations Manual is available at http://dirweb.state.nv.us/OSHA/nom.pdf, and the Whistleblower Investigations Manual is available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

4 "In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision.' In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989). (White, J., concurring). [internal citation omitted]

5 *See generally Martin v. Sears, Roebuck and Co.*, 111 Nev. 923, 899 P.2d 551, 555 (1995) (citing *Bally's Grand Employees' Federal Credit Union v. Wallen*, 105 Nev. 553, 779 P.2d 956, 957 (1989)) (". . . [B]reach of contract and bad faith discharge are not applicable to at-will employment.").

6 *See Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882, 886 (1999) (describing the elements of tortious constructive discharge and of intentional infliction of emotional distress).

7 *See Cooper v. Storey County*, Slip Copy, No. 3:11-CV-00220-LRH-RAM, 2012 WL 2070276 *4 (D. Nev. June 7, 2012) (holding that the plaintiff had not shown "that his conduct was the sole proximate cause of his discharge").

8 The Nevada Supreme Court consolidated *D'Angelo v. Gardner* and *Western States Minerals Corporation v. Jones* for review and opinion. This article cites both actions as *D'Angelo v. Gardner*.

9 *D'Angelo v. Gardner* is a good example of what is often referred to as the public policy exception to the at-will employment doctrine. In sum, this exception provides that, while it is true that employees in Nevada are presumed to be at-will employees, "an employer can [only] dismiss an at-will employee with or without cause, so long as the dismissal does not offend this state's public policy." *Ozawa v. Vision Airlines, Inc.*, 125 Nev. Adv. Rep. 43, 216 P.3d 788, 791 (2009); *see Bigelow v. Bullard*, 111 Nev. 1178, 901 P.2d 630, 632 (1995); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984).

10 The court in *D'Angelo v. Gardner* distinguished this case from *Sands Regent v. Valgardson* because, in *Sands Regent v. Valgardson*, the court "refused to recognize an independent tort action for violation of the public policy . . . because the plaintiffs in *Valgardson* had already recovered . . . damages . . . under the Age Discrimination in Employment Act . . . and under NRS 613.310." *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206, 212 (1991) (citing *Sands Regent*, 105 Nev. 436, 777 P.2d 898, 899–900 (1989)).