



Montana Employment Law Seminar

for corporate counsel, business owners & human resource professionals

SEPTEMBER 21, 2023 | RESIDENCE INN DOWNTOWN

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Presentations:

Navigating the ADA: Case Studies on Reasonable Accommodation

Christina M. Jepson and Susan Baird Motschiedler

Managing without Missteps – Responding to Workplace Conflict and Anticipating Trouble in a Changing Climate

Michael Patrick O'Brien and Paul R. Smith

Termination Trepidation – Identifying and Avoiding the Risks Associated with Employee Terminations and Discipline

Liz M. Mellem and Leah Trahan

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**LEGAL
PERSPECTIVE**

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Montana Employment Law Seminar

Navigating the ADA: Case Studies on Reasonable Accommodation

Christina M. Jepson

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Susan Baird Motschiedler

801.536.6923 | smotschiedler@parsonsbehle.com

For the past 27 years, Christina has partnered with large and small companies to solve their labor and employment issues. She assists clients with the full spectrum of employment matters, including daily management of employment issues as well as litigation.



Christina M. Jepson

Shareholder | Salt Lake City

Biography

For the past 27 years, Christina has partnered with clients to solve their labor and employment issues. She assists clients with the full spectrum of employment matters, including daily management of employment issues as well as litigation.

Christina served as the chair of the firm's Labor and Employment Department for 10 years and is the past chair of the Labor and Employment Section of the Utah State Bar. She is the director of Diversity, Equity and Inclusion (DE&I) director for the firm and regularly speaks in client and community forums on that topic. With her experience as an employment lawyer and as the Director of Diversity, Equity and Inclusion, Christina has the expertise to help clients build DE&I plans, implement plans and address issues.

Christina is recognized in:

- Utah Business Magazine, ranked as a "Legal Elite" in Employment and Labor Law, 2012 - 2023
- Intermountain States Super Lawyers: Ranked as one of the "Top 50 Women Lawyers," 2019 - 2022; also ranked as top attorney in Employment & Labor: Employer; and Employment Litigation: Defense, Business Litigation 2013-2014, 2016-2022
- Best Lawyers in America, ranked as a "Best Lawyer" in Employment Law - Management, 2014 - 2023
- Chambers and Partners USA, "Notable Practitioner" and top rankings, Labor & Employment Law, 2019 - 2023

Christina is also a member of the national and local Society for Human Resource Management (SHRM) and has spoken at multiple SHRM events.

Christina regularly represents employers in lawsuits and counsels employers in a variety of areas including:

Contact information

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cjepson@parsonsbehle.com

Capabilities

Employment & Labor
Employment Litigation
Trade Secret Litigation

Licensed/Admitted

Utah

U.S. Dist. Court, Dist. of Utah

U.S. Court of Appeals, 10th Circuit

U.S. Supreme Court

- Diversity and inclusion plans
- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- ADA, disability and employee medical issues
- Wrongful termination
- Employment contracts and compensation
- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace
- Fair Labor Standards Act (FLSA), overtime, exemptions, collective actions and wage issues
- Independent contractor issues
- Drug and alcohol testing
- FMLA and other leave issues
- Terminations and unemployment
- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees
- Benefits and ERISA
- COVID-19 issues including leave, safety, back to work plans and positive tests

Christina is an adjunct professor of law at the University of Utah S.J. Quinney College of Law. She has taught a litigation skills class for more than 14 years in the Juris Doctor program. She also teaches Labor and Employment Law in the Master of Legal Studies program. She is the past president of the University of Utah S.J. Quinney College of Law Board of Trustees.

Prior to joining Parsons Behle & Latimer, Christina served as a judicial law clerk to the Honorable David K. Winder, then Chief Judge of the United States District Court for the District of Utah, and the Honorable Stephen H. Anderson at the Tenth Circuit Court of Appeals. She graduated first in her class from the University of Utah S.J. Quinney College of law, where she also served on the Utah Law Review and competed for the National Moot Court Team.

Christina is a member of the American Bar Foundation Fellows.

Experience

Representing Software Company in Collective Action

Representing a dental software company in a collective action brought by independent contractors.

Employment Counsel to Bio Research Company

Providing employment advice to a bio research company in the drug discovery space.

Defending Client in FLSA Claims

Defending call center client against claims of violation of the Fair Labor Standards Act, Utah Wage Payment Act and Montana Wage Payment Act.

Racial Discrimination Defense

Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Accomplishments

Professional

Best Lawyers in America, Employment Law Management, 2014 - 2023

Intermountain States Super Lawyers: Ranked as one of the “Top 50 Women Lawyers,” 2019 - 2023; also ranked as top attorney in Employment & Labor: Employer; and Employment Litigation: Defense, Business Litigation 2013-2014, 2016-2022

Defense Research Institute (DRI), Utah Contributor to Fifty State Compendium, 2019 - 2020

Chambers and Partners USA, “Notable Practitioner” and top rankings, Labor & Employment Law, 2019 - 2023

Utah Business Magazine, “Legal Elite,” Labor & Employment, 2012 - 2023

Parsons Behle & Latimer

- Director, Diversity, Equity & Inclusion Department, 2020 - present
- Chair, Employment & Labor Practice Group, 2011 - 2020

Served on:

- Lateral Hiring Committee
- Web Design Committee
- Wellness Committee
- Opinion Letter Committee
- Recruiting Committee

Academic

University of Utah, S.J. Quinney College of Law (J.D., 1995)

- Graduated 1st in the class
- Order of the Coif
- Named Outstanding Woman Law Graduate
- William H. Leary Scholar
- Winner of Law School Moot Court Competition
- Member of National Moot Court Team
- Best Brief and Best Oralist at Regional Moot Court Competition
- Member of Utah Law Review

University of Utah (B.S., 1992)

- Magna Cum Laude
- Phi Kappa Phi, Golden Key, and Pi Sigma Alpha Honor Societies.

Associations

Professional

Utah State Bar Leadership and Boards

- Chair, Utah State Bar Labor and Employment Section, 2014 - 2015
- Vice-Chair, Utah State Bar Labor and Employment Section, 2013 - 2014
- Treasurer, Utah State Bar Labor and Employment Section, 2012 - 2013
- Secretary, Utah State Bar Labor and Employment Section, 2011 - 2012
- Member, Utah State Bar Character and Fitness Committee, 2001 - 2010
- Member, Utah State Bar Association Summer Convention Committee 2015
- Member, Utah State Bar Association Spring Convention Committees 2013 - 2015

Society for Human Resource Management (SHRM)

Co-Chair, Development Committee, UCLI 2022

Pro Bono Attorney for Domestic Violence Victims, 2000 - 2010

Pre-Litigation Chair, Department of Professional Licensing, 2003 - 2005

Judge Pro Tempore, Third District Court Small Claims Court, 1997 - 2007

Community

University of Utah S.J. Quinney College of Law

- Past president, Board of Trustees, 2021 - 2022
- President, Board of Trustees, 2019 - 2021
- President-elect, Board of Trustees, 2017 - 2019
- Member, Board of Trustees, 2008 - present
- Chair, Alumni Relations Committee, 2015 - 2017
- University of Utah Law School Search Committee for Career Development Director

- University of Utah Law School Search Committee for Dean of Academic Affairs

Adjunct Professor of Law, University of Utah Law S.J. Quinney College of Law, 2007 to present

Labor and Employment Law in Masters of Legal Studies Program

Pre-Trial Practice in JD Program, 2007 – present

Adjunct Faculty Service Award 2022

University of Utah Alumni Association Board of Directors Member, 2005 - 2008

- Chair and Member, Community Service Committee, 2006 - 2008
- Member, Development Committee, 2007 - 2008
- Member, Scholarships and Awards Committee, 2006 - 2007
- Member, Legislative Affairs Committee, 2005 - 2006
- Member, Athletics Advisory Council, 2005

Member, Visit Salt Lake Human Resource & Compensation Committee, 2021 - present

Member, Board of Directors, LiveOn.org, currently

Member of Board of Trustees, Visit Salt Lake, 2014 - 2018

Member, Board of Directors, Ballet West, 2012 - 2015

Pro Bono Clients

Utah Film Center

Girls on the Run

Megan Blues Studios

Salt Lake City Arts Council

Political

Member Utah Trafficking in Persons Taskforce Legal Subcommittee, 2016 - present

Democratic Party Sexual Harassment Committee, 2018 – 2019

Articles

"Independent Contractors: Utah," *Practical Law*, August 4, 2023

"Leave Policy Language: Utah (2023)," *Tomson Reuters*, (March 17, 2023)

“Drug Testing Laws – Utah,” *Practical Law*, March 6, 2023

“Employment Claims in Release Agreements: Utah,” *Practical Law*, 2014 to present

“Anti-Discrimination Laws Utah, 2022,” *Practical Law*, Dec. 28, 2022

“Unionization Trending,” *Employment Law Update*, Dec. 13, 2022

“Employee Privacy Laws: Utah,” *Practical Law*, 2014 to present

“Hiring Requirements: Utah,” *Practical Law*, 2014 to present

“Wage and Hour Laws: Utah,” *Practical Law*, July 28, 2022

“SCOTUS Rules States Can be Sued Under USERRA,” *Employment Law Update*, July 15, 2022

“The Impaired Mobile Employee: What are the CMD’s Options?” April 30, 2022

“Drug Testing Laws: Utah,” *Practical Law*, Feb. 7, 2022

“Tenth Circuit Court of Appeals Rules that Computer Log-in Time for Certain In-Office Workers is Compensable Under Fair Labor Standards Act,” *Employment Law Update*, Jan. 11, 2022

“Workers’ Compensation Laws: Utah,” *Practical Law* 2021

“DRI Employment Law Compendium, Utah Section,” DRI Employment and Labor Law Committee, February 17, 2021

“SCOTUS Rules States Can Be Sued under USERRA Leave Policy Language: Utah,” *Practical Law*, November 2020

“Leave Policy Language: Utah,” *Practical Law*, Nov. 2020

See more at <https://parsonsbehle.com/people/christina-m-jepson>

Presentations

“Hot Employment Law Topics for 2023,” University of Utah S.J. Quinney College of Law, Jan. 13, 2023

“Privacy In the Workplace: How Much Snooping is Legal and Proper?” Parsons Behle & Latimer Annual Employment seminar, Oct. 5, 2022

“Common Mistakes and Horror Stories,” WECon Utah SHRM Conference, Aug. 31, 2022

“Independent Contractors or Employees?” 34th Annual Parsons Behle & Latimer Employment Law Seminar, June 16, 2022

“The Impaired Mobile Employee: What are the CMD’s Options?” International Corporate Health Leadership Council, April 30, 2022

“Political Speech in the Workplace,” 33rd Annual Parsons Behle & Latimer Employment Law Seminar, Oct. 27, 2021

“Onboarding Talent Through Wellbeing and Inclusive Practices,” Utah State Bar, May 26, 2021

“Trends in Diversity, Equity & Inclusion Programs,” 32nd Annual Parsons Behle & Latimer Employment Law Seminar – Virtual, Nov. 10, 2020

See more at <https://parsonsbehle.com/people/christina-m-jepson>

Susan Motschiedler provides deep employment and labor experience primarily to medium and small businesses on routine and crisis administrative matters; long-term growth planning and protection; and employment litigation. Her collaboration with multidisciplinary teams benefits clients in matters of business structure; acquisition; acquisition planning and more.



Susan Baird Motschiedler

Of Counsel | Salt Lake City

Biography

Susan Baird Motschiedler is a member of Parsons Behle & Latimer's employment and labor law and litigation practice groups. With an eye toward avoiding litigation, she excels at providing up-front advice and counsel to business owners and management regarding employment discrimination, harassment and retaliation; disciplinary action and documentation; disability accommodation issues; benefits; employment policies and practices; employee leave laws; layoffs; protection of trade secrets and other confidential and proprietary information through the use of confidentiality, noncompetition and nonsolicitation agreements; wage and hour laws; and other employment-related issues. Susan also regularly conducts real world client training programs for employers on topics including harassment and discrimination, disability accommodation, hiring and firing, conducting investigations, record keeping and coaching/disciplining employees. When disputes arise, Susan confidently defends clients in litigation, administrative proceedings and alternative dispute resolution forums.

Susan regularly counsels and represents employers in lawsuits in a variety of areas including:

- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- Americans with Disabilities Act, disability and employee medical issues
- Wrongful termination
- Employment contracts and compensation

Contact information

801.536.6923

smotschiedler@parsonsbehle.com

Capabilities

Employment & Labor
Employment Litigation
Business & Commercial Litigation

Licensed/Admitted

Utah
U.S. Court of Appeals, 10th Circuit

- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace
- Fair Labor Standards Act (FLSA), overtime, exemptions, and wage issues
- Independent contractor issues
- Drug and alcohol testing
- Family Medical Leave Act and other leave issues
- Terminations and unemployment
- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees

Ms. Motschiedler also maintains a practice of black lung defense counsel in workers' compensation claims brought under the federal Black Lung Benefits Reform Act.

She has represented employers with coal mine or other non-coal mine operations in Utah, Colorado, Kentucky, West Virginia, Tennessee, and Alabama before the Department of Labor Office of Administrative Law Judges, the Benefits Review Board, and in appellate proceedings before the United States Court of Appeals for the Tenth Circuit.

Experience

Racial Discrimination Defense

Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Accomplishments

Professional

Recognized in Utah Legal Elite, 2013, 2014, 2017, 2018, 2019, 2020, 2021

Recognized by *Mountain States Super Lawyers* as Rising Star in Business Litigation, 2012, Employment & Labor, 2015

Academic

University of Utah, S.J. Quinney College of Law (J.D., 2005)

Rhodes College (B.A., 1994)

- Major: Anthropology/Sociology
- Major: German

Universität Tübingen, Germany (1992-1993)

Associations

Professional

Utah State Bar

Ethics Advisory Committee

Member

Women Lawyers of Utah

Past President

Co-author, "The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms"

(October 2010)

David K. Watkiss Sutherland II Inn of Court

Member

Salt Lake County Bar Association

Member

Articles

Employment Law Update, April 13, 2023

Did Twitter's Mass Layoff Violate Federal (and State) Law?, November 17, 2022

Employment Law Update, June 15, 2022

DOL Issues Proposed Rule Easing Factors for Classifying Workers as Independent Contractors for Purposes of the FLSA, October 6, 2020

Looking Forward: How to Manage Your Workforce In 2020 and Beyond, June 30, 2020

OSHA Issues New Enforcement Policies Regarding Workplace Inspections And Employer Recording Requirements For Covid-19, May 22, 2020

Re-opening for Business: Employers Should Begin Planning Now, April 14, 2020

Top Nine Takeaways from New FFCRA Regulations, April 3, 2020

Presentations

Parsons Attorneys to Present at SHRM Annual Employment Update, February 14, 2023
Salt Lake SHRM

Employee Discipline and Termination: Avoiding Problems Through Effective Communication and Documentation, June 16, 2022

34th Annual Parsons Behle & Latimer Employment Law Seminar

Conducting an Effective Internal Investigation, October 27, 2021

33rd Annual Parsons Behle & Latimer Employment Law Seminar

Conducting an Effective Internal Investigation, September 22, 2021

Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at All February 10, 2021

Trends in Employment Law Cases Related to COVID-19, November 10, 2020

32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual

Getting Your Company Ready for a Sale or Acquisition: How to Get Your Employment House in Order, November 10, 2020

32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual

What Every Employer Should Know Before Resuming Business in Utah, May 12, 2020
Visit Salt Lake

Moving Forward: Resuming Business in a Changed Environment, May 7, 2020
Missoula Economic Partnership

Employer Considerations To Successfully Reopen A Business, May 5, 2020
South Valley Chamber

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Sept. 21, 2023 | Residence Inn Downtown

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Presenters



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Legal Disclaimer

This presentation is based on available information as of Sept. 21, 2023, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

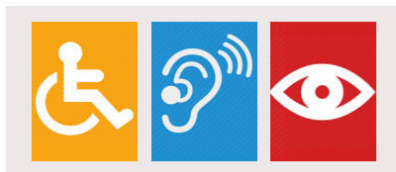
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Reasonable Accommodation Under The ADA

ADA
Americans with
Disabilities Act



The ADA requires employers to make “reasonable accommodations” to the known physical or mental limitations of an otherwise qualified individual . . . Unless such covered entity covered entity can demonstrate that an accommodation would be an undue hardship.”

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Reasonable Accommodation Under The ADA

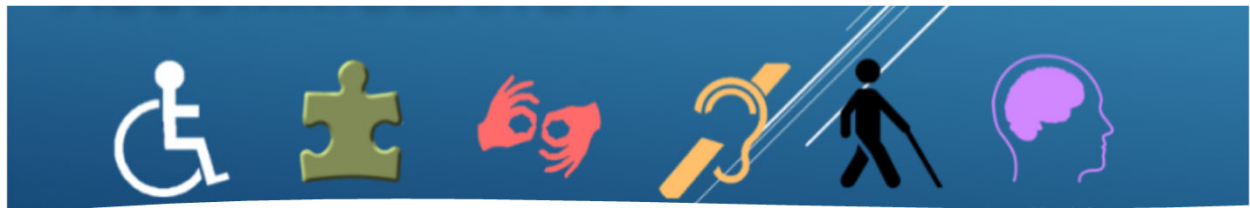
An “otherwise **qualified** individual” is an individual who:

- 1) can perform their **essential job functions** of a job in spite of their disability; or
- 2) who can perform the essential functions of their job with a **reasonable accommodation**.

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Reasonable Accommodation Under The ADA

Reasonable accommodations include, for example, the following:

- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquisition or modification of equipment or devices
- Adjustment or modifications of examinations, training materials, or policies
- The provisions of qualified readers or interpreters
- Other similar accommodations

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Reasonable Accommodation Under The ADA

The ADA **does not** require an employer to do any of the following as a reasonable accommodation:

- Relieve an employee of any essential job function
- Modify an employee's essential job function
- Reassign existing employees or hire new employees

"Essential job functions" are those that "bear more than a marginal relationship to the job at issue."

Essential job functions are determined by looking at the employer's judgement, employee's written job description, the amount of time performing the job function, and the consequences of not requiring the employee to perform the function.

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Reasonable Accommodation Under The ADA

When a qualified individual with a disability requests a reasonable accommodation the employer and employer are required to engage in a **flexible interactive discussion** to determine the appropriate accommodation.

An employer **must** engage in the interactive process.

However, an employer **need not** accept an employee's preferred accommodation and **may choose** an accommodation that is less expensive or easier to provide.



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Case Study #1

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Stover v. Amazon.com, LLC, No. 21-5421 2022 WL 94608 (6th Cir. Jan 10, 2022)

- Nicholas Stover was hired as a seasonal customer service representative at an Amazon Call Center.
- Amazon tracked call center employee's "aux" (auxiliary) status that indicated whether the employee was on a call, in a meeting, going on break.
- Eleven days after hire, Stover told HR he had a "**chronic illness**" that required him to "frequently visit the restroom" without notice and requested "additional break time to visit . . . the restroom, as needed."
- Amazon interpreted this as a request for accommodation and gave him paperwork to complete.

The Amazon logo, featuring the word "amazon" in a bold, black, sans-serif font, with a curved orange arrow underneath it pointing from the letter 'a' to the letter 'z'.

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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- Stover did not complete the paperwork, and Amazon administratively closed the request.
- After several months, Stover was hired as a non-temporary worker, reopened his accommodation request, and completed the necessary paperwork.
- Stover stated he had a gastrointestinal issue that “required more breaks for bathroom use” and necessitated him “missing work or taking time off” to attend to his condition.
- The paperwork also included a note from Stover’s gastroenterologist that said Stover needed to have a bathroom “readily available” to him.



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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

Because the nature Stover’s request was unclear, Amazon asked for more information.

In response, Stover requested

- his shift be reduced from 40 to 32 hours and
- he be provided the ability to “**use the restroom whenever he had an episode.**”

Amazon asked for additional medical documentation from a health care provider. Stover did not provide additional documentation. Amazon closed the request.

Stover testified that because he had been “**told no**” on “**multiple accommodations**” that he “**was done**” with the process.



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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

Stover was assigned a new manager Michelle Nemeth. Stover felt that they had a “personal” conflict and that Nemeth maintained an “overall malaise” towards him. While Nemeth was his supervisor, she:

- Issued Stover a written warning for having the lowest customer service rating on his team. **Stover responded with an email** that said he was “**pissed**” about how the company was treating its “most influential employee” and that Nemeth would find herself facing a “**shit storm that [would] funnel larger and larger.**”
- Warned Stover he was taking excessive break time and personal time. **Stover blamed food poisoning.**
- Warned Stover he had more missed time than any other employee. Stover **blamed his computer and it was replaced.**



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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- Nemeth formally counselled Stover about his excessive breaks. Stover then said it was **due to his Crohn’s disease.**
- Nemeth recommended he make an accommodation request to HR, but Stover refused to do so.
- Stover continued to blame computer issues for his excessive breaks. Nemeth discovered Stover had been routing his calls to other employees at the end of his shift.
- In light of this “egregious” behavior Stover was fired.



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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- Stover sued Amazon alleging that they had **failed to provide a reasonable accommodation for his disability**.
- Stover argued that **two reasonable accommodations** would have accommodated his disability:
 - (1) to have “**bathroom facility access** as required by his disability” and
 - (2) **to adjust his schedule once approximately every 56 days** to receive infusions to treat his condition.

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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- The court found that Stover **had not requested** either of these reasonable accommodations. **First**, the Court found
- Stover’s “initial requests—proposals like ‘more breaks’ or a ‘readily available’ restroom—were . . . **lacking in specificity, so much so that they were tantamount to failing to make any accommodation request whatsoever.**”
- **To qualify as a accommodation request, the request** “must reasonably inform an employer about the nature of the requested accommodation, thereby putting the employer on notice of whether and what type of accommodation might be appropriate.”
- Stover’s failure to provide the additional requested documentation did not provide “Amazon fair notice of his needs.”

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Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- **Second**, the Court found:
- Stover had the burden to “show that he requested the specific accommodation,” as “**a plaintiff may not rely on accommodations that he did not request.**”
- Stover “failed to establish that he requested a scheduling change to receive medical treatment for his condition every eight weeks.”
- Even if the Court were to “generously” interpret Stover’s request for a scheduling change as identical to the one claimed in his lawsuit, he “**never provided Amazon with supporting material demonstrating the nature of the requested accommodation, even after Amazon explicitly requested that information.**”

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Case Study #2

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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

Erin Ryerson was a tax auditor for the Jefferson County Commission in Alabama

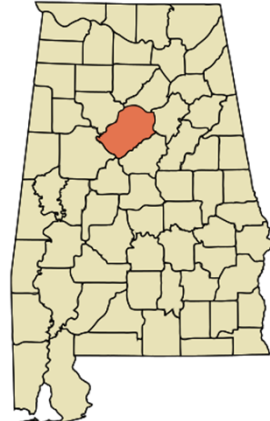
Ryerson had ulcerative colitis—chronic inflammatory bowel disease

She requested that as a reasonable accommodation:

- She be allowed to work a flexible schedule – meaning permitting her to come in late when necessary and make up the time by staying late or coming in early another day; or
- She be allowed to work from home

The County said she needed to work at the office or in the field during business hours

Thoughts?



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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

Pivotal question: whether the essential functions of the job of tax auditor required Ryerson to work on site during regular business hours

- Employer's judgment
- Written job description—especially if before advertising or interviewing
- Past performance



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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

- What did the written job description say:
 - Prepare for and conducts external audits and personal property appraisals
 - Prepares audits reports
 - Enforcement of revenue laws
 - Tax advice and responds to questions from taxpayers and members of public
 - Examination of financial records, operations, and accounting systems
 - Verifying, analyzing, and reconciling financial records
 - May require travel outside of County
- Thoughts? Do any of these requirements necessitate in person work? What does this not say?

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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

- Email correspondence about job:
 - Before accommodation became an issue
 - “Performed primarily in the field at the office location of the business”
- Employer’s judgment
 - Cannot be performed at home because of sensitive and confidential nature of financial records
 - County did not allow auditors to access its tax software remotely
 - Records must be viewed at the taxpayer’s office or at the revenue office
 - Must work regular business hours so they can schedule and perform audits at taxpayer’s offices and to answer questions from taxpayers and public

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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

- Ryerson argued that she had the ability to work at home and County did not show that teleworking would cause undue hardship
- 11th Circuit focused on confidential records and need to examine records at taxpayer's office
- Attendance records
 - Absent entire day more than 75% of the time
 - Came to work 27 of 106 workdays
 - Was generally late between 20 minutes and several hours
 - Never worked more than 27.75 hours in a week and many weeks she did not work at all

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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

“Although a modified work schedule may be a reasonable accommodation in some circumstances, the ADA does not require an employee to eliminate an essential function of a job in order to accommodate a disabled employee.”

The Court ruled in favor of the County because the employee needed to review confidential documents at work or in the field and needed to conduct work during regular business hours



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Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

What could the employer have done better?

What is the lesson from this case?

What if the employee really only needed to come in late occasionally or work a modified schedule?



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Case Study #3

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Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

Jennifer Harkey worked for NextGen Healthcare Incorporated.

Harkey attended an out-of-town conference with several other NextGen employees.

One night, around midnight, Scott O'Donnell, another NextGen employee at the conference heard a knock at his hotel room door and opened it.

Harkey was standing at the door wearing nothing but a black cotton robe. **Harkey entered the room, got in O'Donnell's hotel bed, pulled up the sheets, and fell asleep.**

O'Donnell was unable to wake Harkey. O'Donnell contacted NextGen's director of human resources, Jill Burke, who was also at the conference. Burke woke Harkey and got her back to her hotel room.



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Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

Harkey apologized and stated that she must have been sleepwalking which she had done infrequently since she was a child.

The next morning Burke suspended Harkey, placed her on paid leave, sent her home from **the conference and told her to conduct a doctor.**

Harkey **conducted a doctor** and informed Burke she had scheduled an appointment. However, before the appointment could take place Harkey was fired.

Harkey sued alleging NextGen violated the ADA by terminating because of her sleepwalking.



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Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

Harkey sued, alleging NextGen violated the ADA by terminating her because of her disability, i.e., sleepwalking.

The Fifth Circuit affirmed on the grounds that “even if her sleepwalking disorder was a ‘disability’ under the ADA, she was fired because of what happened when she sleepwalked.”

“She entered a male co-worker's room just after midnight, uninvited and wearing only a robe, and got into his bed. Set aside any peripheral explanations for her actions, NextGen now had a situation on its hands. A male employee had an unconscious-but-somehow-active female in his hotel room, under the covers in his bed, while he was on a work trip.”

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Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

- Harkey could not show she was fired **because she had a sleepwalking disorder**. She was fired because of **what she did** when she was sleepwalking.
- Fifth Circuit cited two cases where an employee was fired **for inappropriate behavior that could potentially have been caused by a disability**:
 - In one case, a court found that an employer did not violate the ADA by firing an employee with PTSD after he got in angry and confronted his manager with profanity. The Court found that even if the outburst was arguably caused by his PTSD that the “**ADA does not insulate emotion or violent outbursts blamed on an impairment.**”
 - In another case, an employee with bipolar disorder verbally abused his supervisor for denying a vacation request. The employee was fired for insubordination and the court found that, even if the employee's reaction was caused by his bipolar disorder, he could not use the ADA as an aegis **and thus avoid accountability for his own actions.**

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Case Study #4

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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Mia Bennett was a nursing student who suffered from generalized anxiety disorder and panic attacks.

Bennett took Ativan to treat her panic attacks. Ativan could stop her panic attacks within five to ten minutes. Otherwise, the panic attacks could last up to an hour.

Bennett's pet Pembroke Welsh Corgi, Pistol, was a medical alert dog who was trained to recognize an oncoming panic attack and to signal Bennett to take her medication to stop the attack.

Pistol was home trained by Bennett



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Bennett was assigned to intern at Hurley Medical Center on floor 7E which included numerous infectious disease and immunocompromised patients. Her internship was a clinical nursing rotation.

Two weeks before she started her internship Bennett emailed Hurley's Human Resources Department to apply for an accommodation to allow Pistol to accompany her during her rotation.

She submitted a statement from her health care provider stating Pistol would alert Bennett to oncoming panic attacks and allow her to take steps to avoid the attack.

Hospital did not request further information.

The request was approved by Hurley's Benefit, Compensation, and Recruitment manager, Summer Jenkins, provided that the use of the service dog complied with Hurley's Policy on the use of service animals.



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

■ Policy stated in part:

- "A Service Animal is permitted in areas of the Facility where patients or the public are allowed, provided the presence of the animal does not require modification of policies, practices or procedures, if such modification would fundamentally alter the good, services, program, or activity of the Facility; or would jeopardize the safe operation of the Facility . . ."
- "A Service Animal is generally permitted in inpatient and outpatient areas unless an individualized assessment is made to exclude a Service Animal."
- Generally cannot be permitted in "patient units where a patient is immunosuppressed or in isolation."



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

On Bennett and Pistol's first day, a clerk on Floor 7E suffered a severe allergic reaction to Pistol that required medical treatment and caused her to be sent home leaving the nursing station short-staffed.

That same day a patient also had a mild allergic reaction to Pistol.

It was also discovered that another nurse who worked on Floor 7E, but who was off for the day, also had a severe dog allergy. She was removed from Wednesdays for the rest of Bennett's rotation.



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Jenkins decided to reevaluate the decision to accommodate.

Bennett and Jenkins spoke over the next week about a possible solution including putting Pistol in a shed defender which is a "lycra type of body suit" that minimizes allergic reaction.

However, Bennett was unable to find a shed defender that would fit Pistol and emailed Jenkins saying she was looking into other options. Bennett did not follow up. The Hospital did not follow up.



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

After another discussion with Bennett, on September 15, human resources sent an emailing **rescinding the accommodation**. However, they offered to allow Pistol to come to work with Bennett and to be **crated** during patient care time.

On September 16, Bennett came to the internship without Pistol.

On September 17, Bennett sent an email stating the proposed accommodation would not work and that she would like to have a **meeting**, including with representatives from the University (Director of Nursing and Disability Services Coordinator), to discuss the issue further. Human resources agreed to the meeting.

On September 21 a meeting took place where the University representatives aggressively advocated to allow Bennett to have her service dog accompany her.



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

On September 22, human resources sent an email to Bennett stating that they **could not accommodate** Bennett's request due to the risk of allergies among patients.

- The email noted that the University representatives' suggestions that staff or patients with allergies be relocated to other floors during the internship were unworkable and would compromise patient care.
- The email also cited Hurley's policy on the use of service animals which required an individual assessment, and which prohibited the use of service animals that would "jeopardize the safe operation of the facility."
- The email explained that after consultation with human resources, risk and legal, and medical care providers and based on objective evidence that accommodating Bennett's request would **jeopardize patient safety**.
- In the email, the **hospital offered to allow Pistol to be crated on the 8th floor, to allow** numerous breaks to visit Pistol, and to make every effort to accommodate unscheduled breaks

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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

On October 6, following additional conversations among Hurley's staff, Jenkins sent another email to Bennett stating that she could **crate** Pistol on the 8th floor during her internship and reiterating that she would be given **breaks** and that unscheduled breaks would be accommodated.

At some point Hurley also offered to provide Bennett with **tutoring** to make up for time she could not spend on her rotation. However, Bennett rejected this offer because tutoring "could not replicate the patient experience"

Bennett finished her rotation without Pistol and without suffering panic attacks.

Subsequently, Bennett completed one rotation at another facility without Pistol and two rotations at other hospitals where she was allowed to have Pistol accompany her and received no patient complaints.

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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Bennett sued alleging that Hurley violated the ADA by denying her request for reasonable accommodation.

The trial court granted summary judgment to Hurley on the grounds that Pistol jeopardized the health and safety of patients of staff.



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

First, the court found that Hurley had conducted a **proper individual assessment** because it had consulted with a medical provider, its risk and legal department, and considered objective evidence before making its decisions.

Second, the court also found that the decision was **not based on speculation** or generalization's because the decision was only made after Pistol had actually caused allergic reactions.

Third, the court found that the hospital had properly assessed whether a modification could mitigate the risk by **offering to allow Pistol to stay in a crate** on the 8th floor.

The trial court also found that it was reasonable for Hurley to conclude that Pistol **posed a considerable and direct threat** to health. In less than a day Pistol had caused allergic reactions. This risk was especially great because Bennett was working on Floor 7E with **immunocompromised patients**.

Finally, the court noted that even if Hurley could have rearranged nursing schedule to find nurses without dog allergies this would interrupt continuity of care and endangering patients.



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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

The court also rejected Bennett's argument that Hurley had failed to engage in the interactive process by revoking her accommodation without consulting her and never responding to her email about the shed defender.

The court found that Hurley had consulted with Bennett the week before withdrawing the accommodation and in the email withdrawing the accommodation had indicated that it was **"remained open to continue dialogue on the matter."**

The court also found that Hurley had not failed to follow up on the shed defender email because Bennett had said she was looking for other options and didn't inquire further.

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Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

What did the employer do right?

What could they have done better?

Do you need a service animal policy?

What if one employee needs a service dog? Another employee is allergic? And a third employee is Muslim and being around dogs is inconsistent with their religious beliefs? A fourth employee has a dog phobia?

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Thank You



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Montana Employment Law Seminar

Managing without Missteps – Responding to Workplace Conflict and Anticipating Trouble in a Changing Climate

Michael Patrick O'Brien

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Paul R. Smith

801.536.6941 | psmith@parsonsbehle.com

A seasoned attorney with nearly four decades of experience, Michael partners with employers in many industries to prevent and solve employment problems. He represents news media organizations in all aspects of the law related to newsgathering and distribution. He also serves as a mediator to help resolve employment and media law disputes.



Michael Patrick O'Brien

Shareholder | Salt Lake City

Biography

Employment Law:

Michael partners with employers in many industries to prevent and solve employment problems.

He works with the local and national Society for Human Resource Management (SHRM) and has served as the legal and legislative director for Utah SHRM and Salt Lake SHRM. For such services, National SHRM honored him with its prestigious Capital Award, which was given annually to one of SHRM's 300,000 members worldwide. Utah SHRM has given him its Award for Professional Excellence.

Michael counsels employers on how to minimize and manage risks, including those involving: civil rights, discrimination, the Americans With Disabilities Act (ADA), sexual harassment, other harassment, retaliation, the Fair Labor Standards Act (FLSA), payment of wages, overtime pay and exemptions, employee benefits, drug and alcohol testing, workplace violence, the Family and Medical Leave Act (FMLA), the Equal Employment Opportunity Commission (EEOC), affirmative action, unemployment compensation, employee misconduct, investigations, unions, unfair labor practices, the National Labor Relations Board (NLRB), employment contracts, noncompetes, defamation, torts, wrongful discharge, mediation and arbitration.

He represents employers when disputes become lawsuits.

He has successfully handled hundreds of cases before administrative agencies, trial courts, juries, arbitrators, mediators and appeals courts.

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Capabilities

Employment & Labor
Employment Litigation

Licensed/Admitted

Utah

Michael works with clients regarding preventative employment law activities, such as investigations, supervisor and employee training, policy and handbook reviews, job descriptions, human resource audits and counseling on day-to-day employee problems.

He has published numerous articles on employment law topics.

He is a popular public speaker, often addressing the news media and local and national employer groups on various employment law trends and issues.

Michael serves as a mediator in employment law disputes.

Media and First Amendment Law:

Michael assists news and publishing organizations in obtaining access to places and records (FOIA and Utah GRAMA), and in minimizing risks (and responding to claims) of defamation, invasion of privacy, tort and other matters related to publishing. He also represents the news media at the Utah Legislature and elsewhere as needed, working to preserve and strengthen Utah's open government laws.

He has represented many media clients including The Salt Lake Tribune, CNN, the Deseret News, the Associated Press, the Newspaper Agency Corporation, Newsweek, the Society of Professional Journalists, KUTV News, the Utah Media Coalition and KSL-TV and radio.

He is a member of, and has received "sunshine" and freedom of information awards from, the Society of Professional Journalists and the National Association of Broadcasters.

Michael is co-editor of the *Utah Media Law Handbook* published by the Utah Headliners Chapter of the Society of Professional Journalists.

Experience

FMLA and ADA Discrimination Defense

Represented a large Intermountain region bank in two discrimination claims in U.S. District Court concerning FMLA and ADA.

Public Records Access Motion for Summary Judgment

Parsons' client The Salt Lake Tribune asked for copies of officer interviews from the City of West Jordan, as part of a project assembling a database of Utah police involved shootings. The city refused to release the records, and The Tribune challenged that access denial in an appeal to the district court. The court issued a ruling granting the Tribune's Motion for Summary Judgment and ordered West Jordan to turn over those records, with minimal redactions.

Accomplishments

Professional

AV Rating Martindale-Hubbell

Highest ratings, Chambers USA, Labor & Employment, 2003-present

Employment Lawyer of the Year, Utah State Bar, 2001

Human Resources Executive, Nation's Most Powerful Employment Lawyers In America, 2010 to present

Mountain States Super Lawyers, 2007-present

Utah Business Magazine, Legal Elite, 2006-present

Best Lawyers in America, "Salt Lake City Best Lawyers Employment Law Lawyer of the Year," 2011-2012, 2014

Best Lawyers in America, First Amendment Law, Labor and Employment Law, 2005-present

Best Lawyer's 2019 Lawyer of the Year for Employment Law

Academic

University of Utah, J.D., 1986

- Harry S. Truman Scholar
- Utah Law Review, Member, 1984-1985 and Executive Editor, 1985-1986

University of Notre Dame, B.A., Government/Theology, 1983

University of Nevada, Reno (B.A., *cum laude*, 2009)

- Honors Program, majors in Political Science and History with a minor in Economic Policy
- Chief Justice of the Associated Students of the University of Nevada Judicial Council

- Dean's Award for Outstanding Graduate in the Humanities

Associations

Professional

Utah State Bar Association and American Bar Association, Employment Sections

Society for Human Resources Management, national and local

University of Utah S.J. Quinney College of Law Board of Trustees, 2019-present

Community

Judge Memorial High School Board President, 2016-present

Media

Utah Media Coalition

Articles

Employment Law Update May 31, 2022 May 31, 2022

Ep 98. Michael O'Brien, Monastery Mornings, February 6, 2022
BYU Radio

Remembering the Christmas Eve We Were Helped by a Savior in Cowboy Boots, December 12, 2021
Salt Lake Tribune

'Mormon Land': Utahn Reflects on His Visits to an Unlikely Monastery in LDS Zion and His Life among Saints and Monks, July 28, 2021
Salt Lake Tribune

Employment Law Update, June 29, 2022 June 29, 2022

A Utah father's tribute to his 'velveteen daughter,' June 19, 2022
Salt Lake Tribune

Presentations

Parsons Attorneys to Present at SHRM Annual Employment Update, February 14, 2023
Salt Lake SHRM

Hot Employment Law Topics for 2023, January 13, 2023
University of Utah S.J. Quinney College of Law

Every Case Really is a Story: Four State and Federal Caselaw Stories and Lessons, October 5, 2022
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Breaking HR Law News: Legislative and Regulatory Update, October 5, 2022
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Employment Law Challenges of a Remote Workplace, June 16, 2022
34th Annual Parsons Behle & Latimer Employment Law Seminar

2022 Legislative and Regulatory Update, June 16, 2022
34th Annual Parsons Behle & Latimer Employment Law Seminar

News

Utah Lawyers Volunteer to Help Salt Lake Tribune Journalists Get Public Records, September 28, 2022

Attorneys Mike Judd and Mike O'Brien Mentioned in Articles regarding Success in Salt Lake Tribune Representation, September 15, 2022

Lawdragon Names Michael Patrick O'Brien a Leading Corporate Employment Lawyer in America, August 24, 2022

Michael Patrick O'Brien Bestowed the 2022 Gold Quill Award for Nonfiction by Utah League of Writers, August 23, 2022

Michael Patrick O'Brien Featured in SHRM Article: Changes in the Workplace Since the 1980s, August 11, 2022

Utah's Trappist Monastery and Weber County Featured on KSL News Radio, May 19, 2022

Paul focuses his practice on helping companies manage two of their most valuable resources: their workforce and their intellectual property (IP). Managing these resources involves two key phases—planning and protecting. Paul assists companies with both.



Paul R. Smith

Shareholder | Salt Lake City

Biography

Planning how to manage a company's workforce and IP can take many forms. From a workforce standpoint, Paul works with companies to ensure they have appropriate terms, conditions, and policies governing their employees. This often takes the form of reviewing, drafting, and revising employee handbooks and employment agreements, including non-solicitation and non-compete agreements. Paul also frequently provides trainings for HR managers, supervisors—and employees at every level—on various topics, including harassment, workplace civility, and conflicts of interest.

To assist companies in managing their IP—for example, proprietary concepts and ideas, confidential information, and brand recognition—Paul performs IP portfolio audits, first investigating the protective strategies the companies are currently employing and then recommending alternative or additional measures to be implemented. Paul has years of experience in obtaining federal registrations for trademarks and copyrights, and developing strategies to protect trade secrets.

While planning is a crucial step in managing workforce and IP, it's not enough by itself—companies must also protect themselves. In the employment arena, Paul regularly defends companies against discrimination, retaliation, and wrongful termination claims brought under the ADA, FMLA, ADEA, USERRA, Title VII, and state law. Sometimes this means simply responding to demand letters; other times it's participating in administrative investigations brought by the EEOC and its state counterparts; often it's defending against claims brought in state or federal court. Paul has experience at every stage of defense. But sometimes the best defense is a good offense. When former employees violate their non-

Contact information

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Capabilities

Employment & Labor
Trade Secret Litigation
Employment Litigation
Appeals
Trademark and Trade Dress Litigation
Business & Commercial Litigation
Copyright Litigation

Licensed/Admitted

Utah

solicitation or non-compete obligations, Paul can assist companies in enforcing those obligations—from drafting cease and desist letters to filing and prosecuting lawsuits.

The need for protective action also arises in the IP context. Paul regularly litigates trademark, trade-dress, patent, and copyright infringement cases and trade secret misappropriation cases in state and federal court. Sometimes companies find themselves enforcing their IP rights in an offensive position—as the plaintiff in a lawsuit—other times they have to enforce their rights from a defensive posture. Paul is experienced in representing IP plaintiffs and defendants.

Paul's experience includes representing companies in other litigation contexts, ranging from general commercial and contractual disputes, to enforcing creditors' rights in the bankruptcy context. Paul acts as legal counsel to the Special Master of two general adjudications of water rights in the State of Utah. While Paul has years of experience litigating at the trial-court level in state and federal court, he also has considerable experience at the appellate level, briefing and arguing cases before the Tenth Circuit Court of Appeals, the Utah Court of Appeals, and the Utah Supreme Court.

Experience

FMLA and ADA Discrimination Defense

Represented a large Intermountain region bank in two discrimination claims in U.S. District Court concerning FMLA and ADA.

Accomplishments

Professional

Business Editor, Arizona State Law Journal

Utah Legal Elite, Civil Litigation, 2022

Academic

Arizona State College of Law (J.D., cum laude, 2012, Willard H. Pedrick Scholar)

University of Utah (B.S., 2009, Major in Mechanical Engineering)

Associations

Professional

Utah State Bar

Federal Bar Association

American Bar Association

Society for Human Resource Management (SHRM)

Board Member, Jefferson Academy

Articles

"Employment Law Update," (January 17, 2023)

"Employment Law Update," (August 16, 2022)

Presentations

"Social Media: What's Not to Like About Social Media in the Workplace?," (October 5, 2022)

Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

"Key Employment Laws Every New HR Professional Must Know," (August 30, 2022)

WECon Utah SHRM Conference

"Social Media: What's Not to Like About Social Media in the Workplace?," (June 16, 2022)

34th Annual Parsons Behle & Latimer Employment Law Seminar

Montana Employment Law Seminar

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Managing without Missteps – Responding to Workplace Conflict and Anticipating Trouble in a Changing Climate

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Paul R. Smith
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Sept. 21, 2023 | Residence Inn Downtown

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Presenters



Michael Patrick O'Brien
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Legal Disclaimer

This presentation is based on available information as of Sept. 21, 2023, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Remember this Scene from Seinfeld?



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Agenda

- Case study: Southwest and the Perfect Storm of Politics and Religion
- Case study: the Birthday Party that Was Anything But a Cakewalk
- Two Related Topics
 - NLRB Primer
 - Workplace Conflict on Social Media
- Workplace-Conflict Policies

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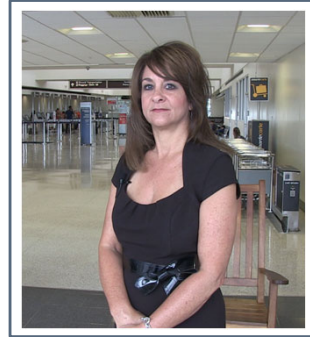
Hidden Protected-Class Issues: the Southwest Airlines Case



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Carter v. Transport Workers Union (Southwest Airlines)

- Audrey Stone (left) was the president of a flight attendants' union.
- That union represented Charlene Carter (right), who was a Southwest Airlines flight attendant from 1996 to 2017.
- Carter had a long-running dispute with the union, which stretched back to at least 2012.



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Carter v. Transport Workers Union (Southwest Airlines)



- In January 2017, some union members, including Stone, participated in the “Women’s March on Washington, D.C.”
- Union members posted pictures from the Women’s March on social media and their attendance was profiled in the union newsletter.
- Carter says that Southwest provided support for those attendees.

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Carter v. Transport Workers Union (Southwest Airlines)

First off I do not want your Propaganda coming to my inbox...that being said I Support the RIGHT TO WORK Organization 100% ABOVE what I have to pay you all in DUES! YOU and TWU-AFL-CIO do not Speak For Me or over half of our work group...We have a RECALL right now that we want adhered to with over the 50+ 1% and growing. WE WANT YOU all GONE!!!!

....

P.S. Just sent The RIGHT TO WORK more money to fight this.... YOU all DISGUST ME!!!! OH and by the WAY I and so many other of our FAs VOTED FOR TRUMP....so shove that in your Propaganda MACHINE! [sic]

- In February 2017, Carter sent a series of angry Facebook messages to Stone.
- Stone complained to management, who brought Carter in for a “fact-finding meeting.”
 - Carter says that at that meeting, Southwest told her that she “cannot post ideological views on a personal Facebook page with a connection to the workplace.”
- Southwest fired Carter a week later.

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Carter v. Transport Workers Union (Southwest Airlines)

- Carter sued Southwest, arguing that her religious beliefs “require her to share with others” her views on religious issues, including abortion, and that Southwest fired her “for engaging in the religious practice of sharing religious beliefs” on her personal Facebook page.
- Finding that Carter had shown “more than a sheer possibility that her religious beliefs and practice were a factor” in her firing, the Texas court allowed her claims to go forward to trial.
- At a July 2022 trial, a jury sided with Carter, and awarded her \$5.1 million in damages.

What could Southwest have done differently?



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What could Southwest have done differently?

- Complex case that has been politicized. Union rights at issue under Railway Labor Act. Venue may play a role. Hard to second guess management.
- Did Southwest miss the religious liberty angle in the noise of the dispute? Would a more careful approach have found it? More eyes on the issue needed? Beware of “hidden” legal issues.
- Was this Southwest’s fight to fight? Was there a sufficient workplace nexus or was this a dispute within the union or a personal political fight instead of a workplace issue?
- Was this a “pick your poison” moment for Southwest?



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Hidden Protected-Class Issues: the Birthday Party Case

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Berling v. Gravity Diagnostics (Birthday Party)

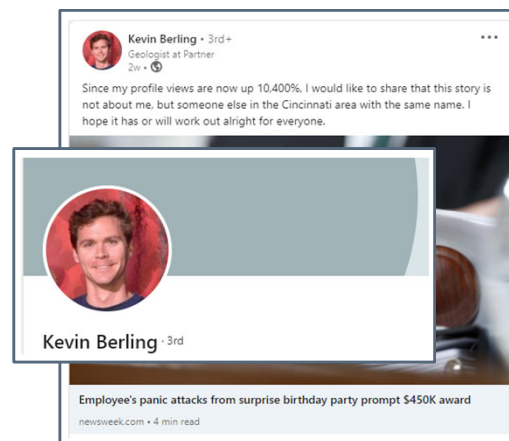


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Berling v. Gravity Diagnostics (Birthday Party)

- The “real” Kevin Berling worked at Gravity for 10 months as a lab accessioner.
- Berling had anxiety disorder, and he experienced panic attacks related to his birthday because his parents announced their divorce to him on his birthday when he was a kid.
- Gravity typically celebrated employee birthdays by placing the date on a breakroom calendar and purchasing a dessert or cake. Coworkers would sign a card and often sing “Happy Birthday.”



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Berling v. Gravity Diagnostics (Birthday Party)

- On the Friday before his birthday, Berling asked Gravity's chief of staff, Allison Wimmers to make sure the company did not celebrate his birthday.
- But... it was the weekend and Wimmers forgot to relay the message to Lauren Finn who coordinated b-days.
- Berling's coworkers wished him a happy birthday and put up a banner in the breakroom. Berling grabbed his lunch, went to his car and had a panic attack.



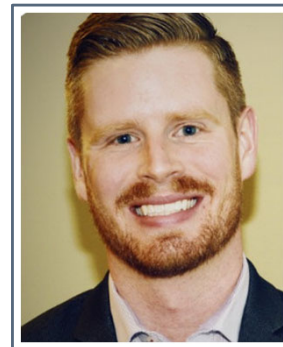
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Berling v. Gravity Diagnostics (Birthday Party)

- Berling complained to Wimmers, who was out of town, so he met with Wimmers' supervisor, Amy Blackburn along with senior director Ted Knauf.
- The meeting was not smooth: Berling became "very red," closed his eyes, clenched his fists, and (when Blackburn asked if he was okay) "commanded silence." Blackburn testified that she was worried Berling would strike her.
- Blackburn and Knauf told the CEO they felt **unsafe**, so the company decided to terminate Berling's employment.
- Berling sued, claiming he was denied a reasonable accommodation and discriminated against based on a disability.



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Berling v. Gravity Diagnostics (Birthday Party)

- Gravity argued that management did not know he was disabled.
- And that it had a legitimate and non-discriminatory reason for termination—that its employees felt unsafe.
- Ultimately, the judge disagreed and sent the matter to the jury.



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Berling v. Gravity Diagnostics (Birthday Party)

INSTRUCTION NO. 3

Kentucky law protects workers who have a disability from adverse employment actions taken by their employers because of the disability.

You will find for the Plaintiff, Kevin Berling, if and only if you believe from the evidence alone all of the following:

A. That Plaintiff had a disability as defined in Instruction No. 2;

AND,

B. That Plaintiff was able to perform the essential functions of his job with, or without, reasonable accommodations;

AND,

C. That Plaintiff suffered an adverse employment action because of that disability.

Otherwise, you will find for the Defendant, Gravity Diagnostics.

Question A

Do you believe from the evidence that Plaintiff suffered an adverse employment action because of a disability as explained in Instruction No. 3?

YES ☒ NO ☐

Michael J. Gower
FOREPERSON, if empaneled

INSTRUCTION NO. 6

You have found for the Plaintiff, Kevin Berling. You must now determine from the evidence what sum of money will reasonably compensate him for his damages.

Question B

(i) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of \$ 120,000 (not to exceed \$120,000.00) will reasonably compensate him for his lost wages, considering the gross amount of compensation he would have earned from Gravity Diagnostics between August 9, 2019, and the present including benefits, and loss of reasonable damages.

(ii) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of \$ 30,000.00 (not to exceed \$64,130.40) will reasonably compensate him for his lost wages and benefits in the future.

(iii) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of \$ 300,000.00 (not to exceed \$500,000.00) will reasonably compensate him for his past, present and future mental pain and suffering, mental anguish, embarrassment, humiliation, mortification, and loss of self-esteem.

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What Could Gravity Diagnostics Done Differently?



- Don't rush to judgment
 - Gather all the facts before making a final decision
- Explore alternatives to termination
 - Maybe Gravity should have temporarily removed Kevin from the workplace
- Better communication and better training
- Bring in a third-party to evaluate and weigh-in on the situation

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Managing Internet Conflict



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But First....

Let's talk about the National Labor Relations Board (NLRB)

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Limiting Disruptive Behavior

What can an employer do when employees speak ill of the workplace, the company, their coworkers or managers?

- ***It depends . . .***

- Is the employee engaged in behavior that is protected by the National Labor Relations Act (NLRA).

- ***Note: this protection is generally not available to managers.***

The National Labor Relations Board (NLRB) has provided guidance for when an employee's social media behavior is protected by the NLRA and when an employer's social media policies run afoul of the NLRA.

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National Labor Relations Board



What is the NLRB?

- An independent federal agency like the EEOC
- Members are political appointees and tend to reflect the party ideology of the President who appoints them

What does it do?

- For our purposes, it mainly enforces the NLRA

“The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union.” (NLRB website) (emphasis added)

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National Labor Relations Board

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to **engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities.” - Sec. 7, NLRA



Key phrase = acting in concert

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National Labor Relations Board



Is the activity concerted?

- Generally...
 - Two or more non-manager employees
 - Acting together
 - To improve wages or working conditions.
- But the action of a **single employee** may be considered concerted if...
 - The employee involves co-workers before acting, or
 - Acts on behalf of others

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National Labor Relations Board

Does the action seek to benefit other employees?

- Will the improvements sought benefit more than just the employee taking action (protected)?
- Or is the action more along the lines of a personal gripe (not protected)

Is the action carried out in a way that causes it to lose protection?

- Reckless or malicious behavior—e.g., sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets—may cause concerted activity to lose its protection.



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Other Laws Might Apply to Social-Media Conflict

- We're going to focus on the NLRB because there have been recent developments and section 7 often gets ignored in the non-union context
- But several other laws could also apply
 - Title VII (Southwest)
 - ADA (Birthday Party)
 - Montana's just-cause-termination standard

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Okay, with that NLRB primer out of the way...

Let's talk about handling workplace conflict on social media

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According to the NLRB, concerted activity on social media sites is protected—even though such activity may be open to the rest of the world.

Case Study:

- Jane tells another employee, Sarah, that her performance is lacking and that they should take the issue up with their supervisor. Before the supervisor meeting, Sarah takes to Facebook to complain about Jane and to ask her co-workers for input. Four co-workers weigh in. Several posts are sarcastic and even profane.
- Employer terminates Sarah and the four other employees who participated in the Facebook exchange.
- Did the employer violate Section 7?

Yes. NLRB called this a textbook example of concerted activity. Sarcasm and swearing was not malicious.

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Case Study:

- Gwen takes to Facebook to complain about her supervisor – she calls him a “scumbag.” Gwen does not seek input from her co-workers, but she gets it – her post drew several supportive responses from co-workers, which led to more negative remarks by the employee about her supervisor. Employer terminated Gwen’s employment because she disparaged her supervisor.
- Did the employer violate Section 7?

Yes. The NLRB concluded that the name-calling was not malicious and unaccompanied by any physical threats.

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Case Study:

- Joe, a bartender, posted a few disparaging remarks about the bar (his employer) on his Facebook page—he said that he had not received a raise in five years and that the bar’s customers were “rednecks.” None of his co-workers respond. The employer terminates his employment.
- Did this employer violate Section 7?

No. The NLRB concluded that this employee was merely griping about work and did not attempt to engage any coworkers in a conversation about the terms and conditions of work.

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Brand New Decision from the NLRB—*Lion Elastomers II*

- Employer disciplined an employee for his conduct during a “dysfunctional” safety meeting
- Tempers flared and arguments ensued between supervisors and the employee over work assignments and the employee’s history of filing grievances
- The employee was disciplined after the meeting
- He ultimately claimed he was disciplined for engaging in union activity and filed grievances about the incident.
- The NLRB ruled in his favor.

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Brand New Decision from the NLRB—*Lion Elastomers II*

- Employers must now carefully navigate two "fundamentally different" classes of employee misconduct:
 - Misconduct during ordinary work
 - Misconduct committed during activities related to their hours, wages, and working conditions
- Employers may discipline employees for profane attacks and threats, posting social media attacks, shouting racist epithets at other employees, or carrying signs sexually harassing a particular employee when committed in the ordinary course of work
- However, employers can't discipline employees for the **same** misconduct if it's linked to efforts to improve their terms and conditions of employment.

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Limiting Conflict Without Impinging on Concerted Activity

- What can an employer do when (non-supervisor) employees create conflict by speaking ill of the workplace, company, coworkers, or managers?
- Mere griping, without involvement or solicitation of co-workers, is not protected by the NLRA.
- But when two or more employees are talking about work—even in a negative way and even when the rest of the world can see it on social media—you should tread lightly.

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Limiting Conflict Without Impinging on Concerted Activity

- NLRB tells us the key to regulating social media conduct:

Context

- Your communications with employees should avoid sweeping bans on social media conduct.
- Refer your employees to your conduct-based policies – e.g., your anti-harassment policy.
- Always make clear that communications with coworkers about their working conditions is allowed.
- Pay attention to the setting: Conflict during ordinary work VS. conflict during activities related to their hours, wages, and working conditions

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Workplace-Conflict Policies



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Other Laws Might Apply to Your Workplace-Conflict Policies

- We're going to focus again on the NLRB
 - The NLRB has been active in this area recently
 - A new decision from the NLRB constitutes a sea change in this area of the law
- But several other laws could also apply
 - Title VII
 - ADA
 - Montana Human Rights Act
 - Montana's just-cause-termination standard

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Civility Standards Used to Be Okay

- Remember: Under section 7 of the NLRA, non-supervisory employees have the right to engage in protected, **concerted activity** regarding terms and conditions of employment
- The NLRA has long prohibited employer rules that **expressly** limit such activities (e.g., rules against talking about pay or advocating for a union).
- Most employer rules, however, fall into the category of “**facially neutral**” rules, or those that do not restrict Section 7 rights on their face—e.g., **civility standards**

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Civility Standards Used to Be Okay



- Since 2017, the NLRB has evaluated facially neutral employer rules using a balancing test set forth in a case called *The Boeing Company*.
- Under that test, an employer's legitimate business reasons for maintaining a rule were weighed against any potential infringement on employee Section 7 rights.
- Moreover, under *Boeing*, certain categories of work rules—including **civility** and **conduct** rules— were presumptively lawful for employers to maintain
- Employers welcomed the clarity provided by the Board's decision in *Boeing*.

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The Boeing Standard Has Left the Gate

- On August 2, 2023, the NLRB issues the much-anticipated *Stericycle* decision
- The Board's majority **rejected** the *Boeing* standard as being too permissive for employers
- *Boeing* allowed employers to enact overbroad work rules that infringed on employee NLRA rights
- Instead of *Boeing's* balancing test and categories of lawful rules, the Board announced, work rules will be analyzed on a **case-by-case** basis
- The Question: whether the work rules "have a reasonable tendency to **chill** employees from exercising their Section 7 rights."



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Here's the *Stericycle* Standard

- The Board will read a work rule from the perspective of a “reasonable employee” who is considering engaging in Section 7 activity and is afraid of being disciplined or losing his or her job
 - ...and therefore more likely to read a rule as limiting Section 7 rights
- If that “reasonable employee” **could** interpret the rule in a way that limits Section 7 rights, the rule will be presumptively unlawful
 - ...regardless of whether the rule could also be interpreted in ways that do not infringe on those rights

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Here's the *Stericycle* Standard



- The employer's **intent** in maintaining the rule is irrelevant
- To avoid liability, the employer will have to prove that a **legitimate and substantial business interest** justifies the rule, *and* that the rule couldn't be crafted more narrowly and still advance that interest
- This *Stericycle* test will be applied **retroactively**, including to rules that were adopted under the more employer-friendly *Boeing* standard

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The Board's *Stericycle* Decision Wasn't Unanimous

- The Board's dissenting member assailed the majority's decision as creating a near-impossible hurdle for employers:

“employers would be well advised [to retain] competent labor counsel to craft, for inclusion in their employee handbooks, language that would make it impossible—even for my colleagues’ version of the reasonable employee—to interpret any rules contained therein to restrict Section 7 activity.”

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Life after *Stericycle*

- Takeaways:
 - Review your policies
 - Look for any language that could be construed as limiting section 7 rights
 - Need to view language from perspective of a disgruntled and paranoid employee
 - See if you can draft the language more narrowly
 - Might have to eliminate the language altogether



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Final Takeaways

- Know all the facts
- Make sure there's a workplace connection
- Figure out all the applicable laws
- Hit pause and consider getting someone else involved
- Sometimes you have to pick your poison



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Thank You



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Montana Employment Law Seminar

Termination Trepidation – Identifying and Avoiding the Risks Associated with Employee Terminations and Discipline

Liz M. Mellem

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Leah Trahan

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Liz Mellem is the managing shareholder of Parsons' Montana offices located in Missoula and Helena. Liz is a skilled litigator, and an experienced neutral investigator regarding employment claims. Her experience with an array of complex commercial issues, including significant employment counseling and litigation, helps guide her clients toward effective and satisfactory resolutions both in and out of court.



Liz M. Mellem

Montana Managing Shareholder | Missoula |
Helena | Salt Lake City

Biography

Liz Mellem represents companies in a wide range of employment and commercial issues including:

- Neutral investigations of internal claims of harassment, discrimination, and ethical violations
- Harassment and discrimination defense
- Wrongful termination defense
- Handbook review and revision
- Employment practices training including harassment and discrimination training of management and non-management employees
- General commercial litigation including breach of contract, trade secret misappropriation, and ownership disputes
- Pre-litigation negotiation and resolution of disputes

Liz focuses on creating innovative business solutions for her clients and zealously advocates for their interests from the beginning of a matter through resolution, including through trial.

Liz has spent much of her career representing clients in both Utah and Montana by traveling between the two states. She is the Montana managing shareholder and is active in the local running and biking communities in Missoula.

Contact information

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Capabilities

Employment & Labor Counseling

Employment Litigation

Business & Commercial Litigation

Licensed/Admitted

Utah

U.S. Dist. Court, Dist. of Utah

Montana

U.S. Dist. Court, Dist. of Montana

Experience

Racial Discrimination Defense

Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Nonsolicitation or Noncompete Contracts

Successfully resolved numerous cases alleging violations of non-solicitation and non-competition contract provisions.

Employee Handbooks

Worked with both large and small companies to revise and improve employee handbooks.

Wrongful Termination

Successfully defended company in alleged wrongful termination case.

Defending Client in FLSA Claims

Defending call center client against claims of violation of the Fair Labor Standards Act, Utah Wage Payment Act and Montana Wage Payment Act.

Provide Counsel in Copper and Molybdenum Mining Activities

Representing client on matters related to ongoing copper and molybdenum mining activities, including cleanup of legacy impacts and future water treatment process.

Defending a Large Gold Mine Against Royalty Claims

Representing an international gold mining company's mine against royalty claims by another world-class gold mine.

Fiduciary Duty Trial

Obtained six-figure jury verdict for plaintiff in breach of fiduciary duty case

Fraudulent Misrepresentation

Obtained defense verdict in fraudulent misrepresentation case involving allegedly hidden assets.

UCC Product Dispute

Successfully resolved UCC “battle of the forms” dispute in pre-litigation, saving client time and expenses of litigation.

Accomplishments

Professional

Admissions:

Utah State Bar, 2010

United States District Court, District of Utah, 2010

State Bar of Montana, 2013

United States District Court, District of Montana, 2014

Mountain States Super Lawyers Rising Star: 2014, 2018, 2019, 2020

Academic

University of Utah, S.J. Quinney College of Law (2010, J.D.)

Montana State University (2004, B.S.) Major: Sociology

Associations**Professional**

Utah State Bar Labor & Employment Section

Chair

(2017 - 2018)

American Bar Association

Member

(2010 - Present)

Community

Humane Society of Western Montana

Board of Directors

Member

(2017 - present)

President of Board

(2020 - 2023)

Run Wild Missoula

Member

(2013 - present)

Articles

“New COVID Relief Statute: Second Round of PPP Loans, Extension of FFCRA Leave Rights, and Tax Code Changes,” December 23, 2020

“Montana Face Coverings Mandates,” July 21, 2020

“Montana Civil Cases Can Resume, But With Significant Restrictions,” May 18, 2020

“Strategies on acing the SBA’s new PPP Loan Forgiveness Application,” May 18, 2020

“Beware the Whistleblower: Avoiding Fraud Liability under the PPP,” May 12, 2020

“Montana’s Employers Can Open for Business – Sort Of,” April 28, 2020

“Re-opening for Business: Employers Should Begin Planning Now,” April 14, 2020

“Top Nine Takeaways from New FFCRA Regulations,” April 3, 2020

Additional Guidance from the Department of Labor Including the Frequently Asked Question: “What is the ‘small business exemption’ under the Families First Coronavirus Response Act? March 30, 2020

“Montana’s ‘Stay at Home’ Directive from Governor Bullock” March 30, 2020

“CARES ACT: Emergency Appropriations,” March 27, 2020

“Emerging Questions for Employers Under The Families First Coronavirus Response Act And Other Coronavirus Employment Issues,” March 24, 2020

Presentations

Regulatory Hot Topics, May 9, 2023

Parsons Behle & Latimer 35th Annual Employment Law Seminar in partnership with Salt Lake SHRM

Preventing and Responding to Workplace Violence and new HB 324, May 9, 2023

Parsons Behle & Latimer 35th Annual Employment Law Seminar in partnership with Salt Lake SHRM

Hiring and Firing Employees, January 23, 2023

National Business Institute (NBI) Seminar – Montana Employment Law 2023

Employee Discipline and Termination: Avoiding Problems with Effective Communication and Documentation, October 5, 2022

Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Hot Employment Topics Sessions #1 and #2, October 28, 2021

33rd Annual Parsons Behle & Latimer Employment Law Seminar

Hot Employment Topics Session #1 and #2, September 22, 2021

Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at All, February 10, 2021

Remote Working Considerations in the ERA of COVID-19, November 10, 2020

Strategies on Acing the SBA's New PPP Loan Forgiveness Application, May 20, 2020

Back in Business: Information Every Idaho Employer Should Know, May 13, 2020

Moving Forward: Resuming Business in a Changed Environment, May 7, 2020

**To view additional insights and related news items, visit parsonsbehle.com/people/liz-m-mellem#insights*

Leah Trahan is a member of the firm's Litigation Group. With more than eight years' legal experience in both the public and private sector, Leah brings her varied experience to the table to provide practical solutions to complex problems for her clients.



Leah Trahan

Associate | Missoula

Biography

Leah Trahan is a member of the firm's Litigation and Employment & Labor practice teams. Since 2014, Leah has worked in various legal roles in both the public and private sector. During this time, Leah gained valuable experience in a wide variety of practice areas, including Title VII and Title IX defense, administrative proceedings, insurance defense, tribal tax law and employment counseling for both private and government employers. Leah's current practice focuses on civil litigation, including employment litigation and commercial litigation.

In 2022, Leah earned her J.D. with high honors from the Alexander Blewett III School of Law. During law school, Leah mentored new law students as a member of the school's Academic Success Program and was a Constitutional Law teaching assistant.

When not in the office, Leah enjoys traveling with her family, gardening, and experimenting with new recipes.

Accomplishments

Academic

Associate Dean of Students Award for Highest Academic Achievement in Legal Writing, Legal Analysis, Administrative Law, and Business Transactions.

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Capabilities

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Employment & Labor
Employment Litigation
Insurance Litigation
Medical Malpractice and Hospital Negligence
Plaintiffs Litigation

Licensed/Admitted

Montana

Montana Employment Law Seminar

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Termination Trepidation – Identifying and Avoiding the Risks Associated with Employee Terminations and Discipline

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Sept. 21, 2023 | Residence Inn Downtown

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Legal Disclaimer

This presentation is based on available information as of Sept. 21, 2023, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Montana Termination Basics



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Wrongful Discharge from Employment Act

- Montana is the only state that does not follow the at-will employment doctrine.
- In Montana, a discharge is wrongful if:
 - It was in retaliation for employee's refusal to violate public policy or for reporting a public policy violation
 - The discharge was not for good cause
 - The employer materially violated a provision of its own policy prior to discharge

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Wrongful Discharge from Employment Act

- **Good cause**
 - Examples: tardiness, express violation of written policies, unsatisfactory performance
- During the **probationary period** employment may be terminated at will.
 - Presumed to be 12 months, up to 18 months
- The employer has the broadest discretion when making decisions about a **managerial** or **supervisory employee**.

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Social Media – Effective October 1, 2023

- An employer may not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or job applicant for: **legal expressions of free speech by the employee or job applicant . . . made on personal social media.**
- Unless the expression:
 - Violates an employer's written policy; or
 - Violates the terms or conditions of the employee's employment contract

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Other Exceptions to At-Will Employment



Other federal laws limit employer rights to terminate employees too, including:

- Section 7 of the National Labor Relations Act
- A framework of whistleblower laws (e.g., the Occupational Safety and Health Act and the Sarbanes-Oxley Act).
- For a full list of federal whistleblower laws, go to www.whistleblowers.gov/statutes

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Protected Characteristics

- In addition, federal laws prohibit employment discrimination on the basis of certain protected characteristics, including:
- race, color, religion, age (40 and over), pregnancy, sex, gender, disability, national origin, ethnic background, sexual orientation, gender identity, genetic information (including of a family member), military service, and citizenship.
- **Montana** protects many of the same characteristics, but also:
 - age (both youth and advanced age)
 - vaccine status
 - martial status

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Retaliation Claims

- Be mindful of timing issues to avoid a **retaliation** claim.
- Courts will infer a retaliatory intent when an employer takes adverse employment action soon after (e.g., within about 3 months) an engages in protected activity (e.g., complaining about discrimination or harassment).
- In such cases, the burden will shift to the employer to rebut the retaliatory presumption with evidence of its legitimate, non-retaliatory intent.

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How Do You Get To Termination?

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Communication and Documentation

- Two pillars of good employee performance management and risk management
- Communication = oral and written
 - Conveys information regarding job duties, expectations, performance feedback, corrective actions, etc.
 - Frequent and early communication and intervention will help avoid employment claims and protect an employer when claims are brought
- Documentation can be a form of communication AND evidence of communication

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“Golden Rule” of Documentation

IF IT IS NOT IN WRITING,
IT DIDN'T HAPPEN!

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How will documentation help limit risk?

- In a case that goes to a jury trial, we never want to rely on testimony alone because the jury gets to pick who to believe
 - Spoiler Alert: They tend to believe the employee more often than the employer!
- Documents help to establish **intent** and show:
 - Decisions were performance or business based
 - Decisions were not motivated by discriminatory, retaliatory, or other unlawful intent

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Who Else Cares About Documentation?

- Documentation also really matters to the agencies that enforce anti-discrimination and anti-retaliation employment laws:
 - State Agencies (ex. Montana Human Rights Bureau)
 - EEOC
 - DOL
- Service of a Charge or Complaint is always accompanied by a Request for Information

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Excerpt from UALD Request for Information

REQUEST FOR INFORMATION FROM RESPONDENT UALD No. CG-0xx & EEOC No. JSC-2020-00xxx

This form contains a request for specific information the Division requires to complete its investigation. Failure to provide this information may affect the outcome of the Division's findings.

Within 30 days of the date of this Request for Information (the "Request"), provide Waiva Charlesworth responses via e-mail at wroberts@utah.gov OR you may send a hardcopy of the documents and information requested below by U.S. mail. **The Division prefers and strongly encourages parties to communicate with the Division using email and to provide any documents or other evidence in an electronic format.** Provide your answers and any supporting documentation or documents specifically requested by the Division organized by number to correspond with the specific Request to which it is responsive. The answers to this Request must be provided to the Division in addition to the Response/Position Statement to the Charge, as described on the first page of this letter.

Provide the following:

1. Verify whether the correct Respondent has been named in the Charge, and provide any necessary corrections to the name of the company or its address.
2. The name and contact information (including email) of the individual from Respondent the Division can contact to schedule interviews of witnesses and parties that are or have been employed by you.
3. All documents relating to any disciplinary actions taken by Respondent against Charging Party in the past five years.
4. All documents related to the Charge.
5. A copy of Charging Party's job description at the time he/she left their employment or at the time you received this charge of discrimination as well as any minimum requirements of the position.
6. A copy of any employee handbook, specifying any policies therein which Charging Party is alleged to have violated.
7. Proof that Charging Party received the employee handbook.
8. Name, position and contact information for all individuals, known to Respondent, to have any information regarding the underlying facts of the Charge.
9. All documents that explain the reason(s) why Charging Party is no longer employed by Respondent. (If Charging Party is still employed by Respondent you do not need to answer this question.)

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Documents Relevant to HRB Investigations

- All documents relating to any disciplinary actions taken by Respondent against Charging Party in the past five years.
- All documents related to the Charge.
- A copy of Charging Party's job description at the time he/she left their employment or at the time you received this charge of discrimination as well as any minimum requirements of the position.
- All documents that explain the reason(s) why Charging Party is no longer employed by Respondent. (If Charging Party is still employed by Respondent you do not need to answer this question.)

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Good Documentation Is Critical at 3 points:

- Performance Evaluations and Appraisals
- Discipline
- Termination

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AVOIDING LEGAL TROUBLE

- Performance Evaluations, Reviews, and Appraisals
 - Should address: C.A.P.
 - **C**ONDUCT
 - **A**TTENDANCE
 - **P**ERFORMANCE
- Be Courageously Honest
- But Not About Non C.A.P. Issues!

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BAD Excerpts from Federal Employee Evals

- “Since my last report, this employee has reached rock-bottom and has started to dig.”
- “I would not allow this employee to breed.”
- “Works well when under constant supervision and cornered like a rat in a trap.”
- “When she opens her mouth, it seems that it is only to change feet.”
- “This young lady has delusions of adequacy.”
- “He sets low personal standards and then consistently fails to achieve them.”
- “This employee should go far, and the sooner he starts, the better.”
- “He would argue with a signpost.”
- “He brings a lot of joy whenever he leaves the room.”
- “If you give him a penny for his thoughts, you’d get change.”

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Be Smart About Documentation

Terms used in a female employee's evaluation:

- "macho"
- "overcompensated for being a woman"
- "needs a course in charm school"
- "matured from a masculine manager to an appealing lady partner candidate"
- "should walk, talk and dress more femininely, wear makeup, get her hair styled and wear jewelry"

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (gender stereotyping)

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Characteristics of Bad Evaluation Ratings

Central Tendency – supervisor avoids rating employees either very high or very low. Reviews are clustered in the middle of the rating scale for all employees.

Leniency – supervisor gives high ratings to all employees.

Strictness – supervisor gives low ratings to all employees.

Similar-to-Me – supervisor gives high ratings only to employees who share similar thinking, personality, background.

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Characteristics of Good Evaluation Ratings

- Addresses C.A.P. (Conduct, Attendance, Performance)
- Provides same or similar review/ratings to same or similar Conduct, Attendance, Performance
- Connected to Job Duties and Description
- Looks at entire performance period; notes trends
- Supports employment decisions
 - Ask: Should this person be promoted? Should this person be on a PIP?
- Avoids stereotypes and personal attacks

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Best Practices For Documenting Termination Timeline



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How Terminations Often Go



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Best Practices


- Outline the lifecycle of an employee and identify all communication possibilities:
 - Hiring
 - Training
 - Day-to-day Feedback/Daily Meetings
 - Biannual Reviews
 - Write Ups/Performance Improvement Plans
- Outline the ideal way to communicate performance expectations and document C.A.P. along the way

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Event – Documentation Outline


HIRE / EVENT	WHAT A SUPERVISOR SHOULD BE DOING
<p>HIRE DATE</p> 	<p>Employee gets a written job description giving fair notice of his/her job duties and performance expectations and goals.</p>

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>90 Days Later</p> 	<p>Supervisor checks in with employee after “orientation” period to verify adequate performance and good job fit. Thereafter, supervisor provides regular oversight, coaching, etc.</p>

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>First Sign of Serious Problem</p> 	<p>Apart from regular coaching, at this point there should be a discussion with the employee. Document the discussion with a note to file or email. Depending on seriousness, escalate to HR and perhaps discipline. Early HR involvement can hasten a resolution and minimize risks.</p>

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>Additional Problems</p> 	<p>Further discussions and coaching, HR involvement and perhaps discipline, maybe written warnings—depending on how serious the problem is. Repeat clear objectives and measurements of the same.</p>

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>Performance Reviews</p> 	<p>Conduct a truthful and accurate review of employee's performance during full relevant period (e.g., one year). Note if problems exist and include discussion of relevant job actions (e.g., warnings or discipline, successes, etc.).</p>

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>Ongoing Discipline</p> 	<p>Escalate discipline (last chance notice). Document these <u>FOUR</u> things:</p> <ol style="list-style-type: none"> 1) nature of the problem; 2) how it can be fixed; 3) clear timetable for doing so; and 4) consequences of failure to do so (such as discharge).

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>Trigger for Discharge</p> 	<p>There should be some event that moves the situation towards termination.</p> <p>Examples include:</p> <ol style="list-style-type: none"> 1) Expiration of a last chance time period without needed improvement; 2) Additional major mistake or misconduct.

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Event – Documentation Outline


HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
<p>Discharge</p> 	<p>Here is the main goal of the whole process: anyone who might try to second guess you should conclude there was clear explanation of expectations, notice of problems and a documented chance to improve before discharge.</p> <p>HR involvement should ensure company-wide consistency and that the written record supports the termination decision.</p>

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Event – Documentation Outline

HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
 Discharge Letter or Memo to File	Document what happened and why, in clear terms but with as few words as possible. List all reasons for discharge, but don't overstate your case. Remember this will be "Exhibit A" in any post-termination dispute, so do it properly.

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Thank You



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