

Senator Stuart C. Reid proposes the following substitute bill:

WHISTLEBLOWER AMENDMENTS

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stuart C. Reid

House Sponsor: Rich Cunningham

LONG TITLE

General Description:

This bill modifies grievance procedure provisions and the Utah Protection of Public Employees Act to address protections for employees who report certain wasteful or wrongful actions.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ empowers the Career Service Review Office to review a grievance by a public entity employee who alleges that adverse action was taken against the public entity employee in retaliation for reporting wasteful or wrongful actions;
- ▶ outlines the grievance procedure for a public entity employee;
- ▶ protects an employee from adverse action for reporting wasteful or wrongful conduct;
- ▶ requires a public entity employee who brings a claim of retaliatory ~~action~~ **action** to choose the forum in which to assert the claim;
- ▶ provides for a political subdivision or a state institution of higher education to create an administrative procedure for an employee to file a complaint;
- ▶ shifts the burden of proof to the employer to prove that a communication was not



26 made in good faith;

27 ▶ permits the award of costs and attorney fees to ~~H→~~[a party that] an employee who ~~←H~~

27a prevails in court;

28 ▶ increases fines imposed under the chapter and addresses who pays the fines;

29 ▶ requires an employer to provide a copy of the chapter to an employee under certain

30 circumstances;

31 ▶ addresses false accusations; and

32 ▶ makes technical changes.

33 **Money Appropriated in this Bill:**

34 None

35 **Other Special Clauses:**

36 This bill coordinates with H.B. 193, Utah State Employment Amendments, by

37 providing substantive amendments.

38 **Utah Code Sections Affected:**

39 AMENDS:

40 **67-19a-101**, as last amended by Laws of Utah 2010, Chapter 249

41 **67-19a-202**, as repealed and reenacted by Laws of Utah 2010, Chapter 249

42 **67-19a-301**, as last amended by Laws of Utah 2010, Chapter 249

43 **67-19a-302**, as last amended by Laws of Utah 2010, Chapter 249

44 **67-19a-303**, as last amended by Laws of Utah 2010, Chapter 249

45 **67-21-2**, as last amended by Laws of Utah 2007, Chapter 329

46 **67-21-3**, as last amended by Laws of Utah 2010, Chapter 324

47 **67-21-4**, as last amended by Laws of Utah 1999, Chapter 177

48 **67-21-5**, as last amended by Laws of Utah 1999, Chapter 177

49 **67-21-6**, as enacted by Laws of Utah 1985, Chapter 216

50 **67-21-9**, as enacted by Laws of Utah 1985, Chapter 216

51 ENACTS:

52 **67-19a-402.5**, Utah Code Annotated 1953

53 **67-21-3.5**, Utah Code Annotated 1953

54 **67-21-3.6**, Utah Code Annotated 1953

55 **67-21-3.7**, Utah Code Annotated 1953

56 **67-21-10**, Utah Code Annotated 1953

181 employee's personnel file.

182 (b) The employing agency of an employee who files a grievance may place records of
183 disciplinary action in the employee's personnel file.

184 (c) If any disciplinary action against an employee is rescinded through the grievance
185 procedures [~~established~~] described in this chapter, the agency and the Department of Human
186 Resource Management shall remove the record of the disciplinary action from the employee's
187 agency personnel file and central personnel file.

188 (d) An agency may maintain a separate grievance file relating to an employee's
189 grievance, but shall discard the file after three years.

190 Section 6. Section **67-19a-402.5** is enacted to read:

191 **67-19a-402.5. Procedural steps to be followed by reporting employee alleging**
192 **retaliatory action.**

193 (1) A reporting employee who desires to assert ~~§~~ → [on] an ← ~~§~~ administrative grievance of
194 retaliatory action:

195 (a) shall submit the grievance in writing within 20 days after the day on which the
196 retaliatory action occurs;

197 (b) is not required to comply with Section 63G-7-402 to file the grievance; and

198 (c) is subject to the provisions of Section 67-24-4.

199 (2) (a) When a reporting employee files a grievance with the administrator under
200 Subsection (1), the administrator shall initially determine:

201 (i) whether the reporting employee is entitled, under this chapter and Chapter 21, Utah
202 Protection of Public Employees Act, to bring the grievance and use the grievance procedure;

203 (ii) whether the office has authority to review the grievance;

204 (iii) whether, if the alleged grievance were found to be true, the reporting employee
205 would be entitled to relief under Subsection 67-21-3.5(2); and

206 (iv) whether the reporting employee has been directly harmed.

207 (b) To make the determinations described in Subsection (2)(a), the administrator may:

208 (i) hold an initial hearing, where the parties may present oral arguments, written
209 arguments, or both; or

210 (ii) conduct an administrative review of the grievance.

211 (3) (a) If the administrator holds an initial hearing, the administrator shall issue a

212 written decision within 15 days after the day on which the hearing is adjourned.

213 (b) If the administrator chooses to conduct an administrative review of the grievance,
214 the administrator shall issue the written decision within 15 days after the day on which the
215 administrator receives the grievance.

216 (4) (a) If the administrator determines the office has authority to review the grievance,
217 the administrator shall provide for an evidentiary hearing in accordance with Section
218 67-19a-404.

219 (b) The administrator may dismiss the grievance, without holding a hearing or taking
220 evidence, if the administrator:

221 (i) finds that, even if the alleged grievance were found to be true, the reporting
222 employee would not be entitled to relief under Subsection 67-21-3.5(2); and

223 (ii) provides the administrator's findings, in writing, to the reporting employee.

224 (c) The office shall comply with Chapter 21, Utah Protection of Public Employees Act,
225 in taking action under this section.

226 (5) A decision reached by the office in reviewing a retaliatory action grievance from a
227 reporting employee may be appealed directly to the Utah Court of Appeals.

228 (6) (a) Except as provided in Subsection (6)(b), an appellate court may award costs and
229 attorney fees, accrued at the appellate court level, to ~~H~~→ [the] a ←~~H~~ prevailing

229a ~~H~~→ [party] employee ←~~H~~ .

230 (b) A court may not order the office to pay costs or attorney fees under this section.

231 Section 7. Section **67-21-2** is amended to read:

232 **67-21-2. Definitions.**

233 As used in this chapter:

234 (1) "Abuse of authority" means an arbitrary or capricious exercise of power that:

235 (a) adversely affects the employment rights of another; or

236 (b) results in personal gain to the person exercising the authority or to another person.

237 [~~H~~] (2) "Adverse action" means to discharge, threaten, or [~~otherwise~~] discriminate
238 against an employee in [~~any~~] a manner that affects the employee's employment, including
239 compensation, terms, conditions, location, rights, immunities, promotions, or privileges.

240 [~~2~~] (3) "Communicate" means a verbal, written, broadcast, or other communicated
241 report.

242 (4) "Damages" means general and special damages for injury or loss caused by each

336 a rule or regulation adopted under the authority of the laws of this state, a political subdivision
337 of this state, or the United States.

338 (4) An employer may not implement rules or policies that unreasonably restrict an
339 employee's ability to document ~~[the existence of any]:~~

340 (a) the waste or misuse of public funds, property, or manpower~~[-or a];~~

341 (b) a violation or suspected violation of any ~~[laws, rules, or regulations:]~~ law, rule, or
342 regulation; or

343 (c) as it relates to a state government employer:

344 (A) gross mismanagement;

345 (B) abuse of authority; or

346 (C) unethical conduct.

347 Section 9. Section **67-21-3.5** is enacted to read:

348 **67-21-3.5. Administrative review of adverse action against a public entity**
349 **employee.**

350 (1) A public entity employee who believes that the employee's employer has taken
351 retaliatory action against the employee in violation of this chapter may file a grievance with the
352 Career Service Review Office in accordance with Section 67-19a-402.5 and subject to Section
353 67-21-4.

354 (2) If the Career Service Review Office determines that retaliatory action is taken in
355 violation of this chapter against the public entity employee, the Career Service Review Office
356 may order:

357 (a) reinstatement of the public entity employee at the same level held by the public
358 entity employee before the retaliatory action;

359 (b) the payment of back wages;

360 (c) full reinstatement of benefits;

361 (d) full reinstatement of other employment rights; or

362 (e) if the retaliatory action includes failure to promote, as described in Subsection
363 67-19a-101(8)(d), a pay raise that results in the employee receiving the pay that the employee
364 would have received if the person had been promoted.

365 (3) A public entity employer has the burden to prove by ~~H~~→ [substantial] a preponderance
365a of the ←H evidence that the
366 public entity employer's action was justified.

367 (4) A public entity employee or public entity employer may appeal a determination of
 368 the Career Service Review Office as provided in Section 67-19a-402.5.

369 Section 10. Section **67-21-3.6** is enacted to read:

370 **67-21-3.6. Administrative review for political subdivision employees.**

371 (1) (a) A political subdivision may adopt an ordinance to establish an independent
 372 personnel board to hear and take action on a complaint alleging adverse action.

373 (b) The ordinance described in Subsection (1)(a) shall include:

374 (i) procedures for filing a complaint and conducting a hearing; and

375 (ii) a burden of proof on the employer to establish by ~~H~~→ [substantial] a preponderance
 375a of the ~~H~~ evidence that the
 376 employer's action was justified by reasons unrelated to the employee's good faith actions under
 377 Section 67-21-3.

378 (2) If a political subdivision adopts an ordinance described in Subsection (1), a
 379 political subdivision employee may file a complaint with the independent personnel board
 380 alleging adverse action.

381 (3) If an independent personnel board finds that adverse action is taken in violation of
 382 the ordinance described in Subsection (1)(a), the independent personnel board may order:

383 (a) reinstatement of the employee at the same level as before the adverse action;

384 (b) the payment of back wages;

385 (c) full reinstatement of fringe benefits;

386 (d) full reinstatement of seniority rights; or

387 (e) if the adverse action includes failure to promote, as described in Subsection
 388 67-19a-101(8)(d), a pay raise that results in the employee receiving the pay that the employee
 389 would have received if the person had been promoted.

390 Section 11. Section **67-21-3.7** is enacted to read:

391 **67-21-3.7. Administrative review for state institution of higher education**
 392 **employees.**

393 (1) (a) A state institution of higher education may adopt a policy to establish an
 394 independent personnel board to hear and take action on a complaint alleging adverse action.

395 (b) The policy described in Subsection (1)(a) shall include:

396 (i) procedures for filing a complaint and conducting a hearing; and

397 (ii) a burden of proof on the employer to establish by ~~H~~→ [substantial] a preponderance
 397a of the ~~H~~ evidence that the

429 (A) may bring a civil action described in Subsection (1)(a) within 180 days after the
 430 day on which the employee has exhausted administrative remedies; and

431 (B) may not bring a civil action described in Subsection (1)(a) until the employee has
 432 exhausted administrative remedies.

433 (c) A public entity employee who is not a legislative employee or a judicial employee
 434 may bring a claim of retaliatory action by selecting one of the following methods:

435 (i) filing a grievance with the Career Service Review Office in accordance with Section
 436 67-19a-402.5; or

437 (ii) bringing a civil action for appropriate injunctive relief, damages, or both, within
 438 180 days after the occurrence of the alleged violation of this chapter.

439 (d) A public entity employee who files a grievance under Subsection (1)(c)(i):

440 (i) may not, at any time, bring a civil action in relation to the subject matter of the
 441 grievance;

442 (ii) may seek a remedy described in Subsection 67-21-3.5(2); and

443 (iii) waives the right to seek a remedy or a type of damages not included in Subsection
 444 67-21-3.5(2).

445 (e) A public entity employee who files a civil action under Subsection (1)(c)(ii) may
 446 not, at any time, file a grievance with the Career Service Review Office in relation to the
 447 subject matter of the civil action.

448 ~~[(3)]~~ (2) An ~~[action begun]~~ employee who brings a civil action under this section ~~[may~~
 449 ~~be brought]~~ shall bring the action in the district court for the county where the alleged violation
 450 occurred, the county where the complainant resides, or the county where the person against
 451 whom the civil complaint is filed resides or has ~~[his]~~ the person's principal place of business.

452 ~~[(4) To prevail in an action brought under the authority of this section, the employee~~
 453 ~~shall establish, by a preponderance of the evidence, that the employee has suffered an adverse~~
 454 ~~action because the employee, or a person acting on his behalf engaged or intended to engage in~~
 455 ~~an activity protected under Section 67-21-3.]~~

456 (3) To prevail in an action brought under this section, the employer shall prove by
 457 **H→** [substantial] a preponderance of the ~~←H~~ evidence that the employer's action was justified.

458 Section 13. Section **67-21-5** is amended to read:

459 **67-21-5. Court orders for violation of chapter.**