

1 SENATE BILL NO. 150

2 INTRODUCED BY A. WITTICH

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR CIVIL ACTIONS FOR THE VINDICATION OF
5 VIOLATIONS OF CONSTITUTIONAL RIGHTS; PROVIDING EXCEPTIONS AND DEFINITIONS; PROVIDING
6 FOR THE NONPAYMENT OF COSTS AND ATTORNEY FEES; CREATING THE OFFENSE OF OFFICIAL
7 OPPRESSION; AND AMENDING SECTION 2-9-305, MCA."

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9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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11 NEW SECTION. **Section 1. Protection of constitutional rights.** (1) This section may be cited as the
12 "Montana Constitutional Rights Protection Act".

13 (2) It is the purpose of the legislature to create in state law civil actions that are adapted to the special
14 needs of Montana and that allow persons to seek redress for deprivations of the rights they have reserved to
15 themselves under the Montana or United States constitution.

16 (3) It is not within the official duty of a public official, including a public official within the boundaries of
17 the state, to deny, restrict, or infringe upon the exercise of a constitutional right of another person without due
18 process of law. A public official who denies, restricts, or infringes upon the exercise of a constitutional right of
19 another person without due process of law does so as a private person and not as a public official, and the act
20 is not an official act.

21 (4) A public official who, under color of law, denies, restricts, or infringes upon the exercise of a
22 constitutional right of another person is subject to a civil action by the other person for compensatory and punitive
23 damages. The action may be brought in the district court of the county in which the plaintiff resides. An action
24 against a public official pursuant to this section is against the official as a private person acting outside of the
25 public official's official capacity. The public treasury may not be called upon to pay any costs of legal defense
26 for or damages awarded against the public official.

27 (5) A public official who orders or directs another public official or other person to deny, restrict, or
28 infringe upon the exercise of a constitutional right of another person is accountable for the act of the directed or
29 ordered public official or other person as if the directing or ordering public official committed the act. A person
30 who attempts to cover up a violation under this section or to obstruct an action or the prosecution of an action

1 under this section is also accountable for the act giving rise to the action as if the person had committed the act.

2 (6) This section does not apply to:

3 (a) a peace officer making an arrest if the officer has probable cause to believe that the person being
4 arrested has committed a crime or a peace officer serving a warrant if the officer has reasonable cause to believe
5 that the warrant has been issued with probable cause, due process, and proper authority;

6 (b) a judicial officer acting in a normal and usual judicial capacity;

7 (c) a circumstance arising out of the lawful incarceration of a person convicted of a crime;

8 (d) a person or group of persons with authority to recommend or grant parole or pardon, with respect
9 to a failure to recommend or grant a parole or pardon, a recommendation to revoke a parole, or a revocation of
10 parole;

11 (e) a juror with respect to circumstances arising out of service on a jury;

12 (f) a witness who truthfully testifies at a trial; or

13 (g) a member of a legislative body with respect to circumstances arising out of an authorized legislative
14 act.

15 (7) Either party to an action under this section must be granted a jury trial upon demand.

16 (8) In an action under this section, the prevailing party is entitled to be awarded reasonable court costs
17 and attorney fees.

18 (9) In an action under this section, the jury or, in the absence of a jury, the court shall determine the
19 damages.

20 (10) If a cause of action arises under this section, the United States constitution, or the Montana
21 constitution, attorney fees and costs of the public official may not be paid.

22 (11) If this section conflicts with any other law, this section prevails.

23 (12) For purposes of this section, "public official" means a person, officer, or agent employed or
24 sanctioned by any level or unit of any government or anyone else who presumes to assert the authority to compel
25 or prohibit the conduct of others on behalf of any level of government, including a person elected or appointed
26 to office and an official of the federal government or of another nation or an organization of nations.

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28 **NEW SECTION. Section 2. Official oppression -- penalty.** (1) A person acting or purporting to act in
29 an official capacity as a public official, as defined in [section 1], or taking advantage of actual or purported
30 capacity as a public official commits the offense of official oppression if, knowing that the person's conduct is

1 illegal or with reckless disregard for the rights of another, the person:

2 (a) subjects another person to arrest, detention, search, seizure, mistreatment, dispossession,
3 assessment, lien, or other infringement of personal or property rights; or

4 (b) denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity.

5 (2) A person convicted of the offense of official oppression shall be fined not more than \$5,000 or
6 imprisoned for not more than 5 years, or both.

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8 **Section 3.** Section 2-9-305, MCA, is amended to read:

9 **"2-9-305. Immunization, defense, and indemnification of employees.** (1) It is the purpose of this
10 section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued
11 for their actions taken within the course and scope of their employment.

12 (2) In any noncriminal action brought against any employee of a state, county, city, town, or other
13 governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to
14 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope
15 of the employee's office or employment, the governmental entity employer, except as provided in subsection (6),
16 shall defend the action on behalf of the employee and indemnify the employee.

17 (3) Upon receiving service of a summons and complaint in a noncriminal action against an employee,
18 the employee shall give written notice to the employee's supervisor requesting that a defense to the action be
19 provided by the governmental entity employer. If the employee is an elected state official or other employee who
20 does not have a supervisor, the employee shall give notice of the action to the legal officer or agency of the
21 governmental entity defending the entity in legal actions of that type. Except as provided in subsection (6), the
22 employer shall offer a defense to the action on behalf of the employee. The defense may consist of a defense
23 provided directly by the employer. The employer shall notify the employee, within 15 days after receipt of notice,
24 whether a direct defense will be provided. If the employer refuses or is unable to provide a direct defense, the
25 defendant employee may retain other counsel. Except as provided in subsection (6), the employer shall pay all
26 expenses relating to the retained defense and pay any judgment for damages entered in the action that may be
27 otherwise payable under this section.

28 (4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee
29 must be indemnified by the employer for any money judgments or legal expenses, including attorney fees either
30 incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result

1 of the suit unless the employee's conduct falls within the exclusions provided in subsection (6).

2 (5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter
3 constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject
4 matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave
5 rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit
6 is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is
7 bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and
8 scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b)
9 through (6)(d).

10 (6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee
11 may not be defended or indemnified by the employer for any money judgments or legal expenses, including
12 attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:

13 (a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other
14 reason does not arise out of the course and scope of the employee's employment;

15 (b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through
16 7;

17 (c) the employee compromised or settled the claim without the consent of the government entity
18 employer; or

19 (d) the employee failed or refused to cooperate reasonably in the defense of the case.

20 (7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the
21 governmental entity employer may determine whether those exclusions apply. However, if there is a dispute as
22 to whether the exclusions of subsection (6) apply and the governmental entity employer concludes that it should
23 clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or
24 other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the
25 employee until a final judgment is rendered in that action holding that the employer did not have an obligation to
26 defend the employee. The governmental entity employer does not have an obligation to provide a defense to the
27 employee in a declaratory judgment action or other legal action brought against the employee by the employer
28 under this subsection.

29 (8) This section does not apply to a violation of a constitutional right to which [section 1] applies."

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1 **NEW SECTION. Section 4. Codification instruction.** (1) [Section 1] is intended to be codified as an
 2 integral part of Title 2, chapter 9, and the provisions of Title 2, chapter 9, apply to [section 1].

3 (2) [Section 2] is intended to be codified as an integral part of Title 45, chapter 7, part 4, and the
 4 provisions of Title 45, chapter 7, part 4, apply to [section 2].

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 6 **NEW SECTION. Section 5. Saving clause.** [This act] does not affect rights and duties that matured,
 7 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

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 9 **NEW SECTION. Section 6. Severability.** If a part of [this act] is invalid, all valid parts that are severable
 10 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part
 11 remains in effect in all valid applications that are severable from the invalid applications.

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