

HOUSE BILL NO. 213
INTRODUCED BY J. WINDY BOY

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING REMEDIES FOR HOSTILE WORK ENVIRONMENTS IN ORDER TO CREATE HEALTHY WORKPLACES; DEFINING TERMS; DESCRIBING UNLAWFUL EMPLOYMENT PRACTICES; PROVIDING AN AFFIRMATIVE DEFENSE FOR EMPLOYERS; PROVIDING AN EMPLOYER DUTY TO RESPOND TO THIRD-PARTY ACTS OF MALICE; RESTRICTING APPLICABILITY TO EMPLOYMENT PRACTICES NOT COVERED BY EXISTING STATE LAWS ON HUMAN RIGHTS OR WRONGFUL DISCHARGE; EXPANDING THE DESCRIPTION OF THE CRIME OF MALICIOUS INTIMIDATION OR HARASSMENT TO INCLUDE PSYCHOLOGICAL HARM; ASSESSING VICARIOUS LIABILITY TO AN EMPLOYER FOR EMPLOYEE ACTIONS IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTIONS 39-2-913, 45-5-221, AND 49-2-509, MCA."

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

NEW SECTION. **Section 1. Short title.** [Sections 1 through 8] may be cited as the "Healthy Workplace Act".

NEW SECTION. **Section 2. Purpose.** It is the intent of the legislature to implement Article II, section 4, of the Montana constitution upholding the dignity of the human being, in part, by encouraging a healthy workplace where employers and employees are held accountable within the workplace for abusive conduct not covered by Title 39, chapter 71, or Title 49, chapters 2 and 3.

NEW SECTION. **Section 3. Definitions.** For the purposes of [sections 1 through 8], the following definitions apply:

(1) (a) "Abusive conduct" means repeated verbal or physical conduct of an employer or employee in a workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include but is not limited to repeated infliction of:

- (i) derogatory remarks, insults, and epithets;
- (ii) verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating;

or

(iii) the gratuitous sabotage or undermining of a person's work performance.

(b) The term does not include a single act unless especially severe and egregious.

(2) "Conduct" means all forms of behavior, including acts and omissions of acts.

(3) "Constructive discharge" has the meaning provided in 39-2-903.

(4) "Employee" has the meaning provided in 39-2-903.

(5) "Employer" means individuals, agencies defined in 2-3-102, local government entities defined in 2-7-501, corporations, partnerships, associations, and unincorporated organizations that compensate an employee in exchange for the employee's labor.

(6) "Hostile work environment" means a workplace where an employee is subjected to abusive conduct so severe as to cause physical harm or psychological harm to the employee and that is based on race, religion, sex, national origin, age, disability, veteran status, sexual orientation, political affiliation, citizenship status, marital status, family responsibilities, or personal appearance.

(7) "Malice" means the desire to see another person suffer physical, psychological, or economic harm, without legitimate cause or justification. Malice may be inferred from the presence of factors such as:

(a) outward expressions of hostility;

(b) harmful conduct inconsistent with the employer's legitimate business interests;

(c) a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of physical or emotional distress in the face of the conduct; or

(d) attempts to exploit an employee's known physical or psychological vulnerability.

(8) "Negative employment decision" means a termination, constructive discharge, demotion, unfavorable reassignment, refusal to promote, or disciplinary action.

(9) "Physical harm" means the material impairment of a person's physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial.

(10) "Psychological harm" means the impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist or supported by competent expert evidence at trial.

NEW SECTION. Section 4. Unlawful employment practices -- employer liability -- affirmative defense. (1) For the purposes of [sections 1 through 8], it is an unlawful employment practice:

(a) to subject an employee to a hostile work environment; or

(b) to retaliate in any manner against an employee because the employee has opposed an unlawful employment practice described in [sections 1 through 8] or has made a charge, testified, assisted, or participated

in any manner in an investigation or proceeding under [sections 1 through 8], including but not limited to internal proceedings, arbitration and mediation proceedings, or legal actions.

(2) If an employer cannot assert an affirmative defense provided in subsection (3), an employee claiming abusive conduct under the provisions of [sections 1 through 8]:

(a) may not file a claim under Title 39, chapter 71, and the provisions of 39-71-413 do not apply; and

(b) may hold the employer vicariously liable for an unlawful employment practice in violation of [sections 1 through 8] for the acts of another employee while that employee is performing duties assigned by the employer.

(3) It is an affirmative defense to an action for an unlawful employment practice if:

(a) (i) the employer exercised reasonable care to prevent abusive conduct through education and takes action to promptly correct the abusive conduct;

(ii) the aggrieved employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer; and

(iii) the abusive conduct did not culminate in a negative employment decision; or

(b) the complaint is grounded primarily upon:

(i) a negative employment decision made consistent with the employer's legitimate business interests, such as a termination or a demotion based on an employee's poor performance; or

(ii) an employer's reasonable investigation of potentially illegal or unethical activity.

NEW SECTION. Section 5. Third-party malice -- limitations. (1) If an employee provides notice to an employer that a third party has engaged in repeated acts of malice toward the employee while the employee is performing duties assigned by the employer, the employer has a duty to investigate.

(2) If the investigation indicates third-party acts of malice toward an employee, an employer has a duty to take action.

(3) If an employer fails to investigate or fails to take action, the employer may be subject to 27-1-221 unless the employer is immune under 2-9-105.

(4) An action against an employer under [sections 1 through 8] precludes an action under 39-71-413 or filing a claim under Title 39, chapter 71.

NEW SECTION. Section 6. Remedies -- injunction -- time limits -- scope. (1) Except as provided in subsection (4)(c), [sections 1 through 8] may be enforced solely by a private right of action in district court.

(2) If a court finds that a defendant has committed an unlawful employment practice under [section 4],

the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is considered appropriate, including but not limited to reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, or reasonable attorney fees.

(3) An action under this section must be initiated no later than 1 year after the last act that comprises the employment practice and that is the focus of the complaint.

(4) (a) The provisions of [sections 1 through 8] are intended for abusive conduct in the workplace outside the scope of Title 39, chapter 2, part 9, Title 39, chapter 71, or Title 49, chapters 2 and 3, and the remedies offered by Title 39, chapter 2, part 9, Title 39, chapter 71, or Title 49, chapters 2 and 3, do not apply to a person who brings an action under [sections 1 through 8].

(b) A person who brings an action under [sections 1 through 8] may bring an action under federal law.

(c) A remedy under this section does not preclude a separate action brought under 45-5-221.

NEW SECTION. Section 7. Liability limits. (1) An employer found to have committed an unlawful employment practice under [sections 1 through 8] that did not result in a negative employment decision may not be assessed:

(a) punitive damages; or

(b) liability for damages for emotional distress exceeding \$25,000.

(2) This section does not apply to individually named co-employee defendants.

(3) A governmental entity and a political subdivision, as each is defined in 2-9-101, are immune from exemplary and punitive damages, as provided in 2-9-105, for actions brought under [sections 1 through 8], and the limitations on liability in 2-9-108 apply to [sections 1 through 8].

NEW SECTION. Section 8. Exemptions. (1) [Sections 1 through 8] do not apply to a discharge of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term if the collective bargaining agreement or written contract of employment includes provisions for remedying a hostile work environment equivalent to [section 6(2)].

(2) An employer who does not follow the terms of a collective bargaining agreement or a written contract of employment is not exempt under this section.

Section 9. Section 39-2-913, MCA, is amended to read:

"39-2-913. Preemption of common-law remedies. Except as provided in [sections 1 through 8] and this part, ~~ne a~~ claim for discharge may not arise from tort or express or implied contract."

Section 10. Section 45-5-221, MCA, is amended to read:

"45-5-221. Malicious intimidation or harassment relating to civil or human rights -- penalty. (1) A person commits the offense of malicious intimidation or harassment when, because of another person's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities, ~~he~~ the person purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy, or offend:

- (a) causes bodily injury to another;
- (b) causes reasonable apprehension of bodily injury in another; ~~or~~
- (c) damages, destroys, or defaces any property of another or any public property; or
- (d) causes serious psychological harm as defined in [section 3].

(2) For purposes of this section, "deface" includes but is not limited to cross burning or the placing of any word or symbol commonly associated with racial, religious, or ethnic identity or activities on the property of another person without ~~his or her~~ that other person's permission.

(3) A person convicted of the offense of malicious intimidation or harassment shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed \$5,000, or both."

Section 11. Section 49-2-509, MCA, is amended to read:

"49-2-509. Conclusion of complaint -- filing in district court. (1) Except as provided in subsection (2), the department shall, at the request of either party, conclude the administrative proceedings if:

- (a) the department has completed its investigation of a complaint filed pursuant to 49-2-305; or
- (b) 12 months have elapsed since the complaint was filed.

(2) The department may not refuse to conclude the administrative proceedings unless:

(a) the party requesting the conclusion of the administrative proceedings has waived the right to request filing in the district court;

(b) more than 30 days have elapsed since service of notice of hearing under 49-2-505, unless the department fails to schedule a hearing to be held within 90 days of service of notice of hearing; or

(c) the party requesting conclusion of the administrative proceedings has unsuccessfully attempted through court litigation to prevent the department from investigating the complaint.

(3) The department shall dismiss a complaint filed under this chapter and the complainant may file a

discrimination action in district court if:

- (a) the commission or the department lacks jurisdiction over the complaint;
- (b) the complainant fails to cooperate in the investigation of the complaint or fails to keep the department advised of changes of address;
- (c) the department determines that the allegations of the complaint are not supported by a preponderance of the evidence; or
- (d) the department determines that the commission or the department will not or cannot hold a hearing within 12 months after the filing of the complaint.

(4) A decision of the department to dismiss a complaint brought under this chapter or to refuse to permit removal to the district court is final unless a party seeks review by filing objections within 14 days after the decision is served on the party. The commission shall review the decision in informal proceedings under 2-4-604. A party may ask the district court to review a decision of the commission made under this section. The review must be de novo.

(5) Within 90 days after receipt of a notice under subsection (1) or (3) or an order under subsection (4) ~~of affirmance of that affirms~~ a dismissal, whichever occurs later, or of a letter issued under subsection (1), the complainant may commence a civil action in the district court in the district in which the alleged violation occurred for appropriate relief. Except as provided in 49-2-510, if the complainant fails to commence a civil action in the district court within 90 days after receipt of the letter, notice, or order issued by the commission or the department, the claim is barred.

(6) If the district court finds, in an action under this section, that a person, institution, entity, or agency against whom or which a complaint was filed has engaged in the unlawful discriminatory practice alleged in the complaint, the court may provide the same relief as described in 49-2-506 for a commission order. In addition, the court may in its discretion allow the prevailing party reasonable attorney fees.

(7) The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of ~~49-1-102, chapter 3, or this chapter, including acts.~~ The provisions of [sections 1 through 8] and this chapter may apply to acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution ~~or 49-1-102~~. A claim or request for relief based upon the acts covered by 49-1-102, chapter 3, or this chapter may not be entertained by a district court other than by the procedures specified in this chapter. A claim or request for relief under the provisions of [sections 1 through 8] must be brought under the provisions of [sections 1 through 8] and not under this chapter."

NEW SECTION. **Section 12. Codification instruction.** [Sections 1 through 8] are intended to be codified as an integral part of Title 39, and the provisions of Title 39 apply to [sections 1 through 8].

NEW SECTION. **Section 13. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

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