

SENATE BILL NO. 494
INTRODUCED BY J. WINDY BOY

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR HEALTHY WORKPLACES BY PROVIDING REMEDIES FOR HOSTILE WORK ENVIRONMENTS; DEFINING TERMS; PROVIDING AN AFFIRMATIVE DEFENSE FOR EMPLOYERS; BANNING RETALIATION IN CERTAIN CIRCUMSTANCES; 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; AND AMENDING SECTIONS 39-2-913 AND 45-5-221, MCA."

WHEREAS, workplaces benefit by being an environment where employees can work efficiently without fear from bullying, abuse, or harassment from fellow employees, customers or clients, or others with whom they are in contact during a work day; and

WHEREAS, abusive work environments can impact employers as well as employees by increasing workers' compensation claims, decreasing productivity, and potentially increasing turnover and absenteeism; and

WHEREAS, existing human rights law protects only protected classes and does not protect one member of a protected class harassing another member of a protected class or a member of a nonprotected class; and

WHEREAS, various studies have found that targeted employees may suffer long-term psychological impairment, including depression and the effects of stress, and that these impacts often extend to their families.

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

NEW SECTION. **Section 1. Short title.** [Sections 1 through 6] may be cited as the "Healthy and Safe 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 and safe 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, and are encouraged to find remedies to combat

abusive conduct.

NEW SECTION. Section 3. Definitions. For the purposes of [sections 1 through 6], 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 or malice 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 the conduct 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 as supported by testimony by a competent expert at trial.

NEW SECTION. Section 4. Remedies -- affirmative defense -- retaliation ban. (1) An employer who receives a complaint of abusive conduct contributing to a hostile work environment shall:

(a) seek to remedy or prevent abusive conduct by providing employees and others in the workplace with appropriate education, including but not limited to training, appropriately placed signs, or brochures; and

(b) take action to promptly investigate the complaint by providing copies of the written complaint to all parties to the complaint, establishing an impartial review committee agreed to by parties to the complaint within one month of the complaint being filed, retaining the employment status of any party to a complaint while the complaint is being reviewed by the impartial review committee, and correcting any abusive conduct recommended by the impartial review committee.

(2) (a) An employee who complains of abusive conduct contributing to a hostile work environment shall notify an employer in writing, request correction by the employer of the situation considered to create a hostile work environment, cooperate in establishing and working with the impartial review committee, and take advantage of appropriate preventive or corrective opportunities provided by the employer.

(b) If efforts to resolve a complaint are unsatisfactory, an aggrieved employee may:

- (i) request a hearing before the board of personnel appeals, provided for in 2-15-1705; or
- (ii) file a private right of action in a court of competent jurisdiction.

(3) For the purposes of [sections 1 through 6], an employer has an affirmative defense if:

- (a) the employer can provide evidence of meeting the requirements of subsection (1);
- (b) the abusive conduct did not culminate in a negative employment decision; or
- (c) 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.

(4) Corrective action by an employer may not include retaliation against the complainant unless the provisions of subsection (3)(c) apply. For the purposes of this section, retaliation is prohibited as provided in

49-2-301.

NEW SECTION. Section 5. Third-party malice. An employer who receives a complaint from an employee about repeated acts of malice by a third party toward the employee while the employee is performing duties assigned by the employer has a duty to investigate, retain the employment status of the employee while the investigation is being undertaken, and take remedying action if the investigation indicates third-party acts of malice toward an employee.

NEW SECTION. Section 6. Scope. (1) The provisions of [sections 1 through 6] are intended to address 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 6].

(2) A person who brings an action under [sections 1 through 6] may bring an action under federal law.

(3) A private right of action under [sections 1 through 6] does not preclude a separate action brought under 45-5-221.

Section 7. Section 39-2-913, MCA, is amended to read:

"39-2-913. Preemption of common-law remedies. Except as provided in [sections 1 through 6] and this part, no claim for discharge may arise from tort or express or implied contract."

Section 8. 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."

NEW SECTION. **Section 9. Codification instruction.** [Sections 1 through 6] are intended to be codified as an integral part of Title 39, and the provisions of Title 39 apply to [sections 1 through 6].

NEW SECTION. **Section 10. 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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