

What you need to know about Retaliation

RIGHTS AND RESPONSIBILITIES



Montana Department of
LABOR & INDUSTRY

Montana's Human Rights Bureau

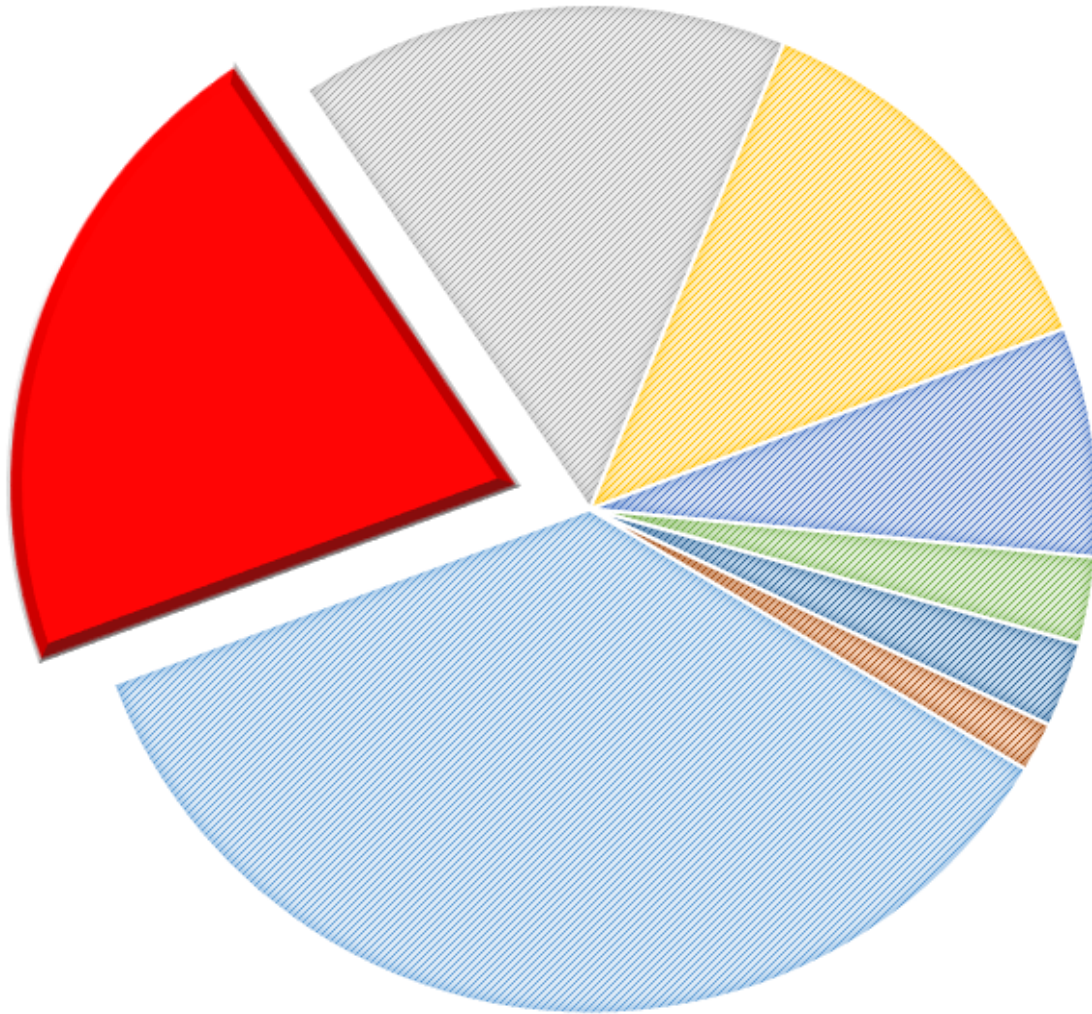
The Montana Department of Labor & Industry's Human Rights Bureau informally investigates complaints of discrimination and retaliation.

If you are interested in learning more, please visit our website at:

www.montanadiscrimination.com

2012-2016 RETALIATION - 2ND HIGHEST FILING PAST 5 YRS

DISABILITY RETALIATION SEX-FEMALE AGE RACE RELIGION MARITAL STATUS POLITICAL BELIEF



What is retaliation?

It is unlawful to take a significant adverse act against a person because he or she has **“opposed”** an unlawful discriminatory practice or because he or she has **“participated”** in any manner in an investigation or proceeding.



OPPOSITION

Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential violation.



Q. What if the allegation of discrimination is made in bad faith?

A. The protection for opposition is limited to those individuals who act with a reasonable good faith belief that the conduct opposed is unlawful or could become unlawful if repeated. It can be reasonable to complain about behavior that is not yet legally harassment (i.e., even if the mistreatment has not yet become severe or pervasive).



Participation

Respondents cannot punish an a person for filing a complaint, serving as a witness, or participating in any other way in an investigation matter, even if the underlying discrimination allegation is unsuccessful or untimely.

This has been interpreted to include participation in an employer's internal complaint process, even if a charge of discrimination has not yet been filed.



Significant or materially adverse act

Retaliation includes any employer action that is "materially adverse." This means any action that *might deter a reasonable person from engaging in protected activity*.

"Materially adverse" actions include denial of promotion, non-hire, denial of job benefits, demotion, suspension, discharge, or other actions that can be challenged directly as employment discrimination.



Dissuade

Retaliation can be an employer action that is work-related, or one that has no tangible effect on employment, or even an action that takes place exclusively outside of work, *as long as it may well dissuade a reasonable person from engaging in protected activity.*



Elements of a retaliation complaint

1. Protected activity;
2. materially or significant adverse act;
and
3. Causal connection between the protected activity and the adverse act.

(A disputable presumption may attach if there is a pending complaint.)



Disputable presumption

When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity.



What types of evidence support a claim of retaliation?

Verbal or written statements may acknowledge its intention to retaliate for engaging in protected activity.

Suspiciously close timing between the activity and the materially adverse action;

Comparative evidence (e.g., discipline for an infraction that regularly goes undisciplined or that another employee who did not engage in Activity committed and was not disciplined as severely); or

Demonstrated falsity of the proffered reason for the adverse action.

Voluntary resolution

After a complaint is filed and all during the administrative proceedings, the Department will offer assistance to parties that are interested in voluntarily resolving a complaint of discrimination.

It is precisely because temperatures rise after a complaint of discrimination that voluntary resolution is a great option for participants, a chance to work on clear communication before it travels further down the path of conflict.



In the context of employment:

After filing a complaint, an employee is not excused from his or her job duties or any discipline or counseling that occurs as a result of not performing his or her job duties.

Further, any “manner of opposition” must be reasonable – if it’s not reasonable, it may not be protected.



Best practices for preventing and addressing retaliation in an employment setting*

1. After someone engages in protected activity, make sure there is clear communication of expectations (don't simply expect everything to spontaneously return to normal).
2. Routinely Educate and train your staff on both discrimination and retaliation.
3. Promote a highly visible and vigorous grievance system for retaliation claims.
4. Ensure leadership commitment to the anti-retaliation environment.
5. Where possible, seek independent input and oversight for decisions that may impact a person that has engaged in protected activity; and
6. Monitor the environment.

* Taken in part from "Protecting whistleblowers" OSHA

Learn more about it:

www.montanadiscrimination.com

www.eeoc.gov

Contact the Human Rights Bureau:
1 (800) 542-0807