

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:

montanadiscrimination.mt.gov

You can also catch us on our YouTube channel (search for the Montana Human Rights Bureau)

It is important to understand that the Bureau does not take complaints based on the dictionary definition of retaliation.

retaliate

verb

retali-ate ri-'ta-lē-āt

retaliated; retaliating

Synonyms of retaliate

intransitive verb

: to return like for like
especially : to get revenge

transitive verb

: to repay in kind *retaliate* an injury



What type of retaliation does the Human Rights Bureau investigate?

This agency can only investigate a complaint of retaliation under applicable statutes, including:

49-2-301. Retaliation prohibited. It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because the individual has **opposed** any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or **participated** in any manner in an investigation or proceeding under this chapter.

What is retaliation?

Given the statutory language, the types of retaliation cases that this agency has the statutory authority to investigate is **limited**.

This agency can only take cases where the Charging Party is asserting that an entity took a significant adverse act against him or her because she engaged in **protected activity**.



What is protected activity?

Protected activity is where the person has **opposed** or complained about discrimination, **participated** in any manner in an investigation or proceeding involving a discriminatory practice, or s/he has **requested** some type of accommodation allowed for by discrimination laws.



Protected Activity: Opposition

This is when you complain about a discriminatory practice.

This 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.

Is this opposition?

I complained about my landlord's treatment of Native American tenants, I think she charges them additional fees.

This could be opposition. It would be unlawful to treat tenants differently based on race.

I told my supervisor that I thought women were being paid less than males.

This could be opposition. It would be unlawful to pay women less than males based on sex.

In a meeting I told my manager I planned on discussing things with the Human Rights Bureau or the EEOC.

This could be opposition. You are conveying resistance to a perceived potential violation covered by this agency.



Is this opposition?

I complained about an OSHA violation to my supervisor.

This would probably not be opposition. For it to be protected activity, you have to be complaining about something that is unlawful under the laws enforced by this agency and this agency does not enforce OSHA.

I complained to HR that my supervisor was yelling at everybody and not showing up for work.

This would probably not be opposition. You can bring concerns to Human Resources about your work environment, but poor management skills is not unlawful under the laws enforced by this agency.

I told my employer that I did not want to work the night shift.

This would probably not be opposition. You can express preferences at work, but your preferences are not protected activity. (Unless you are requested accommodations, see following slides.)



Protected Activity: Participation

Respondents cannot punish 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.



Protected Activity: Accommodation

Protected activity can also be requesting an accommodation under the laws enforced by this agency such as a reasonable accommodation for a disability or a religious accommodation for your religion.



For a party to prevail on a complaint of retaliation, s/he has to show:

- 1. S/he engaged in protected activity;**
- 2. Respondent took a materially or significant adverse act against her; and**
- 3. There is a causal connection between the protected activity and the adverse act.**

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

To prevail in a complaint, a party has to be able to show there was a significant or materially adverse act

"Materially adverse" actions include eviction, denial of services, terminating benefits. In employment, it can be the denial of promotion, non-hire, denial of job benefits, demotion, suspension, or discharge.



Adverse act

Did the Respondent do something (or not do something) that would dissuade a reasonable person from engaging in protected activity?



Significant Adverse Act?

COULD BE

- Fired
- Failed to Promote
- Harassment
- Office moved to an undesirable location (e.g., basement without windows)
- Day shifts changed to night shifts

PROBABLY NOT

- Disapproving look
- Asked to follow a policy that applied equally across the work unit
- After raising concerns about discrimination, you are asked to participate in a discussion or investigation into those concerns in a reasonable manner

Would the adverse act dissuade a reasonable person from filing a complaint?

To prevail in a complaint, a party has to be able to show there was a “causal connection.”

You can engage in protected activity and there can be a significant adverse act, but you would still have to show that there is a “causal connection” between the protected activity and the bad act.



What types of evidence support a claim of retaliation?

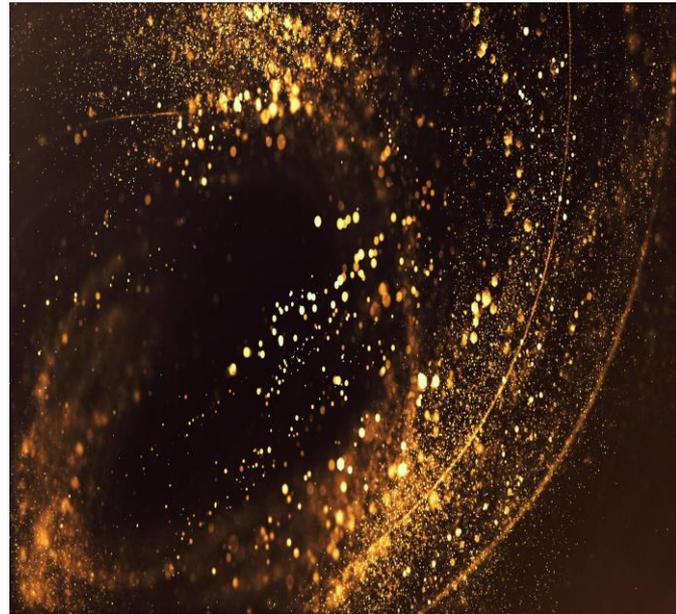
- Verbal or written statements that acknowledge intention to retaliate for engaging in protected activity.
- Suspiciously close timing between the protected activity and the materially adverse action;
- Comparative evidence (e.g., discipline for an infraction that regularly goes undisciplined or that another employee who did not engage in protected activity committed and was not disciplined as severely); or
- Demonstrated falsity of the proffered reason for the adverse action.



In the context of employment:

Remember, 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.



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).

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

After someone engages in protected activity:

1. 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

Voluntary resolution

Remember, after a complaint is filed and all during the administrative proceedings, the Bureau offers 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.

