

Staying Out of Hot Water

MARIEKE BECK, BUREAU CHIEF, MONTANA HUMAN RIGHTS BUREAU

MALIN STEARNS JOHNSON, ATTORNEY, MSJOHNSON LAW, PLLC

Federal Employment Laws

Title VII of the Civil Rights Act of 1968

Age Discrimination in Employment Act

Americans with Disabilities Act

Genetic Information Nondiscrimination Act

Pregnancy Discrimination Act

Fair Labor Standards Act

Family and Medical Leave Act

USERRA – Military Leave and non-discrimination

OSHA – Safe place to work

National Labor Relations Act

Montana Employment Laws

Wrongful Discharge from Employment Act

Montana Human Rights Act

Montana Wage Payment Act

Montana Maternity Leave Act

Workers' Compensation Act

Montana's Human Rights Bureau

A person seeking to recover under the Montana Human Rights Act or the Governmental Code of Fair Practices must file first with the Montana Human Rights Bureau (Bureau).

The Bureau is the agency charged with informally investigating such complaints.

What does HRB do?

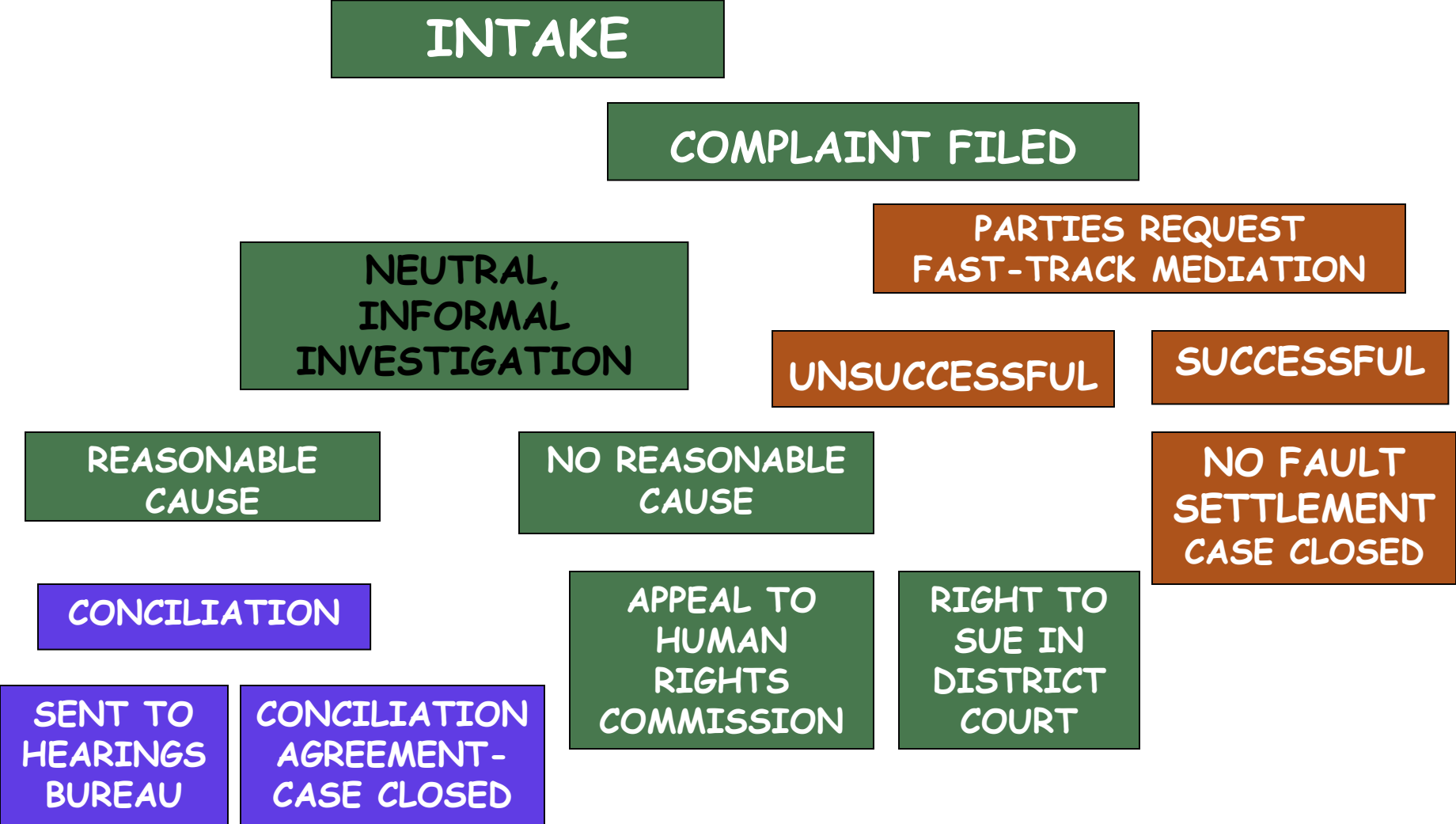
Intake

Neutral investigations into complaints of unlawful discrimination

Fast-Track Mediation (VR)

Education and Outreach

The HRB Process



Discrimination

Strictly prohibited by MHRA and Federal Laws.

Gender/Sex – this includes pregnancy!

Race/Ethnicity

Religion/political beliefs

Marital status (in Montana)

Age (young and old)

Genetic information

Disability

Tread Carefully... Sexual Orientation, Family Responsibilities, Weight,
Hostile Work Environment, Bullying

Protected Classes

Age

Physical or Mental Disability

Race

Marital Status

Sex

National Origin

Color

Family Status (housing)

Religion

Political Belief (government)

Creed

Retaliation

Who is Disabled?

Definition of “disability”:

1. A physical or mental impairment that substantially limits one or more major life activities;
2. A record of such an impairment; or
3. Being regarded as having such an impairment.

“Transitory and minor”

ADA Regulations Section 1630.2(j)(1)(ix):

Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting

Pregnancy or Disability?

The ADA distinguishes between a healthy pregnancy and a pregnancy-related complication or condition that may qualify as a disability.

Changes to the definition of the term “disability” resulting from the ADA Amendments Act of 2008 make it easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.

EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014)

Employee Leave Laws

FMLA

USERRA/Military Leave

Disability Leave

Maternity Leave

Even small employers must provide some leave.

Act reasonably. Ask questions only if they are job-related and consistent with business necessity.

Overlap of FMLA, disability, and pregnancy laws

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees.

ADA/MHRA requires all employers to provide leave in the form of a reasonable accommodation to disabled employees.

Title VII/MHRA requires all employers to provide a reasonable absence of leave for pregnancy.

Accommodation Requests and the Interactive Process

“Provide reasonable accommodation for a qualified employee with a disability who can perform the essential functions of the job, with or without a reasonable accommodation, unless doing so would create an undue hardship.”

Employer Responsibility: Recognize and acknowledge need for accommodation

Employer Responsibility: Engage in the “interactive process”

Employer Defenses: not qualified, not disabled, can't perform essential functions, engaged in interactive process, “reasonable” accommodation, creates undue hardship

Undue Hardship Factors

the nature/cost of the accommodation;

the overall resources of employer;

the type of operation;

the impact of the accommodation on the operation of the facility.

DO THE MATH AT THE TIME OF THE ACCOMODATION REQUEST

◦

Direct Threat

Issues To Consider:

- 1) Duration of the Risk
- 2) Nature and Severity of the Potential Harm
- 3) Likelihood that the Potential Harm Will Occur
- 4) Imminence of the Potential Harm

No Myths, Fears, or Stereotypes

Retaliation

Rights and Responsibilities

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.

State Retaliation Trends

Retaliation complaints have consistently been the Bureau's second highest filing after disability for more than five years. It has become routine for there to be an initial complaint of discrimination followed shortly by a second complaint of retaliation.

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.

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 may support a claim of retaliation?

Verbal or written PARTIES' 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.

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 for Employers*

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

Wage and Hour Laws

Montana Wage Payment Act, Fair Labor Standards Act

Must pay for all hours worked, minimum wage, overtime.

Withholdings and deductions

Payment of accrued vacation, sick, PTO, comp time

Final Paycheck – Written policy important

Wage and Hour Policies

Workweek defined

Payment of final wages: Next payroll or within 15 days, whichever is soonest

Withholding prohibited, even for theft, unless procedure is followed

Policies for exempt employees – no deductions

Overtime Safe Harbor – mandatory reporting of improper deductions

Other Employment Laws

No blacklisting of former employees

Must furnish discharged employee **upon demand** with reason for discharge

May not discharge employee as a result of attachment or garnishment of wages

No discrimination on the basis of bankruptcy

No drug testing without qualified testing program

Discrimination prohibited for use of lawful product during nonworking hours

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.

Learn More

www.montanadiscrimination.com

www.eeoc.gov

Montana Human Rights Bureau: 1-800-542-0807

MSJohnson Law, PLLC: msjohnsonlaw.com, 406-541-7078