

Legal Trends in Employment Law

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The Employment Practices Minefield

- **Dramatic increase in employment practices lawsuits**
- **Federal requirements**
- **Potential State actions**

Common EPLI Claims

- **Sexual harassment**
- **Wrongful termination**
- **Race discrimination/harassment**
- **Sex discrimination/harassment**
- **Age discrimination/harassment**
- **National origin discrimination/harassment**
- **Religious discrimination**
- **Retaliation**

Employment Discrimination Laws

- **Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"):**
 - Prohibits employers from discriminating in all areas of the employment relationship on the basis of:

race, color, religion, sex, or national origin.
 - Prohibits retaliation for engaging in protected activity (i.e., participation and opposition).
 - Prohibits harassment or hostile work environment

Employment Discrimination Laws

- **Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, as amended ("ADEA"):**
- **Prohibits employers from discriminating on the basis of age (40 years and older) in all areas of the employment relationship.**
- **Prohibits retaliation**
- **Prohibits harassment**

Arizona Civil Rights Act (“ACRA”)

- **State law:** Prohibits employers from discriminating against individuals in all areas of the employment relationship if the action is based on:
race, color, religion, sex, national origin, *age*, or disability.
- Prohibits retaliation.

Equal Pay Act of 1963, 29 U.S.C. § 206(d) (“EPA”):

- Requires employers to pay men and women “equal pay” for “equal work” within an establishment.

Lily Ledbetter Fair Pay Act [Pub. L. No.111-2]

- Discriminatory compensation occurs with each paycheck.

Employment Discrimination Laws

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"):

- Prohibits employers from discriminating in employment against a "qualified individual with a disability."

Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), Public Law 110-325:

- ADAAA revises the definition of "disability" to more broadly encompass impairments that substantially limit a major life activity.
- Mitigating measures (other than eyeglasses and contact lenses) have no bearing in determining whether a disability qualifies under the law. (Effective 1/1/2009).

Employment Discrimination Laws

- **Immigration and Nationality Act, 8 U.S.C. §1324(b) (“INA”):**
 - Prohibits employers from discriminating on the basis of citizenship/immigration status and national origin with respect to hiring, firing, and recruitment or referral for a fee.
 - Prohibits intimidation or retaliation against person for intending to, or filing a charge or complaint or testifying, assisting, or participating in investigations or hearings.
- **Genetic Information Non-Discrimination Act of 2008 (“GINA”):**
 - Prohibits discrimination against employees or applicants based on genetic information (including family medical history).

By the numbers

\$80 million

Dollars recovered by EEOC in litigation in 2009

\$1.9 million

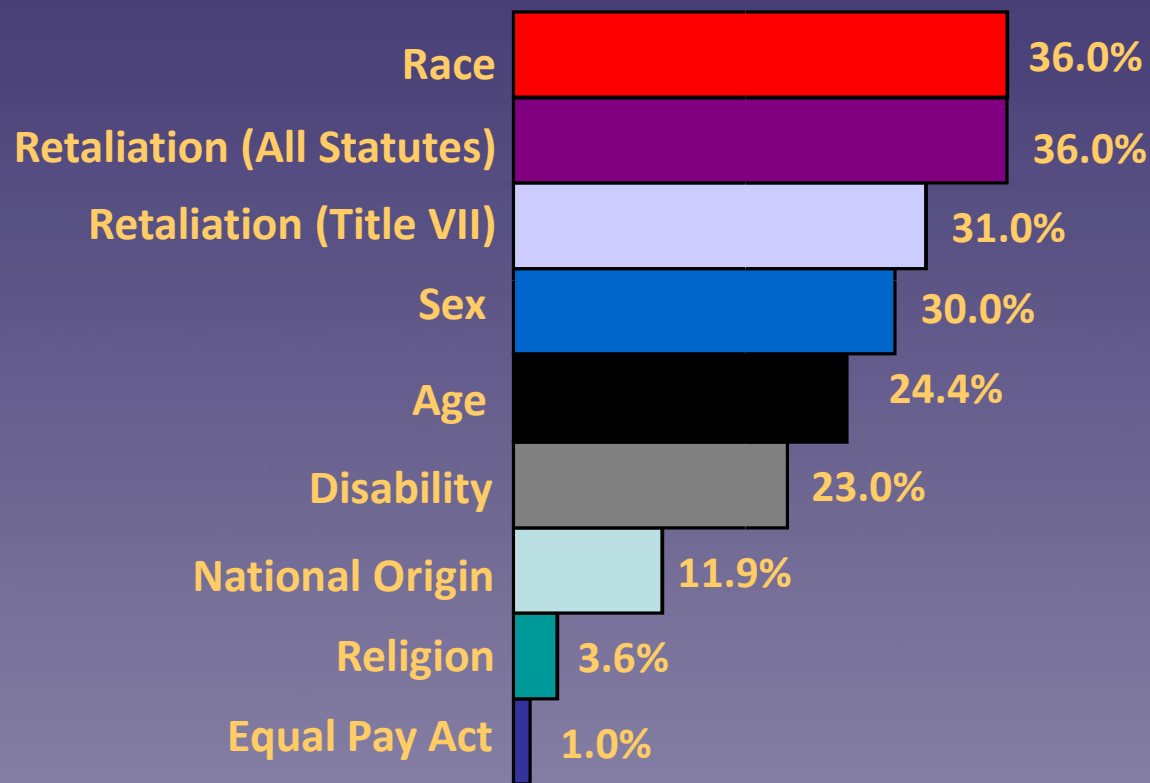
Average verdict in Maricopa County in 2008

93,277

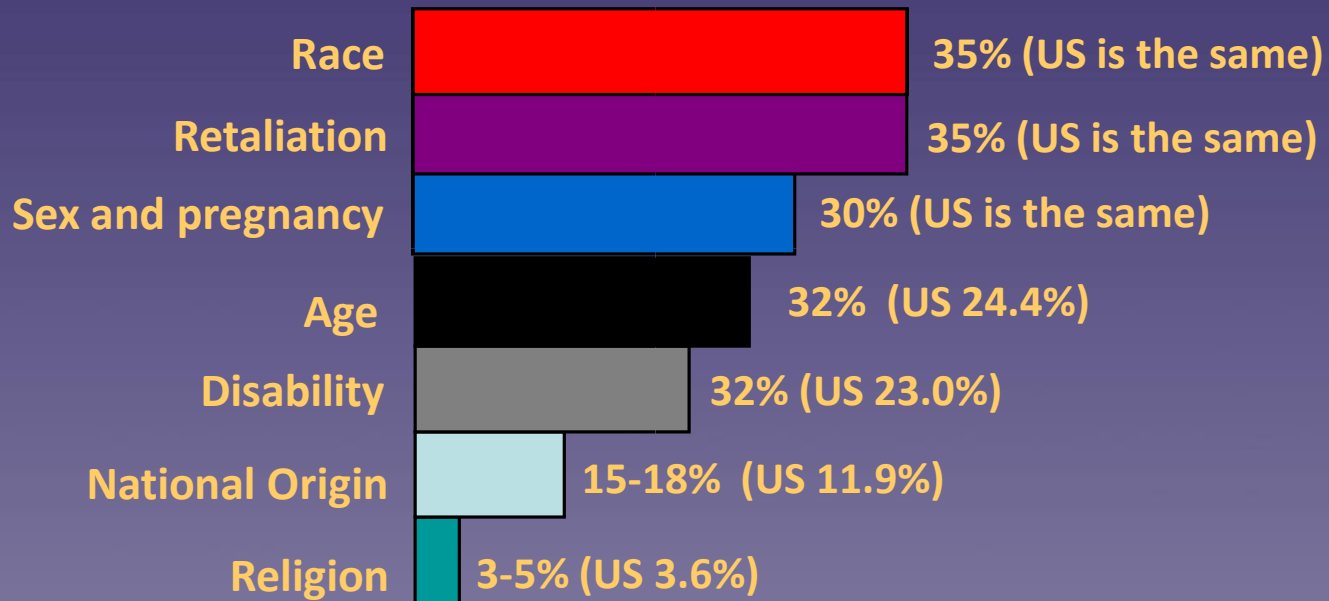
Total charges filed with EEOC in 2009

2009 EEOC Charge Statistics

Total Charges 93,277



Charges filed with EEOC in Arizona



A Court may Order

- **Front pay**
- **Reinstatement or hiring into the position at issue**
- **Back pay, with interest (up to 2 years prior to charge)**
- **Retroactive seniority**
- **Plaintiff's reasonable attorneys' fees and costs**

Jury Trial and Damages

- **In cases involving intentional discrimination:**
 - **Parties have right to jury trial**
 - **Plaintiff may recover compensatory damages, such as medical bills, emotional distress and**
 - **Punitive damages**

ADA Discrimination – Chuck E. Cheese

- Jury awards \$13 Million in Punitive Damages
- District Manager fired a disabled worker
- He did not want “those people” working there
- Jury awarded \$13 million in punitive damages – sending message ADA discrimination will not be tolerated. (Reduced by the court).
- Court ordered reinstatement and ADA training for managers.

Harassment & Retaliation

- EEOC sued for sexual harassment and retaliation
- Cracker Barrel paid \$255,000 to settle, and agreed to train workers
- *EEOC press release - Women at Cedar Bluff Store Punished for Complaining About Sexually Hostile Work Environment (4/9/09)*

Religious Discrimination

- Costco dress code prohibited facial jewelry.
- Kim refused to comply.
- Claimed she was a member of the Church of Body Modification.
- Manager told her to remove it, she refused and filed EEOC charge next day.
- The right decision – or -will it get you sued?

It Depends

- Court held Costco could enforce its dress code to maintain a professional appearance
- To waive dress code would be undue hardship
- *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)

Disagreement in the Courts

- In the Ninth Circuit, some religious tattoos are allowed even where dress code prohibits them.
- Red Robin's kid-friendly, family-oriented image did not show undue hardship.
- *EEOC v. Red Robin*, 2005 U.S. Dist. 36219 (9th Cir. 2005).

Costs to Employers from EPL Actions

- **Defense costs/Attorney's fees (\$20,000 and up)**
- **Settlement/Verdict costs (\$55,000 to \$75,000 per claim)**
- **Potential Bankruptcy of small businesses**
- **Reputational injury**

The Solution: EPLI

- **EPL Lawsuits usually not covered by other insurance (worker's compensation, general liability, etc.)**
- **Employers usually require coverage specifically targeting EPL**

WHAT IS EPLI

- **Protects employers against claims by:**
 - employees
 - former employees
 - job applicants
- **Protects against many employment-related claims such as discrimination and harassment**

What Is Covered?

- **Attorney's fees**
- **Other defense costs**
- **Settlement amounts**
- **Verdict amounts**

Coverage Amounts

- **Standard EPLI policies often cover up to \$100,000 per event**
- **Often include “retention” of \$5,000**
- **Higher policy limits often available (\$500,000, \$1,000,000)**

Common Exclusions

- **Claims alleging violation of W.C. law**
- **Claims alleging violation of disability benefit law**
- **Violations of FLSA and wage and hour issues**
- **OSHA violations**
- **Coverage of penalties for violation of statutes**
- **Where prior knowledge or notice of potential claim available to employer**

Questions?