

EXECUTIVE EDITOR
Tim Newton, *Atlanta, GA*

EDITOR IN CHIEF
Robin Shea, *Winston-Salem, NC*

CHIEF MARKETING OFFICER
Victoria Whitaker, *Atlanta, GA*

By Toby Dykes and Tamula Yelling
Birmingham, AL

The Express Lane

Retailer's Recap

Noteworthy Numbers

Supreme Court to Decide Whether Oral Complaints About Pay Are "Protected Activity" Under FLSA

No Punitive, Compensatory Damages for ADA Retaliation, Court Says

"Head in Sand" Is Not an Adequate Approach to Suspected Sexual Harassment

Retailer's Recap

Expect More I-9 Audits in 2010. ICE is heating up in 2010. The Immigrations and Customs Enforcement agency, the enforcement arm of the U.S. Department of Homeland Security, announced in late November that it would be stepping up its I-9 audits this year. Although ICE claims to be primarily concerned with "critical infrastructure" and "public safety and national security" employers, its actual guidelines are much more broad than that, so retail employers should beware. ICE enforcement activity has increased dramatically since President Obama took office.

Obama Appoints Aggressive New EEOC Members. President Obama has made a number of recess appointments to agencies, including new appointments to the U.S. Equal Employment Opportunity Commission. The EEOC appointments include Jacqueline Berrien as chair of the Commission. Ms. Berrien was been associate director-counsel for the Legal Defense and Education Fund of the National Association for the Advancement of Colored People. Another noteworthy appointment is Chai Feldblum as Commissioner. Feldblum, who was a professor at Georgetown University School of Law, was legislative counsel for the AIDS Project of the American Civil Liberties Union and promoted the original enactment of the Americans with Disabilities Act in 1990. She is an advocate for gay, lesbian, and transgender rights. Obama also appointed P. David Lopez, a longtime EEOC attorney, as General Counsel, and Victoria Lipnic, who served as Assistant Secretary of Labor for Employment Standards under President George W. Bush, as a Republican Commissioner.

DOL Wage-Hour Division Does Away With Opinion Letters. Since the Fair Labor Standards Act, governing minimum wage, overtime, and child labor, was enacted in 1938, the Wage and Hour Division has issued opinion letters written in response to specific requests from employers, employees, unions, and attorneys. The Division has recently **announced** that it is abandoning this type of opinion letter in favor of "Administrator's Interpretations." Where opinion letters responded to specific situations, the Administrator's Interpretations will "set forth a general interpretation of law and regulations, applicable across-the-board to all those affected by the provision in issue." Retail employers should be aware that these interpretations will be issued primarily when the Administrator determines that the Division should take a more "employee-friendly" position than it has in the past.

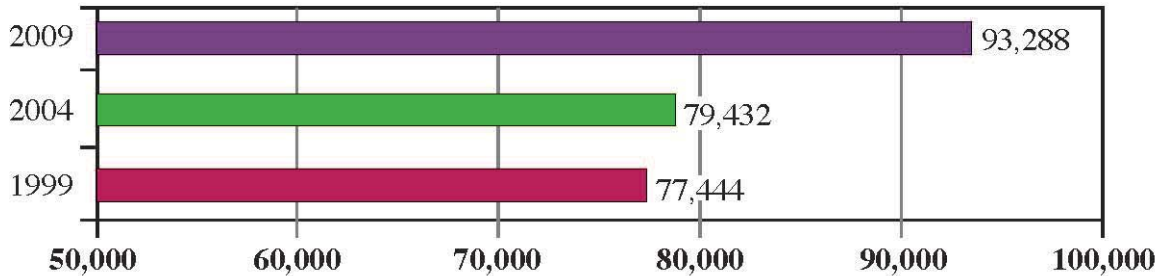
Atlanta
•
Asheville
•
Austin
•
Birmingham
•
Boston
•
Chicago
•
Columbia
•
Fairfax
•
Greenville
•
Jacksonville
•
Kansas City
•
Lakeland
•
Los Angeles County
•
Macon
•
Milwaukee
•
Nashville
•
Parsippany
•
Port St. Lucie
•
St. Louis
•
Tampa
•
Ventura County
•
Winston-Salem

April 15, 2010

FMLA Military Amendments? Even DOL Is Behind the Curve. If you are still getting up to speed on the new military provisions in the Family and Medical Leave Act (either the 2008 amendments, the January 2009 regulations, or the October 2009 amendments to the 2008 amendments), don't feel too bad. The U.S. Department of Labor, which enforces the FMLA, **is also behind the curve.** The DOL website does not mention the latest amendments to the FMLA, and the mandatory FMLA poster doesn't comply. More importantly, the recommended certification forms for military caregiver or qualifying exigency leave have not been updated to conform with the latest amendments, and reliance upon the forms that are currently in use could cause an employer to unknowingly violate the law by denying leave to an employee who is entitled to leave.

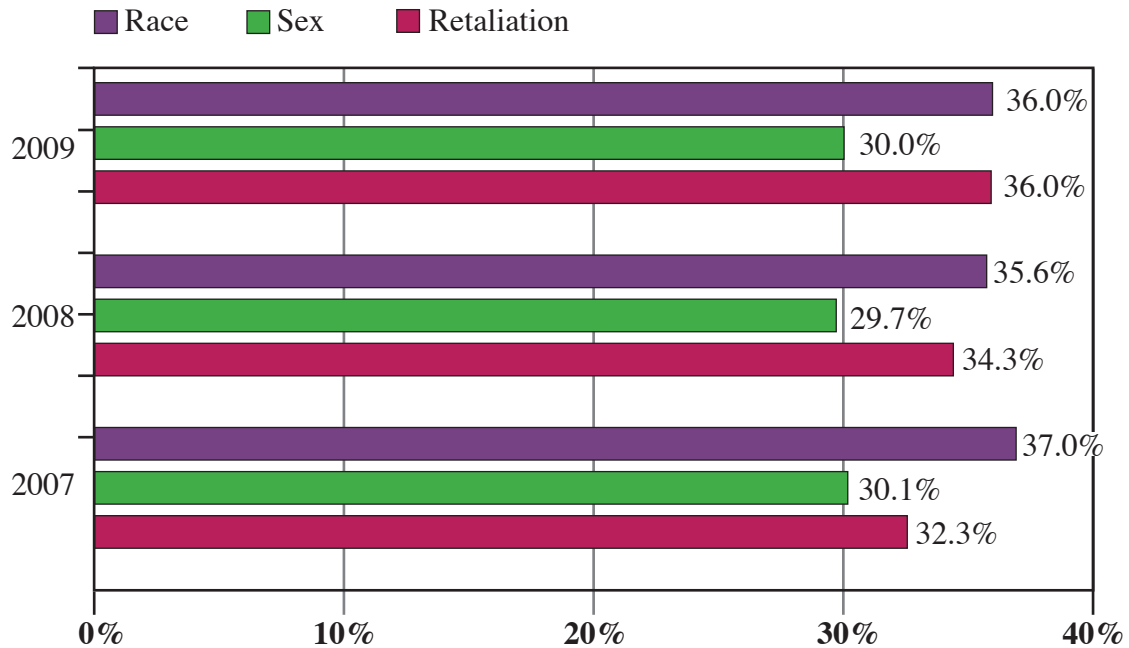
Noteworthy Numbers

TOTAL EEOC CHARGES 1999 THROUGH 2009

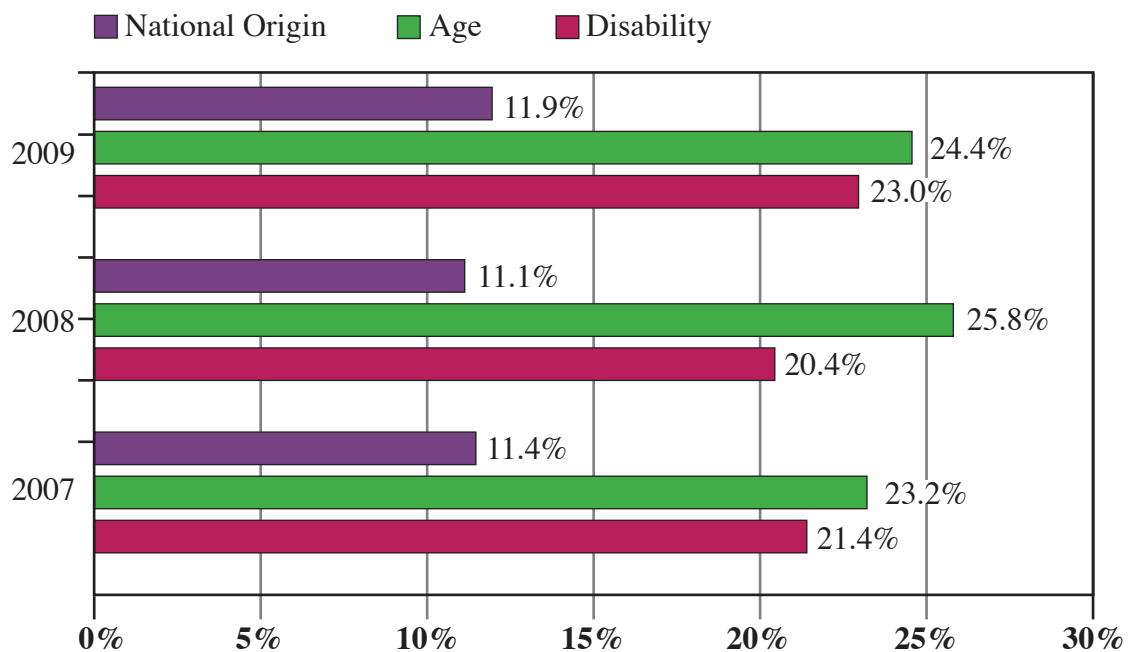


April 15, 2010

**RACE, SEX AND RETALIATION CHARGES
 2007 THROUGH 2009**

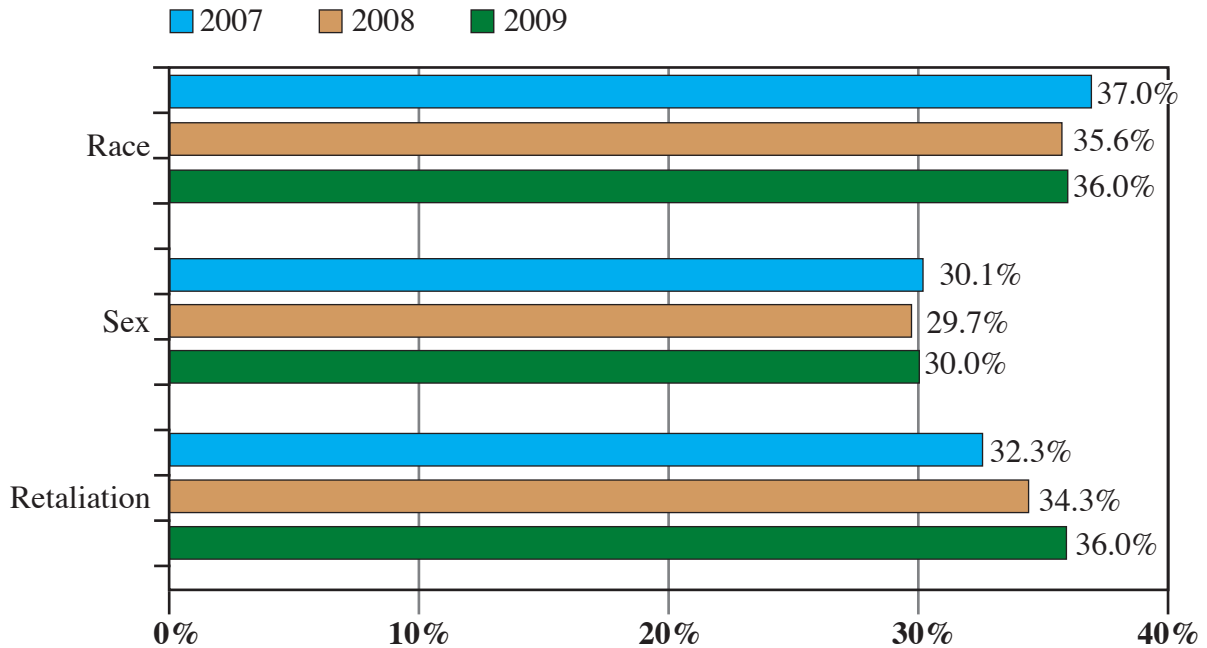


**NATIONAL ORIGIN, AGE, AND DISABILITY CHARGES
 2007 THROUGH 2009**

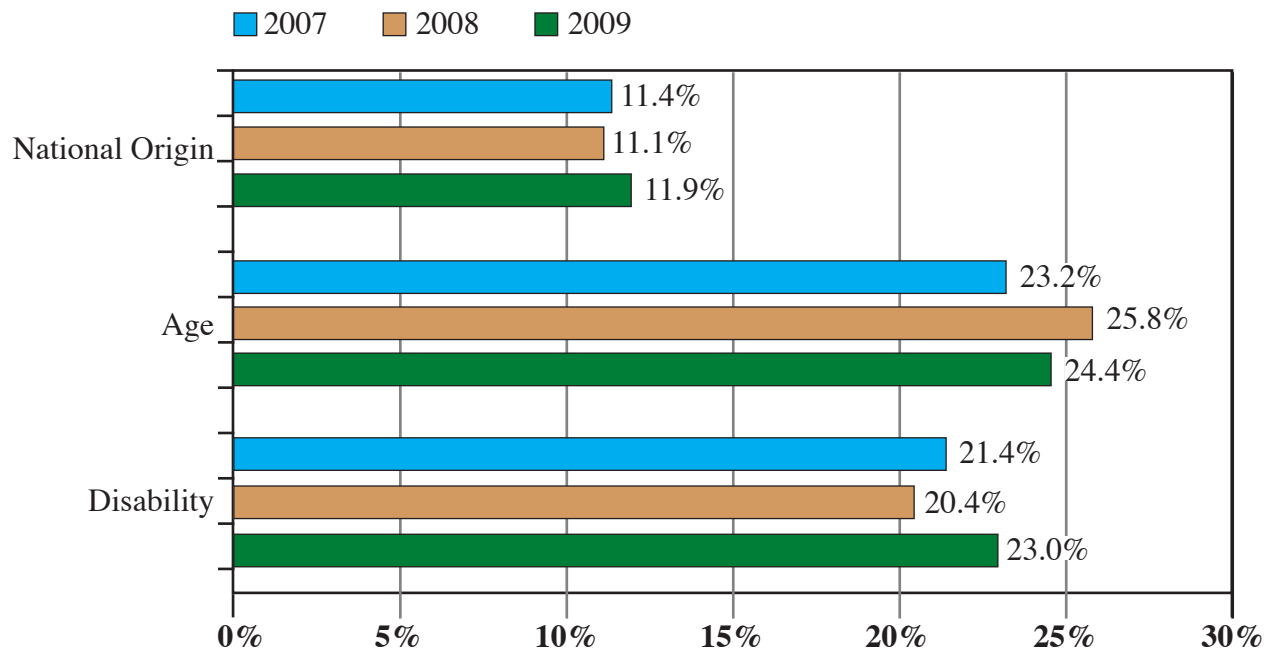


April 15, 2010

**RACE, SEX AND RETALIATION CHARGES
 2007 THROUGH 2009**



**NATIONAL ORIGIN, AGE, AND DISABILITY CHARGES
 2007 THROUGH 2009**



April 15, 2010

Supreme Court to Decide Whether Oral Complaints About Pay Issues Are “Protected Activity” Under FLSA

The U.S. Supreme Court has agreed to decide whether oral (as opposed to written) complaints regarding pay issues are “protected activity” under the anti-retaliation provisions of the Fair Labor Standards Act. Although it is established that internal written complaints are protected, the U.S. Courts of Appeals are split as to whether oral complaints will suffice.

The U.S. Department of Labor and the Courts of Appeals for the Sixth (Kentucky, Michigan, Ohio, and Tennessee), Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, and the Dakotas), and Eleventh (Alabama, Florida, and Georgia) circuits have determined that oral complaints are protected under the anti-retaliation provisions of the FLSA. Meanwhile, the Second (Connecticut, New York, and Vermont) and Fourth (the Carolinas, Maryland, Virginia, and West Virginia) circuits, and most recently, the Seventh Circuit (Illinois, Indiana, Wisconsin) have determined that they are not.

The Supreme Court will be reviewing the Seventh Circuit decision in *Kasten v. Saint-Gobain Performance Plastics Corp.* In that case, the plaintiff alleged that he was terminated from employment because he had orally complained that time clocks were placed in such a way as to require employees to spend uncompensated time performing work-related tasks.

Retailers who are accustomed to “EEOC” retaliation may wonder why any court would say that an FLSA complaint, but not a complaint of harassment or discrimination, must be in writing to be legally protected. The critical difference is in the language of the FLSA’s anti-retaliation provision. Although Title VII and the other federal anti-discrimination laws provide protection for anyone who has engaged in protected activity or “opposed any unlawful practice,” the FLSA protects employees who have “filed any complaint” related to the FLSA. Because the FLSA specifically mentions “filing,” the Second, Fourth, and Seventh circuits have taken the position that this implies some form of writing, although they do not require that the employee go so far as to lodge a complaint with the Department of Labor or file a lawsuit.

While we wait for the Supreme Court to settle the question, retail employers in any jurisdiction should be extremely cautious when taking action against employees who have raised any oral or written concerns about FLSA compliance issues, including unpaid overtime, misclassification, off-clock work, and the like.

No Punitive, Compensatory Damages for ADA Retaliation, Court Says

Neither punitive nor compensatory damages are available in retaliation cases brought under the Americans with Disabilities Act, according to the U.S. Court of Appeals for the Ninth Circuit, joining the **Seventh Circuit** in making such a determination. In *Alvarado v. Cajun Operating Co.*, the Ninth Circuit held that plaintiffs in such cases are limited to equitable relief, which can include back pay and benefits, front pay and benefits, and injunctive relief. The Ninth Circuit handles appeals from federal courts in the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and in the Northern Mariana Islands and Guam. The **Fourth Circuit** has agreed in two unpublished decisions.

Compensatory damages can include damages for emotional distress or physical symptoms resulting from the alleged discriminatory treatment. Punitive damages are intended to punish the employer for its wrongful conduct and are based on the resources of the employer rather than any injury necessarily suffered by the plaintiff.

Two U.S. Courts of Appeals – the Eighth and the Tenth (Colorado, Kansas, New Mexico, Oklahoma, Utah) have upheld compensatory and punitive damage awards in ADA retaliation cases, but the defendants in those cases did not challenge the availability of such damages on appeal.

Constangy expects all ADA claims, including retaliation claims, to increase as a result of the enactment in 2008 of the **ADA Amendments Act**, which dramatically broadened the definition of who is “disabled” and entitled to the protections of the ADA. The position taken by the Fourth, Seventh, and Ninth circuits is certainly good news for retail employers with operations in those circuits. However, as always, employers should carefully review *in advance* any planned adverse action against an employee who has requested reasonable accommodation, who has a known medical condition, who has made any formal or informal complaints about the employer’s compliance with the various aspects of the ADA, who has testified in

April 15, 2010

an ADA proceeding, or who has filed an ADA charge or lawsuit. Even in these “good” jurisdictions, back pay liability can be substantial, and a prevailing employee is also entitled to attorneys’ fees and costs.

“Head in Sand” Is Not an Adequate Approach to Suspected Sexual Harassment

A man and a woman who were co-workers had a sexual encounter, after which the woman told the man that she had a mistake and that this would not happen again. According to the woman, who became the plaintiff in *Duch v. Jakubek*, her co-worker did not get the message, but continued with physical contact, sexually graphic language, and physical gestures. The supervisor of both employees allegedly knew or sensed that something was going on, but he tried to stay out of it, at one point allegedly telling the plaintiff, “I don’t want to know what happened.”

A federal district court granted summary judgment to the employer on the woman’s sexual harassment claim, finding that the company had effective avenues for making sexual harassment complaints, did not know or have reason to know about the harassment, and – assuming that it did know or should have known – responded reasonably.

The Second Circuit reversed on appeal, sending the case back for a jury trial on employer liability for the sexual harassment. With respect to the “employer knowledge” element, the court found that a jury could reasonably find that the supervisor had been “purposefully ignorant.” Among other things, the plaintiff’s evidence showed that she had asked the supervisor to change her work schedule once when she was scheduled to work alone with the co-worker, that other sources had told the supervisor that the plaintiff specifically wanted to stay away from the co-worker, and that the supervisor did agree to change her schedule to keep her from working alone with the co-worker. There was also evidence that the plaintiff became teary-eyed and blushed whenever the co-worker’s name was mentioned. Finally, there was evidence that the supervisor discussed the issue with the co-worker, who allegedly admitted that he had done or said something he should not have, and that the supervisor knew that the co-worker had been involved in sex-related misconduct in the past.

The court found that this evidence created a jury issue as to whether the supervisor knew or should have known that sexual harassment was the cause of the plaintiff’s distress and that it was continuing.

The normal reaction to “love spats” and rumors is to mind one’s own business, and avoid gossip and speculation. *Duch* provides a good lesson that front-line supervisors should never take this approach if they suspect workplace harassment. The safer course would have been for this supervisor to have reported his information and suspicions to Human Resources, and to have allowed HR to determine whether further investigation and action were necessary. By putting their heads in the sand, supervisors can expose companies to significant liability. This is even more true in retail environments, which necessarily operate with minimal central supervision. By the time corporate management becomes aware of potential harassment at a retail facility, it will probably be too late to remedy the situation unless the outlet management reports it as soon as a reasonable suspicion arises.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A “Go To” Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, Super Lawyers, and Top One Hundred Labor Attorneys in the United States. More than 120 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Georgia, Florida, South Carolina, North Carolina, Tennessee, Alabama, Virginia, Missouri, Illinois, Wisconsin, Texas, California, Massachusetts and New Jersey. For more information, visit www.constangy.com.