

REFERENCE TITLE: **discrimination; enforcement; damages**

State of Arizona
Senate
Fifty-first Legislature
Second Regular Session
2014

SB 1022

Introduced by
Senator Ableser

AN ACT

**AMENDING SECTIONS 41-1461 AND 41-1481, ARIZONA REVISED STATUTES; RELATING TO
EMPLOYMENT DISCRIMINATION.**

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 41-1461, Arizona Revised Statutes, is amended to
3 read:

4 41-1461. Definitions

5 In this article, unless the context otherwise requires:

6 1. "Auxiliary aids and services" includes:

7 (a) Qualified interpreters or other effective methods of making
8 aurally delivered materials available to individuals with hearing
9 impairments.

10 (b) Qualified readers, taped texts or other effective methods of
11 making visually delivered materials available to individuals with visual
12 impairments.

13 (c) Acquisition or modification of equipment or devices.

14 (d) Other similar services and actions.

15 2. "Being regarded as having such a physical or mental impairment":

16 (a) Means an individual who establishes that the individual has been
17 subjected to an action prohibited under this article because of an actual or
18 perceived physical or mental impairment whether or not the impairment limits
19 or is perceived to limit a major life activity.

20 (b) Does not mean an impairment that is transitory and minor. For the
21 purposes of this subdivision, "transitory impairment" means an impairment
22 with an actual or expected duration of six months or less.

23 3. "Covered entity" means an employer, employment agency, labor
24 organization or joint labor-management committee.

25 4. "Disability" means, with respect to an individual, except any
26 impairment caused by current use of illegal drugs, any of the following:

27 (a) A physical or mental impairment that substantially limits one or
28 more of the major life activities of the individual.

29 (b) A record of such a physical or mental impairment.

30 (c) Being regarded as having such a physical or mental impairment.

31 5. "Employee":

32 (a) Means an individual employed by an employer.

33 (b) Does not include an elected public official of this state or any
34 political subdivision of this state, any person chosen by an elected official
35 to be on the elected official's personal staff, an appointee on the
36 policymaking level or an immediate adviser with respect to the exercise of
37 the constitutional or legal powers of the office, unless the person or
38 appointee is subject to the civil service laws of this state or any political
39 subdivision of this state.

40 6. "Employer":

41 (a) Means a person who has fifteen or more employees for each working
42 day in each of twenty or more calendar weeks in the current or preceding
43 calendar year, and any agent of that person, except that to the extent that
44 any person is alleged to have committed any act of sexual harassment,
45 employer means, for purposes of administrative and civil actions regarding

1 those allegations of sexual harassment AND ASSOCIATED PROTECTED ACTIVITY
2 PURSUANT TO SECTION 41-1464, SUBSECTION A, a person who has one or more
3 employees in the current or preceding calendar year.

4 (b) Does not include either:

5 (i) The United States or any department or agency of the United
6 States, a corporation wholly owned by the government of the United States or
7 an Indian tribe.

8 (ii) A bona fide private membership club, other than a labor
9 organization, that is exempt from taxation under section 501(c) of the
10 internal revenue code of 1954.

11 7. "Employment agency" means any person regularly undertaking with or
12 without compensation to procure employees for an employer or to procure for
13 employees opportunities to work for an employer and includes an agent of that
14 person.

15 8. "Labor organization":

16 (a) Means a labor organization and any agent of a labor organization.

17 (b) Includes:

18 (i) Any organization of any kind, any agency or employee
19 representation committee, group, association or plan in which fifteen or more
20 employees participate and that exists for the purpose, in whole or in part,
21 of dealing with employers concerning grievances, labor disputes, wages, rates
22 of pay, hours or other terms or conditions of employment.

23 (ii) Any conference, general committee, joint or system board or joint
24 council that is subordinate to a national or international labor
25 organization.

26 9. "Major life activities" includes:

27 (a) Caring for oneself, performing manual tasks, seeing, hearing,
28 eating, sleeping, walking, standing, lifting, bending, speaking, breathing,
29 learning, reading, concentrating, thinking, communicating and working.

30 (b) The operation of a major bodily function, including functions of
31 the immune system, normal cell growth and digestive, bowel, bladder,
32 neurological, brain, respiratory, circulatory, endocrine and reproductive
33 functions.

34 10. "Person" means one or more individuals, governmental agencies,
35 political subdivisions, labor unions, partnerships, associations,
36 corporations, legal representatives, mutual companies, joint-stock companies,
37 trusts, unincorporated organizations, trustees, trustees in bankruptcy or
38 receivers.

39 11. "Qualified individual" means a person with a disability who, with
40 or without reasonable accommodation, is capable of performing the essential
41 functions of the employment position that the individual holds or desires.

42 12. "Reasonable accommodation" includes:

43 (a) Making existing facilities used by employees readily accessible to
44 and usable by individuals with disabilities.

(b) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments, the provision of auxiliary aids and services or interpreters and other similar services and actions for individuals with disabilities.

13. "Religion" means all aspects of religious observance and practice, as well as belief. Unlawful practices as prohibited by this article include practices with respect to religion unless an employer demonstrates that the employer is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

14. "Undue hardship":

(a) Means an action requiring significant difficulty or expense when considered in light of the factors set forth in subdivision (b) of this paragraph.

(b) When determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and cost of the accommodations needed under this article.

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility and any other impact of the accommodation on the operation of the facility.

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees and the number, type and location of its facilities.

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of the covered entity.

(v) The geographic separateness and the administrative or fiscal relationship of the facility to the covered entity.

Sec. 2. Section 41-1481, Arizona Revised Statutes, is amended to read:

41-1481. Filing charges; investigation; findings; conciliation; compliance proceedings; civil action; damages; appeals; attorney fees; violation; classification; definitions

A. A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred. A charge is deemed filed ~~upon~~ ON receipt by the division from or on behalf of a person claiming to be aggrieved or, if filed by a member of the division, when executed by such member upon oath or affirmation. A charge is deemed

1 filed by or on behalf of a person claiming to be aggrieved if received from
2 the United States equal employment opportunity commission. A charge shall be
3 in writing upon oath or affirmation and shall contain such information,
4 including the date, place and circumstances of the alleged unlawful
5 employment practice, and be in such form as the division requires. Charges
6 shall not be made public by the division.

7 B. Whenever a charge is filed by or on behalf of a person claiming to
8 be aggrieved or by a member of the division, referred to as the charging
9 party, alleging that an employer, employment agency, labor organization or
10 joint labor-management committee controlling apprenticeship or other training
11 or retraining programs, including on-the-job training programs, has engaged
12 in an unlawful employment practice, the division shall serve notice of and a
13 copy of the charge on such employer, employment agency, labor organization or
14 joint labor-management committee, referred to as the respondent, within ten
15 days and shall make an investigation of the charge. If the division
16 determines after such investigation that there is not reasonable cause to
17 believe that the charge is true, it shall enter an order determining the same
18 and dismissing the charge and shall notify the charging party and the
19 respondent of its action. If the division determines after such
20 investigation that there is reasonable cause to believe that the charge is
21 true, it shall enter an order containing its findings of fact and shall
22 endeavor to eliminate the alleged unlawful employment practice by informal
23 methods of conference, conciliation and persuasion. Any party to such
24 informal proceeding may be represented by counsel. Counsel need not be a
25 member of the state bar if he is licensed to practice law in any other state
26 or territory of the United States. Nothing said or done during and as a part
27 of such informal endeavors may be made public by the division or its officers
28 or employees or used as evidence in a subsequent proceeding without the
29 written consent of the persons concerned. If a civil action resulting from a
30 charge is commenced in any federal or state court, evidence collected by or
31 submitted to the division during the investigation of the charge and the
32 source of the evidence shall be subject to discovery by the parties to the
33 civil action. Any person who makes public information in violation of this
34 subsection is guilty of a class 1 misdemeanor. The division shall make its
35 determination on reasonable cause as promptly as possible and as far as
36 practicable not later than sixty days from the filing of the charge. If more
37 than two years have elapsed after the alleged unlawful employment practice
38 occurred, and if the charging party has received a notice of right to sue,
39 the division may cease investigation of a charge without reaching a
40 determination.

41 C. All conciliation agreements shall provide that the charging party
42 waives, releases and covenants not to sue the respondent or claim against the
43 respondent in any forum with respect to the matters which were alleged as
44 charges filed with the division, subject to performance by the respondent of
45 the promises and representations contained in the conciliation agreement.

1 The charging party or the respondent may prepare a conciliation agreement
2 which the division shall submit to the other party and which, if accepted by
3 the other party, shall be accepted by the division.

4 D. If within thirty days after the division has made a determination
5 that reasonable cause exists to believe that the charge is true the division
6 has not accepted a conciliation agreement to which the charging party and the
7 respondent are parties, the division may bring a civil action against the
8 respondent, other than the state, named in the charge. The charging party
9 shall have the right to intervene in a civil action brought by the division.
10 If a charge filed with the division pursuant to subsection A of this section
11 is dismissed by the division or if within ninety days from the filing of such
12 charge the division has not filed a civil action under this section or has
13 not entered into a conciliation agreement with the charging party, the
14 division shall so notify the charging party. Within ninety days after the
15 giving of such notice a civil action may be brought against the respondent
16 named in the charge by the charging party or, if such charge was filed by a
17 member of the division, by any person whom the charge alleges was aggrieved
18 by the alleged unlawful employment practice. In no event shall any action be
19 brought pursuant to this article more than ~~one-year~~ TWO YEARS after the
20 charge to which the action relates has been filed. THE TWO YEAR PERIOD DOES
21 NOT INCLUDE ANY TIME THAT ELAPSES BETWEEN THE FILING OF ANY COURT PROCEDURE
22 TO ENFORCE AN ADMINISTRATIVE SUBPOENA AND THE FINAL RESOLUTION OF THAT
23 ENFORCEMENT ACTION. THE TWO-YEAR PERIOD IS NOT JURISDICTIONAL BUT IS A
24 STATUTE OF LIMITATIONS SUBJECT TO THE PRINCIPLES OF ESTOPPEL, TOLLING AND
25 WAIVER. Upon application by the complainant and in such circumstances as the
26 court may deem just, the court may appoint an attorney for such complainant
27 and may authorize the commencement of the action without the payment of fees,
28 costs or security. Upon timely application, the court may in its discretion
29 permit the division to intervene in civil actions in which the state is not a
30 defendant upon certification that the case is of general public importance.
31 Upon request the court may stay further proceedings for not more than sixty
32 days pending the further efforts of the parties or the division to obtain
33 voluntary compliance.

34 E. Whenever a charge is filed with the division and the division
35 concludes on the basis of a preliminary investigation that prompt judicial
36 action is necessary to carry out the purposes of this article or article 4 of
37 this chapter, the division may bring an action for appropriate temporary or
38 preliminary relief pending final disposition of such charge. Any temporary
39 restraining order or other order granting preliminary or temporary relief
40 shall be issued in accordance with the ~~supreme-court~~ ARIZONA rules of civil
41 procedure. The court having jurisdiction over ~~such~~ THE proceedings shall
42 assign ~~such~~ THE action for hearing at the earliest practicable date and cause
43 the action to be expedited in every way.

F. The court shall assign any action brought under this article for hearing at the earliest practicable date and cause the action to be in every way expedited. If the action has not been scheduled for trial within one hundred twenty days after issue has been joined, the judge may appoint a master pursuant to rule 53 of the ~~supreme court~~ ARIZONA rules of civil procedure.

G. If the court finds that the defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice alleged in the complaint, the court may enjoin the defendant from engaging in ~~such~~ THE unlawful employment practice and order such affirmative action as may be appropriate. Affirmative action may include, but is not limited to, reinstatement or hiring of employees with or without back pay payable by the employer, employment agency or labor organization responsible for the unlawful employment practice or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of the charge with the division. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement or promotion of an individual as an employee or the payment to him of any back pay if ~~such~~ THE individual was refused admission, suspended or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, age, handicap or national origin or a violation of section 41-1464.

H. IN AN ACTION BROUGHT BY A COMPLAINING PARTY AGAINST A DEFENDANT WHO ENGAGED IN AN UNLAWFUL EMPLOYMENT PRACTICE THAT IS PROHIBITED BY THIS CHAPTER, THE RECOVERING PARTY MAY RECOVER PUNITIVE OR COMPENSATORY DAMAGES PURSUANT TO SUBSECTIONS I AND J OF THIS SECTION IN ADDITION TO ANY RELIEF PURSUANT TO SUBSECTION G OF THIS SECTION, EXCEPT THAT IN CASES IN WHICH AN UNLAWFUL EMPLOYMENT PRACTICE INVOLVES THE PROVISION OF A REASONABLE ACCOMMODATION UNDER SECTION 41-1463, SUBSECTION F, PARAGRAPH 4, PUNITIVE OR COMPENSATORY DAMAGES SHALL NOT BE AWARDED UNDER THIS SECTION IF THE COVERED ENTITY DEMONSTRATES GOOD FAITH EFFORTS, IN CONSULTATION WITH THE QUALIFIED INDIVIDUAL WHO HAS INFORMED THE COVERED ENTITY THAT ACCOMMODATION IS NEEDED, TO IDENTIFY AND MAKE A REASONABLE ACCOMMODATION THAT WOULD PROVIDE THE INDIVIDUAL WITH AN EQUALLY EFFECTIVE OPPORTUNITY AND WOULD NOT CAUSE UNDUE HARDSHIP ON THE OPERATION OF THE BUSINESS.

I. A COMPLAINING PARTY MAY RECOVER PUNITIVE DAMAGES UNDER THIS SECTION AGAINST A DEFENDANT IF BOTH OF THE FOLLOWING APPLY:

1. THE COMPLAINING PARTY DEMONSTRATES THAT THE DEFENDANT ENGAGED IN AN UNLAWFUL EMPLOYMENT PRACTICE WITH MALICE OR WITH RECKLESS INDIFFERENCE TO THE STATUTORILY PROTECTED RIGHTS OF AN AGGRIEVED INDIVIDUAL UNDER THIS CHAPTER.
2. THE DEFENDANT IS NOT THIS STATE OR AN AGENCY OR POLITICAL SUBDIVISION OF THIS STATE.

J. COMPENSATORY DAMAGES AWARDED UNDER THIS SECTION SHALL NOT INCLUDE BACK PAY, INTEREST ON BACK PAY OR ANY OTHER TYPE OF RELIEF AUTHORIZED UNDER SUBSECTION G OF THIS SECTION. THE SUM OF THE AMOUNT OF COMPENSATORY DAMAGES AWARDED UNDER THIS SECTION FOR FUTURE PECUNIARY LOSSES, EMOTIONAL PAIN, SUFFERING, INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT OF LIFE AND OTHER NONPECUNIARY LOSSES AND THE AMOUNT OF PUNITIVE DAMAGES AWARDED UNDER THIS SECTION SHALL NOT EXCEED THE FOLLOWING FOR EACH COMPLAINING PARTY:

1. IF A DEFENDANT HAS MORE THAN ONE BUT NOT MORE THAN ONE HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR PRECEDING CALENDAR YEAR, FIFTY THOUSAND DOLLARS.

2. IF A DEFENDANT HAS MORE THAN ONE HUNDRED BUT NOT MORE THAN TWO HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR PRECEDING CALENDAR YEAR, ONE HUNDRED THOUSAND DOLLARS.

3. IF A DEFENDANT HAS MORE THAN TWO HUNDRED BUT NOT MORE THAN FIVE HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR PRECEDING CALENDAR YEAR, TWO HUNDRED THOUSAND DOLLARS.

4. IF A DEFENDANT HAS MORE THAN FIVE HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR PRECEDING CALENDAR YEAR, THREE HUNDRED THOUSAND DOLLARS.

K. IF A COMPLAINING PARTY SEEKS PUNITIVE OR COMPENSATORY DAMAGES UNDER THIS SECTION, BOTH OF THE FOLLOWING APPLY:

1. ANY PARTY MAY DEMAND A TRIAL BY JURY.

2. THE COURT SHALL NOT INFORM THE JURY OF THE LIMITATIONS PRESCRIBED IN SUBSECTION J OF THIS SECTION.

~~H~~ L. In any case in which an employer, employment agency or labor organization fails to comply with an order of a court issued in a civil action brought under this section, a party to the action or the division upon the written request of a person aggrieved by such failure may commence proceedings to compel compliance with such order.

~~I~~ M. Any civil action brought under this section and any proceedings brought under subsection ~~H~~ L of this section are subject to appeal as provided in sections 12-120.21, 12-120.22 and 12-120.24.

~~J~~ N. In any action or proceeding under this section the court may allow the prevailing party, ~~other than the division, a~~ reasonable ~~attorney's fee~~ ATTORNEY FEES as part of the costs.

O. FOR THE PURPOSES OF THIS SECTION:

1. "COMPLAINING PARTY" MEANS ANY CHARGING PARTY, THE DIVISION AND, IN INSTANCES WHERE A CHARGE IS FILED BY A MEMBER OF THE DIVISION, ANY PERSON WHO A CHARGE ALLEGES WAS AGGRIEVED BY AN UNLAWFUL EMPLOYMENT PRACTICE.

2. "UNLAWFUL EMPLOYMENT PRACTICE" MEANS ANY UNLAWFUL EMPLOYMENT PRACTICE AND UNLAWFUL PRACTICE THAT IS DESCRIBED IN SECTIONS 41-1463 AND 41-1464.