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*221 H.B. 2274: ENCOURAGING EMPLOYMENT REFERENCES

STATUTE SECTION:	Ariz. Rev. Stat. § 23-1361
LEGISLATIVE SESSION:	42d Legislature, 2d Regular Session
SESSION LAW CHAPTER:	233
BILL DESIGNATION:	House Bill 2274
EFFECTIVE DATE:	April 22, 1996
SUMMARY:	House Bill 2274 places a presumption of good faith on an employer giving an employment reference and awards attorney fees to the prevailing party of a reference lawsuit.

*222 I. Introduction

We had interviewed a candidate to work in our behavioral health unit. The references again were very sketchy giving dates of employment and position held. Further due diligence did reveal that the candidate had a habit of getting "too friendly" with the patients which was part of his "style" and not detrimental. This information was not shared by the previous employer, but by a former co-worker who was willing to talk about it. A background investigation revealed nothing.

After a brief period of employment a patient was raped and this employee was charged. . . . [In his previous job] he was not just "friendly" with previous patients but he had assaulted others and was fired. . . . The previous employer did indeed have information to share that could have avoided this situation but chose not to due to fear of litigation. [1] cm

The preceding is a true story from an Arizona business. For an employer, few things are more frustrating than receiving little or no information when calling a previous employer for an employee reference. [2] There was a time when former employers freely handed out references on request from prospective employers. [3] However, in recent years, large numbers of employers have adopted conservative policies limiting the information provided when asked for a reference about former or current employees. [4] Conservative employment reference policies have created difficulties for the general public and especially employers seeking a reference to help in hiring decisions. [5] A reference request that goes unanswered frustrates prospective employers because of the tendency to ***223** perceive "no reference" as a "bad reference." [6] In addition, employers are frustrated when someone is hired despite the lack of a reference and then turns out to be a bad employee. [7] In many cases, if the reference had been provided, the prospective employer would have learned of the employee's former job conduct, whether lackluster or criminal. [8]

To combat the unwillingness of employers to provide employment references, many states have enacted legislation aimed at encouraging the free-flow of reference information. By providing an employer with immunity in divulging reference information, state legislatures are seeking to reduce employers' perceptions that they will be engaged in bothersome litigation and held liable for honest and truthful employee evaluations. Arizona, following a national trend, hopped on the bandwagon by expanding employer immunity during the 1996 legislative session with the introduction of House Bill 2274.

II. The Value of Employment References

Employers generally agree that references are an invaluable tool in hiring decisions. [9] Past job performance is a great indicator of future performance and conduct on the job. [10] Studies estimate that over fifty percent of employers check the references of a job applicant. [11] Employers use employment references to verify information given by job applicants themselves, to help employers predict performance or job success of applicants, and to provide information that may not be revealed by other sources. [12] The process of checking references can be used either to detect qualified applicants or eliminate those that are not qualified. [13]

Generally, there are four types of applicant information that are useful to prospective employers: (1) prior employment and educational background; (2) character appraisal; (3) estimates of job performance capabilities; and (4) willingness of the reference provider to hire or continue ***224** employment. [14] Although these types of information may be obtained from a variety of sources, former employers are the most capable of providing useful reference information. [15] Therefore, employers clearly benefit from receiving reference information. Ironically, while employers desperately want to receive reference information, they are unwilling to provide that same information to other employers for fear of a lawsuit. [16]

A. The National Background

Currently, employers regularly limit or deny references to prospective employers concerning past or current employees. [17] Consequently, employers are finding it increasingly difficult to obtain reference information. [18] A survey of executives from the one thousand largest companies in the United States revealed that sixty-eight percent thought that it was harder to obtain reference information in 1992 than it was in 1989. [19] Another survey found that only thirty-eight percent of large companies [20] have experienced openness in obtaining a reference from another employer. [21] Additionally, a 1989 survey of human resource professionals revealed that forty-one percent worked for companies with formal written policies not to provide references to inquiring employers. [22] Further, in 1995, sixty-three percent of human resource managers surveyed reported that they have refused to provide reference information due to fear of a lawsuit. [23]

Employers have cited fear of lawsuits from former employees as the principal reason why they give little or no information when faced with a reference request. [24] While it is true that the number of lawsuits against employers for defamation following a negative job reference have increased, the success rate of such cases and the amount of damages awarded have ***225** decreased over the years. [25] Nonetheless employers still fear litigation. Even if an employer is successful in defending a lawsuit, attorney fees and other litigation-related expenses still cost the company money. [26]

Additionally, employers may refuse to give references because of an inaccurate perception of the risks involved. [27] Because the press only reports large jury awards, it is the size of these awards, regardless of their rarity, that is remembered by employers when deciding upon a reference policy. [28] Smaller awards, and cases where the defendant-employer prevails, are soon forgotten. [29] Additionally, risk-averse attorneys have been promoting limited information reference policies in order to avoid litigation. [30] For example, a publication from the Fifteenth Annual Institute on Employment Law suggests that employers only provide "name, rank, and serial number"; that is, only the fact of employment, the dates of employment, and the position held. [31] These reasons may explain why employers, in ever-increasing numbers, are refusing to give meaningful references even though the success rate and damage awards of law suits against employers have decreased.

Recently, state legislatures across the nation have become active in addressing employers' concerns regarding the litigation risks associated with reference providing. In the past two years, twenty-five states have passed bills to protect employers who provide a job reference in "good faith." [32] Prior to 1995, only five states had employer immunity laws. [33] Contributing to this legislative activity, the Society for Human Resource Management ("SHRM") [34] responded to its members' fears of litigation by starting a ***226** national campaign to get employer immunity bills passed at the state level. [35] Although employer support for

a legislative solution was lukewarm at best, legislation became necessary in order to counteract employer fears and otherwise encourage employers to provide substantive references. [36]

B. The Arizona Background

Arizona's experience in this area parallels the rest of the nation. Currently, there are no reported decisions from Arizona's state or federal courts involving an employee suing an employer over a job reference provided by the employer. [37] Despite this lack of evidence, employers in Arizona are reluctant to give employment references because of the fear of litigation. [38] One local director of human resources stated that company policy requires her to verify only employment and hire dates, and she often receives the same scant information when she calls other employers for a reference. [39] In addition, during hearings before the Committee on Commerce at the Arizona House of Representatives, an employment manager discussed three personal experiences in which he was unable to get references and employees were hired with disastrous results. [40] Another human resource director also testified that it was getting more difficult each year to give and get references. [41]

Following the national trend of creating legislation to protect employers when giving a "good faith" reference, in the 1996 legislative session, the Tucson Metropolitan Chamber of Commerce drafted and lobbied for an employment reference bill [42] that amended Arizona's existing blacklisting law. State legislatures enacted blacklisting laws in the late ***227** nineteenth and early twentieth centuries to combat employers who made a list of pro-union workers in order to prevent them from gaining employment. [43] Blacklisting statutes never were intended to limit former employers from providing accurate information in a good-faith response to a reference request. [44] In 1987, Arizona amended its blacklisting statute to give a qualified privilege to employers who provide job references concerning former employees to prospective employers. [45] Despite the qualified privilege afforded them, employers scarcely provided references containing meaningful information. [46] Thus, legislation became necessary to encourage employers to give references.

III. Legislative History

Prior to the passage of House Bill ("H.B.") 2274, [47] Arizona Revised Statute ("A.R.S.") § 23-1361(B)-(C) provided a "qualified immunity" to employers providing employment references. [48] An employer was allowed to provide information about the education, training, experience, qualifications, and job performance of a former employee. [49] Unless the information given was false and defamatory, and the former employer knew that the information was false or acted with reckless disregard as to the truth or falsity of such information, the reference giver was immune from civil liability. [50] Under the qualified immunity of the previous A.R.S. § 23-1361(C), an employer who provided information in a job reference that otherwise would be slanderous [51] was protected from civil liability. [52] The statute provided a qualified privilege to encourage the exchange of information about applicants between former and prospective employers, ***228** with the idea that this exchange of information is beneficial to society as a whole. [53] However, the qualified privilege did not extend to information provided by an employer with malicious intentions [54] nor to information provided to someone who did not have a need to know, or if the employer abused the privilege. [55]

As introduced, H.B. 2274 [56] changed the existing law in three ways. [57] First, it created a rebuttable presumption that an employer who provides information about job performance, professional conduct or an evaluation of the employee to a prospective employer is acting in good faith. [58] Second, the original version of H.B. 2274 changed the standard of evidence an employee needs to prove to be successful against an employer in a reference lawsuit. [59] The third change was a mandatory award of all attorney fees, court costs, and other related expenses to the prevailing party in the litigation. [60]

On its path to its final form, H.B. 2274 subsequently was amended in several ways. First, the language changing the standard of evidence was dropped. [61] Also, immunity was granted to an employer who provided information as to the reason for termination of an employee. [62] Additionally, the presumption of good faith was changed to distinguish between large and small companies. [63] Small companies, those with less than one hundred ***229** employees, are now presumed always to be acting

in good faith when providing an employment reference. [64] However, large companies, those with one hundred employees or more, are now only presumed to be acting in good faith if the company has a regular habit of providing references. [65] Those large companies that do not regularly provide references to prospective employers upon request do not get the presumption of good faith and will have to prove their good faith at trial. [66] This change was enacted because large companies frequently are less likely to provide employment references. [67]

IV. Major Provisions of H.B. 2274

A. Presumption of Good Faith

1. Victory for Employers

Despite the existence of a qualified privilege under the old law, employers still feared litigation and limited the information given in references. [68] Some argued that the existing law was sufficient to protect an employer when giving a reference. [69] As long as the employer only provided information concerning job performance, education, training, and experience without any gossip or other non-job related information, the employer would be protected from any suit brought against them. [70] Thus, a meaningful reference could be given without the fear of being sued. However, this was not enough to comfort employers. [71] The Legislature drafted new legislation to encourage the free flow of employment references by giving employers more protection from civil liability. [72] By providing a presumption of good ***230** faith to the employer giving a reference, the Arizona Legislature hoped to eliminate employers' perceptions that they will be subject to frivolous lawsuits filed by employees. [73] An employee filing suit against an employer now has the burden to show that the reference provider was malicious or acted with a reckless disregard for the truth or falsity of the information divulged. [74] Because the burden is now on the plaintiff to substantiate his or her claim, this should deter all but the truly valid claims. Additionally, unsubstantiated claims are more easily dismissed by summary proceedings.

The belief here is that by reducing the fear of litigation, employers will more freely share information about a current or past employee with a prospective employer. [75] Prior to the passage of H.B. 2274, companies would often settle out of court with an employee bringing a claim against them because of the cost of going to trial. [76] Therefore, even if the employee did not have a valid claim, he or she could get a settlement out of the company just because the company did not want the expense of going to trial. [77] Because the burden will now be on the plaintiff at trial, in addition to the mandatory award of costs to the prevailing party, employers should feel less threatened by the possibility of employee reference lawsuits.

2. Problems for Employees

With a presumption of good faith given to employers, employees now face a major hurdle in bringing a lawsuit against an employer. Even if the employee has a valid claim, she must prove that the employer acted with actual malice. [78] The statute defines actual malice as "knowledge that the information was false or was provided with reckless disregard of its truth or falsity." [79] Opponents of the bill feared that this standard is next-to-impossible for an employee to meet. [80] For instance, because employers are not going to document their malicious actions, [81] it will be difficult for an ***231** employee to prove to the jury that the employer acted with actual malice when giving the reference. In this respect, H.B. 2274 may be unfair to employees.

H.B. 2274 is also problematic in that it is a reaction to employers' perceptions about the prevalence of lawsuits, despite the lack of evidence of lawsuits adversely affecting them. [82] If employers do not perceive the presumption of good faith as reducing or eliminating reference lawsuits against them, it will fail to accomplish its goal of encouraging the free flow of references. This creates problems for employees because "no reference" is often perceived as a "bad reference." [83] Even if the law successfully eases employers' fears, the same result may have been achieved through other means, such as education. [84] Further, it may be the case that the free flow of references is beneficial to some industries more than others. Some industries, because of the nature of work involved, may be more sensitive to the quality of person who fills the job. For instance, the health care industry played a prominent role in lobbying for a reference bill in Arizona. [85] This can be linked to the interpersonal relationship that

is a requirement of the health care profession and the vulnerability of health care patients to would-be wrongdoers. Therefore, a health care provider must be more careful as to whom to employ as compared to a merchant hiring stock personnel. Other professions may be able to adopt a wait-and-see attitude with regard to employees whereas the health care industry cannot without the high possibility of serious consequences.

B. The Award of Costs

The Arizona Legislature included another provision in H.B. 2274 designed to eliminate employers' fears of lawsuits: the mandatory award, to the prevailing party, of attorney's fees, court costs, and other related costs. [86] This should encourage companies to provide references by reducing their fear of litigation. If the company is sued and prevails in any civil proceeding on the merits of the case, the plaintiff-employee will be required to pay the costs associated with the litigation incurred by the company. Therefore, the companies that successfully defend employee reference lawsuits will no longer be saddled with huge legal bills. Secondly, employees have to ***232** seriously consider filing a lawsuit because they will have to pay the company's legal fees if the lawsuit is unsuccessful. Also, out of court settlement is less likely on suits that employers feel are filed frivolously. If a jury does indeed find the suit frivolous, employers incur no cost of going to trial. [87]

However some feel that this provision of the bill is unfair to employees. [88] It is argued that bigger companies will be able to use their vast resources to employ many lawyers and spare no expense in defending employee reference lawsuits. [89] Thus the employee, who has far fewer resources at his disposal, will be left with substantial legal bills if he or she does not prevail in the litigation. [90] One attorney foresees a "chilling of potential litigation." [91]

V. Conclusion

H.B. 2274 is an attempt to get employers to more freely share information with other employers concerning a former or current employee. By reducing the fear of litigation, former employers are encouraged to give useful, substantive information about employees that will help a prospective employer in their hiring decisions. This not only benefits the employer, but society as a whole by providing a safer, more productive work force. However, H.B. 2274 also negatively affects employees by requiring them to meet a very high standard at trial and by sticking them with potentially huge legal bills if their lawsuit is unsuccessful.

VI. Epilogue

The reader must keep in mind that H.B. 2274 only applies to claims brought under Arizona law. An employee in Arizona may bring action in federal court under federal law to circumvent H.B. 2274. For instance, the Supreme Court has recently ruled that Section 704(a) of Title VII [92] covers former, as well as current employees. [93] In Robinson v. Shell Oil Co., the Supreme Court allowed a former employee to proceed with a suit under ***233** Section 704(a), alleging that the former employer gave a negative job reference because the former employee had filed an employment discrimination claim with the Equal Employment Opportunity Commission. [94]

A ruling like this may limit the effectiveness of H.B. 2274. Although H.B. 2274 may give the reference-providing employer protection under state law, a former employer may still be reluctant to provide a reference if it perceives that it may be liable under federal law. A perception by employers that liability may exist under federal law would make H.B. 2274 practically useless in encouraging references since the objective of H.B. 2274 is to quash employers' perceptions that they can be held liable for providing an employment reference. Thus, an employer who perceives that there will be liability under any law, be it federal or state, will still be reluctant to provide employment references.

Footnotes

a1 J.D. candidate, Arizona State University College of Law, 1998; B.A., University of Arizona, 1994. The author would like to thank all those who assisted in this Review. Their time, patience, and knowledge are greatly appreciated.

1 Personal experience of Frank C. Sharp, Employment Manager of Carondelet Health Care Corporation. Employment References; Blacklisting: Tapes of Committee on Commerce Hearing on H.B. 2274, 42d Leg., 2d Reg. Sess. (Ariz. 1996) (on file with Chief Clerk of the House of Representatives) [hereinafter Tapes of the Committee on Commerce Hearing] (Mr. Sharp testified in favor of H.B. 2274 giving three personal experiences where a lack of employment reference led to disastrous results).

2 See David Madrid, Blacklisting Law Eases Hiring Strain: Employers May Soon Give a Detailed Evaluation of an Employee's Work Record, Without Fearing a Lawsuit, TUCSON CITIZEN, July 5, 1996, at BIZ 1.

3 See Valerie L. Acoff, References Available Upon Request. . . Not! Employers Are Being Sued For Providing Employee Job References, 17 AM. J. TRIAL ADVOC. 755, 755 (Spring 1994).

4 See Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform, 13 YALE L. & POL'Y REV. 45, 46 (1995).

5 See id. at 49-51.

6 See id. at 50.

7 See Tapes of the Committee on Commerce Hearing, supra note 1.

8 See id.

9 See Jane L. Eikleberry, Job References: A Legal and Management Paradox, 32 ARIZ. ATT'Y 20, 20 (Oct. 1995).

10 See generally Saxton, supra note 4; Eikleberry, supra note 9; Ramona L. Paetzold & Steven L. Willborn, Employer (Ir) Rationality and the Demise of Employment References, 30 AM. BUS. L.J. 123 (May 1992).

11 See Paetzold & Willborn, supra note 10, at 125.

12 See id. at 124.

13 See id. at 125.

14 See id.

15 See id.

16 See Joan M. Clay & Elvis C. Stephens, The Defamation Trap in Employee References, CORNELL HOTEL & RESTAURANT ADMIN. Q., Apr. 1, 1996, at 19.

17 See Paetzold & Willborn, supra note 10, at 123.

18 See Saxton, supra note 4, at 46.

19 See id.

20 Large companies often are defined as those with one hundred or more employees. See Tapes of the Committee on Commerce Hearing, supra note 1.

21 See Saxton, supra note 4, at 47.

22 See id.

23 See Clay & Stephens, supra note 16, at 18.

24 See Eikleberry, supra note 9, at 20-21.

25 See Paetzold & Willborn, supra note 10, at 136; see also William C. Martucci & Daniel B. Boatright, Immunity for Employment References, EMPLOYMENT REL. TODAY, June 22, 1995, at 119.

26 See Saxton, supra note 4, at 76; see also Tapes of the Committee on Commerce Hearing, supra note 1 (Ron Stuht, Group Vice President, Governmental Affairs, Tucson Metropolitan Chamber of Commerce, commented that defending suits against employers for a bad reference is expensive).

27 See Paetzold & Willborn, supra note 10, at 127-28.

28 See id. at 140-41.

29 See id. at 141.

30 See Saxton, supra note 4, at 48.

31 See Ralph H. Baxter, Jr., Employment Termination Law and Practice, 308 PRACTICING LAW INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 515, 607 (1986).

32 See Julie Forster, 25 States Adopt 'Good Faith' Job Reference Laws to Shield Businesses From Liability, available in 1996 WL 36332425 States Adopt 'Good Faith' Job Reference Laws to Shield Businesses From Liability, available in 1996 WL 363324 (Alaska, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Wisconsin and Wyoming, along with Arizona, have enacted good-faith reference bills.).

33 See id. at *2 (Alaska, California, Colorado, Florida and Georgia).

34 The Society for Human Resource Management is a Washington, D.C.-based organization that represents 77,000 middle to large sized employers. See id.

35 See id.

36 See id. at *4-5.

37 See Eikleberry, supra note 9, at 22.

38 See Tapes of the Committee on Commerce Hearing, supra note 1; Eikleberry, supra note 9, at 20.

39 See Madrid, supra note 2 (Patricia Hinton, director of human resources for the Westward Look Resort in Tucson stated that when employers call her for references, she can verify employment and hiring dates, but company policy forbids references. Additionally, employers she calls often give the same scant information).

40 See Tapes of the Committee on Commerce Hearing, supra note 1 (Frank Sharp, Employment Manager of Carondelet Health Care Corporation and President of the Society of Human Resource Management of Greater Tucson testified to three personal experiences in which not getting an employment reference was detrimental to his business and could have been avoided if a reference was given by the former employer).

41 See id. (Dick Fishel, President and Chief Executive Officer, Fishel Human Resources Associates, testified that it is more difficult each year to give and get references).

42 See Madrid, supra note 2.

43 See Saxton, supra note 4, at 55.

44 See id. at 56.

45 See ARIZ. REV. STAT. ANN. § 23-1361(B)-(C) (West 1987); see also Eikleberry, supra note 9, at 21.

46 See Tapes of the Committee on Commerce Hearing, supra note 1.

47 House Bill 2274 took effect on April 22, 1996, when it was filed with the Secretary of State. The bill modified ARIZ. REV. STAT. § 23-1361.

48 See ARIZ. REV. STAT. ANN. § 23-1361(C) (West 1987); see also Eikleberry, supra note 9, at 21.

49 See ARIZ. REV. STAT. ANN. § 23-1361(B); see also Martucci & Boatright, supra note 25, at 119.

50 See ARIZ. REV. STAT. ANN. § 23-1361(C); see also Martucci & Boatright, supra note 25, at 119.

51 Arizona case law has defined material that tends to injure a person in his profession, trade, or business as slanderous per se; therefore, the plaintiff need not prove special damages. See Modla v. Parker, 495 P.2d 494 (Ariz. Ct. App. 1972); see also Eikleberry, supra note 9, at 21.

52 See Eikleberry, supra note 9, at 21.

53 See ARIZ. REV. STAT. ANN. § 23-1361(C); see also Eikleberry, supra note 9, at 21.

54 See ARIZ. REV. STAT. ANN. § 23-1361(C); see also Eikleberry, supra note 9, at 22; Saxton, supra note 4, at 73; Paetzold & Willborn, supra note 10, at 131.

55 See ARIZ. REV. STAT. ANN. § 23-1361(C); see also Paetzold & Willborn, supra note 10, at 131.

56 See H.B. 2274, as introduced, 42d Leg., 2d Reg. Sess. (Ariz. 1996) (on file with the Chief Clerk of the House of Representatives).

57 See Tapes of the Committee on Commerce Hearing, supra note 1 (Roger Morris, Attorney, Tucson Chamber of Commerce, stated that H.B. 2274 changed the existing law in only three ways: (1) it creates a rebuttable presumption of good faith; (2) it changes the standard of evidence; and (3) the prevailing party is awarded court costs and attorney fees).

58 See id.

59 As introduced, H.B. 2274 changed the standard of evidence needed in reference lawsuits from "more likely than not" to the higher standard of "clear and convincing evidence." Tapes of the Committee on Commerce Hearing, supra note 1.

60 See ARIZ. REV. STAT. ANN. § 23-1361(I) (West 1996); Tapes of the Committee on Commerce Hearing, supra note 1.

61 See Proposed Arizona House of Representatives Floor Amendment to H.B. 2274, 42d Leg., 2d Reg. Sess., Representative McGibbon Amendment (Ariz. Feb. 14, 1996) (on file with the Chief Clerk of the House of Representatives) [[[hereinafter McGibbon Floor Amendment].

62 See Proposed Senate Government Reform Amendment to H.B. 2274, 42d Leg., 2d Reg. Sess., at 1 (Ariz. Mar. 19, 1996) (on file with the Senate Secretary) [hereinafter Government Reform Amendment].

63 The distinction between large and small companies was first proposed by Representative McGibbon. See McGibbon Floor Amendment, supra note 61, at 1. This distinction was clarified by the Senate Government Reform Committee. See Government Reform Amendment, supra note 62, at 1.

64 See Government Reform Amendment, supra note 62, at 1.

65 See McGibbon Floor Amendment, supra note 61, at 1; Government Reform Amendment, supra note 62, at 1.

66 See McGibbon Floor Amendment, supra note 61, at 1; Government Reform Amendment, supra note 62, at 1; see also Tapes of the Committee on Commerce Hearing, supra note 1.

67 See Saxton, supra note 4, at 47.

68 See generally Eikleberry, supra note 9.

69 See id.

70 See id. at 41.

71 See id.

72 See Tapes of the Committee on Commerce Hearing, supra note 1 (David A. Seldon, Chairman, Employee Relations Committee, Arizona Chamber of Commerce; and Partner, Steptoe & Johnson, testified in writing that H.B. 2274 would clarify and confirm the privileges that exist for employers when providing information about past employees).

73 See id.

74 See ARIZ. REV. STAT. ANN. § 23-1361(D) (West 1996); see also Tapes of the Committee on Commerce Hearing, supra note 1.

75 See Tapes of the Committee on Commerce Hearing, supra note 1.

76 See id.

77 See id. (Ron Stuht testified that many companies would settle a suit before trial because of the high cost of litigation).

78 See ARIZ. REV. STAT. ANN. § 23-1361(D).

79 Id.

80 See Tapes of the Committee on Commerce Hearing, supra note 1 (Rep. Armstead raised this issue in the committee hearing).

81 See id.

82 See Paetzold & Willborn, supra note 10, at 127-28, 136.

83 Saxton, supra note 4, at 50.

84 An example of education is Eikleberry, supra note 9.

85 See Tapes of the Committee on Commerce Hearing, supra note 1 (the majority of human resource directors who testified in favor of the bill were from the health care industry).

86 See ARIZ. REV. STAT. ANN. § 23-1361(I) (West 1996).

87 See generally Saxton, supra note 4, at 101-05.

88 See generally Madrid, supra note 2.

89 See id.

90 See id.

91 Id. (Bob R. Gary argues that the mandatory award of attorney fees to the prevailing party is not fair to employees because they may face huge bills from unsuccessful litigation).

92 See 42 U.S.C. § 2000e-3(a) (1994).

93 See Robinson v. Shell Oil Co., 117 S. Ct. 843, 849 (1997).

94 See id.

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