

DISCRIMINATION LAW UPDATE
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I. 2009 MONTANA SUPREME COURT CASES

Jaksha v. Butte-Silverbow County, 2009 MT 263

Facts: Despite being equally qualified as the other top candidate for a firefighting position, Jaksha was denied employment by the Butte-Silverbow Fire Department because he was 35 years old at the time he applied. Butte-Silverbow based its decision on MCA §7-33-4107, which provides that firefighters may not be over 34 at the time of the original appointment. Jaksha filed a discrimination claim and challenged the constitutionality of MCA § 7-33-4107. The district court judge declined to rule on the constitutionality of the statute and ordered a jury trial on the discrimination claim. The Butte jury found that BSB did not unlawfully deny Jaksha employment based on his age. After the trial, Jaksha renewed his request that the statute be declared unconstitutional. The district court declined ruling on the issue on the basis the jury would have had to determine if the age requirement were a bona fide occupational qualification, and it had not done so.

Held: The district court erred in ruling the jury would have had to determine whether the age restriction was a bona fide occupational qualification before it could decide the constitutionality of MCA § 7-3-4107. The constitutionality of a statute is a question of law for the court to decide. Further, the statute is unconstitutional because the cut-off age of 34 is arbitrary. However, because Butte-Silver Bow relied on the statute, an award of damages or back pay is precluded by MCA § 2-9-103, which provides a county cannot be held liable for relying in good faith on a law which is subsequently declared unconstitutional.

Edwards v. Cascade County, 2009 MT 229

Facts: A Great Falls attorney filed a discrimination claim in the Montana Human Rights Bureau (HRB) and then district court on behalf of Edwards and several other Plaintiffs, alleging the County discriminated against them because of their support for an unsuccessful County Sheriff candidate. The HRB found reasonable cause for discrimination only against Edwards. The HRB ultimately issued a favorable decision for Edwards. In district court, the attorney represented all Plaintiffs on their discrimination claims and also filed a petition for enforcement of the favorable HRB decision concerning Edwards. She also requested payment of her attorney's fees. The

attorney claimed fees for pursuit of all the claims and reasoned she was entitled to them because her work for all claimants was intertwined and could not be segregated. The district court awarded her fees, but reduced them to account for time spent on the claims of the unsuccessful Plaintiffs. The district court also declined to award Edwards pre-judgment interest.

Held: The district court erred in reducing the attorney's fees to account for time spent on pursuing similar, but unsuccessful claims of discrimination based on the same set of facts. While a prevailing party in a discrimination claim may bring an action in district court to recover attorney's fees, a non-prevailing party is not entitled to recovery of fees. However, when utilizing the lodestar method to determine reasonable attorney's fees in a human rights claim, the lodestar calculation is presumed to be reasonable. The lodestar fee amount is calculated by taking the number of hours reasonably expended and multiplying by a reasonable hourly rate. When there are multiple claims that involve "core common facts" and no evidence is presented that would justify segregating the fees, the court may not arbitrarily reduce the total fee award. Also, the district court was correct in denying Edwards' request for prejudgment interest. The underlying monetary obligation only became certain upon entry of the district court judgment, thus pre-judgment interest was not appropriate.

McDonald v. DEQ, 2009 MT 209

Facts: DEQ employee with verified disability requested carpeting or mats for areas of her building where she and her service dog were required to walk. The request was made because the service dog had a hard time walking on the tiled floor and as a result slipped, and on more than one occasion was injured. The dog was eventually retired as a service animal because it was unable to provide service to the employee under the conditions at DEQ and after the injuries it received there. DEQ failed to make the accommodation of providing adequate mats or carpeting. The employee filed a complaint with HRB alleging disability discrimination. HRB issued a decision in her favor. On appeal, the HRC affirmed, but the district court held HRB and HRC were incorrect and that the employer had no duty to "accommodate the dog."

Held: The employer did violate the Montana Human Rights Act when it failed to provide the accommodation. The accommodation requested was for the employee and DEQ's failure to provide it denied the employee the opportunity to utilize her service dog. The Supreme Court pointed out the situation is analogous to a request to widen a doorway so someone in a wheelchair can utilize it. There, the accommodation is for the employee and not the wheelchair. The Court noted this situation is no different and DEQ's failure to provide an accommodation was in violation of the MHRA.

II. 2009 FEDERAL CASES

O'Dea v. BNSF, 572 F.3d 785 (9th Cir. 2009)

Facts: The HRB ruled in favor of a discrimination claimant when he applied for a job at BNSF and was conditionally offered the job, but then denied it after a medical exam revealed he was obese. BNSF appealed to HRC, which affirmed the HRB decision. BNSF then filed an action for review of the HRC decision both in state and federal court, then removed its own state court action to federal court. The U.S. District Court dismissed and remanded the federal action.

Held: U.S. District Courts have jurisdiction in diversity actions to review state administrative agency decisions.

Gross v. FBL Financial Services, 129 S.Ct. 2343 (2009)

Facts: Plaintiff brought age discrimination claim under ADEA. At trial the court instructed the jury to find for the Plaintiff if it determined age factored into the employer's decision to take the adverse action.

Held: ADEA claims alleging disparate treatment require "but for" causation. Therefore, the jury was improperly instructed. In disparate treatment claims under the ADEA, the plaintiff cannot prevail unless he proves the adverse action would not have been taken against him but for his age. Also, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Ricci v. DeStefano, 129 S.Ct. 2958 (2009)

Facts: City of New Haven administered a test that was a prerequisite to getting a promotion within its fire department. When the results from the test came back it revealed that statistically more Blacks than Whites and Hispanics failed the exam. After public debate on the issue and a review of the testing methods, the City decided not to certify the test for use in the promotion process because it feared the test violated the disparate impact section of Title VII. Several White and one Hispanic firefighters who passed the test and were denied a promotion filed discrimination claims with the EEOC alleging disparate treatment under Title VII and constitutional claims of equal protection. The EEOC dismissed their claims and the district court and Fifth Circuit ruled in favor of the City on grounds that the City did not intend to discriminate based on race when it refused to certify the test results because of a fear the test would result in disparate treatment of certain races.

Held: The City should have been required to demonstrate a strong basis in evidence that it would have been liable under Title VII for disparate impact had it certified the test results.

According to Title VII, the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. Here, there was no strong basis in evidence to establish that the test was deficient in either of these respects. Therefore, the City was not entitled to disregard the tests based solely on the racial disparity in the results.

III. CHANGES TO THE AMERICANS WITH DISABILITIES ACT

Amendments to the ADA took effect January 1, 2009. The amendments make it easier to make a claim under the ADA. The amendments make the following significant changes to the Act:

- they direct the EEOC to revise its regulations that define the term "substantially limits," to be less onerous on the claimant;
- they expand the definition of "major life activities" and include two non-exhaustive lists:
 1. The first list includes many activities the EEOC has already recognized, such as walking, but also includes activities that have not previously been recognized, such as reading, bending and communicating.
 2. The second list includes major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.
- the changes state that mitigating measures other than "ordinary eyeglasses and contact lenses" shall not be considered in assessing whether an individual has a disability;
- the changes clarify that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- the amendments change claims brought under the "regarded as" section of the ADA to provide that someone is regarded as disabled when he or she is subject to an adverse action based on an impairment that is not transitory and minor; and
- the changes provide that individuals covered only under the "regarded as" prong are not entitled to accommodation.

IV. POTENTIAL NEW FEDERAL DISCRIMINATION LEGISLATION

The Employment Non-Discrimination Act (ENDA), will likely be considered in the coming months. The Act prohibits discrimination based on sexual orientation and includes discrimination against transgendered. The Congressional Budget Office predicts an increase in EEOC charges of 5%-7% if ENDA is passed. Some public interest groups and trade associations have indicated they believe ENDA is likely to pass.

V. MONTANA DISCRIMINATION STATISTICS

The Montana Human Rights Bureau received a record number of discrimination cases in fiscal year 2009 (June 08 - June 09). The majority of those cases were employment related. Disability discrimination claims far exceeded other types of claims made. The Montana Human Rights Bureau provided the attached statistics and discrimination case overviews from the past year.

MONTANA HUMAN RIGHTS BUREAU
Fiscal Year 2009 (July 1, 2008 to June 30, 2009)
Statistics in Brief

CASELOAD SUMMARY

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY 09
Cases filed each quarter	199	101	122	202	624
Cases closed each quarter	143	179	152	139	613

TYPES OF CASE CLOSURE IN ALL CASES

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Closures favoring complainant 41%					
Predetermination settlements	38	49	24	20	131
Withdrawal w/ benefits	5	1	3	4	13
Conciliation after reasonable cause finding	19	20	8	20	67
Reasonable cause finding (conciliation failure, sent to hearings)	4	5	15	14	38
				TOTAL	249
Closures favoring respondent 52%					
No cause findings	68	94	88	69	319
Miscellaneous closures 7%					
ADMINISTRATIVE CLOSURES					
Withdrawal-no benefits	9	10	14	12	45
				TOTAL CLOSURES	613

TYPE OF RESPONDENT-Cases Filed

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Private employers	134	77	79	129	419
State & local government	23	16	31	30	100
Public college/university	1	0	0	1	2
School districts	21	3	9	13	46
Other	20	5	3	29	57
Other includes: private colleges/universities, private elementary schools, unions, employment agencies etc...				TOTAL	624

AREA OF ALLEGED DISCRIMINATION-Cases Filed

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Employment	154	89	100	127	470
Housing	21	2	3	31	57
Government services	12	4	9	16	41
Insurance	0	1	0	1	2
Public accommodations	8	3	6	22	39
Education	4	2	1	5	12
Other	0	0	3	0	3
				TOTAL	624

BASIS OF ALLEGED DISCRIMINATION - ALL CASES FILED*

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Sex - female	47	19	25	43	134
Pregnancy	17	11	11	7	46
Sex - male	3	4	2	7	16
Age	29	20	29	37	115
Retaliation	51	26	30	51	158
Disability	106	59	65	121	351
Marital status	6	3	3	10	22
Political belief	2	0	1	1	4
Religion	11	0	4	16	31
National origin	15	8	6	9	38
Race - American Indian	22	11	21	16	70
Race - Black	5	5	3	1	14
Race - other	1	1	6	5	13
Familial status	3	0	0	10	13
Color	11	4	4	1	20
Other	0	1	1	2	4

*percentages total more than 100% because some cases allege more than one basis

BASIS OF ALLEGED DISCRIMINATION - EMPLOYMENT CASES FILED ONLY¹

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Sex - female	45	19	25	37	126
Pregnancy	17	11	11	6	45
Sex - male	3	3	1	5	12
Age	29	19	28	31	107
Color	11	4	0	1	16
Retaliation	50	25	29	37	141
Disability	89	53	55	73	270
Marital status	6	3	2	5	16
Political belief	2	0	0	1	3
Religion	5	0	2	4	11
Other	0	1	2	2	5
National origin	11	8	4	8	31
Race - American Indian	11	7	18	2	38
Race - Black	4	3	3	1	11
Race - other	1	1	6	5	13

ISSUES OF ALLEGED DISCRIMINATION - ALL CASES FILED*

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Discharge	70	46	42	58	216
Terms/conditions	44	27	18	37	126
Hiring	21	11	25	15	72
Sexual harassment	20	11	17	18	66
Demotion	5	0	0	1	6
Harassment	39	21	20	38	118
Reasonable Accom.	24	19	16	35	94
Maternity					
Leave	0	2	0	1	3
Return to Work	4	2	0	1	0
Pay comparability	5	1	0	0	6
Promotion	3	2	1	0	6
Other**	69	22	46	70	207

*percentages total to more than number of cases
filed because some cases allege more than one issue or basis

**Other issues of Discrimination include but are not limited to: Advertising, Apprenticeship, Assignment, Benefits, Pension, Insurance, References, Referrals, Discipline, Layoff, Exclusion, Paternity, Training, Union Representation, Posting Notices, Recall, Early Retirement incentives etc.

BASIS OF ALLEGED DISCRIMINATION - HOUSING CASES FILED ONLY*

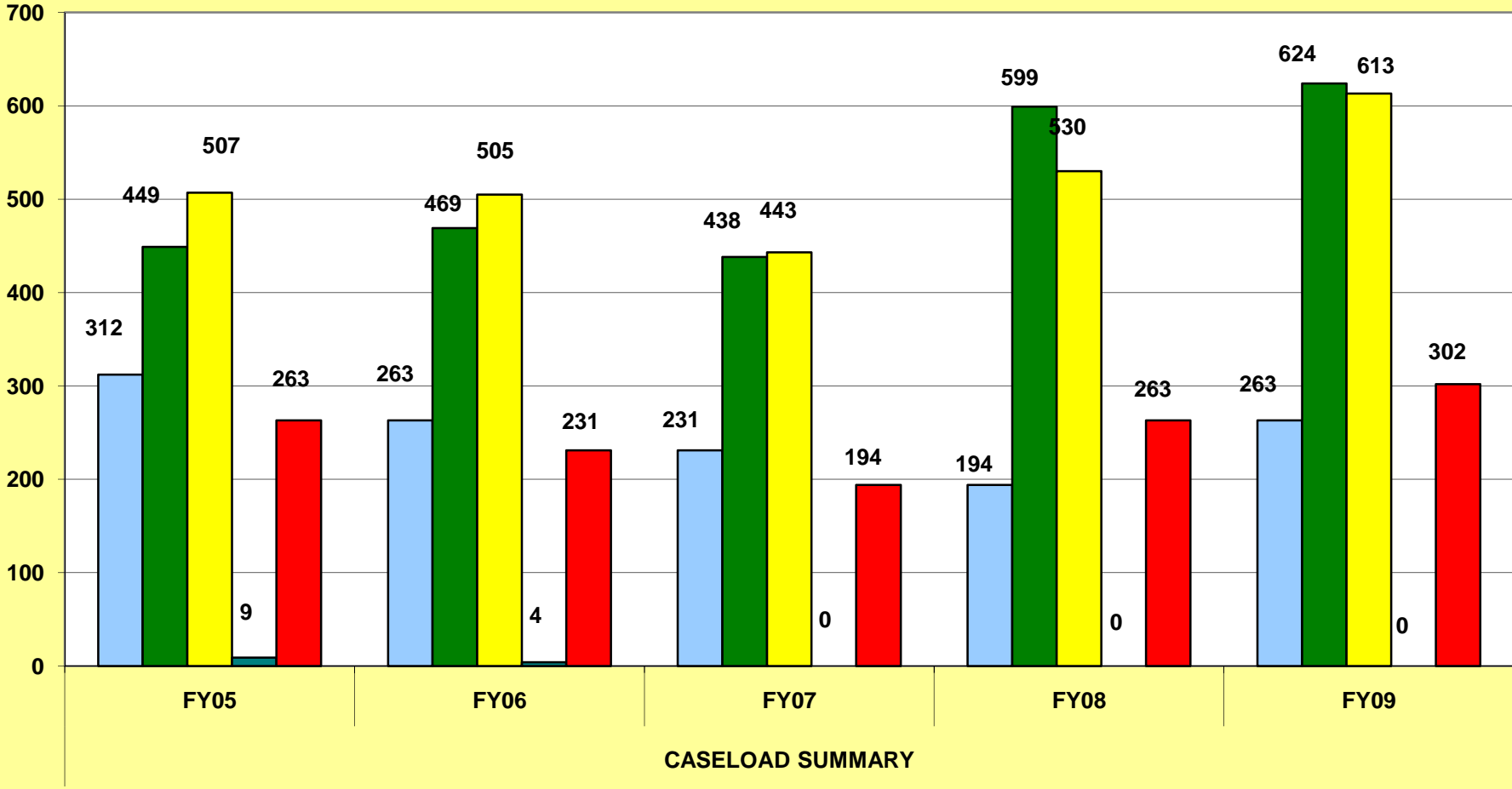
	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Sex - female	2	0	0	2	4
Sex - male	0	0	0	1	1
Age	0	0	0	5	5
Retaliation	1	1	0	0	2
Disability	9	1	1	25	36
Marital status	0	0	1	5	6
Political belief	0	0	0	0	0
Religion	0	0	1	0	1
National origin	0	0	1	0	1
Race - American Indian	6	1	0	0	7
Race - Black	0	0	0	0	0
Race - other	0	0	0	0	0
Familial status	3	0	0	10	13

*percentages total more than 100% because some cases allege more than one basis

TYPES OF CASE CLOSURE IN HOUSING CASES

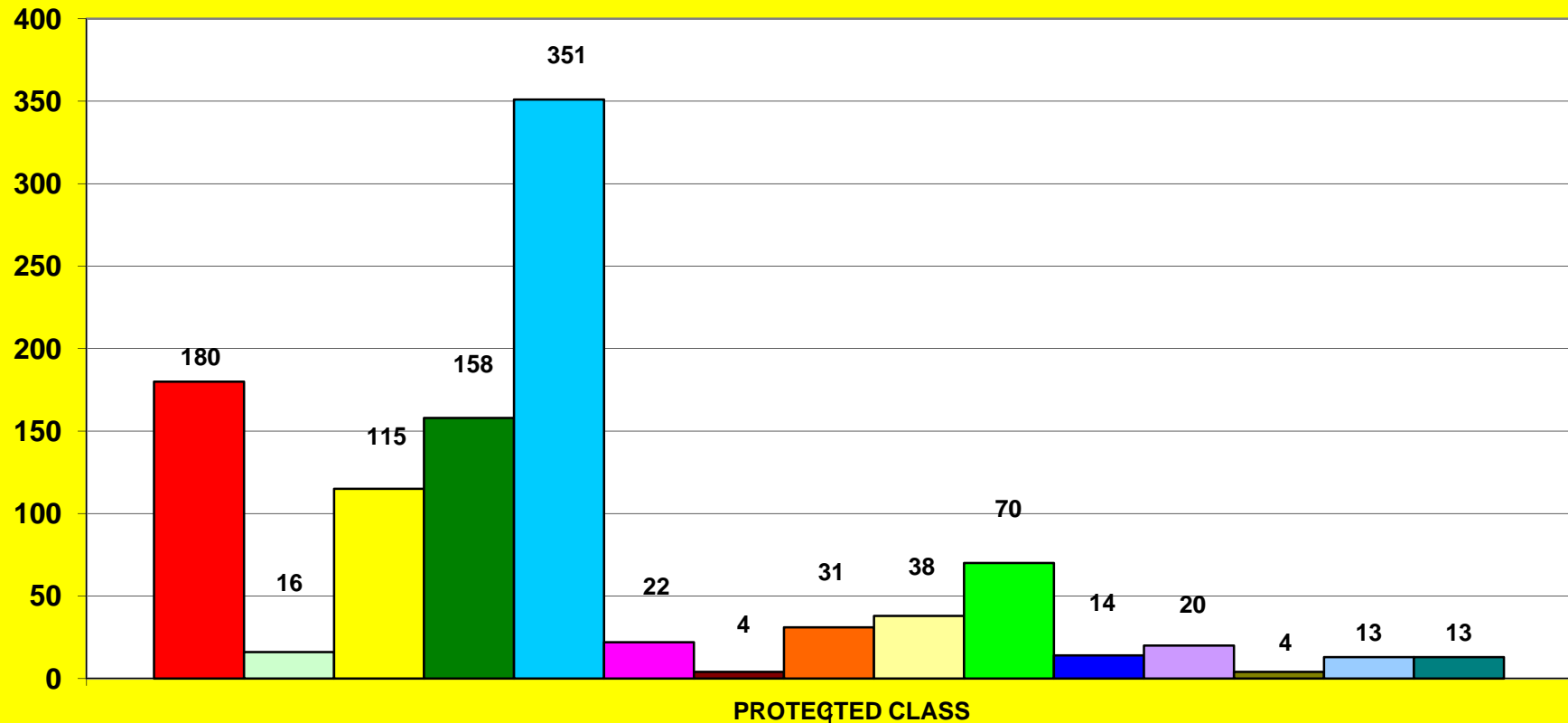
	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total FY09
Closures favoring complainant					
Predetermination settlements	5	10	2	1	18
Withdrawal w/ benefits	0	0	0	1	1
Conciliation after reasonable cause finding	0	0	1	0	1
Reasonable cause finding (conciliation failure, sent to hearings)	1	1	0	0	2
				Total	22
Closures favoring respondent					
No cause findings	3	7	2	1	13
Miscellaneous closures					
ADMINISTRATIVE CLOSURES					
Withdrawal-no benefits	0	0	0	1	1
Total Housing Closures					36

CASE LOAD SUMMARY FISCAL YEAR 2005 TO FISCAL YEAR 2009



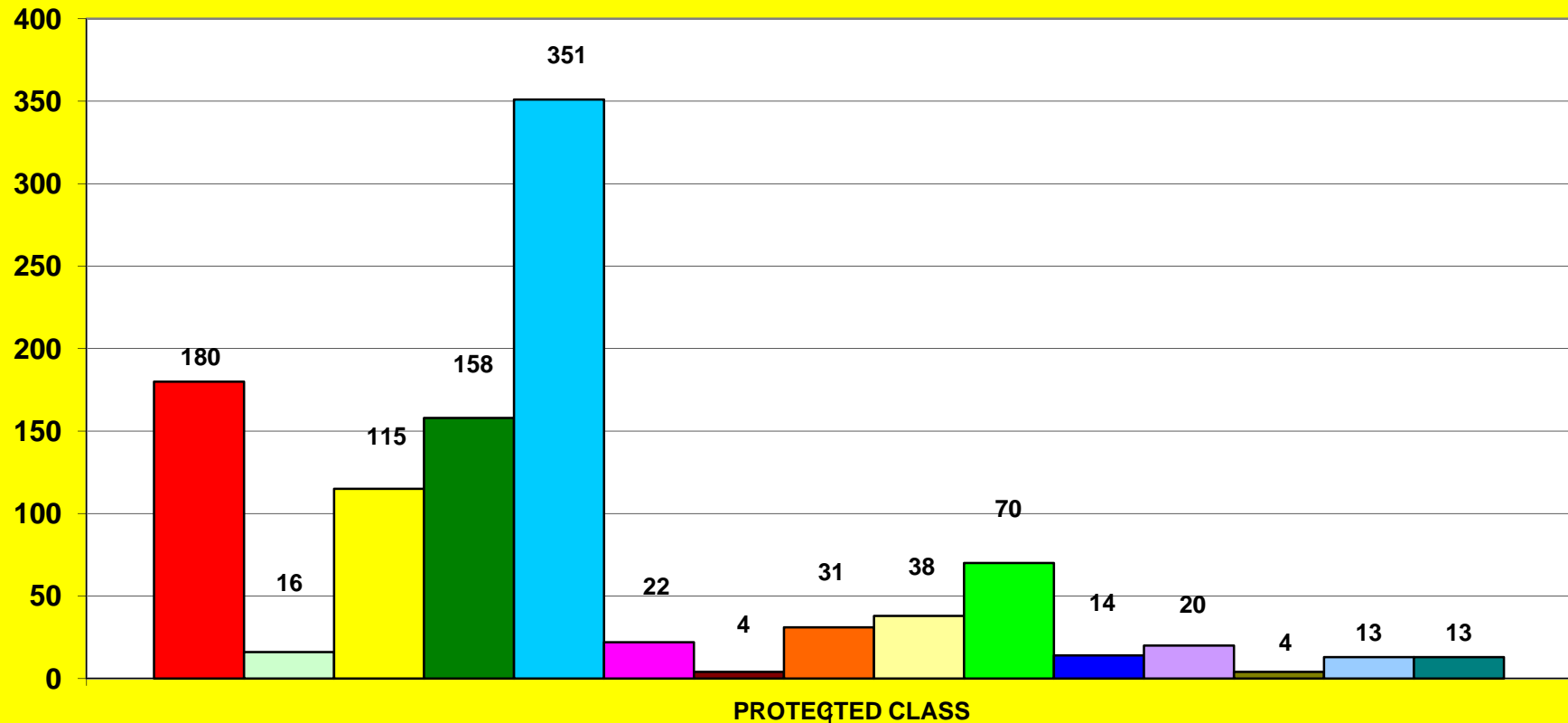
■ Cases open at beginning of year
 ■ Cases filed during year
 ■ Cases closed during year
■ Cases reopened
 ■ Cases open at end of year

TYPES OF CHARGES FILED FY09 (JULY 1, 2008 - JUNE 30, 2009)
 Total case number reflects some cases are filed in more than one category



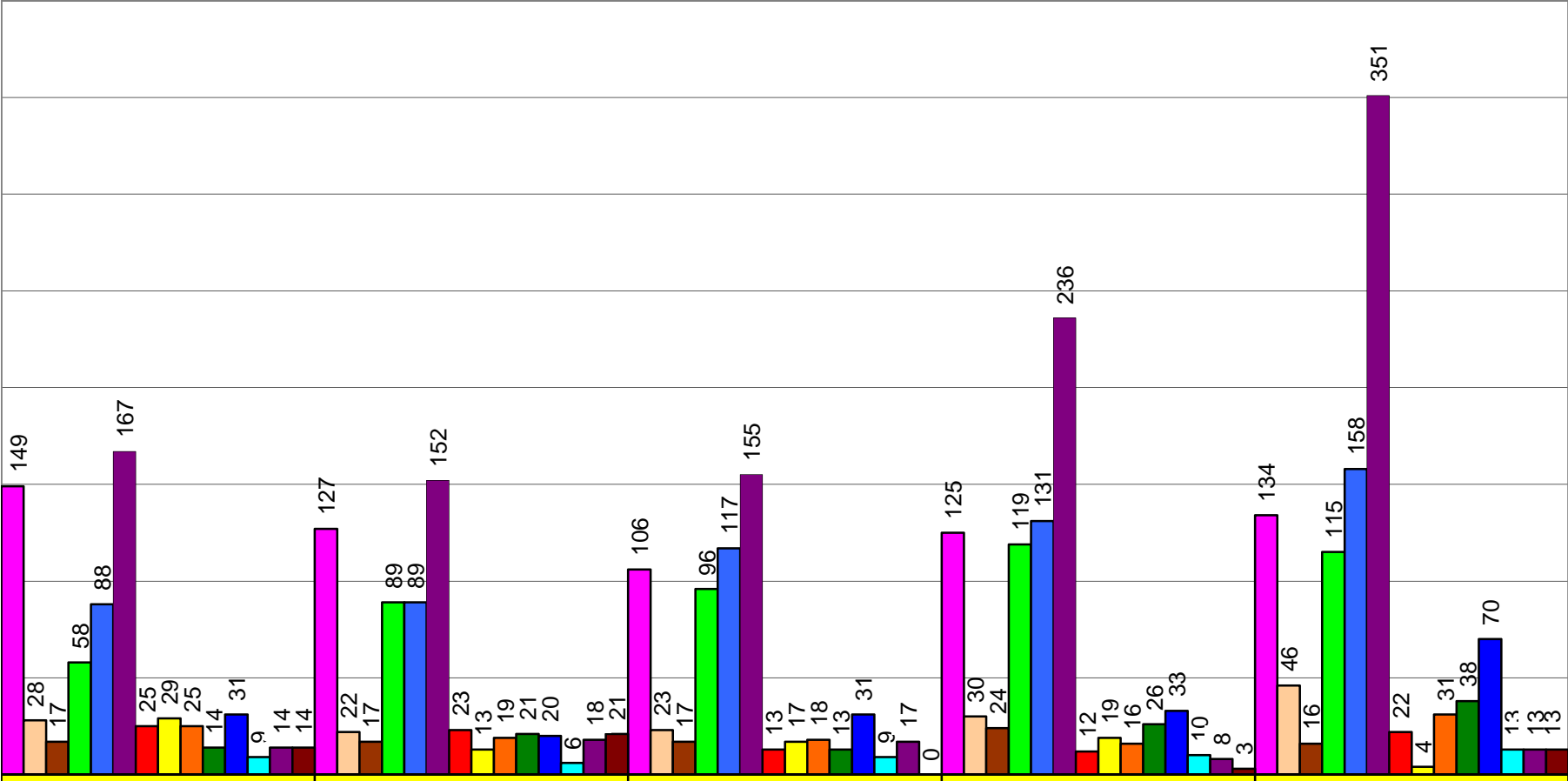
- Sex - female (including pregnancy)
- Sex - male
- Age
- Retaliation
- Disability
- Marital status
- Political belief
- Religion
- National origin
- Race - American Indian
- Race - Black
- Color

TYPES OF CHARGES FILED FY09 (JULY 1, 2008 - JUNE 30, 2009)
 Total case number reflects some cases are filed in more than one category



- Sex - female (including pregnancy)
- Sex - male
- Age
- Retaliation
- Disability
- Marital status
- Political belief
- Religion
- National origin
- Race - American Indian
- Race - Black
- Color

BASIS OF DISCRIMINATION COMPLAINTS FY05 - FY09



Sex - female	Pregnancy	Sex - male	Age	Retaliation
Disability	Marital status	Political belief	Religion	National origin
Race - American Indian	Race - Black	Race - other	Familial status	