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Employment at Will: A Trap for the Unwary

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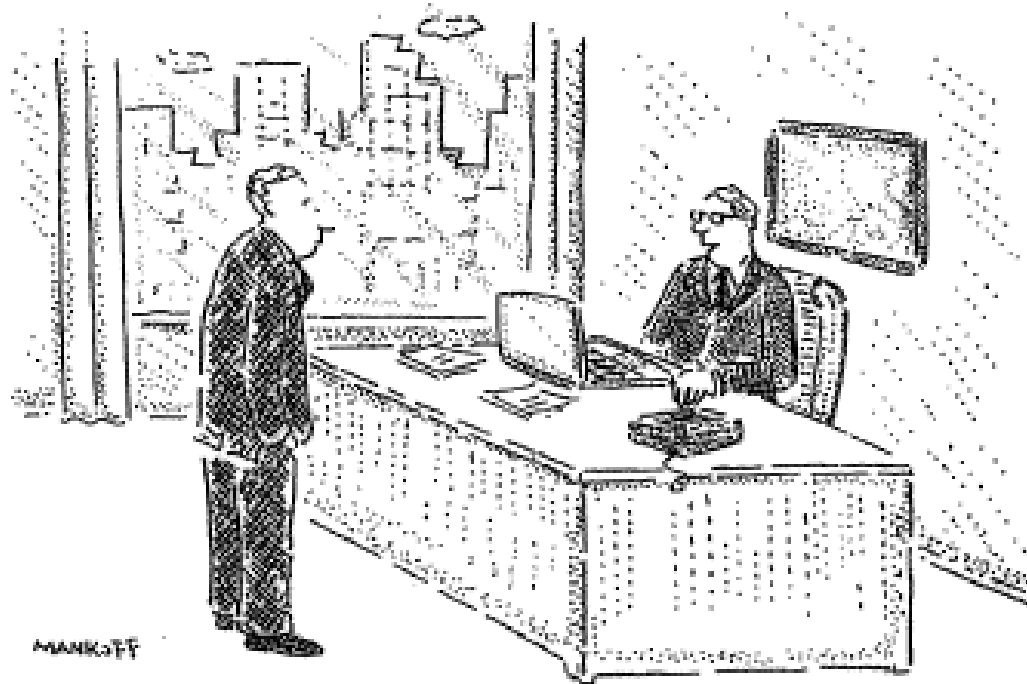


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THE NEW YORKER



"Brodman, after giving it much thought, I've decided to let you go for no apparent reason."

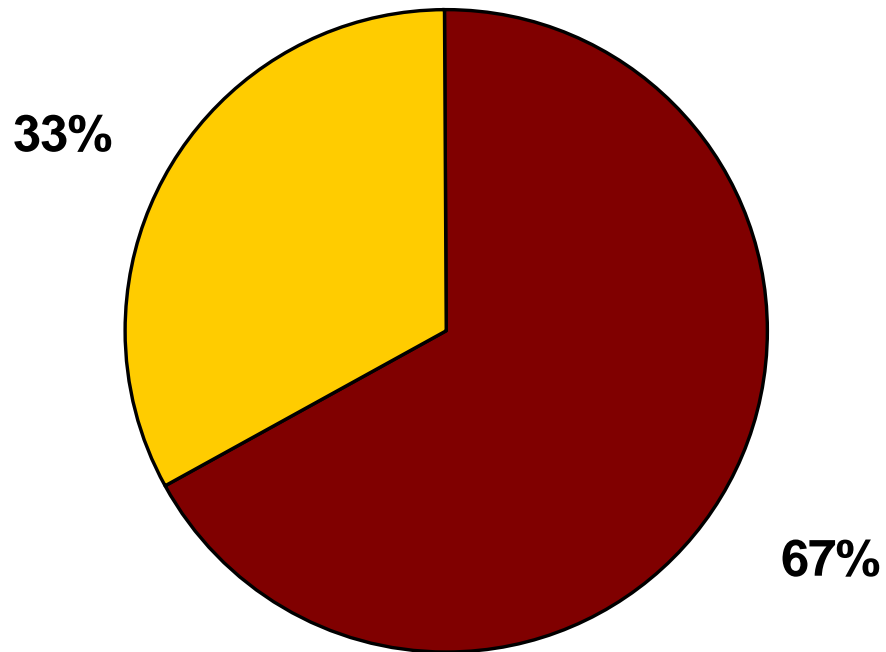
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Too many workers are treated unfairly by the company they work for



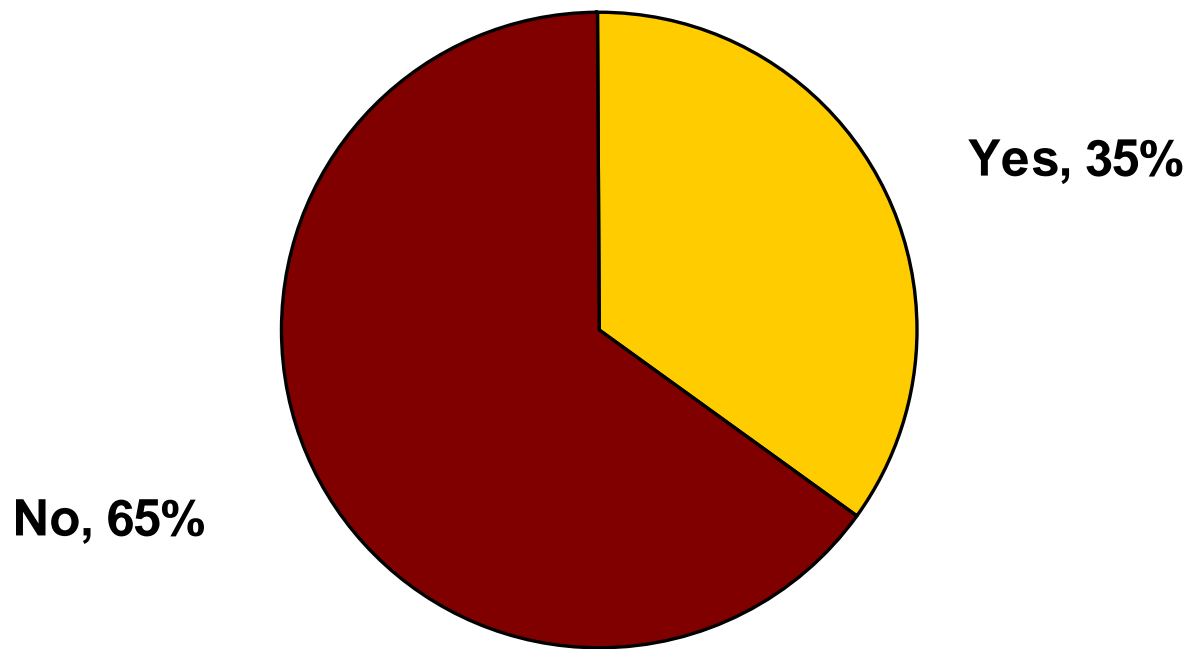
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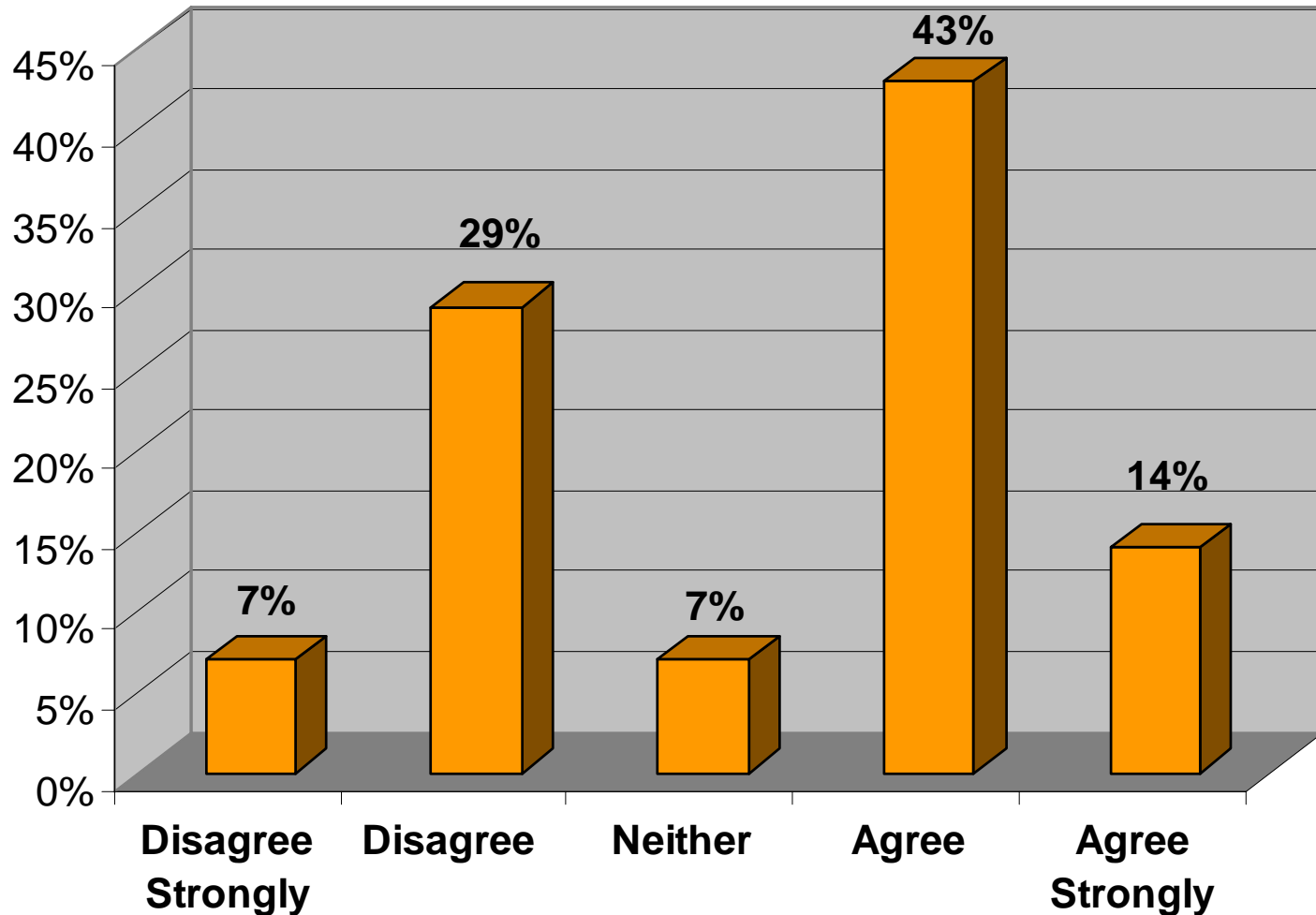
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An employee whose job performance has always been satisfactory may not be fired





The best evidence of an employee's work performance is that employee's performance evaluations



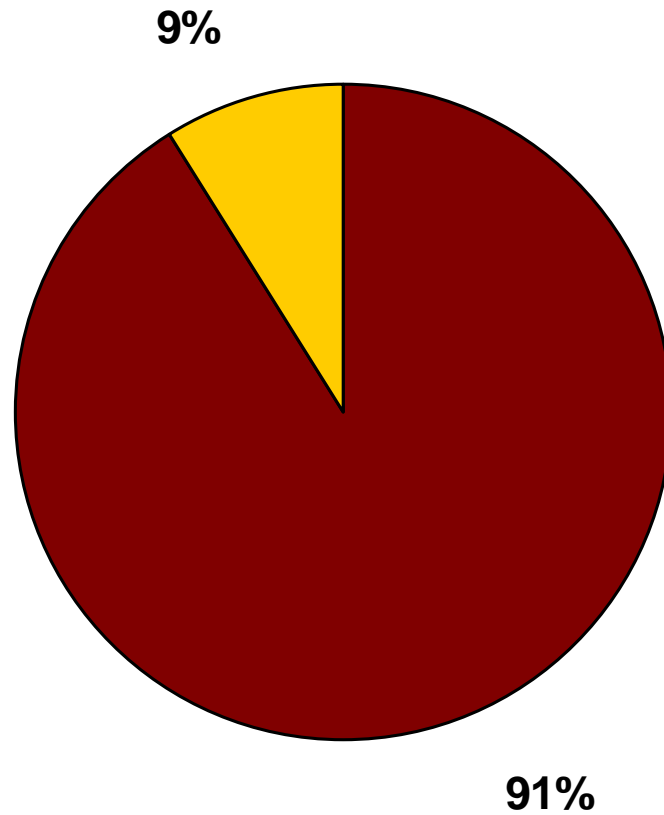
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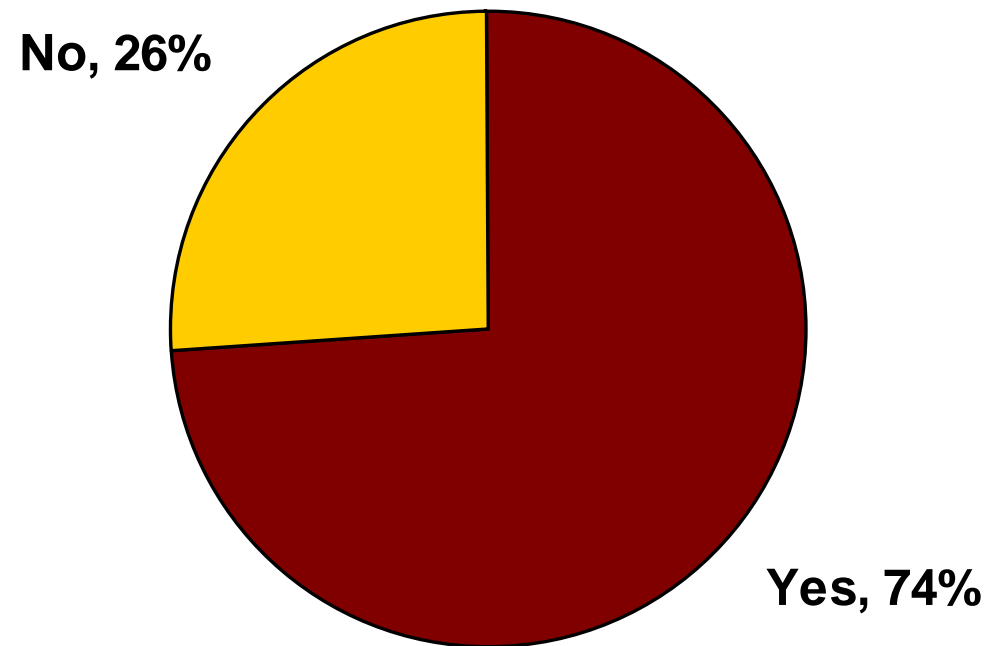
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The company is negligent if it does not properly document an employee's performance problems





All companies must give an employee fair warning before firing the employee





WHAT IS EMPLOYMENT-AT-WILL?

An employer may discharge for any reason except an illegal one:

- Good reason
- Bad reason
- No reason
- Not an illegal reason



UNLAWFUL REASONS FOR DISCHARGE

- Race
- Gender
- National Origin
- Religion
- Pregnancy



UNLAWFUL REASONS FOR DISCHARGE

- Age
- Disability
- Sexual Preference
- Lawful Activities
- Retaliation (OSHA, ERISA, NLRB)



PUBLIC POLICY EXCEPTION

Exercising a legal right: Workers' Compensation claim

- Reporting safety violation
- Joining a union
- Refusing lie detector test
- Accepting jury service
- Honoring a subpoena
- Complaining about legal violations



PUBLIC POLICY EXCEPTION

Refusal to violate the law:

- Perjury
- Price fixing
- Pollution

Whistle-blowing



COLORADO STATUTE (24-34-402.5)

Unlawful to terminate an employee for:

- Engaging in lawful conduct
- Off-premises
- During non-working hours



DEADLIEST DOCUMENTS FOR KILLING EMPLOYERS

- Personnel policies and employee handbooks: they typically negate employment at will before trial and certainly during trial.
- Inflated employee performance evaluations. See Juror Attitude Surveys, *infra*.



CONTRACTS/POLICIES

- Policies are an issue in almost every employment case.
- Personnel policies are usually legally binding contracts.
- Most disclaimers are invalid.
- Policies are:
 - a) Idealistic when written; and
 - b) Practical when applied.
- Policy violations make the employer the issue.



LIMITATIONS OF DISCLAIMERS

- **Disclaimers are ineffective if general or permissive language is inconsistent with more specific or mandatory language in the same document.** See e.g., *Cronk v. Intermountain Rural Elec. Ass'n*, 192 Colo. App. Lexis 228 (Colo. App. 1992) (handbook disclaimer not effective when handbook also contained termination procedures). See also *Torrez v. BEI Graphics Corp.*, 134 F.3d 383 (10th Cir. 1998) (unpublished opinion)
- **Disclaimers may be ineffective where other documents, statements of policy, or past practices by supervisors conflict with the intent to disclaim a contract.** See, e.g., *Allabashi v. Lincoln National Sales Corp.*, 824 P.2d 1, 3 (Colo. App. 1991).
- **An employer cannot disclaim tortious conduct or violations of public policy and statutes.** See *Mariani v. Rocky Mountain Hosp. & Med. Serv.*, 902 P.2d 429 (Colo. 1994), aff. on other grounds, 916 P.2d 429 (Colo. 1996)



THE LEGAL PROBLEMS WITH POLICIES

- Specific promises or commitments in policies are binding on the employer.
- Deviations from policy are evidence of discrimination.
- Failure to follow policies makes the employer the issue at trial.
- Juries punish employers who fail to follow their own policies.

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**“We have met the enemy
and they are us.”**

-Pogo



EXAMPLES

- “Employees will receive a written performance evaluation every year on the anniversary date of their employment.”
- “The Company is committed to providing equal employment opportunity and a workplace free from harassment.”
- The Company is committed to providing the best possible working conditions for its employees.”
- “The Company has a zero tolerance policy against sexual harassment.”



EXAMPLES (cont.)

- “Employees who report sexual harassment will not be retaliated against.”
- “Conduct that is offensive to third parties or co-workers will not be tolerated.”
- “You will treat all persons with whom you have contact in a courteous manner.”
- You will refrain from behavior that is offensive or undesirable.”



CONFIDENTIALITY

- “All complaints made under this policy will be confidential.” (Emphasis added)
- “The investigation will be confidential.” (Emphasis added)



INVESTIGATION

- “All complaints under this policy will be promptly and thoroughly investigated.”
(Emphasis added)



PERSONNEL GUIDELINE

Disciplinary Guideline

- When performance issues are identified with respect to an employee, instances of unacceptable conduct occur, or for any reason the Company perceives there is a problem in the employment relationship, the Company may take any of a variety of steps, up to and including immediate suspension or termination. In some cases, the employee might be given an oral or written warning. In other cases, suspension (with or without pay), demotion, or other action might take place.



PERSONNEL GUIDELINE (Con't)

Disciplinary Guideline

- The Company reserves the right to determine what it believes is an appropriate response and to implement it. Because the particular facts and circumstances may vary widely and are often unique, the action taken in an individual case should not be assumed to establish a precedent in other circumstances.



PERSONNEL GUIDELINE

Reduction of Work Force/Reorganization

- Because of constantly changing business conditions and staffing needs, no employee is guaranteed continued employment. In the case of a reorganization or changing staffing needs, the Company may implement a reduction in work force resulting in an employment loss to one or more employees. The Company will implement any such reduction in a manner that best meets the staffing requirements of the Company at the time.



PERSONEL GUIDELINE (Con't)

Reduction of Work Force/Reorganization

- Employees should also be aware the Company generally disregards seniority in favor of such factors as staffing needs, job performance, job skills, and other job-related factors.



HOW JURIES DECIDE CASES

- What the employee did (or didn't do).
- How the employer handled it.



WHY EMPLOYERS LOSE AT TRIAL

- Adopting aspirational and unrealistic personnel policies; and
- Failing to follow the policies to the letter, particularly when discharging employees.

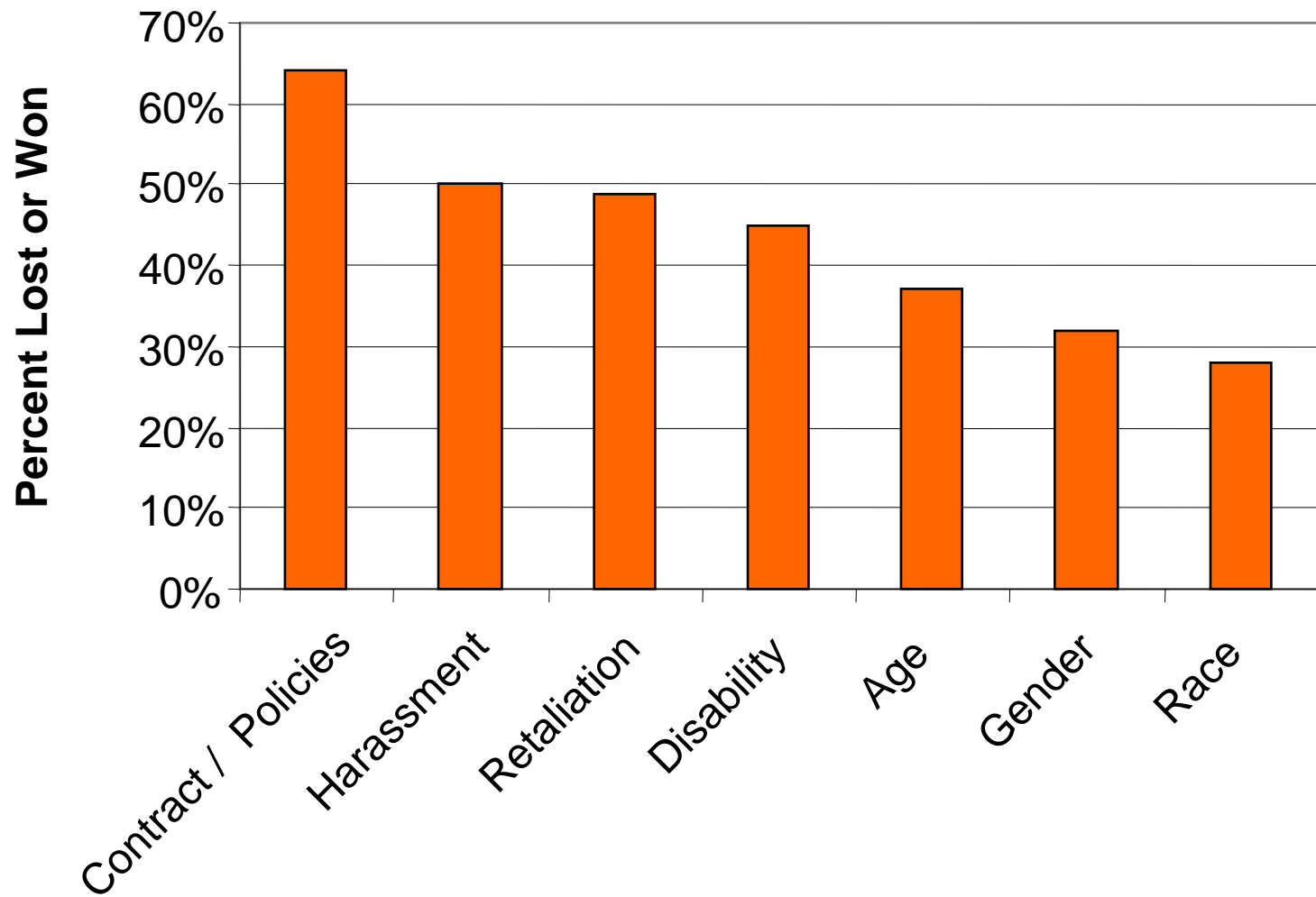
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Percentage of Employer Losses and Employee Wins for Particular Claims in Colorado 1994 - 2008





SUMMARY AND CONCLUSIONS

- Employment at will is nonsensical to jurors.
- Employers who use it at trial are unwisely fighting uphill.
- “Do not fight uphill.” Sun Tzu, The Art of War.
- Employment at will is a potentially deadly concept for employers. Managers and HR Professionals actually believe disclaimers.
- Well-written personnel policies don’t need disclaimers.