The 1996 Employment Protection Act and the Abolition of Common Law Wrongful Termination in Arizona

by David F. Gomez

On July 20, 1996, SB 1386, the Employment Protection Act ("Act"), took effect[1] and radically changed the law of the workplace in Arizona. Victims of wrongful termination will now often find they are without a tort or contract claim or remedy.

The Act abolished common law wrongful discharge claims,[2] codifying most of them under newly added A.R.S. §23-2501 as statutory discrimination claims with exclusive non-tort remedies. The new law recognizes as tort claims only those limited instances where the employer's conduct was retaliatory or in violation of a statute that otherwise provides no statutory remedy to the terminated employee. Also abolished were common law claims for breach of implied employment contract or promissory estoppel based on part performance. Under newly enacted A.R.S. §23-2501, only express written contracts are actionable.

The Act also shortened to one year the statute of limitations for bringing any employment tort or contract claim.[3] The Act's contract provisions do not affect the rights of public sector employees under the Arizona constitution or other state or local laws, or the rights of employers and employees as defined by a collective bargaining agreement.[4]

All workers in Arizona are affected by the statute but hardest hit are the approximately 300,000 employees, over 16 percent of the entire workforce, who work for small businesses (that is, those with less than 15 employees).[5] Employees of small businesses, which generally are not subject to federal or state anti-discrimination laws, have long relied on the common law as their only protection against or remedy for wrongful termination. Arizona's Attorney General, who is responsible for enforcing the state's civil rights laws and protecting citizens against discrimination, vigorously opposed SB 1386 because it would entirely eliminate the only means of so many citizens to seek justice, even in cases of sexual harassment.[6]

In a partial and somewhat anomalous response to the Arizona Attorney General's opposition, the final version of the Act amended the Arizona Civil Rights Act[7] to allow employees of small businesses to bring sexual harassment claims.[8]

The Act's Intent: To Clarify or Limit the Arizona Supreme Court's Authority?

The Act is a stern rebuke of the Arizona Supreme Court for allegedly acting outside its constitutional authority by "creating" new causes of action, particularly the public policy wrongful termination tort claim recognized in *Wagenseller v. Scottsdale Memorial Hospital*.[9] In the "*Intent*" section of the Act, the legislature lectured the court on what it believes is the court's proper place within the framework of the Arizona constitution:

> Public policy is expressly determined by the legislature. [T]he courts...are not authorized to establish a cause of action in connection with specific acts or omissions that constitute a violation of the public policy of this state.
>
> [T]he courts [have no] authority to establish new causes of action or to independently set forth the public policy of the state.
>
> The [Arizona Supreme Court] impedes the uniform application of laws to citizens of the state when it purports to create on an ad hoc basis, rights to recover civil damages in response to varying factual situations before the court. Courts are not vested with the authority to create public policy of the state.
>
> [The Arizona Constitution] vests the legislature with the authority to create laws and the public policy... In contrast, the courts are established to adjudicate cases by applying the laws enacted by the legislature to the facts of those cases.

Fighting words? Yes.

Is the Act Unconstitutional?

The Act abolishes common law rights and remedies, abrogates the right to recover damages for injuries, or imposes a statutory limitation on damages. Proponents of the Act will respond that it merely regulates but does not abrogate rights and remedies for termination claims, providing a reasonable alternative for bringing such claims. However, public policy tort claims based on an employer's violation of the Arizona Civil Rights Act, or any statute that provides a remedy, are abolished and the only "alternative" is a

statutory discrimination claim, not a tort claim for damages. The Act has effectively closed the courthouse door to anyone seeking to recover tort damages for such a claim.

In the case of employees of small businesses, a large and foreseeable class of victims (over 300,000) workers, the Act effectively deprives them of *any* means to seek justice. The sexual harassment exception for employees of small businesses is meaningless to those terminated on the basis of race, color, religion, national origin, disability, age or sex. Provisions of the Act may well be unconstitutional under Article 18, §6, and Article 2, §§13 and 31, of the Arizona Constitution.[10] In any event, the Arizona Supreme Court will have the last word on the issue as constitutional challenges make their way through the courts.

In the coming court battles over the Act's meaning and effect, the first shot may be fired by employer defendants in pending wrongful termination suits, contending the Act is to be applied retroactively. In the face of A.R.S. §1-244 and the Act's abrogation of long-established substantive rights and remedies, such an argument is unlikely to succeed.[11]

How does the Act change existing law?

Summary of Wrongful Termination Law Prior to the Employment Protection Act Taking Effect

Arizona recognized three common law exceptions to the employment-at-will doctrine: (1) implied contract exception, (2) "public policy" exception, and (3) implied covenant of "good faith and fair dealing" exception.[12] Arizona courts recognized the "public policy" exception as a tort claim[13] and the other two exceptions as contract claims.[14]

Public policy tort claims were based on one or more of four theories: (1) the employer's violation of a statute (e.g., race, age, sex and disability discrimination); (2) retaliatory discharge for refusal to commit an unlawful act; (3) retaliatory discharge for whistleblowing; or (4) retaliatory discharge for exercise of a statutory right or important public obligation (e.g., jury duty, national guard service, etc.).[15] Tort damages were the remedy.[16] Damages included lost earnings, any decrease in future earning capacity, damages for mental anguish and emotional distress, physical injury, harm to reputation, lost insurance coverage and punitive damages.[17]

The tort claim exception was based on a violation of public policy. Public policy was to be found in Arizona's constitution and statutes as well as pronouncements by Arizona courts,[18] although most if not all of the reported public policy tort cases were based on public policy expressed in state statutes. The tort claim was also sometimes based on public policy expressed in federal statutes[19] but no reported Arizona cases directly address the issue. The Arizona Supreme Court has expressed a broad view of what public policy means:

> The relevant issue is not limited to whether any particular law or regulation has been violated, although that may be important, but instead emphasizes whether some important public policy interest embodied in the law has been furthered...[20]

Implied-in-fact contract claims arose out of (a) verbal statements about the nature or term of employment; (b) written statements in handbooks, manuals, policies or procedures; or (c) course of conduct, custom or practice.[21] An implied contract could be disclaimed by a prominently displayed written disclaimer clearly stating that the contents of the document did not constitute the terms of a contract or that the relationship was terminable at will.[22] Contract damages were available.

Employees also sometimes brought promissory estoppel claims based on part performance. This might occur when enforcement of an oral contract was claimed barred by the statute of frauds. Arizona courts recognized these claims as contract or quasi-contract claims in the employment setting.[23]

The Employment Protection Act

Public Policy Torts

The act abolishes common law claims for wrongful discharge in violation of public policy based on the employer's violation of a statute (e.g., race, age, sex and disability discrimination). These claims are actionable only as statutory claims, not tort claims, if the statute provides a remedy to the employee for the violation. The Act also provides that "[a]ll definitions and restrictions contained in the statute also apply to any civil action based on a violation of the statute."[24] The new law expressly refers to:

- The Arizona Civil Rights Act (race, color, religion, national origin, sex, age and physical handicap discrimination).[25]
- Occupational Health and Safety Act (OSHA).[26]
- Statutes governing hours of employment.[27]
- Agriculture Employment Relations Act.[28]

What was once a public policy tort claim for wrongful discharge under *Broomfield v. Lundell*[29] based on the theory that the employer terminated the employee on the basis of age or gender has become a statutory age or gender discrimination claim. The former tort claim is now subject to the jurisdictional and administrative prerequisites to suit under the Arizona Civil Rights Act with exclusive and limited non-tort remedies under that statute (back pay, reinstatement, injunctive relief and attorneys' fees).[30] The employee may only bring a tort claim for violation of public policy based on the employer's violation of the state statute if the statute does not otherwise provide a remedy to the employee or for a violation of the Arizona Constitution.[31]

The act codifies with some limitations former common law tort claims for retaliatory discharge in violation of public policy based on the employee's (a) refusal to commit an unlawful act; (b) whistleblowing, or (c) exercise of a statutory right.

While the Act abolishes common law claims for wrongful termination, making most of them statutory claims with exclusive statutory remedies, it expressly provides that some claims for *retaliatory* discharge in violation of public policy remain actionable as tort claims with tort remedies:

> It is the intent of the legislature that the public policy of the state is that the termination of an employee in retaliation for refusing to violate the public indecency or other laws of the state constitutes a violation of the Employment Protection Act, subjecting the employer to civil damages.[32]

Retaliatory Discharge in Violation of Public Policy Based on the Employee's Refusal to Commit an Unlawful Act

The Act codifies claims for retaliatory discharge for an employee's refusal "...to commit an act or omission that would violate the constitution of Arizona or the statutes of this state."[33] To this limited extent, the tort claims recognized in *Wagenseller v. Scottsdale Memorial Hospital* (refusal to violate public indecency laws)[34] and *Vermillion v. AAA Pro Moving Storage* (refusal to cover up a theft)[35] remain unaffected. Federal law, however, can no longer be claimed as a basis for public policy claims.

Retaliatory Discharge in Violation of Public Policy Based on the Employee's Whistleblowing

The Act limited the "whistleblowing" tort claim to state — not federal — law public policy and narrowly defined the elements of whistleblowing:

- An employee
- makes disclosure
- in a reasonable manner
- to the employer or a representative of the employee whom the employee reasonably believes is in a supervisory position or has authority to investigate the information given and to take action to prevent further violations, or to an employee of a public body or political subdivision of Arizona or any public body or political subdivision,
- that the employer has or will violate the Arizona Constitution or statutes.[36]

Retaliatory Discharge in Violation of Public Policy Based on the Employee Exercising Certain Statutory Rights

The Act codifies this claim with express limitations. The public policy tort claim may only be based on the exercise of the following state law rights:

- Rights under the workers' compensation statutes;[37]
- Service on a jury;[38]
- Voting rights;[39]
- Free choice with respect to nonmembership in a labor organization;[40]
- Service in the national guard or armed services;[41]
- Right to be free from the extortion of fees or gratuities as a condition of employment; and[42]
- Right to be free from coercion to purchase goods or supplies from any particular person as a condition of employment;[43]

Under the Act, government employees will have a claim for wrongful termination if they have a right to continued employment under the constitutions of the United States or Arizona, state statutes, any applicable regulation, ordinance, policy, practice, or contract of the state, any subdivision of the state, or other public entity.[44]

Contract Claims

The Act abolished common law claims for breach of implied contract in the employment setting recognized in *Wagenseller*,[45] *Leikvold v. Valley View Community Hospital*,[46] and *Loffa v. Intel Corp*.,[47] and promissory estoppel in employment based on Section 90 of the *Restatement (Second) Contracts*. The Act provides that the employment relationship is expressly "severable at the pleasure of either the employee or the employer" unless:

•A written contract, signed by both employee and employer, specifies a definite term or otherwise limits the employer's right to terminate;

•A written contract in the form of an employment handbook, manual, or similar document that expresses the intent that it is a contract of employment, is distributed to the employee; or

•A written contract is signed by the party to be charged.[48]

Part performance is not sufficient to eliminate these specific requirements.[49] A claim for promissory estoppel based on part performance appears to be no longer viable. This provision does not affect public sector employees who would otherwise have rights under the Arizona Constitution, state or local laws. It also does not affect employees with rights under a collective bargaining agreement.[50]

Statute of Limitations

The Act changed the limitations period for bringing claims for breach of employment contract or wrongful termination to one year.[51] The limitations period was two years for public policy wrongful discharge claims and three and six years, respectively, for claims for breach of oral or written employment contracts.[52]

Conclusion

Arizona's common law of wrongful termination appears to be history as of July 20, 1996. In its place, the so-called Employment Protection Act offers substantial protection for employers, *not* employees, by abrogating or strictly limiting wrongful discharge claims and remedies existing at common law. Employees of small businesses are now left with no protection against discriminatory terminations, with the sole exception of sexual harassment cases.[53] Even though the Act purports to define the role of the courts and codify predictable limits in wrongful termination cases, the Act raises many as yet unanswered questions.

The biggest question now is whether the Act is unconstitutional.

David F. Gomez *is president of David F.Gomez, P.C., Phoenix, and exclusively practices in the area of labor and employment law.*

ENDNOTES

1. Senate Bill 1386 was signed by Governor Symington April 9, 1996. The legislature adjourned on April 20, 1996, and the statute takes effect on the 91st day thereafter i.e., on July 20, 1996, the general effective date applicable to non-emergency legislation. *See* A.R.S. §1-241 and annotations.
2. *See* Arizona Employment Law Handbook, Vol. 1, Art. 6.1, for the history of common-law wrongful termination claims in Arizona.
3. A.R.S. §12-541 subsecs. 3, 4.
4. A.R.S. §23-2501, subsec. 2.
5. According to research data maintained by Research Administration, Arizona Department of Economic Security, for the last quarter of 1995, there were 105, 298 employers in Arizona employing 1,867,550 employees based on averages for the three months data was reported. Based on the data, an estimate of employers employing 14 or less employees is 84,706; estimate of the number of employees they employed over the three-month period is 303, 116, or approximately 16.23% of the entire workforce in Arizona. DES categorizes reporting employers into those employing 0, 1-4, 5-9, 10-19, etc. employees. For purposes of this analysis, it was estimated that one half of employers in the 10-19 employee category employed 14 or less employees, and one half employed 15 or more employees. (Data Source: "Size of Firm Summary," DES Research Administration.)
6. On February 7, 1996, the Attorney General's Chief of Administration, Tom Augherton, wrote to the Arizona State Senate's Professions and Employment Committee. The Attorney General strongly opposed SB 1386 because the statute would eliminate civil rights protections of employees who work for businesses employing fewer than 15 workers. Such workers "...rely on long-standing tort protections as remedies and deterrents against sexual harassment and discrimination based on sex, race, national origin, age and disability. No provisions exist to either expand civil rights statutory coverage or otherwise provide for protecting these disenfranchised Arizonans." The Bill "severely limits tort remedies for sexual harassment and undermines private employer policies against sexual harassment." *Id*. Even after the Bill was amended to make small businesses subject to statutory sexual harassment claims, Mr. Augherton wrote to the Speaker of the Arizona House of Representatives on April 2, 1996: "Amendments to the Bill failed to address our fundamental concerns. The legislation severely limits or eliminates current tort remedies for victims of discrimination: age discrimination, sex discrimination, race and national origin discrimination, and religious discrimination. The humiliation and distress that these victims suffer will go uncompensated while the benefit of deterrents is reduced... We ask that you reject this Bill because it does so much damage to existing legal rights of our citizens in an attempt to clarify the role of the Legislature."
7. A.R.S. §§41-1441, et seq.
8. A.R.S. §§41-1461, subsec. 2.
9. 147 Ariz. 370, 710 P.2d 1025 (1985).
10. Article 18, §6 of the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." *See also, Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986) ["the guarantee of access to judicial remedy prevents the legislature from closing the courthouse door to those claiming to have suffered a wrong recognized by the common law"]; and *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 861 P.2d 625 (1993)[Article 18, §6 "is not limited to those elements and concepts of particular causes of action which were defined in prestatehood case law, and evaluation of common-law causes of action, whether in duty, standard of care, or damages, falls within broad coverage of the constitutional provision."] Article 2, §31 provides: "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person." There is also an equal protection argument because employees who work for small employers, in contrast to others who work for companies with 15 or more employees, are left with no statutory protection except in the case of sexual harassment. *See*, Article 2, §13, Equal privileges and immunities.
11. A.R.S. §1-244 provides: "No statute is retroactive unless expressly declared therein." *See also, e.g., Allen v. Fisher*, 118 Ariz. 95, 96, 574 P.2d (1314 (App. 1978)[no retroactive application where new statute is one of substantive law, i.e., creating, defining and regulating rights].
12. *Wagenseller*, 147 Ariz. 370, 376, 710 P.2d 1025 (1985); *Leikvold v. Valley View Community Hospital*, 141 Ariz. 544, 545-546 n.1, 688 P.2d 170 (1984); *Wagner v. City of Globe*, 150 Ariz. 82, 85, 722 P.2d 250 (1986).

13. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 417-418 n.7, 808 P.2d 297 (App. 1990); *Mack v. McDonnell Douglas Helicopter Co.*, 179 Ariz. 627, 629, 880 P.2d 1173 (App. 1994); *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 198, 888 P.2d 1375 (App. 1994).
14. *Id*. *But see, e.g.*, The Arizona Employment Law Handbook, Vol. 2, Art. 10.6, Labor and Employment Law Jury Instructions, instruction no. 3, Comment: "[T]here is a split in the [State Bar Civil Jury Instructions] Committee as to whether tort damages may also be recovered [for breach of the covenant of good faith and fair dealing]." If tort damages are recoverable, the Act clearly has abrogated the tort claim in violation of Art. 18, §6. *See, Franks v. United States Fidelity & Guar. Co.*, 149 Ariz. 291, 718 P.2d 193 (App. 1985).
15. The Arizona Supreme Court recognized four theories of public policy violation. Public policy tort claims may be based on terminations where (1) an employee refused to participate in illegal acts, (2) an employee performed an important public obligation, (3) an employee exercised a legal right or privilege, and (4) the employee acted as a "whistleblower" in exposing the employer's wrongdoing. *Wagenseller*, 147 Ariz. 370, 377-78, 710 P.2d 1025, 1032-33; *Wagner*, 150 Ariz. 82, 88, 722 P.2d 250, 256. The Arizona Court of Appeal, in interpreting *Wagenseller*, identified a fifth theory: the employer's violation of a statute (Arizona Civil Rights Act's prohibition of sex discrimination) will trigger a common law tort claim for wrongful discharge. *Broomfield v. Lundell*, 159 Ariz. 349, 355, 767 P.2d 397 (App. 1988).
16. *Thompson v. Better-Bilt Aluminum Products Co.*, 171 Ariz. 550, 832 P.2d 203 (1992).
17. *Id*.
18. *Wagenseller*, 147 Ariz. 370, 378, 710 P.2d 1025, 1033.
19. *See Bernstein v. Aetna Life & Casualty Co.*, 843 F.2d 359, 364-365 (9th Cir. 1988); and *Gesina v. General Electric Co.*, 162 Ariz. 35, 38, 780 P.2d 1376 (App. 1989). In *Rains v. Criterion Systems*, 80 F.3d 339 (9th Cir. 1996), the Ninth Circuit, in a case arising in California, held that a federal statute (Title VII of the 1964 Civil Rights Act) could be the basis of a state law wrongful discharge case, and that such a claim was not removable to federal court. The District of Arizona, in an unpublished decision, reached the same holding. *Wozniak v. City of Scottsdale*, 9 IER Cas. 1471 (D. Ariz. 1994).
20. *Wagner*, 150 Ariz. at 89.
21. *Leikvold v. Valley View Community Hospital*, 141 Ariz. 544, 548, 688 P.2d 170 (1984); *Loffa v. Intel Corporation*, 153 Ariz. at 543.
22. *Leikvold*, *supra*; *Chambers v. Valley National Bank of Arizona*, 721 F.Supp. 1128, 1131 (D. Ariz. 1988) (construing Arizona law); *Thomas v. Garrett Corp.*, 744 F.Supp. 199, 201 (D. Ariz. 1989), *aff'd* 904 F.2d 41 (9th Cir.), *cert. den.* 498 U.S. 982 (1990).
23. The doctrine of promissory estoppel applies to an alleged employment contract otherwise barred by the statute of frauds where the promise has been made not to rely on the statute. *Mullins v. South Pac. Transp. Co.*, 174 Ariz. 540, 542, 851 P.2d 839, 841 (App. 1992); *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 421, 493 P.2d 1220, 1226 (1972). *See Fridenmaker v. Valley National Bank*, 23 Ariz. App. 565, 571, 534 P.2d 1064, 1070 (1975) for the elements of a cause of action for promissory estoppel which includes action or forbearance on the part of the promisee.
24. A.R.S. §23-2501, subsec. 3(b).
25. A.R.S. §§41-1441, et. seq.
26. Title 23, Chapter 2, Article 10 (A.R.S. §§23-401 et seq.)
27. Title 23, Chapter 2 (A.R.S. §§23-281 et seq.)
28. Title 23, Chapter 8, Article 5 (A.R.S. §§23-1381 et seq.)
29. 159 Ariz. 349, 767 P.2d 697 (App. 1988).
30. Under the Arizona Civil Rights Act, a prevailing party may be entitled to reinstatement or hiring into the position in question, back wages and fringe benefits, attorneys' fees, costs and appropriate injunctive or affirmative relief. A.R.S. §41-1481(G); *See Civil Rights Div. v. Superior Court*, 146 Ariz. 419, 706 P.2d 745 (App. 1985).
31. A.R.S. §23-2501, subsec. 3(b): "If the statute does not provide a remedy to an employee for the violation of the statute, the employee shall have the right to bring a tort claim for wrongful termination in violation of the public policy set forth in the statute."
32. Employment Protection Act, §1, subsec. E.
33. A.R.S. §23-2501, subsec. 3(c)(i).
34. 147 Ariz. 370, 710 P.2d 1025.
35. 147 Ariz. 215, 704 P.2d 1360 (App. 1985).
36. Employment Protection Act, A.R.S. §23-2501, subsec. 3(c)(ii).
37. Title 23, Chapter 6 (A.R.S. §§23-901, et seq.)
38. A.R.S. §21-236.
39. A.R.S. §16-1012.
40. A.R.S. §23-1302.
41. A.R.S. §23-167 and 26-128.
42. A.R.S. §23-202.
43. A.R.S. §23-203.
44. A.R.S. §23-2501, subsec. 3(d). It is unclear whether or not this provision may affect common law or other preexisting rights for public employees.
45. 147 Ariz. 370, 710 P.2d 1025.
46. 141 Ariz. 544, 688 P.2d 170.
47. 153 Ariz. 539, 738 P.2d 1146 (App. 1987).
48. A.R.S. §23-2501, subsec. 2.
49. *Id*.
50. *Id*.
51. A.R.S. §12-541, subsecs. 3 and 4.
52. A.R.S. §12-543 (three-year statute of limitations for a breach of an oral contract); A.R.S. §12-548 (six-year statute of limitations for breach of a written contract).
53. Phoenix and Tucson municipal codes prohibit employers of 1 or more employees within their jurisdictions from terminating because of race, color, religion, sex, national origin, or marital status. The Tucson code also prohibits discrimination based on ancestry, age, physical handicap not related to job performance, sexual or affectional preference. Unfortunately, even in cases where there is a finding of discrimination in firing, enforcement of the codes is discretionary and may be limited to conciliation and persuasion. *See* Arizona Employment Law Handbook, Vol. 2, Art. 7.2.1 (Phoenix Ordinance) and Art. 7.2.2 (Tucson ordinance).