

The Arizona Legislature Enacts Legislation Protecting Employment At-Will  
by Thomas D. Arn

Since the early 1980s, the volume of employment litigation in the United States has expanded substantially. Virtually nonexistent a few decades ago, today nonunion employment disputes constitute one of the most prolific areas of litigation.<sup>1</sup> Although much of the rise in employment litigation is attributable to federal anti-discrimination legislation such as the Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act, much stems from the judicially created exceptions to the at-will doctrine — the common-law rule whereby employers and employees may terminate their employment relationship at their pleasure. This change, which swept through the states during the 1980s, although benefiting claimants and the legal profession burdened employers and employees alike by substantially increasing the cost of doing business and, thereby, hampering the creation of new jobs.<sup>2</sup>

On April 4, 1996, the Arizona Legislature passed Senate Bill 1386, also known as the Employment Protection Act (the “Act”), thereby overturning or limiting some of the most significant judicial encroachments upon the at-will doctrine in Arizona of the past 12 years.<sup>3</sup> The Act was signed by the Governor on April 9 and became effective on July 20, 1996. The Act represents a substantial step towards restoring balance, predictability and efficiency to employment relations in Arizona. In order to place the Act’s significance in perspective, some discussion of the erosion of the at-will doctrine and the rise of wrongful discharge litigation in Arizona over the past 12 years is required.

The Rise of Wrongful Discharge Litigation in Arizona

For nearly a century, private, nonunion workplaces in the United States have been governed by the employment-at-will doctrine. Under the doctrine, employment relationships of indefinite duration are presumed to be terminable at will. Accordingly, absent an employment contract specifying a particular duration, an employer has been free to discharge an employee for any reason not proscribed by law, without legal liability.<sup>4</sup> The doctrine is predicated upon the principle that “the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.”<sup>5</sup> The doctrine generally provides workers with an incentive to be productive and employers with an incentive to treat employees fairly. Employers’ competitiveness is also benefited by the flexibility of being able to hire and discharge employees as needed based upon their performance.

The at-will doctrine was adopted by the Arizona Supreme Court in 1932.<sup>6</sup> Over the succeeding decades, however, the doctrine’s application has become increasingly circumscribed in both Arizona and nationally by numerous federal and state legislative restrictions on employee discharges such as the National Labor Relations Act (proscribing discrimination based upon concerted activity), Title VII of the Civil Rights Act of 1964 (proscribing discrimination based upon race, color, sex, religion and national origin) and the Arizona Civil Rights Act (ACRA)(proscribing similar forms of discrimination as Title VII). Some of the most significant limitations upon the doctrine, however, have been imposed by state court judges since the early 1980s. Spurred by a decline in unionization, cyclical increases in unemployment and, perhaps, an increase in the litigiousness in the general population, during the 1980s, numerous state courts across the country began to adopt some or all of the three common-law exceptions to the at-will rule: (1) the implied-in-fact contract exception, (2) the public policy exception and (3) the implied-in-law covenant of good faith and fair dealing. All three exceptions, in one form or another, have been embraced by the Arizona Supreme Court over the past 12 years.<sup>7</sup> Their adoption transformed the employment relationship in Arizona from one in which employment decisions rested almost exclusively with management to one in which such decisions, directly or indirectly, frequently rest with Arizona juries.

***The Implied-in-Fact Contract Exception***

The implied-in-fact contract exception was first recognized by the Arizona Supreme Court in 1984 in *Leikvold v. Valley View Community Hospital*.<sup>8</sup> The exception is based upon the premise that the presumption of at-will employment where the employment relationship is of an indefinite duration is merely a rule of construction and that, notwithstanding the indefiniteness of the relationship’s duration, the employer’s freedom to discharge employees can be limited by promises implied from the employer’s policies, representations or practices.<sup>9</sup> The exception is most frequently invoked where an employer’s discharge of an employee is inconsistent with a policy or procedure in an employment handbook or where an employee alleges that he was given assurances of job security. The exception may even be applied to preclude an employer from discharging an employee without cause where it had been the employer’s

practice to discharge employees only for cause.<sup>10</sup> Consideration for such a promise is found in the employee's continued performance of services.<sup>11</sup> An employee seeking to recover for a breach of the implied-in-fact contract need not even demonstrate reliance upon the purported promise.<sup>12</sup>

Because a determination of whether an implied-in-fact employment contract exists is largely a question of fact to be determined by examining the totality of an employer's written statements (such as those contained in personnel manuals or offer letters), oral representations, and other conduct, perhaps occurring over a period of many years, wrongful discharge claims based upon the implied contract exception are usually not subject to summary disposition and, barring settlement, are ultimately decided by juries.<sup>13</sup> Inasmuch as juries tend to be composed of individuals whose natural sympathies lie with the discharged employee, it is not surprising that the vast majority of wrongful termination suits reaching the jury are decided in favor of plaintiffs.<sup>14</sup> Notwithstanding a written employment contract providing that the relationship was at will or an express handbook disclaimer stating that the handbook did not form a contract, an allegation of one oral statement modifying, supplementing, or contradicting the at-will nature of the relationship is sufficient to create a triable issue of fact to send the matter to the jury.<sup>15</sup> Indeed, since a determination of whether an implied promise modifying the at-will nature of the relationship must be made upon a consideration of the totality of the circumstances, even an express disclaimer that the terms of a personnel manual do not create a contract may not protect the employer where the employee alleges conduct at odds with such a disclaimer.<sup>16</sup>

Furthermore, where an implied-in-fact agreement is found to exist, employers may be hard-pressed to demonstrate that the agreement was not breached, inasmuch as the language in personnel manuals is frequently open to differing interpretations.<sup>17</sup> Unless such language is completely unambiguous, the meaning of personnel manual provisions is also a question of fact for determination by a jury. In short, in cases where a breach of an implied-in-fact contract is alleged, the jury will frequently be placed in a position to substitute its judgment for that of management — an outcome completely at odds with the purposes of the at-will doctrine.

### ***The Public Policy Exception***

The public policy exception to the at-will rule provides that employers may be liable in tort for discharging employees for performing acts that public policy encourages or for refusing to perform acts that public policy condemns.<sup>18</sup> The exception has been described as applying to at least four separate fact patterns: 1) employees who are discharged for refusing to participate in illegal behavior, 2) employees who are discharged for performing an important public obligation, 3) employees who are discharged for exercising important legal rights or privileges and 4) employees who are discharged for exposing employer wrongdoing.<sup>19</sup> Additionally, the exception has been applied to create a common-law action for discharge based upon legislatively proscribed forms of discrimination.<sup>20</sup>

The public policy exception was recognized by the Arizona Supreme Court in the seminal case of *Wagenseller v. Scottsdale Memorial Hospital*.<sup>21</sup> In that decision, the court held that an employee who had been discharged following her refusal to participate in lewd public behavior while on a recreational outing with her supervisor could maintain a tort action for wrongful discharge in violation of public policy since the conduct in which she had refused to participate arguably violated the state's public indecency statute. In adopting the exception, however, the court opined that the sources of public policy are not restricted to constitutional or statutory enactments, but that court decisions may also constitute public policy pronouncements upon which tort actions for wrongful discharge may be based.<sup>22</sup> In so holding, the court noted that:

[T]he Legislature is not the only source of such policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field.<sup>23</sup>

With the passage of the Act, these words have taken on new significance.

In what has emerged as probably the most troubling aspect of the public policy exception, following the recognition of the tort, state and federal courts significantly broadened the exception by holding that Arizona employees may base their public policy tort claims upon statutory pronouncements of public policy, even if their claims do not satisfy the statute's conditions and requirements, and may recover the full measure of tort damages even where such damages go beyond those provided by the statute.<sup>24</sup> These decisions were based upon the principle that common-law actions for wrongful termination in violation of public policy are distinct from statutory causes of action even if the common-law claim is drawn from a statute containing its own remedial scheme.<sup>25</sup> Accordingly, employees bringing wrongful termination suits predicated upon the Arizona Civil Rights Act's anti-discrimination provisions have been allowed to

maintain such actions notwithstanding their failure to “fit exactly” into the statute’s protected categories<sup>26</sup> and have been allowed to pursue claims for punitive and emotional damages notwithstanding the statute’s substantially more limited remedial scheme. Thus, the ACRA and other statutes have become the basis for common-law tort actions seeking remedies never intended by the Legislature.

### ***The Implied Covenant of Good Faith and Fair Dealing***

The implied covenant of good faith and fair dealing recognizes that contracting parties have a right to receive the benefits of their agreement and that neither party may act to deprive the other of those benefits.<sup>27</sup> The covenant, although based upon contract principles, may, in limited circumstances, support a tort claim.<sup>28</sup>

In *Wagenseller*, the Arizona Supreme Court construed the exception in the employment setting as sounding in contract and as protecting only the rights of the parties to the benefits of their actual agreement.<sup>29</sup> Since an at-will employment relationship, by its very nature, carries no promise of continued employment, the court declined to apply the exception to guarantee job security. However, the court approved application of the exception to preclude discharge by the employer to avoid payment of compensation or benefits earned by the employee but not yet technically owed under the agreement. Hence, for example, where a salesman earns a commission based upon a completed sale but a portion of the commission is payable only if the employee remains employed until a certain date, the employer may not discharge the salesman to avoid paying the commission.<sup>30</sup>

Because of its narrow scope, the good faith and fair dealing exception has had limited application in Arizona employment decisions.

#### The Legislature Responds

In passing the Act, the Legislature acted to reverse the common-law erosion of at-will employment since *Leikvold* and *Wagenseller*. Although the Act does not return Arizona’s employment law back to the pre-*Leikvold/Wagenseller* era and, indeed, codifies important aspects of the latter decision, it does rectify some of the more troubling aspects of the implied-in-fact contract and the public policy exceptions as they have been applied by the courts. The Act also is significant in that it reduces the statute of limitations for breach of employment contract and wrongful discharge actions to one year<sup>31</sup> and reduces to one the number of employees required under the ACRA in order to maintain a suit for sexual harassment.<sup>32</sup>

### ***Limitations on Contractual Modifications to At-Will Employment Relationships***

With respect to private, nonunion employers and employees, the Act provides that the employment relationship is contractual in nature and is severable at the pleasure of the employer or the employee *unless a written agreement to the contrary has been created*.<sup>33</sup> The written agreement must be either a written contract signed by both parties; a handbook, manual, or similar document expressly stating that it is intended as an employment contract; or a writing signed by the party to be charged. The statute specifically provides that partial performance by the employee or employer does not satisfy the requirement of a writing.<sup>34</sup> The Act therefore eliminates the onerous totality of the circumstances factual inquiry imposed by the implied-in-fact exception in favor of a clear writing requirement. Such a requirement substantially reduces the likelihood of fraud and increases the certainty of both employer and employee as to the nature of their relationship. In essence, the Act creates a statute of frauds for employment relationships.

The Act’s effect on the implied covenant of good faith and fair dealing is less clear. Although the Act does not expressly address this exception, its provision that an action for breach of an employment contract may be maintained only when such contract is reduced to a signed writing or binding handbook provision would apparently allow an action for breach of the covenant of good faith and fair dealing arising out of such a written contract to be maintained. Actions based on agreements not satisfying the writing requirements would presumably be barred.

### ***Establishing the Outer Boundaries of the Public Policy Exception***

In the Act’s intent section, the Legislature notes its approval of *Wagenseller*’s holding that employers may be held liable for discharging an employee for a reason that is contrary to the state’s public policy.<sup>35</sup> The Legislature notes, however, its disagreement with the court’s holding that the courts have independent authority to define public policy underlying such an action and to create new causes of action.<sup>36</sup> The judiciary’s arrogation to itself of the

power to establish on an *ad hoc* basis causes of action in connection with specific conduct constituting a violation of the state's public policy, the Act states, is unauthorized by the Arizona Constitution and deprives the citizenry of the ability to know in advance what conduct may subject it to civil liability.<sup>37</sup>

Consistent with the foregoing intent, the Act codifies the tort of wrongful discharge in violation of public policy and expressly provides that such an action may be maintained where an employee is discharged in violation of state statute or in retaliation for any one of nine specified categories of conduct, including an employee's refusal to violate state law, certain types of "whistleblowing" activities, and the exercise of rights under the state's workers' compensation statutes.<sup>38</sup> In adopting these provisions, the Legislature gave shape and definition to an otherwise amorphous and unpredictable tort action. Accordingly, the Act better allows employers to conform their hiring decisions to a coherent legal standard, thereby avoiding costly mistakes in discharge decisions. In evaluating the merit of the Legislature's formulation, it is well to bear in mind the court's dictum in *Wagenseller*:

It may be argued, of course, that our economic system functions best if employers are given wide latitude in dealing with employees. We assume that it is in the public interest that employers continue to have that freedom. We also believe that the interests of the economic system will be fully served if employers may fire for good cause or without cause. The interests of society as a whole will be promoted if employers are forbidden to fire for cause which is morally wrong.<sup>39</sup> If it is economically beneficial for employers to be free to discharge employees in all cases except where such discharge is for a "bad" or "morally wrong" reason, it follows that it is beneficial for all concerned that employers know in advance which reasons are "bad" or "wrong."

Just as significant as the enumeration of what may serve as the basis for a wrongful discharge action is the Act's provision that where such an action is based upon a state statute, if the statute provides a remedy for its violation, the discharged employee who relies on the statute as the basis of a wrongful discharge claim is limited to those remedies.<sup>40</sup> If the statute provides no remedy, the employee may bring a tort claim based upon the statute and recover the full range of tort remedies.<sup>41</sup> Additionally, in bringing such an action based upon a state statute, the employee must satisfy all of the statute's requirements.<sup>42</sup> For example, where an employee claims discharge in violation of the ACRA based upon discriminatory conduct other than sexual harassment, the employee must demonstrate that the employer has 15 or more employees. The Act therefore rectifies the practice whereby claimants have relied on the ACRA as the basis of their wrongful termination in violation of public policy claim but did so free of the limitations otherwise imposed by the Legislature. The Act thus prevents employees from bootstrapping themselves into a cause of action notwithstanding the contrary intentions of the Legislature.<sup>43</sup>

#### Constitutional Considerations

##### ***The Anti-Abrogation Provision***

Article 18, Section 6 of the Arizona Constitution, also known as the "anti-abrogation provision," provides that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount shall not be subject to any statutory limitation."<sup>44</sup> Critics of the Act contend that it violates article 18, Section 6 by depriving contract claimants of any cause of action for breach absent a written agreement, by depriving tort claimants of any cause of action for wrongful termination in violation of public policy where they fail to satisfy jurisdictional or other prerequisites of the underlying statute, and in limiting the amount recoverable in actions where the statute contains remedies less attractive than the full array of tort damages. They argue, therefore, that the Act unconstitutionally precludes claimants from using the ACRA to sue employers with fewer than 15 employees for wrongful discharge (other than discharge based upon sexual harassment) and, even when this requirement is satisfied, prevents them from recovering anything more than back pay, reinstatement, and attorneys' fees.<sup>45</sup>

Nevertheless, it is clear that the anti-abrogation provision only prohibits the Legislature from so fundamentally restricting the ability of claimants to sue for damages that they are effectively prevented from obtaining redress for their injuries.<sup>46</sup> The Legislature may legitimately regulate and limit damage actions as long as such restrictions do not "abrogate" the right of recovery.

The foregoing raises the question of whether the anti-abrogation provision, which has been widely applied to legislative limitations on the ability to bring tort claims, applies to contract actions. A substantial case can be made that it does not.<sup>47</sup> Assuming that it does, however, the Act's writing requirement for employment contracts arguably constitutes a reasonable "regulation" rather than an "abrogation" of an action for damages. By requiring that employment contracts be embodied in a writing signed by the party to be charged or in an employment manual expressly stating that it is intended as a contract, the Act merely

requires that if the employer in fact intends to extend some form of job security to an employee (a necessary prerequisite even for implied contract formation<sup>48</sup>), the extra step of reducing the agreement to writing must be taken. Such a requirement would not abrogate a breach of contract action any more than the statute of frauds does when applied to actions based upon oral contracts that cannot be performed within one year.<sup>49</sup>

With respect to tort actions for wrongful discharge in violation of public policy, the Act's enumeration of specific public policies upon which wrongful discharge claims may be based does not restrict prospective plaintiffs' ability to bring an action to recover damages. Indeed, claimants basing actions upon the enumerated public policies would be entitled to recover the full array of tort damages, just as they would if they based their claim on any other statute not containing a remedy for its breach.

Only with respect to wrongful discharge in violation of public policy claims predicated upon statutes that provide a more limited array of damages than traditional tort law or which contain conditions or requirements not required at common-law does the Act alter the right to recover injuries for damages. It is difficult to imagine, however, how these changes could be deemed to "abrogate" the common law. Since such common-law actions are themselves predicated upon legislative pronouncements of what constitutes public policy, it stands to reason that the Legislature may alter those pronouncements or expressly provide that the public policies embodied in the statutes include the conditions and limitations contained therein and that claimants may not pick and choose those provisions that suit their needs while disregarding the rest. If it were otherwise, every legislative pronouncement touching upon the public good would become a fixed and immutable part of the legal landscape by merit of the common-law tort of wrongful termination and the anti-abrogation provision.

### ***Equal Protection***

The Act also likely will be challenged under the equal protection provision of the Arizona Constitution.<sup>50</sup> Critics of the Act contend that it violates the equal protection provision because it affords employees of employers with 15 or more employees protections not given to employees of smaller employers, except in cases of sexual harassment. Unless, however, the distinction is shown to be based upon a suspect or quasi-suspect classification, such as race or sex, or to infringe upon a fundamental right, such as the right to bring an action for damages for under article 18, Section 6, it would survive constitutional scrutiny as long as it rationally furthers a legitimate state interest.<sup>51</sup> However, the Act's provision subjecting employers with one or more employees to the ACRA in cases of sexual harassment, while leaving the ACRA applicable only to employers with 15 or more employees in all other cases of discrimination, might be subject to more probing scrutiny on the ground that the provision affords broader protections to one class of discrimination victims (victims of sexual harassment) than are afforded to other classes of discrimination victims, such as victims of race discrimination.

### Conclusion

The Employment Protection Act effects substantial changes in Arizona's employment laws by limiting or overturning several of the more influential employment decisions handed down by the Arizona courts over the past 12 years. Although the Act will undoubtedly face numerous challenges, should it survive those challenges, it will benefit employers and employees alike by bringing balance and predictability back to employment relationships.

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### ENDNOTES

1. By the late 1980s more than 20,000 wrongful discharge suits were pending nationwide. See J. Dertouzos and L. Karoly, *Labor-Market Responses to Employer Liability* 35 (Rand Institute for Civil Justice 1992) (hereinafter "Dertouzos and Karoly"). A recent survey of 850 in-house counsel and human resources specialists by a San Francisco law firm revealed that three out of five of the businesses responding had been sued by at least one employee during the past year. 14 *Employee Relations Weekly* (BNA) 357 (April 1, 1996).
2. Dertouzos and Karoly 62-63 (documenting a 2 to 5 percent decline in employment attributable to adoption of the broadest common-law exceptions to the at-will doctrine); R. Vedder and L. Gallaway, *Laws, Litigation and Labor Markets: Some New Evidence* (Pacific Research Institute 1995)(estimating loss of one million jobs nationwide between 1970 and 1990 as a result of erosion of the at-will doctrine).
3. The Legislature failed in 1993 and 1995 to pass legislation similar to S.B. 1386. D. Selden and J. Pace., 1 *Arizona Employment Law Handbook*, § 1.9.2 (1995).
4. E.g., *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 375-76, 710 P.2d 1025, 1030-31 (1985); *Payne v. Western & Allegheny Railroad Co.*, 81 Tenn. (13 Lea) 507, 513-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W.2d 134 (1915).
5. *Adair v United States*, 208 U.S. 161, 174-175 (1908).
6. *Dover Copper Mining Co. v. Doenges*, 40 Ariz. 349, 12 P.2d 288 (1932).
7. *Leikvold v. Valley View Comm. Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984); *Wagenseller*, 147 Ariz. 370, 710 P.2d 1025.
8. 141 Ariz. 544, 688 P.2d 170.
9. *Id.* at 546-48, 688 P.2d at 172-173.
10. *Cf. Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 897 (Mich. 1980)("Rules and policies uniformly applied are, however, as much a part of the 'common law of the job' as a promise to discharge only for cause.").
11. *Wagner v. City of Globe*, 150 Ariz. 82, 85, 722 P.2d 250, 253 (1986).

12. *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1338. Notwithstanding the court's statements in *Leikvold* suggesting that such reliance was necessary, 141 Ariz. at 548, 688 P.2d at 174, in *Wagenseller*, the court held that reliance is only one factor to be considered by the jury in determining whether an agreement for job security existed. 147 Ariz. at 383, 710 P.2d at 1038.
13. E.g., *Wagner*, 150 Ariz. at 86, 722 P.2d at 254 (whether employer's personnel rules became part of employee's at-will contract was factual question inappropriate for summary judgment); *Huey v. Honeywell, Inc.* 82 F.3d 327, 331-32 (9th Cir. 1996)(reversing summary judgment where, notwithstanding personnel manual disclaimer that employment relationship was at-will and that nothing in the manual altered the employment relationship, employer relied upon supervisors to orally explain personnel policies to employees and employer's practice was to progressively discipline employees for violations of company policy). *But see Duncan v. St. Joseph's Hosp. and Med. Center*, 183 Ariz. 349, 903 P.2d 1107 (Ct. App. 1995).
14. One major study of the impact of the common-law exceptions to the at-will doctrine found that 70 percent of the wrongful termination suits tried in California in the late 1980s before a jury were decided in favor of the employee. Dertouzos and Karoly at 35.
15. *Loffa v. Intel Corp.*, 153 Ariz. 539, 545, 738 P.2d 1146, 1152 (Ct. App. 1987).
16. *Wagner*, 150 Ariz. at 86 n.5, 722 P.2d at 254 n.5.
17. *Jeski v. American Express Co.*, 147 Ariz. 19, 22, 708 P.2d 110, 113 (Ct. App. 1985)(employment handbook's broad terms were reasonably susceptible to more than one interpretation; grant of summary judgment in employer's favor reversed).
18. *Wagner*, 150 Ariz. at 88, 722 P.2d at 256.
19. *Id.* at 88, 722 P.2d at 256. The courts have held that the policy underlying the wrongful discharge claim must be truly public. Even where the employee has been discharged for engaging in conduct protected by statute or for refusing to engage in conduct proscribed by statute, at common-law, no cause of action lies if the conduct concerns a purely private matter. E.g., *id.*
20. E.g., *Broomfield v. Lundell*, 159 Ariz. 349, 355-56, 767 P.2d 697, 703-05 (Ct. App. 1988)(Arizona Civil Rights Act supports common-law action for wrongful discharge predicated upon sex discrimination).
21. 147 Ariz. 370, 710 P.2d 1025. The public policy exception was first recognized by the Arizona Court of Appeals in *Vermillion v. AAA Pro Moving & Storage*, 146 Ariz. 215, 704 P.2d 1360 (Ct. App. 1985).
22. *Id.* at 378-79, 710 P.2d at 1033-34.
23. *Id.* at 378, 710 P.2d at 1033, quoting *Lucas v. Brown & Root*, 736 F.2d 1202, 1205 (8th Cir. 1984).
24. *Broomfield*, 159 Ariz. 349, 767 P.2d 697; *Kelley v. City of Mesa*, 873 F. Supp. 320 (D. Ariz. 1994).
25. *Id.*
26. *Kelley*, 873 F.Supp. at 327.
27. *Wagner*, 150 Ariz. at 85, 722 P.2d at 253; *Wagenseller*, 147 Ariz. at 376-86, 710 P.2d at 1031-41.
28. *Wagenseller*, 147 Ariz. at 383-84, 710 P.2d at 1038-39. *See also Rawlings v. Apodaca*, 151 Ariz. 149, 158, 726 P.2d 565, 574 (1986); *Noble v. National Am. Life Ins.*, 128 Ariz. 188, 624 Ariz. 866 (1981)(recognizing tort action for breach of covenant of good faith and fair dealing in insurance context).
29. *Wagenseller*, 147 Ariz. at 385, 710 P.2d at 1040. *See also Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 197-98, 888 P.2d 1375, 1384-85 (Ct. App. 1994).
30. In *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), the Massachusetts Supreme Court applied the good faith and fair dealing exception to preclude an employer from discharging a salesman in order to avoid paying him a commission on a sale he had made. Although the sale had been made prior to his discharge, a portion of the commission earned was payable only if he was still employed on a subsequent date. 364 N.E.2d at 353. In *Wagenseller*, the court cited the fact pattern presented by *Fortune* in announcing its adoption of the good faith and fair dealing exception in the employment context. 147 Ariz. at 385, 710 P.2d at 1040.
31. Ch. 140, S.B. 1386, § 2.
32. *Id.* at § 4. ACRA's definition of an "employer" as a person who employees 15 or more employees with respect to other alleged violations of the statute remains unchanged. A.R.S. 41-1461 (1992).
33. Ch. 140, S.B. 1386, § 3, ¶¶ 2-3.
34. *Id.* at § 3, ¶ 2.
35. *Id.* at § 1(A)-(E).
36. *Id.*
37. *Id.* at § 1(A)-(B).
38. *Id.* at § 3, ¶ 3.
39. 147 Ariz. at 378, 710 P.2d at 1033.
40. Ch. 140, S.B. 1386, § 3, ¶ 3(b).
41. *Id.* at § 3, ¶ 3(b).
42. *Id.*
43. *Accord Brown v. Ford*, 905 P.2d 223, 228-229 (Okla. 1995)(holding that Oklahoma anti-discrimination statute did not provide complainant with basis for common-law wrongful discharge in violation of public policy claim based upon sexual harassment where statute's application was limited to employers with 15 or more employees and claimant failed to satisfy that condition).
44. Ariz. Const. art. 18, § 6. The anti-abrogation provision overlaps article II, section 31 of the Arizona Constitution, which proscribes the enactment of laws "limiting the amount of damages to be recovered for causing the death or injury of a person." These provisions are intended to protect the same basic right. *Kenyon v. Hammer*, 142 Ariz. 69, 79 n.9, 688 P.2d 961, 971 n.9 (1984).
45. A.R.S. § 41-1481(G) (1992).
46. *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 342, 861 P.2d 625, 627 (1993); *Barrío v. San Manuel Div. Hosp.*, 143 Ariz. 101, 106, 692 P.2d 280, 285 (1984).
47. Although the provision has broadly been described as preserving the right to recover damages for injuries under common law, *see, e.g., Kilpatrick v. Superior Court*, 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970), numerous decisions have described provision as protecting the right to bring tort actions. *See, e.g. Hazine*, 176 Ariz. at 346, 861 P.2d at 631 (Feldman, J. concurring)(tort law protection afforded by article 18, Section 6 applicable beyond employment context); *Kenyon*, 142 Ariz. at 79 n.9, 688 P.2d at 971 n.9 (noting that article 18, Section 6 is drawn from a proposal introduced at the 1910 constitutional convention to preclude the enactment of laws limiting the amount of damages to be recovered for causing the "death or injury of any person" and that the intent of the convention was to extend the right to recover for "accidents, injury or death" to all persons).
48. *Wagenseller*, 147 Ariz. at 381, 710 P.2d at 1036 (implied-in- fact contract stems from promise made by parties, though not expressly).
49. *Cf. Mullins v. Southern Pacific Transportation Co.*, 174 Ariz. 540, 851 P.2d 839 (Ct. App. 1992)(alleged oral promise to employ plaintiff until age 65 unenforceable under the statute of frauds).
50. Ariz. Const. art. 2, § 13.
51. *Kenyon*, 142 Ariz. at 78, 688 P.2d at 970. A similar situation was presented in *Brown v. Ford*, 905 P.2d 223 (Okla. 1995), wherein the plaintiff contended that Oklahoma's anti-discrimination act violated the federal and state equal protection provisions by failing to make an action for sexual harassment culminating in wrongful discharge available to employees of employers with less than 15 employees and thereby "impermissibly sanctioning 'disparate remedies' for similarly situated employees claiming sexual harassment." The Oklahoma Supreme Court held that the act's limited application based on the size of an employer did not implicate any suspect classification or fundamental right and therefore was constitutional because it served a rational legislative goal of sparing small employers from the potentially devastating costs of such litigation. *Id.* at 226-228.