



SINGING CREATIVE PRAISES

I just opened my April magazine and I have to say, I am so impressed by the artistic talents of the bar members you featured this month. As an artist myself (known as the “singing lawyer,” I perform at local theaters all over the Valley), I can appreciate the love of the arts like many other attorneys all over the state. I feel pride in knowing I am a lawyer, but without the “side passions” we have, such as writing, singing and so on, I don’t think I would be as good a lawyer as I feel I am.

Kudos to those artists you featured and all others who strive to keep their passions alive!

—*Ronee Korbin Steiner, Phoenix*

ACCOUNTABILITY, PLEASE

See, here’s the problem: Concerned attorneys can write, and former Justice O’Connor can talk, all they want about judicial independence and its importance to our society, but if judges refuse to follow certain laws because they don’t agree with them, the people are going to circumscribe judges’ power. It’s just that simple. I don’t care whether one thinks Proposition 100 was a good idea or a bad idea—it is the

law of this state. If judges want their independence “respected” (and protected), they are going to have to start behaving in a way that entitles them to act “independent” of oversight and control. If they want to make laws, they should run for office. If they want to be judges, they should follow the laws made by those empowered to make them.

—*Gary Howard, Phoenix*

Editor’s Note: This month, we received an exceptionally detailed exception to an article we published in our March issue. What follows is the reader’s critique, followed by the authors’ response.

I respectfully disagree with the conclusion reached in the March edition’s “All Employment Contracts Are Not Created Equal,” *i.e.*, that the one-year limitation period for “breach of an oral or written employment contract ...”¹ applies only to employment contracts “that alter or limit an employer’s right to terminate [employment] at will.”

This limitations period unambiguously applies to *all* contracts of employment.

With all due respect to the authors, Tom Rogers and David Gomez, who I know to be excellent lawyers and fine fellows that are kind to children and don’t kick their dogs, the assertion that A.R.S. § 12-541(3) applies to a limited subset of employment contracts ignores the canons of statutory construction, plain English and sweet reason itself.

The primary rule of statutory construction is, of course, *read the #*!@% statute!* While this canon of construction is often observed in its breach, it has some applicability in this instance.

The first sentence of the Arizona Employee Protection Act states, “The public policy of this state is that [t]he employment relationship is contractual in nature.”² Ignoring this inconvenient beginning found in section 1,

the authors’ argument first focuses only on section 2 of the AEPAA, which provides that employment relationships can be terminated at-will absent a *written* contract “expressly restricting the right of either party to terminate the employment relationship”³ to make their case. In so doing, the authors state:

In [the AEPAA] and in the public discussions before the Legislature, the only reference to “contract” was in the context of modification of at-will employment. There was never any suggestion that the AEPAA related to or encompassed other kinds of agreements, oral or written occurring in the employment relationship....Thus, the necessary implication and meaning of the AEPAA’s language and its amending of the statute of limitations is that “employment contract” relates solely to agreements affecting a term of employment or limiting the at-will presumption.

Is not the first sentence of the statute a clear “reference” to all contracts of employment, regardless of their terms? Is that sentence the Rodney Dangerfield of the AEPAA that gets no respect?

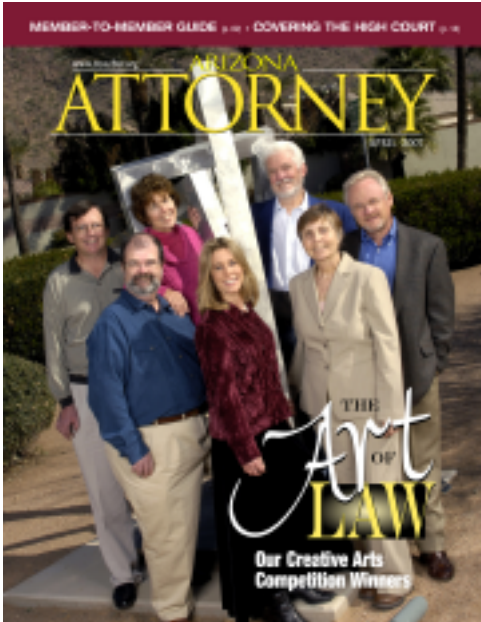
No, courts are constrained to interpret statutes, if possible, so no part is rendered superfluous.⁴

The first sentence of the AEPAA confirms that *all* terms and conditions of the employment relationship are contractual, and it cannot be ignored in any statutory analysis.

Next, the authors claim that the AEPAA’s preamble (or pre-ramble if you prefer) supports their position. Assuming any earthly court would rely on a “*patently unconstitutional*”⁵ statement in construing a statute, section F of the preamble states, “It is the intent of the legislature that the Employment Protection Act will not in any way limit the other protections for employers contained in ... the Arizona Revised Statutes.”⁶

Using the AEPAA to restrict the reach of A.R.S. § 12-541(3) appears to limit the protection that the statute of limitations affords employers in some small way.

The authors also assert that since section 3(a) of the AEPAA⁷ applies only to claims arising under a written contract limiting the employer’s right to fire at-will, “the necessary implication ... is that ‘employment contract’ [as used in § 12-541(3)] relates solely



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to agreements affecting the term of employment or altering or limiting the at-will presumption.” This invention is a mother of a necessity in light of section 1 and section F of the preamble.

Moreover, another pesky phrase mars the authors’ crafted landscape. The one-year limitations period applies to “oral or written employment contract[s].” If this limitations period applies *only* to agreements altering the at-will nature of employment, and those contracts can *only* be in writing pursuant to section 2 of the AEPA, why does the one-year limitation period apply to breaches of *oral* employment contracts?

Was the Legislature simply befuddled as to the wording of section 2 of the AEPA when drafting A.R.S. § 12-541(3), or have the authors reached the wrong conclusion?

While some may argue that the first choice is the Legislature’s natural state, the latter finds support in Arizona’s requirement that “Words and phrases shall be construed according to the common and approved use of the language.”⁸

Try as one might to find it, no ambiguity lurks in the phrase “breach of an oral or written employment contract” justifying different limitations periods for employment contracts based their terms.

When the language of a statute is clear on its face, no need exists to resort to the rules of statutory construction.⁹ As one Arizona court has observed, “There is no magic in statutory construction and no legal legerdemain should be used to change the meaning of simple English words.”¹⁰ While the authors should receive high marks for their legal legerdemain, this conjuring act has no place in the real world.

The policy and purpose of any statute of limitations is repose for a potential defendant and the certainty it brings.¹¹ Under the authors’ formulation, quite the opposite will exist.

Suppose a written employment contract limits the employer’s right to fire at-will *and* contains other terms providing for severance pay, ongoing medical benefits, and the others listed by the authors. Does a single term altering the at-will presumption mean that a one-year limitation period applies to the *entire* contract?

Do *different* limitations periods apply to *different* terms of the same contract? Does a contract that contains non-competition and no-solicitation clauses restrict the right of

the employee to terminate it at-will, bringing it within the one-year limitations period?

And what about *employers* who sue *employees* for breach of contract; does the one-year limitations period apply to them? After all, section 3 of the AEPA is silent as to those types of lawsuits. Is this a “necessary implication,” that A.R.S. § 12-541(3) simply does not apply to such actions?

Finally, a one-year limitations period for all employment contracts is consistent with other relatively short limitations periods in employment law. For example, the Arizona Civil Rights Act requires filing of a charge of discrimination with the Arizona Civil Rights Division within 180 days, and a lawsuit on the charge must be filed within one year thereafter.¹² A charge with the EEOC must be filed within 300 days.¹³ Wrongful discharge and claims for nonpayment of wages must be brought in a year.¹⁴ Claims for breach of a collective bargaining agreement and unfair labor practices have limitations periods of six months.¹⁵

One reason for these minimal periods is that the American workplace is the last vestige of the state of nature, described by Thomas Hobbs as a place where life is “poor, nasty, brutish and short.”¹⁶ Employees come and go, files are destroyed, e-mails get deleted and memories fade, all within a short time.

It only makes sense to apply A.R.S. § 12-541(3) to *all* oral or written contracts of employment, and by the plain language used, that is precisely what the Arizona Legislature intended.

—Bill Allen

endnotes

1. A.R.S. § 12-541(3): “There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, the following actions: ... 3. For breach of an oral or written employment contract including contract actions based on employee handbooks or policy manuals that do not specify a time period in which to bring an action.”
2. A.R.S. § 23-1501(1).
3. *Id.* § 23-1501(2).
4. *E.g. Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini*, 76 P.3d 874 (Ariz. Ct. App. 2003); *State v. Samano*, 11 P.3d 1045 (Ariz. Ct. App. 2000).
5. *Cronin v. Sheldon*, 991 P.2d 231 (Ariz. 1999).
6. Ariz. Laws 1996, Ch.140, sec. 1.
7. A.R.S. § 23-1501(3)(a).
8. A.R.S. § 1-213.
9. *E.g., Arpaio v. Steinle*, 35 P.3d 114 (Ariz. Ct. App. 2001).

10. *St. Paul Fire & Marine Ins. Co. v. Gilmore*, 168 Ariz. 159, 164, 812 P.2d 977 (1991).
11. *Brooks v. Southern Pac. Co.*, 466 P.2d 736 (Ariz. 1970).
12. A.R.S. § 41-1481.
13. 42 U.S.C. 2000e-5(e)(1).
14. A.R.S. § 12-541(2) and (4).
15. 29 U.S.C. 160(b).
16. THOMAS HOBBS, *LEVIATHAN* (1651).

The Authors Respond:

Bill Allen's kind words about the authors, and his disagreement with our conclusion in the March edition's "All Employment Contracts Are Not Created Equal" (that the one-year limitation period for "breach of an oral or written employment contract ..."¹ applies only to employment contracts "that alter or limit an employer's right to terminate [employment] at will.") are most appreciated. Where else would your readers find reference to Hobbs, *Leviathan* (1651), albeit without a chapter or page cite? However, our article focused, appropriately we believe, on the legislative history of the Employment Protection Act, a history more recent and relevant than the *Leviathan*.

By ignoring most of the legislative history, Bill concludes that the statute of limitations for "breach of an oral or written employment contract ... unambiguously applies to all contracts of employment regardless of their terms." This arises from Bill's misreading of A.R.S. § 23-1501 and ignoring the Arizona Employment Protection Act's ("AEPA") language and context, which provide the Legislature's meaning of the term "employment contract."

Bill asserts that the statute's first sentence ("The public policy of this State is that [t]he employment relationship is contractual in nature") clearly and unambiguously refers to *all* contracts of employment, meaning any conceivable agreement arising out of the employment relationship, regardless of context or common sense. In construing this sentence with the meaning he thinks it has, Bill violates a basic rule of statutory construction: Courts do not give effect to statutory terms based on what one assumes their meaning is if "the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended."²

The context of the AEPA, Sections 1, 2 and 3,³ clearly shows that "employment relationship" means the status or condition of



being employed—either at-will or other than at-will—nothing more. Thus, the “employment relationship” or condition of being an at-will employee is “contractual in nature” (Section 1); “and is severable at the pleasure of either the employee or employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship” (Section 2); and “if the employer has terminated” an employee’s “employment relationship” in violation of state law or in reprisal for protected activity, there is liability (Section 3 (a), (b), (c)).

Look at the AEPA language and the testimony at the legislative hearings. The focus was entirely on the courts’ limiting the exceptions to the at-will employment doctrine. Indeed, the Arizona Supreme Court, in one of the cases the Legislature was reacting to, held, “The at-will employment relationship is contractual” in nature when it recognized the whistleblower exception to at-will employment.⁴ The special meaning of “employment relationship” is, therefore, the status or condition of being an at-will employee or employee where the right of either party to terminate the employment relationship is restricted. Bill’s *eisegesis*—reading his own meaning into the term—though heartfelt, is unconvincing and fails.

Bill further misinterprets the statutes by seizing upon an apparent inconsistency between the AEPA and A.R.S. § 12-541(3) and asserting that the statute of limitations language (“breach of an oral or written employment contract”) must be read as independent of the AEPA and pursuant to its plain and unambiguous meaning.

Yes, the AEPA⁵ makes only breach of written employment contracts actionable. And yes, the AEPA’s statute of limitations⁶ applies to both “oral and written employment contract(s).” But from this, Bill wrongly concludes that the AEPA’s statute of limitations must be construed as separate and apart from the AEPA, and the term “employment contract” should be read as broadly as possible, without regard to legislative history and context. So soon we forget that suits for breach of an oral employment contract altering the at-will relationship which accrued prior to enactment of the AEPA could still be filed after the effective date of the AEPA.⁷

Even assuming one should read A.R.S. § 12-541(3) as separate and apart from the AEPA, the term “employment contract” is neither plain nor unambiguous in its meaning. Bill thinks so, but this is but another futile exercise in *eisegesis*. The Legislature itself has created ambiguity because it very narrowly defined “employment contract” in the context of the AEPA. By legislative action, there is no clear or unequivocal meaning to “employment contract” because, even if Bill is right, the meaning now differs from statute to statute. If Bill believes the term “employment contract” unambiguously applies to, *e.g.*, stock options, 401(k) or retirement benefit plans, promissory notes to repay a loan or severance agreements, his “plain and unambiguous” meaning is dramatically at odds with the Legislature’s limited meaning of “employment contract” in the AEPA, *i.e.*, only those that alter or limit the right to terminate at-will. If there is ambiguity, as there surely is, the relevant canon of construction dictates that one must look at statutory history.⁸

In addition, statutes that are *in pari materia*—*i.e.*, that relate to the same subject—should be construed together as though they constituted one law so that inconsistencies in one statute may be resolved by looking at the other statute on the same subject.⁹ This is especially true where the relevant statutes not only relate to the same subject matter but were adopt-

ed by the same legislature at the same time and by the same enactment.¹⁰

Common sense and time-honored canons of statutory construction dictate that the only way to read A.R.S. § 12-541(3) is in conjunction with and in the context of A.R.S. § 23-1501 and the legislation that enacted both statutes.¹¹

Thanks to Bill for demonstrating there is often a lack of clarity when the Legislature, in its wisdom, enacts legislation.

—David F. Gomez

—Thomas M. Rogers

endnotes

1. A.R.S. §12-541(3): “There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, the following actions: ... 3. For breach of an oral or written employment contract including contract actions based on employee handbooks or policy manuals that do not specify a time period in which to bring an action.”
2. *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681 (1992).
3. A.R.S. § 23-1501 (1), (2), and (3) (a), (b), (c).
4. *Wagner v. City of Globe*, 150 Ariz. 82, 85, 722 P.2d 250 (1986).
5. A.R.S. § 23-1501(2).
6. *Id.* § 12-541(3).
7. *Zeraty-Paulson v. McLane/Southwest, Inc.*, 2000 WL 33300666, #14 (D. Ariz. 2000). (“If an amendment of pre-existing law shortens the time of limitation fixed in the pre-existing law so that an action under pre-existing law would be barred when the amendment takes effect, such action may be brought within one year from the time the new law takes effect, and not afterward.”)
8. *Johnson v. Mohave County*, 206 Ariz. 330, 333, 78 P.3d 1051 (App. 203); see also *Rothweiler v. Superior Court of Pima County*, 402 P.2d 1010, *reh’g den.*, 404 P.2d 831, *aff’d*, 410 P.2d 479 (Ariz. Ct. App. 1965).
9. *Fisher v. Buckeye*, 202 Ariz. 107, 110, 41 P.3d 645 (App. 2002); *People’s Choice TV Corp., Inc. v. City of Tucson*, 20 P.3d 1151, *vacated*, 46 P.3d 412 (Ariz. Ct. App. 201); *Collins v. Stockwell*, 671 P.2d 394 (Ariz. 1983) (“*In pari materia*” is rule of statutory construction whereby meaning and application of specific statute or portion of statute is determined by looking to statutes which relate to same person or thing and which have purpose similar to the statute being construed; statutes *in pari materia* must be read together and all parts of law on same subject must be given effect if possible).
10. *Bank of Lowell v. Cox*, 279 P. 257 (Ariz. 1929); *Territory v. Wingfield*, 15 P. 139 (Ariz. 1887) (two acts passed the same day and relating to the same subject matter are to be read together as if parts of the same act).
11. Senate Bill (S.B.) 1386.