

# The Employment Protection Act After *Cronin v. Sheldon*

by David F. Gomez

The Arizona Supreme Court's long-awaited ruling on the constitutionality of the Employment Protection Act (EPA),<sup>1</sup> *Cronin v. Sheldon* (*Denny's Restaurants, Inc.*) and *Finley v. Seidel* (*Calvary Rehabilitation Center*) (*Cronin*),<sup>2</sup> was remarkable not only for what a unanimous court decided but also for what it declined to decide.

## A Victory For Employers

The legislature acted constitutionally when it recharacterized wrongful discharge tort claims based on the Arizona Civil Rights Act (ACRA)<sup>3</sup> as statutory ACRA claims whose exclusive non-tort remedies are restricted to those set forth in the statute, the Court held.<sup>4</sup>

The Court upheld the EPA's abolition of a tort claim first recognized in *Broomfield v. Lundell*.<sup>5</sup> Based on its common law power, the *Broomfield* court recognized an ACRA-based public policy tort claim which permitted plaintiffs to seek tort damages in addition to ACRA statutory remedies. The *Broomfield* claim had bedeviled Arizona employers both large and small because it enabled plaintiffs to bring tort actions based on discriminatory termination. Even workers employed by small companies not subject to the ACRA's jurisdiction (15 employees or more) brought tort claims against their employers based on the ACRA as public policy. Al-

though the ACRA technically did not apply, a fired worker could allege that the small employer had violated an important public interest embodied in the ACRA, as discussed in *Wagenseller v. Scottsdale Memorial Hospital*.<sup>6</sup>

The Court's narrow holding on only one of the EPA's many provisions was clearly a victory for Arizona employers. However, what the Court failed to say about the EPA is equally significant.

## The EPA's Abolition of the Common Law

Controversial from its inception in 1996, the EPA abolished Arizona's common law of wrongful discharge and in its place established a three-part codification of all such claims.

First, EPA § (3)(a)<sup>7</sup> abolished all implied contract claims based on employer representations, custom, practice, or a course of conduct. Only the breach of an express written agreement limiting the employer's right to fire at-will and executed by the parties or the party to be charged, or an employee manual that contains such a limitation, is actionable.<sup>8</sup>

Second, EPA § (3)(b)(i)-(iv)<sup>9</sup> restricted all wrongful discharge tort claims based on an employer violation of public policy to violations of Arizona statutes. If the Arizona statute contained a remedy, it would be the employee's exclusive remedy. If it had no statutory remedy, it was actionable as a tort. The statute's definitions and restrictions would strictly apply to the asserted claim.<sup>10</sup>

Third, EPA § (3)(c)(i)-(ix)<sup>11</sup> codified public policy retaliatory discharge claims based on an employee's refusal to commit an unlawful act, retaliation for an employee's whistleblowing, or the employee's exercise of an important statutory right or public obligation. These claims remained actionable as tort claims but were strictly limited to Arizona statutes or the state constitution.

## The EPA's One-Year Statute of Limitations

The EPA reduced the two-year tort statute of limitations and three-to-six-year contract statute of limitations to one year for all such claims.<sup>12</sup> Employment claims were treated differently than non-employment torts or contracts.<sup>13</sup>

## The EPA's Amendment of the ACRA

The EPA also amended the ACRA so that small employers with fewer than 15 employees were subject to sexual harassment claims filed under the ACRA.<sup>14</sup> This amendment was likely an attempt to mollify the Attorney General's

Office and others who strongly opposed the EPA's abolition of the *Broomfield* claim's "long-standing tort protections and deterrents against sexual harassment and discrimination based on sex, race, national origin, age and disability" provided to Arizonans working for small businesses. The amendment, however, only restored one of the many "protections" it took away from a substantial number of working people in Arizona who were "disenfranchised" by the EPA.<sup>15</sup>

### The EPA's Preamble

In its preamble to the statutory text, the legislature minced no words in declaring the EPA's intent. It strongly rebuked the Arizona Supreme Court for "creating" new causes of action, particularly the public policy wrongful discharge claim rec-

ognized in *Wagenseller*.<sup>16</sup> The preamble stated in relevant part:

C. ...When the legislature adopted the common law to provide the courts with laws of reference, it did not intend to vest the courts with the authority to establish new causes of action or to independently set forth the public policy of the state...

D. ...It is the intent of the legislature to establish that the courts cannot create new causes of action. Courts can apply common law causes of action to cases they adjudicate provided that they do not expand, modify, or in any manner whatsoever alter the common law causes of action that were adopted by the Legislature pursuant to Arizona Revised Statutes § 1-201.<sup>17</sup> Predictably, the Court held that

the pugnaciously worded preamble was "patently unconstitutional."<sup>18</sup> The legislature's intent was to usurp the Court's judicial authority as a co-equal branch of government, including the Court's power to make law or establish new causes of action. The Court struck down the preamble as having no operative effect and disregarded it entirely as a violation of the separation of powers doctrine (Art. 3, Ariz. Const.).

Not predicted was the Court's ruling that: (1) the unconstitutional preamble could be severed from the EPA's statutory text and would not of itself invalidate the EPA's provisions,<sup>19</sup> and (2) the Court would narrowly limit its constitutional analysis and decision to EPA § (3)(b)(i) and the *Broomfield* public policy claim. This left the rest of the EPA's provisions subject to further challenge.

| ARIZONA COMMON LAW OF WRONGFUL DISCHARGE   | EMPLOYMENT PROTECTION ACT (EPA) (A.R.S. §§ 12-541, 23-1501, 41-1461)   | EPA AFTER CRONIN  |
|--|--|---|
| <p>BASED ON BREACH OF IMPLIED CONTRACT. (<i>Wagenseller, Leikvold</i> cases)</p> <p>Remedies: Contract</p>   | <p>CLAIM ABOLISHED. Only express written contracts are actionable. A.R.S. § 23-1501(3)(a).</p> <p>Unchanged</p>  | <p>OPEN QUESTION RE: CONSTITUTIONALITY (ART. 2, § 25, AZ CONST. – IMPAIRMENT OF CONTRACTS?)</p>   |
| <p>BASED ON EMPLOYER'S VIOLATION OF ARIZONA CIVIL RIGHTS ACT (<i>Broomfield</i> case)</p> <p>Remedies: Tort Damages</p>                                      | <p>CLAIM ABOLISHED IN PART. The claim is subject to all definitions and restrictions of the statute. A.R.S. § 23-1501(3)(b)(i).</p> <p>REMEDIES ABROGATED. Remedies are exclusively limited to the statute (e.g., back pay, reinstatement, etc.)</p> | <p>HELD CONSTITUTIONAL UNDER ANTI-ABROGATION AND NON-LIMITATION PROVISIONS OF AZ CONST. (ART. 18, § 6, ART. 2, § 31)</p> <p>OPEN QUESTION RE: CONSTITUTIONALITY UNDER ART. 2, § 13, AZ CONST. – DENIAL OF EQUAL PRIVILEGES.</p> |
| <p>BASED ON EMPLOYER'S VIOLATION OF OTHER ARIZONA STATUTES.</p> <p>Remedies: Tort Damages</p>  | <p>CLAIM ABOLISHED IN PART. Any other state statute that provides a remedy is subject to statute's definitions and restrictions. A.R.S. § 23-1501(3)(b)(ii)-(iv).</p> <p>REMEDIES ABROGATED. Remedies are exclusively limited to the statute.</p>    | <p>OPEN QUESTION RE: CONSTITUTIONALITY</p>  |
| <p>BASED ON RETALIATION FOR EMPLOYEE'S REFUSAL TO COMMIT AN UNLAWFUL ACT. (<i>Wagenseller</i> and <i>Vermillion</i> cases)</p> <p>Remedies: Tort Damages</p> | <p>CLAIM ABOLISHED IN PART. Public policy is limited to the state constitution and statutes, and excludes federal law. A.R.S. § 23-1501(3)(c)(i)</p> <p>Unchanged</p>  | <p>OPEN QUESTION RE: CONSTITUTIONALITY</p>  |
| <p>BASED ON RETALIATION FOR EMPLOYEE'S WHISTLEBLOWING.</p> <p>Remedies: Tort Damages</p>   | <p>CLAIM ABOLISHED IN PART. EPA defines to whom and how the report must be made and extends only to Arizona Constitution or state statutes. A.R.S. § 23-1501(3)(c)(ii).</p> <p>Unchanged</p>   | <p>OPEN QUESTION RE: CONSTITUTIONALITY</p>  |
| <p>BASED ON EXERCISE OF A STATUTORY RIGHT, OR IMPORTANT PUBLIC OBLIGATION.</p> <p>Remedies: Tort Damages</p>   | <p>CLAIM ABOLISHED IN PART. EPA provisions apply to only 7 Arizona statutes. A.R.S. § 23-1501(3)(c)(iii)-(ix).</p> <p>Unchanged</p>  | <p>OPEN QUESTION RE: CONSTITUTIONALITY</p>  |

## Cronin's Challenge to the EPA's Constitutionality

The separate cases of Janette Cronin (*Cronin*) and Linda Finley (*Finley*) are factually similar. Cronin worked for Denny's as a manager. She claimed that her manager sexually harassed her and that she was subject to unequal pay based on her gender. Finley worked for Calvary Rehabilitation Center as a therapist. She claimed that her supervisor sexually harassed her. Cronin complained to a Denny's human resources representative about the hostile environment and pay disparity. She also filed a discrimination charge against the company with the Equal Employment Opportunity Commission (EEOC). Finley complained about the harassment to Calvary's executive director. Both Cronin and Finley alleged that they were fired because of their complaints and that their former employers' stated reasons for the terminations (violation of company policy or poor work performance) were pretextual.<sup>20</sup>

Cronin and Finley sued their former employers alleging *inter alia* a *Broomfield* tort claim for wrongful discharge in violation of public policy. Both challenged the EPA's constitutionality. Both Denny's and Calvary employed 15 or more employees. Like Cronin, Finley filed an EEOC charge against her employer. In both cases, the trial court upheld the EPA's constitutionality and dismissed their *Broomfield* tort claims.<sup>21</sup>

### What the Court Decided

After striking down the preamble as unconstitutional, the Court held that the EPA's recharacterizing the *Broomfield* tort claim as a statutory claim did not violate the Arizona Constitution's anti-abrogation and non-limitation provisions (Art. 18 § 6, Art. 2, § 31). Citing *Hazine v. Montgomery Elevator, Co.*,<sup>22</sup> the Court explained that common law actions for negligence, intentional torts, strict liability, and other tort actions which

trace their origins to the common law cannot be abrogated. The anti-abrogation clause protects tort actions which were recognized at common law long before the Arizona constitution was established or evolved from rights recognized at common law. Since the *Broomfield* tort claim, alleging violation of ACRA public policy, was "strictly statutory," it was not encompassed by *Hazine*. It neither existed in 1912 when Arizona achieved statehood nor evolved from common law antecedents. The ACRA—not the common law—provided protection against discrimination based on gender, age or race.<sup>23</sup>

The *Broomfield* tort claim's demotion to a statutory claim also did not violate the Arizona constitution's prohibition against limiting the right of recovery of damages (Art. 2, § 31, and second phrase of Art. 18, § 6). The Court reasoned that when dealing with a right to recover damages originating exclusively in a statute such as the ACRA, the legislature may constitutionally "regulate" or restrict a remedy or theory of recovery so long as an adequate remedy for the injury remains. The EPA restricted only a particular remedy or a theory of relief, not the amount of damages that may be recovered. The legislature's restriction of the *Broomfield* claim to the exclusive remedy in the ACRA was construed as protecting one of several theories of recovery, not placing a legislative cap on damages.<sup>24</sup>

### What the Court Left Undecided

The Court left open the possibility that even if it did not violate the anti-abrogation and non-limitation doctrines, the EPA's abolition of the *Broomfield* claim under EPA § (3)(b)(i) might violate the equal privileges clause (Art. 2, § 13 Ariz. Const.). The challenge could certainly be raised that the EPA's enactment closed the courthouse door to employees of small businesses, depriving them of the means to bring any claim for wrongful discharge. Under the EPA, employees of small businesses can neither

invoke ACRA's or federal statutory protection (with the sole exception of ACRA's protection against sexual harassment), nor bring a common law *Broomfield* tort claim.<sup>25</sup> The Court ruled that the two petitioners in *Cronin* lacked standing to raise the issue because they were employed by large, not small, employers.<sup>26</sup>

The Court also left open the possibility that other provisions of the EPA might be unconstitutional. Of course, the Court's reasoning in upholding EPA § (3)(b)(i)'s restriction of the *Broomfield* claim may apply to the rest of EPA § (3)(b), but that is not self-evident from the statutory text. If the public policy set forth in OSHA,<sup>27</sup> hours of employment laws,<sup>28</sup> the Agriculture Relations Act,<sup>29</sup> or "any statute that provides the employee with a remedy" is beyond the protection of *Hazine* because it did not exist at common law or evolve from rights recognized at common law, the legislature may be able to restrict such a claim as it restricted the ACRA-based claim. Such questions, however, can only be answered after statute-specific research, analysis and briefing.

### Implied-in-Fact Contract Claims

The Court did not decide whether implied-in-fact contract claims recognized in *Wagenseller, Leikvold v. Valley View Community Hospital*<sup>30</sup> and recently reaffirmed and enlarged upon in *Demasse v. ITT*,<sup>31</sup> were unconstitutionally abolished in violation of the impairment of contract provision (Art. 2, § 25, Ariz. Const.). The EPA made only certain express written contracts actionable. The Court declined to reach the issue since it was inapplicable to the cases presented by Cronin and Finley, who raised only wrongful discharge tort claims, not contract claims that the EPA would bar.<sup>32</sup>

### Retaliation and Whistleblower Tort Claims Under the EPA

The plaintiffs in *Cronin* arguably could have brought their wrongful discharge claims under EPA §

(3)(c)(ii) instead of § (3)(b)(i) and completely avoided the restriction of their tort claims to the ACRA's exclusive remedies. Unfortunately, the Court did not address the issue in *Cronin*. EPA § (3)(c)(ii) provides that a tort claim may be brought if plaintiffs allege the following elements: (1) An employee (2) makes disclosure (3) in a reasonable manner (4) to the employer or a representative of the employer whom the employee reasonably believes is in a supervisory position or has the 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 (5) that the employer has or will violate the Arizona Constitution or statutes.<sup>33</sup>

Both Cronin and Finley made reasonable disclosures to their respective human resources representative and executive director who were in a position to investigate and take action to prevent further harassment or discrimination. The complaints were to

the effect that their respective employers had or would continue to violate an Arizona statute, i.e., the ACRA. If the ACRA is the subject of the employee's disclosure that leads to retaliatory discharge, a plain reading of EPA § (3)(c)(ii) permits the employee to bring a tort action and bypass altogether EPA § (3)(b)(i). Or is a tort claim under EPA § (3)(c)(ii) for ACRA whistleblowing "subsumed" or preempted by EPA § (3)(b)(i)? In *Walters v. Maricopa County*,<sup>34</sup> an employee fired in violation of an Arizona statute which contained a remedy was permitted to also bring a tort claim under EPA § (3)(c)(ii).<sup>35</sup> The Arizona Supreme Court recently granted review in *Walters* and may address this issue.<sup>36</sup>

The Court also did not address EPA §§ (3)(c)(iii)-(ix), which recognize a wrongful discharge tort claim based on retaliatory discharge for exercise of a statutory right, or important public obligation, viz., worker's compensation,<sup>37</sup> jury service,<sup>38</sup> voting,<sup>39</sup> free choice in union membership,<sup>40</sup> Na-

tional Guard or armed services duty,<sup>41</sup> freedom on the job from extortion for fees and gratuities,<sup>42</sup> or coercion on the job to buy particular goods or supplies.<sup>43</sup> May other provisions be the basis for such a wrongful discharge claim?

### Is the Statute of Limitations Unconstitutional?

The Court did not address the constitutionality of the EPA's shortening of the statute of limitations to one year for bringing wrongful discharge claims. Cronin brought her claim nearly two years after her termination, and more than one year after the EPA was enacted. Denny's argued that the EPA's one-year statute of limitations barred her claim. The Court declined to rule on the question on the grounds that the trial court should first deal with possible factual issues unique to Cronin's case relating to the statute of limitations. Is the EPA's one-year statute of limitations unconstitutional?

## Conclusion

The Supreme Court's ruling in *Cronin* is narrowly confined to striking down the preamble and upholding EPA § (3)(b)(i)'s restriction of the *Broomfield* claim to the ACRA's exclusive remedy. What the Court did not decide is an open invitation to further challenges to the EPA in the days ahead. 🗑️

*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. A.R.S. §23-1501
2. *Cronin v. Sheldon (Denny's Restaurants, Inc.)*, CV 98-0495-SA and *Finley v. Seidel (Calvary Rehabilitation Center)*, no. CV 98-0580-SA, were consolidated for oral argument before the Arizona Supreme Court on January 12, 1999. The Court issued its decision in both cases on December 17, 1999, in *Cronin v. Sheldon*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.2d \_\_\_, 1999 WL 1206977 ("Cronin v. Sheldon"). Citations are to the slip opinion ("slip opin.").
3. A.R.S. § 41-1441 *et seq.*
4. A.R.S. § 23-1501(3)(b)(i).
5. 159 Ariz. 349, 767 P.2d 697 (App. 1989).
6. 147 Ariz. 370, 710 P.2d 1025 (1995).
7. A.R.S. § 23-1501(3)(a).
8. A.R.S. § 23-1501(2), (3)(a).
9. A.R.S. § 23-1501(3)(b)(i)-(iv).
10. A.R.S. § 23-1501(3)(b).
11. A.R.S. § 23-1501(3)(c)(i)-(ix).
12. A.R.S. § 12-541(3), (4).
13. A.R.S. § 12-542 permits non-employment tort claims to be brought within 2 years. A.R.S. §§ 12-543 and 12-548 permit non-employment oral or written contract claims to be brought within 3 and 6 years, respectively.
14. A.R.S. § 41-1461(2).
15. See David F. Gomez, *The 1996 Employment Protection Act and the Abolition of Common Law Wrongful Termination in Arizona*, ARIZ. ATTY., August/September 1996, pp. 36 and 39, fn. 5, 6.
16. 147 Ariz. 370, 710 P.2d 1025 (1985).
17. A.R.S. § 23-1501 Historical and Statutory Notes.
18. *Cronin v. Sheldon*, slip opin. at ¶ 32.
19. *Id.*
20. *Id.* at ¶¶ 7-14
21. *Id.* at ¶¶ 9, 14.
22. 176 Ariz. 340, 861 P.2d 625 (1993).
23. *Cronin v. Sheldon*, slip opin. at ¶¶ 33-39.
24. *Id.* at ¶¶ 40-51.
25. *Id.* at ¶¶ 52-54.
26. *Id.* at ¶ 54.
27. Occupational Health and Safety Act (OSHA), A.R.S. §§ 23-401 *et seq.*
28. A.R.S. §§ 23-281 *et seq.*
29. A.R.S. §§ 23-1381 *et seq.*
30. 141 Ariz. 544, 688 P.2d 170 (1984).
31. 194 Ariz. 500, 984 P.2d 1338 (1999).
32. *Cronin v. Sheldon*, slip opin. at ¶¶ 55-56.
33. A.R.S. § 23-1501(3)(c)(ii).
34. 299 Ariz. Adv. Rep. 52. (*Ariz. App. Div. 1, July 13, 1999*), review granted (November 30, 1999).
35. *Id.*
36. A.R.S. §§ 23-901 *et seq.*
37. A.R.S. § 21-236.
38. A.R.S. § 16-1012.
39. A.R.S. § 23-1302
40. A.R.S. §§ 23-167 and 26-128.
41. A.R.S. § 23-202.
42. A.R.S. § 23-203.
43. *Cronin v. Sheldon*, slip opin. at ¶ 10.