

Present at the Conception

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Title VII of the Federal Civil Rights Act of 1964 was nearly ten years old before Arizona lawyers realized their state law needed to ban sex discrimination in employment.¹ Indeed, major Phoenix law firms were openly refusing to hire women in 1969, five years after the federal law went into effect.² As the mid-1970s approached, the women's movement was getting into full swing, and women were graduating from law schools in numbers that could no longer be ignored.³ In 1974, several women graduated from the Arizona State University School of Law, including Ruth McGregor, who later became Arizona's Chief Justice.⁴ She recalled that 1974 was the first year that major Phoenix law firms hired ASU women straight out of law school, though many attorneys were hostile, and, she added, at least some remained hostile for many years.⁵

Employment discrimination law was becoming big business by 1974.⁶ The Nixon Administration adopted "goals and timetables" for the construction industry.⁷ My own practice included representation of the industry's union subcontractors, and both the unions and employers knew the U.S. Equal Employment Opportunity Commission (EEOC) had more complaints than it

1. Julie A. Pace et al., *Here's How Court's Decision on LGBTQ Discrimination Impacts Arizona Employers*, AZ BIG MEDIA (June 16, 2020), <https://azbigmedia.com/business/heres-how-courts-decision-on-lgbtq-discrimination-impacts-arizona-employers/> [https://perma.cc/LL7K-6UUQ] (noting that the Arizona Civil Rights Act's employment provision was passed in 1974).

2. See Mary M. Schroeder, *No One Knew What To Expect: Breaking the Phoenix Gender Barrier in 1969*, 49 ARIZ. ST. L.J. 537, 547 (2017).

3. Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 13 (2009).

4. Rachel McNeill, *Former Arizona Supreme Court Chief Justice Reflects on Path to State's Highest Court While Paving Way for Women, Minorities*, 12 NEWS (Mar. 22, 2021, 6:49 PM), <https://www.12news.com/article/news/local/arizona/former-arizona-supreme-court-chief-justice-reflects-on-path-to-states-highest-court-while-paving-way-for-women-minorities/75-3bed43d2-7e71-4518-bd95-93b272e11ca7> [https://perma.cc/G42P-XVDS].

5. *Id.*

6. Marilyn Bender, *Job Discrimination, 10 Years Later*, N.Y. TIMES, Nov. 10, 1974, at 187 (recognizing that "[a] small army of lawyers . . . have developed a lucrative specialty under Title VII of the Civil Rights Act of 1964").

7. Douglas E. Schoen, Opinion, *Commentary: Nixon's Legacy in a New Light*, PHILA. INQUIRER (May 16, 2016), https://www.inquirer.com/philly/opinion/20160515_Commentary__The_legacy_of_Richard_Nixon.html [https://perma.cc/62TM-FASV].

could handle. The backlog was frustrating to all sides. Everyone thought the system needed to work better. Many of us practicing in the area also thought the states might be able to handle some of the load. After all, Congress had thought the states should be involved.⁸ Title VII was actually created with a special provision that allowed the EEOC to “defer” to a state agency’s handling of an employee’s discrimination complaint if the state agency had laws adequate for the job.⁹

The main reason Arizona was not handling cases seemed simple—Arizona’s civil rights law was out of date and did not even include discrimination on account of sex.¹⁰ The solution also seemed simple—write a law that paralleled the federal law so that the EEOC would grant Arizona “deferral” jurisdiction. The state agency that would enforce the law was the Arizona Attorney General’s Office, and Bruce Babbitt, whom I knew, was interested in running for that job. Bingo! It seemed everyone could win. Employees with discrimination complaints would not have to stand in line to get through the EEOC backlog. Employers and unions who were subject to discrimination complaints could have them handled by a state agency more accessible to them, as well as to complainants. I started to pull together a group of lawyers to draft legislation.

There were skeptics. My senior partners, for example, doubted any legislation as historically controversial as civil rights legislation could get through the notoriously conservative Arizona legislature. The local EEOC office seemed less than enthusiastic. None of them seemed to grasp the theory of deferral as a “carrot” that made the plan seem feasible to me.

So our group went to work, designating a reporter and meeting from time to time in an available conference room of one of our various offices. The group included lawyers representing unions, utilities, and other major employers. At key drafting stages, we consulted with local leaders of various civil rights organizations such as the NAACP. The drafting experienced some lurches, but the final product passed both houses of the legislature without meaningful opposition.¹¹ The Arizona Attorney General’s Office of Civil Rights would have a brand-new employment law, known as the Arizona Civil Rights Act, or ACRA.¹²

8. See 42 U.S.C. §§ 2000e-5(c) ~~&~~and (e).

9. *Id.*; *Mohasco Corp. v. Silver*, 447 U.S. 807, 810 (1980).

10. See Arizona Civil Rights Act, ch. 76, 1974 Ariz. Sess. Laws 229, 236-41 (adding sex-based employment discrimination to the Arizona Revised Statutes in 1974).

11. H.R. Journal, 31st Leg., 2d Sess. 681-82 (Ariz. 1974); S. Journal, 31st Leg., 2d Sess. 245 (Ariz. 1974).

12. Arizona Civil Rights Act, ARIZ. REV. STAT. ANN. §§ 41-1401 to -1493.02 (1974).

The dream, as I envisioned it at the time, was that Arizona would have a new Attorney General who could build a super civil rights office that, over the course of years, would make Arizona a leader in fighting employment discrimination. The federal EEOC office would defer to the state agency, and the process would be less expensive and more efficient.

It did not quite work out that way. Bruce Babbitt was elected Arizona's Attorney General in 1974, but he did not serve even one full term, through a series of thoroughly improbable events. The state's governor, Raul Castro, resigned to become Ambassador to Argentina; the official who succeeded him as governor died shortly after assuming the office, and Bruce Babbitt was suddenly no longer Attorney General, but the Governor—and in the midst of some turmoil, having never had a real opportunity to develop the Civil Rights Division.

The office did not go away, however, and has since done some good work. Arizona's laws have kept up with the major developments in areas such as age and disability discrimination. The 2020 year-end report of the Arizona Attorney General's Office, Civil Rights Division (ACRD) is illustrated in chart form in Figure 1. It shows that more than 1,400 cases were investigated, more than 100 were resolved through mediation conciliation or settlement, and more than one million dollars were recovered as relief for charging parties, apart from injunctive relief and monitoring.¹³ Perhaps surprisingly, allegations of disability discrimination made up the largest category of complaints relating to a protected class, with sex and age coming in ahead of national origin and race.¹⁴

While the 1974 ACRA is alive and well, the state's civil rights enforcement arm never became the cutting edge of anti-discrimination law that I had envisioned a diverse state like Arizona could develop. I suspect Arizona is not an isolated example, and I should not be surprised. State agencies in all but the largest states appear to lack the resources for sustained pushes to move the law forward, or for sustained litigation on behalf of large numbers of complainants.¹⁵

13. Letter from Rebekah Browder, Section Chief Counsel, Civil Rights Division, Arizona Attorney General's Office, to Doug Ducey, Governor, Arizona Office of the Governor, Karen Fann, Senate President, Arizona State Senate, and Rusty Bowers, House Speaker, Arizona House of Representatives (Dec. 30, 2020), <https://www.azag.gov/sites/default/files/2021-01/AGO%27s%202020%20Civil%20Rights%20Division%20Report.pdf> [<https://perma.cc/R6V5-9VNG>].

14. *Id.*

15. *See, e.g.*, OFF. OF THE ATT'Y GEN., STATE OF ARIZ., BUDGET REQUEST FISCAL YEAR 2019, at 93, 129 (2017), https://www.azag.gov/sites/default/files/publications/2018-06/FY19_Dept_Law_Budget_Request.pdf [<https://perma.cc/8ABW-K4RK>] (finding that the

Increasing resources means increasing revenue, and tax increases are, to say the least, hard to come by in Arizona and elsewhere. All of this means we have to continue to depend on the resources of the federal government, including legislative, fiscal, and judicial, to strive to fulfill the promise of equal employment opportunities.

Yet the ACRA and the related anti-discrimination laws that followed it are still on the books. The legal structure is there for the state of Arizona to become an even more forceful participant in combating discrimination in the future. Lawyers are resourceful and can utilize the state laws to bring cases before the Arizona state courts. The state Supreme Court has said that because the ACRA is modeled after Title VII of the Civil Rights Act, federal case law is persuasive in construing the ACRA.¹⁶ Nevertheless, Arizona's courts could become more creative, particularly if the federal courts indicate a tendency to become less vigilant in the field of civil rights. As one who was "present at the conception" of Arizona's employment discrimination law, I would like nothing better than to see that law utilized to the fullest.

Civil Rights Division of the Arizona Attorney General's Office spent \$2,334,900 during the 2017 fiscal year, in comparison to the Criminal Division, which spent \$8,521,000); *see also* U.S. COMM'N ON CIV. RTS., ARE RIGHTS A REALITY?: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 29 (2019), <https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf> [<https://perma.cc/SH37-YDUQ>] (finding that "[federal] civil rights enforcement offices have been inadequately funded").

16. *See* *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 911 n.3 (1983).

Figure 1

