

## Updates



In a recent decision, the Arizona Court of Appeals considered the claim that an employee was discharged for disclosing allegedly unsafe conditions in violation of the Arizona Employment Protection Act (AEPA), A.R.S. § 23-1501.

The court considered whether each disclosure by the employee qualified as protected activity and concluded that the reported violation of the Arizona Administrative Code (AAC) could constitute protected activity, while the others, including a reported violation of state regulations of the National Electric Safety Code (NESC), were not protected activity.

In *Seballos v. Freeport-McMoran, Inc.*, 2023 WL 5624716 (Ariz. Ct. App. Aug. 31, 2023), the court evaluated an employee's retaliatory termination claim under the AEPA, which authorizes a cause of action against an

employer that terminates an employee for reporting a reasonable belief that the employer "has violated, is violating or will violate the Constitution of Arizona or the statutes of [the] state."

The plaintiff argued that the defendants terminated him for complaining about unsafe conditions, including "problems with [the] [d]efendant's electrical grid," which he asserted he reasonably believed violated the NESC. The court held that this disclosure did not fall under the scope of the AEPA "because [the plaintiff] ha[d] neither alleged nor established that he disclosed an Arizona constitutional or statutory violation." Specifically, the court noted that the Arizona Corporation Commission adopted the NESC through its *regulations*—not through the state constitution or by statute.

By contrast, the plaintiff also reported concerns about unsafe drinking water, specifically alleging that the defendants violated Title 18, Chapter 4, of the AAC, which incorporates federal Safe Drinking Water Act (SDWA) standards. While the appellate court noted that it was a "closer question" as to whether this disclosure violated a statutory provision under the AEPA—and suggested that defendants could potentially have challenged the plaintiff's reliance on the AAC, but waived the issue on appeal—the court ultimately found that the plaintiff's reference to the AAC raised "a triable issue of fact on whether he had 'information or a reasonable belief' of a statutory violation because it is enforceable by statute and incorporates related statutes." For this disclosure, the appellate court reversed the trial court's grant of summary judgment and found that the unsafe drinking water complaint alleged in the action could be enough to meet the AEPA's requirement that an employee's disclosure must be of an Arizona statutory or constitutional violation.

*Seballos* distinguishes an important nuance in employee-reported violations as a basis for a claim under the AEPA. Employers presented with retaliatory termination claims should consult experienced counsel, including to determine whether the underlying complaint is grounds for a claim under the AEPA.

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