IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARIO ALDERETE, DONALD MEDINA, JESSE SERNA, GEORGE ALLEN WYLER, JERONIMO RIVERA, GILBERT KOZLOWSKI, RICHARD BARROS, JOSEPH TAFOYA, ANGELO GALLEGOS, and MIKE FARIAS,

Plaintiffs-Appellants,

and

SAM BEATTY,

Plaintiff,

vs.

CITY OF ALBUQUERQUE,

Defendant-Appellee,

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES 3022,

Defendant.

No. 33,151
Bernalillo County
D-202-CV-2012-3136

BRIEF IN CHIEF

Appeal from Decision of the Honorable Beatrice Brickhouse, Second Judicial District Court.

Submitted by:

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ORAL ARGUMENT IS REQUESTED

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SUMMARY OF PROCEEDINGS

Plaintiffs/Appellants worked for Appellee as supervisors (M14s) for The City of Albuquerque Solid Waste Department. *[RP #72].* Ten of the Plaintiffs/Appellants, whose claims against the City were dismissed, were promoted from the B Series to M Series as M14 step 2s. Plaintiffs presented evidence that they were told by Defendant City that all M14s promoted and hired into Solid Waste Department would be paid the same rate of pay. *[RP #73].* The City's Personnel Rules and Regulations §700 outline the procedure to determine the rate of pay for M Series employees in coordination with the CBA pay schedule. *[RP#73]* The Defendant City of Albuquerque admitted in its Motion for Summary Judgment that the City at the time was paying fifteen M14s with the same title, position, authority and responsibilities as the Plaintiffs at a higher rate of pay. *[RP#73, #74].*

Plaintiffs/Appellants asserted that the City breached its contractual obligations to them by not following the City Personnel Rules and Regulations when it hired or promoted other M14 supervisors in the Solid Waste Department with the same title, position and duties as Plaintiffs/Appellants at a higher rate of pay than Plaintiffs. *[RP#131, #132]* Defendant/Appellee City of Albuquerque filed a Motion for Summary Judgment arguing that Plaintiffs did not have standing to assert a breach of contract claim against the City of Albuquerque because: 1) the

Plaintiffs/Appellants had no evidence that the City did not follow its Personnel Rules and Regulations with regard to the promotion and setting of Plaintiffs' rate of pay; and 2) the City of Albuquerque had substantially complied with its own Personnel Rules and Regulations with regard to the pay of the higher rate of pay for the other fifteen higher paid M14s. *[RP#75, #76, #131].*

The Plaintiffs filed a Response in Opposition arguing that the City Personnel Rules and Regulations and statements made by Defendant City asserted a property interest established by the City Personnel Rules and Regulations and the City owed them a duty to apply the Personnel Rules and Regulations uniformly and equally to all the M14s in the Solid Waste Department. *[RP#133, #134].* Plaintiffs also asserted a genuine issue of material fact existed in that Defendant had not produced sufficient evidence that it had substantially complied with the City Personnel Rules and Regulations when setting the rate of pay for the higher paid M14s because the City did not show how the rate was calculated. *[RP# 72 - #74, #131- #133].*

The District Court without hearing oral arguments determined that The City of Albuquerque did not breach any contractual obligations to Plaintiffs and that Plaintiffs had suffered no injury. *[RP#242 - #250].* The District Court also determined that the fact The City of Albuquerque failed to produce evidence on how the higher rates of pay were calculated for the fifteen other M14s in Plaintiffs'

department was irrelevant and immaterial to the disposition of this case. *[RP#242 - #250]*.

ARGUMENT

A THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFFS HAD NOT SUFFERED ANY INJURY WHEN THE DEFENDANT CITY OF ALBUQUERQUE FAILED TO FOLLOW ITS OWN PERSONNEL RULES AND REGULATIONS WHEN PROMOTING AND SETTING A HIGHER RATE OF PAY FOR OTHER CITY EMPLOYEES WITH THE EXACT SAME JOB TITLE, POSITION AND DUTIES AS PLAINTIFFS.

This case turns on whether the City of Albuquerque is required to follow its personnel policies and procedures when setting the pay of all of its M series employees. The City argued and the District Court agreed that the Personnel Rules and Regulations did not create a contract with Plaintiffs/Appellants. However that is a misstatement of the law. The U.S. Supreme Court has held:

Property interests are not created by the due process clause of the Constitution. *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709. Rather, they are created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract. *See, e.g., Bishop v. Wood,* 426 U.S. 341, 344-45, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976) (ordinance or implied contract may create a property

interest in continued employment); *Perry v. Sindermann,* 408 U.S. 593, 600-02, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972) (written contract with explicit tenure provision creates property interest; contract "implied" from policies and practices of institution may create property interest); *Melton v. City of Oklahoma,* 879 F.2d 706, 718 n. 15 (10th Cir.) (state statute, ordinance, or express or implied contract may create property interest), *partial reh'g granted,* 888 F.2d 724 (1989); *Vinyard v. King,* 728 F.2d 428, 432 (10th Cir.1984) (*Vinyard II*) (federal statute, city charter, or contract may create a property right); *Poolaw v. City of Anadarko,* 660 F.2d 459, 463 (10th Cir.1981) (city charter may create property interest), *cert. denied,* 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 779 (1985). *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972))

New Mexico Courts have also held that Personnel Rules and Regulations create a property interest and it also has been recognized that under New Mexico law a constitutionally protected property interest can arise despite the absence of a statute or formal contract. *See, Lovato v. City of Albuquerque* 106 N.M. 287, 290, 742 P.2d 499, 502 (1987).

The City Personnel Rules and Regulations create a property interest with every City employee that the City will pay them according to the pay schedule of the CBA and will apply the Personnel Rules and Regulations uniformly when establishing an

employees' pay. The Plaintiffs have been harmed by the City's failure to follow its own rules and regulations. The Plaintiffs/Appellants receive less pay for performing the same work as their peers. The City admits that all the Plaintiffs performed the same work and the same duties as the other M14s who are paid a higher wage. *RP#73, #74, #131* The Plaintiffs have a property interest in the Personnel Rules and Regulations that they will be applied uniformly for all M14s doing the same duties and under the same position description. The Plaintiffs/Appellants by accepting the position of a M14 at the City's Solid Waste Department believed that they would be compensated according to the Personnel Rules and Regulations. However, the City has admitted to paying higher wages to M14 employees contrary to the City's Personnel Rules and Regulations. *RP#73, #74* . While the Personnel Rules and Regulations do allow for exceptions, the City did not follow its own policies with regard to the exceptions. *RP#73, #74, #131, #133*

The District Court's decision that Plaintiffs have not been harmed is incorrect. The Plaintiffs/Appellants accepted the position as M14s believing the City would apply the same rules and regulations to every M14s hired. The City did not apply the rules and regulation uniformly. Therefore, the Plaintiffs have been harmed and the District Court should have denied the City's Motion for Summary Judgment.

B. THE DISTRICT COURT ERRED IN FINDING DEFENDANT CITY OF ALBUQUERQUE DID NOT BREACH ANY CONTRACTUAL OBLIGATIONS TO PLAINTIFFS WHEN IT DID NOT FOLLOW ITS OWN PERSONNEL RULES AND REGULATIONS WHEN PROMOTING AND SETTING A HIGHER RATE OF PAY FOR OTHER CITY EMPLOYEES WITH THE EXACT SAME JOB TITLE, POSITION AND DUTIES AS PLAINTIFFS.

In New Mexico our Courts have long held:

> If employer chooses to issue policy statement, in a manual or otherwise, and by its language or by employer's actions encourages reliance thereon, employer cannot be free to only selectively abide by it; having announced a policy, employer may not treat it as illusory.

Garcia v. Middle Rio Grande Conservancy Dist. 121 N.M. 728, 918 P.2d 7 (1996). As stated above the City of Albuquerque's Personnel Rules and Regulations created a property interest and contract with Plaintiff/Appellants. Therefore, the City owed Plaintiffs/Appellants a duty to follow its Personnel Rules and Regulations for all its employees. The City breached its duty to Plaintiffs/Appellants by paying higher wages to other M14s doing the same work and having the same job titles. The District Court in its ruling allows the City to breach its own personnel policies and rules whenever it feels like it. The City admits it failed to follow its personnel policies with regard to M14s pay at the City's Solid Waste Department. Therefore, the City's Personnel Rules and Regulations have become illusory and arbitrary. The

District Court's ruling now allows the City to breach its contractual obligations to its M14s and prevents any real recourse by the harmed M14s. The District Court ruling only allows the M14s who are being paid more than the Personnel Rules and Regulations allow to bring an action. The M14s who were paid more than the Personnel Rules and Regulations certainly are not going to complain about being paid more contrary to the Personnel Rules and Regulations. Therefore, the City of Albuquerque is now free to pick and choose when to follow and apply the Personnel Rules and Regulations. The District Court's ruling must be reversed to prevent manifest injustice to Plaintiffs/Appellants.

C. THE DISTRICT COURT ERRED IN DETERMINING THERE WAS NO GENUINE ISSUE OF FACT WITH REGARD TO WHETHER THE DEFENDANT CITY OF ALBUQUERQUE HAD COMPLIED WITH ITS PERSONNEL RULES AND REGULATIONS IN SETTING THE PAY FOR OTHER M14S IN PLAINTIFFS' SOLID WASTE DEPARTMENT WHEN THE CITY OF ALBUQUERQUE FAILED TO PRESENT EVIDENCE OF HOW THE CITY DETERMINED OR CALCULATED THE HIGHER PAY FOR THE OTHER M14S.

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992).

> A court reviewing a summary judgment motion may not weigh the evidence or pass on the credibility of the witnesses. In its review, the court must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories and admissions in a light most favorable to a trial on the merits. Summary judgment is an extreme remedy that should be imposed with caution. If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied.

Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶12, 135 N.M. 539, 91 P.3d 58 (internal citations and quotation marks omitted). The New Mexico Supreme Court has restated and renewed its position on New Mexico's summary judgment standard stating: "New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits." *Romero v. Philip Morris Inc.* 148 N.M. 713, 720, 242 P.3d 280, 287 (2010).

The City in its Motion for Summary Judgment did not demonstrate to the Court how it calculated Plaintiffs/Appellants and the other M14s pay pursuant to the CBA and the Personnel Rules and Regulations. Rather, the City just filed an affidavit from its Human Resources Department stating the City substantially complied with the Personnel Policies. *RP #73, #74, #75.* Plaintiffs/Appellants objected to the affidavit testimony as being self serving and inappropriate for summary judgment. *RP#131, #132, #133* Our Courts have held that self serving affidavits without explanations of the conclusions are inappropriate for summary Judgement.

> In our view, this self-serving affidavit without any explanation of the underlying factual basis for its conclusions does not serve to create a material issue of fact that "all reasonable beneficial use" of the property has been deprived by the County's actions. *See Galvan v. City of Albuquerque,* 85 N.M. 42, 44-45, 508 P.2d 1339, 1341-42 (Ct.App.1973) (holding that affidavits must set forth facts admissible in evidence and explain its conclusions)

Santa Fe Trail Ranch II, Inc. v. Board of County Com'rs of San Miguel County 125 N.M. 360, 365, 961 P.2d 785, 790 (Ct. App.,1998). Without the underlying factual calculations on how the M14s pay was calculated, Plaintiffs/Appellants were unable to dispute the calculations. The City was allowed to create a material fact without providing the underlying calculations. The District Court erred in allowing the affidavit testimony without underlying facts to be used as a material fact for summary judgment.

CONCLUSION

WHEREFORE, Plaintiffs/Appellants respectfully requests this Court to reverse in full the decision of the District Court granting summary judgment to Appellee, and remand this matter back to the District Court for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing ***Brief-in-Chief*** were mailed with a Copy of the Certificate of Service Via First-Class Mail, Postage Prepaid, Addressed to the Following on this 6^{th} day of January, 2014:

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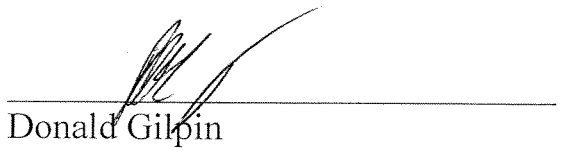

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