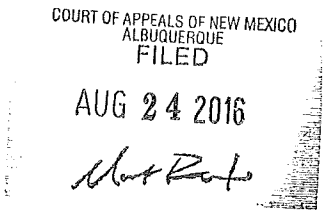
IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO



ALISHA TAFOYA LUCERO,

Plaintiff-Appellee,

v.

Ct. App. No. ~~35,492~~ 35438
Dist. Ct. No. D-101-CV-2013-03206

NEW MEXICO CORRECTIONS DEPARTMENT,

Defendant-Appellant.

Civil Appeal from the First Judicial District Court
Honorable David K. Thomson

APPELLEE'S ANSWER BRIEF

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August 24, 2016

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I. QUESTION PRESENTED

The New Mexico legislature enacted the Fair Pay for Women Act to correct pay inequality between the sexes. The Fair Pay for Women Act contains no language excluding state employees from its benefits. Did the legislature intend for state employees to have the same rights as private sector employees under the Fair Pay for Women Act?

II. INTRODUCTION

This is an appeal of the district court's denial of Defendant New Mexico Corrections Department's motion to dismiss on April 12, 2016, rejecting Defendant's argument that the Fair Pay for Women Act does not apply to it.

Plaintiff Alisha Tafoya Lucero brought this action for violation of the Fair Pay for Women Act against her employer, Defendant New Mexico Corrections Department ("Corrections Department"). The Corrections Department sought to have the case dismissed under Rule 1-012(B) NMRA. After the district court denied its motion, the Corrections Department obtained a writ of error and brought this appeal.

The district court found that the Fair Pay for Women Act applies to state employers. The Corrections Department argues that this Court should strike down that applicability. Ms. Lucero maintains that the district court was right. This Court should affirm the district court's ruling and remand the case to the district court for a trial on the merits.

III. SUMMARY OF PROCEEDINGS

In 2013, the New Mexico legislature passed the Fair Pay for Women Act. After receiving Governor Susanna Martinez's signature, it went into effect on June 14, 2013.

Ms. Lucero filed her suit against the Corrections Department on December 19, 2013. The Corrections Department filed its answer on February 4, 2014.

The district court issued an order prohibiting motions to dismiss after August 24, 2014. The Corrections Department proceeded to litigate the case, responding to interrogatories and requests for production and serving its own discovery requests. Then on November 5, 2014, the Corrections Department moved to dismiss the case. That was seventy-four days after the deadline imposed by the district court. It was also 275 days after the deadline contained in Rule 1-012(B) NMRA.

On April 23, 2015, the district court held oral argument on the motion to dismiss. More than ten months later, the district court entered an order dismissing Ms. Lucero's claim for punitive damages, but otherwise denying the motion to dismiss, finding the Fair Pay for Women Act applies to the state. The district court then supplemented that order to allow for the Corrections Department to seek an interlocutory appeal.

The Corrections Department went ahead with its application for an interlocutory appeal, but not before first filing a petition for a writ of error. This Court granted the writ of error, but denied the interlocutory appeal and issued a mandate to the district court clerk on July 26, 2016.

IV. STATEMENT OF FACTS

In October 2012, the Corrections Department assigned Ms. Lucero the position of Acting Deputy Warden. R.P. 12. She was promoted to Deputy Warden-Max Security in January 2013. *Id.*

At the time she filed this suit, Ms. Lucero had worked for the Corrections Department for more than twelve years and was always a reliable employee, yet her compensation has been significantly less than that of a similarly-situated male: Ms. Lucero was earning approximately $29.00 per hour while Deputy Warden-Max Security Derek Williams earned approximately $39.00 per hour for similar work. *Id.*; R.P. 2.

The Corrections Department cannot articulate any legitimate reason to pay Mr. Williams more than Ms. Lucero for equal work on jobs the performance of which require equal skill, effort, and responsibility and that are performed under similar working conditions. R.P. 2. Despite receiving notice of the need for change, the Corrections Department has not implemented a pay system to stop the gender disparity. *Id.*

V. SUMMARY OF ARGUMENTS

The legislature intended for state employees to enjoy the same rights as private sector employees under the Fair Pay for Women Act. This is evident after

considering the following:

- In light of the facts Ms. Lucero alleges, the district court correctly denied the Corrections Department's motion to dismiss. A motion to dismiss is only proper when it appears that the plaintiff can neither recover, nor obtain, relief under any state of facts provable under the claim. Ms. Lucero's complaint properly alleges a violation of the Fair Pay for Women Act.
- The district court correctly discerned that the legislature intended to correct pay inequality in state and private sector jobs. The legislature identified the problem and acted to correct it with the Fair Pay for Women Act.
- Claims under the Fair Pay for Women Act are not barred by sovereign immunity because the New Mexico Supreme Court abrogated it. Neither the Tort Claims Act nor the Fair Pay for Women Act restore such immunity under the circumstances of this case.
- Even if the Tort Claims Act did restore sovereign immunity under the circumstances of this case, the Tort Claims Act contains a waiver of that immunity: "The provisions of the Tort Claims Act shall not affect the provisions of any personnel act, any rules or regulations issued thereunder or any other provision of law governing the employer-employee relationship."

- State employers are within the Fair Pay for Women Act's definition of "employer" when read together with the Human Rights Act. The Human Rights Act applies to the state and the legislature wanted the Fair Pay for Women Act to also apply to the state, so it adopted nearly identical language.
- The issue of immunity from suit is moot as the Corrections Department opted to litigate by completing discovery and otherwise preparing for trial before moving to dismiss.

VI. ARGUMENTS

A. The district court properly denied the motion to dismiss.

Motions to dismiss are reviewed de novo. *Glaser v. LeBus*, 2012-NMSC-012, ¶ 8, 276 P.3d 959, 962. Whether a governmental entity has immunity is also reviewed de novo. *Martinez v. New Mexico Dep't of Transp.*, 2013-NMSC-005, ¶ 10, 296 P.3d 468, 470. Further, questions of interpretations of statutes, such as the Fair Pay for Women Act, are reviewed de novo. *See State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 770.

Ms. Lucero agrees with the district court's denial of the Corrections Department's motion to dismiss because the Fair Pay for Women Act applies to state employers. R.P. 281. A motion to dismiss is only proper when it appears that

the plaintiff can neither recover, nor obtain, relief under any state of facts provable under the claim. *Village of Logan v. Eastern N.M. Util. Auth.*, 2015-NMCA-103, ¶ 8, 357 P.3d 433, 435; *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 670. Considering the facts stated in the complaint, Ms. Lucero set forth facts that entitle her to relief for violation of the Fair Pay for Women Act, NMSA 1978, §§ 28-23-1 through 6 (2013). R.P. 2, 12.

The Court is to review the sufficiency of the complaint and not decide whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support her claims. *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-030, ¶ 11, 150 N.M. 258, 262; *Callahan v. New Mexico Fed'n of Teachers–TVI*, 2006-NMSC-010, ¶ 4,139 N.M. 201, 204. "[G]ranting a motion to dismiss is an extreme remedy that is infrequently used." *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 4, 120 N.M. 69, 70; *Rummel v. Edgemont Realty Partners, Ltd.*, 1993-NMCA-085, ¶ 9, 116 N.M. 23, 25. For the reasons stated below, the Corrections Department fails to meet its burden for a motion to dismiss.

B. The district court correctly discerned the legislature's intent.

The New Mexico Supreme Court instructs New Mexico courts that their "primary goal when interpreting statutes is to further legislative intent." *Robinson v. Board of Commr's*, 2015-NMSC-035, ¶ 18, 360 P.3d 1186, 1190 (quoting *State*

v. Strauch, 2015-NMSC-009, ¶ 13, 345 P.3d 317, 321). Yet the Corrections Department attempts to take us all down the wrong path, arguing that by discerning legislative intent, the trial court "usurp[ed] . . . the legislative function and the rules of statutory construction militate against it." Appellant's Br. in Chief at 14.

Amicus Curiae New Mexico Association of Counties ("NMAC") asserts that state employers should be allowed to continue to discriminate because "the burdens of litigation are a heavy load. . . . " Br. of Amicus Curiae N.M. Ass'n of Counties in Supp. of Def./Appellant N.M. Corr. Dep't at 11. The NMAC points out that even men can sue for equal pay under the Fair Pay for Women Act, resulting in a cause of action for "10,000-plus employees against counties. . . . " *Id.* Yet rampant pay discrimination is exactly what the legislature intended to curb with the Fair Pay for Women Act.

As Amici Curiae Southwest Women's Law Center et al. explain in their brief, by 2009 New Mexico's classified employment system had mostly eliminated serious pay inequalities among state employees. Yet pay gaps remained in the public and private sectors. Rep. Brian Egolf, the Fair Pay for Women Act's sponsor, explained: "Today women in New Mexico earn 78 cents for each dollar earned by a man. This bill is a strong step in ending this terrible inequality." Kirk

Rafdal, *N.M: Governor Signs 'Fair Pay for Women Act,'* SOCIETY FOR HUMAN RESOURCE MANAGMENT (June 9, 2016, 9:59 AM), https://www.shrm.org/legalissues/stateandlocalresources/pages/nm-governor-signs-fair-pay-women-act.aspx.

There is no reason to believe the legislature intended to exclude the state from the requirements of the Fair Pay for Women Act. To the contrary, as Amici Curiae Southwest Women's Law Center et al. maintain, the legislature intended for the state–as New Mexico's largest employer–to lead the way in closing the pay gap. That intent is apparent from the language and context of the Fair Pay for Women Act, as well as the policies animating it. The Corrections Department argues that does not matter. Def./Appellant N.M. Corr. Dep't's Br. in Chief at 8. Not only does it matter, but it is of utmost importance as the primary goal of New Mexico's appellate courts is to further legislative intent. *Robinson*, 2015-NMSC-035, ¶ 18, 360 P.3d at 1190; *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 168.

The Corrections Department offers another argument: State employees cannot, and should not, be able to sue under the Fair Pay for Women Act because "there's already all kinds of provisions to sue the state for unfair pay discrimination, okay? There's the Lilly Ledbetter Act. There's Title VII. There's

the New Mexico Human Rights Act." Tr. CD at 11:59. Under that argument even private sector employees would be barred from suing under the Fair Pay for Women Act because they are also covered by the statutes the Corrections Department mentions. If the Corrections Department's argument were correct, the Fair Pay for Women Act would not benefit anyone.

The Corrections Department and NMAC have decided they are better off operating under the ambit of pay inequality and have joined forces to parry legislative intent. What they are overlooking is that we would all be better off paying men and women the same for the same work. As President Kennedy pointed out long ago, "Our economy today depends upon women in the labor force . . . [and it] is extremely important that adequate provision be made for reasonable levels of income to them. . . . " John F. Kennedy, *Remarks Upon Signing the Equal Pay Act, June 10, 1963*, online by Gerhard Peters & John T. Woolley, THE AMERICAN PRESIDENCY PROJECT (June 9, 2016, 10:30 AM), http://www.presidency.ucsb.edu/ws/?pid=9267.

C. Sovereign immunity does not bar Ms. Lucero's suit.

The Corrections Department argues that it should be allowed to continue to discriminate against women such as Ms. Lucero because sovereign immunity shields it from these lawsuits and there is no applicable waiver. Def./Appellant

N.M. Corr. Dep't's Br. in Chief at 19-24. Without citing any supporting authority, the Corrections Department contends, "It has been clear since the legislature enacted the TCA, that the State and its agencies are immune to suit absent an express legislative directive." *Id.* at 21. The Court should reject this argument for lack of cited authority. *See Lenscrafters, Inc. v. Kehoe*, 2012-NMSC-020, ¶ 22, 282 P.3d 758, 764 (court may reject an argument that is not supported by cited authority); *see also City of Eunice v. New Mexico Taxation & Revenue Dep't*, 2014-NMCA-085, ¶ 17, 331 P.3d 986, 991 ("Where a party cites no authority to support an argument, we may assume no such authority exists").

Conversely, sovereign immunity is of no use to the Corrections Department because in 1975, the New Mexico Supreme Court found that "the ancient doctrine of sovereign immunity has lost its underpinnings" and abrogated it. *Hicks v. State*, 1975-NMSC-056, ¶ 13, 88 N.M. 588, 592. One year later New Mexico's legislature restored sovereign immunity, under certain circumstances, with the Tort Claims Act, NMSA 1978, §§ 41-4-1 through 27. Yet state agencies, such as the Corrections Department, cannot assert sovereign immunity in lawsuits arising under the Fair Pay for Women Act because "[t]he provisions of the Tort Claims Act shall not affect the provisions of any personnel act, any rules or regulations issued thereunder or any other provision of law governing the employer-employee

relationship." NMSA 1978, § 41-4-21. As the Fair Pay for Women Act is a personnel act and a provision of law governing the employer-employee relationship, the Tort Claims Act's restoration of sovereign immunity does not apply here.

Nowhere in the Tort Claims Act or the Fair Pay for Women Act does the legislature even hint that the state is immune from a law that requires equal pay for similar work. *See* NMSA 1978, §§ 41-4-1 through 27 (2015); NMSA 1978, §§ 28-23-1 through 6 (2013). In fact, the legislature clearly directs that "[l]iability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." NMSA 1978, § 41-4-2(B). The Fair Pay for Women Act has no relation to traditional tort concepts–it deals with contract rights borne from the employer-employee relationship. *See* NMSA 1978, § 28-23-3 (2013) (Fair Pay for Women Act prohibits certain employment discrimination). Moreover, the Tort Claims Act was enacted in 1976, so the legislature could not have intended for the Fair Pay for Women Act to be within the contemplated "traditional tort concepts" as the Fair Pay for Women Act was not enacted until thirty-seven years later. Sovereign immunity, as abrogated by the New Mexico Supreme Court, does not allow the Corrections Department to continue to

discriminate against women such as Ms. Lucero, and neither the Tort Claims Act nor the Fair Pay for Women Act restore such immunity.

In their brief, Amici Curiae Southwest Women's Law Center et al. further explain that nothing in the Fair Pay for Women Act provides the Corrections Department immunity from its prescripts. In the absence of such a provision, the state is subject to suit. *See State v. Hanosh*, 2009-NMSC-047, ¶ 10, 147 N.M. 87, 90 (government agencies do not enjoy immunity absent statutory authorization); *Zuni Pub. Sch. Dist. #89 v. State Pub. Educ. Dep't*, 2012-NMCA-048, ¶ 20, 277 P.3d 1252, 1258 (sovereign immunity is abrogated unless the legislature explicitly asserts or waives it). As the district court recognized, the Fair Pay for Women Act's incorporation of the Human Rights Act's relief process demonstrates the legislature's intent to deem the state as an employer and, thereby, subject to the Fair Pay for Women Act. R.P. 285-87.

D. If the Tort Claims Act did apply, sovereign immunity would be waived.

If the Tort Claims Act did provide the Corrections Department with sovereign immunity, that immunity would be waived under these circumstances because "[t]he provisions of the Tort Claims Act shall not affect the provisions of any personnel act, any rules or regulations issued thereunder or any other

provision of law governing the employer-employee relationship." NMSA 1978, § 41-4-21. Examination of the Tort Claims Act reveals that because the Fair Pay for Women Act is a provision of law governing the employer-employee relationship, the legislature intends for § 41-4-21 to render a waiver of immunity.

The legislature intended to treat employment matters differently from the torts for which it waives sovereign immunity, enumerated in NMSA 1978, §§ 41-4-5 to -12. Sections 41-4-5 through 11 all deal with negligence, while § 12 deals with liability for intentional torts committed by law enforcement personnel. The legislature covers the employment torts collectively in NMSA 1978, § 41-4-21.

Judge Mechem discerned the legislative intent of NMSA 1978, § 41-4-21 in *Garcia v. Purcell*, No. 94-220-M Civil, 1995 U.S. Dist. LEXIS 21999, at *28 (D.N.M. Sept. 7, 1995). He found that under the Tort Claims Act, "sovereign immunity has been waived to the extent that suits for retaliatory discharge may be brought against a public employer while acting within the scope of his duty." *Id.* It follows that violation of the Fair Pay for Women Act by an employer acting within the scope of his duty would be treated similarly. There are no reported cases that are contrary to the holding in *Garcia*.

Rubio v. Carlsbad Mun. Sch. Dist., 1987-NMCA-127, 106 N.M. 446, which deals with negligent retention and supervision, may appear to be contrary to

Garcia. A deeper examination, however, reveals the holding in *Rubio* to be harmonious with *Garcia*. *Rubio* is about how the Tort Claims Act affects a negligent hiring and retention claim by a third party, not an employee. The claim at issue in *Rubio*, therefore, does not deal with an employment tort. In *Rubio*, the duty is not owed to an employee who has been fired, but to a third party who is a member of the public. *See Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 10, 137 N.M. 64, 68 ("[l]iability for negligent hiring 'flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring.'" (quoting *Medina v. Graham's Cowboys, Inc.*, 1992-NMCA-016, ¶ 7, 113 N.M. 471, 473)). In *Rubio*, the plaintiffs asserted that a duty was owed to students who were allegedly harmed by teachers. *Rubio*, 1987-NMCA-127, ¶ 1, 106 N.M. at 447. The *Rubio* court concluded there was no waiver of sovereign immunity for negligent hiring and retention, which is the correct conclusion because, in *Rubio*, those causes of action were asserted against third parties and were not provisions of law governing the employer-employee relationship.

Although *Garcia* was decided eight years after *Rubio*, there was no reason for Judge Mechem to mention *Rubio* in the *Garcia* opinion because *Garcia* relates to a provision of law governing the employer-employee relationship for which

NMSA 1978, § 41-4-21 provides a waiver of immunity. As Judge Mechem put it, "The language of [§ 41-4-21] of the Tort Claims Act is clear." *Garcia*, 1995 U.S. Dist. LEXIS 21999, at *28.

"Under the plain meaning rule of statutory construction, 'when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.'" *Rivera*, 2004-NMSC-001, ¶ 10, 134 N.M. at 770 (quoting *State v. Jonathan M.*, 1990-NMSC-046, ¶ 4, 109 N.M. 789, 790). If the Court finds that the Tort Claims Act applies in this case, it should find a waiver of immunity as did Judge Mechem in *Garcia*.

E. The Fair Pay for Women Act applies to state employers.

The Corrections Department challenges Ms. Lucero's claim under the Fair Pay for Women Act as not applicable to a state employer because it does not specifically mention the state in its definition of "employer." Appellant's Br. in Chief at 6-12. The failure of this argument is apparent when the definition of "employer" in the Fair Pay for Women Act is compared to the definition of "employer" in the Human Rights Act, NMSA 1978, § 28-1-2(B) (2007). The Human Rights Act, NMSA 1978, § 28-1-7(A) (2004), also bars sex discrimination in employment compensation, and it unquestionably applies to the state. *See, e.g., Lobato v. New Mexico Env't Dep't*, 2012-NMSC-002, 267 P.3d 65; *Ulibarri v.*

State of N.M. Corr. Acad., 2006-NMSC-009, 139 N.M. 193; *Garcia-Montoya v. State Treasurer's Office*, 2001- NMSC-003, 130 N.M. 25. The legislature is presumed to have enacted statutes, such as the Fair Pay for Women Act, with knowledge of judicial pronouncements such as those immediately above that apply the Human Rights Act to the state. *See State v. Tomlinson*, 1982-NMCA-025, ¶ 11, 98 N.M. 337, 339.

Under the Human Rights Act, "'employer' means any person employing four or more persons and any person acting for an employer." NMSA 1978, § 28-1-2(B) (2007). The Fair Pay for Women Act defines "employer" as "a person employing four or more employees and any person acting for an employer." NMSA 1978, § 28-23-2(E) (2013). The definitions of "employer" in the Fair Pay for Women Act and Human Rights Act are nearly identical and their meanings are indistinguishable. The legislature plainly modeled the Fair Pay for Women Act's definition of "employer" on the Human Rights Act's definition. The logical reason the legislature would do such a thing would be for the two statutes to cause a harmonious effect. In other words, the Human Rights Act applies to the state and the legislature wanted the Fair Pay for Women Act to also apply to the state, so it adopted nearly identical language. Why would the legislature use such language if it intended two different effects?

In *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 26, 309 P.3d 1047, 1054, the New Mexico Supreme Court explains that "all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." As the Fair Pay for Women Act shows, it is in pari materia with the Human Rights Act. *See* NMSA 1978, § 28-23-4(A)(2) (2013) (a person claiming to be aggrieved by a violation of the Fair Pay for Women Act may seek relief under the Human Rights Act). Like the Human Rights Act, the Fair Pay for Women Act applies to the state.

The Corrections Department misreads the Uniform Statute and Rule Construction Act ("USRCA") as excluding state agencies, such as the Corrections Department, from the definition of "person." The Corrections Department overlooks the inclusion of legal entities within the definition of person in the USRCA. *See* NMSA 1978, § 12-2A-3(E) (1997) (definition of "person" includes any legal entity). As the New Mexico Supreme Court found long ago, bodies politic, such as the Corrections Department, are legal entities capable of suing and being sued. *See Donalson v. County of San Miguel*, 1859-NMSC-001, ¶ 4, 1 N.M. 263, 266-67 ("a county is fairly included as a body politic and corporate, to which the word 'person' is extended, and is liable to be a party in suits at law, of suing and being sued").

It is not unusual for the legislature to consider nonhuman beings to be within its definition of "person." For example, in *Akins v. United Steel Workers*, 2010-NMSC-031, 148 N.M. 442, the New Mexico Supreme Court found that the legislature considered a union to be a person within the definition of "employer" in the Human Rights Act.

The Corrections Department argues a statute cannot include the state as a "person" unless the statute defines "person" as including the state or its agencies. Def./Appellant N.M. Corr. Dep't's Br. in Chief at 11. To support this argument, the Corrections Department points to the Whistleblower Protection Act. *Id.* This argument fails because the Whistleblower Protection Act applies *only* to the state. NMSA 1978, § 10-16C-3 (2010) ("A public employer shall not take any retaliatory action against a public employee. . . . ") Legislative intent is clear regardless of how the Whistleblower Protection Act defines "public employer."

The New Mexico Supreme Court directs: "Under the plain meaning rule, when a statute's language is clear an unambiguous, we will give effect to the language and refrain from further statutory interpretation. We will not read into a statute language which is not there, especially when it makes sense as it is written." *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 516, *quoted in Faber v. King*, 2015-NMSC-015, ¶ 15, 348 P.3d 173, 178. The Fair Pay

for Women Act defines "employer" as "a person employing four or more employees and any person acting for an employer." NMSA 1978, §28-23-2(e) (2013). It does not say "except the state," despite the Corrections Department's insistence that the Court read that into it. The Corrections Department does not dispute that the Fair Pay for Women Act makes sense as it is written. The Corrections Department is, therefore, an employer under the Fair Pay for Women Act.

F. Whether the Corrections Department is immune from suit is moot.

The Corrections Department is fortunate that the district court elected to overlook the Corrections Department's violation of Rule 1-012(B) NMRA, which required its motion to dismiss to be "made before pleading if a further pleading is permitted." The Corrections Department did not file its motion before further pleading (its answer), but rather 275 days after it filed its answer. Also, the district court disregarded the Corrections Department's violation of the district court's order by filing its motion seventy-four days after the district court's deadline for such motions. R.P. 73.

Such behavior by the Corrections Department bears on the issue of whether it is immune from suit. Just as there is no immunity from liability, no immunity

from suit protects the Corrections Department. But even if the Corrections Department were immune from suit, it decided to forego immunity by completing its discovery and otherwise preparing for trial before moving to dismiss.

The Corrections Department's behavior is contrary to New Mexico Supreme Court policy, which directs: "When the State moves to dismiss a plaintiff's claim by raising the affirmative defense of sovereign immunity invoking the lack of subject matter jurisdiction, the district court must rule on that motion before allowing the claim to proceed." *Ramirez v. State of N.M. Children, Youth & Families Dep't*, 2016-NMSC-016, ¶ 11 (No. S-1-SC-34613, April 14, 2016).

The Corrections Department first raised sovereign immunity as an affirmative defense in the answer it filed back on February 4, 2014 (R.P. 13), but it never moved to dismiss until November 5, 2014. (R.P. 98.) The state has been instructed not to litigate a claim to which it is immune. *Ramirez*, 2016-NMSC-016, ¶ 11 (citing *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002)). By litigating this case, the Corrections Department rendered moot the issue of whether it is immune from suit.

VI. CONCLUSION

The legislature intended for state employees to have the same rights as private sector employees under the Fair Pay for Women Act. Based on the

foregoing, Ms. Lucero respectfully requests that the Court affirm the district court's denial of the Corrections Department's motion to dismiss and remand this case for further proceedings.

Respectfully submitted,

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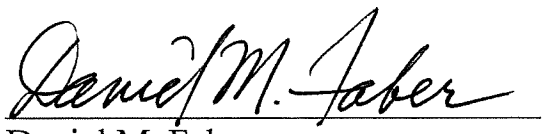
I hereby certify that a true copy of this pleading was mailed to Ellen S. Casey, attorney for New Mexico Department of Corrections, P.O. Box 2068, Santa Fe, NM 87504-2068, Peter Auh, attorney for Amicus Curiae NMAC, 111 Lomas Blvd., Suite 424, Albuquerque, NM 87107, and Alice Lorenz, attorney for Amici Curiae Southwest Women's Law Center et al., 2501 Rio Grande Blvd. NW #A, Albuquerque, NM 87104-3233, this 24th day of August, 2016.



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