ORIGINAL

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MELINDA L. WOLINSKY,

Plaintiff-Appellant,

v.

Ct. App. No. 35,762
Dist. Ct. No. D-101-CV-2016-01005

NEW MEXICO CORRECTIONS DEPARTMENT,

Defendant-Appellee.

Civil Appeal from the First Judicial District Court
Honorable Francis J. Mathew

APPELLEE'S ANSWER BRIEF

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QUESTION PRESENTED

1) Does the New Mexico Fair Pay For Women Act, NMSA 1978, Sections 28-23-1 to 28-23-6 ("FPWA") apply to the New Mexico Corrections Department ("NMCD")?

2) Though Question #1 was the only issued specifically decided by the District Court, Ms. Wolinsky provides argument regarding the second potential basis for dismissal that was included within NMCD's motion to dismiss: Is NMCD entitled to sovereign immunity as to Ms. Wolinsky's FPWA claim based upon the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 to 41-4-30 ("TCA")?

SUMMARY OF PROCEEDINGS

On April 14, 2016, Ms. Wolinsky filed her Complaint against NMCD for an alleged violation of the FPWA due to a claimed failure to pay equal wages. R.P. 000003, ¶ 19. NMCD filed a motion to dismiss this claim on May 18, 2016 on two grounds. R.P. 000009-000018. First, NMCD requested dismissal because the FPWA does not apply to NMCD. R.P. 000009. Second, NMCD requested dismissal because NMCD was entitled to sovereign immunity as to Ms. Wolinsky's claim under the TCA. *Id.* The District Court granted NMCD's motion to dismiss based upon the conclusion that the FPWA does not apply to NMCD. R.P. 000048. The District Court did not make a determination as to NMCD's argument for sovereign immunity under the TCA. *Id.*

NMCD has also been ordered by the First Judicial District Court in *Ayala v. NMCD*, D-101-CV-2016-01485, another case involving these same legal issues, to inform the Court that the District Court had denied NMCD's similar motion to dismiss in the *Ayala* case. The District Court in *Ayala* has stayed that case pending the results of this appeal and/or in *Lucero* v. NMCD, Case No. 35,492. Per the District Court's order in *Ayala*, NMCD will be providing a copy of the relevant orders in *Ayala* to this Court.

ARGUMENT

The FPWA does not apply to NMCD because the FPWA does not specifically provide that state agencies are subject to the FPWA. NMCD is also entitled to sovereign immunity under the TCA because no waiver is provided in the TCA, or the FPWA, to allow suit against NMCD under the FPWA. NMCD requests that the Court affirm the District Court's dismissal.

I. Legal Standard

Rule 1-012(B)(6) NMRA provides for dismissal when the plaintiff has failed to state a sufficient claim for relief. A motion to dismiss should be granted under Rule 1-012(B)(6) "when it appears that plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim." *Burke v. Permian Ford-Lincoln-Mercury*, 1981-NMSC-001, ¶ 4, 95 N.M. 314, 621 P.2d 1119 (citation omitted). Rule 1-012(B)(1) provides for dismissal of a claim where the court does not have subject matter jurisdiction. Under New Mexico law, a court should dismiss a claim pursuant to Rule 1-012(B)(1) where the plaintiff's claim is barred by the state's sovereign immunity. *See Ping Lu v. Educ. Trust. Bd. of New Mexico*, 2013-NMCA-010, ¶ 10, 293 P.3d 186 (citations omitted). "Although a court will take factual allegations in a complaint as true, it does not have to accept legal conclusions, couched as factual accusations, as true." *See Kendall v. Thaxton Rd. LLC*, 443 Fed. Appx. 388, 390 (11th Cir. Sept. 7, 2011) (citation omitted).

II. The FPWA Does Not Apply To NMCD.

A. NMCD Is Not An "Employer" Under The FPWA.

NMCD is an agency of the State of New Mexico. *See* NMSA 1978, § 33-1-3; *Guzman v. N.M. Corr. Dep't*, 2016 U.S. Dist. LEXIS 55518, 4 (D.N.M. Apr. 25, 2016); *Cf. Silva v. State*, 1987-NMSC-107, ¶ 49, 106 N.M. 472, 745 P.2d 380 (holding that NMCD is a "governmental entity" for purposes of the TCA). "A claim against an agency of the state constitutes a suit against the state...." *Dunn v. New Mexico*, 1993-NMCA-059, ¶ 20, 116 N.M. 1, 859 P.2d 469. In order for the FPWA to apply to NMCD, the FPWA must expressly apply to the state.

With exception to certain excepted pay systems, the FPWA prohibits an "employer" from discriminating against employees on the basis of sex by paying lower wages to one sex "for equal work on jobs the performance of which requires equal skill, effort and responsibility and that are performed under similar working conditions." § 28-23-3(A). An "employer" is defined by the FPWA as "a *person* employing four or more employees and any person acting for an employer[.]" § 28-23-2(E) (emphasis added). The FPWA does not define the term "person."

The Uniform Statute and Rule Construction Act, NMSA 1978 Sections 12-2A-1 to 12-2A-20 ("USRCA") provides definitions for general terms for which a New Mexico statute or rule does not otherwise provide a definition. § 12-2A-1(B). The term "person" is defined by the USRCA as an "an individual, corporation,

business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity." § 12-2A-3(E). The term "person" for the FPWA therefore encompasses private individuals and business entities and not the State of New Mexico or its agencies. This point is confirmed by USRCA's separate definition for the term "state" as a "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States." § 12-2A-3(M). The FPWA's provision prohibiting unequal pay therefore does not apply to NMCD.

New Mexico law makes it clear that courts are not to read the state or its agencies into the terms of a statute which do not expressly include such entities. "[A]bsent express words to the contrary, neither the state nor its subdivisions are included within general words of a statute." *Lucero v. Richardson & Richardson, Inc.*, 2002-NMCA-013, ¶ 11, 131 N.M. 522, 39 P.3d 739. In *Stansell v. New Mexico Lottery*, the Court of Appeals applied this principle in addressing an interpretive task that is identical to the one which faces the Court in this case. *Stansell v. New Mexico Lottery,* 2009-NMCA-062, ¶ 3, 146 N.M. 417, 211 P.3d 214.

The issue in *Stansell* was whether the New Mexico Lottery, a government instrumentality, was subject to the Unfair Practices Act given that the applicable term "person" did not expressly include governmental entities. *Id.* The *Stansell* court held that the Unfair Practices Act did not apply to the New Mexico Lottery,

reasoning that "although the UPA's definition of 'person' does not explicitly exclude any state entity, it also does not include one." *Id.*, 12. The *Stansell* court emphasized that the New Mexico "Supreme Court has stated that '[w]hen the [L]egislature has wanted to include . . . governmental bodies in its statutes, it has known how to do so.'" *Id.* (citation omitted). The *Stansell* court finished its analysis with the same conclusion which should be reached by this Court regarding the FPWA – "[s]ince the Legislature did not include any governmental body or the Lottery within the UPA's definition of 'person,' the Lottery is not subject to the UPA." *Id.*

A comparison between the FPWA and the New Mexico Human Rights Act, NMSA 1978 Section 28-1-1 to 28-1-15 ("NMHRA") makes the legislature's intent clear. The FPWA and NMHRA, both employment statutes prohibiting certain employment practices, have similar definitions of the subject term "employer" as based upon the term "person." *Compare* § 28-23-2(E) *with* § 28-1-2(B). However, in the NMHRA, the Legislature put forth a specific definition of the term "person" to include "one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers *or the state and all of its political subdivisions*." § 28-1-2(A) (emphasis added). In the FPWA, the Legislature chose to rely instead upon the general definition for the term "person" in the USRCA which does not include a state and its agencies. § 12-2A-3(E). Therefore, when the Legislature has wanted to include the state and its agencies

within the reach of an employment statute, the Legislature has made an express effort to do so.

Ms. Wolinsky argues that Section 12-2A-3(E)'s mention of "any legal or commercial entity" should include the state because the state is considered a legal entity in the general sense. In presenting such argument, Ms. Wolinsky entirely fails to address the *Lucero* court's holding that "absent *express* words to the contrary, neither the state nor its subdivisions are included within general words of a statute." *Lucero*, 2002-NMCA-013, ¶ 11 (emphasis added). Certainly, the term "any legal or commercial entity" is such a general term that does not *expressly* include the state. Ms. Wolinsky also fails to address the *Stansell* court's ruling that the New Mexico Unfair Practice Act's definition of the term "person" did not apply to the state because it did not specifically include the state. *Stansell,* 2009-NMCA-062, ¶ 12. Ms. Wolinsky further ignores *Stansell* by arguing that Section 12-2A-3(E) must include the state because it has no provision excluding the state. The *Stansell* court came to its holding after specifically identifying that "although the UPA's definition of 'person' does not explicitly exclude any state entity, it also does not include one." *Id.*

B. The Legislature Did Not Create A Private Cause Of Action Against NMCD Under The FPWA.

"The right to sue the government is a statutory right and the legislature can reasonably restrict that right." *Marrujo v. New Mexico Highway Transp. Dep't,*

1994-NMSC-116, ¶ 24, 118 N.M. 753, 887 P.2d 747. The Legislature created a private cause of action under the FPWA for individuals to sue their private employers for a violation of the FPWA. § 28-23-6. In doing so, the Legislature did not in any way indicate that it had also created a private cause of action for a claim against the state or its agencies. *See id.*

The language of the FPWA is in stark contrast to other employment related statutes wherein the Legislature expressly created a cause of action against the state. In establishing its private cause of action, the NMHRA provided that "the state shall be liable the same as a private person." *See* §§ 28-1-2(B) & 28-1-13(D). The New Mexico Minimum Wage Act similarly establishes a definition of "employer" as specifically including the state for purposes of suit for paying the minimum wage. § 50-4-21(B). And the New Mexico Whistleblower Protection Act provides a specific definition, prohibition, and cause of action against public employers. §§ 10-16C-2 to 10-16C-4. Unlike these other statutes, the FPWA did not establish a private cause of action against the state or its agencies.

C. Application Of The FPWA To NMCD Would Conflict With New Mexico Personnel Act Regulations.

It makes sense why the Legislature would not apply the FPWA to the state in that such application would cause a conflict with the New Mexico Personnel Act regulations regarding public employee pay. The FPWA's prohibition of unequal pay between sexes performing "equal work" only allows for three excepted pay

systems: 1) seniority system; 2) merit system; and 3) system that measures earning by quantity or quality of production. § 28-23-1(A). Importantly, the FPWA differs from the federal Equal Pay Act in that the FPWA omits a fourth excepted non-discriminatory catch-all factor: "a differential based on any other factor other than sex...." *Compare* NMSA 1978, § 28-23-1(A) *with* 29 U.S.C. § 206(d)(1).

The purpose of New Mexico's Personnel Act is to "establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs." § 10-9-2. The Personnel Act directed the State Personnel Board to pass regulations on a number of items, including "a pay plan for all positions in the service." §§ 10-9-10(A) & 10-19-13(B). Based on this mandate and authority, the State Personnel Board passed Sections 1.7.4.1 to 1.7.4.19 NMAC regarding "Pay," which have been effective since 2002.

Under these regulations, the State Personnel Board provided that the pay of state employees can certainly vary based upon factors which would now be outside of those excepted by the FPWA. Sections 1.7.4.12(A) & (C) provide that an employee's salary "should reflect *appropriate placement* within the pay band." (Emphasis added). Section 1.7.4.7(C) provides that "appropriate placement means those elements to be considered in determining pay upon hire, promotion, transfer or reduction including the employee's education, experience, training, certification,

licensure, internal pay equity, budgetary availability and, when known and applicable, employee performance." Section 1.7.4.8(A) provides that the Director should establish a plan by which these factors for "appropriate placement" are implemented by managers in state agencies. Accordingly, the Personnel Act regulations, which had been in effect more than eleven years before the FPWA, require managers to consider factors outside of the excepted factors of the FPWA for merit, seniority, and quantity/quality of production. § 28-23-1(A). In particular, important factors like years and type of experience of the employee fall outside of the FPWA's expressed exceptions, but undoubtedly play an important role in the "appropriate placement" of NMCD employees like Ms. Wolinsky.

It is reasonable then to conclude that the Legislature did not apply the FPWA to the state and its agencies because it would create a substantial conflict with the Personnel Act regulations, along with the system that had been in place since at least since 2002. It is a fundamental rule of statutory interpretation that courts must interpret two statutes, or a statute and a regulation, on the same subject in a manner that avoids a conflict. *See Spray v. City of Albuquerque*, 1980-NMSC-028, ¶ 16, 94 N.M. 199, 608 P.2d 511 ("When such a conflict exists between 'statutes relating to the same subject,' we will interpret them, if possible, so that "all of the acts will be operative.") (citation omitted); *see also In re Anheuser-Busch Beer Labeling Mktg. & Sales Prac. Litig.*, 2014 U.S. Dist. LEXIS 76005, 40 (D. Ohio June 2, 2014) ("The

general principles of statutory construction require that, when possible, the court interpret the statutes and regulations so as to avoid conflicts and give meaning to all.").

D. The FPWA's Mention Of The NMHRA In Section 28-23-4 Does Not Make The FPWA Applicable To NMCD.

Ms. Wolinsky makes the unsupported statement that the FPWA somehow incorporated the NMHRA's "relief process," which Ms. Wolinsky claims "demonstrates the legislature's intent to deem the state to be an employer and subject to the [FPWA]." Appt. Brief, 9. Ms. Wolinsky fails to provide the entire section of law to which she cites:

> A. A person claiming to be aggrieved by an unlawful discriminatory practice in violation of the Fair Pay for Women Act [28-23-1 NMSA 1978] may:
>
> (1) maintain an action to establish liability and recover damages and injunctive relief in any court of competent jurisdiction by any one or more employees on behalf of the employee or employees or on behalf of other employees similarly situated; or
> (2) seek relief under the Human Rights Act [28-1-1 NMSA 1978] pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978.
>
> ...
>
> F. The initiation of an administrative process under the Human Rights Act [28-1-1 NMSA 1978] pursuant to the process set out in Sections 28-1-10 through 28-1-13 NMSA 1978 shall toll the statute of limitations for initiating a claim under the Fair Pay for Women Act [28-23-1 NMSA 1978].

§ 28-23-4(A), (F).

This language from the FPWA did not incorporate the NMHRA's express language of applicability to the state for two reasons. First, *Lucero* and *Stansell* require express language to make the statute applicable to the state. There is nothing in Section 28-23-4 which expressly makes the FPWA applicable to the state. Even the mention of these sections of the NMHRA is done in general terms without any specific mention of the state. The Legislature chose not to define "person" to include the state as the NMHRA had and did not provide an express cause of action against the state as in the NMHRA. §§ 28-1-2(A), 28-1-13(D). It would be inconsistent to conclude that the Legislature chose to specifically omit the state when actually defining the scope of the FPWA, only to allow for such application by silent incorporation.

Second, Ms. Wolinsky reads Section 28-23-4(A)(2) as a kind of incorporation of the provisions of the NMHRA into the FPWA. Section 28-23-4(A)(2) is not an attempt at incorporation, or even a basis for reading the two statutes together – it is the Legislature saying that the FPWA is not the sole cause of action available for a person that has suffered unequal pay based upon sex discrimination. The Legislature provides in straightforward terms that a person that has suffered from unequal pay based upon sex discrimination may bring suit under either the FPWA or the NMHRA. In essence, the Legislature clarified that the FPWA did not preclude a

claim under the NMHRA. Section 28-23-4(F)'s allowance for a tolling of the statute of limitations upon the initiation of the administrative process under the NMHRA simply recognized that the substance of a claim under the separate NMHRA may be similar to an FPWA claim, and may therefore place the defendant on notice of such claim.

The Legislature's clarification that the FPWA does not preclude a claim under the NMHRA (if applicable) actually demonstrates the Legislature's intent to protect its decision to not include the state within the applicability of the FPWA. Since the FPWA did not apply to the state, the Legislature was making clear that a government employee suffering from gender discrimination based upon pay may still pursue relief under the NMHRA if applicable. The FPWA did not incorporate the NMHRA's inclusion of the state into the FPWA.

Accordingly, the Court should find that the FPWA does not apply to NMDC and affirm the District Court's dismissal.

III. NMCD Is Entitled To Sovereign Immunity.

Again, the District Court did not make a determination regarding NMCD's request for dismissal under the TCA. However, given Ms. Wolinsky's extensive argument on the alternative ground for dismissal under the TCA, NMCD will address the sovereign immunity argument. "It is axiomatic that a state cannot be sued without its consent." *Begay v. State*, 1985-NMCA-117, ¶ 9, 104 N.M. 483, 723

P.2d 252 (citation omitted), *reversed on other grounds*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306. "A claim against an agency of the state constitutes a suit against the state...." *Dunn*, 1993-NMCA-059, ¶ 20. The absence of an express waiver of sovereign immunity precludes a finding that such immunity has been waived. *See Barreras v. New Mexico Corrections Dep't*, 2003-NMCA-027, ¶ 24, 133 N.M. 313, 62 P.3d 770 (citation omitted). The Legislature did not provide that the state was subject to the FPWA or otherwise that it was creating a private right of action against the state under the FPWA. Therefore, there is no indication that the Legislature waived the state's sovereign immunity in creating the private cause of action under the FPWA. NMCD is therefore entitled to sovereign immunity as to the statutorily created right of action under the FPWA.

The TCA provides that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [or waived by the TCA specifically]." § 41-4-4(A). The TCA includes an exclusive remedy provision, which explains that the TCA "shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee...."

The TCA applies to claims based in statute. In *Begay*, the plaintiffs brought a claim for violation of NMSA 1978, Section 24-12-4 for failure to obtain the proper consent to perform a post-mortem examination. *Begay*, 1985-NMCA-117, ¶ 13. Though the plaintiffs brought this claim under a stand-alone statute (as opposed to a common law tort), the *Begay* court found that the sovereign immunity established by the TCA prevented the plaintiffs' claim because the TCA was applicable and none of its express waivers applied. *Id.*; *compare with Luboyeski v. Hill*, 1994-NMSC-032, ¶¶ 10-15, 117 N.M. 380, 872 P.2d 353 (distinguishing *Begay* in the case only because the NMHRA provided an express waiver of sovereign immunity).

The TCA's general grant of immunity would therefore apply immunity in this case for NMCD. None of the TCA's waivers for operations of motor vehicles, aircraft, and watercraft (§ 41-4-5), buildings, public parks, machinery, equipment, and furnishings (§ 41-4-6), airports (§ 41-4-7), public utilities (§ 41-4-8), medical facilities (§ 41-4-9), health care providers (§ 41-4-10), highways and streets (§ 41-4-11), or law enforcement officers (§ 41-4-12) would apply to Ms. Wolinsky's claims under the FPWA. Therefore, as in *Begay*, the TCA would provide sovereign immunity for NMCD regarding Plaintiffs' claims under the FPWA.

Section 41-4-21 provides: "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." This

is not a waiver of immunity. In *Rubio*, a case in which the plaintiffs argued that a waiver could be found under Section 41-4-21, the New Mexico Court of Appeals explained that "Section 41-4-4(A) clearly states immunity from liability exists except as waived under Sections 41-4-5 to -12. Since plaintiffs do not claim a waiver under any of those sections, immunity from liability is preserved." *Rubio v. Carlsbad Mun. Sch. Dist.*, 1987-NMCA-127, ¶¶ 9-10, 106 N.M. 446, 744 P.2d 919. The court went on to make the point abundantly clear: "Section 41-4-21 does not provide a waiver of immunity and, therefore, furnishes no basis for suing defendant." *Id.*, ¶ 10. Indeed, Section 41-4-21 only provides that the TCA will "not affect" personnel acts and employment law. In essence, the TCA will not override a personnel act that provides for an express waiver of immunity itself. *See id.* As the *Rubio* court explains:

> Read in context, [Section 41-4-21] simply means that if a waiver of immunity exists that would entitle an injured party to bring a claim, the Tort Claims Act shall not affect personnel acts, rules or regulations, or other provisions of law governing the employer-employee relationship. That section was designed to preserve employment relations, not to provide a waiver of immunity.

Id., ¶ 12.

Ms. Wolinsky attempts to distinguish *Rubio* because the court was considering a negligent hiring and retention claim. This distinction is immaterial as the *Rubio* court's conclusion regarding Section 41-4-21 was clearly not contingent

upon the claim at issue, but was instead an all-encompassing interpretation that Section 41-4-21 does not provide a wavier for *any* claim. *Rubio*, 1987-NMCA-127, ¶¶ 9-12. Ms. Wolinsky cites to no other New Mexico authority to limit the *Rubio* court's holding. To the extent that the unpublished federal opinion from *Garcia v. Purcell* conflicts with the New Mexico Court of Appeal's interpretation of New Mexico law in *Rubio*, *Garcia* was incorrect and is inapplicable. *Lustgarden v. Gunter*, 966 F.2d 552, 553 (10th Cir. 1992) (explaining that absent extreme circumstances, "a state court's interpretation of a state statute is controlling in federal court.").

Ms. Wolinsky also argues that because the TCA was passed in 1976, a cause of action established by the FPWA afterwards could not have been contemplated by the TCA, and therefore immunity under the TCA could not apply. Essentially, Ms. Wolinsky argues that those causes of action that were not recognized by New Mexico law as of 1976 are free from the immunity established by the TCA. Ms. Wolinsky cites to no authority to support this argument. There is nothing in the TCA itself to support this argument. In sum, there is no law to support the proposition that immunity under the TCA is frozen in time forty-one years ago in 1976. In fact, Ms. Wolinsky's attempt to use Section 41-4-21 regarding the TCA's effect on personnel statutes (to the FPWA) to her own benefit within the very next section.

Accordingly, Ms. Wolinsky has not presented sufficient authority to rebut NMCD's entitlement to immunity under the TCA.

Since NMCD is entitled to immunity under the TCA, the Court should affirm the District Court's dismissal.

CONCLUSION

The FPWA does not apply to NMCD because the FPWA does not specifically provide that state agencies are subject to the FPWA. NMCD is also entitled to sovereign immunity under the TCA because no waiver is provided in the TCA, or the FPWA, to allow suit against NMCD under the FPWA. NMCD requests that the Court affirm the District Court's dismissal.

Respectfully submitted,

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