

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

 ORIGINAL

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE

FILED

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MELINDA L. WOLINSKY,

Plaintiff-Appellant,

Ct. App. No. 35,762

v.

Dist. Ct. No. D-0101-CV-2016-01005

NEW MEXICO CORRECTIONS
DEPARTMENT,

Defendant-Appellee.

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

APPELLANT'S REPLY BRIEF

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ARGUMENTS

INTRODUCTION

Appellant Melinda L. Wolinsky asserts that de novo review by this Court of the district court's interpretation of the Fair Pay for Women Act should result in reversal of the district court's dismissal. Sovereign immunity does not shield the Corrections Department from the precepts of the Fair Pay for Women Act. The Corrections Department is an "employer" under the Fair Pay for Women Act's definition. If there is a conflict with Personnel Act regulations, the Fair Pay for Women Act takes precedence. The Tort Claims Act does not restore sovereign immunity in this instance. The Court should recognize that the district court improperly dismissed Ms. Wolinsky's case and remand it for further proceedings.

I. THE CORRECTIONS DEPARTMENT IS AN EMPLOYER

The Fair Pay for Women Act applies to entities that it deems to be "employers." The Corrections Department is within that definition. *See* NMSA 1978, § 28-23-2(E) (2013). Although the Corrections Department argues that *Stansell v. New Mexico Lottery*, 2009-NMCA-062, 146 N.M. 417, pertains to "an interpretive task that is identical to the one which faces the Court in this case," that is incorrect. *See* Appellee's Answer Br. at 10. *Stansell* is about the definition of "person" under the Unfair Practices Act, NMSA 1978, §§ 57-12-1 through 26

(2003). It has nothing to do with employment, wages, or sex discrimination, and cannot be used to construe “employer” within the Fair Pay for Women Act.

When the court in *Lucero v. Richardson & Richardson, Inc.*, 2002-NMCA-013, ¶¶ 9-11, 131 N.M. 522, stated, “[A]bsent express words to the contrary, neither the state nor its subdivisions are included within general words of a statute,” it was discussing the interplay of the Recreational Use Statute, NMSA 1978, § 17-4-7, and the Tort Claims Act. The Recreational Use Statute was passed in 1967, nine years before the Tort Claims Act so it was important to determine if the newer statute affected the older statute. Yet the interplay of these statutes has no relevance to this case.

Although the Fair Pay for Women Act was intended to apply to the state, the legislature saw no reason to specifically mention the state as an employer. The Corrections Department points out that the Human Rights Act and Minimum Wage Act do specifically mention the state, but those statutes were enacted before sovereign immunity was abrogated. The Human Rights Act, NMSA 1978, §§ 28-1-1 through 15 (2007), was enacted in 1969. The Minimum Wage Act, NMSA 1978, §§ 50-4-19 through 30, was enacted in 1968. The New Mexico Supreme Court abrogated sovereign immunity in 1975. *Hicks v. State*, 1975-NMSC-056, ¶ 13, 88 N.M. 588. When sovereign immunity no longer shielded the state, there

was no longer any reason for the legislature to specifically mention when the state was to be considered an “employer” just like any other entity that fell within a statute’s definition.

Of course the Whistleblower Protection Act (“WPA”), NMSA 1978, §§ 10-16C-1 through 6 (2010), also specifically mentions the state as an employer and it was enacted after the abrogation of sovereign immunity. It was necessary for the legislature to specifically mention the state, however, because the WPA *only* applies to the state. NMSA 1978, § 10-16C-3 (2010). The WPA could not have been drafted without mentioning the state.

The Corrections Department does not even acknowledge *State v. Hanosh*, 2009-NMSC-047, 147 N.M. 87 or *Zuni Pub. Sch. Dist. #89 v. State Pub. Educ. Dep’t*, 2012-NMCA-048, 277 P.3d 1252. These are the cases that show that nothing in the Fair Pay for Women Act causes the Corrections Department to be immune from its prescripts, and in the absence of such a provision, the state is subject to suit. Appellant’s Br. in Chief at 8-9. By ignoring this argument the Corrections Department concedes the issue. See *Tierra Realty Trust LLC v. Village of Ruidoso*, 2013-NMCA-030, ¶ 8, 296 P.3d 500 (when a party declines to address an issue the court treats the party’s silence as a concession); *Santa Fe Pac. Gold v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 41, 143 N.M. 215.

II. THE FAIR PAY FOR WOMEN ACT IS IN PARI MATERIA WITH THE HUMAN RIGHTS ACT

Another argument that the Corrections Department disregards, and the Court should consider conceded, is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain legislative intent. *See* Appellant's Br. in Chief at 13-14. The Corrections Department concedes that the Fair Pay for Women Act is in pari materia with the Human Rights Act, so like the Human Rights Act, the Fair Pay for Women Act applies to the state. *See Tierra Realty Trust LLC*, 2013-NMCA-030, ¶ 8, 296 P.3d at 504; *Santa Fe Pac. Gold*, 2007-NMCA-133, ¶ 41, 143 N.M. at 229.

III. THE FAIR PAY FOR WOMEN ACT WOULD TAKE PRECEDENCE OVER REGULATIONS

Arguing about the supposed conflict between the between the Fair Pay for Women Act and New Mexico Personnel Act regulations is, simply, wasteful. *See* Appellee's Answer Br. at 13-16. The Corrections Department does not deny that the Fair Pay for Women Act would take precedence, as Ms. Wolinsky illustrates in her Brief in Chief. *See* Appellant's Br. in Chief at 15.

IV. THE TORT CLAIMS ACT DOES NOT RESTORE SOVEREIGN IMMUNITY IN THIS INSTANCE

The Tort Claims Act contains no indication that the legislature intended to restore sovereign immunity to the Corrections Department to allow it to evade a law that requires equal pay for similar work, as does the Fair Pay for Women Act. See NMSA 1978, § 28-23-3 (2013). *Begay v. State*, 1985-NMCA-117, 104 N.M. 483, and *Rubio v. Carlsbad Mun. Sch. Dist.*, 1987-NMCA-127, 106 N.M. 446, do not support the Corrections Department's arguments to the contrary as they are not employment cases.

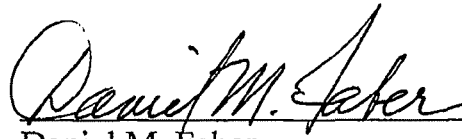
In *Begay*, the court held there was no waiver of immunity for wrongful decision to perform an autopsy. *Begay*, 1985-NMCA-117, ¶ 13, 104 N.M. at 487. The holding in *Rubio* is there is no waiver of sovereign immunity that allows an action for educational malpractice—a form of negligence. *Rubio*, 1987-NMCA-127, ¶ 14, 106 N.M. at 449. These cases do not support the Corrections Department's argument that the Tort Claims Act, which is “based upon 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(A), provides it immunity from a suit under the Fair Pay for Women Act, which is not based on traditional tort concepts.

CONCLUSION

In this case, it is not so much what the Appellee says, it is what it does not say. The Corrections Department ignores Ms. Wolinsky's arguments that nothing in the Fair Pay for Women Act provides it with immunity from its prescripts. The Corrections Department also disregards Ms. Wolinsky's argument that the Fair Pay for Women Act is in pari materia with the Human Rights Act, so like the Human Rights Act, the Fair Pay for Women Act applies to the state. The Corrections Department also overlooks Ms. Wolinsky's argument that the Fair Pay for Women Act would take precedence over New Mexico Personnel Act regulations.

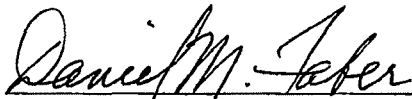
As the Corrections Department correctly states, the legislature can restrict the rights of individuals to sue it. The Tort Claims Act, though, does not restrict the rights of individuals to sue the Corrections Department under the Fair Pay for Women Act. The district court's dismissal should be reversed and the case remanded for further proceedings.

Respectfully submitted,



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I hereby certify that a true copy of this pleading was mailed to Zachary R. Cormier and Sean Olivas, Attorneys for Defendant New Mexico Corrections Department, P.O. Box AA, Albuquerque, NM 87103, this 29th day of March, 2017.



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