

COPY

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

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

MAY 29 2014

Wendy Flores

Plaintiffs-Appellants,

and

SAM BEATTY,

No. 33, 380
Bernalillo County
CV-2012-3136

Plaintiff,

vs.

CITY OF ALBUQUERQUE,

Defendant-Appellee,

and

AMERICAN FEDERATION OF
STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 3022,

Defendant.

BRIEF IN CHIEF

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

Submitted by:

Donald Gilpin
The Gilpin Law Firm, LLC
6100 Indian School Rd. NE, Suite 201
Albuquerque, New Mexico 87110
(505) 244-3861 Telephone
(505) 254-0044 Facsimile
Attorney for Plaintiffs-Appellants

ORAL ARGUMENT IS REQUESTED

Plaintiffs request an Oral Argument stating that this is a matter of public importance that affects not only Plaintiffs' rights but all New Mexico Public Employee's who belong to Unions.

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1. The first issue is whether the District Court erred in finding that since Defendant City of Albuquerque had not breached the CBA, then Defendant AFSCME had no duty to file a grievance and could not have violated the duty of fair representation.
2. The second issue is whether the District Court erred in determining there was no genuine issue of fact with regard to whether the Defendant AFSCME had no duty to file a grievance on behalf of Plaintiffs.

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SUMMARY OF PROCEEDINGS

Plaintiffs/Appellants worked for Appellee as supervisors (M14s) for The City of Albuquerque Solid Waste Department. *[RP 2]*. Plaintiffs were all AFSCME members at the times complained of in their Complaint. *[RP 3]*. Plaintiffs discovered that they were being paid less than other M14s doing the exact same duties as Plaintiffs. *[RP 2-3]*. Plaintiffs relied on the City of Albuquerque's personnel rules and regulations that required the City to pay all employees promoted to an M14 position the same according to the CBA. *[RP 2]*. The Director for the City of Albuquerque's Solid Waste Department testified that in order to set an M14s pay, the City must read the Personnel Rules in connection with the CBA to set the pay rate. *[RP 263-265]*. 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 rate schedule. *[RP 263-265]*. The Defendant City of Albuquerque admitted in its Motion for Summary Judgment that the City at the time was paying several M14s with the same title, position, authority and responsibilities as the Plaintiffs at a higher rate of pay. *[RP 90]*. The City of Albuquerque's Personnel Rules and Regulations do allow the City to pay an employee a higher salary, however, the City must have submitted a written request to the Chief Administrative Office for the City's approval. *[RP 263-265]*.

Plaintiffs requested Defendant AFSCME Local 3022 file a grievance on behalf of Plaintiffs regarding the pay inequity issue with the City of Albuquerque. *[RP 3]*. Defendant AFSCME Local 3022 did not file a grievance on behalf of Plaintiffs. *[RP 3]*.

Defendant AFSCME Local 3022 filed a Motion for Summary Judgment asserting that since the District Court had ruled in an earlier decision that the City of Albuquerque did not breach any provisions of the CBA, then, Defendant AFSCME could not have filed a grievance or owed any duty

to Plaintiffs. *[RP 203]*. The District Court had earlier granted the City of Albuquerque's Motion for Summary Judgment which is currently on appeal and has been assigned to the General Calendar No. 33,151.

The Plaintiffs filed a Response in Opposition arguing that the City Personnel Rules and Regulations and CBA have to be read together to set the pay rate for the M14s. *[RP 252]*. Further, Defendant AFSCME Local 3022 owed Plaintiffs the duty to file at least an initial grievance to determine why and how there was a pay inequity. *[RP 252]*.

The District Court without hearing oral arguments determined that The City of Albuquerque did not breach the CBA, and therefore, Defendant AFSCME Local 3022 owed no duty to Plaintiffs to file a grievance. *[RP 324]*. The District Court also determined that there was no genuine issue of material as to the arbitrary nature of AFSCME's denial to file an initial grievance. *[RP 324]*.

ARGUMENT

- A. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT SINCE DEFENDANT CITY OF ALBUQUERQUE HAD NOT BREACHED THE CBA, THEN DEFENDANT AFSCME HAD NO DUTY TO FILE A GRIEVANCE AND COULD NOT HAVE VIOLATED THE DUTY OF FAIR REPRESENTATION.

Defendant AFSCME asserted that since the Court find no violation of the CBA on the part of the City of Albuquerque, then AFSCME had no duty to file a grievance. The City of Albuquerque Personnel Rules and Regulations require the City to place all promoted employees to the M14 level at the same pay rate according to the CBA pay rate schedule. *[RP 263-266]*. The City Personnel Rules and Regulations do allow the City to pay a higher salary to a newly promoted employee if the City follows a procedure to justify why the deviation occurred. *[RP 264-266]*. The Union could

have filed an initial grievance requesting the City to explain why several M14s performing the same work and duties as Plaintiffs were being paid more, and requested proof the City followed its procedure to deviate from the Personnel Rules and CBA pay schedule. The Union refused to file the initial grievance. [RP 3].

As to the issue of filing an initial grievance, there is New Mexico Case Law that is precisely on point with the facts of this case. In *Howse v. Roswell Independent School Dist.*, 144 N.M. 502, 506, 188 P.3d 1253, 1257 (Ct. App. 2008) Howse sued her Union over failing to enforce the CBA as to the pay schedule set by the Union and the school district. The Union failed to file the initial written grievance about the pay inequity issue. *Id.* The New Mexico Court of Appeals reversed the granting of the Union's Motion for Summary Judgment stating that the failure to take the basic step to file an initial grievance constituted an arbitrary action. *Id.* The New Mexico Court of Appeals stated:

A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998). "[A]bsent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation." *Ruzicka v. Gen. Motors Corp.*, 649 F.2d 1207, 1211 (6th Cir.1981). As discussed below, CWA can point to no admissible evidence that explains its reasons for not taking the basic step of filing the initially required written grievance on Howse's behalf. Absent justification or excuse, this failure may be found under the law to be "unexplained union inaction, amounting to arbitrary treatment, [that] has barred an employee from access to an established union-management apparatus for resolving grievances." *Id.* (internal quotation marks and citation omitted).

Id.

In this case, we have almost identical facts. The Plaintiffs went to their Union about a pay inequity alleging among other things that the City was not following the pay schedule established by

the CBA and integrated into the City's Personnel Rules and Regulations. The City was violating the CBA and Personnel Rules by placing newly promoted M14s into a higher pay scale than Plaintiffs. [RP 2-3]. AFSCME refused to file an initial grievance requiring the City to explain the pay inequity. [RP 3]. This is not a case about the Union failing to take the Plaintiffs' grievance to arbitration, but rather the Union's failure to even initiate the basic filing of a grievance about a matter that is controlled by the CBA, specifically the pay of M14s. The District Court erred by finding AFSCME did not have to file an initial grievance regarding the pay inequity.

In addition, the Union argued in its Motion for Summary Judgment that the Plaintiffs could have filed their own prohibited practices' complaint. [RP242]. If that is true, then the Union could have filed a prohibited practices' complaint on behalf of the Plaintiffs. AFSCME is the signatory to the CBA and should have acted on behalf of Plaintiffs. By failing to file an initial grievance, Plaintiffs were left without any remedies other than filing their own lawsuit.

2. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THERE WAS NO GENUINE ISSUE OF FACT WITH REGARD TO WHETHER THE DEFENDANT AFSCME HAD NO DUTY TO FILE A GRIEVANCE ON BEHALF OF PLAINTIFFS.

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). Further, where an appeal is taken from an order granting summary judgment, the reviewing court will assess the record in the light most favorable to support a trial on the merits. *Eavenson v. Lewis Means, Inc.*, 105 N.M. 161, 730 P.2d 464 (1986); *North v. Public Serv.*

Co., 97 N.M. 406, 640 P.2d 512 (Ct. App.1982). Plaintiffs assert in this case there were factual issues about why AFSCME could not file an initial grievance, which did not cost any money, and why AFSCME could not take other actions to assist Plaintiffs in resolving the pay inequity issue.

In Plaintiffs' Response in Opposition to Defendant AFSCME's Motion for Summary Judgment, Plaintiffs raised the argument that while AFSCME refused to file a grievance for Plaintiffs, the Vice President of the Union was able to get himself a raise and currently is paid a higher wage as an M13 than Plaintiffs as M14s. [RP266-267]. AFSCME Vice President testified that you had to be aggressive to get his pay increases and make several requests for desk audits. [RP266-267]. However, AFSCME's Vice President only made one request for a desk audit for Plaintiffs but made several requests for himself. [RP266-267]. The fact that the Vice President would be aggressive and make multiple requests for a desk audit for himself to get a pay raise, but only make one attempt at requesting a desk audit for Plaintiffs raised a question of fact if AFSCME did all it could for the Plaintiffs. Further, the filing of an initial grievance did not cost AFSCME any money only the time to fill out the paperwork.

Plaintiffs presented evidence that genuine issues of material fact existed and therefore, summary judgment should not have been granted. The District Court erred in not allowing the factfinder to determine if the actions of AFSCME were reasonable at the time.

CONCLUSION

Plaintiffs respectfully request this Court to reverse the decision of the District Court for the reasons stated above, and to award Plaintiffs their costs for the appeal.

Respectfully Submitted,

THE GILPIN LAW FIRM, LLC



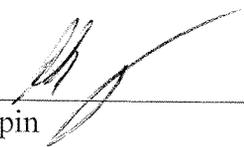
Donald G. Gilpin
6100 Indian School Road NE
Suite 201
Albuquerque, New Mexico 87110
(505) 244-3861 Telephone
(505) 254-0044 Fax
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing *Brief in Chief* was e-mailed and mailed with a Copy of this Certificate of Service Via First-Class Mail, Postage Prepaid, Addressed to the Following on this **29th** day of May, 2014:

Rebecca Wardlaw, Samantha Hults, Stevie Nichols, Melissa Kountz
City of Albuquerque Legal Department
P.O. Box 2248
Albuquerque, New Mexico 87107-5950
(505) 768-4500 Telephone
(505) 768-4440 Facsimile
Attorneys for Defendant-Appellee
rwardlaw@cabq.gov , shults@cabq.gov ,
snichols@cabq.gov , mkountz@cabq.gov

Shane C. Youtz and Stephen Curtice
Youtz & Valdez, P.C.
900 Gold Avenue SW
Albuquerque, New Mexico 87102
(505) 244-1200 Telephone / (505) 244-9700 Fax
Attorneys for Defendant AFSCME
shane@youtzvaldez.com , stephen@youtzvaldez.com



Donald Gilpin