IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BOBBY CHERESPOSY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

Ct. App. No. 34,867

MOSHER ENTERPRISES, INC.,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the Second Judicial District
County of Bernalillo
Cause No. D-202-CV-2011-03068
Honorable Nan G. Nash

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ORAL ARGUMENT REQUESTED

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COME NOW Plaintiffs, by and through their counsel, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice & James Montalbano), and file this Reply Brief.

ARGUMENT

I. Appellee Ignores Fundamental Differences Between the Federal Davis-Bacon Act and the PWMWA When Arguing that the Legislature Did Not Provide a Private Right of Action under the PWMWA.

Appellee asserts that the Public Works Minimum Wage Act ("PWMWA") (NMSA 1978, §§ 13-4-10 through -17 (1963, as amended through 2011) has as its "closest analog" the Davis-Bacon Act, "the federal statute after which it was modeled." **[AB 2]**. Thus, argues Appellee, Plaintiffs' "private claims fail for some of the same reasons as those of federally-contracted workers under the DBA." **[AB 3]**. There is a fundamental and fatal flaw with this argument—the PWMWA is emphatically not the same as the Davis-Bacon Act; rather, the Legislature amended it in 1963 and 2005 in ways that expand its remedial scheme and make it fundamentally different than that contained in the federal counterpart.

In those years, the Legislature did two things that made it clear that a private right of action was available ***in addition to*** the prior administrative enforcement scheme. From 1937 (when the PWMWA was first enacted) until 1963, the enforcement provision only contained what is now Subsections A and B of Section 13-4-14. *Compare* 1937 N.M. Laws, Ch. 179, § 3 (containing only subsections A & B), *with* 1963 N.M. Laws, Ch. 304, § 3 (adding a subsection C). Those

Subsections only provided for the withholding of payments under the contract in the case of a violation (Subsection A) and an action brought by the District Attorney in the event that the withheld amounts were insufficient (Subsection B). This remedial scheme is virtually identical with that contained in the Davis-Bacon Act. *See* 40 U.S.C. § 3144.

In 1963, the Legislature added Subsection C, which has no comparable provision in the Davis-Bacon Act. It provided that in the event of a violation of the PWMWA, "the contractor or any subcontractor responsible therefore shall be liable to any affected employee for his unpaid wages." 1963 N.M. Laws, Ch. 304, § 3. Prior to this provision, a contractor was only indirectly liable to the employee, through the enforcement scheme set forth in Subsections A & B, which required the withholding of payments under the contract.

Then, in 2005, the Legislature added Subsection D. That Subsection clarified that the direct liability newly established by Subsection C could be enforced through "an action" brought "pursuant to Subsection C of this section," in which case "the court may award, in addition to all other remedies, ***attorney fees and costs to an employee adversely affected*** by a violation of the Public Works Minimum Wage Act by a contractor, subcontractor, employer or person acting as a contractor." Again, there is no similar provision in the federal Davis-Bacon Act.

There are two significant facts regarding the 2005 amendment, which Appellee largely ignores. First, Subsection B recognizes that the liability created by Subsection C can be enforced through an "action." Nothing in this section states or even suggests that this action for direct liability is dependent upon the indirect process under Subsections A & B. Thus, the fact that the Legislature deleted language from this subsection referring to a private right of action is of little import. **[AB at 6].** *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236 ("Unlike some states, we have no state-sponsored system of recording the legislative history of particular enactments. We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history."). The Legislature could have deleted the language because it was duplicative; the language left in the statute—which is all that is left for interpretation—recognized that the liability created by Subsection C could be enforced through an "action" in which the employee could recover his or her costs and attorneys' fees from the Court. This language is clearly sufficient to confer a private right of action to enforce the PWMWA.

Second, the legislature made clear that this "action" was one available to the employee directly. For, there would be no other reason for providing that the Court may award "attorney fees and costs to an employee" as part of the "action." Appellee argues that this provisions are ambiguous "because a party can incur attorneys' fees pursing administrative remedies as easily as it can by filing a lawsuit." **[AB at 4]**. This argument ignores the text of the statute. The statute clearly provides that the Court would award fees for the "action" brought "pursuant to Subsection C." It is completely silent regarding fees for the administrative and judicial processes available to the DWS pursuant to Subsections A & B.

Through the 1963 and 2005 amendments, the Legislature fundamentally changed and expanded the remedial scheme under the PWMWA. These changes make the PWMWA differ in significant ways from the Davis-Bacon Act by recognizing direct liability to workers, which can be enforced by an action separate and apart from the administrative scheme. Thus, Appellee's arguments by analogy to the Davis-Bacon Act fail.

II. Appellee Ignores the Text of the PWMWA and Misstates the Record When Claiming that the Act and the Implementing Regulations Require Exhaustion of Administrative Remedies Pursuant to Subsections A and B of Section 13-4-14 Before Bringing the Separate Action Authorized by Subsection C.

Appellee asserts that the "statutory framework" of the PWMWA requires administrative exhaustion. **[AB at 9]**. Of course, no provision of the PWMWA so provides. Indeed, Section 13-4-14 contemplates two processes: (1) the process available to the Director of DWS and described in Subsections A & B, and (2) the separate process—described by the statute as an "action"—to enforce the direct liability created by Subsections C & D. In *Grauerholtz v. New Mexico Labor and Industrial Commission*, 1986-NMSC-071, 104 N.M. 674, 726 P.2d 351, the New Mexico Supreme Court noted that Subsections A & B are the only provisions available ***to the Director*** to enforce his wage orders. That case, however, only described the Director's powers, and said nothing regarding the ability of a worker to pursue the "action" described in Subsection D to enforce the liability created by Subsection C. *See Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323 ("The general rule is that cases are not authority for propositions not considered."). While the Director is limited to Subsections A & B, nothing in the rest of the PWMWA says—or even suggests—that workers are limited to those two Subsections or required to ask the Director to proceed under those Subsections before proceeding with an "action" contemplated by Subsection C.

Apart from ignoring the difference between the Subsections A & B, Appellee misstates the record in making its arguments regarding the applicable

DWS regulations. **[AB at 11-12]**. Perhaps conceding that the regulation expressly disavowing an administrative exhaustion requirement would be fatal to its argument, Appellee claims instead that "the cited provision did not exist in the New Mexico Administrative Code at any time relevant to this appeal." **[AB at 11]**. This is not true, as the very document Appellee relies upon (the Supplemental Record) shows. It is true that 11.1.2.15(A)(2) NMAC was not the same in 2008-2009 as it currently is. However, that is simply because the language at issue was moved from another section.

In the version of the Administrative Code Appellee claims should apply to this case—provided to the Court as part of the Supplemental Record—the language at issue is found instead at 11.1.2.10(E)(1)(b). That section provides "The provisions of 10.5 [now Subsection E of 11.1.2.10 NMAC] do not affect any worker's right to make a claim through the wage and hour bureau or appropriate court for payment of prevailing wages and does not diminish the prime's or subcontractor's duty to cooperate with the wage and hour bureau." (Insertion in original). Apart from the differing internal cross-reference, this provision is ***identical*** to the current provision contained at 11.1.2.15(A)(2) NMAC. Thus, Appellee is flat wrong in claiming that the regulation disavowing any exhaustion requirement did not exist at the relevant time. There simply is no such exhaustion requirement in the PWMWA, as the DWS itself acknowledges in its regulations.

III. Appellee Failed to Preserve its Constitutional Argument; In Any Event, Such a Claim Requires Finding that Courts Following the Rules of Civil Procedure Would Deny It Due Process of Law.

For the first time on appeal, Appellee argues that not requiring the parties to first go through an administrative process or recognizing a private right of action would deny it due process. However, Appellee never presented that argument to the District Court below. **[RP 507-32].** Typically, this Court would not address a claim made for the first time on appeal. *Campos Enterprises, Inc. v. Edwin K. Williams & Co.*, 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855 ("This Court review[s] the case litigated below, not the case that is fleshed out for the first time on appeal. ... As a court of review, we cannot review Plaintiffs' allegations which were not before the district court." (quotation marks and quoted authority omitted)). Moreover, Appellee does not cite a single case in support of the proposition that appearing in court, rather than an administrative agency, deprives it of due process. *McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 11, 148 N.M. 16, 229 P.3d 489 ("Where Plaintiffs have failed to cite any contrary authority from this or any other jurisdiction, this Court will presume that no such authority exists.").

In any event, it is a strange argument. In Court, Appellee has the full benefit of the Rules of Civil Procedure and Rules of Evidence, whereas in an administrative tribunal, those rules are often truncated or not applied. For that

reason, it is usually the case that a litigant required to present a claim to an administrative tribunal rather than a court brings a due process challenge, particularly if the statute limits judicial review of the proceeding. *See generally Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, 118 N.M. 470, 882 P.2d 511 (considering, but rejecting claim that mandatory arbitration provisions in the School Personnel Act violated due process because they did not follow the Rules of Civil Procedure and Rules of Evidence, and finding that due process required meaningful judicial review of arbitration awards). This is certainly the first case in the undersigned's experience where a party has claimed that a court proceeding affords it less due process than an administrative hearing.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court **REVERSE** the Decision of the District Court and **REMAND** for further processing of the case consistent with this Court's opinion.

Dated: June 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2016, I caused a true and correct copy of the foregoing pleading to be mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

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