

# EMPLOYMENT LAW UPDATE

*Decisions on employment law issues within the last year.*

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## **U.S. Supreme Court Cases**

Jackson v. Birmingham Board of Education, 125 S.Ct. 1497 (Mar. 2005).

- Title IX Case: Retaliation is discrimination on basis of sex, when made against a person who complains of sex discrimination.

Smith v. City of Jackson, 125 S.Ct. 1536 (Mar. 2005).

- ADEA authorizes recovery in disparate impact cases.

## **Tenth Circuit Court of Appeals**

### Title VII

Orr v. City of Albuquerque, 417 F.3d 1144 (10<sup>th</sup> Cir. Aug 2005).

- Plaintiffs were police officers who sued the Albuquerque Police Department for discrimination under Title VII, NMHRA and § 1983.
- The Tenth Circuit affirmed summary judgment on the 1983 claims but reversed summary judgment for the employer on the Title VII & NMHRA claims and remanded.
- District court's analysis did not allow plaintiffs to address the issue of pretext in the McDonnell-Douglas test conflating the defendant's showing of a business reason for its action as proof of no pretext.

Medina v. Income Support Div., 413 F.3d 1131 (10<sup>th</sup> Cir. June 2005).

- Female plaintiff sued the State of New Mexico alleging gender based hostile work environment and retaliation in violation of Title VII.
- Tenth Circuit affirmed summary judgment for employer on all claims.
- Plaintiff claimed she was harassed because she was heterosexual and other employees, including her supervisor, were lesbians.
- Title VII protects against harassment due to noncompliance with gender stereotypes. However, Title VII protections do not extend to harassment because of person's sexuality so plaintiff's claim that she was harassed because she was heterosexual was not actionable.

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<sup>1</sup> The summaries and views expressed herein are those of the author, and not of the Los Alamos National Laboratory. The Los Alamos National Laboratory strongly supports academic freedom and a researcher's right to publish; therefore, the Laboratory as an institution does not endorse the viewpoint of a publication or guarantee its technical correctness.

- \*The New Mexico Human Rights Act does prohibit discrimination based on sexual orientation.
- Regarding her retaliation claim, the Court determined that the plaintiff failed to allege specific instances of co-worker harassment in support of her retaliation claim, that a warning letter that did not affect the terms or conditions of her employment was not an adverse action, and that she failed to establish the requisite causation between her complaint and subsequent denial of a promotion which occurred 5 weeks later.

Plotke v. White, 405 F.3d 1092 (10th Cir. Apr 2005).

- Plaintiff sued the Army alleging she was terminated from her job as a historian based on her gender.
- Court of Appeals reversed summary judgment in favor of the employer.
- The Court reminded that where a discriminatory termination is alleged, the elimination of a position is not fatal to the plaintiffs' prima facie case.
- The Court also stated that pretext can be inferred if employer offers after-termination reasons for discharge or multiple suspicious explanations for discharge such as claiming that termination was based on unsatisfactory performance where employee has never been counseled about performance or misconduct. "[A]n employer's strategy of simply tossing out a number of reasons...in the hope that one of them with 'stick' could easily backfire...[A] multitude of suspicious explanations may itself suggest that the employer's investigatory process was so questionable that any application of the 'honest belief' rule is inappropriate."

Dick v. Phone Directories Co., 397 F.3d 1256 (10th Cir. Feb. 2005).

- Plaintiff alleged hostile work environment same sex discrimination and retaliation under Title VII.
- Appeals Court affirmed summary judgment for employer on retaliation claim but reversed summary judgment for employer on hostile work environment claim.
- Plaintiff worked in a female dominated office. Conduct at issue included sexual gestures, lewd comments, sex talk and physical touching by co-workers and witnessed by plaintiff a few instances where a co-worker attempted to pinch the plaintiff but she moved away and the playing of vulgar rap music in the office.
- Appeals Court found that the Plaintiff established a genuine dispute of material fact as to whether the alleged harassers conduct toward her occurred because of her sex.
- Regarding the retaliation claim the Court affirmed the district court's determination that there was no adverse action. In reaching that decision the court found that the following are not adverse actions: (1) an unrealized threat of termination; (2) filing a police report that has not resulted in criminal charges; (3) circulation of a memo admonishing employees not to engage in certain behavior; (4) a single write-up. The Court also commented that co-worker hostility or retaliatory harassment may be an adverse employment action if it is sufficiently severe but rejected that contention by the plaintiff because she failed to present any evidence linking the co-worker hostility to her complaints.

Chavez v. New Mexico, 397 F.3d 826 (10th Cir. Feb 2005).

- Five female employees of the New Mexico Boys School sued the State of New Mexico and several individual defendants alleging gender and race discrimination and retaliation.
- Appeals court reversed summary judgment for employer on 4 of 5 plaintiff's sexual harassment claims.
- Affirmed summary judgment for employer on race discrimination, retaliation and Section 1983 claims.
  - Two comments "clica" and "spic lover," fall far short of the "steady barrage" required for a hostile environment claim based on race.
- Regarding the sexual harassment claim, the court reaffirmed that a substantial amount of arguably gender neutral harassment can bolster a small amount of gender based conduct.

- The entire work environment must be viewed in context and may show that what appears to be gender neutral conduct is actually gender based.

Chavez v. Thomas & Betts Corp., 396 F.3d 1088 (10th Cir. Jan 2005).

- Affirmed verdict for plaintiff on sexual discrimination, hostile work environment & negligent hiring claims and award of punitive damages.
- Plaintiff presented evidence that her female supervisor treated women differently than men and targeted her because she was female – made humiliating comments to her about her body parts in front of men, called men over and told them to guess what kind of underwear she was wearing, pulled open her shirt exposing her chest and bra to co-workers and pulling open her pants exposing her underwear.
- Plaintiff met Oncale 2-part test to determine if same sex harassment arising from a hostile work environment occurred.
  - Conduct was discriminatory because of sex.
  - Conduct met the standards for a hostile work environment.
- The Tenth Circuit affirmed the award of punitive damages finding that although employer was fully aware of Title VII prohibitions against sexual harassment and had posted its sexual harassment policy, it did not promptly respond to Plaintiff's complaint. An investigation was not conducted until months after the alleged conduct. Further, the evidence showed that other supervisors witnessed the harassment and did nothing. Also damaging was the admission of two memos written by a supervisor warning upper management about the harasser's conduct.

### Title VII & Constitutional Claims

Baca v. Sklar, 398 F.3d 1210 (10<sup>th</sup> Cir. 2005)

- Affirmed summary judgment for employer on Title VII, §§ 1981, and 1983 ethnic discrimination claim but reversed summary judgment for employer on First Amendment retaliation claim.
- Plaintiff resigned and could not show that he "had no other choice but to quit," as required to establish constructive discharge and thus, could not establish a prima facie case of race discrimination under Title VII, Sections 1981 and 1983.
- Summary judgment reversed on the retaliation claim because the district court inappropriately placed the burden on the plaintiff to present evidence showing that the defendant would have acted differently absent the plaintiff's protected speech. Once the plaintiff establishes that his protected speech substantially motivated adverse action, the burden shifts to the employer to show that it would have reached the same decision regardless of the speech.
- Court found there was a genuine issue of material fact as to whether the defendants subjected the plaintiff to adverse action because of his protected speech.

### FMLA

Harbert v. Healthcare Servs. Group, Inc., 391 F.3d 1140 (10<sup>th</sup> Cir. 2004) (cert. denied 2005).

- Court reversed verdict for employee on claim of wrongful denial of FMLA leave.
- The employer had denied request for FMLA leave based on provision which excludes from FMLA eligibility any employee who is employed at a particular worksite with less than 50 employees within 75 miles of the worksite.
- Plaintiff's worksite More than 50 employees in Golden. Less than 50 employees in Brush.
- District court concluded that more than 50 employees were employed at Plaintiff's worksite per 29 CFR § 825.111(a)(3) so FMLA applied. Employer appealed arguing that the regulation defining worksite relied on by the district court was invalid.
- Court held that 29 CFR § 825.111(a)(3) defining worksite of jointly-employed employees was not a valid exercise of agency authority and is therefore invalid.

- Regulation defines worksite as primary employer's office where employee is assigned or reports.
- Definition does not affect FMLA purpose of exempting large employer with geographically scattered employees.
- Definition creates arbitrary distinction between sole & joint employers.
- If employee has fixed worksite there is no need to create 'constructive' worksite.
- FMLA does not apply because there are less than 50 employees within 75 miles.

### ADA Cases

Kelly v. Metallics West, Inc., 410 F.3d 670 (10<sup>th</sup> Cir. 2005).

- Jury verdict of \$50,000, in favor of terminated employee who alleged disability discrimination and retaliation in violation of ADA.
- Need for supplemental oxygen was temporary and not a disability under the ADA, but employer had regarded employee as disabled.
- Court of Appeals upheld verdict and determined that employers must reasonably accommodate employees it regards or perceives as disabled.
- Allowing use of supplemental oxygen (oxygen tank) was reasonable accommodation which employer failed to provide.

Lanman v. Johnson County, KS, 393 F.3d 1151 (10<sup>th</sup> Cir. 2004).

- Hostile working environment claim actionable under ADA

McKenzie v. Benton, 388 F.3d 1342 (10<sup>th</sup> Cir. 2004).

- Deputy Sheriff with history of psychological problems sued county sheriff for not rehiring her due to alleged disability discrimination.
- Tenth Circuit reversed summary judgment in favor of defendant and remanded case for jury trial. Jury returned verdict in favor of defendant and plaintiff appealed again. Tenth Circuit affirmed jury's verdict.
- Defendant relied on direct threat exception to ADA in defense of claims.
- Although direct threat is an affirmative defense to an ADA claim, given the inherently dangerous job of a sheriff's deputy, the burden rested on the plaintiff to prove she did not pose a direct threat to others in the workplace.

### ADA, ADEA

Mackenzie v. Denver, 414 F.3d 1266 (10<sup>th</sup> Cir. 2005).

- Resigned employee with heart condition sued city alleging age and disability discrimination, retaliation, and constructive discharge.
- Appeals court affirmed summary judgment in favor of employer finding that the employee's heart condition was not a disability under the ADA and employee had failed to produce evidence of disparate treatment or pretext. Regarding the ADEA claim, the court found that Plaintiff failed to establish that employer's decisions were based on age and a supervisor's age related comments – calling employee "old lady," and jokes about senility and hot flashes did not amount to hostile work environment under ADEA where plaintiff was also making age comments and engaging in a mutual banter with the supervisor.
- Regarding constructive discharge claim court reminded: "Not every unhappy employee has an actionable claim of constructive discharge."

### ADEA Cases

Kruchowski v. Weyerhaeuser Co., 2005 WL 2212312 (10<sup>th</sup> Cir. 2005)

- Defendant terminated plaintiffs as part of a reduction in force.
- Plaintiffs signed a Release of Claims in order to obtain a severance package.
- On appeal, the release was found to be ineffective because it failed to comply with the Older Workers Benefit Protection Act (OWBPA) requirements.

## **New Mexico Cases**

### **State Court:**

Archuleta v. Santa Fe Police Dept., 131 N.M. 161, 108 P.3d 1019 (2005).

- Supreme Court held that there were no due process violations based on denial of discovery.
- City Grievance Review Board decision denying police lieutenant's demotion grievance upheld.
- Denial of lieutenant's discovery request for last five years of cases involving suspension, demotion or termination of police officer found reasonable and upheld.

Aguilera v. Hatch Valley Public School, 137 N.M. 642, 114 P.3d 322 (Ct. App. 2005).

- Public school teacher was discharged as part of reduction in force (RIF) policy and sought review of arbitrator's decision that school board had just cause in discharging her as part of RIF.
- Court of Appeals reversed and held that the School Personnel Act requires just cause to terminate teacher under Contract and a RIF is not just cause.

Sanchez v. Santa Ana Golf Club, Inc., 136 N.M. 682, 104 P.3d 548 (Ct. App. 2005).

- Plaintiff sued Santa Ana Golf Club, a corporation wholly owned by Santa Ana Pueblo, for wrongful discharge and defamation.
- District court dismissed for lack of jurisdiction due to the tribe's sovereign immunity from suit.
- On appeal, plaintiff argued that the tribe waived its sovereign immunity: (1) via a "sue or be sued" clause in its corporate charter; (2) by expressly agreeing to adhere to anti-discrimination standards in its employee handbook; (3) by participating in New Mexico's workers' compensation program; and (4) by failing to abide by its own express conditions of how to effectuate a waiver of other contracts.
- Court of Appeals found that the defendant did not waive tribal sovereignty explaining that the sue or be sued clause was conditional and the conditions for waiver had not been met, the language in the handbook and the tribes participation in workers compensation program could only create an implied waiver and a waiver of sovereign immunity must be express and cannot be implied.
- An express waiver of sovereign immunity cannot be pieced together through inference and implication.

Piano v. Premier Distributing Co., 137 N.M. 57, 107 P.3d 11 (Ct. App. 2005).

- Former at-will employee brought action against employer for wrongful termination and employer sought to compel arbitration.
- Court of Appeals affirmed denial of Motion to Compel Arbitration.
- A promise to allow at will employees to continue employment as consideration for arbitration agreement is illusory and insufficient consideration for plaintiff's promise to submit her claims to arbitration; and
- An employer's promise to arbitrate is illusory and insufficient consideration if the employer retains the unilateral authority to modify the Arbitration Agreement.

Callahan v. TVI, 136 N.M. 731, 104 P.3d 1122 (Ct. App. 2005) (cert. granted).

- Labor union members filed grievances with their union after they were terminated by school and the union dismissed them.
- Thereafter the union members sued the union in district court and the district court dismissed the action.
- The Court of Appeals reversed the district court, holding that the union had a duty to fairly and adequately represent members' interests once unions began representation; union members were not required to exhaust administrative remedies before filing civil action; and the union members could bring action for breach of fiduciary duty against the union as third party beneficiaries of collective bargaining agreement.

Gormley v. Coca-Cola Enterprises, 137 N.M. 192, 109 P.3d 280 (2005).

- Former employee brought action against employer for breach of implied contract, constructive discharge, age discrimination and disability discrimination and the District Court granted employer summary judgment on all claims.
- Court of Appeals reversed on the breach of contract claim but affirmed summary judgment on all other claims.
- Supreme Court defined, as a matter of first impression in New Mexico, "constructive discharge," explaining that "constructive discharge is not an independent cause of action, such as a tort or a breach of contract. Instead, constructive discharge is a doctrine that permits an employee to recast a resignation as a de facto firing, depending on the circumstances surrounding the employment relationship and the employee's departure."
- Court listed examples from federal court cases of elements necessary to prove constructive discharge such as a humiliating demotion, extreme cut in pay, transfer to a position with unbearable working conditions, overt pressure to resign, retaliation.
- Court determined that reduction in overtime hours, criticism by manager and loss of lighter duty work did not amount to constructive discharge and affirmed summary judgment in favor of employer.

Nava v. City of Santa Fe, 136 N.M. 647, 103 P.3d 571 (2005).

- Female police officer sued city for sexual harassment under the New Mexico Human Rights Act. Jury returned verdict in favor of plaintiff awarding \$285,000. District Judge granted remittitur of jury's verdict and lowered it to \$90,250 and reduced attorney fees. Both parties appealed.
- On appeal, Supreme Court held that the mixed-motives jury instruction was proper; substantial evidence supported jury's finding of harassment "because of sex."
- Harassment sufficiently severe to alter terms and conditions of employment.
- Remittitur of damages was proper.

### **Amendments to the New Mexico Human Rights Act (Effective, July 1, 2005)**

- Time limit for filing appeals and grievances extended from 180 days to 300 days.
- Order of Non-Determination shall be issued without delay. Previously had to wait 180 days.
- Time limit to seek trial de novo after waiving a hearing before the Human Rights Commission extended from 30 to 90 days.
- Time limit to file appeal from HRD decision extended from 30 to 90 days.
- First court of appeal for HRD decisions is district court. Next reviewing court formerly Supreme Court, now Court of Appeals.

U.S. District Court Cases, New Mexico

Trujillo v. APS, 377 F.Supp. 2d 1020 (D.N.M. 2005)(Judge Browning).

- Former high school teacher sued school board and individuals under Title VII alleging he was retaliated against for supporting wife's discrimination charge against the school after she was not hired for a position for which she applied.
- District Court granted Defendants' motion for summary judgment finding that plaintiff failed to offer sufficient evidence of adverse action and failed to establish a causal connection between his protected activity and adverse action. Court found the following were not adverse actions: (1) being placed on leave with pay; (2) one written warning.
- Court also found that Defendants have offered legitimate non-discriminatory reasons for actions taken.

Gamez v. Country Cottage Rehab, 377 F.Supp. 2d 1103 (D.N.M. 2005)(Judge Browning).

- Employee sued employer nursing home for alleged violations of the ADEA, Title VII, NMHRA and constitution and laws of New Mexico, claiming that her hours were reduced because of her age and because she is Hispanic.
- The District Court granted employer's motion for summary judgment on federal claims and remanded state claims to state court.
- Time reduction from 28 to 24 hours was "adverse employment action," however, there was no evidence that persons younger than plaintiff received more hours or were treated differently than the plaintiff with respect to scheduling.

West v. Norton, 376 F.Supp. 2d 1105 (D.N.M. 2004)(Judge Browning).

- Federal female employee sued employer for sex discrimination and retaliation.
- District Court granted employer's motion for summary judgment.
- There is liberal definition of "adverse employment action." Denial of request to relieve additional workload, travel restrictions and limitations on plaintiff attending meetings not adverse employment action, however, letter of reprimand was adverse employment action.
- Defendant entitled to Faragher/Burlington defense and showed that is prohibited discrimination and retaliation, posted its anti-discrimination policy, and advised employees of its complaint procedures.