Official Publication of the State Bar of New Mexico

Bar Bulletin

November 15, 2017 • Volume 56, No. 46

Red Rock Echoes, by John Cogan (see page 3)

Marigold Arts, Santa Fe

Inside This Issue

New Mexico Lawyer

Recent Developments in Employment and Labor Law

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17
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10–11:15 a.m., First Judicial District Court Jury Room, Santa Fe, 1-800-876-6657

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1
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About Cover Image and Artist: *Red Rock Echoes*, acrylic on canvas, 9 by 12 inches
John Cogan works in an American tradition of landscape painting dating back to the 1830s and the Hudson River School. Using the beauty of the natural world as a subject in its own right, he captures the particular mystique, the feeling of separateness, of the Southwest in images that represent a traditional American character. Cogan paints as if seeing nature for the first time, engaging the viewer intimately in the drama and limitless sweep of vast spaces, the timelessness and elemental experience of the desert and the superb color, light and serenity of mountains, canyons and hills. In 2012, Cogan won the Jack Dudlev Memorial Fund Purchase Award and his painting *Out of Depths* is a part of the permanent collection of the Grand Canyon Museum. For more information about Cogan, visit Marigold Arts in Santa Fe or www.marigoldarts.com.

Notices

Court News

Supreme Court Law Library

Hours and Information

The Supreme Court Law Library is open to any individual in the legal community or public at large seeking legal information or knowledge. The Library's staff of professional librarians is available to assist visitors. The Library provides free access to Westlaw, Lexis, NM OneSource and HeinOnline on public computers. Search the online catalog at https://n10045.eos-intl.net/N10045/OPAC/Index.aspx. Visit the Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe NM 87501. Learn more at lawlibrary.nmcourts.gov or by calling 505-827-4850.

Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

First Judicial District Court

Mass Reassignment

Effective Nov. 1 a mass reassignment of all Division II cases previously assigned to Judge Sarah M. Singleton except cases:

1. D101CV200300668
2. D101CV201300014
3. D101CV201302328
4. D101CV201400793
5. D101CV201402535
6. D101CV201501232
7. D101CV201600290
8. D101CV201600603
9. D101CV201602176
10. D101CV201700176

will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. Hon. Gregory S. Shaffer has been appointed to fill the vacancy in Division II of the First Judicial District. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Nov. 15 to challenge or excuse Judge Gregory S. Shaffer pursuant to Rule 1-088.1.

Eleventh Judicial District Court

Judicial Vacancy

A vacancy on the Eleventh Judicial District Court will exist as of Jan. 2, 2018 due to the retirement of Hon. Sandra Price effective Jan. 1, 2018. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the Eleventh Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., Jan. 10, 2018. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Eleventh Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on Jan. 25, 2018, to interview applicants in Farmington. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

I will be punctual in convening all hearings, meetings and conferences.

U.S. District Court for the District of New Mexico

Court Closure

The U.S. District Court for the District of New Mexico will be closed Nov. 23-24 for the Thanksgiving holiday. Court will resume on Monday, Nov. 27. After-hours access to CM/ECF will remain available as regularly scheduled. Stay current with the United States District Court for the District of New Mexico by visiting the Court's website at www.nmd.uscourts.gov.

State Bar News

Attorney Support Groups

- Dec. 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Dec. 11, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

Board of Bar Commissioners

N.M. Access to Justice Commission

The Board of Bar Commissioners will make two appointments to the New Mexico Access to Justice Commission for three-year terms. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico wishing to serve on the Commission should send a letter of interest and brief resume by Nov. 17 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Solo and Small Firm Section

Fall Speaker Series Line-up

The Solo and Small Firm Section's monthly luncheon presentations on unique law-related subjects continue on Nov. 21 with Eric Sirotkin. He will explain how his principle of non-violent advocacy developed from his work with Truth Commissions in both South Africa and South Korea, and peacebuilding across the DMZ in North Korea, can be applied to create a healthier and more successful law practice. On Jan. 16, 2018, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last 50 years and the effects (if any) on American and international law. Both presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

UNM School of Law

Law Library Hours

Through Dec. 16

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Holiday Closures

Nov. 24–25 (Thanksgiving)

Women's Law Caucus

Justice Mary Walters 2018 Honoree Nomination

Each year, the Women's Law Caucus at the University of New Mexico School of Law

2018 Budget Disclosure

Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners (BBC) has completed its budgeting process and finalized the 2018 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure is available in its entirety on the State Bar website at www.nmbar.org on the financial information page under the About Us tab. **The deadline for submitting a budget challenge is on or before noon, Nov. 30, 2017**, and the form is provided on the last page of the disclosure document.

The BBC will consider any challenges received by the deadline at its Dec. 7, 2017, meeting.

Address challenges to:
Interim Executive Director Richard Spinello
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199
rspinello@nmbar.org

Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque, NM 87109.

chooses an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. The Women's Law Caucus is currently soliciting nominations for the 2018 recipient of the Award. To nominate an inspiring woman, submit the following information to Erin Phillips at phillier@law.unm.edu by Dec. 1. Include: nominee name and firm/organization/title; a description of why that person should receive the award; if that nominee is chosen, would you be willing to introduce them; and the nominator's name and email/phone so we can contact you for more information.

Other Bars

First Judicial District Bar Association

November Luncheon

The First Judicial District Bar Association's next luncheon is scheduled from noon–1 p.m., Nov. 20, at the Santa Fe Hilton (100 Sandoval Street). New Mexico Supreme Court Chief Justice Judith Nakamura will discuss current issues in the New Mexico judiciary, including the 2018 legislative agenda, rule changes, and other matters affecting New Mexico's court system. There will also be time for questions. The price of admission is $15 for members and $20 for non-members. Please arrive early to facilitate the sign-in process. R.S.V.P. with Mark Cox at mcox@hatcherlawgroupnm.com by Thursday, Nov. 16.

New Mexico Trial Lawyers Foundation

Negotiation, Mediation and Settlement Seminar

The New Mexico Trial Lawyers Foundation presents a seminar, "Negotiation, Mediation and Settlement" (5.2 G) on Nov. 17 at the Albuquerque Marriott Pyramid North Hotel. The final hour of the program will be presented by the State Bar Center for Legal Education. To register, call 505-243-6003 or visit www.nmtla.org.

New Mexico Women's Bar Association

Nominations Open for Board of Directors

Elections for two year terms, beginning January 2018, for the New Mexico Women's Bar Association will be held on Nov. 17. The Board invites interested members of the association to apply with a short letter of interest and résumé. Send the letter and résumé to the WBA at nmwba1990@gmail.com. Board members are expected to attend an overnight retreat Jan. 20–21, 2018; to attend bi-monthly meetings, in person or by phone; to actively participate on one or more committees; and to support the events sponsored by the Women's Bar Association. The New Mexico Women's Bar does not discriminate on the basis of sex or gender and encourages all licensed attorneys to become members and apply to be on the Board. For more information about the Women's Bar Association or to become a member, visit www.nmwba.org.

Other News

Center for Civic Values

Animas High School Seeks Attorney Coach

Animas High School in Animas, N.M., seeks an attorney coach to help with its mock trial team. For more information, contact Kristen Leeds, director, Center for Civic Values and Gene Franchini New Mexico High School Mock Trial Program, at 505-764-9417 or kristen@Civicvalues.org.

Requesting Judges for Gene Franchini High School Mock Trial

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Mock Trial qualifiers will be held Feb. 16–17, 2018, at the Bernalillo County Metropolitan Court in Albuquerque. CCV needs volunteers for judges

(opportunities exist for sitting judges and non-judges). Learn more and register at www.civicvalues.org.

State of New Mexico Workers' Compensation Administration

Notice of Destruction of Records

In accordance with NMAC 11.4.4.9 (Q)-Forms, Filing and Hearing Procedures: Return of Records—the New Mexico Workers' Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2011, excluding causes on appeal. The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque, NM, 87106 and can be picked up until Nov. 30. For further information, contact the Workers' Compensation Administration at 505-841-6028 or 1-800-255-7965 and ask for Heather Jordan, clerk of the court. Exhibits and depositions not claimed by the specified date will be destroyed.

Elias Law

Annual Turkey Giveaway

Annually, Elias Law gives out 500 free turkeys to low income families in Albuquerque's South Valley. This year's Turkey Giveaway will take place at 10 a.m., Nov. 18, at Elias Law located at 111 Isleta Blvd SW, Albuquerque. The firm seeks donations of food and water for those waiting in line and canned goods to accompany the turkeys. Volunteer assistance is also needed to hand out turkeys and to help those in need to their car with their groceries. To donate or volunteer, contact Nathan Cowan at cowann@abogadoelias.com or 505-888-8888.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Board of Bar Commissioners

2017 Election: Electronic Voting Procedures

Voting in the 2017 election for the State Bar of New Mexico Board of Bar Commissioners began Nov. 9 and will close at noon on Nov. 30. There are two open positions in the **First Bar Commissioner District** (Bernalillo County). Three candidates submitted nomination petitions for the two positions, so there is a contested election in that district. There are two open positions in the **Sixth Bar Commissioner District** (Chaves, Eddy, Lea, Lincoln and Otero counties). Three candidates submitted nomination petitions for the two positions, so there is a contested election in that district. There were two open positions in the **Third Bar Commissioner District** (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties). One nomination petition was received from Elizabeth J. Travis, so she is elected by acclamation. The Board will appoint a member from that district to fill the other position at the February meeting. View photos and bios of individuals running contested elections in the Nov. 8 *Bar Bulletin* (Vol. 56, No. 45).

A link to the electronic ballot and instructions was emailed to all members in the First and Sixth Bar Commissioner Districts using email addresses on file with the State Bar. To provide an email address if one is not currently on file or to request a mailed ballot, contact Pam Zimmer at pzimmer@nmbar.org.

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: July 1–Sept. 30, 2017

Final Decisions

Final Decisions of the NM Supreme Court 2

Matter of Thomas A. Pfarr, Esq., Disciplinary No. 07-2016-746. The New Mexico Supreme Court issued an Order on August 2, 2017 Indefinitely Suspending Respondent from the practice of law for a period of no less than eighteen (18) months for failing to deposit client retainers in trust account; failing to hold funds in which clients claimed an interest; sharing legal fees with a non-lawyer; and forming a practicing law partnership with a non-lawyer. Respondent was also ordered to pay costs to the Disciplinary Board.

Matter of Joshua R. Simms, Esq., Disciplinary No. 01-2016-735. The New Mexico Supreme court issued on Order on September 6, 2017 Indefinitely Suspending Respondent from the practice of law for a period of no less than eighteen (18) months for knowingly failing to provide competent representation to clients; knowingly failing to ascertain and abide by clients' decisions concerning the objectives of representation; failing to represent clients diligently; knowingly failing to communicate with clients; knowingly representing numerous clients without obtaining their informed consent to do so in the face of one or more concurrent conflict(s) of interest between the clients and the interests of a third party; knowingly accepting compensation for representing numerous clients from one other than the clients without obtaining informed consent from the clients, and where there was actual rather than merely potential interference with Respondent's independence of professional judgment and with the client-lawyer relationships; failing to deposit into a client trust account legal fees and expenses paid in advance; knowingly undertaking representation of clients when such representation, under the circumstances, resulted in violations of the Rules of Professional Conduct; filing a lawsuit with no non-frivolous basis in law or fact; sharing legal fees with a non-lawyer; knowingly permitting persons affiliated with a third party to direct or regulate Respondent's professional judgment in rendering legal services; and knowingly engaging in conduct involving dishonesty and misrepresentation and that is prejudicial to the administration of justice. Respondent was also ordered to pay costs to the Disciplinary Board.

Summary Suspensions

Total number of attorneys summarily suspended 0

Administrative Suspensions

Total number of attorneys administratively suspended.....0

Disability Inactive Status

Total number of attorneys placed on disability inactive status .0

Charges Filed

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonable diligence and promptness in representing a client; failing to charge a reasonable fee; failing to promptly return client funds; failing to expedite litigation consistent with the interests of the client; failing to give full cooperation and assistance to disciplinary counsel; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to act with reasonable diligence and promptness in representing a client; failing to expedite litigation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to act with reasonable diligence and promptness in representing a client; failing to reasonably communicate with a client; failing to promptly render a full accounting upon request to do so; failing to promptly deliver to the client funds and the balance of the retainer; knowingly making a false statement of material fact in connection with a disciplinary matter; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to adequately counsel a client not to engage in, or assisting a client in conduct that the attorney knows is criminal or fraudulent or misleading to a tribunal; failing to provide independent professional judgment; knowingly filing a frivolous action by instituting litigation where there is no basis, either in law or fact; engaging in conduct intended to disrupt a tribunal; knowing using means that have no substantial purpose other than to embarrass, delay or burden a third person; knowingly making statements that are false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to hold a client's property separate from the lawyer's own property and by failing to keep complete records of the account funds; knowingly making a false statement of material fact in a disciplinary matter; engaging in conduct involving fraud, deceit or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; failing to represent the client diligently; failing to expedite litigation; knowingly failing to comply with a Court order; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to charge a reasonable fee; failing to hold a client's property separate from the lawyer's own property and by failing to keep complete records of the account funds; knowingly making a false statement of material fact in a disciplinary matter; engaging in conduct involving fraud, deceit or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegedly failing to provide competent representation to a client; knowingly filing a frivolous lawsuit; knowingly making false statements of fact to the Court; knowingly making a false statement of material fact in connection with a disciplinary matter; engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Petition for Injunctive Relief Filed

Petitions for injunctive relief filed…….0

Petitions for Reciprocal Discipline Filed

Petitions for reciprocal discipline filed 1

Matter of Burt Lee Burnett, Esq. (Disciplinary No. 07-2017-764). The New Mexico Supreme Court entered an order granting the petition for reciprocal discipline and suspending Respondent from the practice of law for one (1) year effective August 24, 2017.

Reinstatement from Probation

Petitions for reinstatement filed 1

John Michael Bowlin, Esq. (Disciplinary No. 01-2015-714) Respondent petitioned for reinstatement to the practice of law from probation. The Supreme Court granted the petition in an Order dated July 17, 2017.

Formal Reprimands

Total number of attorneys formally reprimanded 0

Informal Admonitions

Total number of attorneys admonished 0

Letters of Caution

Total number of attorneys cautioned 11

Attorneys were cautioned for the following conduct: (1) general incompetence (four letters of caution issued); (2) failure to file (two letters of caution issued); (3) contact or threats to opposing party; (4) failure to protect interest of client; (5) unauthorized practice of law (two letters of caution issued); and (6) harassment.

Complaints Received

Allegations	**Number of Complaints**
Trust Account Violations	2
Conflict of Interest	1
Neglect and/or Incompetence	125
Misrepresentation or Fraud	33
Relationship with Client or Court	36
Fees	13
Improper Communications	5
Criminal Activity	0
Personal Behavior	5
Other	1
Total number of complaints received	221

From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

Introduction: You Bought It! You Better Read It!

Purchasing or renewing professional liability insurance can be a tedious task at best. Research is performed. Telephone calls are made to friends for advice and copious cups of coffee are consumed while slogging through boilerplate language and technical jargon.

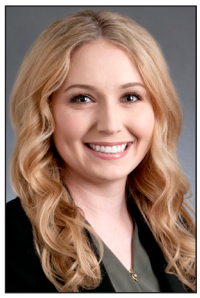
In an effort to provide a bit of relief, members of the Lawyer's Professional Liability Committee put their collective heads together to come up with a list of 17 good signs to look for.* They reflect trends and issues in professional liability insurance that the Committee has encountered and/or addressed over the last several years. In an effort to ensure this information is disseminated to the members in a clear and concise way that is both practical and convenient, the Committee would like to introduce its new monthly tip column "Good Signs to Look for When Choosing a Professional Liability Insurance Company." Over the past year, the Column has highlighted one or two of the items included on the Committee's best practices list along with a brief explanation of each. All 17 tips are listed here. Read more on the Committee's website at www.nmbar.org > About Us > Committees > Lawyers Professional Liability and Insurance.

Every lawyer's insurance needs are different and the Committee's list of tips is by no means exhaustive; nor is the column a substitute for independent research. However, the Committee hopes that both the list and the column will provide food-for-thought when it comes time to pour another cup of coffee and begin the tedious task of purchasing or renewing your professional liability policy.

**This list is provided to members of the State Bar of New Mexico for use when evaluating potential professional malpractice insurers and policies. This list is meant for use as a guideline only. It is not exhaustive and is not a substitute for independent research. Before purchasing a professional malpractice insurance policy, please carefully read the policy and all accompanying documentation; evaluate their contents for accuracy, currency, relevance, and completeness; and, if necessary, obtain professional advice regarding the policy and the contents thereof.*

1. No action has been taken against the company by the New Mexico Office of the Superintendent of Insurance in the last five years;
2. There has been no nonrenewal on the basis of potential claims only;
3. Coverage for disciplinary matters in an amount of at least $5,000 and including coverage for events occurring pre-Specification of Charges (the insured lawyer wants disciplinary coverage which will pay for representation in responding to a disciplinary complaint before Specification of Charges are filed);
4. There is a free tail policy after three years with the company for retiring attorneys;
5. Defense-within-limits policies will not erode more than half of the coverage amount;
6. If the policy is a defense-within-limits policy, the company will provide a separate letter/summary of coverage explaining the terms of the defense-within-limits coverage;
7. Company provides access to an independent risk advisor;
8. In the last five years, the company has no bad faith judgments entered against it in New Mexico;
9. Company has at least three different firms on its defense panel;
10. Company offers coverage for firms with one to six attorneys;
11. Company offers coverage for class action suits, as well as claims arising from estate planning and intellectual property matters;
12. Company holds an "Excellent (A or A-)" or better rating from AM Best;
13. Contact with a live representative is available;
14. The retroactive date and coverage includes all periods of time during which the insured was continuously covered under a prior malpractice insurance policy;
15. Policy provides coverage for pre-claim subpoenas and depositions;
16. Policy provides innocent insured coverage; and
17. Policy provides a broad definition of "Legal Services" to include mediation, arbitration, guardian ad litem, and personal representative services provided by the attorney.

Hearsay



Brana Hardway has joined the Sutin, Thayer & Browne Law Firm in its commercial group practice in Albuquerque. Hardway practices primarily in transactions law, to include commercial contracts and general business and corporate law. Hardway earned her bachelor's degree in political science (*summa cum laude*) at University of New Mexico, her master's in social work (clinical practice) at New Mexico Highlands University and her law degree (with honors) at University of New Mexico School of Law. She joined the State Bar of New Mexico in October.

At the annual business meeting of ALFA International, **S. Carolyn Ramos** was named chair of its Women's Initiative Practice Group. Ramos is an attorney, shareholder and director with the Albuquerque law firm of Butt Thornton & Baehr PC where her litigation and trial practice focuses on the defense of transportation, product liability, sports venue and other catastrophic personal injury cases.

Brigadier General Fermin A. Rubio, assistant adjutant general for air and commander of the New Mexico Air National Guard, was recognized for his service at a retirement ceremony at Kirtland Air Force Base, N.M., on Oct. 21. He is a U.S. Navy veteran having served on active duty with the U.S. Navy from 1990–1994. He affiliated with the U.S. Naval Reserve and then transferred to the U.S. Air Force Reserve in 1997. Brig. Gen. Rubio is a 1986 graduate of the University of New Mexico School of Law.

Atkinson & Kelsey, PA
U.S. News and World Report
Albuquerque First Tier Rankings: family law

Frank E. (Dirk) Murchison (Taos)
2018 Best Lawyers in America (arbitration and mediation)

Rodey, Dickason, Sloan, Akin and Robb, PA
Benchmark Litigation:
Highly Recommended Law Firm in New Mexico
Local Litigation Stars: **Jeff Croasdell, Jocelyn Drennan, Nelson Franse, Scott Gordon, Bruce Hall, Jeff Lowry, Ed Ricco, Andy Schultz** and **Tom Stahl**
Future Litigation Stars: **Cristina Adams** and **Krystle Thomas**
U.S. News and World Report
Albuquerque First Tier Rankings: administrative/regulatory law, appellate practice, arbitration, banking and finance law, commercial litigation, corporate law, eminent domain and condemnation law, employment law—management, government relations practice, health care law, insurance law, labor law—management, land use and zoning law, legal malpractice law—defendants, leveraged buyouts and private equity law, litigation—banking and finance, litigation—first amendment, litigation—labor and employment, litigation—land use and zoning, litigation—real estate, litigation—tax, mass tort litigation/class actions—defendants, mediation, medical malpractice law—defendants, mergers and acquisitions law, personal injury litigation—defendants, product liability litigation—defendants, professional malpractice law—defendants, public finance law, real estate law, securities/capital markets law, tax law and trusts and estates law.
Santa Fe First Tier Rankings: administrative/regulatory law, arbitration, banking and finance law, corporate law, energy law, financial services regulation law, mediation, mining law, Native American law, natural resources law, personal injury litigation—defendants and real estate law.

In Memoriam

Christian E. Eaby passed away on Oct. 8 surrounded by his loving family. Eaby grew up in Ephrata and was the son of the late David R. Eaby and the late Pearl (Root) Eaby. He is survived by his stepmother Beverly Eaby. He graduated from Manheim Township High School and later moved to Albuquerque. There he earned his law degree at the University of New Mexico. He returned to Lancaster County in 1990. He had been in private practice since 1980 until his retirement this summer. He was a loving husband, father, brother, uncle, cousin and friend. He will be greatly missed by all. Everyone will remember him for his dry sense of humor and quick wit which will be forever missed at all the family gatherings. He leaves behind his wife, Dace, and daughter, Sarah of New York City, whom he adored; brothers, Brad (Julie) of Dover, Delaware, Scott (Jan) of Ephrata, David, Jr. of Lititz, Eric of Lancaster; sister, April (Bradford) of Elizabethtown; nieces and nephews, Karlis (Kate), Adams (Adi), Davis (Colleen), Sheridan, Mackenzie, Garrison, Maya, Ian, Erica, Erin, Jeff (Allison), and Danny.

Fred C. Hannahs passed away on Aug. 26 after a brief illness. Fred was born in Tucumcari, N.M., on July 27, 1927. After graduating from Southern Methodist University he went on to the University of Miami Law School and began his practice in Santa Fe. He became a partner in the current law firm of Montgomery and Andrews before moving his practice to Albuquerque. He also served in the Navy Reserve for 20 years achieving the rank Commander. Hannahs retired in 1995. He is survived by his three children, Reina and Steve Kline of Albuquerque and Jeanne Jones (husband Key) of Santa Fe.

Legal Education

November 2017

15 **2017 Business Law Institute**
4.5 G, 1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **2017 Probate Institute**
6.3 G , 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **2016 Ethics, Confidentiality and the Attorney-Client Privilege Update**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Municipal Law**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
City of Albuquerque Legal Department
505-768-4500

17 **Sports and Entertainment Law**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Black Lawyers Association
www.newmexicoblacklawyersassociation.org/

17 **RMD Outside Counsel Seminar and General Counsel annual Meeting**
4.3 G, 2.0 EP
Live Seminar, Santa Fe
New Mexico General Services Department
505-827-0402

17 Negotiation, Mediation and Settlement
5.2 G
Live Seminar, Albuquerque
New Mexico Trial Lawyers Foundation
www.nmtla.org

17 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **2017 Tax Symposium**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **3rd Annual Symposium on Diversity and Inclusion—Diversity Issues Ripped From the Headlines (2017)**
5.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Copy That! Copyright Topics Across Diverse Fields (2016 Intellectual Property Law Institute)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Estate Planning, Current Developments and Hot Topics**
1.0 G
Live Seminar, Albuquerque
Bessemer Trust
713-803-2843

28 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Federal and State Tax Updates (2017 Tax Symposium)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **2017 Employment and Labor Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **2017 Family Law Institute (Day 1)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico Liquor Law for 2017 and Beyond**
3.5 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **2017 ECL Solo and Small Business Bootcamp Parts I and II**
3.4 G 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Health Law Symposium (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Basics of Family Law**
5.2 G, 1.0 EP (plus an optional 1.0 EP)
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

December 2017

1 **Specialized Areas of Law for Lawyers and Paralegals—Annual Paralegal Division CLE**
5.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

1 **Office Leases: Drafting Tips and Negotiating Traps**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

1 **Navajo Law Seminar**
6.0 G, 2.0 EP
Live Seminar, Albuquerque
Sutin Thayer and Browne
www.sutinfirm.com

4 **Legal Malpractice Potpourri**
1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Ethicspalooza: Ethical Issues of Using Social Media and Technology in the Practice of Law (2016)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **28th Annual Appellate Practice Institute (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Indemnity and Insurance in Real Estate**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **"HEMS"—Defining Distribution Standards in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Annual Winter Meeting and Seminar**
11.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Municipal League
www.nmml.org

7 **Tech Toch, Tech Tock: Social Media and the Countdown to Your Ethical Demise (2016)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Rise of the Machines, Death of Expertise: Skeptical Views of Scientific Evidence**
3.5 G, 2.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Law and Policy for Neighborhoods**
10.0 G, 1.0 EP
Live Seminar, Santa Fe
Santa Fe Neighborhood Law Center
www.sfnlc.com

8 **Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute)**
5.0 G, 2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Live Seminar, Las Cruces
Center for Legal Education of NMSBF
www.nmbar.org

8 **Wage Theft in New Mexico**
3.0 G, 1.0 WP
Live Seminar, Roswell
New Mexico Hispanic Bar Association
www.nmhba.net

11 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Ethicspalooza**
1.0 EP–5.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **2017 Family Law Institute Day 1**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **2017 Probate Institute**
6.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **2017 Family Law Institute Day 2**
5.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Trial Know-How! (The Rush to Judgement) 2017 Trial Practice Section Annual Institute**
4.0 G, 2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective November 3, 2017

PUBLISHED OPINIONS

A-1-CA-35126	Cable One v. NM Tax & Rev	Reverse/Remand	10/30/2017

UNPUBLISHED OPINIONS

None

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Clerk's Certificate of Admission

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective November 15, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-015	Amended and supplemental pleadings	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017
1-088	Designation of judge	12/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017
1-121	Temporary domestic orders	12/31/2017
1-125	Domestic Relations Mediation Act programs	12/31/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-105	Assignment and designation of judges	12/31/2017
2-112	Public inspection and sealing of court records	03/31/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-105	Assignment and designation of judges	12/31/2017
3-112	Public inspection and sealing of court records	03/31/2017
3-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Civil Forms		
4-223	Order for free process	12/31/2017
4-402	Order appointing guardian ad litem	12/31/2017
4-602	Withdrawn	12/31/2017
4-602A	Juror summons	12/31/2017
4-602B	Juror qualification	12/31/2017
4-602C	Juror questionnaire	12/31/2017
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
4-941	Motion to restore right to possess or receive a firearm or Ammunition	12/31/2017
Domestic Relations Forms		
4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
4A-201	Temporary domestic order	12/31/2017
4A-209	Motion to enforce order	12/31/2017
4A-210	Withdrawn	12/31/2017
4A-321	Motion to modify final order	12/31/2017
4A-504	Order for service of process by publication in a newspaper	12/31/2017
Rules of Criminal Procedure for the District Courts		
5-105	Designation of judge	12/31/2017
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information and Indictment	07/01/2017
5-211	Search warrants	12/31/2017
5-302	Preliminary examination	12/31/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017

NEW MEXICO
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Recent Developments in Employment and Labor Law

Employment and Labor Law Section

Recent Developments in Employment and Labor Law

Introduction From The Section Chair

The employer employee relationship is highly personal and complex. Federal, state and local laws governing labor and employment are constantly in flux and, in many cases, dominate public policy discussions. In this Issue of *New Mexico Lawyer*, the Employment and Labor Law Section provides updates and analysis on recent case law and legal issues. We hope that the employment and labor related topics that the authors take up in this issue will be interesting and valuable for all lawyers, whether representing employers or employees, advising business clients or simply serving as employers themselves.

Sincerely,

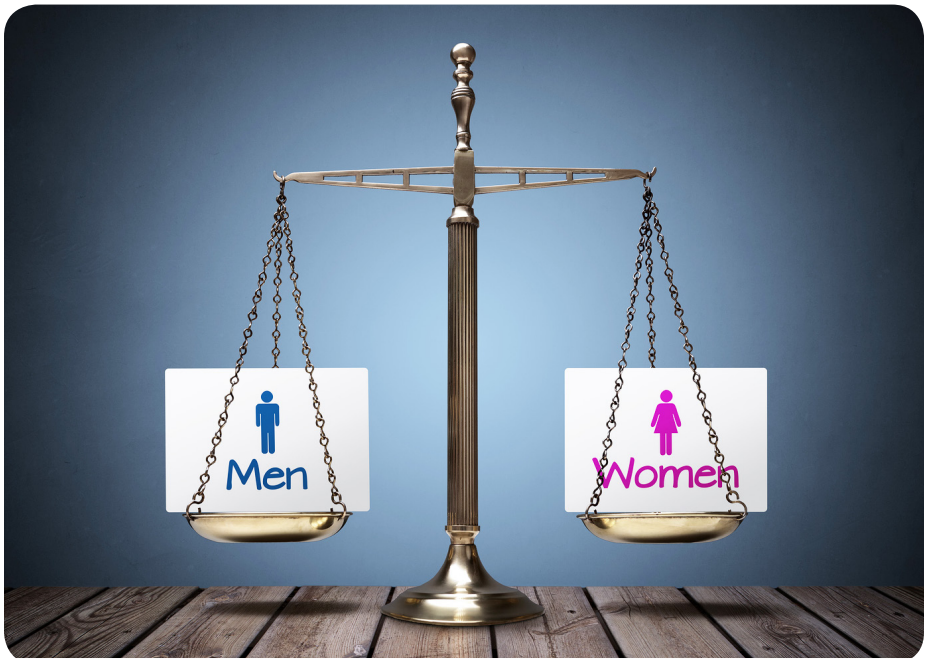
Marshall Ray
Chair, Employment and Labor Law Section

Equal Pay is COMP-licated:

Equal Pay Claims in Today's Workplace

By Victor P. Montoya

Congress enacted the Equal Pay Act (EPA) in 1963 as an amendment to the Fair Labor Standards Act. *See* 29 U.S.C. § 206(d). Over the last three years, the Equal Employment Opportunity Commission (EEOC) reported an increase in EPA claims. This may be attributed to many factors, including the addition of pay discrimination to the EEOC intake form and workers' heightened awareness of equal pay issues gained from social media and other sources, as well as celebrity activism. Another government agency, the Office of Federal Contract Compliance Programs (OFCCP), also proposed rulemaking to require covered federal contractors and subcontractors with more than 100 employees to submit an annual Equal Pay Report on employee compensation to address equal pay concerns.



What is the EPA and how can employers lower the risk of EPA claims? There is no simple answer — equal pay is COMP-licated.

Equal Pay Act

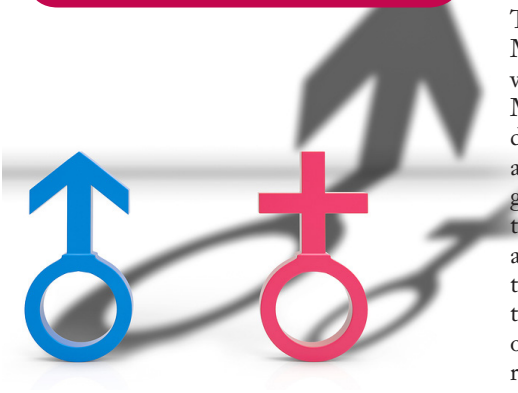
The EPA prohibits discrimination on the basis of sex by paying wages at a rate less than the rate paid to employees of the opposite sex for work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions. Exceptions are provided: "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of [the EPA] shall not, in order to comply with the provisions of [the EPA], reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

Watch the Gap

The risk of EPA claims for employers of all sizes and industries is highest from employees in highly compensated or highly populated positions. The American Association of University Women (AAUW) published a report entitled "The Simple Truth About the Gender Pay Gap," which it updated in Fall 2017. According to the AAUW report, at the rate of change between 1960 and 2016, the pay gap between women and men may not close until 2059. Given the slower rate of change seen since 2001, the anticipated date men and women may reach pay equity could extend to 2119. The report notes that, in 2016, women were paid just 80% of what men were paid. For mothers, the pay gap only grows with age - women aged 55-64 were paid only 74% of what similarly aged men earned. In 2016, women of color were paid even less, which makes it difficult to pay off their student loans and other debts. The report states that New York had the lowest pay gap for women at 89%. New Mexico, at 82%, was among the states with the lowest pay gaps in the country. The pay gap exists in almost every occupation and, although education helps increase women's earnings, education does not close the pay gap. Among women at all education levels, white women earn more than black and Hispanic women. As a result of the pay gap, women also receive lower benefits from Social Security, pensions, and similar benefits when they retire. The AAUW report states that the pay gap is largest for Hispanic and Latina women, who earned just 54% of that earned by white men in 2015. The report also notes that the pay gap can have wide-ranging effects on children and men, since 42 percent of families' primary or sole breadwinners are mothers with children under 18 years of age.

Hollywood celebrities (including Patricia Arquette, Jennifer Lawrence, Amy Schumer, Hugh Jackman, Emma Stone, Robin Wright, and the cast of the *Big Bang Theory*) and professional athletes also have joined the equal pay debate. In March 2016, the U.S. Women's Hockey Team, the reigning tournament champions, announced that it would sit out the International Federation World Championship in Michigan unless the players received a living wage, and only settled the dispute shortly before the tournament began. In the same year, the U.S. Women's soccer team filed a landmark charge with the EEOC asserting that

> The EPA prohibits discrimination on the basis of sex by paying wages at a rate less than the rate paid to employees of the opposite sex for work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions



team members were paid less than members of the U.S. Men's team. The charge alleges that despite the women's team earning over $20 million more in revenue than the men's team the prior year, it still received less pay.

It is unknown how the current administration in Washington, D.C., will address equal pay issues. President Donald Trump previously stated women should get the same pay if they do the same job. However, he then signed an executive order in March 2017 revoking the 2014 Fair Pay and Safe Workplaces order created by President Barack Obama intended to ensure that federal contractors improve their compliance with federal labor and civil rights laws.

Despite this uncertainty, other branches of the federal government, states, academics, pay experts, and women's and civil rights groups are addressing the pay gap head on. This includes state equal pay laws, enforcement priorities established by the EEOC and OFCCP, and bans on asking applicants for their salary histories.

State Law Examples

The 2016 California Fair Pay Act amended the California Labor Code to change pay groups from "similarly situated" (as used in the EPA) to "substantially similar." Cal. Lab. Code § 1197.5. This change makes it easier for California employees to compare themselves and their wages to other employees. The California law also bars employers from prohibiting their employees from disclosing their wages, discussing the wages of others, and inquiring about another employee's wages. This change addresses salary transparency, another barrier to equal pay.
Massachusetts also enacted an Equal Pay Act in 2016, which becomes effective in 2018. Mass. Gen. Laws ch. 149, § 105A. The standard for pay groups under the Massachusetts law is "comparable work," which is similar to the California law. The Massachusetts law, however, provides a defense to employers who self-evaluate and make progress towards eliminating the gender pay gap. An employer sued under the Massachusetts law is entitled to an affirmative defense if it can demonstrate the following: 1) it has within the previous three years completed a self-evaluation of its pay practices in good faith; and 2) reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation. This provision encourages employers to be proactive and take affirmative steps to address equal pay in their workplaces.

The New Mexico Fair Pay for Women Act also prohibits wage discrimination based upon an employee's sex. *See* NMSA 1978, §§ 28-23-1, *et seq.* (2013). Proof of an employer's intent to discriminate is not required. Similar to the EPA, exceptions are provided for wage differentials based upon seniority or merit systems, or systems that measure earnings by quality or quantity of production.

Many other countries, including the United Kingdom, Germany, and Sweden, also are enacting equal pay laws. Equal pay therefore is a concern for employers in the global market.

EEOC and OFCCP

Although EPA claims represented only 1.2% of the total charges received by the EEOC in Fiscal Year 2016, they resulted in $8.1 million in monetary benefits to

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Fifty Years of the ADEA:

Proving and Defending Age Discrimination Claims in 2017 and Beyond

By Alana M. De Young

Although media outlets often focus on the millennial generation's impact upon the workforce, today's workforce is also marked by the unprecedented participation of older workers. The increased number of older workers pursuing employment long after reaching the traditional "retirement age" comes hand-in-hand with the 50th anniversary of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. When enacting the ADEA a half century ago, Congress prohibited age discrimination in employment decisions, including decisions to hire, promote, and discharge, and with regard to the compensation, terms, conditions, or privileges of employment. 29 U.S.C. § 623(a).

Although media outlets often focus on the millennial generation's impact upon the workforce, today's workforce is also marked by the unprecedented participation of older workers.

As age discrimination and bias in the workplace continue to trigger litigation throughout New Mexico and the country, this article considers two current ADEA-related issues. First, it considers recent court decisions regarding "substantially younger workers" and age stereotypes under the ADEA to provide guidance on making and defending against *prima facie* cases of age discrimination. Second, it discusses recent court opinions that foreshadow a potential increase of disparate impact claims under the ADEA.

The "Substantially Younger" Analysis and the Impact of Age Stereotypes in Making and Defending Against *Prima Facie* Cases of Age Discrimination

Under the ADEA, one of the elements a plaintiff must prove to establish a *prima facie* case of age discrimination is that he or she was replaced by a "substantially younger" employee. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-313 (1996). Notably, this does not mean that the plaintiff's replacement must be from outside the protected ADEA class (*i.e.*, under 40); instead, "[t]he fact that one person in the protected class has lost out to another person in the protected class is ... irrelevant, so long as he has lost out because of his age." *Id.* at 312. Indeed, the Eleventh Circuit Court of Appeals in *Liebman v. Metro. Life Ins. Co.* found that a 42-year-old employee who replaced the 49-year-old terminated plaintiff qualified as "substantially younger," even though the replacement was over 40 himself. 808 F.3d 1294, 1299 (11th Cir. 2015).

Several courts have recently reviewed what is "substantial enough" of an age difference to support an inference of age discrimination under the ADEA. Historically, the majority of federal circuit courts had found an age gap of less than ten years was presumptively *insufficient*, in and of itself, to meet the substantially younger element under the ADEA prima facie analysis. In *France v. Johnson*, the Ninth Circuit Court of Appeals was faced with an eight-year average age difference between the 54-year-old plaintiff and four other applicants in their 40s who were selected over the plaintiff for a promotion. 795 F.3d 1170, 1172 (9th Cir. 2015), *as amended on reh'g* (Oct. 14, 2015). While the *France* court agreed with its sister circuits that an age gap of less than ten years is presumptively insufficient to make a *prima facie* showing, the Court explained that a plaintiff "can rebut the presumption by producing additional evidence to show that the employer considered his or her age to be significant." *Id.* at 1174. Thus the *France* court held the eight-year gap, coupled with additional evidence of age bias including a spoken

preference for "younger, less experienced" workers and repeated discussions about the plaintiff's potential retirement, established a *prima facie* case of age discrimination. *Id.*

Similarly, the Eighth Circuit Court of Appeals held in *Hilde v. City of Eveleth* that an eight-year age gap between the plaintiff, who was denied a promotion, and the successful promotion candidate was substantial enough based on additional evidence that the decision makers assumed the plaintiff was not committed to the position solely because his age made him retirement-eligible. 777 F.3d 998, 1006 (8th Cir. 2015).

Ultimately, these cases emphasize that there is no magic number for what constitutes "substantially younger" under the ADEA. Instead, when analyzing age discrimination claims, the courts are carefully considering evidence relating to age and particularly focusing on evidence relating to employers' assumptions about age. Thus, plaintiffs may be able to establish age discrimination by showing smaller age gaps between comparators, particularly where such gaps are coupled with additional evidence of age discrimination or bias. As for employers, while it may be insufficient to solely rely upon an age gap of ten years to rebut a *prima facie* showing, they, too, can use this lack of a bright-line rule to defend against age discrimination claims: these cases suggest a trend away from focusing narrowly on the age comparison and towards looking more broadly at biases of the employer *relative to* age. Accordingly, employers who root employment decisions not only on the age of older employees or job applicants but also upon their fears as to the commitment or ability of those older employees or applicants, based solely on age, may be more vulnerable to losses on these claims because they are making assumptions based on age stereotypes.

The Potential Increase of Disparate Impact Claims under the ADEA

The ADEA, in addition to prohibiting discriminatory treatment of older workers, also prohibits facially neutral employment policies and practices—such as a reduction in force—that have disparate impacts on older workers. *See* 29 U.S.C. § 623(a)(2); *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). As disparate impact claims "usually focus on statistical disparities" to make a *prima facie* disparate impact case under the ADEA, a plaintiff must proffer statistical evidence showing that the employer's facially neutral policy or practice caused a significantly disproportionate adverse impact based on age. *See Karlo v. Pittsburgh Glass Works*, 849 F.3d 61, 69 (3d Cir. 2017).

The ADEA, in addition to prohibiting discriminatory treatment of older workers, also prohibits facially neutral employment policies and practices—such as a reduction in force—that have disparate impacts on older workers.

Often times, ADEA disparate impact claims will compare a neutral policy's impact on employees aged 40 and older versus the impact on employees under 40. At the beginning of 2017, however, the Third Circuit Court of Appeals in *Karlo* split from the Second, Sixth, and Seventh Circuit Courts and held that the plaintiffs, workers in their 50s, had stated a cognizable disparate impact claim against their employer based upon evidence that the employer's reduction in force had a greater negative impact upon them than upon workers in their 40s. 849 F.3d 61 (3d Cir. 2017). The *Karlo* court explained that both the plain language of the ADEA and its remedial purpose of "proscrib[ing] *age* discrimination, not forty-and-over discrimination" permitted the use of subgroup statistics to prove a disparate impact claim under the ADEA. *Id.* at 71 (emphasis in original). This decision signals that courts may be more willing to expand ADEA disparate impact claims in light of the changing age demographic of our workforce in 2017 and beyond.

Another recent disparate impact issue addressed by the courts is whether job *applicants* may bring ADEA disparate impact claims. In *Villarreal v. R.J. Reynolds Tobacco Co.*, the Eleventh Circuit Court of Appeals dismissed the plaintiff's case, holding that because a job applicant has no status as an employee under the ADEA, the plaintiff applicant could not bring a disparate impact claim. 839 F.3d 958, 963 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017). Because the *Villarael* court found the plain language of the ADEA on this point was clear, it refused to consider legislative history or the EEOC's interpretation to the contrary. *Id.* at 969. In contrast, in *Rabin v. PricewaterhouseCoopers LLP*, a California federal district court permitted the plaintiff job applicants to proceed with their disparate impact claims based upon Supreme Court precedent, the ADEA's legislative history and intent, and EEOC guidance. 236 F. Supp. 3d 1126, 1128, 1133 (N.D. Cal. 2017). Although there is currently no Tenth Circuit decision on this issue, employers in New Mexico should be cognizant of this split as well as the potential increase of ADEA disparate impact claims by job applicants in this jurisdiction.

Conclusion

These opinions not only highlight the impact that the older workforce has upon age discrimination claims under the ADEA, but also reveal an emerging judicial trend with less emphasis on the age "number" in discrimination claims and increased focus on the underlying assumptions employers may make as to ability, commitment, and other employment issues related to a worker's age. Employers are encouraged to step back and objectively consider whether their concerns about an aging staff member or job applicant are based upon actual facts relating to job performance and ability, or instead upon the employer's age-related assumptions and biases. In addition, and in light of recent court disagreement over disparate impact claims, employers should carefully assess potentially adverse impacts of company-wide employment practices, such as reductions in force, upon older workers.

Endnotes:

[1] Drew Desilver, More older Americans are working, and working more, than they used to, Pew Research Center (June 20, 2016) http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to/ (according to a Pew Research Center analysis of employment data from the federal Bureau of Labor Statistics, there are more workers (aged 65 and older) working than at any time since the turn of the century); see also Mitra

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Joining *Wirth:*

Potential Impacts of the Court of Appeals' decision to limit the scope of "Joint Employment" in New Mexico

By Benjamin A. Nucci

New Mexico employers owe their employees an array of duties arising under both state and federal law. In many circumstances, the existence of an employer-employee relationship, and the legal obligations that flow from that relationship, are clear. In other circumstances, though, courts may consider one entity to be a "joint employer" of another entity's employees and find it is subject to some of the same legal obligations as the primary employer. An entity may be a joint employer under New Mexico law even when the employer-employee relationship is not necessarily clear or obvious. The "joint employer" dilemma can arise in a variety of scenarios, such as when an employer uses employees from a temporary staffing agency, engages an outside entity to administer certain human resource functions, or operates as a parent to subsidiaries.

Historically, determining whether an entity was a joint employer for purposes of liability under federal law centered upon, *inter alia*, whether the putative employer possessed and exercised authority to immediately and directly control essential terms and conditions of employment of those employees alleged to be jointly employed. In 2015, the National Labor Relations Board created a new standard under which an entity could be deemed a joint employer based only on the *possibility* of an employer asserting *indirect control* over the putatively jointly employed employees. *See Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (2015). The NLRB's sister federal agencies made similar overtures in moves that threatened to have widespread repercussions for entities that had previously relied upon a lack of control to escape joint employer liability. For example, in January 2016, the U.S. Department of Labor established new standards for determining joint employment, stating "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA." *See* Dep't of Labor Wage & Hour Division, Administrator's Interpretation No. 2016-01.

An entity may be a joint employer under New Mexico law even when the employer-employee relationship is not necessarily clear or obvious.

The developments were particularly troubling for franchisors. Unlike some corporate chains, such as Starbucks or Chipotle, that own all of their U.S. stores and directly employ their workers, franchisees are legally distinct businesses that operate at a distance from the franchisor entity and typically follow a set of corporate operating standards. The downstream franchise, rather than the franchisor, has direct control of an employee's essential terms and conditions of employment, i.e., hiring, firing, wages and setting of schedules. The NLRB's new standard shattered the joint employer shield corporate franchisors had relied upon to protect themselves from local employment disputes. Franchisor liability in the wake of the NLRB's decision garnered support at the state level. For example, New York Attorney General Eric Schneiderman filed a lawsuit against Domino's Pizza in 2016 seeking a finding that, under state law, Domino's is a joint employer of the employees working in 10 franchise stores named in the lawsuit. *See* N.Y. State Office of the Attorney General, Press Office, "A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino's And Its Franchisees Liable For Systematic Wage Theft," (May 24, 2016).

In late 2016, the New Mexico Court of Appeals bucked the trend and refused to affirm a jury verdict that found several upstream entities to be "co-employers" of the employees of a skilled nursing facility in the context of a wrongful death lawsuit. *See Wirth v. Sun Healthcare Group, Inc.*, 2017-NMCA-007, ¶ 43, 389 P.3d 295. The court's holding in *Wirth* provided some relief from state law liability for businesses operating in New Mexico and coincidentally marked the start of a general federal agency retreat of expanded "joint employer" liability.

Federal Joint Employer Liability Prelude

For several decades, the concept of "direct control" guided the federal approach toward analyzing whether or not an entity was a joint employer. The NLRB defined a "joint employer" as one who "has retained for itself sufficient control of the terms and conditions of employment of employees who are employed by the other employer[,]" *NLRB v. Browning-Ferris Industries of Pa.*, 691 F.2d 1117, 1122 (3rd Cir. 1982), but clarified that "[t]he essential element in [the joint employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate." *See Airborne Express,* 338 NLRB 597, 597 n. 1 (2002). Similarly, for suits brought under Title VII of the Civil Rights Act of 1964, federal circuits have adopted various tests but uniformly consider whether actual control was exerted. Indeed, the U.S. District Court for the District of New Mexico concluded that New Mexico courts would likely follow the federal standard in determining joint employer liability under the New Mexico Human Rights Act. *See Tenorio v. San Miguel Cty. Det. Ctr.*, No. 1:15-CV-00349-LF-WPL, 2017 WL 1020196, at n. 2 (D.N.M. Mar. 15, 2017).

However, 2015 marked a significant departure from this standard when the NLRB expanded the scope of joint employer liability to entities that have the authority to exercise control, even if they do not exercise their authority. *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015). In *Browning-Ferris*, California waste management company Browning-Ferris Industries ("BFI") subcontracted with employment agency Leadpoint Business Agency ("Leadpoint") to provide staffing for tasks to be performed for BFI. *Id.* at 3. The contract between Leadpoint and BFI stated that Leadpoint was the sole employer of the workers it supplied, but their contract placed significant limitations on Leadpoint's autonomy as an employer. *Id.* at 3, 23. When the Teamsters Local 350 petitioned BFI to represent those workers, the issue arose as to whether Leadpoint and BFI were joint employers. *Id.* at 1.

The NLRB ruled in favor of the workers and found that a joint employer relationship existed with both BFI and the subcontractor, and therefore both entities were liable under the National Labor Relations Act ("NLRA"). *Id.* at 22. Restating its joint employer standard, the NLRB held that one of the various ways in which joint employers "share" control over terms and conditions of employment or "codetermine" them is simply by retaining "the contractual right to set a term or condition of employment." *Id.* at 19, f. 80. This new standard exposed a broad range of businesses to liability for workplaces over which they exercised little or no control.

While New Mexico did not pass any laws to protect upstream entities in reaction to the Browning Ferris decision, the Court of Appeals provided a hint as to how such liability might be handled in the state, in the context of a wrongful death lawsuit against a putative joint employer.

Other federal agencies supported the NLRB's ruling, or redefined the scope of joint employer liability. Franchisors, who may have clauses in their franchise agreements arguably retaining the right to set a term or condition of employment, were paying attention.

In the wake of the NLRB's decision, Arizona, Kentucky, North Dakota, South Dakota and Wyoming enacted laws explicitly stating that franchisors are not employers of their franchisees or francisees' employees. While New Mexico did not pass any laws to protect upstream entities in reaction to the *Browning Ferris* decision, the Court of Appeals provided a hint as to how such liability might be handled in the state, in the context of a wrongful death lawsuit against a putative joint employer.

The *Wirth* Decision

The New Mexico Court of Appeals in *Wirth* rejected joint employer liability despite evidence of potential parent control over a subsidiary's policies. In *Wirth*, a personal representative brought a wrongful death action against a skilled nursing facility operated by Peak Medical Assisted Living, LLC ("PMAL") and "three upstream entities in the ownership chain." *Id.* ¶ 1. PMAL was a wholly owned subsidiary of Peak Medical, LLC, which was wholly owned by SunBridge Healthcare LLC, which was wholly owned by Sun Healthcare Group, Inc. *Id.* ¶ 33. The district court denied the defendants' motion for directed verdict on the plaintiffs' joint venture and co-employer theories. *Id.* ¶ 13. The jury found that all the defendants were joint venturers and co-employers of the nursing home staff and awarded $2.5 million in compensatory damages to the wrongful death estate. *Id.*

On appeal, the defendants contended "the evidence showed nothing more than the degree of control normally incident to a chain of ownership in a legitimate corporate structure." *Id.* ¶ 16. The court noted "[t]here was some apparent overlap in corporate officials within the group, and entities up the chain promulgated general policies and provided assistance at [the facility] for employee conduct, patient care, and regulatory compliance." *Id.* ¶ 34. Nonetheless, the Court found that there was "nothing particularly unusual" about that corporate structure. *Id.* ¶ 35.

Ultimately, the Court found there was no co-employment liability in the context of the evidence presented at trial. *Id.* ¶ 43. The court acknowledged that while joint employment theories are recognized by some federal employment statutes, absent "extraordinary circumstances," there is still "a strong presumption that a parent company is not the employer of its subsidiary's employees[.]" *Id.* ¶ 42. In this instance, the court found that joint employer liability was based only upon the instruction that asked the jury to apply the "right to control" test used to distinguish employees from independent contractors, which "effectively eschewed any finding of domination or instrumentality that is normally required to find a shareholder vicariously liable for the torts of corporate employees." *Id.* ¶ 43. As a result, the court held the district court should have granted a directed verdict. *Id.*

Wirth It?

Instead of an expanded approach to co-employment liability based on a theory of retained control over employees, which may have been the outcome based upon the corporate policies had the matter been before the NLRB, the court deferred to the purpose behind the corporate structure, which is limited liability.

While the *Wirth* decision provided some insight as to how franchisors may fare in New Mexico courts under a theory of joint employer liability, the case did not analyze joint employer liability under federal law. Since *Wirth*, the federal push toward expanded joint employer liability has lost some momentum. In June 2017, the Department of Labor announced the withdrawal of its 2015 and 2016 informal guidance on joint employment. *See* Jennifer Hazelton, U.S. Dep't of Labor, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (June 7, 2017) (available at https://www.dol.gov/newsroom/releases/opa/opa20170607).

Yet despite the D.C. Circuit recently criticizing the NLRB's approach, *see NLRB v. CNN America, Inc.* 865 F.3d 740 (D.C. Cir. 2017), and rumors that the board's standard is in the House Appropriations Committee's "crosshairs," *see* Anthony K. Glenn, "NLRB's Controversial Joint-Employer Standard in House Appropriations Committee's Crosshairs," The National Law Review (July 18, 2017) (available at https://www.natlawreview.com/article/nlrb-s-controversial-joint-employer-standard-house-appropriations-committee-s), the NLRB has not backflipped on its *Browning-Ferris* standard. As such, New Mexico businesses with downstream entities are well advised to actively monitor developments and potentially analyze their corporate relationships.

Endnotes

[1] *See* 29 C.F.R. § 791.2 (guidance under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*); *see also* 29 C.F.R. § 500.20 (guidance under the Migrant Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 *et seq.*); *see also TLI, Inc.*, 271 N.L.R.B. No. 798 (1984) (ruling that in order to determine whether two separate entities are joint employers under the National Labor Relations Act, the NLRB will assess whether the two "share or codetermine those matters governing the essential terms and conditions of employment.").

[2] *See, e.g., Burton v. Freescale Seminconductor, Inc.*, 798 F.3d 222, 227 (5th Cir. 2015) ("The economic realities component of our test has focused on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment."); *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 702-03 (7th Cir. 2015) ("The first of the five *Knight* factors examines … whether the employer provided direction with respect to scheduling and performance of the work."); *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994) ("The actual exercise of authority and the retained authority … are a sufficient basis upon which to find [Defendants] to be joint employers.").

[3] In the resulting D.C. Circuit appeal of the NLRB's decision, the U.S. Equal Employment Opportunity Commission ("EEOC") filed an amicus brief supporting the NLRB's new standard. *See* Brief of the EEC As Amicus Curiae In Support of Respondent/Cross-Petitioner And In Favor Of Enforcement, *Browning-Ferris Industries of California, Inc. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir.) (amicus filed Sept. 14, 2016). In an internal memo that was leaked, the Occupational Safety and Health Administration addressed whether "a joint employment relationship can be found between the franchisor (corporate entity) and the franchisee so that both entities are liable as employers under the OSH Act." OSHA, Internal Memorandum, Can Franchisor (Corporate Entity) and Franchisee be Considered Joint Employers, available at https://edworkforce.house.gov/uploadedfiles/osha_memo.pdf.

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50 Years of the ADEA

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Toosi and Elka Torpey, Older workers: Labor force trends and career options, Bureau of Labor Statistics, (May, 2017), https://www.bls.gov/careeroutlook/2017/article/older-workers.htm (predicting that, although older workers make up a smaller number of workers in the overall workforce, the annual labor force growth rate for older age groups is greater than any other age groups).

[2] The ADEA's prohibition against age discrimination is limited to individuals of at least 40 years of age or older. 29 U.S.C. § 631.

[3] The courts typically apply the McDonnel Douglas burden-shifting framework age discrimination claims wherein a plaintiff must first establish a *prima facie* case of age discrimination, at which time the burden shifts to the employer to present evidence of a nondiscriminatory reason for the adverse action, which the plaintiff then must show is a mere pretext for unlawful discrimination. *McDonnel Douglas v. Green*, 411 U.S. 792 (1973).

[4] See *France v. Johnson*, 795 F.3d 1170, 1174 (9th Cir. 2015), as *amended on reh'g* (Oct. 14, 2015) (citing *Grosjean v. First Energy Corp.*, 349 F.3d 332, 338-39 (6th Cir. 2003) (collecting cases from various circuits)).

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Equal Pay is COMP-licated

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equal pay claimants. Having identified equal pay as an enforcement priority in its previous Strategic Enforcement Plan, the EEOC did so again in its Strategic Enforcement Plan for 2017-2021. The EEOC and OFCCP also entered into a Memorandum of Understanding in 2011 wherein they expressly agreed to refer complaints between them when a referring agency lacks jurisdiction. When complaints are referred, the original date of filing with the first agency is deemed the date of filing with the other agency in order to determine the timeliness of the complaint.

Best Practices

Best practices for mitigating the risk of equal pay claims include the following:

1. **Do not base starting salary on prior salary:** Even if this practice remains permissible, an employer may inadvertently create pay disparities that will be difficult to defend.
2. **Limit discretion when making pay decisions:** An employer should consider implementing pay ranges or bands for specific positions to limit discretion. Unlimited discretion may appear to give rise to discrimination.
3. **Avoid pay based on performance-based evaluations:** Since performance evaluations can be subjective, avoid risk by limiting pay decisions based on performance.
4. **Ensure starting salaries are based upon job-related factors:** Job-related factors may include experience, education, skills, certifications, and so on.
5. **Document the bases for pay decisions:** Educate hiring managers to document their pay decisions and place that documentation in the employees' personnel files. Documentation is even more important when paying outside of established pay bands or ranges.
6. **Establish proper comparators for pay decisions:** Determine which employees are similarly situated or perform similar work for purposes of making equitable pay decisions.
7. **Conduct a pay equity analysis:** Finally, and most importantly, employers should conduct a self-evaluation of their pay practices or a pay equity analysis with the assistance of appropriate legal counsel. Locate the pay gaps in your workforce and determine if those gaps are justifiable. Carefully consider if pay equity adjustments are required and how they should be implemented.

Equal pay is COMP-licated. But with care and attention, employers may reduce their risk through self-evaluation and proactive steps to address pay inequities before claims arise.

Endnotes:

[1] *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics: FY 1997 Through FY 2016, USA.gov (last visited Oct. 2, 2017), https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [Hereinafter Charge Statistics].

[2] *See* The Simple Truth About the Gender Pay Gap, AAUW (last updated Fall 2017), http://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/

[3] "The new deal is significantly more lucrative for the players, according to a person familiar with agreement. Previously, USA Hockey didn't pay the women at all in non-Olympic years and gave each a total of $6,000 in the year leading up to a Winter Games. Under the new deal, players could stand to earn in the neighborhood of $70,000 a year with the possibility of even more from performance bonuses, according to the source familiar with the contract. In addition to a $2,000 monthly training stipend from the U.S. Olympic Committee, the national team will split an annual pool paid by USA Hockey of at least $850,000 this year and $950,000 in each of the final three years of the contract. USA Hockey also agreed to pay players a $20,000 bonus for winning gold at next year's PyeongChang Olympics, or $15,000 for silver." See Rick Maese, *Women's hockey team, USA Hockey reach agreement, settling pay dispute*, THE WASHINGTON POST, March 28, 2017, https://www.washingtonpost.com/sports/olympics/womens-hockey-team-usa-hockey-reach-agreement-settling-pay-dispute/2017/03/28/a3823b28-13cf-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.a78b48f14ce9.

[4] *See* Charge Statistics, supra note i;

[5] *See* U.S. Equal Employment Opportunity Comm'n: Strategic Enforcement Plan, USA.gov (last visited Oct. 2, 2017), https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[6] *See* Memorandum of Understanding between U.S. Dep't of Labor and the Equal Employment Opportunity Comm'n (Nov. 9, 2011), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.

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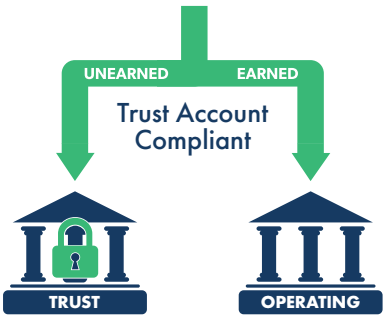

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Editor's Note: In the Nov. 1 *Bar Bulletin* (Vol. 56, No. 44), *Gzaskow v. PERB* (A-1-CA-35161) was published with errors in some headings that occurred in production. These errors could cause the intent of the opinion to differ from the original written by Judge Henry M. Bohnhoff. Therefore, the opinion has been re-printed below with the heading problems corrected.

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-064

No. A-1-CA-35161 (filed June 5, 2017)

MICHAEL GZASKOW and FRANCOISE BECKER,
Plaintiffs-Appellants,
v.
PUBLIC EMPLOYEES RETIREMENT BOARD and EACH MEMBER OF THE BOARD IN HIS OR HER OFFICIAL CAPACITY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
FRANCIS J. MATHEW, District Judge

RONALD J. VANAMBERG
VANAMBERG, ROGERS, ABEITA & GOMEZ, LLP
Santa Fe, New Mexico
for Appellants

MISTY M. BRASWELL
NEW MEXICO PUBLIC EMPLOYEES RETIREMENT ASSOCIATION
Santa Fe, New Mexico
for Appellees

CHARLES H. RENNICK
ROBLES, RAEL & ANAYA, PC
Albuquerque, New Mexico

Opinion

Henry M. Bohnhoff, Judge

{1} In 2011, Plaintiff Michael Gzaskow retired from employment with the State of New Mexico and began receiving retirement pension benefits pursuant to the Public Employees Retirement Act (the Act), NMSA 1978, §§ 10-11-1 to -142 (1987, as amended through 2016). At the time of his retirement he was divorced, but he named Plaintiff Francoise Becker to receive retirement benefits in the event of his death; a few months after his retirement, Gzaskow married Becker. In late 2014, shortly before he took an extended overseas trip with Becker, Gzaskow executed and delivered to the Public Employees Retirement Association (PERA) a form that exercised a "one-time irrevocable option to deselect" Becker as his survivor beneficiary and designate his daughter, Sabrina Gzaskow (Daughter), as the survivor beneficiary. Following his return from the trip, Gzaskow advised PERA that the deselection of Becker and designation of Daughter was a mistake and requested that the action be voided. PERA declined to do so, taking the position that the action was not reversible. Gzaskow and Becker (collectively, Plaintiffs) then brought suit in district court (the Complaint) against the Public Employees Retirement Board (PERB), which is responsible for administering PERA, asserting a right to cancellation of the deselection of Becker as survivor beneficiary and seeking declaratory, injunctive, and equitable relief. PERB moved to dismiss the Complaint for lack of subject matter jurisdiction, arguing that Plaintiffs had failed to exhaust the administrative remedy afforded under the Act. The district court granted PERB's motion to dismiss and Plaintiffs now appeal. We affirm.

I. BACKGROUND

A. The Act

{2} Through the Act, the New Mexico Legislature has established a program whereby employees of the State of New Mexico and other public agencies may receive retirement pensions. Participating employees are "members" of PERA and earn the right to receive a pension by meeting various age and service credit requirements. *See* §§ 10-11-2(M), -3(A); *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 5, 117 N.M. 346, 871 P.2d 1352. The Act establishes PERB to administer the Act and manage the retirement pension program and PERA. Section 10-11-130.

{3} When a member who qualifies for a pension retires, he or she must elect one of four payment options or "Forms." Section 10-11-116(A). The Forms of Payment are set forth in Section 10-11-117. Under Form of Payment A, the "[s]traight life pension," the retiree receives a monthly payment and upon his or her death the payments cease. Section 10-11-117(A). Under Form of Payment B, "[l]ife payments with full continuation to one survivor beneficiary," the retiree receives a reduced monthly payment, but upon his or her death a survivor beneficiary will receive the same payment until the survivor's death. Section 10-11-117(B). Under Form of Payment C, "[l]ife payment[s] with one-half continuation to one survivor beneficiary," the retiree receives a reduced monthly payment in an amount greater than that received under Form of Payment B, and upon his or her death a survivor beneficiary will receive one-half of that payment. Section 10-11-117(C). Under Form of Payment D, "[l]ife payments with temporary survivor benefits for children," the retiree receives a reduced monthly payment, and upon his or her death each "declared eligible child" of the retiree is paid a share of the retiree's monthly payment until death or age twenty-five, whichever occurs first. Section 10-11-117(D). Form of Payment A is the default payment option if the retiree is not married at the time of retirement and does not elect another form of payment; Form of Payment C is the default payment option if the retiree is married at the time of retirement and does not elect another form of payment. Section 10-11-116(A)(1), (2). Under each of the Forms of Payment, the pension payments are calculated to have the same overall "actuarial present value" as Form of Payment A. Section 10-11-116(B).

{4} In addition to selecting a form of payment (other than Form of Payment A),

when a member retires he or she will name the survivor beneficiary (or beneficiaries, in the case of more than one declared eligible child under Form of Payment D). Section 10-11-116(A). If the member is married, PERA must obtain the spouse's written consent to the election of form of payment as well as the designation of survivor beneficiary; in the absence of such consent, the election and designation are not effective. *Id.*

{5} "An election of form of payment may not be changed after the date the first pension payment is made." *Id*. Further, after the date of the first pension payment, the survivor beneficiary (or beneficiaries) may not be changed except as provided in Section 10-11-116(C), (D), and (E). Subsection C provides that a retiree who is being paid under Form of Payment B or C with his or her spouse as the designated survivor beneficiary may, upon becoming *divorced*, elect to have future payments made under Form of Payment A. Alternatively, Subsection D provides that a retiree who is being paid under Form of Payment B or C may, upon the *death* of his or her designated survivor beneficiary, "exercise a one-time irrevocable option" to designate another individual as the survivor beneficiary. Subsection E provides that a retiree who is being paid under Form of Payment B or C with a living, designated, survivor beneficiary other than his or her spouse or former spouse "may exercise a one-time irrevocable option to deselect the designated beneficiary" and either designate another survivor beneficiary or have future payments made under Form of Payment A. Section 10-1-116(E).

{6} While a PERA member is employed, his or her spouse ordinarily acquires a community property interest in the member's pension benefit. *See generally* NMSA 1978, § 40-3-8(B) (1990) (defining community property); *Ruggles v. Ruggles*, 1993-NMSC-043, ¶¶ 14-32, 116 N.M. 52, 860 P.2d 182 (discussing divorcing spouses' community property interest in employer-sponsored retirement plans); *cf. Martinez v. Pub. Emps. Ret. Ass'n*, 2012-NMCA-096, ¶¶ 28-36, 286 P.3d 613 (discussing parameters of widowed spouse's statutory interest in PERA survivor benefits). The Act recognizes a spouse's interests in PERA benefits in various ways. First, as mentioned above, Section 10-11-116(A)(2) provides that if a member who is married at the time of his or her retirement does not designate another form of payment, the default is Form of Payment C, life payment with one-half continuation to one survivor beneficiary, with the member's spouse as the survivor beneficiary. Second, again as stated above, Section 10-11-116(A) provides that if the member is married, the consent of member's spouse is necessary to an election of the form of payment and designation of any survivor beneficiary other than the spouse. Third, Section 10-11-136 provides that, at the time of divorce, the court handling the divorce may provide for a division of the marital community's interest in the PERA pension and other benefits.

{7} Section 10-11-120 addresses denials of claims for benefits under the Act. Benefit claimants shall be notified in writing, with explanation, of a denial of a claim for benefits. Following receipt of the notice,

> [a] claimant may appeal the denial and request a hearing. The appeal shall be in writing filed with the association within ninety days of the denial. . . . The retirement board shall schedule a de novo hearing of the appeal before the retirement board or, at the discretion of the retirement board, a designated hearing officer or committee of the retirement board within sixty days of receipt of the appeal. A final decision on the matter being appealed shall be made by the retirement board.

Section 10-11-120(A). Regulations promulgated by the PERB authorize representation by legal counsel, limited discovery including depositions as authorized by the hearing officer, issuance of subpoenas to compel the production of documents and attendance of witnesses, direct and cross examination of witnesses under oath, and transcription of the hearing by a court reporter. 2.80.1500.10(C)(2), (3), (5) NMAC. A dissatisfied claimant may appeal a final decision of PERB pursuant to the provisions of NMSA 1978, Section 39-3-1.1 (1999), which generally provides for record review of administrative agency decisions. Section 10-11-120(B). *See, e.g.*, *Johnson v. Pub. Emps. Ret. Bd.*, 1998-NMCA-174, ¶ 10, 126 N.M. 282, 968 P.2d 793. ("Appeals from decisions of the Board denying disability retirement benefits are reviewed on the record made before the Board.").

B. Factual History

{8} The Complaint alleges the following: Gzaskow retired from employment as a physician with the State of New Mexico on January 1, 2011. At that time Gzaskow was divorced. On his PERA retirement application form he selected Form of Payment C and designated Becker as his survivor beneficiary. Plaintiffs were then married on April 15, 2011. Prior to the marriage, Plaintiffs entered into a pre-nuptial agreement: they agreed that Becker would be the designated survivor beneficiary with respect to Gzaskow's PERA benefits, but that she would distribute to Gzaskow's children a portion of any such benefits that she received.

{9} From time to time thereafter, Plaintiffs took extended trips. Gzaskow claims that he spoke with PERA personnel and discussed with them how to address his retirement benefits in the event both he and Becker were to die while on these trips. Gzaskow claims that he was told that he could pay PERA a $100 fee and have his benefits provisionally recalculated on the assumption that, pursuant to Section 10-11-116(E)(1), he deselected Becker as survivor beneficiary and designated Daughter as the new survivor beneficiary. Gzaskow also claims that he was told that if he and Becker both died while on a trip, Daughter would become the beneficiary if the recalculation had been done. Gzaskow had his benefits provisionally recalculated several times: each time PERA would prepare and provide to Gzaskow a form to accomplish the deselection and new designation. The form would show the recalculated pension and survivor benefit payments for Gzaskow and Daughter: because Daughter was younger than Becker, and in accordance with the requirement in Section 10-11-116(E)(1)(b) that the pension benefit's overall actuarial present value remain the same, Gzaskow's new pension payment would be a reduced amount. The form stated in bold font:

> **This one-time change to a new beneficiary or change to Form of Payment A is Irrevocable.**
>
> **. . . .**
>
> **I have read and understand that this is a one-time removal and selection of a new beneficiary or selection of Form of Payment A. By choosing one of the options above, this will change my beneficiary or payment option until my death or the death of my beneficiary.**

When preparing for extended travel, Gzaskow would execute and give the form to Daughter, with the understanding that she would deliver it to PERA in the event he and Becker died during their travels.

{10} In October 2014, Plaintiffs planned

a trip to Vietnam. Gzaskow repeated the process of having PERA recalculate his retirement benefits if he deselected Becker and designated Daughter as the new survivor beneficiary. This time, however, Gzaskow not only signed the form on October 14, 2014, but also—he claims, mistakenly—delivered it to PERA.

{11} On November 20, 2014, while Plaintiffs were in Vietnam, PERA sent Gzaskow a letter, acknowledging receipt of the deselection of Becker and new designation of Daughter as Gzaskow's survivor beneficiary. The letter restated Gzaskow's reduced pension payment that had been set forth on the form that he had signed and delivered to PERA. The monthly payment was approximately $1,700 less than his pre-October 14, 2014 pension benefit. Upon returning from the trip and reading the letter, Gzaskow notified PERA that there was a mistake, that he had not intended to make the deselection of Becker and the new designation of Daughter, and requested that the change be canceled. Gzaskow alleges that PERA personnel knew that Gzaskow was attempting to protect himself should he and Becker die in a common incident by repeatedly initiating the process of deselecting Becker, and that he did not intend to replace Becker as the survivor beneficiary if she was still alive. Gzaskow asserted that under his pre-nuptial agreement with Becker, Becker could not be removed as his survivor beneficiary, and as a result of his mistake he was in breach of that agreement. Gzaskow also provided PERA with an affidavit signed by Daughter renouncing the beneficiary designation. However, PERA declined to cancel the deselection of Becker and designation of Daughter as the new survivor beneficiary. PERA took the position that, Gzaskow having delivered the executed form to PERA, the action was irrevocable, and that under the Act and the regulations PERB had promulgated to implement the Act, nothing could be done to reverse the deselection.

C. Procedural History

{12} Following an exchange of correspondence between counsel for the parties, Plaintiffs filed the Complaint in the First Judicial District Court in Santa Fe, New Mexico on March 30, 2015. The Complaint alleged the facts set forth above, and then articulated five counts that seek overlapping relief. Distilled to its essence, the Complaint asserts the following:

(1) Pursuant to Section 10-11-116(A), discussed above, Becker's consent was a necessary predicate to any deselection of her as Gzaskow's survivor beneficiary. Because she did not give her consent, the court should declare Gzaskow's deselection was void and canceled, and that Gzaskow's pre-October 14, 2014 pension benefit should be restored.

(2) A PERB regulation, 2.80.1100.11 NMAC, identifies a number of documents (e.g., a statement as to whether the previous beneficiary is still living, a copy of the new beneficiary's birth certificate, and certain divorce proceeding documents) that must accompany the delivery of a deselection form. Because Gzaskow did not provide these documents to PERA on October 14, 2014, the court should declare the deselection void and canceled, and Gzaskow's pre-October 14, 2014 pension benefit should be restored.

(3) Alternatively, because the deselection form was signed by mistake, Plaintiffs will suffer severe prejudice if the mistake is not remedied, and because PERA would not be prejudiced by returning to the pre-October 14, 2014 survivor designation, the court should exercise its equity jurisdiction and enjoin PERA to return Becker to her pre-October 14, 2014 status as Gzaskow's survivor beneficiary and restore Gzaskow's pre-October 14, 2014 retirement benefits.

{13} PERB initially responded to the Complaint by moving to dismiss for lack of subject matter jurisdiction based on Plaintiffs' failure to exhaust their administrative remedies under Section 10-11-120. PERB subsequently filed an answer to the Complaint as well. In PERB's memorandum of law in support of its motion to dismiss and its answer, PERB disputed a number of Plaintiffs' factual allegations: whether Gzaskow had spoken with PERA personnel about provisionally signing a beneficiary deselection form to address the possibility that he and Becker both could die during their travels; whether the paperwork listed in 2.80.1100.11 NMAC was provided to PERA; fundamentally, whether Gzaskow's October 14, 2014 execution and delivery of the deselection form was a mistake, i.e., whether he in fact intended to take that step; and whether PERA would be financially impacted by voiding and canceling of the deselection.

{14} Plaintiffs responded in opposition to the motion to dismiss, generally articulating two arguments. First, Plaintiffs argued that PERB lacked authority to grant an equitable remedy to Gzaskow because it is a quasi-judicial administrative agency, and that the exhaustion of administrative remedies does not apply to claims over which an administrative agency lacks jurisdiction. Second, Plaintiffs argued that their claim was properly brought under the Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15 (1975). They cited, as authority for exempting such claims from the exhaustion requirement, *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 26, 142 N.M. 786, 171 P.3d 300, and the Declaratory Judgment Act.

{15} Plaintiffs also moved for summary judgment. In that motion, Plaintiffs advanced their substantive arguments that underlie the Complaint: Gzaskow's declaration was invalid because Becker did not give her consent and the documentation specified in 2.80.1100.11 NMAC did not accompany the deselection form. Alternatively, because the deselection form was signed by mistake, Plaintiffs will suffer severe prejudice if the mistake is not remedied, and because PERA would not be prejudiced by returning to the pre-October 14, 2014 survivor designation, the court should exercise its equity jurisdiction and enjoin PERA to return Becker to her pre-October 14, 2014 status as Gzaskow's survivor beneficiary and restore Gzaskow's pre-October 14, 2014 pension benefit.

{16} PERB responded in opposition to Plaintiffs' summary judgment motion, again disputing Plaintiffs' version of the facts as well as reiterating the same legal positions that it first signaled in its motion to dismiss. In particular, PERB argued that, because persons who become spouses after retirement have no community property interest in the pension benefit, Section 10-11-116(A)'s spousal consent requirement is intended to, and should be construed to, extend only to persons who are spouses prior to the member's retirement. It pointed out that PERB's regulations reflect this construction. *See* 2.80.1100.11(C) NMAC (explaining that spousal consent is required for post-retirement selection of new beneficiary only if retired member was married at the time of retirement and re-

mains married to that person).[1] PERB also argued that the question of whether it has the authority to grant equitable relief was moot, because Plaintiffs had not articulated a legal claim upon which their request for equitable relief is based. PERB asserted that the equitable relief Plaintiffs requested, that Gzaskow's change of beneficiary be rescinded and his original benefit amount be reinstated, would be granted by PERB only upon a proper legal showing which, PERB went on to argue, Plaintiffs had not articulated.

{17} The district court heard the motions together. It granted PERB's motion to dismiss and denied, as moot, Plaintiffs' motion for summary judgment. Plaintiffs timely filed their notice of appeal.

II. DISCUSSION

A. The Doctrine of Exhaustion of Administrative Remedies and *Smith v. City of Santa Fe*'s Declaratory Judgment Exception

{18} The New Mexico Constitution broadly grants district courts original jurisdiction to hear "all matters and causes not excepted in this constitution[.]" N.M. Const., art. VI, § 13. However, based on separation of powers considerations and due respect for the executive branch, our Supreme Court repeatedly has determined that district courts lack subject matter jurisdiction where the plaintiff has failed to exhaust available administrative remedies. *See New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 10, 149 N.M. 42, 243 P.3d 746 (stating that the doctrine of separation of powers is implicit to our Supreme Court's reasoning in its cases "addressing the relationship between administrative proceedings and declaratory judgment actions"). "Under the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Smith*, 2007-NMSC-055, ¶ 26 (alteration, internal quotation marks, and citation omitted); *accord*, *State Racing Comm'n v. McManus*, 1970-NMSC-134, ¶ 17, 82 N.M. 108, 476 P.2d 767 (reversing district court issuance of writ of prohibition); *Associated Petroleum Transp., Ltd. v. Shepard*, 1949-NMSC-002, ¶ 12, 53 N.M. 52, 201 P.2d 772 ("The plaintiffs are required to exhaust such remedies as are accorded them by the law before resorting to the courts.").

{19} In *Smith*, our Supreme Court noted several previously-recognized exceptions to the exhaustion of administrative remedies rule. The exhaustion doctrine (1) "does not apply in relation to a question which, even if properly determinable by an administrative tribunal, involves a question of law, rather than one of fact"; and (2) "exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which an administrative tribunal clearly lacks jurisdiction, or which are vain and futile." 2007-NMSC-055, ¶ 27 (internal quotation marks and citations omitted). The court also addressed, however, whether to recognize a new exception to the rule for actions brought pursuant to the Declaratory Judgment Act. The court noted that, the "Declaratory Judgment Act is a special proceeding that grants the district courts the 'power to declare rights, status and other legal relations whether or not further relief is or could be claimed' " and that it is "intended to be liberally construed and administered as a remedial measure." *Smith*, 2007-NMSC-055, ¶ 13 (quoting Section 44-6-2). The court noted in particular that, pursuant to Section 44-6-4, the Declaratory Judgment Act specifically authorizes district courts to construe and determine the validity of statutes and local laws. *Smith*, 2007-NMSC-005, ¶ 14. On the basis of these considerations the court recognized a declaratory judgment exception to the exhaustion of administrative remedies rule for declaratory judgment actions: "[the p]laintiffs' decision to use a declaratory judgment action as their method for challenging the [c]ity's authority to regulate the permitting of domestic water wells appears to fall well within the perimeters of what the Declaratory Judgment Act was intended to encompass." *Smith*, 2007-NMSC-055, ¶ 15. *See also Rainaldi v. Pub. Emps. Ret. Bd.*, 1993-NMSC-028, ¶¶ 3, 4, 115 N.M. 650, 857 P.2d 761 (holding that the district court had jurisdiction under N.M. Const. art. VI, § 13, and §§ 44-6-4, -13, to hear suit for declaration of rights to retirement benefits).

{20} Importantly, however, our Supreme Court then immediately qualified the declaratory judgment exception:

> That said, however, we must remain mindful of some important limitations on the use of declaratory judgment actions to review the propriety of administrative actions. In particular . . . , we caution against using a declaratory judgment action to challenge or review administrative actions if such an approach would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.
>
> Accordingly, a declaratory judgment action challenging an administrative entity's authority to act ordinarily should be limited to purely legal issues that do not require fact-finding by the administrative entity.

Smith, 2007-NMSC-055, ¶¶ 15-16. *See also New Energy Econ.*, 2010-NMSC-049, ¶ 12 ("[W]hen the matter at issue (1) is purely legal, (2) requires no specialized agency fact-finding, and (3) there is no exclusive statutory remedy, it is a proper matter for a declaratory judgment action and does not require exhaustion of administrative remedies.").

B. Plaintiffs Must Exhaust Their Administrative Remedy Under the Act

{21} Plaintiffs argue that, because they seek declaratory relief, the exception recognized in *Smith* exempts them from exhausting the administrative remedy under Section 10-11-120(B). They argue as well that PERB has only quasi-judicial authority, which does not encompass equitable remedies, and therefore they are free to pursue that relief as well in district court. We are not persuaded.

1. Standard of Review

{22} "Whether a court has jurisdiction to hear a particular matter is a question of law that we review de novo." *El Castillo Ret. Residences v. Martinez*, 2015-NMCA-041, ¶

[1]This construction of the scope of Section 10-11-116(A)'s spousal consent requirement presumably is the answer to the question why PERB ever permitted Gzaskow to use Section 10-11-116(E) to deselect Becker in the first place, given that Becker had been his spouse since April 2011. But the question remains why Gzaskow thought he could engage in the deselection exercise, given his claimed literal understanding of the provision to apply broadly to any person who is a spouse at the time of the deselection.

13, 346 P.3d 1164. This proposition, however, begs the question how a district court is to resolve a challenge to its jurisdiction. The answer depends on whether or not the challenge is fact-based:

> In reviewing a facial [i.e., non-fact-based] attack on the complaint, a district court must accept the allegations in the complaint as true. In contrast, in a factual attack, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations.
> . . . .
> When the challenge is factual, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts[.]

South v. Lujan, 2014-NMCA-109, ¶¶ 8-9, 336 P.3d 1000 (alterations, internal quotation marks, and citation omitted). *See also Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶ 9, 310 P.3d 631 (stating that on purely facial challenge to jurisdiction, the court will accept as true all material allegations of the complaint), *rev'd on other grounds by* 2017-NMSC-007, 388 P.3d 977.

{23} This standard of review necessarily must be modified in the context of a motion to dismiss for lack of subject matter jurisdiction based on failure to exhaust administrative remedies, because, as will be discussed below, one of the relevant factors that enters into the exhaustion analysis is whether there are disputed fact issues. As to that factor, Plaintiff's challenge effectively remains purely facial: Plaintiff's contention is simply that the pleadings and other papers in the record do not reveal a fact dispute. With the possible exception of futility (which has not been asserted in this proceeding), the other factors that enter into the jurisdictional analysis—whether the administrative agency itself lacks jurisdiction, whether agency expertise would assist the agency in resolving the dispute, the exclusivity of the statutory scheme for review of administrative decisions, or other procedural or substantive limitations on review—are all facial as well. *See Smith*, 2007-NMSC-055, ¶¶ 15, 26. Thus, our review, though de novo, is facial and limited to the record. We need not resolve any factual contentions.

2. Section 10-11-120 Provides an Exclusive Remedy for the Denial of Benefits Under the Act

{24} Section 10-11-120 authorizes a benefit claimant to pursue an administrative appeal before PERB, followed by a judicial appeal before the district court, in the event his or her benefit claim is denied. As a threshold issue, Plaintiffs contend that their claims do not involve a denial of benefits, because the issue is whether Becker was effectively deselected as a survivor beneficiary and whether, even if effective, the deselection nevertheless should be reversed. We think Plaintiffs' reading of Section 10-11-120 is too narrow; it grants appeal rights to all benefit claimants, not just members, so it encompasses Becker as well as Gzaskow. Further, PERA's action not only has denied Becker her contingent interest in receiving a survivor benefit, but, more immediately—as a consequence of the deselection—Gzaskow's current monthly pension payment has been reduced by approximately $1,700. Both consequences constitute benefit denials, and therefore Section 10-11-120 affords Plaintiffs a remedy.

{25} The question under *Smith*, however, is whether Section10-11-120's scheme for the review of administrative decisions is *exclusive*. *Smith*, 2007-NMSC-055, ¶¶ 15, 27. "The exclusivity of any statutory administrative remedy turns on legislative intent." *Barreras v. N.M. Corr. Dep't.*, 2003-NMCA-027, ¶ 9, 133 N.M. 313, 62 P.3d 770. The absence of explicit language stating that the remedy is exclusive is not dispositive. *Id.* ¶ 11. Rather, we will look to "the comprehensiveness of the administrative scheme, the availability of judicial review, and the completeness of the administrative remedies afforded." *Id.* The test ultimately is whether the administrative remedy is "plain, adequate, and complete." *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 14, 124 N.M. 479, 952 P.2d 474.

{26} Particularly when the procedural provisions of 2.80.1500.10 NMAC (the validity of which Plaintiffs do not question) are considered, Section 10-11-120's administrative appeal scheme is comprehensive. It generally grants PERB authority to review and, if appropriate, rectify PERA benefit denials. As stated above, the statutory appeal is open to all persons who might claim a benefit and encompasses all agency actions that would operate to deny benefits. In the absence of any constraining language, we also understand that PERB would possess full authority to act to reverse, or otherwise remedy, agency actions to the extent permitted by the Act itself.

{27} Section 10-11-120 also provides for judicial review pursuant to NMSA 1978, Section 39-3-1.1 (1999). *Compare State ex rel. Regents of E. N.M. Univ. v. Baca*, 2008-NMSC-047, ¶¶ 13, 22, 144 N.M. 530, 189 P.3d 663 (stating that the Procurement Code grants specific statutory rights to judicial review of bid protest decision), *and Barreras*, 2003-NMCA-027, ¶ 13 (stating that the "State Personnel Act makes express provision for judicial review of [State Personnel Board] decisions"), *with Chavez*, 1998-NMCA-004, ¶ 18 (noting that Municipal Code does not provide for judicial review of municipal personnel board decisions).

{28} Finally, the administrative remedy under Section 10-11-120 is complete. As is discussed below, to the extent the Act would permit cancellation or other reversal of the deselection of Becker as Gzaskow's survivor beneficiary, PERB would possess authority to take that action, and a court acting under its equitable jurisdiction could provide no further remedy. Thus, not only is the administrative remedy complete, any judicial remedy would be redundant and thus unnecessary.

{29} For these reasons, therefore, we believe that Plaintiffs have a remedy under Section 10-11-120 to challenge PERA's refusal to reverse the deselection of Becker as Gzaskow's survivor beneficiary, and that such remedy is exclusive.

3. Fact Questions Are Present

{30} In its order dismissing the Complaint, the district court found that, "Plaintiffs' claims require factual determinations that should be made within the hearing process provided at the administrative level." We agree that multiple disputed issues of material fact constitute an additional reason why Plaintiffs must exhaust their administrative remedies.

{31} First, in the Complaint, Plaintiffs alleged that Gzaskow had discussed with PERA personnel the idea of preparing, dating, and signing—but not delivering to PERA and instead leaving with Daughter—before they left on an extended trip, a provisional or contingent deselection of Becker as his survivor beneficiary and designation of Daughter as the new survivor beneficiary. The suggestion is that PERA acquiesced in, if not encouraged, a tactic that could significantly enhance the aggregate monetary benefit paid to Gzaskow's family over time

in the event both he and Becker were to die on the trip: if that were to occur, Daughter could deliver the document, which had been executed prior to Gzaskow's death, and claim survivor benefits that otherwise would never be paid due to Becker's concurrent death. PERA disputed this claim of consultation, as well as Plaintiffs' additional claim that PERA would not be prejudiced by cancellation of the deselection. Resolution of these issues may be material to construction of Section 10-11-116(E), *see Helman*, 1994-NMSC-023, ¶¶ 19-20 (explaining that a statute will not be interpreted literally if such construction is unreasonable), as well as any request for cancellation to the extent that it might call for the exercise of discretion.

{32} Second, Plaintiffs alleged that Gzaskow had not delivered with his signed deselection form the other documentation specified in 2.80.1100.11 NMAC. PERA disputed this claim, arguing that those facts were yet to be established by Plaintiffs. Resolution of this dispute in favor of Plaintiffs was the basis for one of their claims of entitlement to cancellation of the deselection.

{33} Third, and most fundamentally, the factual lynchpin of Plaintiffs' claim of entitlement to cancel and void the deselection of Becker and designation of Daughter as survivor beneficiary was the notion that his execution and delivery of the document to PERA was a mistake, i.e., that at the time Gzaskow signed and delivered the document he did not intend to accomplish the deselection. PERA also disputed this contention.

{34} PERB is no less well positioned to resolve these disputed factual issues than the district court. For this reason as well, *Smith*'s declaratory judgment exception for the exhaustion doctrine is not available to Plaintiffs.

C. Plaintiffs' Remaining Arguments

1. PERB's Equity Jurisdiction

{35} Citing *AA Oilfield Service, Inc. v. New Mexico Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273, 881 P.2d 18 (recognizing that an agency possessed only quasi-judicial powers which did not encompass the authority to grant equitable remedy), and *Leonard v. Payday Professional/Bio-Cal Co.*, 2008-NMCA-034, ¶ 12, 143 N.M. 637, 179 P.3d 1245 (concluding that Worker's Compensation Judge did not have authority to issue injunctions under the Worker's Compensation Act), Plaintiffs argue that PERB has only "quasi-judicial" powers and lacks authority or jurisdiction to grant equitable relief. Because *Smith* recognizes claims over which the administrative agency lacks jurisdiction as exempt from the exhaustion requirement, 2007-NMSC-055, ¶ 27, Plaintiffs urge that the district court erred in dismissing their claim for injunctive relief against PERA.

{36} We can assume for purposes of discussion that PERB lacks the power to grant an equitable remedy. However, Plaintiffs overlook a threshold consideration that moots the point.

{37} The key question in this case is whether, under the language of Section 10-11-116(E), the Legislature has authorized reversal—whether articulated as cancellation, rescission or otherwise—of a deselection on grounds of mistake or, indeed, any grounds. If the answer is yes, then PERB can grant such a remedy pursuant to Section 10-11-120(A). In taking such action PERB could not be characterized as "enjoining" PERA to do anything: PERB exercises ultimate control and authority over PERA, i.e., PERA personnel effectively act on behalf of, and in the name of, PERB. Section 10-11-130. Therefore, if on appeal PERB were to reverse the 2015 denial of Plaintiffs' request to cancel the deselection, PERB effectively would only be reconsidering its own institutional decision, the same as any other decision that it might make to reverse a previous PERA denial of benefits. In other words, if Section 10-11-116(E) permits reversal of mistaken deselections, then Section 10-11-120 provides an adequate legal remedy that precludes Plaintiffs' claim for injunctive relief by the district court. [2] *Dydek v. Dydek*, 2012-NMCA-088, ¶ 53, 288 P.3d 872 ("[E]quity will not act if there is a complete and adequate remedy at law." (internal quotation marks and citation omitted)).

{38} Alternatively, if under Section 10-11-116(E) the Legislature has not authorized reversal of a mistaken deselection, then the courts have no more authority—equitable or otherwise—to reverse the deselection than that which PERB statutorily possesses. That is, if Section 10-11-116(E) is construed to not permit reversal of a deselection, then as a matter of law there could be no equitable cause of action to accomplish the same result.

{39} That a court may not exercise an equitable remedy to accomplish a goal that a statute has foreclosed is well recognized by courts throughout the United States. In *Immigration & Naturalization Service v. Pangilinan*, 486 U.S. 875, 882-83 (1988), the United States Supreme Court reversed the Ninth Circuit Court of Appeals' decision to use equitable authority to confer citizenship upon two Filipino citizens who had served in the United States armed forces during World War II in contravention of a federal statute explicitly setting a cutoff date by which the two individuals should have applied for citizenship, but did not. The *Pangilinan* court stated, "[I]t is well established that 'courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.' " *Id*. at 883 (alteration omitted) (quoting *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893)). The *Pangilinan* court continued, " 'A [c]ourt of equity cannot . . . create a remedy in violation of law.' " *Id*. (quoting *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873)). Specifically, *Pangilinan* stated that the power to grant citizenship had not been conferred upon the federal courts as a generally applicable equitable power. *See* 486 U.S. at 883-84. Instead, because a federal statute dictates how a person may be naturalized, "[n]either by application of the doctrine of

[2] Because an agency would never enjoin itself as opposed to simply reverse its decision, it is illogical to argue the lack of equitable jurisdiction as a means of circumventing the requirement to exhaust administrative remedies: the agency can provide a sufficient administrative remedy whether or not it lacks authority to grant injunctive relief. An exception might exist, however, where the administrative agency is addressing one party's relative rights and obligations as against another party. *See, e.g.*, *AA Oilfield Serv., Inc.,* 1994-NMSC-085 (common carrier opposed competing common carrier's application for transfer of certificate of public convenience and necessity); *Leonard*, 2008-NMCA-034 (addressing worker's pursuit of worker compensation benefits against employer and insurer). Only in that situation, not present here, might the first party have reason to seek equitable relief.

We also observe that most any challenge to an administrative agency's decision may be articulated in terms of a request for injunctive relief. If one can circumvent administrative remedies simply by seeking the court's order enjoining the agency to reverse its decision, the exception will swallow the rule. For that reason as well, we would not expect injunctive relief to be a frequent basis for not exhausting administrative remedies.

estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these [Congressional] limitations." *Id*. at 885.

{40} Similarly, in *Westerman v. United States*, the Eighth Circuit Court of Appeals applied the equitable principle that equity follows the law, stating, "Well over a century has passed since American jurisprudence definitively established that 'courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.' " 718 F.3d 743, 752 (8th Cir. 2013) (alteration omitted) (quoting *Hedges*, 150 U.S. at 192). The Eighth Circuit decided that because the Internal Revenue Service's rights to "maximize the treasury's collection of unpaid liabilities by applying undesignated employment tax payments first toward non-trust fund taxes and then by recovering unpaid trust fund taxes from the person (Westerman) responsible for their underpayment" were " 'clearly defined and established by law, equity has no power to change or unsettle those rights[.]' " *Id*. (quoting *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1853)). *See generally* 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 425, at 188-90 (5th ed. 1941) ("Equity follows the law, in the sense of obeying it, conforming to its general rules and policy, whether contained in the common or the statute law. . . . Courts of equity may no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute[.] . . . Wherever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules.").

{41} New Mexico courts have embraced the same principle. In *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶¶ 3, 32, 123 N.M. 526, 943 P.2d 560, this Court declined to utilize "the court's power of equity" to affirm the district court's refusal to enforce non-consent penalty provisions of an operating agreement to drill oil and gas wells. *Nearburg* acknowledged that while it is within the discretion of the district court to decide whether equitable relief should be granted, "such discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law." *Id*. ¶ 32 (alteration omitted) (quoting *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 26, 115 N.M. 690, 858 P.2d 66). This Court also has observed, in declining to endorse the exercise of equitable powers to override express contractual deadlines for renewing a commercial lease, that " '[e]quity jurisdiction has never given the judiciary a roving commission' to do whatever it wishes in the name of fairness or public welfare." *United Props. Ltd. Co. v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶ 19, 134 N.M. 725, 82 P.3d 535 (quoting *In re Adoption of Francisco A.*, 1993-NMCA-144, ¶ 88, 116 N.M. 708, 866 P.2d 1175). Therefore, if under Section 10-11-116(E), the Legislature has not authorized reversal of a mistaken deselection, neither PERB (acting pursuant to its authority under Section 10-11-120) nor this Court (acting pursuant to either legal or equitable authority) may reverse the deselection.

{42} We conclude that PERB has authority under Section 10-11-120 to address the statutory interpretation question in the first instance and determine whether a member's mistaken deselection of a survivor beneficiary may be reversed. If Plaintiffs disagree with PERB's decision, they will remain free to pursue an appeal to the district court under Section 39-3-1.1. For the present, however, it is clear that Plaintiffs must exhaust their administrative remedy. We express no opinion on the substantive question.

2. Invalidation of the Deselection Ab Initio

{43} In their pleadings Plaintiffs claim not only that the deselection of Becker and designation of Daughter as new survivor beneficiary should be *reversed*, but also that the deselection was void ab initio because: (1) Becker never gave her consent; and (2) documents required by 2.80.1100.11 NMAC did not accompany the deselection form. The two claims are analytically separate: even if under Section 10-11-116(E) a deselection, if mistaken but otherwise valid, may not be reversed, that would not necessarily preclude a determination that conditions precedent prevented the deselection from ever taking effect. Indeed, the second claim logically should be addressed first, because if the deselection was null and void, then there is no need to address whether it can be reversed.

{44} These, too, are questions that PERB may address during any Section 10-11-120 appeal, with the opportunity for review by the district court on appeal. That is, on these questions as well, Plaintiffs must exhaust their administrative remedy. We express no opinion on the issue, including the subsidiary questions whether Becker has any property interest in a survivor benefit, whether the spousal consent language in Section 10-11-116(A) applies only to pre-retirement spouses, and whether the failure to submit with the deselection form any of the documentation described in 2.80.1100.11 NMAC would operate to void the deselection.

III. CONCLUSION

{45} We affirm the district court's dismissal of Plaintiffs' Complaint on grounds that they must exhaust the administrative remedy afforded them pursuant to Section 10-11-120.

{46} IT IS SO ORDERED.
HENRY M. BOHNHOFF, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
JAMES J. WECHSLER, Judge

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The Law Office of Amy Sirignano, PC is looking for a full-time or part-time paralegal to join her solo federal criminal defense practice. Ms. Sirignano is looking for someone to assist her office in administrative tasks and in managing her complex caseload. Ms. Sirignano is looking to hire immediately, interested applicants should send resume to amy@abqnmlaw.com.

Legal Secretary/Executive Assistant
Legal Secretary/Executive Assistant to General Council and Co-President of 18 years for a Military and Commercial Manufacturer. A minimum of 5+ years Executive level experience required. We offer excellent benefits. Visit our website at www.mct-ind.com please submit resumes to info@mct-ind.com. EDUCATION: BS or BA preferable in Business Management from an accredited University; Will entertain candidates who can demonstrate equivalent experience. SKILLS AND ABILITIES: Provide minor administrative support to two others, the founder CEO, and Co-President; Engaging personality that uses the tools of humor, diplomacy and teambuilding; Self-motivated; Embraces dynamic task list that can become reprioritized in an instant; Efficient path finder that sees issues as navigable challenges rather than negative, overwhelming obstacles; Mastery of attention to detail; Prior experience in managing complex travel logistics for multiple executives; Prior experience in a corporate setting advantageous; Prior marketing experience; Required high proficiency level in Microsoft Outlook, Word, Excel & PowerPoint; Microsoft Publisher preferred; Some experience with Web Design is a plus; Managing calendar, maintaining satellite office facilities, misc. logistics, personal support, etc; RESPECTFUL, charismatic, effective Communicator in person, over the phone, via email and formal/informal written and verbal presentations; Potential minimal travel.

Positions Wanted

Legal Assistant for Hire
Would like to work for a PI Atty., or Ins. Def. in ABQ or RR only. CV Litigation exp., WC exp., Odyssey-CM/ECF, Prepare/Answer Discovery, Med. Rec. Reqts/ Follow up/Organization, MS Office exp., Calendaring exp. Hard-Working, Loyal, Dedicated. Strong work ethic. Empathetic. Enjoys continuous learning. Please email me for resume & references, at 'legalassistantforhire2017@gmail.com.'

Services

Briefs, Research, Appeals—
Leave the writing to me. Experienced, effective, reasonable. cindi.pearlman@gmail.com (505) 281 6797

Contract Paralegal
Experienced, professional contract paralegal available to assist you with your cases. Pleadings, discovery, court filings, trial prep. civilparanm@gmail.com

Office Space

Seeking Office Space
Experienced Attorney seeking office space. Willing to consider trading legal services for rent. Please send inquiries to santafestore@gmail.com

For Sale
1,300 square feet, downtown office building. Includes 12 parking spaces. 712 Marquette NW, Albuquerque. Call 238-9543

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Purchase/Take Over Practice
I am seeking an Attorney or Attorneys to purchase or take over my practice as a sole practitioner in Alamogordo, New Mexico. The Twelfth Judicial District, and Alamogordo in particular, is experiencing a shortage of attorneys who practice civil and family law. This is a great opportunity for an attorney to take over an established law firm. I opened the Robert M. Doughty II, PC, in July 1999, upon retiring from the District Court Bench. Please contact Robert M. Doughty II, Esq., Robert M. Doughty II, PC, P.O. Box 1569, Alamogordo, NM 88311-1569,(575)434-9155, rmdlaw@qwestoffice.net.

Miscellaneous

Want To Purchase
Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

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