

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

MORGAN WOOD, on behalf of herself
and others similarly situated, pursuant
to NMSA § 28-23-4(A)(1),

Plaintiff,

vs.

No. D-101-CV-2020-01454

Case assigned to Wilson, Matthew Justin

NEW MEXICO PUBLIC DEFENDER
DEPARTMENT, a/k/a LAW OFFICES
OF PUBLIC DEFENDER and
BENNETT BAUR, CHIEF PUBLIC
DEFENDER,

Defendants.

COMPLAINT FOR (AND NOTICE OF APPEAL FROM HUMAN RIGHTS BUREAU
REGARDING) VIOLATIONS OF THE FAIR PAY FOR WOMEN ACT, NEW MEXICO
HUMAN RIGHTS ACT, AND WHISTLEBLOWER PROTECTION ACT

Plaintiff Morgan Wood (“Ms. Wood”), by and through her counsel, Trent A. Howell, Esq., on behalf of herself and others similarly situated, pursuant to NMSA § 28-23-4(A)(1), brings this Complaint against New Mexico Public Defender Department, a/k/a Law Offices of Public Defender (“NMPD”), and Bennett Baur, Chief Public Defender (“Baur”) in his official and individual capacities.

1. This action is brought under and for redress of Defendants’ violations of Fair Pay for Women Act, NMSA § 28-23-1, *et. seq.* (“FPWA”), New Mexico Human Rights Act (“HRA”), NMSA § 28-1-1, *et seq.*, and Whistleblower Protection Act, NMSA § 10-16C-4 NMSA 1978, *et seq.* (“WPA”) of the State of New Mexico, as a result of NMPD and Baur terminating Ms. Wood from employment on January 27, 2020, because and in culmination of:

a. Under FPWA and HRA, Defendants discriminating against Ms. Wood and

others similarly situated on the basis of sex in employment compensation by paying wages to male employees at a rate more than to female employees, for equal work, on jobs the performance of which requires equal skill, effort and responsibility and that are performed under similar working conditions; and

b. Under FPWA, HRA, and WPA, Defendants retaliating against Ms. Wood because:

i. Under FPWA, Ms. Wood in good faith asserted a claim or right, assisted other persons in asserting a claim or right, and/or informed other person(s) of employment rights under FPWA, including but not limited to Ms. Wood being disclosed in a June 2019 hearing as a cooperating witness and potential plaintiff in the pending FPWA lawsuit captioned as *Leblanc, et al. v. NMPD and Baur*, Case No. D-202-CV-2018-04740, County of Bernalillo, Second Judicial District Court, State of New Mexico) (the “*LeBlanc Action*”);

ii. Under HRA, Ms. Wood by the same actions “opposed any unlawful practice ... testified or participated in” a proceeding under HRA; and

iii. Under WPA, Ms. Wood in good faith resisted Baur’s pressure to retaliate (including but not limited to in January 2019) against other NMPD employees (including Damian Horne) who were asserting claims of unlawful conduct by NMPD.

PARTIES AND JURISDICTION

2. Defendant NMPD is an independent state agency. *See* New Mexico Constitution, Art. VI, § 39A.

3. NMPD is Plaintiff’s “employer” as defined by FPWA, NMSA § 28-23-2(E), and

NMHRA, NMSA § 28-1-2(B) and (A), as well as a “public employer” as defined by WPA, NMSA § 10-16C-2(C).

4. Defendant Baur is Chief Public Defender. He holds office under due appointment by the New Mexico Public Defender Commission pursuant to New Mexico Constitution, Art. VI, § 39B and implementing laws in NMSA § 31-15-4. Baur is administrative head of NMPD and a “person acting for [Plaintiff’s] employer” as defined by FPWA, NMSA § 28-23-2(E), and HRA, NMSA § 28-1-2(B) and (A); as well as an “officer” of a “public employer” as defined by WPA, NMSA § 10-16C-2(C). As such, Defendant Baur is amenable to suit and joinder as a defendant to each cause of action.

5. Defendant Baur is required to manage all operations of the Department, including supervision of all employees of the Department. He is required to fix the compensation of all employees in compliance with the constitution and laws of the State of New Mexico, including all anti-discrimination laws. *See e.g.*, NMSA § 31-15-7. He is required to comply with the New Mexico Constitution, Article II, § 18 prohibiting sex discrimination. (“Equality of rights under law shall not be denied on account of the sex of any person.”). He is also required to comply with the FPWA, HRA, and WPA.

6. Plaintiff Wood is a female attorney with almost 15 years’ experience and was an “employee” of Defendants as defined by FWPA, NMSA § 28-23-2(D) and HRA, NMSA § 28-1-2(E) NMSA 1978, as well as a “public employee” of NMPD within the meaning of § 10-16C-2(B) NMSA 1978, from August 2005 through January 2020.

7. Ms. Wood at all relevant times was a resident of and “resides” in Santa Fe, New Mexico within the meaning of §38-3-1 (A) NMSA 1978.

8. Defendant NMPD at all relevant times was a political sub-division of the State of

New Mexico, *see Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 329, 361 P.2d 950, 952, *cert. denied*, 368 U.S. 915, 82 S.Ct. 194, 7 L.Ed.2d 131 (1961); can be sued pursuant to §10-16C-4 NMSA 1978 and §4-46-1 NMSA 1978; is located in the First Judicial District; and/or in substantial part is located, may be found, and “resides” in Santa Fe County within the meaning of §38-3-1 (A) NMSA 1978.

9. Defendant Bennett Baur, upon information and belief, “resides” in the First Judicial District.

10. The residence and employment by NMPD of Ms. Wood in the City of Santa Fe, location and “residence” of NMPD in substantial part in the County of Santa Fe, and/or fact that NMPD “may be found” in the First Judicial District make venue in this Court proper pursuant to §38-3-1 (A) NMSA 1978.

11. The unlawful employment retaliation against Ms. Wood alleged herein was committed by Defendants on dates from 2014 through January 27, 2019 within the First Judicial District, in Santa Fe, New Mexico, thereby making this action timely, and conferring jurisdiction over the parties and subject matter hereto in this Court.

12. The statutory claims asserted herein under FPWA, HRA, and WPA are not subject to the New Mexico Tort Claims Act (“NMTCA”), which was enacted in 1976.

13. Enacted in 2013, by a legislature fully aware of the existence of NMTCA, FPWA is an express legislative waiver of the partial immunity otherwise created by the NMTCA.

14. As an agency of the State of New Mexico, NMPD is a legal entity that falls within the FPWA definition of “person” and thus is subject to suit for violating the FPWA. *See Wolinsky v. N.M. Corrections Dep’t*, 2018-NMCA-071, *cert. denied*.

15. Amended several times since 1976, by a legislature fully aware of the existence

of NMTCA, HRA is also an express legislative waiver of the partial immunity otherwise created by the NMTCA.

16. HRA defines its covered employers to include “any person employing four or more persons and any person acting for an employer” and defines “person” to include “the state and all of its political subdivisions.” *See* §28-1-2 (A) and (B) NMSA 1978.

17. In addition, while setting forth the process by which an aggrieved person may appeal any administrative determination to the district court, HRA dictates “the state shall be liable the same as a private person.” *See* §28-1-13 (D) NMSA 1978.

18. Finally, enacted in 2010, by a legislature fully aware of the existence of NMTCA, WPA is an express legislative waiver of the partial immunity otherwise created by the NMTCA.

19. WPA not only defines its covered employers to include public employers; the entire statute is expressly limited to public employers. *See* § 10-16C-2 (C) NMSA 1978. That is, the entire purpose and effect of WPA is to create specific liability of public employers in waiver of prior NMTCA immunity.

20. Pursuant to the New Mexico Supreme Court decision in *Luboyeski v. Hill*, 117 N.M. 380, 382, 872 P.2d 353, 355 (1994), NMTCA does not supersede or override WPA.

21. Nonetheless, pursuant to §4-46-1 (A) NMSA 1978, Defendants also have had “actual notice” of the occurrence giving rise to this Complaint: since Ms. Wood, among others, in February 2018 was identified as one of the female employee-attorneys suffering pay disparity; since Ms. Wood in June 2019 was identified as a potential witness and party in the *LeBlanc Action* on the same matters; since Baur, a licensed attorney, in July 2019, demoted Ms. Wood in retaliation for the same; and since Baur, on January 27, 2020, terminated Ms. Wood’s employment in retaliation for the same.

22. Pursuant to § 4-46-1 (A) NMSA 1978, Defendants had both “actual notice” and “written notice” of the occurrence giving rise to this Complaint within less than 90 days of said occurrence.

23. Ms. Wood has satisfied all preconditions that would otherwise apply to sue under the NTCA, § 4-46-1 (A) NMSA 1978.

24. In compliance with FPWA, Ms. Wood timely filed this Complaint prior to the expiration of:

a. two years from the last date of her NMPD employment, pursuant to NMSA § 28-23-4(D); and

b. six years from the date of the last violation of FPWA for which she seek damages, pursuant to NMSA § 28-23-6(D).

25. In compliance with HRA, Ms. Wood timely filed:

a. a Charge of Discrimination on May 5, 2020, thus within 300 days of Defendants’ termination of her employment (on January 27, 2020), *see* NMSA §28-1-10(A);

b. a request for Order of Non-Determination on May 15, 2020, as was her statutory right, *see* NMSA §28-1-10(A), and which the New Mexico Department of Workforce Solutions, Human Rights Bureau (“NMHRB”) did in fact issue (in apparent error) with a date of “May 13, 2020,” thus ripening this HRA claim for “appeal,” *see* NMSA §28-1-10(D) and §28-1-13(A); and

c. this Complaint in this Court on today’s date, thus within 90 days after Plaintiff’s receipt of NMHRB’s May 13, 2020 Order of Non-Determination, *see* NMSA §28-1-13(A).

26. In compliance with WPA, NMSA §10-16C-6, Ms. Wood timely filed this Complaint prior to the expiration of two years from the date on which the retaliatory action occurred.

27. The court has jurisdiction over the parties and subject matter pursuant to FPWA, NMSA § 28-23-4(A), the WPA, §10-16C-4 NMSA 1978, and Article VI, §13 of the Constitution of the State of New Mexico, and venue is proper pursuant to NMSA §38-3-1.

FURTHER BACKGROUND FACTS

28. For her first 14 years with NMPD, Plaintiff received promotions including to Managing Attorney, 2010 to 2011, in the Aztec, San Juan County NMPD office (including approximately eleven attorneys and seven staff) and to District Defender, April 2016 to July 2019, for Taos, Santa Fe, and Rio Arriba Counties (including supervision of eighteen attorneys and seven staff members).

29. Despite Plaintiff's exemplary performance and Defendants' nominal recognition of the same by such promotions, Defendants paid Plaintiff far less than similarly situated male attorneys employed by Defendants who perform the same duties at the same time.

30. For example, although Plaintiff has comparable or more years of experience in general as compared to male attorney Aleksandr Kostitch ("Kostitch"), in at least one known year in the past:

- a. Kostitch and Plaintiff were both classified as "Public Defender 4;"
- b. Plaintiff had comparable or more responsibilities as compared to Kostitch when occupying the same positions;
- c. the "Position Midpoint" for pay for persons in the Public Defender 4 position was \$69,709.00;

- d. Kostitch earned above the Position Midpoint;
- e. Plaintiff earned below the Position Midpoint; and
- f. overall, NMPD paid Plaintiff an annual salary \$6,628.51 less than that of Kostitch.

31. The pay discrimination Plaintiff has suffered by Defendants is even more pronounced than the instances of pay discrimination alleged by a few other, individual plaintiffs to have occurred against women attorneys in the Second Judicial District offices of NMPD, as alleged in the *LeBlanc Action*, which has been litigated since June 2018.

32. In the *LeBlanc Action*, plaintiffs allege that in the NMPD's offices for the Second Judicial District, the male Managing Attorneys averaged \$2.18 per hour more than their female counterparts. That equates to a \$4,534.40 loss per year for Managing Attorneys in the same district doing the same work. And Plaintiff female Managing Attorneys in the Second Judicial District are paid \$2.63 less than the highest paid male Managing Attorney resulting in a pay disparity of \$5,470.40 per year for Plaintiffs Barela and LeBlanc who are both paid the same amount of wages, further evidence of intentional gender-based pay decisions by Defendants.

33. Finally, in a June 2019 hearing in the *LeBlanc Action*, plaintiffs therein identified Ms. Wood as a potential witness and party. And in swift, direct retaliation, Defendants:

- a. in July 2019, demoted Ms. Wood to PD-4 Supervisor status, supervising three attorneys handling docket in Santa Fe Magistrate Court;
- b. in Fall 2019, through representatives including Julie Ball, undermined Ms. Wood's status and reputation by advising NMPD employees Ms. Wood would soon be leaving employment; and
- c. on January 27, 2020, terminated Ms. Wood from employment on grounds

that were false and a mere pretext for discrimination and retaliation.

34. Defendants cannot articulate any legitimate reason that it paid Plaintiff or other females similarly situated less than male employees performing equal work on jobs the performance of which require equal skill, effort, and responsibility and that are performed under similar working conditions.

35. Defendants have known of and yet consciously disregarded the facts of pay inequity since at least February 2018. At that time, NMPD completed a pay equity study in showing gender discrimination between male and female employees. But Baur responded he was “proud” the NMPD’s pay inequity was not as egregious as other governmental entities.

36. The referenced LOPD Gender Equity study of February, 2018 was addressed to the PDC Commission Members. On information and belief, the PDC Commission Members have individually expressed concerns to Baur and others about gender pay discrimination in the Department. However, Defendant Baur has failed and refused to remedy the matter even though approximately \$388,663 was left over in the budget and reverted to the State General Fund at the end of the 2016-2017 fiscal year. This money could have easily been used to rectify the gender pay disparity for all employees of the Department.

37. On information and belief, there is no seniority system implemented by Defendants that would account for the wage disparity.

38. On information and belief, there is no merit system implemented by Defendants that would account for the wage disparity.

39. On information and belief, there is no system that measures earnings by quantity or quality of production that would account for the wage disparity.

40. Despite notice of the need for change, Defendants have not implemented a pay

system to stop the gender disparity. When Plaintiff and others specifically addressed the gender pay disparity with Baur and/or others in the Department, Baur has stated that no change will be made.

41. Worse, in the instance of Ms. Wood, Baur has retaliated against the persons who speak out against and are owed corrective action as a result of the pay disparity.

CAUSES OF ACTION

COUNT I – FPWA DISCRIMINATION

42. Under FPWA, Defendants discriminated against Plaintiff and others similarly situated, pursuant to NMSA § 28-23-4(A)(1), on the basis of sex by paying wages at a rate less than the rate Defendants paid an employee of the opposite sex for equal work requiring equal skill, effort, and responsibility, and that is performed under similar working conditions.

43. By the aforesaid acts and omissions, Defendants directly caused Plaintiff and others similarly situated, pursuant to NMSA § 28-23-4(A)(1), to suffer actual damages including, but not limited to, loss of wages and wage benefits, loss of earnings, loss of retirement benefits, emotional distress, pain and suffering, mental anguish, medical bills, attorneys' fees, costs of suit, and other pecuniary losses.

44. As a result of Defendants' unlawful acts as alleged herein, Plaintiff, on behalf of herself and others similarly situated, pursuant to NMSA § 28-23-4(A)(1), is entitled to reasonable attorneys' fees and costs of suit as provided in NMSA 1978, § 28-23-4(B) (2013).

45. As a result of Defendants' unlawful acts as alleged herein, Plaintiff, on behalf of herself and others similarly situated, pursuant to NMSA § 28-23-4(A)(1), is entitled to treble damages as set out in NMSA 1978, § 28-23-6(A(3)) (2013).

46. As a result of Defendant Baur's intentional refusal to address the gender pay

disparity even though Plaintiff, Commissioners and other employees of Defendant NMPD have requested that he act to address the clear sex-based pay disparity, Plaintiff, on behalf of herself and others similarly situated, pursuant to NMSA § 28-23-4(A)(1), is entitled to both treble and punitive damages as set out in NMSA 1978, § 28-23-6C (2013).

47. As a result of Defendants' unlawful acts as alleged herein, this court is requested to order appropriate injunctive relief, including requiring Defendant Baur to post in each office of the Public Defender a notice describing violations by the Defendant employer as found by the court or a copy of a cease and desist order applicable to the employer.

48. In accordance with in NMSA 1978, § 28-23-35, no employee, male or female's wages shall be reduced to bring the wages paid male and female employees into a non-discriminatory state.

COUNT II – FPWA RETALIATION

49. Under FPWA, NMSA 1978, § 28-23-5, Defendants retaliated against Plaintiff on the basis of her asserting an FPWA claim or right, assisting another person to do so, or informing another person about employment rights or other rights provided by law.

50. By the aforesaid acts and omissions, Defendants directly caused Plaintiff to suffer actual damages including, but not limited to, loss of wages and wage benefits, loss of earnings, loss of retirement benefits, emotional distress, pain and suffering, mental anguish, medical bills, attorneys' fees, costs of suit, and other pecuniary losses.

51. As a result of Defendants' unlawful acts as alleged herein, Plaintiff is entitled to reasonable attorneys' fees and costs of suit as provided in NMSA 1978, § 28-23-4(B) (2013).

52. As a result of Defendants' unlawful acts as alleged herein, Plaintiff is entitled to treble damages as set out in NMSA 1978, § 28-23-6(A)(3).

53. As a result of Defendant Baur's intentional refusal to address the gender pay disparity even though Plaintiff, Commissioners, and other employees of Defendant NMPD have requested that he act to address the clear sex-based pay disparity, and as a result of Baur further acting in willful retaliation against Plaintiff on the same grounds, Plaintiff is also further entitled to punitive damages as set out in NMSA 1978, § 28-23-6(C).

54. As a result of Defendants' unlawful acts as alleged herein, this court is requested to order appropriate injunctive relief, including requiring Defendant Baur to post in each office of the Public Defender a notice describing violations by the Defendant employer as found by the court or a copy of a cease and desist order applicable to the employer.

COUNT III – HRA SEX DISCRIMINATION AND RETALIATION

55. Plaintiff repeats and realleges the preceding allegations as though set forth fully herein.

56. By the same above-named acts in violation of New Mexico Statutes § 28-1-7 (A), (I)(1), and (I)(2), Defendants engaged in an unlawful discriminatory practice in matters of compensation, terms, conditions, and privileges of employment (including unequal pay, prestige, and treatment, a hostile work environment, involuntary administrative leave, demotion, and constructive termination of her employment) against a person otherwise qualified because of sex, and engaged in, aided, abetted, incited, compelled and/or coerced forms of threats, reprisal, retaliation against Plaintiff for having "opposed [an] unlawful discriminatory practice" with respect to the same conduct by Defendants.

57. In violation of New Mexico Statutes § 28-1-7 (I)(1) and (2), Defendants engaged in, aided, abetted, incited, compelled and/or coerced forms of threats, reprisal, retaliation, and discrimination against Wood on the basis of her sex and having "opposed [an] unlawful

discriminatory practice” with respect to the same conduct by NMPD and Baur.

58. The supposed non-discriminatory reason Defendants have offered for terminating Ms. Wood is a mere pretext for discrimination.

59. Under New Mexico Statutes § 28-1-13, Defendants are liable to Plaintiff for her resulting compensatory damages, including but not limited to back pay, front pay, employee benefits, and emotional distress, and for reasonable attorney fees, and litigation costs including but not limited to expert fees.

COUNT IV – WPA RETALIATION

60. Wood repeats and realleges the preceding allegations as though set forth fully herein.

61. Wood by complaints to Defendants and by offering information and cooperation with the LeBlanc Action regarding FPWA and HRA violations:

- a. communicate[d] to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act;
- b. provide[d] information to, or testifie[d] before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act;
and
- c. object[ed] to or refuse[d] to participate in an activity, policy or practice that constitutes an unlawful or improper act.

See §10-16C-2 (C)(3) NMSA 1978.

62. Defendants took retaliatory actions against Wood for these reports in the form of

demotion and termination of her employment.

63. On such bases, Defendants committed whistleblower retaliation in violation of New Mexico Statutes § 10-16C-3.

64. Under New Mexico Statutes § 10-16C-4, Defendants are liable to Wood for actual damages, including but not limited to back pay, front pay, lost employee benefits including but not limited to retirement benefits under the Public Employees Retirement Association, and emotional distress, reinstatement to the position and seniority status she would have had but for the violation, two times the amount of back pay with interest on the back pay, compensation for special damages including emotional distress sustained as a result of the violation, and litigation costs and reasonable attorney fees.

PRAYER FOR RELIEF

65. WHEREFORE, Wood requests as to her claims for violations of FPWA, HRA, and WPA, that she be awarded, including but not limited to unpaid or underpaid wages; back and front pay and benefits; pre- and post-judgment interest as permitted by law; emotional distress; costs and reasonable attorneys' fees; and any such other and further relief as the Courts deems just and proper;

- a. Pursuant to FPWA, Plaintiff is also requesting:
 - i. damages under NMSA §28-23-6(A) including unpaid wages, the damages from retaliation, all other actual damages, and treble damages;
 - ii. an added amount for punitive damages under NMSA §28-23-6(C);
 - iii. injunctive relief on behalf of herself and others similarly situated under NMSA §28-23-4(A)(1); and

- iv. costs and attorney fees pursuant to NMSA §28-23-6(C);
- b. Pursuant to HRA, Plaintiff is also requesting:
 - i. Actual damages under NMSA §28-1-13 including unpaid wages, the damages from retaliation, and all other actual damages;
 - ii. costs and attorney fees pursuant to NMSA §28-1-13; and
- c. Pursuant to WPA, Plaintiff is also requesting:
 - i. damages under NMSA §10-16C-4(A) including actual damages, reinstatement, two times the amount of back pay, interest on the back pay, special damages including emotional distress and associated medical bills;
 - ii. the same and further common-law damages pursuant to NMSA §10-16C-4(C); and
 - iii. costs and attorney fees pursuant to NMSA §10-16C-4(A).

JURY DEMAND

66. Plaintiff Morgan Wood hereby demands trial by jury on all issues so triable.

Respectfully Submitted,

-/s/ - Trent A. Howell -
Electronically filed & signed-
Attorney Trent A. Howell
P.O. Box 2304
Santa Fe, New Mexico 87504
www.trentahowell.com
trent@trentahowell.com
(505) 919-9158

*Counsel for Plaintiff Morgan Wood, on behalf of
herself and others similarly situated, pursuant to
NMSA § 28-23-4(A)(1)*