

**SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO**

**ENDORSED
FILED IN MY OFFICE THIS**

APR 08 2009

Janita M. Dwan
CLERK DISTRICT COURT

**ANTOINETTE GONZALES, CAROLL AUSTIN,
SARAH CLOVER, and ANNETTE MORA,
and A CLASS OF SIMILARLY SITUATED
CITY EMPLOYEES,**

Plaintiffs,

CV 2009 0 4 1 2 2

vs.

**CITY OF ALBUQUERQUE,
ED ADAMS, Chief Administrative Officer,
and ESTHER TENENBAUM, Division
Manager, in their individual and official
capacities,**

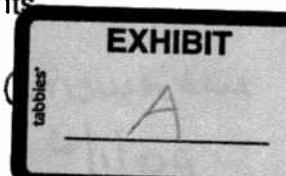
Defendants.

**COMPLAINT OF VIOLATIONS OF
STATUTORY AND CONSTITUTIONAL LAW**

Plaintiffs Antoinette Gonzales, Carroll Austin, Sara Clover, and Annette Mora submit the following Complaint of violations of federal and state statutory and constitutional law resulting from their employment and termination of employment as 311 Citizens Contact Center employees with the City of Albuquerque, stating as grounds therefore:

1. Plaintiffs are former employees of the City of Albuquerque, New Mexico, who were each employed as 311 Citizen Contact Center ("CCC") operators or as the supervisor(s) of operators.

2. The named-Plaintiffs seek to represent other, similarly-situated employees of the City of Albuquerque who were also denied constitutional and statutory rights



whose rights and interests were similarly violated, and who are similarly entitled to substantially the same declaratory and injunctive relief.

3. Defendant are the City of Albuquerque, a home-rule municipality in Bernalillo County, New Mexico; Ed Adams, the City's Chief Administrative Officer; and Esther Tenenbaum, Division Manager, who are sued in their individual and official capacities.

4. The City's Personnel Rules and Regulations provide that Classified employees "are City employees who are entitled to all the rights and benefits described in these Regulations and guaranteed by the Merit System Ordinance. . . ." Unclassified employees "shall be entitled to all of the rights and benefits to which classified employees are entitled except for the rights of disciplinary actions, the grievance resolution procedure, appeals and layoff."

5. The advertisements for positions of Citizen Contact Agent I and II give a summary of the positions, state minimum education and experience requirements, additional requirements, and preferred knowledge, skills, and abilities, but do not indicate that the positions are non-classified, unclassified, or anything other than regular City classified employee positions.

6. Although the employment position advertisements did state that "This is not a union position," the CCC employees were never advised or informed why that was true, and the City never explained or justified its denial of union representation to Contact Center employees. Throughout the time Plaintiffs were employed at the CCC they inquired about union representation but Defendants did not respond to their inquiries.

7. Citizen Contact Center employees were repeatedly advised that they had the same rights and benefits as other City employees.

8. Upon instituting the 311 CCC Agent I and II and Supervisor positions, the City did not inform or contact the union representatives for the appropriate bargaining units, despite a requirement in both the clerical, AFSCME, Local 2962, and the supervisors', AFSCME, Local 3022, Collective Bargaining Agreements that the respective unions must be notified, given the opportunity to provide input, and allowed to take any dispute over the classification (or non-classification) of employees "to the Labor Board for resolution."

9. Nor did the City in training employees of the 311 CCC and thereafter either inform or advise employees of their purportedly "unclassified" status. To the contrary, employees of the Citizen Contact Center were counseled and held to a higher and more strict standard than other City employees, especially as related to attendance, precision of work, and performance of work.

10. Citizen Contact Center employees were never given any documentation, memo, or other statement of their employee status that would give them any indication that they were anything other than regular, "classified" employees of the City of Albuquerque, entitled to all the obligations, rights, and benefits of such employment.

11. Although the AFSCME local unions representing City employees filed a prohibited practice complaint with the City's Labor Board concerning the 311 Operators on or around May 5, 2005, the City claimed that the Labor Board lacked jurisdiction. The AFSCME Complaint was apparently never followed up, decided, resolved, or

appealed and the AFSCME unions apparently entered into a "deal" with City officials to drop any claim to representation of the 311 CCC employees.

12. As further described herein, Defendants have subjected Plaintiffs to denial of due process, wrongful termination of employment, and violations of the Fair Labor Standards Act and the Family and Medical Leave Act.

Factual Allegations

13. Plaintiff **Antoinette Gonzales** was employed by the City at the Citizen Contact Center since March, 2004. She worked as a supervisor of 311 operators, had an excellent record of attendance and work performance, was extremely competent, and had no disciplinary infractions or actions against her up until the time her employment was terminated in September, 2008.

14. On January 4, 2008, Ms. Gonzales suffered a work-related injury for which she received Workers' Compensation benefits. She had surgery for a carpal tunnel injury on May 21, 2008, and a second surgery on July 30, 2008. Ms. Gonzales was able to return to work on August 18, 2008, but on September 12, 2008, she was informed by Ms. Tenenbaum that the City was "no longer in need of (her) services."

15. On September 22, 2008, through her counsel, Ms. Gonzales requested a hearing in accordance with Section 3-1-25 of the City's Merit System Ordinance. The City's Chief Administrative Officer, Ed Adams, first stated that the request "will be forwarded to the City Hearing Officer and you will be notified of the date and time scheduled for a hearing." A few days later Mr. Adams wrote that "(t)here was a clerical administrative error" and that the "termination should not have been forwarded to the

City Hearing Officer, since she has no right to appeal her termination.” Mr. Adams “request(ed) that the Office of Administrative Hearings close this case.”

16. On numerous occasions Ms. Gonzales was expected to and did work hours in excess of 40 hours per week; it is her understanding that the City considered her and other 311 CCC supervisors to be exempt from the provisions and pay provided by the Fair Labor Standards Act.

17. Plaintiff **Caroll Austin** was employed as an Agent II with the 311 CCC. She was a highly competent employee, with an excellent record of attendance and performance. In September, 2007, her physician diagnosed and advised her that she would need surgery for a serious medical condition. 311 Division Manager Esther Tenenbaum advised her that the surgery would have to wait, but on December 26, 2007, the surgery was scheduled for January 23, 2008.

18. Ms. Austin requested leave without pay, but on January 15, 2008, Ms. Tenenbaum told her that the request had been denied and that she would either have to resign or be fired. The next day, another CCC official, Operations Manager Charles Cowen, advised her that her request for leave was approved. In the following days Ms. Austin continued to call in, and was advised several times that she was considered to be on FMLA leave.

19. On January 24, 2008, Ms. Tenenbaum called Ms. Austin and said “Caroll, you don’t have to call in anymore. . . .because your services are no longer needed.” Through her attorney Ms. Austin requested a hearing, but that was denied.

20. Plaintiff **Sarah Clover** was employed at the CCC since March 19, 2005; in December, 2006, the City approved her request for FMLA leave and she took maternity

leave. She returned to work part-time in February, 2007, and in May, 2007, returned to full-time employment. Ms. Clover was a consistently excellent employee and her Agent Score Cards from the date of her employment to March 11, 2007, showed 100% attendance.

21. On July 18, 2007, Ms. Clover felt ill, and after checking to assure that she had sufficient paid leave time, she went home. The next day Ms. Clover reported back to work and was summoned to Esther Tenenbaum's office, whereupon Ms. Tenenbaum ordered Ms. Clover to go home.

22. The next day, July 20, 2007, Ms. Tenenbaum gave Ms. Clover the option of resigning or being terminated, purportedly because of her attendance. Ms. Clover was not allowed any appeal or recourse, and her medical benefits were cancelled effective July 1, 2007.

23. Plaintiff **Annette Mora** was also an excellent CCC employee who suffered from a work-related carpal tunnel injury. On three occasions in 2007, City doctors released her to return to work part-time and she was scheduled for surgery on October 19, 2007. On October 10, 2007, with the approval of Human Resources official Mary Scott, the City's Director of the Department of Finance and Administrative Services, Tanda Meadors, wrote to Ms. Mora:

to inform you that effective October 12, 2007, you have exhausted all your sick leave (and FMLA leave, if applicable) and your accrued vacation hours, if applicable, will be paid to you in a lump sum. Effective October 13, 2007, you are being transferred into Physical Layoff for a period of up to one (1) year.

24. After her surgery on October 19, 2007, Ms. Mora was recovering and was planning to return to work well within the year allowed under City rules for her "physical

layoff" status. Nonetheless, on January 29, 2008, Human Resources Administrator Mary Scott wrote to Ms. Mora stating that:

This letter is to inform you that you were placed in physical layoff in error. Per Section 307.7 Physical Layoff (enclosed) unclassified employees are not eligible for physical layoff.

Effective February 1, 2008 your services with the City of Albuquerque are no longer needed and your employment will be terminated.

25. Despite her years of service to the City, excellent work record, and absence of any disciplinary action against her, like the other Plaintiffs, Ms. Mora was not allowed any recourse, relief, or appeal, purportedly because she was an "unclassified" employee.

26. The actions taken against the four named Plaintiffs, who by any standard were exemplary employees, and the denial of their statutory and contractual employment rights are typical of treatment and actions taken against many other employees of the 311 Citizen Contact Center, and Plaintiffs are accordingly seeking class-action representational status.

WHEREFORE, Plaintiffs seek relief pursuant to the following Causes of Action:

COUNT 1

BREACH OF EMPLOYMENT CONTRACT

27. The allegations in the preceding paragraphs are incorporated as if set out herein.

28. Employees of the City of Albuquerque are employed under a contract of employment that consists of the City's Merit System Ordinance, the City's Personnel Rules and Regulations, and any applicable Collective Bargaining Agreements. In

addition, Plaintiffs' employment was governed by representations and promises made by management officials and their representatives.

29. By their acts and omissions described herein, the City Defendants have breached their contracts of employment with Plaintiffs, have unreasonably taken disciplinary action without just cause, have denied Plaintiffs and others their contractually required process, and are liable for damages proximately resulting from those contract violations.

30. The City's contract of employment with its employees includes a duty of good faith and fair dealing. By their conduct described herein, City Defendants have breached their duty of good faith and fair dealing and are liable for damages proximately resulting from those breaches.

COUNT 2

DENIAL OF DUE PROCESS AND EQUAL PROTECTION

31. The allegations in the preceding paragraphs are incorporated as if set out herein.

32. Non-probationary public employees with a reasonable expectation of continued employment have a property interest in their public employment which cannot be properly terminated without adequate pre-determination and post-termination process.

33. By their acts and omissions described herein, Defendants have violated and denied the right to due process of Plaintiffs and other similarly situated employees who have been terminated without just cause and have been denied any pre-determination or post-termination process to grieve or appeal the actions against them.

34. Defendants have treated Plaintiffs and similarly situated employees and former-employees as second-class employees, even though there is no meaningful or reasonable distinction or difference between these employees and "classified" City employees performing the same or similar work.

35. Even if they were not formally considered "classified" employees, Plaintiffs and those similarly situated were "de facto" classified employees and as such were entitled to all the rights and benefits of such employees, including pre-termination and post-termination hearings.

36. Like other full-time, non-probationary employees, Plaintiffs had an important interest in and right to union representation, which Defendants denied without valid reason or justification.

37. Plaintiffs and similarly situated City employees and former-employees are entitled to damages for the City's denial of their rights to due process and equal protection of the laws.

COUNT 3

WRONGFUL TERMINATION OF EMPLOYMENT

38. The allegations in the preceding paragraphs are incorporated as if set out herein.

39. If Plaintiff and similarly situated employees and former employees are not entitled to constitutional protection, then they alternatively plead that their terminations, treatment as "unclassified" employees, and other employment actions against them are contrary to their understanding and agreement with the City, contrary to the representa-

tions made by the City concerning its treatment of its full-time public employees, and contrary to public policy.

40. In particular, the named Plaintiffs in this case were highly competent and exemplary employees, uninformed as to their purportedly "unclassified" status, who were entitled to fair treatment and continued employment absent any misconduct or failure to perform their work.

41. In addition, as described herein, some or all Plaintiffs have been discriminated against and terminated for improper and illegal reasons, in violation of their statutory rights and entitlements.

42. The City Defendants are liable for and Plaintiffs are entitled to damages and other and further relief resulting from the wrongful termination of their employment.

COUNT 4

VIOLATIONS OF THE FAMILY AND MEDICAL LEAVE ACT

43. The allegations in the preceding paragraphs are incorporated as if set out herein.

44. As described herein, some of the Plaintiffs have been denied their rights and entitlements under the Family and Medical Leave Act and Defendants are liable for damages and relief set out in the law.

COUNT 5

VIOLATIONS OF THE FAIR LABOR STANDARDS ACT

45. The allegations in the preceding paragraphs are incorporated as if set out herein.

46. Although she was a supervisor at the "311" Citizens Contact Center, Ms. Gonzales was not properly considered an "exempt" employee under the terms and definitions of the Fair Labor Standards Act (FLSA).

47. By erroneously and unreasonably considering Ms. Gonzales and other similarly-situated employees as "exempt" from the provisions of the FLSA and by denying her the pay she was entitled to under the FLSA, the City has violated the FLSA and Defendants are liable for damages, including wages at the rate of time and a half her regular rate of pay and an equal amount in liquidated damages, for each and every hour of overtime (hours in excess of 40 hours per week) worked by Ms. Gonzales and similarly situated employees who were not paid overtime wages to which they were entitled.

COUNT 6

CLASS AND COLLECTIVE ACTION

48. The allegations in the preceding paragraphs are incorporated as if set out herein.

49. Plaintiffs bring this action pursuant to Rule 1-023 of New Mexico Rules of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated and under the provisions of the FMLA and FLSA on behalf of persons who later choose to opt in to be represented by the named Plaintiffs in this case..

50. The class that Plaintiffs seek to represent in this action consists of all persons who were treated (or are now being treated) as "unclassified" employees of the City of Albuquerque without good reason or justification and who have suffered any

damage(s) and are entitled to injunctive, declaratory, or equitable relief as a result of that treatment.

51. The class is so numerous that joinder of all members of the class is impractical and there are questions of law and fact common to the class.

52. Defendants have acted or refused to act and will continue to act or refuse to act on grounds generally applicable to the class, thereby making injunctive and declaratory relief appropriate with respect to the class as a whole.

53. Separate actions by individual members of the class on common issues would create a risk of inconsistent adjudication with respect to individual members of the class and would risk establishing incompatible standards of conduct for Defendants.

54. Questions of law and fact common to the members of the class predominate over any questions affecting only an individual member or members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy in this case.

55. The claims of the named-Plaintiffs are typical of the claims of the class and Plaintiffs and their attorney will adequately represent and protect the interests of the class.

COUNT 7

DECLARATORY JUDGMENT

56. Each and every preceding allegation is incorporated herein.

57. The treatment and City acts and omissions directed at Plaintiffs and those similarly situated raise issues and concerns about the rights and obligations of the parties which require determination and clarification by the Court.

58. Included in the issues that are ripe for a declaratory judgment are the issues of property interests in employment, entitlement to union representation, entitlement to hearings, de facto status as classified employees, and other statutory and constitutional matters which are disputed and that are of substantial concern to Plaintiffs and the public.

59. The New Mexico Declaratory Judgment Act, Sec. 44-6-1 to 44-6-15, NMSA, permits the court "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." Sec. 44-6-14, NMSA.

60. The treatment of 311 Citizens Contact Center employees as "unclassified" employees and the denial of City employment rights and process is a matter of substantial public concern and importance; the controversy involves the rights and legal relations of the parties seeking declaratory relief; the interests of the parties are real and adverse, and the issues are ripe for judicial determination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. Compensatory relief including but not limited to damages for breach of contract and the duty of good faith and fair dealing, denial of constitutional rights, and/or wrongful termination

B. Granting of class action status and granting of declaratory, injunctive, and other equitable relief appropriate all members of the class who were or are now being treated similarly, unfairly, and unreasonably.

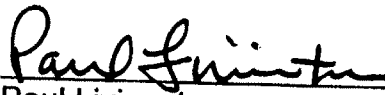
C. Relief under the terms and provisions of the FMLA and the FLSA, including the award of damages and liquidated damages, and costs and attorneys' fees, all as provided by law.

D. Equitable relief, including but not limited to injunctive relief, back pay and benefits and reinstatement to their positions of employment..

E. Reasonable costs and attorneys' fees as provided by law.

F. Such other and further relief as the Court deems just.

Respectfully submitted,



Paul Livingston
Attorney for Plaintiffs
P.O. Box 250
Placitas, NM 87043
(505) 771-4000
Fax - 771-2333