

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ANTOINETTE GONZALES, et al.,

Plaintiffs,

vs.

No. CIV-09-520 JB/RLP

CITY OF ALBUQUERQUE, et al.,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs present the following response to the City of Albuquerque's Motion for Summary Judgment and Amended Memorandum in Support. (Doc. 65).

The City asks for summary judgment on grounds supported by three sets of alleged "Material Facts As To Which No Genuine Issue Exists." The first set of facts is presented to support the City's contention that "All 311-CCC Employees are 'Unclassified.'" (City's Memo, Doc. 65, at pp. 2, 3, City's Facts 3-9).

The City's second set of material undisputed facts addresses "Plaintiffs' Employment at the 311-CCC," concentrating heavily on contentions about Antoinette Gonzales's supervisory duties. (Id., at pp. 3-7, Facts 10-35). The City's third and last set of material facts supporting the City's Motion for Summary Judgment is grouped under the contention, "Plaintiffs Knew They Were Unclassified Employees." (Id., at pp. 7-10, Facts 36-44).

I. Plaintiffs' Statement of Material Contested Facts

Plaintiffs contest the City's Statement of Facts as to which the City contends there is no genuine issue, as follows:

A. All 311-CCC Employees are "Unclassified"

1. The City's "**Fact No. 3**" broadly states that "All employees of the 311-CCC are (and at all relevant times have been) "unclassified" under the City's Merit System Ordinance." This is based on the City's contention that the City's Chief Administrative Officer, under the authority of the Merit System Ordinance, declared the 311-CCC employees to be "unclassified" and "at will" employees.

The City's support for this contention is based on Ms. Tenenbaum's recollection of what her predecessor told her. Asked what she knows "about the origin of the unclassified nature of the 311 operators" her answer was that "When I came on board, I was told that all of 311 was unclassified. That's the depth of my knowledge."

The City's Merit System Ordinance's provision allowing the CAO to declare employees "unclassified" is a catch-all that excludes from the Merit System any employees deemed unclassified by the CAO. Surely a material fact, which the City has failed to produce, would be a document, declaration, or at least a formal statement, with a specific date and signed by a specific person, enacting such an important exemption from the Merit System and the ordinary course of City employee and labor relations. While it may be true that all 311-CCC employees have been treated as "unclassified" from the start, that is far from substantial evidence that they have ever properly been deemed "unclassified."

fied” and excluded from the City’s civil service system, or that there was a valid reason to exclude them.

2. The City’s **Fact No. 4** states that “When the 311-CCC was created, the CAO designated all positions within the 311-CCC as unclassified, as was within his discretion. Again, the City relies on the same statement by Ms. Tenenbaum about what she was “advised” by Michael Padilla. And again, the City ignores Ms. Tenenbaum’s admission, on the same page of her deposition, that all she knows about 311 employees being classified is what she was told when she “came on board.”

3. For its “uncontested” **Fact No. 6**, the City states that “When the 311 CCC was first created, the City decided that all 311 CCC employees would be unclassified.” Again, the City refers to Ms. Tenenbaum’s hearsay without acknowledging that she has no personal knowledge whatsoever about what “the City decided” when it was creating the 311-CCC resource. As a corollary to this “Fact,” the City contends, without attribution, that “This would allow the facility to be operated as closely as possible to a high-level private call center.”

The City’s **Facts Nos. 7 and 8** claim that the City’s consignment of 311 employees to “unclassified” status “allows the City flexibility in wages and benefits” and allows the City “to tailor specific employee incentives such as spot bonuses, awards, and social events...to motivate employees. The City claims that such “incentives would not be possible under City rules and regulations applicable to classified employees.”

The City's references to justifications for making Plaintiffs' "unclassified" are to Plaintiffs' Interrogatories Nos. 7, and 14-16 as well as Ms. Tenenbaum's deposition testimony at pp. 33-36 and 63-64. The City's justification and statements about what "the City decided" are not attributed to any person and have no documentary support. Ms. Tenenbaum's "actual knowledge" about the origins and philosophies behind the establishment of the 311 contact center is nonexistent.

Even as to the explanation given to the 311 agents that "the reason they were unclassified was because they were receiving higher wages and benefits than other City employees and that if they made them classified, they would lose those," Ms. Tenenbaum said she "was told that by Michael Padilla." Thus, both the origin and the reasoning behind the establishment of an "at will" division of employees with the City are shrouded in mystery and Ms. Tenenbaum simply lacks any knowledge of those matters. The interrogatory answers that refer to the start of the 311 program and the justification for making its employees "unclassified" are not supported by any fact and are verified only by Esther Tenenbaum, who has conceded her lack of personal knowledge about anything that happened before she was hired at the 311-CCC.

4. The City's **Fact No. 9** compares 311 agent duties and pay with those of other City employees and concludes with the contention that "Were 311-CCC employees classified, the City would not have the flexibility that it currently has to run the Center...." Even though Ms. Tenenbaum was required to testify on the basis of personal knowledge, it is again apparent that all she knows about the reasons for making

“nonclassified, nonunion positions” is that “I was told that by Michael Padilla.”

Tenenbaum deposition, at pp. 63, 64.

The “facts” that the City relies on for its contentions that the 311-CCC agents are all unclassified and the reasons given for that determination are all based on testimony and verification from Division Director Esther Tenenbaum. Ms. Tenenbaum’s information, in turn, apparently came from Michael Padilla, the call center’s original director. Because she lacked personal knowledge of what she testified about, Ms. Tenenbaum’s testimony fails to support the City’s motion for summary judgment and should be discounted or discarded.

B. Plaintiffs’ Employment at the 311-CCC

The City’s second set of “material facts” concern Plaintiffs’ duties at the 311-CCC and presents the reasons the City claims justify the termination of each of the nine Plaintiffs. These factual allegations are supported for the most part by Ms. Tenenbaum’s testimony and selective excerpts from the Plaintiffs’ depositions. Plaintiffs contest the veracity of many of these factual contentions and challenge the materiality of others.

1. Antoinette Gonzales

The City sets out alleged undisputed facts concerning Antoinette Gonzales at pages 3-5, Facts Nos. 10-22. For its **Fact No. 14** the City states that

All 311-CCC supervisors, including Gonzales, are responsible for leading their teams, making hiring decisions, making recommendations for dismissals, ensuring adherence to City policy, and disciplining and reviewing their team.

And **Fact No. 19** states that “Gonzales participated in granting leaves of absences, sick leave and approving overtime by considering and signing off on employee request forms.” The City then states, in **Fact No. 22**, the “reasons” it claims it terminated Ms. Gonzales’s employment: two employees submitted complaints about her and she hosted a charity event at the 311-CCC.

Ms. Gonzales’s description of her job duties is far different from the account given by Ms. Tenenbaum:

As a supervisor I was still required to take citizen calls, and the other supervisors and I routinely spent at least three quarters of our time answering phones just as we had when we were contact agents.

Gonzales Affidavit, at para. 6.

In my work as a supervisor with the City I was almost never able to exercise any judgment or discretion about any important matter; in particular, I never had any role whatsoever in hiring or firing employees, or even in recommending their hiring or firing.

Id., at para 13.

Supervisors, such as myself, did not have any authority to authorize overtime work or absence from work. All approvals were required to be in writing and could only be approved by Charles Cowen and Esther Tenenbaum.

Id., at para. 14.

As for the “reasons” for terminating Ms. Gonzales’s employment, from the employee’s point of view there had been a work-related injury for which she received Workers’ Compensation benefits. She had surgery on May 21, 2008, and a second surgery on July 30, 2008. Id., at para. 18. Ms. Gonzales returned 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 my services.’” Affidavit, at para. 19.

2. Carroll Austin

For its material undisputed facts, the City states that Ms. Austin began working as a 311-CCC agent in June, 2005. Fact No. 23. The City then claims that after Ms. Austin requested medical leave the City informed Austin:

that she had approximately 47 hours of FMLA leave remaining and that, pursuant to the City’s policies, she would be considered a voluntary resignation if she did not show up for work following exhaustion of all leave to which she was entitled.

City’s Fact No. 24.

Carroll Austin, on the other hand, gives a different account in her Affidavit.

3. Annette Mora

The City states that Ms. Mora “requested and was granted a leave of absence, and she exhausted 960 hours during such leave.” The City also claims that “Mora did not return to work after exhausting her leave and, consequently, the City treated her as a voluntary resignation under its policies and procedures.” Facts Nos. 26 and 27.

4. Sarah Clover

In its Fact No. 30, the City states that “Throughout her tenure, Clover continuously violated the City’s attendance policies, was placed on a progressive discipline paln, and was ultimately terminated for her failure to adhere to such policies. Fact No. 30. Ms. Clover disputes this account:

5. Nicole Bordlemay

The only “fact” presented by the City that specifically concerns Ms. Bordlemay is that she was terminated “after she repeatedly mishandled citizen calls.” Significantly, this “fact” is attributed to Ms. Bordlemay. City’s Fact No. 31, citing Ms. Bordlemay’s deposition at pages 5, 24-25.

Nicole Bordlemay, however, disputes that she mishandled any call. In fact, it was because she refused to “show remorse” to Ms. Tenenbaum for the call she denied mishandling that was the basis for the termination

6. Nicole Foster

The City claims that it terminated Nicole Foster’s employment “because she violated the City’s policy and procedures when she: (1) took personal time in the chill room; and (2) wore earphones while at work. City’s **Fact No. 32**. As with the others, no reason was given for the disciplinary action terminating Ms. Foster’s employment after more than four years of service to the City.

In her Affidavit Ms. Foster describes her use of the “chill” room and explains that after she was shown the policy prohibiting eating in that room, “I read the policy and procedure, sent Esther Tenenbaum an e-mail stating I apologized, and told her that it would not happen again.” Foster Affidavit, at para. 7.

7. Yolanda Garcia

Citing only to Ms. Garcia’s deposition, the City states only that “in September, 2009, the City terminated Garcia’s employment . . . pursuant to the City’s progressive

disciplinary procedures, for performance-related issues.” **Fact No. 33.** Since Ms. Garcia had no idea why the City decided to terminate her employment when it did, it is hard to understand how her deposition testimony supports the City’s contention about the reason she was terminated.

As with each of the other terminated employees, Ms. Garcia was informed by Ms. Tenenbaum that her “services are no longer needed.” Garcia Affidavit, at para. 14.

8. James Pescetti

The City claims as “fact” that it “terminated Pescetti’s employment as a Contact Agent II because of a citizen complaint made against him. **Fact No. 34.** Although the City states that Mr. Pescetti’s deposition, at pages 19 to 20, supports its factual contention, that is not true:

Q. (By Mr. Bergmann) Directing your attention to May of 2008, was there an incident that led to your termination?

A. No, not that I was made aware of.

Q. Were you made aware of – of any call with a citizen that the citizen complained about, a call involving you?

A. No.

Q. And you aren’t aware that there was any kind of a citizen complaint about you relative to a call in May of 2008?

A. No.

In his Affidavit James Pescetti confirms that at his deposition he:

was asked questions about certain complaints and conferences I supposedly had with supervisors concerning those complaints about my calls. I was not

aware of any of the issues I was asked about and none of the conferences I was asked about actually took place.

Pescetti Affidavit, at para. 9. The City has never presented any evidence at all that there even was a “citizen complaint” against James Pescetti, or that if there was such a complaint, there was any basis to it. Nonetheless, Mr. Pescetti was called into Esther Tenenbaum’s office and told that his “services are no longer needed.” Id., at para. 8.

9. Keri Waites

The City is especially vague about its reasons for terminating Ms. Waites employment:

In or around June 2005 (sic), the City terminated Waites’s employment pursuant to its progressive disciplinary procedures because of several performance issues, misconduct, and repeated violations of the City’s attendance policies.

City’s Fact No. 35. The City terminated Keri Waites’ employment in January, 2010; she was the last of the Plaintiffs to be fired. Again, as with Mr. Pescetti, the City cites Ms. Waites’ deposition as the source of information about the reasons she was fired, and again the City is mistaken.

C. Plaintiffs Knew They Were Unclassified

For its third and final set of uncontested material facts, the City claims that because Plaintiffs “knew they were unclassified employees” they had no protected property interest in their employment. The City contends that all the Plaintiffs “knew” that they were unclassified. Some of the Plaintiffs “knew” based on documents that say

“Employment Status: Unclassified” (Bordlemay, Fact No. 36); “unclassified hire (Foster, Fact No. 37); “a document that states her status was unclassified” (Garcia, Fact No. 38); “Employment Information Form that shows his status as ‘unclassified’” (Pescetti, Fact No. 39); a document that stated her employment status as ‘unclassified’” (Waites, Fact No. 44).

In their Affidavits, the Plaintiffs all agree that they were informed that their new jobs were “unclassified” only after they had accepted the positions with the City. (E.g., “I did not know the City position was ‘unclassified’ when I decided to accept the position,” Gonzales Affidavit at para. 2).

Most were informed in their training class about their “unclassified” status. However, all the Plaintiffs agree, and other testimony confirms, that the Plaintiffs were told that “we received higher pay as unclassified employees, but that we received all other benefits and had all the rights of other City employees.” (Id., at para. 3). Plaintiffs’ counsel asked Ms. Tenenbaum, for example:

Q. Are you aware of an explanation that was given to some of the operators, contact agents, that the reason they were unclassified was because they were receiving higher wages and benefits than other City employees and that if they made them classified, they would lose those?

A. I was told that by Michael Padilla.

Tenenbaum deposition, at p. 63.

D. Summary of Contested Facts

Plaintiffs contest the City's first set of facts on the grounds that they are not supported by personal knowledge and are based on hearsay. These are the purported "facts" concerning the City's decision to make its new 311-CCC division employees "unclassified," and what interests that status was intended to advance. The City admits to having no documentation of the reasons for making these employees "unclassified." (See, City's Second Supplemental Answer to Interrogatory No. 9, "no documents that set forth specific reasons for unclassified versus classified status have been located.") Nor has the City been able to identify any person to testify about the origins of the 311-CCC.

Plaintiffs contest the City's second set of facts because the City gives a distorted account of Antoinette Gonzales's duties that misrepresents her authority and discretion and sets out versions of each Plaintiff's termination that range from serious to trivial, but no matter what the basis for the discipline, none of the Plaintiffs were given any reason for their termination, just as none was given a meaningful opportunity to tell her side of the story.

The City's last set of uncontested facts demonstrates that all but one of the Plaintiffs knew that the 311-CCC employees were "unclassified." The City stops there, however, instead of going to the next step and trying to understand what its employees were told and what they believed about their "unclassified" status. While Plaintiffs were aware that the City considered them to be "unclassified," they were told and believed that

meant that they were paid more and were not allowed to be members of a union. What they were not told, however, is that their public employer claimed they could be fired at any time for any reason or no reason at all.

ARGUMENT AND AUTHORITY

The City Defendants claim that they are entitled to summary judgment on each of the seven counts in Plaintiffs' Complaint. First, the City argues that there was no breach of contract. The City next denies any due process or equal protection violations and rejects any wrongful discharge claims. The City alleges that on the basis of the uncontested facts the Court should find that it did not violate the Family and Medical Leave Act or the Fair Labor Standards Act. Finally, the City denies any basis for a declaratory judgment.

I. Breach of Contract

The City's contention is that:

Because Plaintiffs and other 311-CCC employees were at all times unclassified, at will employees, they could be terminated at any time for any reason or no reason at all and their claim for breach of employment contract fails.

City's Memo, at p. 10. Thus, the City's argument is premised on the "fact" that Plaintiffs "were at all times unclassified, at will employees."

New Mexico courts, however, recognize an exception to the at-will employment rule "where the facts disclose the existence of an implied employment contract provision that limits the employer's authority to discharge." *Lopez v. Kline*, 124 N.M. 539, 541; 953 P.2d 304, 306 (Ct. App. 1997). In the private sector at least, that provision "must be

sufficiently explicit to give rise to a reasonable expectation that the employer restricted its ability to discharge employees at will. *Kiedrowski v. Citizens Bank*, 119 N.M. 572, 575; 893 P.2d 468, 471 (Ct. App. 1995).

In *Kiedrowski*, 119 N.M. at 575, the court found an implied contract existed when the employee handbook contained mandatory progressive discipline procedures and managers were required to follow the procedures in the handbook. Here, as in *Kiedrowski*, the City employer has established elaborate progressive discipline procedures. Even an express disclaimer will not, in itself, defeat an implied contract claim, “where the employer’s conduct reasonably leads employees to believe that they will not be terminated without just cause and a fair procedure.” *Id.* The court must consider the totality of the circumstances and the employer-employee relationship “to determine whether the employee’s expectations were reasonable.” *Lucero v. The New Mexico Lottery*, 685 F. Supp. 2d 1165, 1175 (D.N.M., 2009), citing *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476 (10th Cir. 1988).

II. Due Process & Equal Protection

The City also argues that “Plaintiffs’ claim for denial of due process and equal protection fails:

Plaintiffs and other 311-CCC employees were at all times unclassified, at will employees. They were on notice that they were unclassified and, accordingly, cannot make an argument that they had any reasonable expectation of an entitlement to continued employment.

City's memo at p. 10. Again, the City's defense is based on its contention that "Plaintiffs and other 311-CCC employees were at all times unclassified, at will employees." The City claims that Plaintiffs "cannot make an argument that they had any reasonable expectation of an entitlement to continued employment."

A. Plaintiffs Had a Reasonable Expectation of Continued Employment

In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) the Supreme Court established the scope of a protected property interest:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Plaintiffs may pursue an action for termination of their public employment without due process if they had a protected property or liberty interest in their employment which "consists of 'a legitimate expectation in continued employment.'" *Lenz v. Dewey*, 64 F.3d 547, 551 (10th Cir., 1995) (citing, *Roth*, 408 U.S. at 577).

A public employee is entitled to procedural due process if a deprivation of a property interest can be shown. *Roth*; *Derstein v. Kansas*, 915 F.2d 1410, 1413 (10th Cir. 1990); *Driggins v. City of Oklahoma City, Oklahoma*, 954 F.2d 1511, 1512 (1992). Such a property interest "exists if state or local law creates 'a sufficient expectancy of continued employment.'" *Driggins*, 954 F.2d at 1513; citing *Campbell v. Mercer*, 926 F.2d 990, 992 (10th Cir. 1991) (quoting *Vinyard v. King*, 728 F.2d 428, 432 (10th Cir. 1984):

The existence of a property interest “is defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577. In *Driggins*, 954 F.2d at 1514, the Court noted that “(p)ersonnel policies, taken alone, might be sufficient to create a property interest.” “Statutes, ordinances, contracts, implied contracts, as well as rules and policies developed by government officials may all create such [property] interests.” *Simmons v. Uintah Health Care District*, 2010 U.S. App. LEXIS 2666; citing, *Calhoun v. Gaines*, 982 F.2d 1470, 1473-74 (10th Cir. 1992)

Here, the City Charter, the Merit System Ordinance, State law related to permanent, non-probationary, public employees, and especially the City’s 311-CCC “progressive” disciplinary policies and termination provisions provide the basis for a property interest in employment that requires procedural due process.

The City of Albuquerque’s Charter requires the creation and maintenance of a merit system based on performance, competence, and experience. The Merit System Ordinance provides the policies and rules governing City employment. And such rules, combined with “(m)utually explicit understandings can create a property interest in continued employment by means of an implied contract.” *Bishop v. Wood*, 426 U.S. 341, 344 (1975); citing *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

The unwritten policies and practices¹ that label 311-CCC personnel “unclassified,” on the other hand, purport to preclude a hearing and exclude them from the protections of the Merit System Ordinance and are applied to *all* the employees at the 311 Citizen Contact Center, regardless of their length of service or competence at their job.

In *Goudeau v. Independent School District No. 37*, 823 F.2d 1429, 1431-32 (10th Cir. 1987), the Tenth Circuit Court of Appeals:

recognized the importance of employees’ due process rights even when the employer articulates a permissible reason for the discharge: “Without adequate due process protection, an employee . . . Can never discover whether the reasons offered for her discharge are true – or are false and a mere subterfuge.”

823 F.2d at 1431. Given the variety of “reasons” for warnings and termination of its 311-CCC personnel, ranging from “wearing earphones” and “hosting a charity event” to “poor performance” and “attendance issues,” all resulting in termination with the employees being told their “services are no longer needed,” it should be apparent that relief, including reinstatement and back pay, should not be summarily withheld or denied.

¹ The City has been unable to find or produce any official document deeming the 311-CCC employees “at will” or unclassified. On the other hand:

there have been situations where the mayor personally has called in, or someone representing him. Like he had people calling in regularly. This is Mayor Chavez, by the way. . . he made it very clear when we opened this call center that if he ever got less than quality service, where he didn’t hear the smile in the voice, those people would be immediate terminations... And he came into the very first training class and told people that.

Deposition of Esther Tenenbaum, at pp. 68-69.

In this case the City actually has asserted grounds for its disciplinary actions, even though it continues to insist it needs no reason or justification to terminate 311 agents' and supervisors' employment.. In a case where Plaintiffs were allegedly fired due to a reduction in force, the Plaintiffs were held to "have sufficiently alleged that they were fired for 'cause' to afford them the protections of due process." *West v. Grand County*, 967 F.2d 362, 367 (10th Cir. 1992), citing, *Misek v. City of Chicago*, 783 F.2d 98 (7th Cir. 1986). Here there is no doubt that Plaintiffs were fired for some kind of "cause," even as the City continued to insist it needed none.

In *Casias v. City of Raton*, 738 F.2d 392, 394 (10th Cir. 1984), the Court stated that it "has recognized that under New Mexico law a constitutionally-protected property interest can arise despite the absence of a statute or formal contract." *Casias*, citing *Chavez v. City of Santa Fe Housing Authority*, 505 F.2d 282, 284 (10th Cir. 1979).

The City states that it attempts to keep its 311 employees in at-will status in order to allow "flexibility in wages and benefits by enabling it to provide wages, benefits, and incentives beyond or different from those applicable to classified City employees." However, that is far from the truth. The real reason for denying due process was stated by Ms. Tenenbaum:

- Q. Can you tell us what is different about 311 that the CCC -- that would suggest that that right to a hearing should not be given to the employees?
- A. Well, here's a very good example. Here is a call that was recorded, and not the first of -- not the only person where the service was below what we expect. It was disrespectful to this citizen. It is not the way we do business. If we were in a classified role, we would have had to have continued to

tolerate that behavior, which impacts the reputation of the City as well as of our center, until all the processes were completed.

When there is an infraction in an unclassified role, we can sit down and have a discussion and try and change that behavior immediately so that it doesn't continue to impact anybody until a hearing or processes take place.

Deposition of Esther Tenenbaum, at p.33.

Here, not only did Plaintiffs reasonably expect that they would only be disciplined for cause, but the City enacted and enforced a strict set of rules governing the workplace. Those rules relied for enforcement almost exclusively on the promise of disciplinary action for rules violations. The situation was further exacerbated by the strictness of the rules: ten minutes late constitutes a disciplinary infraction. The City Defendants contend that they needed no reason to terminate the 311-CCC employees, but at the same time they now offer their reasons for termination, including numerous alleged violations of the progressive discipline rules leading to termination.

Based on all the rules relating to conduct, performance, and the imposition of discipline both progressive and immediate, depending on the nature and severity of the alleged offenses, Plaintiffs had a legitimate and reasonable expectation that the City would apply its rules fairly and even-handedly. That meant, in this case, that Plaintiffs had a reasonable expectation of continued employment absent just cause for discipline. Plaintiffs' employment was terminated, contrary to their reasonable expectations, without either just cause or due process. Because there are disputed material facts concerning Plaintiffs' property interest in their employment as well as disputed facts concerning the presence or

absence of cause for terminations, the City's Motion for Summary Judgment on Plaintiffs contract and due process claims should be denied.

B. The Equal Protection Claim Will be Dismissed

Plaintiffs claimed violation of the constitutional right to equal protection of the law, having suffered disparate treatment both within the 311-CCC (between employees who were terminated and those who were similarly situated but who were not terminated) and outside, between similarly situated employees who were not deemed "unclassified." Plaintiffs are unable, however, to prove the necessary element of "discriminatory intent" and the existence of a possible "rational basis" for the non-classification may also be problematic. Accordingly, Plaintiffs will voluntarily withdraw, or agree to dismissal, of their equal protection claim.

C. Failure to Plead Section 1983

The City claims that a "fatal flaw" in Plaintiffs' pleading of Fourteenth Amendment violations is their failure to plead a violation of Section 1983. Plaintiffs agree that they cannot bring a cause of action directly under the Constitution, however "for individuals who have been deprived of federally protected rights" Section 1983 is "the exclusive federal remedy against persons acting under color of state law." City's Memo, at p. 13, citing *B.T. v. Davis*, 557 F. Supp. 2d 1262, 1273-74 (D.N.M. 2007).

The City fails to cite any authority for the proposition that Plaintiffs' failure to specifically claim relief under 42 U.S.C. Sec. 1983 renders their claim for "damages for the City's denial of their rights to due process and equal protection of laws" invalid.

Plaintiffs intended to assert claims for the City's denial of their due process rights in their public employment as evidenced by and resulting from their terminations as "at will" employees because their "services are no longer needed." Omission of the only possible statutory basis for those claims is at most a technical rather than a substantive flaw, one which could easily be repaired when the case is amended; the City suggests no authority holding a contrary view.

III. Wrongful Termination

According to the City, "Plaintiffs' wrongful termination claim fails because Plaintiffs were at all times at will employees with no contract of employment." (City's Memo at p. 10). This is the same contention the City raises in response to Plaintiffs' breach of contract and due process claims. The City states that there "is absolutely no evidence that any Plaintiff was ever told that he or she was 'classified' so it is unclear to what 'representations made by the City' Plaintiffs refer.

While it may be "unclear" to the City, Plaintiffs each state that:

When it was explained to me in training that we were 'unclassified' I understood that meant only that we could receive higher pay as unclassified employees than we could if we were classified, but that we received all other benefits and had all the rights of other City employees.

Clover Affidavit, at para. 4; See also, Mora Affidavit, at para. 4; Austin Affidavit, at para. 4, etc. Ms. Mora's Affidavit explains that at training "Michael Padilla said that the only difference between us and other City employees was that we would get more pay than we would if we were classified."

Remarkably, the City argues that Plaintiffs' claim of entitlement to fair treatment and continued employment "ignores the myriad misconduct and performance issues that Plaintiffs experienced during their employment." The City thus attempts to justify its application of the "at-will" employment doctrine by "convicting" Plaintiffs of the charges against them that were never stated or specified in the termination process. Plaintiffs' Affidavits and their deposition testimony easily refute most of the charges. Because there are disputed issues of material fact, summary judgment would be inappropriate on this issue as well as the contract and due process claims.

IV. FMLA

The City asks the Court to rule summarily against Plaintiffs because "Plaintiffs were given all leave to which they were entitled under the FMLA." (City's memo at p. 10). Of the nine Plaintiffs, six were on FMLA leave, injury leave, or workers' compensation leave at the time they were terminated.

Antoinette Gonzales had suffered a work-related injury for which she had two surgeries. She returned to work on August 18, 2008, but on September 12, 2008, she was informed that the City was "no longer in need of my services." At the time she was fired she had not exhausted her FMLA leave time. Gonzales Affidavit, at paras. 18, 19, and 21.

Caroll Austin was denied time off for gall bladder surgery, then leave time was approved, then rescinded, and finally Ms. Austin was advised that she had been terminated. At the time of her surgery Ms. Austin believed she was eligible for FMLA leave, but she was terminated before the question of eligibility could be decided. She was not

informed that the City was using up her FMLA leave time. Austin Affidavit, at paras. 5, 10, and 12.

Annette Mora had run out of leave time and was placed on physical layoff status. Several months later, she received another letter telling her that she had been placed in layoff status by mistake, and that her “services are no longer needed.” Mora Affidavit, at paras. 7 and 8.

Sara Clover had used up her FMLA time when she gave birth to her daughter. She was forced to return to work, but one day she felt ill and was told to go home. The next day she was called in and told that her “services are no longer needed.” She believes she was terminated because she used her FMLA leave. Clover Affidavit, at paras. 6 and 12-14.

James Pescetti had used most of his FMLA leave due to serious illness and death in his family. As of May 16, 2008, his FMLA leave time had all been used, but he was supposed to start a new year of approved FMLA leave on May 22, 2008. He was fired on May 16. Pescetti Affidavit, at paras. 8 and 11.

Yolanda Garcia suffers from rheumatoid arthritis and was approved for FMLA leave in October, 2006. In July, 2009, she had a mild stroke and was notified at home that her FMLA leave time would expire on July 18, 2009. She had previously sought, and over Ms. Tenenbaum’s objections, secured a part time position to accommodate her physical condition. In September, 2009, Ms. Tenenbaum called Ms. Garcia into her office and fired her. Garcia Affidavit, at paras. 11, 12, 14, and 15.

Factual issues in each case preclude summary judgment.

V. FLSA

The City contends that Plaintiff Antoinette Gonzales's claim of entitlement to overtime pay "fails, because Gonzales was exempt from the FLSA's overtime provisions under the executive exemption." (City's memo at p. 10). The City has the burden of proving the exemption. The City contends that Ms. Gonzales's work at the 311-CCC is such that she qualifies for the exemption.

To the contrary, Ms. Gonzales, who started as a Contact Agent II and was soon advanced to the supervisor's position, states that most of her work as a supervisor is just the same as her work was as an agent. She routinely spent "at least three-quarters" of her time answering telephones. Gonzales Affidavit, at para. 6. She also monitored agent calls for quality, advised and counseled the agents she supervised, and kept track of the agents' phone time, attendance, and statistics. *Id.*, at para. 7.

All hiring and firing was done by Esther Tenenbaum, generally without consultation with a supervisor. *Id.*, at para. 9. Ms. Gonzales estimates that she worked 55 to 65 hours a week, and never received any overtime pay, management leave, or compensatory time off. She estimates that in the three years before filing this lawsuit she worked at least 3,000 hours of overtime.

Ms. Gonzales had no discretion or say in formulating any rules or guidelines. Her supervisory duties in addition to answering citizen phone calls included monitoring calls and enforcing rules. As a 311-CCC supervisor, she almost never exercised any judgment

or discretion about any important matter. Supervisors were not given authority to approve or authorize overtime work or absences from work, and Ms. Gonzales had no role in hiring or firing employees, or even in recommending their hiring or firing. *Id.*, at para.

The employer bears the burden of showing "the employee fits 'plainly and unmistakably within the exemption's terms'--under both the 'salary' test and the 'duties' test." *Aaron v. City of Wichita, Kan.*, 54 F.3d 652, 657 (10th Cir.) (quoting *Reich v. State of Wyoming*, 993 F.2d 739, 741 (10th Cir.1993)). Narrowly construing the exemption furthers the congressional goal of providing broad federal employment protection "to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959).

Whether an employee's primary duty is management is a fact-based inquiry guided in part by the amount of time spent on management duties. 29 C.F.R. Sec. 541.103; Primary duty usually means "the major part, or over 50 percent, of the employee's time." 29 C.F.R. Sec. 541.103. However, "[t]ime alone ... is not the sole test." *Id.* When an employee spends less than 50 percent of his time on management, four other factors should be considered: " the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor." *Id.*; accord *City of Sapulpa*, 30 F.3d at 1287.

Here, the City claims that Ms. Gonzales is exempt, but her description of her work strongly suggests that she is not an exempt employee. This, again, is a legal conclusion

that is properly based on a fact-finder's determination of the contested facts and the correct conclusion to be drawn from the facts. Given the factual disputes about the duties and use of independent judgment and discretion, summary judgment on this issue would be incorrect.

VI. Declaratory Judgment

The City's argument concerning Plaintiff's entitlement to a declaratory judgment is circular:

. . . to the extent they allege they were wrongly designated as unclassified employees, this argument fails for the same reasons as their due process and equal protection claims fail, namely that Plaintiffs were at all times unclassified employees with no expectation of continued employment.

(City's Memo at p. 10). Plaintiffs sought a declaratory judgment on the over-riding issue in this case: whether Plaintiffs have a reasonable expectation of continued employment such that they have a property interest in their employment. While issuance of a declaratory judgment is discretionary, the Court is free to issue, or decline to issue, a declaratory judgment, depending on what the Court deems appropriate.

VII. CONCLUSION

Summary judgment is a "drastic remedy" that must be "awarded with care." *Roemer v. Public Service Co. of Colorado*, 911 F. Supp. 464, 466 (D. Colo. 1996) (citing *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988)). Because they were told that their "unclassified" status meant no more or less than that they would receive higher wages and couldn't join a union, Plaintiffs reasonably expected the City to act fairly and consistently with the City's

employment principles, which demand “just cause” for disciplinary actions and provide the right to due process to permanent City employees.

For all the reasons set out herein the Court is requested to deny the City’s Motion for Summary Judgment.

Respectfully submitted,

s/ Paul Livingston

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I hereby certify that I filed the foregoing electronically under the Court’s CM/ECF system, which generates copies sent to all counsel of record this 7th day of September, 2010.

s/ Paul Livingston

Paul Livingston