

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

PAUL SALAZAR,

Plaintiff,

vs.

No. CIV-10-00645 RLP/LGF

CITY OF ALBUQUERQUE,
MARTIN CHAVEZ, former Mayor,
RICHARD BERRY, Mayor, GREG
PAYNE, former Transit Dept. Director,

Defendants.

**DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S COMPLAINT
FOR VIOLATION OF STATUTORY, CONTRACTUAL,
AND CONSTITUTIONAL RIGHTS**

Defendants City of Albuquerque and Mayor Richard Berry, through their undersigned attorneys, and pursuant to Fed.R.Civ.P. 12(b)(6), respectfully submit the following memorandum of law in support of their Motion to Dismiss Plaintiff's Complaint. For the reasons that follow, the Court should dismiss Plaintiff's Complaint as to all Defendants, though the City can ascertain that only Mayor Berry and the City have been served to date.

A. Plaintiff has failed to state a claim for a violation of due process.

Accepting as true the allegations in Plaintiff's Complaint for purposes of a motion to dismiss, Plaintiff has not stated an actionable claim for violation of procedural due process under federal law. In paragraph 35 of his Complaint, he states:

The Defendants' disregard and derogation of the City's merit system, including its [hearing officer and Personnel Board], and its appeals to the district court, denied Plaintiff's due process right to a meaningful hearing and the benefit of prevailing on the disciplinary charges against him

He cannot be asserting that he was denied due process in the City's administrative process because he prevailed at every step there, even according to his own account. *Complaint, para. 14, 20, and 21.* The City's Personnel Hearing Officer and Personnel Board sided with him on every occasion. Nor were any errors in the initial predetermination hearing a violation of due process for purposes of federal law, because the subsequent hearings provided adequate post-deprivation remedies, and Plaintiff indeed prevailed there.

Under Plaintiff's theory, then, only the City's decision to appeal the adverse rulings violated his procedural due process rights. The City, however, like any other aggrieved party to an administrative proceeding, has a statutory right to appeal to a state district court under NMSA 1978, § 39-3-1.1, and pursuant to the procedures set forth in Rule 1-074 NMRA. Said another way, the City had a legal right to appeal the decisions of the Personnel Board. Plaintiff's theory distilled to its essence yields the proposition that a governmental entity commits a due process violation by exercising its right to appeal rulings that are adverse to it. Consequently, the only way to avoid such a claim would be for the government entity to acquiesce at every turn. The City is aware of no rule of law to support Plaintiff's position, and ordinary logic refutes it.

The City's appeals of the Personnel Board's decisions to state court did not, and could not, violate Plaintiff's procedural due process rights. The Court should dismiss this claim.

B. Plaintiff cannot state a claim for violation of substantive due process where his claim is both unripe due to the pending state court matter on his termination, and will be mooted by the City's reinstatement of his employment.

As of the filing of the present Motion, the City's appeal of the latest Personnel Board ruling is pending in the Second Judicial District Court in CV 2009-10465. *Complaint, para. 22.* The state court has yet to rule on whether the City properly terminated Plaintiff, making his liberty interest claims here unripe. In other words, the outcome of the state court case, either for

or against the City, will have an effect on whether Plaintiff's claims in federal court can stand. See Strickland v. City of Albuquerque, 103 F.3d 1408 (10th Cir. 1997); see also New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995) (the doctrine of ripeness is intended to forestall judicial determinations until the controversy is presented in clean-cut form) (citations and internal quotations omitted). With the pending state court case, which will determine the appropriateness of Plaintiff's termination, the present case in this Court is not ripe.

Moreover, the City is in the process of reinstating Plaintiff and dismissing that appeal in state court, after which Plaintiff's liberty interest claim will become moot. To establish a claim for violation of a liberty interest under substantive due process, a plaintiff must meet all four of the following elements of the test:

First, to be actionable, the statements must impugn the good name, reputation, honor, or integrity of the employee. Second, the statements must be false. Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. And fourth, the statements must be published.

Renaud v. Wyoming Dep't of Family Services, 203 F.3d 723, 727 (10th Cir. 2000) (quoting Workman v. Jordan, 32 F.3d 475, 481 (10th Cir. 1994)). See also Melton v. City of Oklahoma, 928 F.3d 920, 926-27 (10th Cir. 1991)(en banc)(holding that all elements must be satisfied and are not disjunctive).

Plaintiff cannot satisfy the third element. In the present case, the City is contemporaneously with this Motion withdrawing its appeal in state district court, and acting to reinstate Plaintiff. It is also moving in state court to provide him a name-clearing hearing. Accordingly, Plaintiff will no longer be "terminated" or "foreclosed from other employment opportunities." Plaintiff's claim will therefore be moot. Under the constitutional doctrine of mootness, an actual case or controversy must be extant at all stages of review. Rio Grande

Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1121 (10th Cir. 2010). And even if a claim is not constitutionally moot, a federal court may stay its hand in the interest of comity with coordinate branches of government for prudential reasons. Id. (citations omitted). The other branch of government in this case is the state court where the administrative appeal is being resolved. The Court should therefore dismiss this claim as well.

C. The New Mexico Tort Claims Act has not waived immunity for claims for defamation, and this claim therefore fails.

The New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, et seq., has not waived immunity for claims of defamation against government officials acting within the scope of their employment. Vigil v. State Auditor's Office, 138 N.M. 63, 116 P.2d 854 (Ct. App. 2005). Statements made in the scope of employment are clearly immune under New Mexico statutory and common law. Further, the statement attributed to Defendant Greg Payne at paragraph 25 of the Complaint is not defamatory. Plaintiff alleges that Mr. Payne made the following statement:

I think the personnel board is absolutely crazy to say we need to bring this individual back, put him behind the wheel of a bus and give him \$100,000. That's nuts.... If Mayor Berry was forced to re-hire him, he should have given him a position where he's not around children.

This statement asserts no facts of and concerning Plaintiff that can injure him, see Clough v. Adventist Health Systems, Inc., 108 N.M. 801, 780 P.2d 687 (N.M. 1989), and the statement is directed at the Personnel Board and the Mayor, criticizing their decisions.

The Defamation count must be dismissed based on governmental immunity or lack of a defamatory statement.

D. The Tort Claims Act does not waive immunity for abuse of process, and Plaintiff otherwise fails to state a claim for it.

The New Mexico Tort Claims Act has not waived immunity for abuse of process. NMSA 1978, § 41-4-4(A) (noting waivers of immunity in §§41-1-5 through -12). The closest

thing to such a waiver is in §41-4-12, and only concerns law enforcement officers acting within the scope of their duties. The Complaint neither alleges and the alleged facts do not otherwise indicate that any of the named defendants were law enforcement officers acting as such for purposes of any claims in this lawsuit.

Moreover, appeals taken as of right are not an abuse of process in any sense, and the City is aware of no New Mexico case holding they are. See Durham v. Guest, 145 N.M. 694, 701, 204 P.3d 19, 26 (N.M. 2009) (citing Devaney v. Thriftway Marketing, 124 N.M. 512, 522, 953 P.2d 277, 287 (N.M. 1997) with lists of examples of the abuse of process, and noting the tort is construed narrowly to protect the right of access to the courts). In any event, Plaintiff has failed to state a claim for malicious abuse of process against the defendants, and the Court should dismiss this claim.

E. Appeals from the Personnel Board, and public statements by Mayors Chavez and Berry concerning Plaintiff, do not equate to a breach of employment contract or of good faith and fair dealing.

Plaintiff's claim for breach of employment contract and duty of good faith and fair dealing appear to be based on two things. First, he implies the City was required to automatically comply with the Personnel Board's final orders once they were rendered, *Complaint*, para. 56. Second, he alleges "invidious statements and comments defaming" him by both mayors. *Id.* at para. 57.

As to the first claim, the City has already shown above in Section A that it had a statutory, legal right to appeal the Personnel Board's decisions just like any other party. And Plaintiff's allegation that the City had no choice but to comply with the decision, as if that right to appeal did not exist, is wrong as a matter of law for those same reasons here.

In the same way, the statements made by the former and current mayors did not breach any employment contract. Nothing in the City's Charter or Merit System Ordinance prevents the mayor, or any other elected official, from commenting publicly on matters of public interest. That includes the commenting on the history and employment status of the City's employees, and taking a position on litigation of cases, and certainly on high profile ones such as this, which Plaintiff's own Complaint acknowledges it was.

The City Charter states as follows:

Except to the extent necessary for the administration of the merit system, the Mayor is prohibited from becoming involved in the hiring, promotion, demotion, or discharge of any city employee except those personnel hired for unclassified positions directly responsible to the Mayor.

Albuquerque City Charter, Art. X, § 2(b). *Complaint*, para. 5. Public statements made on cases of public interest are not involvement in the hiring or discharge process. More to the point, the comments were made here after the discharge had already occurred, and do not demonstrate actual involvement in the process. *Complaint*, para. 13. For the same reason, taking a position on litigation of the claims cannot be either, nor can the mayor's expressed agreement with his director's decision. Again, nothing in the Charter or Merit System Ordinance prevents the mayor from making public statements about subjects of public interest concerning city employees, or from taking a position on litigation of their cases. The Court should therefore dismiss this claim as well.

F. Plaintiff's claim for punitive damages fails because the underlying claims fail, or are otherwise barred by state law.

Plaintiff cannot claim punitive damages for Counts 1, 2, and 5 because those counts fail to state a claim and are alternatively unripe, or moot with his reinstatement. Because Counts 3 and 4 do not state claims for which immunity is waived under the Tort Claims Act, they could

not support punitive damages, which in any event are not available under the Act. NMSA 1978, § 41-4-19(B) (excluding exemplary damages and pre-judgment interest).

G. Conclusion.

For the foregoing reasons, the City respectfully asks the Court to dismiss Plaintiff's Complaint in its entirety with prejudice, and for such other and further relief as the Court deems just and proper.

Respectfully submitted:

CITY OF ALBUQUERQUE

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I hereby certify that a true copy of the foregoing was served via Notice of Electronic filing to all counsel of record on this 10th day of August, 2010.

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