

County Commissioners and Personnel Matters

BIPO

December 2024



NEW MEXICO
COUNTIES

33 STRONG

- Historically, New Mexico has rated as high as No. 1 in “employee lawsuit risk” See NM No. 1 in employee suits, *Albuquerque Journal*, 11-16, 2015
- NM employers had a 50% higher chance of employment litigation than the national average. 2017 HISCOX Guide to Employee Lawsuits.



Employment Issues



Are you a policy maker or a supervisor?

Why does it matter?

Legislative Immunity from suit

- Government officials are immune for all actions taken "in the sphere of legitimate legislative activity" (*Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998)).
- A legislative act generally involves policymaking rather than mere administrative application of existing policies.



Legislative Immunity from suit



- A decision is more likely administrative if the facts used to decide are *specific* rather than *general*.
- If the decision affects specific individuals rather than the general population, it is more apt to be administrative in nature. (*Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995)(voting to replace white clerk with black clerk).

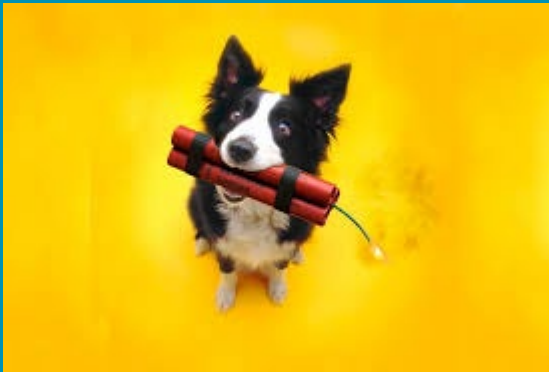
Legislative Immunity from suit



Potential or alleged motives are not relevant when determining whether an act is legislative (*State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 90 (2d Cir. 2007)).

Motives of supervisors are always relevant in employment suits.

**No good deed
goes
unpunished is
often true in
employment
matters**



Despite your good intentions, if you involve yourself in individual personnel matters you will taint the process and create potential civil rights claims against you and your county.

Policy Maker vs Supervisor

Passing an ordinance = policy making =
legislative immunity=



Policy Maker vs Supervisor

Passing a note to County Manager
requesting an employee be disciplined
=supervisor=no legislative immunity =



Policy Maker VS Supervisor



Suggesting to the County Manager your **lesser qualified brother-in-law** be hired=supervisor=no legislative immunity=



Policy Maker vs Supervisor

Asking the County Manager to adopt an anti-bullying policy = policy maker = legislative immunity =



Policy Maker vs Supervisor

Asking the County Manager to fire a
bully=supervisor= no legislative immunity =



Legislative
Immunity =
Happiness



Political Patronage



Political patronage is the practice whereby “public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party [or candidate].” **Elrod v. Burns*, 427 U.S. 347 (1976)

“First Amendment prevents the government, except in the most **compelling circumstances**, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990)

- These positions are usually high-level policymaking positions or positions that require confidential relationships.
- Political appointments.

Merit Ordinances = Civil Service Protections



- In general, merit ordinances/systems provide:
 - That personnel actions will be objective, fair, and impartial and based upon the qualifications and performance, **not on political or other improper considerations.**
 - **Delegate authority** to the county manager to administer the county's personnel policies.
 - Create a personnel department/HR or designates a position to assist the county manager in personnel admin.
 - **Require “just cause”** for disciplinary actions after a probationary period is completed.

Merit/Personnel Ordinance, or Ethic Ordinance



Many counties have passed specific ordinance restricting a commissioner involvement in personnel matters:

“Examples of acts or actions that violate public trust may include . . . attempts by Commissioners to direct the work of County employees or to influence the outcome of a personnel matter.” Dona Ana County Code of Conduct § 14-1.

Delegation of Authority Provides Protection



The delegation of authority to a county manager and the creation of human resources department will only protect commissioners/county from liability to the extent they allow HR and the county manager to operate professionally and independently and do not personally involve themselves in personnel matters.

Staying within your “Scope of Duties” Provides Protection



Unless insurance provides a defense, a governmental entity must provide a defense for any public employee (includes elected officials) when sued for:

(1) any alleged tort committed while **acting within the scope of their duty**; or

(2) any constitutional or statutory violations (state & federal) when alleged to have been committed while **acting within the scope of their duty**. NMSA § 41-4-4(B).

Likewise, a governmental entity **must pay any settlement or judgment** entered against a public employee for 1 & 2 above if the public employee was acting **within the scope of their duty**. NMSA § 41-4-4(C).

Scope of Duties



“Scope of duty” means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance.’ NMSA § 41-4-3.

If you intervene in a personnel matters in violation of county ordinance, are you acting within the scope of your duties?

Personal liability



A governmental entity may recover from a public employee the defense costs, settlement agreed to by the public employee or the final judgment “if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.” NMSA § 41-4-4.

Also, usually no coverage for fraudulent, criminal, or intentional malicious acts.

Liability NMCIA Pool Coverage



- Employment lawsuits present counties with out-of-pocket costs even when the insurance carrier or Pool defends the suit.
- This is because counties may be responsible for front pay, back pay, or incidents of compensation or benefits due to a successful plaintiff, and such damages are not covered.

Private vs Public employment



Private Employment

- Usually **at-will employees**—can be fired for any reason provided it is not an **unlawful reason**.

Public Employment—Civil Servants-Merit Protections

- Have a property right in their employment
- Property right is protected by the US Constitution, and it cannot be deprived without providing due process.
- Must have “just cause” to terminate.

What is an unlawful reason for terminating an at-will employee?




- A termination which violates any of the county, state, or federal employment laws, including the state and federal constitutions. For example:
 - Section 1983
 - Title VII, including Pregnancy Discrimination Act
 - ADA (American with Disabilities Act)
 - ADEA (Age Discrimination in Employment Act)
 - GINA (Genetic Information Nondiscrimination Act)
 - USERRA (Uniform Services Employment and Reemployment Rights Act)
 - Section 1983 of the Civil Rights Act of 1866
 - NMHRA (New Mexico Human Rights Act)
 - FMLA
 - PWFA- (Pregnant Workers Fairness Act)
 - WCA (Workers' Compensation Act)
 - FLSA (Fair Labor Standards Act)
 - NMWPA (Whistleblower Protection Act)
 - NMOSHA
 - COBRA (Consolidated Omnibus Budget Reconciliation Act)
 - HIPPA (Health Insurance Portability and Accountability Act)
 - EPA (Equal Pay Act)
 - Fair Pay for Women Act (NMSA 1978 § 28-23-1)

Exceptions to at-will employment

- **public policy exceptions**—termination because an employee refused to break the law or performed an act that public policy has authorized or would encourage. *Chavez v. Manville Prod. Corp.*, 1989-NMSC-050, ¶ 16.
- **implied contracts exceptions**—

At-Will County Employees

- Probationary employees
- Positions designated by the BOCC as exempt from the protections provided by the merit ordinance.
- The designation must occur when the position is vacant or the incumbent consents to the change and is provided with consideration for giving up the property right in the employment.



POP

QUIZ!

What should you do?



Your brother works for the county road department. He injured his back while hunting last winter and has been on light duty. Now he tells you that his supervisor is insisting that he take on additional duties that require him to lift...

What should you do?



Discrimination cases now cost employers over $\frac{1}{2}$ a billion dollars to resolve each year. Most involve sexual harassment. You suspect the county manager is making unwanted sexual advances...

What should you do?



Your county is having trouble finding a good person to run the senior center program. You have a good friend who would be perfect for the job...

No Harm No Foul ????



- You ask the county manager to hire your close friend as the Detention Center Administrator because the current one is bad. The county manager refuses.

**No Harm No
Foul ????**



COUNT 1

VIOLATION OF THE WHISTLEBLOWER PROTECTION ACT

20. Commissioners _____, _____, and _____, in their official capacity as public employers of Plaintiff engaged in unlawful or improper acts by attempting to circumvent the legal hiring process and place Mr. X in the Detention Facility Administrator position, within the meaning of the WPA § 10-16C-2(E).

21. Plaintiff's communications to Commissioners _____, _____, and _____ about his opposition to circumventing the legal hiring process for the Detention Facility Administrator position constituted good faith disclosures of unlawful or improper acts within the meaning of the WPA §10-16C-3(A).

No Harm No Foul ????



22. Plaintiff objected and refused to participate in the attempts to circumvent the legal hiring process for the Detention Facility Administrator position within the meaning of the WPA §1 0-1 6C-3(C).

23. Plaintiff's termination by Defendant on or about May 25, 2022 constituted retaliation in violation of WPA.

24. As a result of Defendant's violation of the WPA, Plaintiff has suffered actual damages in the form of lost past and future wages, and special damages.

True or False?

One of a commissioner's responsibilities is to stick up for employees who are being unjustly disciplined?

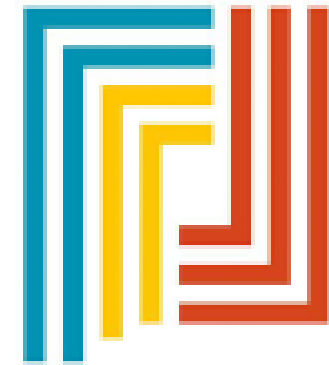
True or False?



A commissioner should direct the termination of an employee who is not qualified for their job.

Thank you!

Progress happens
when all 33 come
together.



**NEW MEXICO
COUNTIES**

33 STRONG