

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

KAUFMAN FIRE PROTECTION SERVICES, INC., DON
KAUFMAN, THE ASSOCIATION OF COMMERCE AND
INDUSTRY, NAIOP, AND THE NEW MEXICO
RESTAURANT ASSOCIATION,

Plaintiffs,

D-202-CV-2017-02314

v.

THE CITY OF ALBUQUERQUE, THE CITY COUNCIL
OF THE CITY OF ALBUQUERQUE, and NATALIE
HOWARD, in her capacity as CITY CLERK,

Defendants,

and

ORGANIZERS IN THE LAND OF ENCHANTMENT AND
EL CENTRO DE IGUALDAD Y DERECHOS, New Mexico
membership-based organizations representing workers
who lack earned sick leave, OLE EDUCATION FUND AND REBECCA
GLENN, proponents of the Healthy Workforce Ordinance,

Intervenor-Defendants.

**MEMORANDUM OPINION AND ORDER GRANTING
INTERVENOR-DEFENDANTS' AMENDED MOTION TO DISMISS
CLAIMS THAT SEEK TO KEEP THE HEALTHY WORKFORCE ORDINANCE
OFF THE 2017 BALLOT (COUNTS I, III, IV, VI)**

Intervenor-Defendants have filed an Amended Motion to Dismiss Claims that Seek to Keep the Healthy Workforce Ordinance (“HWO”) Off the 2017 Ballot (Counts I, III, IV, VI) as pleaded in Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief and Application for Preliminary Injunction (“Complaint”), filed May 4, 2017, against Defendants City of Albuquerque, the City Council of the City of Albuquerque, and Natalie Howard, in her

capacity as City Clerk (collectively “City”). The Court has reviewed the relevant pleadings and law cited therein. The Court **GRANTS** the Motion.

I. DISCUSSION

Intervenor-Defendants move this Court to dismiss Counts I, III, IV, and VI of Plaintiffs’ Complaint. Plaintiffs’ Complaint generally seeks the invalidation of the HWO for being in violation of the New Mexico Constitution. [Complaint ¶ 2] Count I seeks a declaratory judgment that the HWO constitutes "logrolling" in violation of Article IV, Section 16 of the New Mexico Constitution. [Id. ¶¶ 14-29, p.27] Count III seeks a declaratory judgment that the HWO is void because it exceeds the powers granted to a home rule municipality in violation of New Mexico Constitution Article X, Section 6(D). [Id. ¶¶ 43-51] Count IV contends that enactment of the HWO by voter initiative violates the New Mexico Constitution, and Count VI asserts that the HWO exceeds the City’s home rule powers and the territorial reach of the City. [Id. ¶¶ 52-58, 65-69] Plaintiffs also seek an injunction enjoining further implementation and enforcement of the HWO. [Id. ¶¶ 70-71, 76-79]

A. Dismissal of Count I is proper as Article IV, Section 16 of the New Mexico Constitution does not apply to municipal ordinances.

Intervenor-Defendants move to dismiss Count I of Plaintiffs' Complaint for failure to state a claim. See Rule 1-012(B)(6) NMRA.

A motion to dismiss tests the legal sufficiency of the complaint. In considering a motion to dismiss for failure to state a claim upon which relief can be granted, we must accept as true all well-pleaded facts and question only whether the plaintiff might prevail under any state of facts provable under the claim.

N.M. Life Ins. Guar. Ass’n v. Quinn & Co., 1991-NMSC-036, ¶ 5, 111 N.M. 750, 809 P.2d 1278. Count I alleges that the HWO violates the constitutional prohibition against "logrolling," or the single subject rule, contained in Article IV, Section 16 of the New Mexico Constitution.

Intervenor-Defendants assert, inter alia, that the New Mexico Supreme Court has held that said prohibition does not apply to municipal ordinances, such as the HWO, and thus dismissal is appropriate. [Motion 6-8] The Court agrees with Intervenor-Defendants.

Article IV, Section 16 of the New Mexico Constitution states in pertinent part: “The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws.” In State ex rel. Ackerman v. City of Carlsbad, 1935-NMSC-053, ¶ 24, 39 N.M. 352, 47 P.2d 865, the Supreme Court considered whether Article IV, Section 16 of the state Constitution applied to an ordinance and its title. The Court stated: “It is not our understanding, however, that N.M. Const. art. 4, § 16, is applicable to ordinances, nor do we know of any legal requirement that an ordinance be entitled.” Id. Given that Plaintiffs offer no law to the contrary, the Court agrees with Intervenor-Defendants that Article IV, Section 16 does not apply to municipal ordinances and **GRANTS** their Motion as to Count I.

B. Dismissal of Count III is proper as it fails to state a claim that the City has exceeded the powers granted to home rule municipality in violation of New Mexico Constitution.

Count III of Plaintiffs’ Complaint seeks to void the HWO under Article X, Section 6(D) of the New Mexico Constitution because the powers granted to a home rule municipality “do[] not extend to . . . the power to modify state criminal statutes.” [Complaint ¶¶ 44-45]

45. [HWO] section 13-16-4 requires that an employer shall not report an employee or an employee’s family member to any law enforcement agency because the employee has exercised rights protected under this ordinance or has in good faith alleged violation of this ordinance, whether mistakenly or not. This is an amendment to a criminal statute by a civil ordinance and is the exercise of a power a home rule municipality has not been given.

Plaintiffs allege that the HWO has created an exception to NMSA 1978, Section 30-24-3 (1997) (“Bribery or intimidation of a witness; retaliation against a witness”) because an employer might

not report a crime because of the HWO and then potentially be charged as an accessory for failure to report that crime or an employee might intimidate the employer with potential HWO repercussions to keep the employer from reporting a crime. [Id. ¶¶ 46-48] Finally, Plaintiffs contend that the HWO provides for penalties greater than a petty misdemeanor as defined by Section 1-1-99 ROA 1994. [Id. ¶¶ 49-51]

Intervenor-Defendants ask this Court to dismiss Count III for lack of ripeness, for lack of standing, and for failing to state a claim as it does not infringe on any state statute. The Court agrees with Intervenor-Defendants that Count III fails to state a claim. For that reason, the Motion is **GRANTED**, and Court III is **DISMISSED**.

Article X, Section 6(D) states:

A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationship except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

Plaintiffs contend that the City has exceeded its municipal powers in Section 13-16-4 of the HWO by modifying certain criminal statutes:

EXERCISE OF RIGHTS PROTECTED; RETALIATION PROHIBITED. An employer shall not intimidate, retaliate, discipline, discharge, suspend, assign to less favorable duties, refuse to hire, reduce pay or hours, refuse to assign additional hours, report an employee or an employee's family member to any law enforcement agency, or take or threaten any adverse action whatsoever against an employee because the employee has exercised rights protected under this Ordinance or has in good faith alleged violations of this Ordinance whether mistakenly or not. There shall be a rebuttable presumption of a violation of this section whenever an employer takes any adverse action against a person who, within 90 days, exercised rights protected under this Ordinance or has in good faith alleged violations of this Ordinance, whether mistakenly or not. An employer shall not require an employee to find a replacement worker as a

condition of using paid sick time or count use of paid sick time in a way that will lead to any adverse employment action.

The Court is unpersuaded. Nothing in the plain and express language of Section 13-16-4 amends, changes, or otherwise modifies any criminal statute enacted by the Legislature. What the plain and express language does is prohibit an employer from, inter alia, intimidating, retaliating, or “report[ing] an employee or an employee’s family member to any law enforcement agency . . . because the employee has exercised rights protected under this Ordinance or has in good faith alleged violations of this Ordinance, whether mistakenly or not.” Id. It does not prohibit anyone from making a good faith report regarding criminal activity or from cooperating with a criminal investigation. Plaintiffs’ concerns regarding what may happen when an employer reports a crime or does not report a crime are purely speculative and unripe for any decision by this Court.

Plaintiffs in Count III also argue that the HWO provides for penalties greater than a petty misdemeanor as defined by Section 1-1-99 ROA 1994 in violation of the New Mexico Constitution. [Id.] Article X, Section 6(D) of the New Mexico Constitution states that “[a] municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power . . . to provide for a penalty greater than the penalty provided for a petty misdemeanor.” NMSA 1978, Section 31-19-1(B) (1984) contains the penalty or sentence for a petty misdemeanor: “[T]he judge shall sentence the person to be imprisoned in the county jail for a definite term not to exceed six months or to the payment of a fine of not more than five hundred dollars (\$500) or to both such imprisonment and fine in the discretion of the judge.” The City Code of Ordinances Section 1-1-99 then provides:

Any person who violates any provision of this code for which another penalty is not specifically provided shall, upon conviction, be subject to a fine not exceeding \$500 or by imprisonment not exceeding 90 days or both unless a different specific penalty is provided. Each separate violation shall constitute a separate offense and, upon conviction, each day of violation shall constitute a separate offense.

The Court agrees with Intervenor-Defendants that Plaintiffs' Count III fails to state a claim on this basis. Section 13-16-6 of the proposed HWO states in pertinent part:

Section 13-16-6 ENFORCEMENT. . . . The Department shall have the power to impose penalties payable to the city for violations of this article and to grant an employee(s) or former employee(s) all appropriate relief. . . . The Department or any person or any entity a member of which is aggrieved by a violation of this article may bring a civil action individually or as a class action under state law in a court of competent jurisdiction within four years from the date the alleged violation occurred. Upon prevailing, the plaintiff or plaintiffs shall recover all appropriate legal or equitable relief, the costs and expenses of suit and reasonable attorney's fees, and liquidated damages calculated at three times the value of the unpaid sick time accrued; and in the case of retaliation, the plaintiff shall recover actual damages, including but not limited to back pay, and shall have a right to reinstatement or other appropriate relief. Any employer found to be in violation of this article shall also be liable for a civil penalty of fifty dollars per week for each separate violation, not to exceed five hundred dollars per employee.

Plaintiffs are correct that Section 13-16-6 gives the City the power to impose penalties payable to the City. However, those penalties are limited to "fifty dollars per week for each separate violation, not to exceed five hundred dollars per employee." Id. Thus, on its face, the penalty is capped at \$500.00 which is the monetary cap for a petty misdemeanor and the monetary cap under Section 1-1-99 ROA. To the extent that the HWO permits the City or employee to bring a civil action to recover damages it cannot violate any constitutional prohibitions regarding criminal penalties as measured by the term petty misdemeanor. See, e.g., Denison v. Tocker, 1951-NMSC-022, ¶ 13, 55 N.M. 184, 229 P.2d 285 ("A civil action is for damages if it is brought for the compensation of the injured individual. It is for a penalty if it seeks to obtain a sum of money for the state, an entity which has not suffered direct injury by reason of any prohibited action. In order to obtain damages the loss must flow out of the wrong and be [its]

natural and proximate consequence. A penalty need have no causal connection with the wrong inflicted. In a penal statute the penalty is inflicted by a law for its violation.” (Internal quotation marks, quoted authority, and citations omitted.)). As the Court concludes that Count III fails to state a claim, the Court need not determine if Plaintiffs have standing to raise their contentions in Count III.

C. Dismissal of Count IV is appropriate as Plaintiffs fail to state a claim that the HWO as voter-initiated legislation is unconstitutional.

In Count IV, Plaintiffs ask this Court to issue a declaratory judgment that the City does not have the power to place voter-initiated voter referendums on any ballot. [Complaint p.27] Intervenor-Defendants assert that Plaintiffs’ claim is without legal basis and accordingly fails to state a claim. The Court **GRANTS** Intervenor-Defendants’ Motion as to Count IV.

The City is a home rule municipality that has adopted a charter. Article III, Section 3 of that Charter permits direct legislation by voter initiative and sets forth the requirements for such initiatives. Article X, Section 6(D) of the New Mexico Constitution states: “A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.” The purpose of Article X, Section 6 “is to provide maximum local self-government. A liberal construction shall be given to the powers of municipalities.” Article X, Section 6(E). The state Legislature thus has provided that “[t]he charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including the manner of appointment or election of its officers, the recall of the officers and the petition and referendum of any ordinance, resolution or action of the municipality.” NMSA 1978, Section 3-15-7 (1965). Intervenor-Defendants argue that both the Constitution and Section 3-15-7 allow voter-initiated legislation and dismissal of Count IV is proper. [Motion 9]

Plaintiffs rely on Article XIX, Section 3 of the New Mexico Constitution to argue that voter-initiated legislation is unconstitutional. That Section states: “If this constitution be in any way so amended as to allow laws to be enacted by direct vote of the electors the laws which may be so enacted shall be only such as might be enacted by the legislature under the provisions of this constitution.” Plaintiffs contend that the “City Charter is no substitute for an Amendment to the Constitution or for the lack of statutory authority.” [Response 4, 11 (“Article III, § 3 of the City Charter is not only inconsistent with the Constitution and prohibited by NMSA 1978, § 3-15-7, but it is also prohibited by Constitution Article XIX, § 3 which prohibits such laws unless allowed by an amendment to the Constitution of New Mexico.”)] The Court disagrees.

Article XIX, Section 3 does not expressly prohibit voter-initiated legislation at the municipal level. Article XIX of the New Mexico Constitution consists of sections addressing amendment of the Constitution. Adopted in 1911, Section 3 of that article only states if the Constitution is so amended “to allow laws to be enacted by direct vote of the electors the laws which may be so enacted shall be only such as might be enacted by the legislature under the provisions of this constitution.” Then, in 1965, the state Legislature enacted a statute allowing a “charter [to] provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including the manner of appointment or election of its officers, the recall of the officers and the petition and referendum of any ordinance, resolution or action of the municipality.” Contrary to Plaintiffs’ assertions, the Court does not read the language of this statute to limit the charter’s scope to “the manner of appointment or election of its officers, the recall of the officers and the petition and referendum of any ordinance, resolution or action of the municipality.” Rather, the only limitation is that the system of government “be deemed expedient and beneficial to the people.” The Court **GRANTS** the Motion.

D. The Court dismisses Count VI for failure to state a claim that the HWO exceeds the City’s home rule power and territorial reach.

In Count VI, Plaintiffs assert that the HWO is invalid because it exceeds the City’s home rule power and the territorial reach of the City because the HWO’s definitions of “employer” and “place of business” include in its scope employers outside the City and that “location of buyer” is too broad. Intervenor-Defendants ask the Court to dismiss Plaintiffs’ Count VI for failure to state a claim and lack of standing. Intervenor-Defendants contend that the HWO only applies to businesses that have a place of business within the municipal limits so Plaintiffs’ assertions that the HWO improperly extends beyond the municipality fails as a matter of law. The Court agrees with Intervenor-Defendants. As the Court determines that Count VI fails to state a claim as a matter of law, the Court need not determine whether Plaintiffs have properly pleaded standing.

The HWO defines “employer:” “An EMPLOYER is as defined in Section 13-12-2 of this Code or any nonprofit organization, partnership, association, corporation, or charitable trust with a physical premises within the City of Albuquerque. EMPLOYER shall not include the State of New Mexico or any employee thereof.” Section 13-16-2 (emphasis added). Section 13-12-2 of the Minimum Wage Ordinance defines “Employer” as:

Any person, partnership, association, corporation, business trust, legal representative, or any other entity, or group of persons or entities, including corporate officers or executives, who is required to have a business license or business registration from the City of Albuquerque and who directly or indirectly or through an agent or any other person including, but not limited to, through a subsidiary or through the services of a temporary services agency, a staffing agency, a building services contractor, or any similar entity, employs or exercises control over the wages, hours or working conditions of any employee.

Section 13-12-2 (emphasis added). Thus, for the HWO to apply to an “employer” that “employer” must be one with a “physical premises” in the City and/or “required to have a business license or business registration from the City.” Id.; Section 13-16-2. Section 13-1-5

states that “[all persons proposing to engage in business within the municipal limits of the city shall apply for and pay a Business Registration Fee for each outlet, branch, location, or Place of Business within the municipal limits of the city prior to engaging in business.]” (Emphasis added.) A “Place of Business” is:

The premises, whether it be a personal residence, main business location or any outlet, branch or other location thereof, temporary or otherwise, to which the public is expressly or impliedly invited for the purpose of transacting of business. In the event there is no such location, but the business is transacted at the location of the buyer, then the general sales area shall be considered a “Place of business”. Unless a construction contractor has at least one permanent location within the city, “Place of business” includes a construction site, located therein.

Section 13-1-2 (emphasis added). Read together the Court agrees with Intervenor-Defendants that the coverage of the HWO is confined to those “employers” with a “place of business” or physical premises within the municipal limits. Count VI fails to state a claim.

Plaintiffs do not respond to Intervenor-Defendants’ arguments requesting dismissal of Count VI in their Response. The Court **GRANTS** Intervenor-Defendants’ Motion and **DISMISSES** Count VI.

II. CONCLUSION

For the above-stated reasons, the Court **GRANTS** Intervenor-Defendants’ Motion to Dismiss Counts I, III, IV, and VI. Intervenor-Defendants also ask the Court to dismiss Plaintiffs’ request for a preliminary injunction enjoining the placement of the HWO on the ballot. As the Court dismisses all of Plaintiffs’ claims regarding the HWO, the Court **DISMISSES** as well Plaintiffs’ request for a preliminary injunction.

IT IS SO ORDERED.


C. SHANNON BACON
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was efiled and served to the following:

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