

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 low-income
workers, OLE EDUCATION FUND AND REBECCA
GLENN, proponents of the Albuquerque Minimum Wage
Ordinance,

Intervenor-Defendants.

**MEMORANDUM OPINION AND ORDER GRANTING
INTERVENOR-DEFENDANTS' AMENDED MOTION TO DISMISS
CLAIMS TO OVERTURN THE ALBUQUERQUE MINIMUM
WAGE ORDINANCE (COUNTS II, IV, AND V)**

Intervenor-Defendants have filed an Amended Motion to Dismiss Claims to Overturn the Albuquerque Minimum Wage Ordinance (“MWO”) (Counts II, IV, and V) 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 II, IV, and V of Plaintiffs’ Complaint for lack of jurisdiction based on untimeliness (Counts II, IV), failure to state a claim (Counts II, IV, and V), and lack of standing (Count V). Plaintiffs’ Complaint generally seeks “to have the 2012 amendments to the Albuquerque [MWO] declared unenforceable for having been placed on the ballot in violation of the New Mexico Constitution.” [Complaint ¶ 2] Count II of the Complaint asks the Court for a declaratory judgment to void the MWO as amended in 2012 as violative of the single subject rule of Article IV, Section 16 of the state’s Constitution. [*Id.* ¶ 42, p.27] Count IV asks for declaratory judgment that the MWO is void because no provision of the New Mexico Constitution or state statute authorizes enactment of ordinances by voter initiative in a home-rule, mayor-council form of government, and Count V seeks a declaratory judgment that the MWO “improperly expands the City’s Home Rule powers outside of its limits and beyond its own internal concerns, thereby rendering the ordinance invalid.” [*Id.* ¶¶ 58, 64(C), p.27] Plaintiffs also ask the Court for an injunction enjoining further implementation and enforcement of the MWO. [*Id.* ¶¶ 70-75]

A. The Court lacks jurisdiction to hear Counts II and IV as they are untimely pursuant to NMSA 1978, Section 3-8-63 (1999).

Intervenor-Defendants move this Court to dismiss Counts II and IV for lack of subject matter jurisdiction because they constitute untimely “election contests” under NMSA 1978, Section 3-8-63 (1999) of the Municipal Election Code. In its review of this Motion pursuant to Rule 1-012(B)(1) NMRA, the Court “accept[s] all facts alleged in the complaint as true and resolve[s] all doubt about the sufficiency of the complaint in favor of the plaintiffs’ right to

proceed.” Glaser v. Lebus, 2012-NMCA-028, ¶ 7, 274 P.3d 114. Whether Plaintiffs’ claims contained in Counts II and IV constitute an election contest presents a legal question for the Court’s consideration. See id.

Article II, Section 3(a) of the City Charter provides: “The Municipal Election Code, Chapter 3, Articles 8 and 9, NMSA 1978, . . . shall govern the conduct of all aspects of municipal elections, except where inconsistent with the terms of this Charter, in which event this Charter shall control.” Section 3-8-63(C) of the Municipal Election Code provides:

C. Any action to contest an election shall be commenced by the filing of a verified complaint of contest in the district court. Such complaint shall be filed no later than thirty days from issuance of the certificate of election to the successful candidate or thirty days after completion of canvassing for elections in which there are no candidates for municipal office. A copy of the petition shall be served on the municipal clerk, and the municipality shall be afforded an opportunity to intervene in the contest. The one instituting the action shall be known as the contestant and the one against whom the action is instituted shall be known as the contestee. The rules of civil procedure shall apply to all actions commenced under the provisions of this section.

Intervenor-Defendants assert that Plaintiffs’ time to bring these contests expired in December 2012, thirty days after the “completion of canvassing.” [Motion 8] Plaintiffs do not contest Intervenor-Defendants’ calculations regarding when the various time limits ran. Rather, Plaintiffs contend that their claims as set forth in Counts II and IV are not “election contests” and Section 3-8-63 does not apply. The Court agrees with Intervenor-Defendants.

In New Mexico,

case law . . . define[s] an election contest as a challenge to the result of an election, as well as a challenge to the inherent validity of an election when the challenge would necessarily require overturning the results or effects of the election. An election contest can derive from a violation of a provision of the Election Code, from a violation of another statute governing the particular election at issue, or from the New Mexico Constitution.

Glaser, 2012-NMCA-028, ¶ 20 (citing, inter alia, Gunaji v. Macias, 2001-NMSC-028, ¶¶ 2, 26, 130 N.M. 734, 31 P.3d 1008 (noting that Election Code contest procedures apply to election contests alleging violation of Article II, Section 8 of the New Mexico Constitution)). Plaintiffs argue that these two counts present constitutional challenges and cannot constitute “election contests.” In Count II, Plaintiffs allege that MWO was enacted in violation of Article IV, Section 16 the New Mexico Constitution prohibiting “logrolling.” [Complaint ¶ 37] That section 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; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not expressed shall be void.

Plaintiffs assert that the MWO “constituted logrolling which is a form of voter fraud” and that “violation of the single subject rule of the New Mexico Constitution Article IV, Section 16 voids the [MWO] in its entirety.” [Id. ¶¶ 41-42] In Count IV, Plaintiffs allege that enactment of the MWO by voter initiative violates Article X, Section 6(D) of the New Mexico Constitution, which provides:

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 relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide 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.

The Court concludes that both Counts are election contests subject to the statutory thirty-day limitation. First, there cannot be any question that if this Court invalidated the MWO it would “necessarily require overturning the results or effects of the election.” Glaser, 2012-

NMCA-028, ¶ 20. Second, the Court of Appeals in Glaser expressly stated that election contests could include claims brought pursuant to the New Mexico Constitution. Id.

The Court notes that neither of Plaintiffs' claims in Counts II and IV contends that the substance of the MWO is unconstitutional as applied. Rather, Plaintiffs' position is that the form of the MWO and the process by which the MWO was put on the ballot was unconstitutional. As Plaintiffs filed their initial Complaint on April 3, 2017, and the statutory deadline expired in December 2012, Counts II and IV are untimely, which precludes the Court from hearing them. The Court **GRANTS** the Motion on Counts II and IV for lack of jurisdiction.

B. Count V fails to state a claim that the MWO exceeds the City's home rule power and territorial reach.

In Count V, Plaintiffs assert that the MWO is invalid because it exceeds the City's home rule power and territorial reach as the MWO requires an "employer" to pay minimum wage, the definition of "place of business" includes in its scope employers outside the City, and "location of buyer" is too broad. [Id. ¶¶ 60, 64(A) ("Employers doing business outside the City that have no place of business in the City [and have a New Mexico taxpayer identification number] would be subject to the [MWO] as to each employee involved in any product or service and possibly any activity related thereto that goes to the location of the buyer within the City.")] Plaintiffs contend that "[b]usinesses based throughout New Mexico and even in other states and countries come within the purview of the [MWO] if they have employees who work at least 2 hours in the City during the week." [Id. ¶ 64(C)] Intervenor-Defendants ask the Court to dismiss Plaintiffs' Count V for failure to state a claim and lack of standing. Intervenor-Defendants argue that the MWO only applies to businesses that have a place of business within the municipal limits so Plaintiffs' assertions that the MWO improperly extends beyond the municipality fail as a matter of law. The Court agrees with Intervenor-Defendants. As the Court determines that Count V

fails to state a claim as a matter of law, the Court need not determine whether Plaintiffs have properly pleaded standing.

The MWO provides that “[e]xcept as provided herein, employers shall pay all employees no less than the minimum wage for each hour worked within the municipal limits of the city.”

Section 13-12-3(A). “Employer” includes:

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 MWO to apply to an “employer” that “employer” must be one “required to have a business license or business registration from the City.” Id.

Section 13-1-5 of the Albuquerque Code of Ordinances 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.

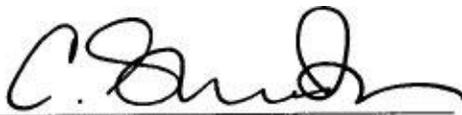
Section 13-1-2 (emphasis added). Read together the Court agrees with Intervenor-Defendants that the coverage of the MWO is confined to those “employers” with a “place of business” within the municipal limits.

The Court notes that Plaintiffs choose not to respond directly to Intervenor-Defendants’ arguments requesting dismissal of Count V in their Response, but rather they direct the Court to, and incorporate, their Response in Opposition to Intervenor’s Motion to Dismiss: Voter Initiative are Prohibited, the Sick Leave Ordinance Constitutes Logrolling, and Certain Provisions are Beyond the Power of a Home-Rule City. [Response 5] However, Plaintiffs fail to direct the Court to which pages of their twenty-seven (27) page Response are relevant specifically as to whether Count V fails to state a claim. The Court **GRANTS** Intervenor-Defendants’ Motion and **DISMISSES** Count V.

II. CONCLUSION

For the above-stated reasons, the Court **GRANTS** Intervenor-Defendants’ Motion to Dismiss Count II, Count IV as to the MWO, and Count V. Intervenor-Defendants also ask the Court to dismiss Plaintiffs’ request for a preliminary injunction enjoining the application of the MWO. As the Court dismisses all of Plaintiffs’ claims regarding the MWO, 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:

Gail Evans
Elizabeth Wagoner
Tim Davis
New Mexico Center on Law and Poverty
924 Park Avenue SW Suite C
Albuquerque, NM 87106

Christopher Tebo
Hessel E. Yntema IV
P.O. Box 2248
Albuquerque, NM 87103

Patrick Rogers
20 First Century Plaza Suite 725
Albuquerque, NM 87102

Heather Garcia
CV 2017-02314