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Employment Law Alert

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Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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Update on Reverse Discrimination Claims in New Mexico

The New Mexico Court of Appeals recently considered the legal standard applying to employee reverse-discrimination claims under the New Mexico Human Rights Act ("NMHRA"). Reverse discrimination occurs when a member of a majority group is discriminated against on the basis of a protected factor, such as race or gender. In *Garcia v. Hatch Valley Public Schools*, 2016-NMCA-034, *cert. granted*, 2016-NMCERT-___ (No. S-1-SC-35641, Apr. 14, 2016), the court held that non-Hispanic workers can bring reverse-discrimination claims under the NMHRA, and that such claims will be analyzed in nearly the same way as other NMHRA discrimination claims. This holding makes it significantly easier for New Mexico employees to succeed on reverse-discrimination claims under the NMHRA than under Title VII. As such, New Mexico employers could see an increase in reverse discrimination claims and should take care to document non-discriminatory reasons for all employment decisions, including decisions affecting traditional majority groups such as men and non-Hispanics.

Background

The NMHRA prohibits employers from discriminating against employees on the basis of protected categories such as race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition. *See* § 28-1-7 NMSA. New Mexico courts generally analyze NMHRA discrimination claims using the so-called "McDonnell Douglas burden-shifting test" that federal courts apply to Title VII claims. *Id.* This burden-shifting test creates a presumption of discrimination that allows employees to litigate discrimination claims without providing direct evidence of an employer's discriminatory intent. Under the McDonnell Douglas framework, an employee bears an initial burden of demonstrating a prima facie discrimination claim, which typically involves the following or similar elements: (1) the plaintiff is a member of a protected group, (2) he or she applied for and was qualified for a job, (3) he or she was rejected, and (4) after this rejection, the position remained open and the employer continued to seek applicants. *Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, ¶¶ 10-11, 125 N.M. 500. The employer may then provide a legitimate, non-discriminatory reason for its adverse employment action, which the employee may rebut with evidence that the employer's proffered reason was pretextual. *Id.*

The New Mexico Supreme Court has not considered whether the McDonnell Douglas test should apply to reverse-discrimination claims, and federal courts are split on this issue. Several courts, including the Tenth Circuit (which provides authority for federal claims filed in New Mexico), have applied a heightened burden to plaintiffs bringing reverse-discrimination claims. These courts take the position that the "inference of discrimination" created by the McDonnell Douglas test is intended to benefit minorities, and that the test's presumptions should not apply to majority plaintiffs in the same way. *Garcia*, 2016-NMCA-034, ¶ 26. Thus, these courts have modified the McDonnell Douglas test to require that plaintiffs claiming reverse discrimination "show background circumstances that support the suspicion that the defendant is the unusual employer who discriminates against the majority." *Id.* at ¶ 22. Under the Tenth Circuit's version of this test, "a majority plaintiff may state a prima facie case by either using the background circumstances test or by showing indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status as a member of the majority the challenged action would have favored the plaintiff." *Id.* at ¶ 24 (citing *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992)).

New Decision: *Garcia v. Hatch Valley Public Schools*

In *Garcia v. Hatch Valley Public Schools*, the New Mexico Court of Appeals rejected the Tenth Circuit's heightened "background circumstances" test and held that reverse-discrimination claims under the NMHRA should be evaluated using the standard McDonnell Douglas framework.

In that case, the plaintiff was employed as a bus driver by Hatch Valley Public Schools. After receiving mediocre reviews, the plaintiff learned that Hatch Valley would not renew her employment contract. *Garcia*, 2016-NMCA-034, ¶¶ 2-5. The plaintiff brought an NMHRA discrimination claim in which she alleged that her contract had not been

renewed because of her non-Hispanic national origin. *Id.* at ¶ 6.

The Court of Appeals first considered whether non-Hispanics can bring discrimination claims under the NMHRA. It held that non-Hispanics are a protected national origin group and, as such, can bring discrimination claims under the NMHRA. *See id.* at ¶¶ 10-15.

Next, the court considered as a matter of first impression the applicability of the McDonnell Douglas methodology to reverse-discrimination claims. *Id.* at ¶ 18. The Court of Appeals rejected the Tenth Circuit's heightened burden standard. The court explained that New Mexico courts have not interpreted the McDonnell Douglas test to require a plaintiff's membership in a minority class and that applying the test to both discrimination and reverse discrimination reflects the legislative goal of eliminating discrimination based on all racial, ethnic, or other distinctions. *See id.* at ¶¶ 41-43. The court then applied the McDonnell Douglas test to the plaintiff's reverse-discrimination claim and held that she had put forth sufficient evidence to survive the defendant's motion for summary judgment. *Id.* at ¶¶ 44-48.

Takeaway for Employers

Prior to *Garcia v. Hatch Valley Public Schools*, courts assumed that the Tenth Circuit's heightened "background circumstances" test would apply to reverse-discrimination claims under the NMHRA. Thus, employees who were members of a majority class could not bring discrimination claims under either Title VII or the NMHRA without (1) proving background circumstances suggesting that the defendant is the "unusual employer who discriminates against the majority," or (2) presenting indirect evidence that "but for the plaintiff's status as a member of the majority the challenged action would have favored the plaintiff." *See id* at ¶¶ 22, 24 (citing *Notari*, 971 F.2d at 589). This burden is significantly more difficult than the traditional McDonnell Douglas test, which does not require any showing of background circumstances suggesting discrimination.

Following *Garcia*, employees who are members of a majority class are more likely to bring reverse-discrimination claims, and it will be much more difficult for employers to prevail against such claims at the summary judgment stage. Thus, the holding in *Garcia* probably will lead to increased litigation and settlement costs associated with reverse-discrimination claims. The New Mexico Supreme Court has granted certiorari to review the Court of Appeals' decision in the coming months. In the meantime, employers should take care to document non-discriminatory reasons for *all* employment decisions. The mere fact that an employee is a member of a traditional majority group, such as men or non-Hispanics, no longer protects employers against discrimination claims in New Mexico. Instead, under *Garcia*, reverse-discrimination lawsuits brought by such majority-group plaintiffs may be just as likely to survive summary judgment as discrimination claims by members of traditional minority groups.