BEFORE THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of 10/32397

DENNIS W. MONTOYA, ESQ.

An Attorney Licensed to
Practice Law Before the Courts
of the State of New Mexico

PETITION FOR SUMMARY SUSPENSION AND MOTION FOR ORDER TO SHOW CAUSE

Comes now Petitioner Chief Disciplinary Counsel and, pursuant to NMRA 17-207 (A)(5) and upon the recommendation of the Disciplinary Board, respectfully requests this Court for its order directing Dennis W. Montoya, hereinafter Respondent, to appear before this Court and to show cause, if any he has, why he should not be summarily suspended from the practice of law pending the conclusion of a disciplinary proceeding currently before a hearing committee of the Disciplinary Board. As grounds for this request, Petitioner states:

1. On April 28, 2010, Deputy Disciplinary Counsel caused to be filed a Specification of Charges against Respondent alleging forty (40) separate violations of nineteen (19) Rules of Professional Conduct, including but not limited to allegations of conflicts of interest, misrepresentations to courts and to others, and failures to safeguard client funds. A copy of the

Specification of Charges is attached hereto as Exhibit A and by reference made a part hereof.

2. In addition, Respondent is currently under investigation for five additional instances of alleged misconduct. In March of 2010 the office of disciplinary counsel received information from various sources that Respondent had been sanctioned and/or had cases dismissed due to missed deadlines and other conduct. After a review of the relevant court orders, Chief Disciplinary Counsel complaints were instituted in accordance with counsel's authority under NMRA 17-105(B).

3. These five investigations involve the following cases decided in the United State District Court for the District of New Mexico wherein various federal judges made the below-listed findings:

A) Sizemore v. New Mexico, Cause No. CV 04-272 JP/DJS, in which Judge James A. Parker entered an Order on June 6, 2007, assessing $6,448.50 in attorney fees against Respondent personally for needlessly prolonging litigation for two years after summary judgment was entered for the defendants. Copies of Judge Parker's Order and the related Chief Disciplinary Complaint under investigation are attached hereto as Exhibits B and C respectively and by reference made a part hereof.

B) Hernandez v. Potter, Cause No. CV 08-323 JCH/CEG, in which Judge Judith C. Herrera entered an Order on August 4, 2009, granting summary judgment to the Defendant on the basis that Respondent had misrepresented that Hernandez was within the age group protected by the ADEA even after he knew or discovered that she was not within the protected group and that he had misleadingly altered the deposition testimony of a defense witness. Copies of Judge Herrera's Order and the related Chief Disciplinary Complaint under investigation are attached hereto as Exhibits D and E respectively and by reference made a part hereof.

C) Boza v. Donley, Cause No. CV 08-00908 BB/LFG in which Judge Bruce Black entered a Memorandum Opinion on June 25, 2009, granting the Defendant's Motion to Dismiss on the basis that Respondent had not filed a timely appeal before the Merit Systems Protection Board (MSPB) of Boza's dismissal from employment by Kirtland Air Force base. The untimely filing resulted in the dismissal of Boza's appeal by the MSPB. That dismissal amounted to a failure by Boza to exhaust his administrative remedies; Boza was held "responsible for his counsel's errors that fall short of due diligence." Copies of Judge Black's Order and the related Chief Disciplinary Complaint under investigation are

attached hereto as Exhibits F and G respectively and by reference made a part hereof.

D) Hughes v. Martinez, et al, Cause No. CV 09-00104 WJ/WPL, in which Judge William "Chip" Johnson entered an order on April 3, 2009, remanding the case to the Superior Court of the State of Arizona in and for the County of Mariposa based upon the fact the Respondent (representing the Defendant) had improperly – and in violation of the plain language of federal removal statutes – removed the case to the United States District Court for the District of New Mexico. Judge Johnson also noted in his order that the arguments Respondent had asserted in opposition to the remand were devoid of merit and subsequently awarded the plaintiff fees and costs in the amount of $12,426.05 against Respondent personally as a sanction for his conduct. Copies of Judge Johnson's Order and the related Chief Disciplinary Complaint under investigation are attached hereto as Exhibits H and I respectively and by reference made a part hereof.

E) Garcia v. Vilsack, Cause No. CV 08-0406 BB/WPL, in which Judge Bruce Black entered an Order on June 23, 2009, dismissing the claim of Respondent's client Garcia that she had been improperly terminated from her position with the U.S. Forest Service and that the Merit Systems Protection Board (MSPB) had improperly upheld her termination. Garcia

had been advised by the MSPB of certain actions she could take and the time limits within which each action could be filed. Respondent and Garcia had elected to seek judicial review under Title VII of the Civil Rights Act of 1964, but Respondent had filed Garcia's claim twenty-nine (29) days after the expiration of the deadline for filing such a claim. Copies of Judge Black's Order and the Chief Disciplinary Counsel complaint under investigation are attached hereto as Exhibits J and K respectively and by reference made a part hereof.

4. In addition to the Chief Disciplinary Counsel complaints, there are four (4) more complaints under investigation that were filed with the Office of Disciplinary Counsel by other persons within the past few months alleging various acts of misconduct. The pertinent allegations of these complaints are as follows:

A) Two clients have complained that they had hired Respondent in July 2006 regarding a vehicle seizure; and he advised them that because neither of the co-owners had been indicted, they could bring a civil action against the United States government for forfeiture abuse. Respondent initiated a federal tort claim, and the United States made an offer of settlement that would have returned the motor vehicle. On the advice of Respondent, the clients rejected the settlement. In November

2008, one of the co-owners of the vehicle was indicted on charges of credit card fraud. Respondent had not pursued the claim in the almost two and one-half (2½) years between the date he was retained and the date of the indictment. Respondent has now withdrawn as counsel and advised his clients to retain the services of another attorney.

B) A health care provider has complained that Respondent settled the patient/client's case but failed to honor the letter of protection signed by the patient/client, incorrectly advising the provider that New Mexico law mandated that he deduct 1/3 of the amount of the patient/client's bill. The check for 2/3 of the amount of the patient/client's was dated one year prior to its being sent to the provider and thus was not negotiable. When the provider offered to settle his claim for the 2/3 plus an additional $400, Respondent sent him a check for the $400 but did not reissue the non-negotiable check. The provider ultimately had to retain the services of another attorney in order to collect his fee.

C) A state District Court judge and a probation officer have each filed complaints that at an April 21, 2010, hearing wherein Respondent's client was scheduled to admit to a probation violation and where there was an agreement as to sentencing, Respondent went on a tirade implying that if his client were a "white guy" the proceeding would not have

been brought by the Assistant District Attorney and the probation officer and insinuating that they were racists and against the Hispanic community. A transcript of this proceeding is attached hereto as Exhibit L and by reference made a part hereof.

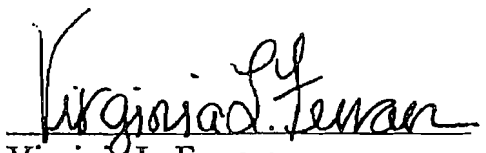
5. Nine serious complaints against one attorney in the space of two months is highly unusual and led disciplinary counsel to fear that the continued practice of law by Respondent could present a danger to the public and to the integrity of the legal system.

6. By reason of all of the foregoing, the Disciplinary Board is concerned that the continued practice of law by the Respondent pending the outcome of these proceedings and investigations would result in a substantial probability of harm, loss, or damage not only to the public but also to the judicial system.

WHEREFORE, it is respectfully requested that this Court issue its order directing Respondent to appear before it and to show cause, if any there be, why he should not be suspended from the practice of law pending the resolution of these proceedings and investigations.

Dated this 14th day of May, 2010

Respectfully submitted,



Virginia L. Ferrara
Chief Disciplinary Counsel
P.O. Box 1809
Albuquerque, NM 87103-1809
(505) 842-5781

VERIFICATION

STATE OF NEW MEXICO)
)ss
COUNTY OF BERNALILLO)

Virginia L. Ferrara, being first duly sworn, states that she is the Petitioner herein and that the contents hereof are true and correct to the best of her knowledge and belief.

Virginia L. Ferrara
Chief Disciplinary Counsel

Subscribed and sworn before me this 14th day of May. 2010.

Notary Public

My commission expires:

8/28/13

OFFICIAL SEAL
ERLINDA D. BRANCHAL
NOTARY PUBLIC-State of New Mexico
My Commission Expires 8/28/13

I hereby certify that a true copy of the foregoing petition was served upon Charles J. Vigil, attorney for Respondent, this 14th day of May, 2010.

Virginia L. Ferrara
Chief Disciplinary Counsel

BEFORE THE DISCIPLINARY BOARD OF
THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the Matter of

DENNIS W. MONTOYA, ESQ. Disciplinary No. 04-2010-594

An Attorney Licensed to
Practice Law Before the Courts
of the State of New Mexico

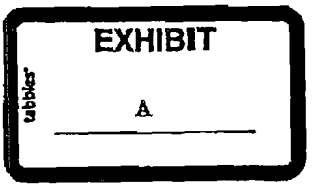
SPECIFICATION OF CHARGES

1. Rule 17-105 of the New Mexico Supreme Court Rules Governing Discipline empowers Counsel for the Disciplinary Board to file a specification of charges against an attorney with the Disciplinary Board.

2. Dennis W. Montoya (hereinafter "Respondent") is an attorney licensed by the Supreme Court of New Mexico.

3. The factual allegations set forth in the Specification of Charges state acts of professional misconduct by Respondent in violation of Rules 16-101, 16-104(B), 16-105(B), 16-105(C), 16-107(A), 16-107(B), 16-108(G), 16-114(B), 16-115(A), 16-115(B), 16-303(A)(1), 16-303(D), 16-401(A), 16-401(B), 16-503(B), 16-503(C), 16-505(A), 16-804(C), and 16-804(D) of the Rules of Professional Conduct.

4. Pursuant to Rule 17-309 of the Supreme Court Rules Governing Discipline, cause exists to conduct a hearing on the following charges so that the Disciplinary Board and the Supreme Court may determine whether further action is appropriate.



BACKGROUND

5. Cody Utley ("Utley") and Tresa Kosec ("Kosec") met in Utah in the fall of 1996 and began living together in November of 1996. Kosec had a daughter, Brionna Kosec ("Brionna") from a previous relationship. Utley did not adopt Brionna.

6. In 1998, Utley, Kosec and Brionna moved to Farmington, New Mexico. Utley and Kosec had a son together, Thomas Utley ("Thomas"), born in Farmington on August 29, 1999.

7. On November 5, 2002, Utley was killed in an automobile accident while driving from a site at which he was working for his employer, Key Energy, Inc. ("Key Energy") to a motel where he was staying. A passenger in the car, Craig Hopkins ("Hopkins") suffered serious injuries. The accident occurred when a tire on the vehicle Utley was driving failed.

8. Kosec and Utley never married. New Mexico does not recognize common law marriages, unless the marriage is established in compliance with the law of a state which does recognize common law marriages.

9. By statute, §30-1-4.5, Utah law permits the recognition of common law marriages "if a court or administrative order establishes that the marriage arises out of a contract between a man and a woman..." who meet the following five (5) criteria:

a. are of legal age and capable of giving consent;
b. are legally capable of entering a solemnized marriage under the provisions of this chapter;
c. have cohabited;

d. mutually assume marital rights, duties, and obligations; and
e. who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

The statute further provides that the determination must occur during the relationship or within one year following termination of the relationship.

10. Utley and Kosec did not utilize the Utah statutory procedure to establish the legality of their relationship before Utley was killed.

11. In March of 2003, Kosec retained Respondent and Ronald R. Adamson, Esq. ("Adamson") for representation on claims arising from the accident which killed Utley, including recovering life insurance proceeds, worker's compensation and a wrongful death suit against the seller and the manufacturer of the tire that failed.

12. Kosec was referred to Respondent by and through Adamson. Adamson acted as co-counsel with Respondent in representing Kosec on claims arising from Utley's death.

13. Neither Respondent nor Adamson utilized the Utah statutory procedure to obtain recognition of the marriage within one year of Utley's death.

14. On June 25, 2003, Kosec was charged with felony possession of drugs (methamphetamine). She was represented on these criminal charges by Adamson. Respondent was aware of the charges and of Kosec's use of illegal drugs.

15. In May of 2004, Kosec was incarcerated for two weeks for failure to appear at a hearing in the criminal case. In June or July of 2004, Kosec was again incarcerated for two weeks, this time for failing a court-ordered drug test.

16. Kosec completed inpatient drug rehabilitation in August of 2004 and was dismissed from probation in November of 2005.

17. During 2003 and 2004, Respondent collected life insurance proceeds and settled the worker's compensation case.

18. In December of 2005, Respondent and Adamson settled with one of the two defendants in the wrongful death suit. In none of these settlements did Respondent have a guardian appointed for Thomas or have any money set aside for Thomas' benefit. All of the monies recovered were paid directly to Kosec in her individual capacity.

19. On October 25, 2004, Respondent and Adamson, along with lawyers representing other plaintiffs asserting claims as a result of the accident which killed Utley and injured Hopkins, filed suit in the Fourth Judicial District against Bridgestone/Firestone, Inc ("Bridgestone") and Bumper to Bumper Auto Salvage ("Bumper to Bumper"). Bridgestone was the manufacturer of the tire that failed; Bumper to Bumper sold the tire.

20. In approximately September of 2007, Respondent and Adamson agreed to a settlement with Bridgestone, the remaining defendant in the wrongful death suit, for $550,000. In this settlement, for the first time, Respondent and Adamson sought the appointment of a guardian ad litem

("GAL") to protect the interests of the minor beneficiary, Thomas, and to obtain court approval of the settlement.

21. Although the wrongful death suit had been filed in the Fourth Judicial District, as a result of various judicial issues, the case was assigned to Hon. Linda M. Vanzi ("Judge Vanzi"), a district court judge in the Second Judicial District. Judge Vanzi granted the motion to have Kathleen M.V. Oakey, Esq. ("Oakey") appointed GAL.

22. As a result of Oakey's investigation, Judge Vanzi held a hearing on December 3, 2007 which resulted in the proceeds of the Bridgestone settlement being deposited into the court registry along with the balance of funds Respondent held in his trust account concerning the Utley matter. It also resulted in the court directing Oakey to pursue any claims she found to be viable on Thomas' behalf as a result of the actions and conduct of Respondent and Adamson in the handling of the claims arising from Utley's death.

23. On or about January 31, 2008, Judge Vanzi filed a disciplinary complaint concerning the actions and conduct of Respondent and Adamson in the handling of the claims arising from Utley's death.

COUNT I
(Fee Agreements)

24. The above and foregoing allegations are incorporated herein as if fully set forth.

25. On March 14, 2003, Kosec met with Brandon C. Cummings ("Cummings"), Respondent's contract paralegal, at Adamson's office in

Farmington. Respondent was not present at this meeting. At that meeting, Cummings had Kosec sign multiple fee agreements for representation on "**A PERSONAL INJURY CASE ARISING FROM THE FACT THAT THE DECEASED, Cody Utley, WAS THE VICTIM OF Wrongful Death/Motor Vehicle Accident on 11-06-2002.**" Kosec's signature on all of the fee agreements was dated March 14, 2003.

26. One of the fee agreements was signed by Kosec and by Cummings for Respondent; Cummings signature was dated March 14, 2003. This agreement provided for a 33 and 1/3% contingent fee, with a higher fee percentage only if the case went to trial or was appealed. This agreement also provided that Kosec would deposit $25,000 for costs with Respondent upon receipt of life insurance or other proceeds.

27. Another of the fee agreements contained Kosec's and Cummings' signatures dated March 14, 2003 and Respondent's signature above Cummings. Respondent's signature was not separately dated. This fee agreement also provided for a 33 and 1/3% contingent fee, with a higher fee percentage only if the case went to trial or was appealed. This agreement also provided that Kosec would deposit $25,000 for costs upon receipt of life insurance or other proceeds.

28. A third fee agreement signed by Kosec on March 14, 2003 did not contain Cummings' signature at all. Respondent signed this fee agreement; his signature was dated March 16, 2003. This fee agreement provided for a 33 and 1/3% contingent fee, with a higher fee percentage only if the case went to trial

or was appealed. This agreement also provided that Kosec would deposit $25,000 for costs upon receipt of life insurance or other proceeds.

29. The fourth version of the fee agreement also contained Kosec's signature dated March 14, 2003. It also contained Respondent's signature dated March 16, 2003. This fee agreement contained a different page two than any of the other versions. Not only were the subparagraphs identified differently, but also the contingency fee was set at 40%, with an even higher percentage if the case went to trial or was appealed. This fee agreement did not provide for a deposit of costs by Kosec.

30. The 40% fee agreement was not a separate agreement signed by Kosec. Rather, the page reflecting the 40% fee was inserted to replace a page showing a 33 and 1/3% fee in one of the agreements Kosec signed on March 14, 2003. This was done without Kosec's knowledge or consent.

31. At various times, Respondent and Adamson utilized the terms of different versions of the fee agreement. Respondent did require Kosec to make a cost deposit of $25,000 upon receipt of life insurance proceeds from Prudential, as required by the fee agreements listing a 33 and 1/3% contingent fee. The proposal Respondent submitted to the GAL for distributing the proceeds of the final settlement, with Bridgestone, claimed a 40% fee.

32. On October 25, 2004, Respondent and Adamson had Arthur Vargas, Esq. ("Vargas") appointed personal representative for the wrongful death suit Respondent planned to file as a result of Utley's death.

33. A fifth version of the fee agreement was signed on May 16, 2004 by Arthur Vargas, Esq. ("Vargas"), when he was appointed personal representative of the wrongful death estate of Utley. The fee agreement signed by Vargas provided for a 40% contingency fee; the section on cost deposits was marked through with an "x." Vargas signed this fee agreement as personal representative more than one year after Kosec paid the $25,000 cost deposit to Respondent from life insurance proceeds.

34. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-104(B), by failing to explain the fee arrangement to the extent necessary to permit the client to make informed decisions about the representation;

b) Rule 16-105(B), by failing to communicate the basis or rate of the fee to the client;

c) Alternatively, Rule 16-105(C), by failing to accurately state the percentage or percentages that would accrue to him in the case of settlement;

d) Rule 16-107(B), by engaging in a conflict of interest by representing a client which the representation was materially limited his interest in obtaining a higher fee; and

e) Rule 16-804(D), by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

35. The witnesses presently known to disciplinary counsel are as follows:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

Ronald R. Adamson, Esq.
217 N. Schwartz Ave.
Farmington, NM 87401-5546

COUNT II
(Misrepresentations to Probate Court)

36. The above and foregoing allegations are incorporated herein as if fully set forth.

37. On March 18, 2003, Respondent filed in the Eleventh Judicial District, San Juan County, an Application for Informal Appointment of Personal Representative in the *Matter of the Estate of Cody Utley*, Case No. PB 2003-18 ("Application").

38. The Application Respondent filed alleged that Petitioner, Tresa Kosec, was the "wife of the decedent, Cody Utley, and the mother of decedent's children, Brionna Kosec and Thomas Utley...." It further stated that no personal representative had been appointed and Petitioner was not aware of any demand for notice of any probate or appointment proceeding. The Application requested an order that Utley died intestate and an order "determining the heirs."

39. On April 3, 2003, Hon. Thomas J. Hynes, 11th Judicial District Judge signed the Order for Informal Administration, Appointment of Personal

Representative, Order of Intestacy, and Determination of Heirship ("Order"). This Order was prepared and submitted by Respondent. No hearing was held on the Application before the Order was entered.

40. The Order specifically stated that the findings were "based upon the statements in the Application...." The order prepared by Respondent including the following findings:

— Applicant (Kosec) is the wife of Cody Utley, deceased;

— Brionna Kosec and Thomas Utley are the minor children of the deceased; and

— Deceased was married to Applicant (Kosec) at the time of his death.

41. The Order included the following orders:

— Application for appointment of Kosec as personal representative is granted;

— Decedent died intestate; his heir-at-law is his wife named above.

42. Prior to filing the Application, while dealing with issues concerning the collection of life insurance for Kosec, Respondent learned that there was no marriage certificate between Utley and Kosec. Kosec advised Respondent that there was no marriage certificate and that she and Utley had a common law marriage.

43. Respondent was aware that Kosec and Utley had lived together in Utah, that they considered themselves husband and wife and that they were raising a family together. Respondent researched Utah law and knew that Utah provided a procedure for declaring the validity of a marriage which had not been solemnized.

44. Respondent thought that Kosec and Utley had an established common law marriage and that, in order for that marriage to be recognizable in New Mexico, he needed to have a court acknowledge that the marriage had been established

45. Respondent discussed these matters with Cummings, his paralegal, and his co-counsel Adamson.

46. The Application filed by Respondent to have Kosec appointed personal representative did not alert the court that there was any issue regarding the marriage of Kosec and Utley. It did not allege that the claim that Kosec was Utley's wife was based on a claim that a common law marriage had been established in Utah. Nor did it ask the court to recognize the establishment of the marriage under the Utah statute. Instead, the Application stated the conclusion that Kosec was the wife of Utley without any indication to the court that there was no certificate of marriage, as required by New Mexico law.

47. The application also alleged that Brionna Kosec was a legal heir of Utley. The application did not advise the court that Brionna was not the biological child of Utley, that she had not been adopted by Utley, or that

Respondent was relying upon a theory of "de facto" adoption for Brionna's claim as an heir.

48. The Order prepared by Respondent and presented to the Court stated that, "[b]ased upon the statements made in the Application, the Court Finds...." The stated findings included that Kosec is the wife of Utley and that Brionna and Thomas are Utley's minor children.

49. The "order" portion of the Order prepared by Respondent specifically stated that Kosec was the heir-in-law of Utley.

50. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, competence, by failing to take appropriate steps to have the common law marriage between Kosec and Utley established under the terms of the Utah statute;

b) Rule 16-303(A)(1), by knowingly making a false statement of fact or law to a tribunal;

c) Rule 16-303(D), by failing in an *ex parte* proceeding to inform the tribunal of all material facts known to him that would enable the tribunal to make an informed decision;

d) Rule 16-804(C), by engaging in conduct involving fraud, deceit, dishonesty or misrepresentation; and

e) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

51. The witnesses presently known to disciplinary counsel concerning this Count are as follows:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

Ronald R. Adamson, Esq.
217 N. Schwartz Ave.
Farmington, NM 87401-5546

COUNT III
(Misrepresentation to Worker's Compensation Court)

52. Respondent also represented the Estate of Cody Utley in pursuing worker's compensation benefits.

53. In pleadings filed in the worker's compensation case, Respondent misrepresented that Brionna was Utley's child and that she was named "Brionna Utley."

54. Respondent knew that Brionna was not Utley's natural child and that she had not been adopted by Utley. Respondent knew that Brionna's legal last name was "Kosec"

55. Respondent did not advise the worker's compensation court that Brionna was not Utley's child or that he relying on a theory of "de facto" adoption to represent that Brionna was Utley's child.

56. Respondent did not advise the worker's compensation court that Brionna's legal last name was Kosec, not Utley.

57. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-303(A)(1), by knowingly making a false statement of fact or law to a tribunal;

b) Rule 16-804(C), by engaging in conduct involving fraud, deceit, dishonesty or misrepresentation; and

c) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

58. The witnesses presently known to disciplinary counsel concerning this Count are as follows:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

COUNT IV

(Misrepresentations in the Wrongful Death Suit)

59. On October 25, 2004, a wrongful death suit was filed concerning claims arising from the accident in which Utley was killed.

60. Both the Complaint and the Amended Complaint were signed by Respondent.

61. Both the Complaint and the Amended Complaint specifically alleged that Kosec was the lawful wife of Utley.

62. Both the Complaint and the Amended Complaint alleged that Brionna was the "lawful daughter of Utley."

63. Neither the Complaint nor the Amended Complaint advised the court that Respondent was relying on a theory that Kosec was the common law wife of Utley based upon Utah law.

64. Neither the Complaint nor the Amended Complaint advised the court that Brionna was not Utley's natural daughter and had not been adopted by Utley.

65. Later, Respondent would represent to the GAL that he was not relying on a claim that Kosec and Utley were married for her claims, but rather was claiming Kosec was entitled to a loss of consortium under *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003).

66. On or about June 14, 2006, Kosec's deposition was taken in the wrongful death suit. Kosec testified that Brionna's father was Clifford Bruin. She also testified that Utley never adopted Brionna.

67. On or about June 13, 2007, Respondent submitted a Settlement Position Letter to a Mediator selected and agreed upon by the parties. In the introductory section, Respondent alleged that Utley's death left "Tresa Kosec without her life partner. Brionna Kosec was left without the only father she had ever known. Thomas Utley no longer had a father."

68. In subsequent sections of the settlement letter, Respondent specifically and repeatedly referred to "Cody Utley's wife and two children."

Respondent did not advise the court that Respondent was relying on a theory that Kosec was the common law wife of Utley based upon Utah law or that Brionna was not Utley's natural daughter and had not been adopted by Utley.

69. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-303(A)(1), by knowingly making a false statement of fact or law to a tribunal;

b) Rule 16-804(C), by engaging in conduct involving fraud, deceit, dishonesty or misrepresentation; and

c) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

70. The witnesses presently known to disciplinary counsel concerning this Count are as follows:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

COUNT V
(Misrepresentations to Guardian Ad Litem)

71. The above and foregoing allegations are incorporated herein as if fully set forth.

72. On September 12, 2007 Respondent filed a motion to have Oakey appointed GAL for Thomas in the wrongful death suit. (Even though Respondent had also named Brionna as a plaintiff to make a claim for her for loss of consortium, he negotiated a settlement which included no proceeds for her, but did not dismiss her from the suit or seek the appointment of a GAL for her.)

73. The motion Respondent filed to have Oakey appointed GAL alleged, inter alia, that "[b]ecause the claims made and settlements reached involve a minor child, judicial approval of the proposed settlement is required...", that Respondent represented the minor child, that the GAL would be acting as an arm of the court, and that the GAL should determine the reasonableness and fairness of the settlement and the manner in which the settlement monies should be held and used on behalf of the minor child.

74. After her appointment as GAL, Oakey began to investigate the proposed settlement. In the course of carrying out her duties, Oakey spoke to and corresponded with Respondent. In response, Respondent made various misrepresentations to Oakey.

75. In a letter dated October 15, 2007, Respondent advised Oakey that the Prudential life insurance proceeds had been paid to Kosec as the "named" beneficiary and as the "listed" beneficiary. Neither statement was true; no beneficiary was named in the policy.

76. In a letter dated October 19, 2007, Respondent represented to Oakey that he had been unable to obtain any documents from Prudential and

that Prudential "had closed their file years ago." When Oakey contacted Prudential directly, she was advised that there would be no problem in retrieving and providing a copy of the file. Prudential provided a copy of its file to Oakey upon receipt of a court order Oakey obtained for release of the file.

77. Oakey made inquiries about the costs for which Respondent was seeking reimbursement. One cost concerning which Oakey made inquiry was the amount paid to BCC Legal Services, Inc. ("BCC") BCC was the litigation support paralegal enterprise owned and operated by Cummings, Respondent's contract paralegal. Respondent advised Oakey in his October 19, 2007 letter that he had been unable to contact BCC because it was no longer in business and the entire staff was attending various law school.

78. At that time, Cummings was a student at the University of New Mexico Law School.

79. On September 12, 2007, Respondent had entered an appearance as Cummings' lawyer in *State of New Mexico v. Brandon C. Cummings*, Case No. DW495707 (Metro Court 2007).

80. Oakey obtained Cummings cell phone number from Kosec and was able to contact Cummings.

81. In his October 15, 2008 letter to Oakey, Respondent provided a settlement distribution statement for the Bumper to Bumper settlement for $97,500. On the settlement statement provided by Respondent to Oakey, the signature line stated that the original had been signed by Kosec. In the body of

the October 15, 2008 letter, Respondent stated that Kosec had received the sum of $38,061.25.

82. Kosec would have received that sum, $38,061.25 only if Respondent had charged a 40% fee on the Bumper to Bumper settlement, as he later proposed on the Bridgestone settlement.

83. In fact, the Bumper to Bumper settlement statement Kosec actually signed showed that Respondent took only a 33 and 1/3% fee and that Kosec received $45,000 from that settlement, not $38,061.25.

84. Respondent submitted an accounting to the GAL showing he had charged a forty percent (40%) fee on the Bumper to Bumper settlement in order to bolster his claim for a forty percent (40%) fee on the much larger Bridgestone settlement.

85. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-303(A)(1), by making false statements of material fact to a tribunal by making false statements to the GAL acting as an arm of the court;

b) Alternatively, Rule 16-401(A), by making a false statement to a third person in connection with the representation of a client;

c) Rule 16-804(C), by engaging in conduct involving misrepresentation, deceit or dishonesty; and

d) Rule 16-804(d), by engaging in conduct prejudicial to the administration of justice.

86. The following witnesses are presently known to disciplinary counsel:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

Brandon C Cummings
Unknown at this time

COUNT VI
(Conflict of Interest)

87. The above and foregoing allegations are incorporated herein as if fully set forth.

88. In the course of representing Kosec, Respondent assisted her in recovering life insurance proceeds from The Prudential Insurance Company of America ("Prudential") from a policy that covered Utley through his employment with Key Energy (other misconduct which occurred in the process of obtaining life insurance proceeds is addressed in Count VII, *infra*).

89. Following the exchange of several letters, the proceeds were obtained and paid to Kosec in her individual capacity.

90. The proceeds were obtained for Kosec by Respondent's contract paralegal, Cummings, submitting the order appointing Kosec personal representative of Utley's estate and an affidavit signed by Kosec in which she

swore she was the common law wife of Utley and that, specifically, she lived with Utley in the State of Utah from November 1996 through July 1998.

91. Respondent's purpose in submitting the order appointing Kosec as the personal representative of Utley's estate and Kosec's affidavit to Prudential was to aid in establishing Kosec's claim. Establishing Kosec's claim to the life insurance proceeds was detrimental to the interests of Thomas because Prudential had advised that if Kosec was not married to Utley, the insurance proceeds would go to the children (Brionna had also been listed as Utley's child in documents submitted by Respondent and his staff to obtain the proceeds) and that a guardian would need to be appointed or Prudential could hold the funds until the children reached majority.

92. On or about July 1, 2003, the proceeds of the Prudential life insurance on the life of Utley were paid directly to Kosec in her individual capacity in the amount of $73,806.97. None of this money was set aside for Thomas or paid to Kosec as the personal representative of Utley's estate.

93. In March of 2004, a worker's compensation proceeding brought by Respondent settled for a lump sum payment of $55,000. The net proceeds of this settlement were paid to Kosec in her individual capacity by check dated April 3, 2004. None of the proceeds was set aside for Thomas or paid to Utley's estate.

94. The Complaint and the Amended Complaint filed in the wrongful death action against Bridgestone and Bumper to Bumper asserted claims on

behalf of the Wrongful Death Estate of Cody Utley as well as individual loss of consortium claims for Kosec, Brionna, and Thomas.

95. In November of 2005, Respondent settled with Bumper to Bumper for $97,500.00. The net proceeds of this settlement were paid to Kosec in her individual capacity. None of the proceeds was set aside for Thomas (or Brionna) or paid to Vargas, the personal representative of Utley's wrongful death estate.

96. In July of 2007, Respondent negotiated a settlement of the wrongful death claim against Bridgestone for the sum of $550,000. It was this settlement which was brought before Judge Vanzi and which led to the filing to the underlying complaint in this proceeding.

97. Respondent's proposed distribution statement allocated $450,000 to Kosec and $100,000 to Thomas.

98. The interests of Kosec and Thomas in the various claims and settlements obtained as a result of Utley's death were in conflict with regard to the distribution of the settlement funds by Respondent. Respondent continued to represent both Kosec and Thomas and prior to the Bridgestone settlement and failed to obtain court approval of the settlements for the minor heir's interest or have a GAL appointed for Thomas.

99. After Oakey was appointed GAL by Judge Vanzi, she began to investigate the proposed Bridgestone settlement. This led her to question the previous settlements, from which no money was set aside for Thomas.

100. On November 28, 2007, Respondent wrote to his co-counsel, Ronald Adamson, as well as to defense counsel in the wrongful death suit, advising them that he had been informed that the GAL:

> "intends to argue that no proceeds of the proposed settlement should go to her. Ms. Oakey apparently believes that all proceeds of the settlement should go to Thomas Utley. Obviously, this is not acceptable to Ms. Kosec.
>
> Therefore, it seems likely that the proposed settlement is about to be torpedoed. If you would like to discuss this before the December 3rd hearing, I would be happy to talk with any of you."

101. After previously settling three (3) claims for a total of $226,290.80, without ensuring that any of the proceeds were set aside for Thomas, Respondent continued to pursue Kosec's interests at the expense of Thomas' interests in the settlement with Bridgestone.

102. Established New Mexico case law requires that attorneys pursuing claims in which a minor is a beneficiary exercise reasonable care to ensure that the minor beneficiary actually receives the proceeds. Competent representation of the interests of a minor beneficiary requires an attorney to ensure that funds are set aside for the minor.

103. Respondent failed to take steps to ensure that funds were set aside for Thomas from the claims arising from his father's death, including claims for loss of guidance and counseling, his claim as an heir of Utley's estate and his claim as a statutory beneficiary under the New Mexico Wrongful Death Act.

104. All proceeds paid directly to Kosec prior to court approval of the Bridgestone settlement were spent by Kosec. This included the proceeds of the Bumper to Bumper settlement, which occurred after Vargas was appointed as personal representative of the wrongful death estate of Utley. Some of the proceeds were spent on illegal drugs.

105. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, by failing to provide competent representation in the distribution of settlement proceeds;

b) Rule 16-101, by failing to seek court approval of settlements which should have benefited the minor, Thomas;

c) Rule 16-107(A), by representing the substantially adverse interests of Kosec, Brionna and Thomas;

d) Rule 16-107(B), by representing a client when the representation was materially limited by Respondent's responsibilities to another client or third person;

e) Rule 16-108(G), by making aggregate settlements of the claims of Kosec and Thomas (and purportedly for Brionna) without obtaining the consent of each client after consultation (or court approval for the minor client);

f) Rule 16-114(B), by failing to seek the appointment of a guardian or conservator or take other protective action for Thomas in the negotiation and distribution of settlement proceeds; and

g) Rule 16-804(D), by engaging in conduct prejudicial to the administration of justice.

106. The following witnesses are presently known to disciplinary counsel:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

Ronald R. Adamson, Esq.
217 N. Schwartz Ave.
Farmington, NM 87401-5546

Arthur Vargas, Esq.
4112 State Road 68
Ranchos de Taos, NM 87557-8836

Arthur O. Beach, Esq.
P.O. Box AA
Albuquerque, NM 87103-1626

COUNT VII
(False Statements; Aiding Unauthorized Practice of Law)

107. The above and foregoing allegations are incorporated herein as if fully set forth.

108. In the latter part of 2002 and early part of 2003, following Utley's death, Kosec corresponded with The Prudential Insurance Company of America ("Prudential") concerning a policy of life insurance covering Utley through Key Energy. Utley had not named a beneficiary for the policy on his life.

109. The first letter from Prudential was addressed to Kosec as "Tresa Utley." It requested that she complete a Beneficiary Statement. Kosec signed

the statement as "Tresa K. Kosec-Utley" and listed her relationship to Utley as "wife."

110. On December 16, 2002, Kosec submitted a Preferential Beneficiary's Affidavit attesting that she was the surviving spouse of Utley. She signed the affidavit, "Tresa Utley."

111. By letter dated December 31, 2002, Prudential informed Kosec that it could not make a determination of eligibility for benefits because the death certificate for Utley listed him as not married and did not list a surviving spouse. The letter requested a copy of Kosec's marriage certificate to Utley.

112. Subsequent letters from Prudential informed Kosec that because Utley was not married and no beneficiary was named in the policy, the proceeds would go to the minor children. The letters referred to both Thomas and Brionna as Utley's minor children and stated that a guardian would need to be appointed to receive the funds for them or the funds could be held by Prudential until they reached majority.

113. On April 10, 2003, Prudential wrote to Respondent acknowledging a telephone conversation with Respondent on March 17, 2003 in which it was discussed that the death certificate listed Utley as unmarried, that Utley's residence at the time of his death was in New Mexico, and that New Mexico does not recognize common law marriage. The letter further stated that Respondent had advised Prudential that Utley and Kosec had lived together in Utah and Utah does recognize common law marriage. Prudential requested "tax forms,

household bills, medical bills or any other information you can provide as verification of this marriage."

114. By letter dated April 17, 2003, Cummings, Respondent's contract paralegal, wrote to Prudential and demanded copies of the Prudential policies. Cummings enclosed with the letter a copy of Letters of Administration and Acceptance and Order for Informal Appointment of Personal Representative, Order of Intestacy, and Determination of Heirship appointing Kosec as Utley's personal representative and heir. This was the Order Respondent obtained by representing that Kosec was Utley's wife, without informing the district judge that there was an issue as to the establishment of a common law marriage between Kosec and Utley under Utah law. Cummings "demanded" release of the life insurance proceeds to Respondent and threatened suit if the proceeds were not promptly released.

115. On May 5, 2003, Respondent wrote to Prudential and threatened to file suit for bad faith unless Prudential released the life insurance proceeds.

116. Following an exchange of additional letters, on June 10, 2003, Cummings wrote to Prudential on Respondent's letterhead enclosing an affidavit executed by Tresa Kosec. The affidavit stated, *inter alia*, that Kosec was the common law wife of Utley and that they lived together in Utah from November 1996 through July 1998. In his letter to Prudential, Cummings referred to Kosec's "cohabitation" with Utley in Utah and stated, "Pursuant to Utah law, this

residency establishes the common-law marriage of Ms. Kosec-Utley and Mr. Utley." (Emphasis added)

117. This statement was incorrect and misleading; Utah law, §30-1-4.5, permits the recognition of a marriage that has not been solemnized if a court or administrative order establishes that certain criteria have been met. The statute does not provide that residency alone can establish a common law marriage under Utah law.

118. Cummings statement constituted the unauthorized practice of law. His June 10, 2003 letter to Prudential stated a legal opinion upon which he expected Prudential to rely to release the life insurance proceeds.

119. Life insurance proceeds totaling more than $73,000 were paid directly to Kosec, not to or through the Estate of Cody Utley. None of the proceeds were set aside for Thomas.

120. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, competence, by failing to properly distribute the life insurance proceeds through Utley's estate;

b) Rule 16-401(A), by making a false statement of material fact or law to a third person through his legal assistant, by representing to Prudential that Kosec was the wife of Utley under Utah law and submitting an affidavit to that effect;

c) Rule 401(B), by failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;

d) Rule 16-503(B), by failing to make reasonable efforts to ensure that his paralegal's conduct was compatible with the Rules of Professional Conduct;

e) Rule 16-503(C), by ordering or, with knowledge of the specific conduct, ratifying the conduct of his paralegal; and

f) Rule 16-505(A), by assisting another person to engage in the unauthorized practice of law.

121. The witnesses presently known to disciplinary counsel are as follows:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

Brandon C. Cummings
Unknown at this time

COUNT VIII
(Failure to Provide Adequate Information to Client)

122. The above and foregoing allegations are incorporated herein as if fully set forth.

123. Respondent did not inform Kosec that the money received from the various settlements, or some portion, did not belong to her but to Thomas, or that she had a fiduciary to distribute the money to the child.

124. Respondent took no actions to discharge the duty he owed to Thomas as a statutory beneficiary of the wrongful death suit to protect Thomas' interest in receiving proceeds obtained for him.

125. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-101, by failing to provide competent representation; and

b) Rule 16-104(B), by failing to explain the matter to the extent necessary to permit the client to make informed decisions about the representation.

126. The witnesses presently known to disciplinary counsel are as follows:

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Tresa Kosec Kinder
5414 S. 2500 W.
Roy, Utah 84067-1661

COUNT IX
(Failure to Account for Funds)

127. The above and foregoing allegations are incorporated herein as if fully set forth.

128. In November of 2003, Respondent filed a worker's compensation claim for the Estate of Cody Utley, naming Kosec as Utley's wife and personal representative and both Thomas and Brionna as Utley's children.

129. Respondent settled the worker's compensation claim for the Estate of Cody Utley in early 2004 for $55,000.00.

130. Respondent's accounting of the proceeds of this settlement showed that the net distribution to Kosec was $26,270.47 and that the net proceeds were distributed directly to Kosec.

131. Contrary to the representation on the accounting, the check given to Kosec was in the amount of $23,135.24.

132. At no time did Respondent distribute the remaining $3,135.23 or provide an accounting for that amount.

133. One of the attachments to Respondent's October 15, 2008 letter to the GAL was what Respondent represented was "[a]n item by item breakdown of all expenses showing the remaining balance as $68,785.54." ("Cost Log") (Emphasis added)

134. The Cost Log included items totaling more than $40,000 which had not in fact been paid, including items Respondent later stated he had no intention of paying.

135. The Cost Log included duplicate items.

136. On or about January 9, 2008, Respondent provided the GAL a copy of his trust ledger for the Utley matter.

137. The ledger failed to include at least two trust account checks written in connection with the Utley matter, check no. 1522 to Cummings for $1,000 dated February 4, 2004 and check no. 1524 to Paul Leischer for $35.00.

138. At the time check nos. 1522 and 1524 were written, Respondent had not entered into a fee agreement with Kosec and had not received any funds from which these costs could be paid. These costs related to the Utley matter were paid using the funds of other clients.

139. The trust ledger listed check no. 1550 as being written to Respondent's firm for $15,129.16. In fact, check no. 1550 was written to Respondent's firm for $23,129.16. This check was written for attorney's fees from the settlement of the Bumper to Bumper claim for $97,500.

140. Although check no. 1550 was written for more than was shown on the trust ledger, it did not disburse the entire attorney's fee Respondent claimed from the Bumper to Bumper settlement. Respondent has produced two different settlement statements (Attorney's Final Account of Litigation Proceeds) for the settlement of the claim against Bumper to Bumper. On the version signed by Kosec, the attorney's fees were calculated at 33 and 1/3% and the total, including gross receipts tax, was $34,693.75; on the other, the version provided to the GAL, the attorney's fees were calculated at 40% and the total, including gross receipts tax, was $41, 632.50.

141. Under either version of the accounting for the Bumper to Bumper settlement, a portion of the attorney's fee Respondent claimed remained in the trust account and was commingled with client funds.

142. On April 7, 2008, at the GAL's request, Respondent deposited into the court registry the sum shown on his trust ledger as balance being held in connection with the Utley matter. In fact, there was $8,000.00 less in the trust for the Utley matter.

143. Respondent deposited funds belonging to other clients into the court registry.

144. By reason of the above and foregoing conduct, Respondent violated the following provisions of the Rules of Professional Conduct:

a) Rule 16-105(C), by failing to provide a written statement upon the conclusion of a contingent fee matter showing the remittance to the client and the method of its determination;

b) Rule 16-115(A), by failing to safeguard client funds, by paying Utley expenses using the funds of other clients and by depositing funds belonging to other clients into the court registry;

c) Rule 16-115(A), by failing to keep funds belonging to him separate from client funds;

d) Rule 16-115(A), by failing to generate and maintain complete and accurate trust account records;

e) Rule 16-115(B), by failing to promptly deliver funds owed to a client.

145. The witnesses presently known to disciplinary counsel are as follows;

Dennis W. Montoya, Esq.
P.O. Box 15235
Rio Rancho, NM 87174-0235

Kathleen M. V. Oakey, Esq.
P.O. Box 6695
Albuquerque, NM 87197-6695

FACTORS IN AGGRAVATION

146. Respondent's misconduct displayed a selfish or dishonest motive.

147. Respondent engaged in a pattern of misconduct.

148. Respondent committed multiple disciplinary violations.

149. Respondent has refused to acknowledge the wrongful nature of his misconduct.

150. Respondent's clients, especially the minor child Thomas, were vulnerable to Respondent's misconduct.

151. Respondent has substantial experience in the practice of law, having been licensed in New Mexico since 1985.

152. It is anticipated that this matter will be prosecuted by deputy chief disciplinary counsel Sally E. Scott-Mullins.

WHEREFORE, by reason of the foregoing, it is respectfully requested pursuant to Rule 17-309 NMRA, that a hearing committee by assigned to hear evidence and make findings of fact and recommendations to the Disciplinary

Board and, if any of the charges are sustained, the Respondent be disciplined and assessed the costs of this proceeding.

Respectfully submitted,

Sally Scott-Mullins
Deputy Chief Disciplinary Counsel
20 First Plaza NW, Suite 710
Albuquerque, NM 87102
(505) 842-5781

Done this 28th day of April, 2010
In Albuquerque, New Mexico

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

JUDITH SIZEMORE,

Plaintiff,

v. No. CV 04-272 JP/DJS

STATE OF NEW MEXICO, et al.,

Defendants.

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS, ANALYSIS AND RECOMMENDED DISPOSITION, AND AWARDING ATTORNEY FEES TO STATE DEFENDANTS AGAINST ATTORNEY DENNIS W. MONTOYA

On November 17, 2006, acting on this Court's Order of Reference, Chief Magistrate Judge Lorenzo F. Garcia entered his Findings, Analysis and Recommended Disposition (hereafter "Recommended Disposition" or "RD") on two pending motions for attorney fees (Doc. No. 170).[1] Judge Garcia recommends that no attorney fees be assessed against Plaintiff Judith Sizemore. R.D. at 19. Judge Garcia further recommends that only a small portion of the State Defendants' attorney fees be assessed against Dennis W. Montoya, former counsel for Plaintiff, under 28 U.S.C. § 1927. R.D. at 20-21. On December 4, 2006 the State Defendants filed their Objections (Doc. No. 172), in which they object to the recommendation that only those fees incurred by the State Defendants subsequent to April 18, 2005 should be awarded against Mr. Montoya. On the same day Mr. Montoya filed his Objections (Doc. No. 173), in which he challenges the recommendation that any fees be assessed against him. On January 4, 2007 Mr. Montoya also filed a Response to the State Defendants' Objections (Doc. No. 179).

[1] On February 25, 2005 RCI Defendants filed their Motion for Attorney's Fees (Doc. No. 95), and on July 18, 2005 State Defendants filed their Motion for Award of Attorney Fees and Costs (Doc. No. 136).

EXHIBIT
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Neither the RCI Defendants nor the State Defendants object to the Magistrate Judge's Recommended Disposition that no fees be assessed against Plaintiff.

The Court has carefully considered the Magistrate Judge's Recommended Disposition, the parties' objections, and the underlying pleadings. The Court is intimately familiar with the underlying facts of the progress of this case, but lacked information about Plaintiff Sizemore's ability to pay the Defendants' requested attorney fees. Magistrate Judge Garcia held an evidentiary hearing on August 29, 2006 at which Plaintiff Sizemore testified and was subject to cross-examination. Mr. Montoya did not appear at the hearing, although he was represented by counsel.

A. State Defendants' Objections.

The State Defendants object to Judge Garcia's recommendation that only fees incurred by the State Defendants subsequent to April 18, 2005 should be assessed against Mr. Montoya under 28 U.S.C. § 1927. On that date, this Court entered summary judgment in favor of the State Defendants and dismissed all Plaintiff's claims against them. Doc. Nos. 115, 116. Defendants argue that the Magistrate Judge mistakenly relied on a standard of Mr. Montoya's subjective bad faith rather than objective bad faith, and that under the proper objective standard the Court should award their fees from the outset of the litigation to its conclusion.

B. Mr. Montoya's Objections.

Mr. Montoya objects to the award of any sanctions against him. He argues that the Magistrate Judge incorrectly perceived that the question to be resolved was one of amount rather than propriety of sanctions, and that it is thus unclear from the Recommended Disposition what, if any, grounds exist for the award of $6,448.50 in sanctions against him.

C. Discussion.

This Court previously determined that the claims against the State Defendants were "unreasonable and without foundation even though they were not brought in subjective bad faith," which justified a fee award against Plaintiff under 42 U.S.C. § 1988. Mem. Op. and Order (Doc. No. 145) at 8. The State Defendants argue that the Magistrate Judge applied this Court's determination on Plaintiff's lack of subjective bad faith to preclude a pre-April 18, 2005 award of fees against Plaintiff's attorney when ruling on the § 1927 fee request. The Court disagrees. Judge Garcia correctly applied the proper standard under § 1927. *See* R.D. ¶¶ 57-60 at 11, 15-16, 20-21.

Judge Garcia made factual findings that Mr. Montoya's litigation activities after April 18, 2005 "needlessly prolonged and increased the costs of the litigation." R.D. ¶ 58 at 11. Judge Garcia concluded that by missing deadlines, by failing to respond to motions, and by running up costs and fees after summary judgment was granted for the State Defendants, "Montoya's conduct as an attorney in this case was inappropriate." R.D. at 20. Judge Garcia further determined that "Montoya acted poorly, but he didn't prosecute the action with subjective bad faith [and that] the proper sanction would be to award the State Defendants the fees they incurred after summary judgment was granted on April 18, 2005, because those fees are attributable to Montoya's litigation practices which needlessly increased the State's fees." R.D. at 20.

This Court agrees with Judge Garcia that attorney Montoya should not be subjected to a monetary sanction for all the fees the State Defendants incurred during the litigation, but only to those incurred after summary judgment was granted. It is true that a court may award sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."

28 U.S.C. § 1927. It has been shown that attorney Montoya multiplied the proceedings, and that he acted unreasonably and vexatiously. However, even when such a showing is made, a court is not required to impose sanctions, and a court is never required to impose the full amount requested by the opposing party; the award of sanctions is discretionary. Center for Legal Advocacy v. Earnest, 89 Fed. Appx. 192, 193 (10th Cir. 2004) (unpublished) (§ 1927 "permits, but does not require" sanctions); *see also* Walter v. Fiorenzo, 840 F.2d 427, 433 (7th Cir. 1998) ("award of fees under § 1927 is given solely to the discretion of the district court"). *Cf.* Loftus v. Southeastern Pennsylvania Transp. Authority, 8 F.Supp. 2d 464, 466 n.1 (E.D. Pa. 1998) ($23,000 in fees requested, reduced to award of $4,000 in "exercise of discretion"), *aff'd* 187 F.3d 626 (3rd Cir. 1999). Moreover, § 1927 sanctions are not available for the entire case. Steinert v. Winn Group, Inc., 440 F.3d 1214, 1225 (10th Cir. 2006) ("it is not possible to multiply proceedings until *after* those proceedings have begun") (emphasis in original).

Even though it has not been shown that Mr. Montoya acted with subjective bad faith, his conduct in this case meets the objective standard for bad faith, in that he brought federal discrimination claims that had no basis, engaged in dilatory tactics, and continued to assert meritless claims long after it became clear that the claims had no basis. Furthermore, after being given the opportunity to show cause why sanctions should not be imposed against him, Mr. Montoya failed to appear at the hearing scheduled by Judge Garcia. "Section 1927 targets conduct that multiplies the proceedings, which, when viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." Steinert, 440 F.3d at 1226 (citation and internal quotation marks omitted); Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1342 (10th Cir.1998) (conduct that, viewed objectively, manifests either intentional or reckless

disregard of attorney's duties to court, warrants § 1927 sanctions). Viewed objectively, Mr. Montoya's conduct, especially after April 18, 2005, manifested "intentional or reckless disregard" of his duties to the Court. *See* Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987). Thus, Mr. Montoya's conduct meets the standards for an award of sanctions against him under § 1927.

THEREFORE IT IS ORDERED:

1. The State Defendants' Objections (Doc. No. 172) are overruled;

2. Movant Dennis W. Montoya's Objections (Doc. No. 173) are overruled;

3. Chief Magistrate Judge Lorenzo F. Garcia's Findings, Analysis and Recommended Disposition (Doc. No. 170) are adopted in full;

4. The State Defendants' attorney fees in the amount of $6,448.50 are assessed against Dennis W. Montoya as a sanction under 28 U.S.C. § 1927, and are to be paid by July 20, 2007.

SENIOR UNITED STATES DISTRICT JUDGE

CHIEF DISCIPLINARY COUNSEL COMPLAINT

RESPONDENT: **Dennis W. Montoya**

RULES: **16-101, 16-301, 16-303 and 16-804(D)**

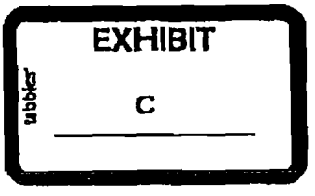
DATE: **15 March 2010**

This matter arises out of Respondent's handling of a civil rights action filed on behalf of client Judith Sizemore entitled Sizemore v. Department of Labor, Cause No. CV-04-00272 JP/DJS in the United States District Court for New Mexico.

Sizemore was employed by the NM Department of Labor from May 1995 until her discharge in 2003. As head of the Department's Management Information Systems Bureau ("MISB"), she was responsible for the direct supervision of six employees (one of whom was her administrative aide and friend Sylvana Luciani ("Luciani") and indirect supervision of another fifty employees. In this role, her duties included ensuring that employees performed their work and adhered to policies, procedures and regulations of the Department of Labor; approving sick, annual, administrative and FMLA leave requests; and evaluating the performance of employees under her direct supervision.

After a thorough independent investigation (conducted by Robert Caswell Investigations ["RCI"]) of rumors that Sizemore was aware of a pattern of leave abuse by Luciani and had failed to correct it, the Department of Labor terminated the employment of three individuals, including Sizemore and Luciani. With respect to Sizemore, the State determined that her pattern of neglect and misconduct was so egregious that her employment could no longer be continued.

Sizemore filed claims with the EEOC alleging discrimination based upon various categories of protected status. After conducting its own investigation, the EEOC concluded that there was no evidentiary support for any claim of discrimination. Notwithstanding the results of two separate investigations and the State's characterization of her conduct as egregious, Sizemore filed suit against the State of New Mexico, various individual State defendants, and RCI raising claims under 42 USC §1983 Title VII and various common law claims. Both the State and RCI filed motions for summary judgment, and both motions were granted. The lawsuit was dismissed on April 18, 2005, and the 10th Circuit affirmed the dismissals. Both the State and RCI requested that their attorney fees be assessed against Sizemore. Additionally, the State made a second request that attorney fees be assessed against Respondent pursuant to 28 USC § 1927, which allows the Court to impose sanctions against "[a]ny attorney...who...multiplies the proceedings in any case unreasonably and vexatiously."



After the Court's dismissal of the cases against the State and RCI, Respondent filed numerous additional pleadings for Sizemore, including motions to reconsider and to set aside the Court's determination or to file out-of-time responses. At a hearing to determines the reasonableness of the requests for attorney fees, Judge Lorenzo Garcia found that these litigation activities "needlessly prolonged and increased the costs of the litigation" and concluded that by missing deadlines, failing to respond to motions, and by running up costs and fees after summary judgment was granted, Respondent's "conduct as an attorney in this case was inappropriate." He also determined that it would be proper to assess the State's attorney fees incurred after summary judgment against Respondent "because those fees are attributable to [his] litigation practices which needlessly increased the State's fees."

The Court (Judge James Parker) adopted Judge Garcia's recommendation and assessed $6448.50 of the State's attorney fees against Respondent personally. Claims against Sizemore were found to be justified but were not assessed due to her physical and financial condition; Defendant RCI had not requested fees pursuant to § 1927.

By virtue of this conduct, Respondent may have failed to provide competent representation to a client, thus violating Rule 16-101 NMRA. He may also have violated Rule 16-301 by asserting or controverting issues therein where there was no basis for doing so that was not frivolous. It appears that Respondent may also have failed to make reasonable efforts to expedite litigation in violation of Rule 16-302 NMRA and engaged in conduct prejudicial to the administration of justice in violation of 16-804(D) NMRA. Other Rules may be implicated as this investigation progresses.

Virginia L. Ferrara
Chief Disciplinary Counsel

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

IMELDA HERNÁNDEZ

Plaintiff,

vs. Civ. No. 08-323 JCH/CEG

JOHN E. POTTER,
Postmaster General of the United States,

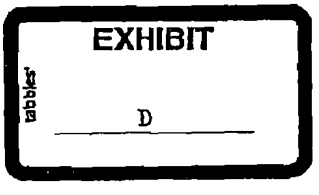
Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant John E. Potter's *Motion for Summary Judgment*, filed May 4, 2009 [Doc. 42]. The Court having considered the motion, briefs, exhibits, and relevant law, and being otherwise fully informed, finds that Defendant's motion is well taken and should be GRANTED.

BACKGROUND

Plaintiff Imelda Hernandez is a female of Mexican origin who was 35 years old at the time of the events leading to this action. She began working for the United States Postal Service ("USPS") on February 18, 2006 as a Rural Carrier Associate ("RCA") assigned to the Richard Pino Station in Albuquerque, New Mexico. As with all other new RCAs, Plaintiff's status with the USPS was probationary until she worked ninety days or was employed for a calendar year, whichever occurred first. The probationary period provides the USPS with the opportunity to evaluate an employee's suitability for permanent employment. During her probationary period, Plaintiff was an "at-will employee" whose employment with the USPS could be terminated for any legal, non-discriminatory reason.



Plaintiff's role as an RCA entailed her filling in for regular rural mail carriers who were on vacation or extended leave. RCAs are not salaried employees, and are instead paid at an hourly rate. Plaintiff's pay, as well as that of all other RCAs, was based in part on an "evaluated time system," under which she was paid the "evaluated" (estimated) time for the routes she handled, regardless of her actual hours worked, in those weeks in which she did not work over forty hours. If she worked more than forty hours in a week, she was paid for her actual hours worked, including overtime for the hours worked in excess of forty. Plaintiff's hourly pay rate was $16.45.

On May 12, 2006, Plaintiff delivered mail on Rural Route 54, a route having an evaluated time of 9.29 hours. Plaintiff completed the route in only six hours. Plaintiff was paid for the actual time she spent delivering the route, rather than the evaluated time. Plaintiff claims that she should have been paid instead for the evaluated time, resulting in an underpayment of 3.29 hours or $54.12. Plaintiff worked a total of 50.8 hours during the weekly pay period that included May 12.

On May 22, 2006, Plaintiff delivered mail on Rural Route 105. While completing her route, Plaintiff lost her "Arrow Key"– a master key that opens every customer mailbox in Albuquerque. Plaintiff told her co-worker, Jay Gruberman, that she had lost her key. He then lent Plaintiff his arrow key so that she could complete her route. At the end of that workday, Mr. Gruberman notified James Jarm, a Customer Service Supervisor at Richard Pino Station, that Plaintiff had lost her Arrow Key. Despite several USPS workers returning to the area to search for the key, it was not located until two days later, when it was found by a customer and returned to the Station.

On May 24, 2006, Adam Trujillo, a Customer Service Supervisor and Officer in Charge

of Richard Pino Station, conducted an investigative interview of Plaintiff. During the interview, Plaintiff agreed that, on May 22, she completed paperwork signing out the Arrow Key to do her route, but that she lost the key while delivering mail on Route 105. She admitted that the key was not attached to her belt or clothing, as required by regulations, and that she was responsible for the loss. Plaintiff now claims that she did not attach the key to her belt or clothing because the chain to which the key was attached was too short to make the key functional when it was attached. She also asserts that, because she is hearing impaired, she did not hear the key hit the ground when she lost it.

After the interview with Mr. Trujillo, Plaintiff was not called to return to work. On June 8, 2006, Mr. Trujillo issued a Notice of Separation to Plaintiff, informing her that she would be separated from her employment with the USPS, effective June 10, 2006. The Notice of Separation stated that it was based on Plaintiff's inability to perform her assigned duties in an efficient manner. It specifically referenced her loss of the Arrow Key and that she did not report its loss. Mr. Trujillo issued the separation while Plaintiff was still within her probationary period.

On June 6, 2008, Plaintiff filed her First Amended Complaint [Doc. 3], which stated four counts. Count I (Age Discrimination), Count II (National Origin Discrimination-Mexican), and Count III (Gender Discrimination) all relate to Plaintiff's allegations that she was denied equal pay for her May 12, 2006 route and that she was wrongfully terminated. Count IV (Retaliation) alleges that she was wrongfully terminated for "speaking out against discriminatory treatment on the job." Amended Complaint [Doc. 3] at ¶ 43. In addition, although not referenced in any of the Counts, Plaintiff's Complaint also asks the Court to declare that Defendant violated the

Rehabilitation Act of 1973. *Id.* at 12.[1]

LEGAL STANDARDS

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides for entry of summary judgment where "there is no genuine issue as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995) (citation omitted). In applying this standard, the record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment, in this case, Plaintiff. *See McKnight v. Kimberly Clark Corp.*, 149 F. 3d 1125, 1128 (10th Cir. 1998).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving

[1] Because Plaintiff has not pled a claim for violation of the Rehabilitation Act of 1973, or sufficiently indicated the manner in which Defendant allegedly violated the Act, the Court cannot fully address this matter. The Court notes, however, that in Plaintiff's pursuit of the portion of her EEO complaint related to her hearing impairment, she indicated that "[t]he type of accommodation I need was for someone to clearly show me how important it was to pull down the mail the same way as the 'the line of travel' required otherwise it was very hard while delivering." EEO Investigative Affidavit, attached as Ex. H to Defendant's Reply to Plaintiff's Response to Motion for Summary Judgment [Doc. 47] at 3. This requested accommodation appears to be unconnected to Plaintiff's alleged hearing loss. Thus, the reference in the Complaint to Plaintiff's request "to be accommodated for her disability," First Amended Complaint [Doc. 3] at ¶ 32, must either refer to a request unconnected to her alleged hearing loss, or must refer to a requested accommodation not referenced in her EEO complaint, and therefore not properly before the Court because it has not been administratively exhausted.

party meets its burden, "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). The opposing party may not rest upon "mere allegations and denials in the pleadings . . . but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (citation omitted). An issue of fact is genuine if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *See id.* at 249. In conducting its summary judgment analysis, the Court must not weigh evidence or assess the credibility of any witness, but instead must focus solely on whether genuine factual issues exist requiring a trial. *See id.* at 249, 255.

B. Age Discrimination

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), prohibits an employer from failing to hire or discharging any individual, or discriminating against such individual with respect to her compensation, or terms, conditions, and privileges of employment, because of such individual's age. *See MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1276-77 (10th Cir. 2005). To establish a *prima facie* age discrimination disparate treatment claim, a plaintiff must demonstrate that: 1) she was within the age group protected by the ADEA when she was discriminated against; and 2) she was treated differently than similarly-situated employees engaged in the same conduct. *See id.* at 1277. To establish a *prima facie* age discrimination discharge claim, a plaintiff must demonstrate that: 1) she was within the age group protected by the ADEA when she was terminated; 2) she was performing her job satisfactorily; 3) she was discharged; and 4) she was replaced by a younger worker. *See*

Miller v. Eby Realty Group LLC, 396 F.3d 1105,1111 (10th Cir. 2005).

C. Discharge Based on Gender or National Origin

In order to establish a *prima facie* claim of discriminatory discharge based on gender or national origin under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a plaintiff must show that: 1) she is a member of a protected class; 2) she was qualified for her position; 3) despite her qualifications, she was discharged; and 4) the job was not eliminated after her discharge. *Rivera v. City and County of Denver*, 365 F.3d 912, 920 (10th Cir. 2004) (national origin discrimination); *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1150 (10th Cir. 2008) (gender discrimination).

Claims involving circumstantial evidence of discrimination, rather than direct evidence, are subject to the three-step burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and its progeny. *See Adamson*, 514 F.3d at 1145. To survive summary judgment under this framework, a plaintiff must initially establish a *prima facie* case of discrimination. *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002). If the plaintiff cannot establish a *prima facie* case, summary judgment should be entered on behalf of the defendant. *Id.* If the plaintiff can establish a *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas*, 411 U.S. at 802. This burden is one of production, not persuasion. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000). The defendant need not demonstrate that the reason it relied upon was factually correct, or even that the action was actually motivated by the proffered reason; it must simply offer a facially nondiscriminatory reason for its action. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

If the defendant meets this burden, the presumption of unlawful discrimination drops

from the case. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Once the defendant has met its burden, "summary judgment is warranted unless the employee can show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir. 2005). The relevant inquiry here is not whether the defendant's actions were wise, fair, or correct, but whether the defendant honestly believed those reasons and acted in good faith on those beliefs. *See Riggs v. Airtran Airways, Inc.*, 497 F.3d. 1108, 1118-19 (10th Cir. 2007). "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997).

D. Wage Discrimination Based on Gender or National Origin

To establish a claim of wage discrimination on the basis of gender or national origin under Title VII, a plaintiff must prove that the employer intentionally discriminated against her. *See Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1306 (10th Cir. 2005). To make a *prima facie* case, the plaintiff must demonstrate that she was paid less than similarly situated males and employees not of her national origin, and that such disparity was the result of intentional discrimination. *See Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1311 (10th Cir. 2006). If the plaintiff can establish her *prima facie* case, the Court then uses the *McDonnell Douglas* burden-shifting framework, discussed above, to evaluate whether the claim can survive summary judgment. *See Mickelson*, 460 F.3d at 1311.

E. Retaliation

Title VII prohibits retaliation against employees for opposing any practice made unlawful

by Title VII or for asserting a charge, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing under Title VII. *See Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1262 (10th Cir. 1998). To establish a *prima facie* case of retaliation, the plaintiff must show that: 1) she engaged in protected opposition to discrimination or participated in a proceeding or hearing under Title VII; 2) she suffered an adverse action that a reasonable employee would have found material; and 3) a causal nexus exists between her opposition and the employer's adverse action. *See Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1122-23 (10th Cir. 2007). In addition, the Tenth Circuit also requires that the plaintiff show that the management personnel responsible for making the decision had knowledge of plaintiff's protected acts. *See Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1176 (10th Cir. 2007). Similar to a discrimination claim, once the employee establishes a *prima facie* case of retaliation, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *See O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1252 (10th Cir. 2001). If the defendant successfully articulates such a reason, the employee must then demonstrate that the employer's proffered reason for the adverse action is pretextual. *Id.*

ANALYSIS

A. Age Discrimination

Plaintiff claims that she was discriminated against by being underpaid and wrongfully terminated because of her age in violation of the ADEA. In order to be within the age group protected by the ADEA, Plaintiff must have been at least 40 years old at the time of the alleged discrimination. *See* 29 U.S.C. § 633a(a). Plaintiff admits that her date of birth is December 8, 1970. *See* Plaintiff's Responses to Defendant's First Set of Requests for Admission, attached as Exhibit A to Defendant's Memorandum in Support of Motion for Summary Judgment

(hereinafter "Def't Mem.") [Doc. 43] at 1. Thus, Plaintiff would have been 35 years old at the time of the events giving rise to her claim, and is not within the age group protected by the ADEA. Summary judgment is therefore granted on Plaintiff's ADEA claim.[2]

B. Discharge Based on Gender or National Origin

As previously discussed, in order to establish a *prima facie* case of impermissible discharge based on gender or national origin, Plaintiff must demonstrate that she is a member of a protected class, that she was qualified for her position, that she was discharged despite her qualification, and that her position was not eliminated after her discharge. In this case, there is no dispute that plaintiff is a member of protected classes as a female of Mexican origin, that she was discharged, or that her position was filled after her discharge. Thus, the only element of the *prima facie* case for which Plaintiff must produce evidence is that she was qualified for her position. Although Defendant disputes the issue of Plaintiff's qualification, the Court will presume, for purposes of deciding this motion only, that Plaintiff was qualified for her position and that she has met her *prima facie* case.

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[2] The Court notes that Plaintiff's Complaint claimed that Plaintiff was over 40 years old. *See* Amended Complaint [Doc. 3] at ¶¶ 6, 9, and 35. In filing a complaint, an attorney is certifying to the Court "that to the best of the [attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances...the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b). Although it is unclear how this ADEA claim, misrepresenting Plaintiff's age by at least five years, could have been filed based on knowledge formed after an inquiry that was reasonable under the circumstances, the Court will assume that it was a mistake made in good faith. What is even less clear, however, is why no effort appears to have been made to drop the claim following the revelation of Plaintiff's actual age. Not only did Plaintiff's counsel not file an amended complaint dropping the claim, but counsel did not renounce the claim in her Response to Defendant's Motion for Summary Judgment, even after having admitted that Plaintiff was only 35 years old at the time of the events. In fact, the Pretrial Order, filed June 22, 2009 [Doc. 50], still contains references to Plaintiff's claims of age discrimination, months after she conceded her true age. This is completely unprofessional and a matter the court intends to take up with counsel after the conclusion of this case.

Given the presumption that Plaintiff has met her *prima facie* case, the burden shifts to Defendant "to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas*, 411 U.S. at 802. Defendant easily meets this burden. Given Plaintiff's probationary status in her employment, the asserted grounds for her dismissal would not even have to rise to the level of just cause to constitute a legitimate, nondiscriminatory basis for termination. Plaintiff does not deny that she was hired by the USPS on a probationary basis and was required to perform her job satisfactorily for ninety days actually worked or one calendar year, whichever occurred first, before she was no longer a probationary employee. During the probationary period, the USPS has the right to "separate," i.e., terminate, an employee "because work performance or conduct during this period fails to demonstrate qualification for continued postal employment," as long as the employee is notified in writing as to why he or she is being terminated. Section 365.32 of the Postal Service's Employee Relations Manual, attached as Ex. 2 to Ex. C of Def't Mem. [doc. 43]; *see also* Articles 12.1.A and 30.2.b of the Agreement between the United States Postal Service and the National Rural Letter Carriers' Association, attached as Ex. 1 to Ex. C of Def't Mem. (discussing and defining the probationary period).[3]

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[3] Plaintiff disputes Defendant's contention that the USPS can separate from its employ a probationary employee at any time during the probationary period, and cites Article 16 of the Agreement between the United States Postal Service and the National Rural Letter Carriers' Association, which governs disciplinary procedures. *See* Plaintiff's Response to Defendant's Motion for Summary Judgment [Doc. 44] at 10. This citation creates, at most, a legal question regarding the limits of Defendant's power to dismiss Plaintiff. It does not create a material question of fact. In addition, Article 16, cited by Plaintiff without any context, governs only discipline or discharge of a permanent employee, rather than probationary-period "separation," which does not provide a probationary employee with the same procedural protections as a permanent employee. *See American Postal Workers Union v. United States Postal Service*, 940 F.2d 704, 707 (D.C. Cir. 1991). Allowing a probationary employee to "enforce against the [USPS] the just-cause requirement for dismissals contained in Article 16...would undermine the purpose of the probationary employment period–to permit an employer to evaluate a new employee on a trial basis and terminate [her] *for whatever reason it chooses* during the trial

In its letter to Plaintiff notifying her that she was being separated from her employment with the USPS, Defendant cited Plaintiff's loss of the Arrow Key and her failure to report that loss. *See* Notice of Separation, attached as Ex. 1 to Ex. A of Def't Mem. [Doc. 43]. The supervisor responsible for making the decision to terminate Plaintiff, Adam Trujillo, testified that he terminated Plaintiff solely for the reasons cited in the Notice of Termination. *See* Declaration of Adam Trujillo, attached as Ex. C to Def't Mem. at ¶ 18. Plaintiff admits that she lost the Arrow Key. *See* Pl. Resp. [Doc. 44] at 14. Losing an Arrow Key appears to be a serious infraction, as this master key opens practically every mailbox in Albuquerque,[4] potentially compromising the security of everyone's mail in the event of its loss. Thus, Defendant's explanation provides a legitimate, nondiscriminatory reason for the termination.

As Defendant has met its burden, any presumption of unlawful discrimination drops from the case. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Thus, summary judgment for Defendant is warranted unless Plaintiff can demonstrate the existence of a genuine issue of material fact as to whether Defendant's proffered reasons for termination are merely a

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period of employment." *Id.* (emphasis added).

[4] Plaintiff disputes Defendant's material fact that "[a]n arrow key is a master key that opens every customer mailbox in Albuquerque." *See* Pl. Resp. [Doc. 44] at 12. As grounds for disputing this fact, Plaintiff selectively and misleadingly cites the deposition testimony of Adam Trujillo. *See id.* Plaintiff paraphrases Mr. Trujillo's testimony as indicating that an Arrow Key is "a special key that is assigned specifically to the Agency and also a special key that's assigned to specific zones....Each one is assigned to a specific area." *Id.* (ellipsis in original). Mr. Trujillo's full testimony indicates that an Arrow Key is "a special key that is assigned specifically to the Agency and also a special key that's assigned to specific zones. *So, i.e., cities. So in other words, you cannot have an Arrow Key in California open up a box in, you know, New Mexico.* Each one is assigned to a specific area." Deposition of Adam Trujillo, attached as Ex. 5 to Pl. Resp. [Doc. 44] at 50:7-11. The full quotation does not provide any grounds for challenging Defendant's statement of fact. Plaintiff's use of an altered quotation that changes the substance of Mr. Trujillo's statement as a basis for challenging a material fact is disturbingly misleading at best.

subterfuge for discrimination on the basis of gender or national origin. A plaintiff can raise the issue of pretext by demonstrating, through admissible evidence, "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997). In examining the issue of pretext, the Court's role is "not to act as a 'super personnel department' that second guesses employers' business judgments," but rather to determine whether the plaintiff has presented sufficient evidence to enable a fact finder to conclude that the defendant's proffered reasons for termination may not be worthy of belief. *Simms v. Oklahoma ex rel Dep't of Mental Health and Substance Abuse Servs.*, 165 F3d 1321, 1329 (10th Cir. 1999) (citation omitted).

Plaintiff has offered no admissible evidence to indicate that Defendant's explanation for her termination was pretextual. Plaintiff does not contend that Mr. Trujillo, who solely made the decision to terminate her, ever commented on her gender or national origin in a disparaging manner, nor does she contend that any other supervisor discussed her gender or national origin. Thus, Plaintiff's termination did not take place under circumstances that give rise to an inference of discrimination.

Plaintiff contends that Defendant's explanation is unworthy of belief because someone else allegedly lost an Arrow Key and was not terminated. Plaintiff's contention is based on a conversation that she allegedly had with someone named Maria Rodriguez who told her that she had lost a key and not been fired. *See* Plaintiff's deposition, attached as Ex. E. to Def't Mem. [Doc. 43] at 49:3-50:4. As an initial matter, Plaintiff's contention cannot create a material question of fact, because it relies on hearsay rather than admissible evidence. *See Young v.*

Dillon Cos., Inc., 468 F.3d 1243, 1252 (10th Cir. 2006) (court may not consider inadmissible hearsay testimony from depositions submitted in opposition to motion for summary judgment). Even if Plaintiff's contention that Ms. Rodriguez was not terminated after losing a key was not based on hearsay testimony, she has failed to demonstrate its materiality to the case. Plaintiff has not indicated whether Ms. Rodriguez was a probationary or permanent employee, the time period in which she lost the key, how long the key remained missing, whether she immediately reported the key missing, who her supervisor was, or whether the post office at which Ms. Rodriguez worked (Rio Rancho) had the same policies as Richard Pino Station. As such, Plaintiff has not offered any evidence that she was similarly situated to Ms. Rodriguez, and so Ms. Rodriguez's alleged experience is not material to this case.

Plaintiff also contends that sufficient evidence exists to cast doubt on Defendant's explanation that she was fired in part for not immediately reporting that she lost the Arrow Key, because her cell phone records indicate that she called Richard Pino Station twice on the afternoon of the day she lost the key. *See* Pl. Resp. [Doc. 44] at 14-15. However, she has not presented any evidence that she spoke with anyone at the Station, that she informed anyone there that she had lost the key, or that such information was relayed to Mr. Trujillo. As such, the telephone call, by itself, is not relevant to the question of whether Mr. Trujillo believed that she had not immediately reported the loss of the key. Plaintiff has not presented any other evidence to contest the sworn statements of Mr. Trujillo and Mr. Jarm that they were not notified about the loss of the key until the evening of the day it was lost, and they were notified by Plaintiff's co-worker, Jay Guberman, who had loaned her his key. Simply put, Plaintiff has not demonstrated that Defendant's "proffered [race-neutral] reasons were so incoherent, weak, inconsistent, or contradictory that a rational trier of fact could conclude the reasons were

unworthy of belief." *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004). Thus, Defendant's motion for summary judgment must be granted on the discriminatory discharge counts.

C. Wage Discrimination Based on Gender or National Origin

In order to prevail on a wage discrimination claim brought under Title VII, a plaintiff must demonstrate not only that she was paid less than similarly-situated co-workers of different gender or national origin, but also that such disparity in pay was intentional on the part of the employer, and was motivated by the plaintiff's gender or national origin. *See Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1311 (10th Cir. 2006). Plaintiff has failed to come forward with any evidence supporting her contention that she was underpaid, or that such alleged underpayment resulted from unlawful discrimination, so Defendant is entitled to summary judgment on the wage discrimination claims.

In her Complaint, Plaintiff contends that her pay was inconsistent and that she was being paid less than comparably suited males and persons of non-Mexican origin. First Amended Complaint [Doc. 3] at 4, ¶ 16. However, in response to an interrogatory propounded by Defendant, Plaintiff identified only one instance in which she was allegedly underpaid–on May 12, 2006, when she was paid for the actual time she spent delivering mail on Rural Route 54, rather than the evaluated time. *See* Ex. F, attached to Def't Mem. [Doc. 43].

In his declaration, Customer Service Supervisor James Jarm described the compensation structure for RCAs such as Plaintiff, who are paid according to the system detailed in Article 9.2.I of the Agreement between the USPS and the National Rural Letter Carriers' Association. *See* Declaration of James Jarm, attached as Ex. D. to Def't Mem. at ¶ 10. The Article provides that RCAs are paid the "evaluated" time for delivering mail on their assigned routes when they

do not work in excess of forty hours per week. When the RCA's total actual hours worked exceeds forty hours, their compensation for the week is based on the actual number of hours worked plus overtime for the number of hours worked in excess of forty hours. *Id.* Plaintiff does not dispute this characterization of the RCA compensation structure. *See* Pl. Resp. [Doc. 44] at 9-10. Thus, whether Plaintiff should have been paid the evaluated time or the actual time for delivering the mail on Rural Route 54 on May 12, 2006 depends on the number of hours that she worked during that weekly pay period.

Plaintiff has admitted that May 12, 2006 falls within Week 2 of Pay Period 10, and that she worked a total of 50.80 hours during that pay period. *See id.* at 16-17. According to Plaintiff's Earnings Statement submitted by Defendant, during Week 2 of Pay Period 10, Plaintiff worked 34.34 hours on Rural Route 107, 5.66 hours on Rural Route 106, and 10.80 hours of overtime, for a total of 50.80 hours worked during the pay period. *See* Ex. 3 to Ex. D, attached to Def't Mem. As explained by Mr. Jarm in his declaration, because she worked over forty hours that week, Plaintiff was only entitled to be paid for the actual time she spent delivering mail on Rural Route 54 on May 12, 2006, rather than the evaluated time. Mr. Jarm further explained that Rural Route 54 was not explicitly referenced in Plaintiff's earning statement because the six hours worked on May 12, 2006 were overtime, and were therefore included in the 10.80 hours of overtime listed on the statement under Miscellaneous Code A999. *See* Ex. D, attached to Def't Mem. at ¶ 12. Plaintiff has proffered no evidence to challenge or rebut Mr. Jarm's explanation. Her contention that she was underpaid is nothing more than a conclusory allegation lacking in factual support, and does not create a genuine question of material fact. Even if Plaintiff could somehow demonstrate that she should have been paid for the evaluated time rather than the actual time worked on that particular day, Defendant is still

entitled to summary judgment because Plaintiff has not come forward with any evidence that could indicate that the alleged one-time shortage of $54.12 was the result of intentional discrimination rather than a clerical error.

D. Retaliation

Plaintiff also alleges that she was terminated from her probationary employment with the USPS for "speaking out against discriminatory treatment on the job." First Amended Complaint [Doc. 3] at ¶ 43. A retaliation claim brought under Title VII consists of three elements: 1) the plaintiff engaged in protected opposition to discrimination; 2) the plaintiff suffered an adverse employment action; and 3) there is a causal connection between the protected activity and the adverse employment action. Plaintiff's retaliation claim fails because she has not provided evidence that she engaged in a protected activity and has also failed to demonstrate any causal link between her complaint about being allegedly shorted in one paycheck and her termination.

For the purpose of Title VII retaliation claims, protected activities fall into two distinct categories–participation and opposition. Title VII's participation clause provides that an employer may not retaliate against an employee because the employee has participated in any manner in an investigation, proceeding, or hearing under Title VII. *See* 42 U.S.C.A. § 2000e-3(a). "The participation clause is designed to ensure that Title VII protections are not undermined by retaliation against employees who use the Title VII process to protect their rights." *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1528 (2009). On the other hand, the opposition clause provides that an employer may not retaliate against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. 42 U.S.C.A. § 2000e-3(a).

In this case, Plaintiff's actions can only fall within the scope of the opposition clause

because there is no evidence suggesting that she was involved in any proceeding arising under Title VII, nor does she allege participation in any such proceeding in her First Amended Complaint. On the contrary, she avers that her protected activity consists of "speaking out against discriminatory treatment on the job." First Amended Complaint [Doc. 3] at ¶ 43. According to Plaintiff, her only opposition to discriminatory treatment consists of complaints to her direct supervisor, Frank Ortega, that she was underpaid for her work on May 12, 2006.[5]

In her deposition, Plaintiff testified that on or about May 19, 2006, she spoke to Mr. Ortega about the alleged shortage in her paycheck. *See* Exhibit E, attached to Def't Mem., at 33-34. She alleges that she showed Mr. Ortega her Earnings Statement for Pay Period 10 and informed him that she had not been properly paid for the work she did delivering mail on Rural Route 54 on May 12, 2006. *See id.* at 35.[6] Plaintiff claims that Mr. Ortega looked at the Earnings Statement and acknowledged that Route 54 was not specifically referenced therein. *Id.* Mr. Ortega then allegedly informed Plaintiff that he would look into the problem, that the problem would be fixed, and that she would be paid on the following check. *Id.* According to Plaintiff, the foregoing was the extent of her conversation with Mr. Ortega. *Id.* at 36.

Plaintiff's complaint to Mr. Ortega regarding her pay does not fall within the realm of

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[5] In her Complaint, Plaintiff claimed that she raised her wage discrimination complaint with Mr. Trujillo as well. First Amended Complaint [Doc. 3] at ¶ 19. However, in her answer to Defendant's Interrogatory No. 3 and in her deposition testimony, Plaintiff refers only to a conversation that she had with Mr. Ortega, and she presented no evidence that she ever spoke with Mr. Trujillo about the alleged wage discrimination. *See* Plaintiff's Deposition, attached as Ex. E. to Def't Mem. at 33:24-36:20.

[6] In his Declaration, Mr. Ortega claims that Plaintiff never informed him that she felt that she had not been fully paid all of the wages due to her. *See* Ex. B, attached to Def't Mem. at ¶ 8. Nevertheless, for purposes of deciding this motion, the Court will assume that Plaintiff did make such complaints to Mr. Ortega.

protected opposition activity under Title VII because at no time during her discussion with Mr. Ortega did Plaintiff allege that she was the victim of discrimination or that she had been shorted because of her gender or national origin. An employer cannot engage in unlawful retaliation if it does not know that the employee has opposed or is opposing a violation of Title VII. *See Petersen v. Utah Dep't of Corrections*, 301 F.3d 1182, 1188 (10th Cir. 2002). Thus, because Plaintiff's complaint to Mr. Ortega concerning her alleged pay disparity apparently did not indicate that she believed the disparity stemmed from discriminatory treatment based on her gender or national origin, it does not constitute protected activity for Title VII purposes, *id.* at 1189, and cannot form the basis for a retaliation complaint.

Plaintiff's retaliation claim also fails because Plaintiff cannot establish a causal connection between her allegedly protected activity and her termination. She has produced no evidence to indicate that Mr. Trujillo was aware that she had complained to Mr. Ortega about being shorted. If Mr. Trujillo was not aware of her allegedly protected activity, by definition, he could not have retaliated against her for it. *See Petersen*, 301 F.3d at 1189 (employer's action against an employee cannot be because of that employee's protected opposition unless the employer knows the employee has engaged in protected opposition activity); *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) (plaintiff must show that the individual who took the adverse action against him knew of the employee's protected activity).

Finally, even if Plaintiff could establish a *prima facie* case of retaliation, Defendant is entitled to summary judgment on this claim because it has articulated a legitimate, non-discriminatory explanation for Plaintiff's termination, and, as discussed above, Plaintiff failed to come forward with any evidence showing that Defendant's explanation is pretextual.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Potter's *Motion for Summary Judgment* [Doc. 42] is **GRANTED.**

UNITED STATES DISTRICT JUDGE

CHIEF DISCIPLINARY COUNSEL COMPLAINT

RESPONDENT: **Dennis Montoya**

RULES INVOLVED: **Rules 16-101, 16-301, 16-303, and 16-804(D)**

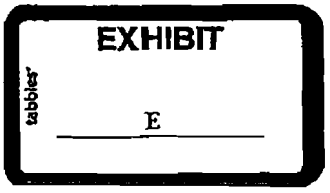
DATE: **12 March 2010**

This complaint arises out of Respondent's handling of the case Hernandez v. Potter, Cause No. CV-08-0023 JCH/CEG in the United States District Court for the District of New Mexico.

Respondent represented Hernandez in a wrongful termination suit against the United States Postal Service (USPS.) In the complaint, Hernandez alleged (among other things) that she had been terminated because of her age in violation of the Age Discrimination in Employment Act, 29 USC § 621 *et seq.* (ADEA) and that her discharge was based upon her gender or national origin. The Court (Judge Judith Herrara) granted summary judgment to the defendant on August 4, 2009.

In her Memorandum Opinion and Order granting summary judgment, Judge Herrara noted that in order to establish a *prima facie* age discrimination claim, a plaintiff must first demonstrate that he or she was within the age group protected by the ADEA at the time of termination; in order to be within the protected group, one must have been at least forty (40) years old. In her responses to Defendant's First Set of Requests for Admission, Hernandez gave her date of birth as 12/08/70, which would have made her thirty-five (35) at the time of her termination. Respondent made no effort to file an amended Complaint dropping the age discrimination claim nor did he renounce the claim in his Response to Defendant's Motion for Summary Judgment.

One defense raised by the Defendants in response to Hernandez' gender/national origin claim of discrimination was that there were legitimate non-discriminatory bases for her termination, to wit: she had lost an "Arrow Key" and failed to promptly report its loss to her superiors. In his deposition testimony, supervisor Adam Trujillo testified that an Arrow Key is "a special key that is assigned specifically to the Agency and also a special key that's assigned to specific zones. *So, for example, cities. So. in other words, you cannot have an Arrow Key in California open a box in, you know, New Mexico.* Each one is assigned to a specific area." In disputing Defendants' material fact that "an arrow key is a master key that opens every customer mailbox in Albuquerque," Respondent deleted the italicized words from Trujillo's testimony thus making it appear that the defendant had acknowledged the lost key would only open boxes in a specific area of Albuquerque. Judge Herrara opined that Respondent had selectively and misleadingly altered the quotation as a basis for challenging a material fact.



Rule 16-101 NMRA provides that an attorney must provide competent representation to a client. Rule 16-301 NMRA directs that a lawyer may not bring a frivolous claim. Rule 16-303(A)(1) and (4) state that an attorney may not knowingly make a false statement to a tribunal or offer evidence the lawyer knows to be false. Rule 18-804(D) defines as misconduct engaging in conduct prejudicial to the administration of justice. Respondent's conduct may have been in violation of some or all of these Rules. Possible violations of additional Rules may be disclosed as the investigation proceeds.

Virginia L. Ferrara
Chief Disciplinary Counsel

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

Glenn M. Boza,

Plaintiff,

v. No. CV-08-00908 BB/LFG

Michael B. Donley, Secretary,
United States Air Force,

Defendant.

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant's April 6, 2009 motion to dismiss, or in the alternative, for summary judgment. [Document #12]. After reviewing the motion, response, reply, and relevant law, this Court finds that Defendant's motion to dismiss should be GRANTED.

I. BACKGROUND

A. Facts and Procedural Posture

Plaintiff, Glenn Boza, was employed by the Kirtland Air Force base in Albuquerque, New Mexico from March 22, 2004 until February 11, 2008. [Document #12 at 2] On February 11, Plaintiff received a Notice of Decision to Remove, and a Last Chance Agreement ("LCA"). [*Id.*] The notice informed him that his position would be terminated unless he signed the LCA within seven days. [*Id.*] The notice also informed him that if he did not sign the LCA, the effective date

of his removal would remain February 11, 2008. [*Id.*] Plaintiff did not sign the LCA, thus the effective date of his removal was February 11, 2008. [*Id.*]

On March 24, Plaintiff challenged his removal by filing a mixed-case appeal with the Merit Systems Protection Board ("MSPB").[1] He raised the affirmative defenses of race, national origin, age, and disability discrimination. [Document #12 at 2] The MSPB dismissed his case due to untimely filing. [Document #14-2 at 4] This dismissal occurred on May 30, 2008. On October 5, 2008, ninety-four days later, Plaintiff filed this action. Defendant now moves to dismiss, or in the alternative, for summary judgement, arguing two independent grounds: first, Plaintiff untimely filed his mixed-case appeal with the MSPB. Second, Plaintiff untimely filed this action with the Court.

B. Mixed-Case Appeals Under the Civil Service Reform Act

The Civil Service Reform Act of 1978 ("CSRA") allows federal employees to challenge adverse employment actions. 5 U.S.C. §§ 1201-1222. If the adverse employment action is appealable to the MSPB[2] and related to unlawful discrimination,[3] the case is referred to as a

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[1] The MSPB is an independent, quasi-judicial federal administrative agency created by Congress in 1978. *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1327 (Fed. Cir. 2006). Congress gave the Board the responsibility, inter alia, to adjudicate appeals of adverse personnel actions taken by a federal agency against its employees. *Id.*

[2] The MSPB has jurisdiction over appeals from specified agency employment actions, including demotions, suspensions, and removals of agency employees. 5 C.F.R. § 1201.3.

[3] Under 5 U.S.C. § 7702(a), mixed cases must allege discrimination prohibited by:
(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),
(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph.

"mixed case." 5 C.F.R. § 1201.3; 29 C.F.R. § 1614.302(a); *e.g.*, *Williams v. Rice*, 983 F.2d 177, 179 (10th Cir. 1993). Under the CSRA, a federal employee may file a mixed-case complaint with the agency's Equal Employment Office ("EEO"), or a mixed-case appeal with the MSPB, but not both. 5 U.S.C. § 7702(a); 5 C.F.R. § 1201.151-57; 29 C.F.R. § 1614.302(b).

According to MSPB regulations, an agency employee wishing to challenge his removal must appeal within thirty days of the effective date of his removal, or of his receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). However, the MSPB may waive the time requirement for good cause. 5 C.F.R. § 1201.22(c). Here, both the effective date and receipt of notice occurred on February 11. (Document #14-2 at 2). Plaintiff filed his appeal forty-two days later, twelve days after the deadline. (*Id.*) The MSPB found no good cause for the delay[4] and dismissed Plaintiff's claim for untimely filing. (*Id.* at 4). U.S. district courts review *de novo* discrimination cases that are dismissed by the MSPB for untimeliness.[5] 5 U.S.C. § 7702(a)(1); 5 U.S.C. § 7703; 29 C.F.R. § 1614.310; *Harms*, 321 F.3d at 1008.

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[4] Plaintiff contends that his counsel misunderstood the effective date of his removal, that his counsel was busy and training a new staff, and that any delays were *de minimis*. (Document #14-2 at 2-3). The MSPB held that Plaintiff failed to use due diligence in complying with the time requirements, so even *de minimis* delays would not be excused. (*Id.* at 3-4).

[5] Typically, the Federal Circuit has exclusive jurisdiction to review final decisions by the MSPB. 5. U.S.C. § 7703(b)(1). However, in mixed-case appeals, a federal district court has jurisdiction to review MSPB decisions. 5 U.S.C. § 7702(a)(1); 5. U.S.C. § 7703(b)(2); In the Second and Tenth Circuits, this is true even if the MSPB does not hear the merits of the case due to untimeliness. *Harms v. IRS*, 321 F.3d 1001, 1008 (10th Cir. 2003).

II. DISCUSSION

A. Plaintiff Must Exhaust Administrative Remedies Prior to Bringing Suit in Federal Court

The "exhaustion doctrine" is the well-established requirement that Plaintiffs bringing discrimination cases must exhaust administrative remedies before filing a civil suit. *See, e.g., Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976) (discussing exhaustion of administrative remedies under the Rehabilitation Act and Title VII). The exhaustion doctrine is equally applicable to discrimination suits filed by federal employees through the CSRA. *Downey v. Runyon*, 160 F.3d 139, 145 (2d Cir. 1998). To exhaust administrative remedies, federal employees bringing mixed cases must timely file with either their agency's EEO or the MSPB. 5 C.F.R. § 1201.154; 29 C.F.R. § 1614.310; *see also Harms*, 321 F.3d at 1009 ("Under the CSRA, a plaintiff must either file a timely mixed case appeal with the MSPB or a timely mixed case complaint with the agency's EEO department prior to bringing a civil action."); *Coffman v. Glickman*, 328 F.3d 619, 623-24 (10th Cir. 2003). Once Plaintiff chose to file a mixed-case appeal with the MSPB, he had to timely exhaust that remedy before appealing to federal court. *Harms*, 321 F.3d at 1009.

B. To Exhaust his Administrative Remedies, Plaintiff Must Comply With MSPB Time Requirements, or Show Good Cause for Delay

To exhaust his administrative remedies, Plaintiff must file his mixed-case appeal according to the MSPB's time requirements. *Harms*, 321 F.3d at 1009. However, the Supreme Court has held and the Tenth Circuit has long recognized that administrative time requirements are subject to waiver, estoppel, and equitable tolling.[6] *Zipes v. Trans World Airlines*, 455 U.S.

[6] The Tenth Circuit distinguishes cases that do not *timely* exhaust administrative remedies, from cases that do not exhaust at all. While timeliness is subject to waiver, estoppel,

385, 393 (1982) (holding that EEOC time requirements are akin to a statute of limitations, and thus subject to waiver, estoppel, and equitable tolling); *Beaird v. Seagate Tech.*, 145 F.3d 1159, 1174-75 (10th Cir. 1998); *Richardson v. Frank*, 975 F.2d 1433, 1435 (10th Cir. 1991). MSPB time requirements also are subject to equitable tolling, if good cause is shown. *Harms*, 321 F.3d at 1009. Generally good cause to waive time requirements is narrowly construed, and exceptions to MPSB time requirements are no less narrow. *Id.* at 1006; *Biester v. Midwest Health Servs.*, 77 F.3d 1264, 1267 (10th Cir. 1996). Good cause to waive time requirements exists only when a plaintiff is actively misled or prevented from timely filing his complaint. *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

Here, Plaintiff did not file within the thirty-day deadline, but twelve days late. (Document #14-2 at 2). The MSPB found no good cause to excuse his late filing. Before the MSPB, Plaintiff's justifications for filing late were counsel's inability to meet with his client until twenty-three days before the deadline, counsel's miscalculation of the filing deadline, counsel's busy schedule, and counsel's new staff. (*Id.*). Plaintiff did not show he was actively misled or somehow prevented from complying with deadlines.

Before this Court, Plaintiff has presented no argument or evidence concerning his late filing with the MSPB.[7] Therefore the only reason Plaintiff has supplied for failing the MSPB

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and equitable tolling, failure to exhaust at all is a complete bar to suit. *Jones v. UPS, Inc.*, 502 F.3d 1176, 1183 (10th Cir. 2007) (noting that, although a timely filing is not jurisdictional in nature, the filing itself is a jurisdictional requirement); *Sizova v. Nat'l Inst. of Stds. & Tech.*, 282 F.3d 1320, 1325 (10th Cir. 2002) (distinguishing "between a failure to timely file an administrative charge, which is not jurisdictional, and a failure to file an administrative charge at all, which is a jurisdictional bar."); *Jones v. Runyon*, 91 F.3d 1398, 1399 n.1 (10th Cir. 1996).

[7] Plaintiff's arguments were directed only at the timeliness of this lawsuit, rather than his original filing with the MSPB. Due to this Court's resolution of the case based on the untimely

time requirement is the argument he made to the MSPB concerning his counsel's lack of due diligence. Plaintiff is responsible for his counsel's errors that fall short of due diligence. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (holding that EEOC time requirements should not be equitably tolled to excuse attorney error that is "at best a garden variety claim of excusable neglect"). No good cause exists to waive the MSPB time requirements, because "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). Thus Plaintiff's untimely filing amounts to a failure to exhaust administrative remedies. Because failure to exhaust administrative remedies bars suit in federal court, Plaintiff's claim should be dismissed.

III. CONCLUSION

Because Plaintiff failed to timely exhaust his administrative remedies, he is barred from bringing civil action. Accordingly, Defendant's motion to dismiss is GRANTED.

Bruce D Black

BRUCE D. BLACK
United States District Judge

MSPB filing, the Court need not address arguments as to why the late filing of this lawsuit should be excused.

CHIEF DISCIPLINARY COUNSEL COMPLAINT

RESPONDENT: **Dennis Montoya**

RULES INVOLVED: **16-103 and 16-804(D)**

DATE: **11 March 2010**

This complaint arises out of the handling of a case captioned Boza v. Donley, Cause No. CV-08-00908 before the United States District Court for the District of New Mexico. Court records indicate that you represented the plaintiff Glenn Boza in this wrongful termination case.

Regulations governing proceedings before the federal Merit Systems Protection Board (MSPB) provide that one must appeal a dismissal within thirty (30) days of the effective date of removal or receipt of notice of removal, whichever is later. In this case, you filed an appeal for Boza forty –two (42) days later (or twelve days after the thirty day deadline for appealing the removal had expired.) While you argued that you had misunderstood the effective date of the removal, that you were busy training a new staff, and that the delay was *de minimis,* the MSPB found no good cause for the delay and dismissed Boza's appeal for untimeliness. On behalf of Boza, you filed a civil action in the United States District Court.

The District Court (Judge Black) found that prior to bringing suit in Federal Court, one must first exhaust one's administrative remedies and that Boza's untimely filing amounted to a failure to exhaust administrative remedies. Judge Black held that Boza was "responsible for his counsel's errors that fall short of due diligence" and granted defendant's motion to dismiss on June 25, 2009.

Rule 16-103 NMRA provides that "a lawyer shall act with reasonable diligence and promptness in representing a client." Rule 16-804(D) NMRA provides that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Other Rules may be found to have been involved once this investigation proceeds.

Virginia L. Ferrara
Chief Disciplinary Counsel

EXHIBIT
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JANE DOE, a minor, by and through her next friend EVA HUGHES, her mother and natural guardian, MARY DOE, a minor, by and through her next friend EVA HUGHES, her mother and natural guardian,

Plaintiffs,

vs. No. CIV-09-104 WJ/WPL

ISAAC MARTINEZ, a married man, CRUZ DELIA MARTINEZ, an unmarried woman; ISAAC MARTINEZ and CRUZ DELIA MARTINEZ, jointly for the former Community Estate comprised of Isaac Martinez and Cruz Delia Martinez, JOHN MOE and JANE MOE, husband and wife; JOHN ROES I-V, inclusive; JANE ROES I-V, inclusive; ABC Corporations, Inclusive; XYZ Partnerships, inclusive,

Defendants.

ORDER REMANDING CASE AND AWARDING ATTORNEY'S FEES, EXPENSES AND COSTS FOR IMPROPER REMOVAL

THIS MATTER comes before the Court on Plaintiffs' Motion for Remand (Doc. 12) which includes a request for attorney's fees and costs. The above captioned case was initiated in the United States District Court for the District of New Mexico by Defendant Isaac Martinez when his lawyer, Dennis Montoya, filed the Notice of Removal (Doc. 1) on February 4, 2009, pursuant to 28 U.S.C. § § 1441 and 1446. The Notice of Removal purportedly removed to this Court the case of Jane Doe, a minor, by and through next friend, Eva Hughes, et al., Plaintiffs v. Isaac Martinez, et al., Defendants, CV-2008-033216, Superior Court of Arizona, County of Maricopa (the "Arizona State Court Case"). The Court, having considered Plaintiffs' Motion to Remand (Doc. 12), the Declaration of Leonard J. Mark (Doc. 16), Defendant Martinez's

EXHIBIT

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Response (Doc. 19), Plaintiff's Reply (Doc. 20) and the applicable law, **FINDS** that Plaintiff's Motion to Remand is well taken and shall be **GRANTED.**

I. REMOVAL UNDER 28 U.S.C. § § 1441 and 1446:

28 U.S.C. § 1441 is entitled "Actions Removable Generally." Paragraph (a) of Section 1441 states in relevant part:

> ". . . any civil action brought in a State court of which the District Courts of the United States have original jurisdiction, may be removed by the Defendant or the Defendants, **to the district court of the United States for the district and division embracing the place where such action is pending.**" (Emphasis added).

28 U.S.C. § 1446 is entitled "Procedure for Removal." Paragraph (a) of Section 1446 states in relevant part:

> "Federal Rules of Civil Procedure . . . A defendant or defendants desiring to remove any civil action . . . from a State court shall file **in the district court of the United States for the district and division within such action is pending** a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." (Emphasis added).

Had Attorney Montoya bothered to read the first paragraph of Section 1441 or the first paragraph of Section 1446, he would have discovered in clear and unequivocal statutory language that the Arizona State Court Case could not be removed to federal court in New Mexico. Assuming diversity of citizenship such that there would be subject matter jurisdiction in federal court, the only federal court Defendant Martinez could have removed the Arizona State Court case to is the United States District Court for the District of Arizona. Having determined that the Notice of Removal is jurisdictionally deficient on its face, the Court need not address any of the arguments raised by Attorney Montoya in Defendant Martinez's Response to the Motion for Remand (Doc. 19) other than to note that the arguments raised by Attorney Montoya are totally devoid of merit.

The United States District Court for the District of New Mexico, like the United States District Court for the District of Arizona, has a huge criminal caseload, much of which is comprised of border related cases. Consequently, the judges in this district are not always able to devote as much time as they would like to pending cases on their civil dockets. Simply stated, had I discovered the improper removal of the Arizona State Court case to this Court when the Notice of Removal was filed, I would have *sua sponte* remanded the case back to Arizona State Court pursuant to 28 U.S.C. §1447(c). Further, the record shows that U. S. Magistrate Judge William P. Lynch denied Arizona counsel's Motions for Admission Pro Hac Vice. While Judge Lynch was correct in noting the technical deficiencies with the Motions for Admission Pro Hac Vice in accordance with the local rules of this Court, I am confident that had Judge Lynch realized how blatantly improper Defendant Martinez's removal of the Arizona State Court case to this Court, he would have brought the matter to my attention, or would have overlooked the technical deficiencies in the Motions for Admission Pro Hac Vice.

II. JUST COSTS, EXPENSES AND ATTORNEY'S FEES FOR IMPROPER REMOVAL PURSUANT TO 28 U.S.C. § 1447(c):

Attorney Leonard J. Mark submitted his Declaration under penalty of perjury (Doc. 16) whereby he is requesting on behalf of his clients attorney's fees and costs in amount of $4,210.00 plus certain other unspecified costs and/or fees. The Court considers the sum of $4,210.00 to be an extremely reasonable amount considering Attorney Montoya's blatantly improper removal to this Court and considering Attorney's insistence that removal to this Court was somehow proper after noble attempts by Attorney Mark to demonstrate to Attorney Montoya just how legally unsound and untenable his removal to this Court of the Arizona State Court. What is not completely clear to the Court is whether the sum of $4,210.00 is adequate to reimburse Plaintiffs' counsel in Arizona and Plaintiffs' counsel in New Mexico for the attorney's

fees, expenses and costs reasonably incurred in bringing the improper removal to this Court's attention.

Based on the Declaration of Attorney Mark and Exhibit 1 attached thereto and the pleadings filed in this case, the Court finds that Plaintiffs are entitled to attorney's fees, expenses and costs in accordance with 28 U.S.C. § 1447(c). Even assuming that Attorney Montoya was operating under the mistaken belief that he could properly remove the Arizona State Court case to federal court in New Mexico, Attorney Mark's letter dated February 11, 2009 (Ex. 1, Doc. 16) put Attorney Montoya on notice that his removal of the Arizona State Court case to federal court in New Mexico was improper and any marginally competent lawyer would have examined the removal statute to see if in fact removal of the Arizona State Court Case to New Mexico was improper. Moreover, if Attorney Mark's letter was somehow overlooked, clearly Plaintiffs' Motion to Remand would put any marginally competent lawyer on notice that removal was improper. Notwithstanding Attorney Mark's letter and Plaintiffs' Motion for Remand, Attorney Montoya dug in his heels and filed a Response in Opposition to Remand which set forth several bogus and frivolous arguments that somehow removal to this Court was proper. Attorney Montoya's conduct not only caused Plaintiffs to incur attorney's fees, expenses and costs by Arizona counsel, but also resulted in Plaintiffs incurring attorney's fees, expenses and costs by having to retain New Mexico counsel to file the Motion for Remand and to file the Reply to Attorney Montoya's frivolous response. If ever there was a case where attorney's fees and costs should be awarded under Section 1447(c), this is the one.

While the Court is remanding the case back to Arizona State Court, the Court shall retain jurisdiction to consider the exact amount of an appropriate award of attorney's fees, costs and actual expenses to be awarded Plaintiffs on account of the improper removal by Defendant Martinez. Accordingly, Arizona counsel and/or New Mexico counsel for Plaintiffs shall within

ten (10) days of the entry of this Order file an affidavit detailing what they assert is the reasonable attorney's fees, expenses and costs that should be awarded for the improper removal.

Attorney Montoya shall have ten (10) days after such affidavit is filed to submit any written objections concerning the reasonableness of attorney's fees, expenses and costs that the Court will award pursuant to § 1447(c). If Attorney Montoya decides to file any objections, he needs to understand that what remains undecided is not whether attorney's fees, expenses and costs are going to be awarded, but rather the amount of such attorney's fees, expenses and costs to be awarded to Plaintiffs.

III. SANCTIONS UNDER 28 U.S.C. § 1927:

28 U.S.C. § 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Sanctions are appropriate when an attorney acts recklessly or with indifference to the law; is cavalier or bent on misleading the court; intentionally acts without a plausible basis; or when the entire course of the proceedings is unwarranted. Steinert v. Winn Group, Inc., 440 F.3d 1214, 1221 (10th cir. 2006). An attorney's actions are measured under the standard of objective bad faith. Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) (enbanc). The Court also has the **inherent right** to manage its own proceedings. It has authority under its own inherent powers to deter frivolous and abusive litigation and promote justice and judicial efficiency by imposing monetary sanctions. See Roadway Express, Inc. V. Piper, 447 U.S. 752, 764-67 (1980); Braley v. Campbell, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987); Link v. Wabash R. Co., 370 U.S. 626 632 (1962) (recognizing the well-acknowledged inherent power of a court to levy sanctions in response to abusive litigation practices).

The statutory and case law language quoted and referenced in the preceding paragraph

describes exactly the conduct of Attorney Montoya in filing the Notice of Removal and insisting that removal was somehow proper in this Court in contravention to the express language of the removal statute. Moreover, Attorney Montoya's refusal to dismiss this case after the improper removal was brought to Attorney Montoya's attention first by Attorney Mark's letter and second by Plaintiff's Motion to Remand, is the type of abusive litigation practice Section 1927 is designed to deter. Therefore, 28 U.S.C. § 1927 provides an additional basis for awarding Plaintiffs attorney's fees, expenses and costs.

IT IS THEREFORE ORDERED that the above captioned case is hereby remanded to the Superior Court of the State of Arizona in and for the County of Maricopa;

IT IS FURTHER ORDERED that Plaintiffs are hereby awarded attorney's fees, costs and expenses pursuant to 28 U.S.C. § 1447 (c) and pursuant to 28 U.S.C. § 1927 against Attorney Dennis Montoya. Arizona counsel and New Mexico counsel for Plaintiffs shall submit within ten (10) days of the entry of this Order an affidavit setting forth the attorney's fees, costs and expenses requested and Attorney Montoya shall have an additional ten (10) days from the date of filing of such affidavit to object to the reasonableness of the amounts requested;

IT IS FINALLY ORDERED that Arizona Attorney Leonard J. Mark is admitted to this Court Pro Hac Vice and is allowed to file any pleadings in connection with this case without having to further utilize New Mexico counsel.

UNITED STATES DISTRICT COURT

CHIEF DISCIPLINARY COUNSEL COMPLAINT

RESPONDENT: **Dennis W. Montoya**

RULES: **16-101, 16-103, 16-301, 16-302, and 16-804(D)**

DATE: **17 March 2010**

This matter arises out of Respondent's representation of Defendant Isaac Martinez in the case Hughes v. Martinez, et al, Cause No. CIV-09-00104 WJ/WPL in the United States District Court for the District of New Mexico.

On December 31, 2008, Eva Hughes filed a tort claim on behalf of her two minor daughters against Martinez and others alleging sexual abuse occurring in Lordsburg, New Mexico, during a visit in 2008. The case was filed in the Superior Court of Arizona, County of Maricopa, as Doe, et al v. Martinez at al, Cause No. CV2008-033216. On February 4, 2009, Respondent filed a Notice of Removal pursuant to 28 USC §1441 and §1446 thereby purporting to remove the case from state court in Arizona to the United States District Court for the District of New Mexico.

28 U.S.C. §1441 is entitled, "Actions Removable Generally." Paragraph (a) of Section 1441 provides in pertinent part as follows:

> "...any civil action brought in a State court of which the District Courts of the United States have original jurisdiction, may be removed by the defendant or defendants, **to the district court of the United States for the district and division embracing the place where such action is pending.**" (Emphasis added).

28 U.S.C. §1446 is entitled, "Procedure for Removal." Paragraph (a) of Section 1446 provides in pertinent part as follows;

> "Federal Rules of Civil Procedure...A defendant or defendants desiring to remove any civil action...from a State court shall file **in the district court of the United States for the district and division within which such action is pending** a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." (Emphasis added).

Respondent was first notified of the improper removal by a letter from Plaintiff's counsel. Despite the plain and unambiguous language of the quoted rules, Respondent took no action to remedy the situation. Plaintiff then filed a Motion to Remand and Request for Attorney Fees and Costs. Respondent still took no action to remedy the improper removal. Instead, Respondent filed a response in opposition to the motion for remand. On April 3, 2009, the United States District Court (Judge William Johnson)

EXHIBIT

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granted the motion to remand, noting the unequivocal language that would prevent an Arizona state court case from being removed to a federal court in New Mexico. Judge Johnson's order also noted that the arguments Respondent asserted in opposition to remand were devoid of merit and awarded the plaintiff fees and costs to be assessed against Respondent personally as a sanction for his conduct. Arizona counsel filed affidavits and times records showing their costs and fees in the amount of $12,426.05.

Respondent filed a Motion to Vacate the Order of Remand and Motion for Recusal (of Judge Johnson) but did not file an objection to the to the fee request. On June 12, 2009, the Court awarded the $12,426.05 in Costs and attorney fees and directed that they be paid by Respondent within thirty (30) days.

Respondent did not pay the fees and costs by July 12, 2009, as ordered. On July 19, 2009, Respondent filed a motion for adversarial proceedings regarding the attorney fees or, in the alternative, for entry of judgment so he could appeal the award and also renewed his motion for recusal. After the Court denied the motions on July 20, Respondent filed a Notice of Appeal on the original order of remand, the order denying his motion to vacate and for recusal, the order sanctioning him and awarding attorney fees, and the order denying reconsideration. The plaintiff petitioned for a show cause order regarding Respondent's continued failure to pay the sanctions ordered on July 12, and Respondent moved for a stay of enforcement pending resolution of his appeal. At a hearing on the motion for stay, Magistrate William P. Lynch ruled that there would be no stay unless Respondent posted a supersedeas bond.

Respondent ultimately posted a bond, and the 10th Circuit Court of Appeals dismissed his appeal by order of December 20, 2009, for want of jurisdiction (Respondent was not a party to the underlying case.)

Based upon the above allegations, Respondent may have committed violations of Rule 16-101 NMRA (Competence); 16-103 NMRA (Diligence); 16-301 NMRA (Meritorious Claims); 16-302 NMRA (Expediting Litigation); and 16-804(D) (Conduct Prejudicial to the Administration of Justice.) Other Rules may be implicated as the investigation proceeds.

Virginia L. Ferrara
Chief Disciplinary Counsel

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

BARBARA GARCIA,

Plaintiff,

v. No. CIV 08-0406 BB/WPL

THOMAS J. VILSACK, Secretary, United States Department of Agriculture,

Defendant.

MEMORANDUM OPINION

This MATTER comes before the Court on a motion for summary judgment (Doc. # 25) from the defendant, Thomas J. Vilsack, the Secretary of the United States Department of Agriculture (hereinafter "Defendant" or "the USDA").[1] Barbara Garcia is the plaintiff in this action (hereinafter "Plaintiff" or "Ms. Garcia"). Ms. Garcia is a former employee of the USDA, who was terminated for alleged misconduct. She sues under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"). The USDA seeks summary judgment because Plaintiff did not timely file her judicial complaint with this Court.[2] After reviewing the submissions of the parties

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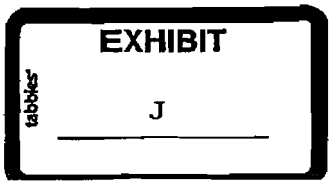
[1]On January 21, 2009, Thomas J. Vilsack was appointed Secretary of the Department of Agriculture and is thus automatically the proper named Defendant in this action under Federal Rule of Civil Procedure 25(d). *See* FED. R. CIV. P. 25(d).

[2]Before this opinion was filed, Defendant filed another summary-judgment motion (Doc. # 40) addressing the merits of Plaintiff's Title VII claims. Because the Court finds that Plaintiff's Title VII claims were not filed on time, Defendant's additional motion for summary judgment should be DENIED as moot.



and the relevant law, the Court agrees with Defendant and concludes that the summary-judgment motion (Doc. # 25) should be GRANTED.

STANDARD FOR REVIEWING MOTIONS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 governs summary-judgment motions. Summary judgment is not "a disfavored procedural shortcut but rather [it is] an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1). Summary judgment is appropriate if the evidence submitted by the parties shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)). In evaluating a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party. *See T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1306 (10th Cir. 2008) (citing *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1112 (10th Cir. 2007)). But a mere scintilla of evidence supporting the non-moving party's theory does not create a genuine issue of material fact. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175 (10th Cir. 1999).

FACTUAL BACKGROUND

The facts of this case are undisputed. Plaintiff was a Forester for the Forest Service, a branch of the USDA, in Santa Fe. *See* MSPB Dec. (Doc. # 25, Exh. A at 1). On May 14, 2007, it came to light that Plaintiff had made what appeared to be unauthorized purchases with her government-issued credit card, leading her supervisors to issue a "Letter of Inquiry." *Id.* at 4. When the Forest Service was unsatisfied with the explanations Plaintiff provided, it gave her a notice of its decision to remove her dated September 18, 2007, effective September 29. *Id.* at 5.

On the date her termination became effective, Plaintiff filed a mixed case appeal to the Merit Systems Protection Board (hereinafter "MSPB"), challenging the Forest Service's decision to discharge her.[3] In that mixed case appeal, Plaintiff raised discrimination and retaliation as affirmative defenses to her termination. *Id.* at 6, 10-11. In particular, she alleged: (1) that co-workers at the Forest Service unlawfully discriminated against her because of her sex and race; and, (2) that the USDA retaliated against her for seeking counseling from its Equal Employment Opportunity office (hereinafter "EEO office"). However, in the MSPB's thorough, 24-page written opinion, it rejected Plaintiff's defenses and affirmed the Forest Service's decision to remove her. *See id.* at 21. In addition, at the end of its opinion, the MSPB notified Ms. Garcia of her options going forward. *Id.* at 22-24.

Those options were the following: (1) she could receive a review of the MSPB decision by the MSPB itself, so long as she filed a petition for such review by February 22, 2008; (2) she could receive administrative review of her discrimination claims by filing a petition with the Equal Employment Opportunity Commission (hereinafter "EEOC"), so long as she did so no later than 30 days after February 22, 2008; or, (3) she could seek judicial review of her discrimination claims by filing a complaint in federal district court under Title VII, so long as she did so no later than 30 days after February 22, 2008. *Id.* at 22-24. Attempting to choose the third option, Ms. Garcia filed a complaint in this Court. *See* Compl. (Doc. # 1). Yet she did not do so until April 21, 2008—59 days after February 22, 2008, and 29 days after the deadline. *Id.*

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[3]A mixed case appeal is an appeal filed with the MSPB, alleging that an appealable agency action, *i.e.*, a termination or a demotion, was effected, in whole or in part, because of discrimination based on race, sex or advanced age. *See* Civil Service Reform Act, 5 U.S.C. §§ 1201-1222 (providing a mechanism by which federal employees may assert discrimination claims that arise out of adverse employment actions which are appealable to the MSPB); *see also* 29 C.F.R. § 1614.302(a)(2) (defining "mixed case appeal").

DISCUSSION

A. The Complaint Was Untimely, And The Court Has no Reason to Excuse Its Tardiness

A basic precept of litigation is a plaintiff's obligation to file his or her judicial complaint in a timely manner. *See Johnson v. United States Postal Serv.*, 64 F.3d 233, 238 (6th Cir. 1995) (affirming district court's decision to grant summary judgment because the plaintiff's complaint was untimely). As discussed above, once the MSPB decision became final on February 22, 2008, Ms. Garcia had 30 days in which to file a judicial complaint in this Court. *See* 42 U.S.C. § 7703(b)(2). Ms. Garcia does not dispute that she filed her judicial complaint beyond that 30-day deadline. For Plaintiff's claim to survive summary judgment, therefore, she must convince the Court to excuse the untimeliness of her complaint.

In so doing, Plaintiff faces an uphill battle. Indeed, courts may only excuse a late-filing in Title VII cases under very extraordinary circumstances, including, for example, agency subterfuge. *See Mosley v. Pena*, 100 F.3d 1515, 1518 (10th Cir. 1996) (equitable tolling may be appropriate where agency misled plaintiff or where extraordinary circumstances prevented plaintiff from asserting rights); *see also Simons v. Southwest Petro-Chem, Inc.*, 28 F.3d 1029, 1031 (10th Cir. 1994) (finding that a Title VII time limit will be tolled only upon a showing of deception). As is clear from the aforementioned facts, Ms. Garcia suffered no such trickery here.

On the contrary, the MSPB gave Plaintiff straightforward, accurate instructions regarding her options in appealing its decision. *See* MSPB Dec. (Doc. # 25, Exh. A). Moreover, Plaintiff provides no explanation for her failure to file a complaint within 30 days of the date on which the MSPB decision became final. Without a rationale for the dilatory nature of her complaint, Plaintiff may not benefit from the equitable tolling doctrine. *See Harms v. IRS*, 321 F.3d 1001, 1006 (10th Cir. 2003) ("the district court did not abuse its discretion in concluding that equitable

tolling was not warranted because [the plaintiff] failed to proffer any evidence to justify the delay"). As a consequence, Plaintiff's complaint was untimely as a matter of law. *See Martinez v. Slater*, 1997 WL 589205 at *2 (10th Cir. 1997) (unpublished) ("Because plaintiff failed to file a timely complaint following the MSPB's decision, the district court did not err in granting summary judgment"). For these reasons, Defendant's summary-judgment motion (Doc. # 25) should be GRANTED.

B. Plaintiff's Argument Regarding "Piecemeal Litigation" is Unpersuasive

Rather than explaining the tardiness of her judicial complaint, Plaintiff avers that the Court should disregard the 30-day deadline. Pl.'s Resp. (Doc. # 30 at 1-2). Plaintiff's argument hinges on the EEO complaint she filed with the EEO office, in which she alleged discrimination by co-workers at the Forest Service, and which she claims is still "pending." *See id.*; *see also* USDA Rep. (Doc. # 30, Exh. 2). In response to that EEO complaint, the EEO office investigated Plaintiff's allegations and issued a report on its findings. USDA Rep. (Doc. # 30, Exh. 2). Then, after receiving the report, Ms. Garcia sought a hearing before the EEOC, a request to which the EEOC never responded. *See* (Doc. # 30 at Exh. 4).

In an attempt to excuse her tardy filing, Plaintiff points out that because the EEOC has yet to grant a hearing reviewing the findings of the EEO office's report, and, the argument goes, because those findings addressed issues "inextricably intertwined" with the issues in her judicial complaint, dismissing this lawsuit for untimeliness would result in "piecemeal litigation." Pl.'s Resp. (Doc. # 30 at 2). What Plaintiff fails to acknowledge, however, is that by law she elected to pursue a remedy through the MSPB exclusively, thus voiding her subsequent EEO complaint.

To elaborate: once an aggrieved federal employee files a mixed case appeal with the MSPB, that act demarcates an election to proceed in that forum to the exclusion of others. *See*

McAdams v. Reno, 64 F.3d 1137, 1141 (10th Cir. 1995) ("A mixed case may be filed as a complaint with the agency's EEO office or as an appeal to the MSPB, but not both"). In other words, if an employee wishes to challenge her removal, while also raising discrimination claims or defenses, she has two options: (1) she may file a complaint with her agency's EEO office, or (2) she may file a mixed case appeal with the MSPB—but she must choose one. Also, in cases such as this, where the aggrieved employee in fact files both a mixed case appeal to the MSPB and an EEO complaint, "whichever is filed first shall be considered an election to proceed in that forum." 29 C.F.R. § 1614.302(b). The question, then, is: In which forum did Plaintiff file first?

The relevant dates make it clear that Plaintiff chose the MSPB option. Ms. Garcia filed her mixed case appeal with the MSPB on September 29, 2007, three days before she filed her EEO complaint, on October 2.[4] *See* EEO Compl. (Doc. # 30, Exh. 2 at 22). By filing a mixed case appeal to the MSPB first, Plaintiff waived her right to have the EEO office address her discrimination claims.[5] *See, e.g., Economou, supra*, 286 F.3d at 149-150 (once a government employee elects to pursue a mixed case appeal before the MSPB, she is obliged to follow that route, to the exclusion of any other remedy that may have been available). Thus, the EEO office

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[4]At some point during the time between receiving the Forest Service's notice of removal and its effective date, Ms. Garcia sought EEO counseling. *See* MSPB Dec. (Doc. # 25, Exh. A at 11). Though she contacted the EEO office before she filed the mixed case appeal, the timing of this contact is irrelevant. The essential comparison is the date on which she filed her mixed case appeal, versus when she lodged a formal EEO complaint. *See* 29 C.F.R. § 1614.301 ("[a]n election to proceed [with an EEO action] is indicated only by the filing of a written complaint; use of the pre-complaint process . . . does not constitute an election for purposes of this section."); *see also Economou v. Caldera*, 286 F.3d 144, 149 (2d Cir. 2002) ("This binding 'election' between the MSPB and EEO remedies occurs as soon as a formal petition is filed in either forum.").

[5]As evidenced by the USDA's Report of Investigation, the EEO office did in fact address Plaintiff's discrimination claims. *See* USDA Rep. (Doc. # 30, Exh. 2). However, because she filed the EEO complaint after she filed a mixed case appeal with the MSPB, this report was superfluous. Put simply, the EEO office had no legal obligation to issue it.

had no obligation to issue its report. *See Stoll v. Principi*, 449 F.3d 263, 266 (1st Cir. 2006) (describing an EEO complaint as a "nullity" when filed after a mixed case appeal). Indeed, Plaintiff's request for a hearing with the EEOC is subject to dismissal, and the Court need not concern itself with the potential for piecemeal litigation. *See* 29 C.F.R. § 1614.107(a)(4) (EEOC regulation which states, "the [EEOC] shall dismiss an entire complaint . . . [w]here the complainant has raised the matter . . . in an appeal to the [MSPB]").[6] In short, Plaintiff's argument cannot salvage her untimely claim.

C. Plaintiff's Request For Leave to Amend Her Complaint is Denied

The final matter the Court must address is Plaintiff's request for leave to amend her complaint, so as to include issues raised in her EEO complaint. *See* Pl.'s Resp. (Doc. # 30 at 2). Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint shall be given freely. FED. R. CIV. P. 15(a). However, a district court may deny leave to amend a complaint where the party seeking amendment knew of the facts upon which the proposed amendment is based, but failed to incorporate them into the original complaint. *See Las Vegas Ice and Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

Plaintiff does not deny that, at the time she filed her judicial complaint, she knew of the facts upon which all the claims in her EEO complaint were based. In fact, the only cause of action in her EEO complaint that is not included in her judicial complaint is one of disparate treatment based on sex, which she asserts occurred during her employment with the Forest Service. *See* USDA Rep. (Doc. # 30, Exh. 2). However, her tenure with the Forest Service

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[6]In her response brief, Plaintiff asserts that she is "entitled to have her day in court on the pending EEO complaint[.]" That, however, is an inaccurate statement of the law pursuant to C.F.R. § 1614.107(a)(4), which mandates that the EEOC dismiss a complaint when it encompasses matters already raised in a mixed case appeal.

ended almost seven months before she filed her judicial complaint. As there is no reason to believe that Plaintiff was unaware of the factual basis for her disparate treatment claim when she filed her judicial complaint, that cause of action should have been included therein.

Moreover, as Defendant points out, Plaintiff provided notice in the Joint Status Report of her intention to file an amended complaint by December 15, 2008. *See* Joint Status Rep. (Doc. # 12 at 2). And Magistrate Judge Lynch adopted the time line set forth by the parties as an order of the Court. *See* Sch. Order (Doc. # 16). Despite Plaintiff's declared intention, however, she never filed an amended complaint. Given this unexplained failure to follow the time line agreed to by the parties and Judge Lynch, the Court is disinclined to allow Plaintiff to amend her complaint now. For these reasons, the Court denies Plaintiff's request.

CONCLUSION

In sum, Plaintiff's complaint alleging violations of Title VII was untimely, and she has not provided evidence to persuade the Court that the filing deadline should be tolled. In addition, Plaintiff's argument that the Court should ignore the 30-day deadline to prevent "piecemeal litigation" is unavailing. Defendant's summary-judgment motion (Doc. # 25) should thus be GRANTED. Lastly, under the circumstances of this case, the Court elects to exercise its discretion by denying Plaintiff's request for leave to amend her complaint.

Bruce D Black

BRUCE D. BLACK
United States District Judge

CHIEF DISCIPLINARY COUNSEL COMPLAINT

RESPONDENT: **Dennis Montoya**

RULES INVOLVED: **16-101, 16-103 and 16-804(D)**

DATE: **11 March 2010**

This complaint arises out of the handling of a case captioned Garcia v. Schaefer, Cause No. CIV-08-0406 BB/WPL before the United States District Court for the District of New Mexico. Court records indicate that you represented the plaintiff Barbara Garcia in this lawsuit filed under Title VII of the Civil Rights Act of 1964

Plaintiff was employed by the United States Department of Agriculture (Forest Service) as a forester and was issued a "Letter of Inquiry" by her supervisors regarding what appeared to be unauthorized purchases with her government-issued credit card. Not satisfied with Garcia's explanation, the Forest Service terminated her as of September 29, 2007. On that same day, Garcia filed a "mixed case appeal" with the Merit Systems Protection Board (MSPB) alleging discrimination and retaliation as defenses to her termination.

The MSPB affirmed the Forest Service's decision to terminate Garcia's employment. At the end of its opinion, the MSPB notified Garcia of her options for going forward: she could (a) petition for review of the decision by MSPB so long as the petition was filed by 02/22/08, (b) file a petition for review by the EEOC on or before 02/22/09, or (c) seek judicial review in federal district court under Title VII no later than thirty (30) days after 02/22/08. Garcia chose the third option but Montoya did not file her complaint with the federal court until 04/21/08 – twenty-nine (29) days after the thirty day deadline had expired. No satisfactory rationale was given for the delay, and on 06/23/09 the District Court (Judge Black) granted the Defendant's Motion for Summary Judgment.

Rule 16-101 NMRA provides that a lawyer shall provide competent representation to a client and defines "competent representation" as requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 16-103 NMRA provides that "a lawyer shall act with reasonable diligence and promptness in representing a client." Rule 16-804(D) NMRA provides that it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Other Rules may be found to have been involved once this investigation proceeds.

Virginia L. Ferrara
Chief Disciplinary Counsel

EXHIBIT
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In sum, Plaintiff's complaint alleging violations of Title VII was untimely, and she has not provided evidence to persuade the Court that the filing deadline should be tolled. In addition, Plaintiff's argument that the Court should ignore the 30-day deadline to prevent "piecemeal litigation" is unavailing. Defendant's summary-judgment motion (Doc. # 25) should thus be GRANTED. Lastly, under the circumstances of this case, the Court elects to exercise its discretion by denying Plaintiff's request for leave to amend her complaint.

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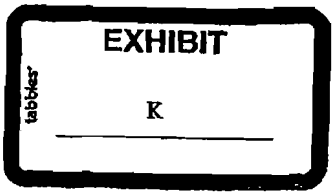


STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

No. CR-2000-1158

STATE OF NEW MEXICO,

Plaintiff,

v.

HECTOR AGUILAR,

Defendant.

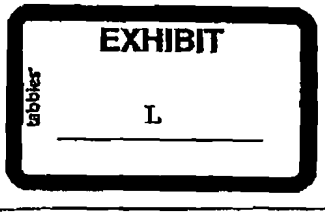
TRANSCRIPT OF PROCEEDINGS

On the 21st day of April 2010, at approximately 2:00 p.m., this matter came on for hearing on a PROBATION VIOLATION before the HONORABLE REED SHEPPARD, Division XIV, Judge of the Second Judicial District, State of New Mexico.

The Plaintiff, STATE OF NEW MEXICO, appeared by Counsel of Record, JOHN SUGG, Assistant District Attorney, 520 Lomas Blvd. NW, Albuquerque, New Mexico 87102-2118.

The Defendant, HECTOR AGUILAR, appeared in person and by Counsel of Record, DENNIS W. MONTOYA, Attorney at Law, PO Box 15235, Rio Rancho, New Mexico 87174.

At which time the following proceedings were had:



April 21, 2010

(Note: In open court at approximately 2:00 p.m.)

THE COURT: Number 16, 2000-1158, Hector Aguilar.

MR. SUGG: John Sugg for the State.

MR. MONTOYA: Good afternoon, Your Honor. Dennis Montoya representing Mr. Aguilar, who appears in custody.

THE COURT: Good afternoon. Thank you. Counsel, we have this set for a probation violation hearing here this afternoon. Is the State ready to proceed?

MR. SUGG: State is ready to proceed, Judge. There is also a preliminary issue.

MR. MONTOYA: Yes, Your Honor. The Defense is ready to proceed, but we have -- I think it's the same preliminary issue.

THE COURT: All right. Mr. Sugg.

MR. SUGG: Judge, the State would like to file -- may I approach -- Supplemental Information charging the defendant as being a habitual offender. His parole was revoked pursuant to the Repeat Offender Plea and Disposition Agreement. The State can pursue habitual offender enhancement if there is probation violation or parole violation. There has been a parole violation. I do have documents, as well as a witness that can lay foundation. There has been a parole violation, and we are seeking to enhance the sentence by two one-year enhancements.

THE COURT: Mr. Montoya.

MR. MONTOYA: Your Honor, it's not the preliminary issue I was anticipating. As Your Honor knows, my entry of appearance was just days ago, so I'm new to the case. But if in fact the State alleges to proceed on the habitual offender enhancements, we have some jurisdictional argument, and I would like some time to study the criminal information and bring those.

But, Your Honor, my question is this: Back when Mr. Demartino from the Public Defender's Office was counsel, he filed on December 16, 2009 in open court a Motion to Dismiss in this matter based on a defect in the Judgment, Sentence and Commitment that was subsequently amended. And in studying the docket, the docket is somewhat confusing as to whether the Court ruled on this motion. I would ask for some clarification.

THE COURT: Okay.

MR. SUGG: Judge, you had actually -- I do remember the proceeding. If you don't --

THE COURT: I do as well, but go ahead.

MR. SUGG: There was a habeas proceeding filed by the defendant as well, and essentially the Court -- I gave a certified copy of the transcripts of the proceedings, sentencing proceedings, to the Court. The Court reviewed those transcripts, found that he was sentenced to five years

of supervised probation. You denied the pro se motion of habeas -- Pro Se Petition, I should say, as well as the Defense Counsel's Motion to Dismiss the Probation Violation based on the transcripts, and what they said.

I do have -- I can make an additional copy, but I did keep a copy of the transcript for myself and Mr. Montoya to review, if you'd like. I believe that ruling came on January 13, 2010. This Court ordered me to file a corrected Judgment and Sentence pursuant to what the sentencing was, and it was actually done. The Court made a finding that was a clerical error; and based on that, that's why the corrected Judgment and Sentence was entered and, I believe, filed on March the 11th, 2010.

THE COURT: That's correct.

MR. MONTOYA: Your Honor, the electronic docket was not clear as to whether the Court's order denying habeas relief addressed the Motion to Dismiss the Probation Violation matter. I believe that Mr. Sugg's comments do shed some light on what has occurred. We aren't ready to proceed on Mr. Aguilar's side with a Criminal Information just filed seeking a habitual offender enhancement which really places him at greater jeopardy than we had --

THE COURT: It does. Just to clarify a bit, Mr. Sugg's recitation was accurate. That's exactly what happened. In the order on Petition for Writ of Habeas Corpus

filed on January 15 of 2010, it does say the Writ of Habeas Corpus is denied, and the other subject matter was addressed on the Motion to Dismiss Probation Violation matter. State was granted leave to file corrected J and S to include five years of supervised probation. So the motion filed by Mr. Demartino was denied.

MR. MONTOYA: Oh, I see.

THE COURT: After reviewing the transcript from the hearing for the sentencing.

MR. MONTOYA: Judge, we would like to be properly served with the new information seeking a habitual offender enhancement. We would ask that the Court reschedule this matter within a reasonable amount of time. I have a motion I would like to file addressing the criminal information.

THE COURT: All right. The new criminal information seeking to enhance is not in today's setting, so I will grant leave to file as to that. Are the parties prepared to go forward with the probation violation portion of the setting for today?

MR. SUGG: The State is ready, Judge.

MR. MONTOYA: Yes, Your Honor.

THE COURT: All right. Based on the State's asserted intent to enhance, is there any reason that perhaps the parties should take a few minutes to discuss this matter, potentially a new spin on things based on the State's intent

to enhance.

MR. MONTOYA: We would like a moment to confer with the State, Your Honor.

THE COURT: All right. Let's take about five minutes. I'll be back a quarter until by this clock, so 2:45. We will be in short recess.

(Note: A recess was taken/
back on the record.)

THE COURT: Counsel, we are back on the record.

MR. SUGG: John Sugg for the State.

MR. MONTOYA: Dennis Montoya, Your Honor, representing Hector Aguilar.

MR. SUGG: Judge, the State and the Defense have agreed. The State is going to withdraw the Supplemental Information in this case. The defendant is going to admit to violating his probation by having a GPS violation. He will final out his sentence in the Department of Corrections which is 1,413 days from today's date. He will be eligible for good time. We will ask the Court to recommend Therapeutic Communities.

THE COURT: Mr. Montoya.

MR. MONTOYA: Your Honor, on behalf of Mr. Aguilar, the justice system requires the degree of confidence in order to function. Mr. Aguilar is accused of having violated the conditions of his probation because he

fell off of a milk crate, and the GPS that's attached to his ankle was damaged. His family has consulted with me; he has consulted with me. They have absolutely no confidence that they will not be harassed for the remainder of any probation or parole term. My client has indicated to me that he cannot stand the idea of his parents being subjected to the treatment they have already endured, being told that they can't have their grandkids come over, being told that they are on probation together with their son, being intimidated. And they are here if you want to take testimony from them.

So my client has reached a very difficult decision to ask for a harsh result for falling off a milk crate. He wants to admit to a GPS violation and be sentenced to straight time until he finishes and not to come out, not have to deal with any of these two gentlemen on my right or any of their colleagues. He has an exemplary history in custody up until the 13th month on parole when he fell off the milk crate. He had an exemplary history on parole. There is no allegation that he left the residence or absconded or committed any new crime.

Granted the acts that he committed 13 years ago, or whenever his original sentence was, are pretty horrendous, but he has not done nothing to truly warrant the result that we are asking you to impose. The result that we are asking you to impose is the product of lack of confidence in the

justice system, the probation system, the District Attorney's Office, and all sectors of the justice system that serve this community, these people, and their roots in Mexico, even though Hector is a US citizen.

I asked to make these comments also because it's not sufficiently often that a Court record is made of the severe disparities that exist that lead people to enter into plea agreements that probably no White man would do, that probably would not be asked of someone else that fell off a milk crate. So we are asking, Your Honor, to accept an admission from Hector Aguilar that because he fell off of a milk crate, he deliberately tampered with his GPS device, and he asks that you impose straight time which would result in his return to the Department of Corrections for just about four years. That's what we are asking.

THE COURT: Well, in that set of circumstances, I'm not sure I can accept an admission that he deliberately tampered when he is stating to the Court, to his attorney, that he did not tamper; that he fell off a milk cart. I'm assuming somehow or another it's the theory that he got tangled on a milk carton and then pulled it off of his ankle, so I'm not sure if I can accept the plea.

MR. MONTOYA: Well --

THE COURT: Just a moment, Mr. Montoya. I'm not aware of an offered type of plea or no contest. Perhaps

there is a probation violation, but I'm not going to accept a guilty plea if he stands here and tells me that he did nothing wrong.

MR. MONTOYA: Well, I'm the one that did the talking, Your Honor. You can ask Mr. Aguilar. I think Mr. Aguilar should be asked what happened.

THE COURT: You are his representative. Certainly I'll ask him, but you speak for him in court. That's your purpose here today, so I'm assuming everything that you've told the Court is because your client wanted you to tell the Court that.

Mr. Aguilar, it's been alleged that in the past, you've tampered with your GPS device. That's called a strap violation; that when someone, I guess from Probation, went to the home, and they could tell that the strap had been tampered with. As you know, you have a right to a hearing. So you have the ability to cross-examine the State's witnesses, call witnesses to testify for you, remain silent, and then the State would have to prove to the Court's satisfaction that you had, indeed, violated the terms of your probation agreement. Are you waiving your right to have that hearing held?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You've heard the allegations that you had tampered with your strap on your GPS device and that that

is a violation of the order of probation. You are waiving your right to have a hearing. Is it true that you've tampered with the strap on your GPS device?

THE DEFENDANT: Yes, Your Honor, I'm willing to plead guilty.

THE COURT: All right. Anything from the State?

MR. SUGG: Judge, at this point, I'm a bit concerned about the habeas issue. I just want to know that this is a knowingly and voluntarily entered into admission. The State had offered other Plea and Disposition Agreements. The State also, just so the record is perfectly clear, has brought testimony of the probation officer. He is here to testify if the Court should have questions. He brought the actual electronic device with him so that the Court can examine that, as well as another one that had not been tampered with. So my major concern is if we do an admission, based on Mr. Montoya's comments, I can see potentially some sort of habeas, some sort of a motion to withdraw an admission based on some sort of coercion or sort of prejudice to describe Mr. Montoya's comments. That would be my major concern at this point, so I don't know how to proceed necessarily based on those comments. We are ready for testimony today. I'm just afraid that -- if this is not freely and voluntarily entered into, I don't want to revisit this, you know, a year down the road, two years down the road

when this officer may not be with Probation and Parole. And when this ankle bracelet may have been fixed and given to somebody else, the evidence isn't going to be what it is today. So that is my major concern.

THE COURT: I don't want to revisit this matter down the road either.

MR. MONTOYA: Your Honor, my client says he already filed the habeas, and so it has been ruled on. You know, if it will help this process along and help Mr. Aguilar achieve the results that he wants, I will say that the two gentlemen standing next to me, I assume, are the most outstanding citizens; that they harbor love and affection for the Hispanic community and have never mistreated any Hispanic parolee or probationer and would never do so. I would further state that John Sugg is an example of good citizenship and that everyone in the Hispanic community should visit him and look up to him and learn from the example that he sets at the District Attorney's Office.

We are fortunate, Your Honor, to be allowed to live in this country and to face situations in court where we are allowed to choose between a two-year habitual offender enhancement of a sentence being beaten and threatened on the way to court and then to where --

THE COURT: Mr. Montoya, stop.

MR. MONTOYA: I think that's great, and so does --

THE COURT: Stop, Mr. Montoya. Thank you, sir. The plea is rejected. We do not have time to try this matter. We will have a hearing on whether or not he violated his terms of probation. We are not here on some racial animus. And I greatly --

MR. MONTOYA: Your Honor, he is entitled to the benefit of the agreement that is offered, and he has accepted it and has attested to it.

THE COURT: There is no constitutional right to have a plea accepted. You tell me where it is, and I'll be glad to look at it. The plea is rejected. We will reset this matter for trial.

MR. MONTOYA: Your Honor, this is retaliatory.

THE COURT: It's not retaliatory at all, Mr. Montoya. It's in response to your colloquy about the racial animus.

MR. MONTOYA: I'm simply saying these gentlemen are exemplary and --

THE COURT: This will turn into a circus, and I do not agree at all with what you are saying. I do not think you are effectively representing your client. You have made it now where the Court is denying to accept this plea.

MR. MONTOYA: That being the case, Your Honor, you need to let someone else come in and negotiate with this District Attorney's Office. You've made a finding on the

record that there's an ineffective assistance of counsel, and so my client is --

THE COURT: You are entitled for that purpose, and I think that's not an ethical role for an attorney to sit here and try to set up ineffective assistance.

MR. MONTOYA: Judge, I didn't ask you to make the ruling. You made your ruling, and you made it on the record.

THE COURT: What you are stating required the ruling I'm making, Mr. Montoya. You made it perfectly clear your client did nothing wrong, and then you asked this Court, on behalf of your client, to accept the plea of guilty for something he didn't do.

MR. MONTOYA: Your Honor --

THE COURT: Sir, do you want this gentleman to continue to represent you as an attorney?

THE DEFENDANT: Your Honor, I would like to waive the hearing and just get everything over with, please, Your Honor.

THE COURT: I know you would, but your attorney made that impossible today, sir.

THE DEFENDANT: I'm sorry for that, Your Honor. Your Honor, I would just like to represent myself if possible and just get this over with, please.

MR. MONTOYA: Your Honor, would you allow me to remain as stand-by counsel?

THE COURT: Mr. Montoya, I think you made a mockery of this hearing this afternoon, sir.

MR. MONTOYA: Your Honor, if I cannot remain as stand-by by counsel, will you allow Hector to represent himself?

THE COURT: I would need to conduct a preliminary hearing to see if he is qualified to represent himself.

MR. MONTOYA: We would be happy to make him available if he can be transported for that purpose. I will also arrange for other counsel to appear at no cost to him to ensure that he understands those proceedings.

THE COURT: Mr. Sugg.

MR. SUGG: My concern is the rule, Judge. You had granted the State's Petition for Rule Extension on through today anticipating that this hearing would happen. We did file a petition asking for additional time; but, again, the rule date is today, so that is my concern. So if we will continue for whatever purpose, I will make an oral petition, as well as follow up in writing. I don't know that it will get filed on today's date given the fact that the Clerk's Office is going to close in about 30 minutes. But I will make an oral motion to extend the rule an additional month at least until we can get a new attorney involved and have a hearing, however the Court wants to proceed.

THE COURT: Mr. Montoya.

MR. MONTOYA: My client does not agree, Your Honor, and I'm not at liberty to agree on his behalf. He wants to take care of this, and he would ask for the benefit of a plea that's been offered to him.

THE COURT: Is there a no contest plea to a probation violation?

MR. SUGG: You can't plead no contest to a probation violation, Judge.

THE COURT: All right. Mr. Aguilar, it's my understanding that you believe you did not violate probation. Is that true? All I'm asking is a truthful response, sir.

THE DEFENDANT: I plead no contest on that, Your Honor.

THE COURT: What a no contest plea means is that you believe that should this matter proceed to a hearing -- as you know you are not entitled to a jury trial on this, but you are entitled to a hearing in front of this Court -- a no contest plea indicates that you believe, based on the facts as you understand them that would be presented to the Court by the State, that this Court could make a finding that you did violate probation. You do not agree that you violated probation, but you agree that the State might very well likely prevail on that issue should this matter proceed to hearing. Do you understand basically what a no contest plea is, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Could you restate that in your own words for me, please?

THE DEFENDANT: Pretty much the allegations they have towards me on the violation, that's, you know, there is no way of proving that I did not break it. So regardless, if I was to stand and say that I did not purposely violate or tamper with the bracelet, I can't prove it. So, you know, there is nothing I can do about that. There's no witnesses there at the time when I fell, and it's pretty much nothing I can do.

THE COURT: So based on your understanding of the evidence, you believe the State would be able to meet its burden of proof in this hearing if it were held to convince the Court that you did violate probation. Is that a correct statement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In that event, I'm willing to accept Mr. Aguilar's plea of no contest to the probation violation, and I'm prepared to impose the agreed upon sentence which is that you will final out in the Department of Corrections. According to Mr. Sugg's calculation relayed to the Court, it is 1,413 days and that Therapeutic Communities will be strongly recommended by the Court for the time that he is in the Department of Corrections.

MR. SUGG: Thank you, Judge.

THE COURT: Anything further?

MR. SUGG: Nothing further from the State.

THE COURT: Mr. Montoya.

MR. MONTOYA: Nothing further. Thank you.

THE COURT: All right. Thank you.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: We are adjourned.

(Note: No further record.)

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, JULIE AVALLONE, Official Court Reporter for the Second Judicial District of the State of New Mexico, hereby certify that I reported, to the best of my ability, the attached proceedings, PV Hearing; that the pages numbered 1 through 18, inclusive, are a true and correct transcript of my stenographic notes and were reduced to typewritten transcript through Computer-Aided Transcription; and that on the date I reported these proceedings, I was a New Mexico Certified Court Reporter.

Dated at Albuquerque, New Mexico, this 3rd day of May 2010.

JULIE AVALLONE, CCR, RPR
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Expires 12/31/10
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