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Contracts - Implied Employment Contracts Based on Written Policy Statements Are Not Subject to Governmental Immunity: Garcia v. Middle Rio Grande Conservancy District

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CONTRACTS—Implied Employment Contracts Based on Written Policy Statements Are Not Subject to Governmental Immunity: *Garcia v. Middle Rio Grande Conservancy District*

I. INTRODUCTION

In *Garcia v. Middle Rio Grande Conservancy District*,[1] the New Mexico Supreme Court found that an implied employment contract incorporating terms from a written personnel policy statement met the statutory written contract exception to sovereign immunity. In reaching its decision, the court held that New Mexico's statutory written contract exception[2] waives sovereign immunity for both implied and express contracts, so long as the relevant, disputed terms are in a writing. *Garcia* provides a cause of action based on implied contract to plaintiffs who seek to recover against a governmental entity if the plaintiffs can identify written terms that could be incorporated into such a contract. As a result, *Garcia v. Middle Rio Grande Conservancy District* potentially broadens New Mexico's statutory written contract exception to governmental immunity beyond the case's narrow holding.

II. STATEMENT OF THE CASE

The plaintiff, Adolfo Garcia, began employment with the defendant, Middle Rio Grande Conservancy District (MRGCD), in 1975.[3] Garcia was employed by the MRGCD without an express written contract. From 1976 until August, 1990, Garcia held the position of Division Manager of the Belen Division of the MRGCD. In August, 1990, the MRGCD demoted Garcia from Division Manager to Equipment Operator. Garcia's demotion resulted in a pay reduction from $17.17 per hour to $11.25 per hour. The MRGCD's General Manager notified Garcia by formal letter that he was being demoted. During the term of Garcia's employment, the MRGCD had a written Personnel Policy Statement containing detailed provisions relating to its employment practices, including employee demotion.[4]

Garcia filed suit against the MRGCD and its board of directors for breach of contract. In his complaint, Garcia alleged that his demotion did not comply with the MRGCD's written Personnel Policy Statement. According to Garcia, the MRGCD's Personnel Policy Statement requires the MRGCD to show good cause and to provide employees with both notice and the opportunity to improve their performance before the MRGCD demotes them.

The MRGCD submitted a motion for summary judgment in response to Garcia's complaint, claiming governmental (sovereign) immunity. The MRGCD claimed that

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1. 121 N.M. 728, 918 P.2d 7 (1996). *Garcia*'s holding answers a question concerning the scope of the written contract exception that a badly fractured court refused to answer just two years before the *Garcia* decision, *see* Swinney v. Deming Bd. of Educ., 117 N.M. 492, 873 P.2d 238 (1994).

2. *See* N.M. STAT. ANN. § 37-1-23(A) (Repl. Pamp. 1990).

3. *See Garcia*, 121 N.M. at 730, 918 P.2d at 9. Unless otherwise indicated, all subsequent references to the facts of this case refer to this citation.

4. The policy statement included job descriptions and provisions relating to compensation levels, overtime and compensatory time, time clock violations, tardiness, leave, and grounds for demotion or reclassification. *See id.* at 732, 918 P.2d at 11.

any employment contract between it and Garcia was implied at best.[5] To satisfy the statutory exception to sovereign immunity for contract causes of action in *New Mexico Statutes Annotated* section 37-1-23, a contract must be a "valid written contract."[6] An implied contract, the MRGCD argued, does not satisfy the requirement of section 37-1-23. Therefore, as an implied contract, the alleged employment contact between the MRGCD and Garcia was not a "valid written contract"[7] which satisfied the statutory exception to sovereign immunity. The district court granted the MRGCD's motion for summary judgment.

The New Mexico Supreme Court took direct jurisdiction of Garcia's appeal from the district court based on the jurisdiction it had at that time over appeals in contract cases.[8] The court reversed the district court's order granting summary judgment to the defendant, holding "that [the term] 'valid written contract' [as provided in section 37-1-23(A)] incorporate[d] the implied employment contract between the MRGCD and Garcia."[9] The supreme court then remanded the case to the district court for further proceedings on the merits.

III. BACKGROUND

A. *Nature of the Employment Contract*

The general rule in New Mexico is that an employment contract is for an indefinite period of time and may be terminated at the will of either party.[10] The employment at will doctrine is based on traditional notions of freedom of contract.[11] Exceptions to the "at will" doctrine include instances where the contract is supported by consideration beyond the performance of duties and payment of wages, or where there is an express provision in the contract concerning terms or duration.[12] New Mexico courts also recognize a "public policy" exception to the doctrine, where termination or demotion is in retaliation for employee conduct that promotes the public interest, such as "whistleblowing."[13]

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5. The term "implied contract" in the context of *Garcia* refers to contracts that arise from promises inferred wholly or partly by conduct. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981). Such contracts are often referred to as "implied in fact" contracts, and are not to be confused with "implied in law" or quasi-contracts. *See id.* § 4 cmt. b, illus. 3.

6. *See* N.M. STAT. ANN. § 37-1-23(A) (Repl. Pamp. 1990).

7. *See id.*

8. *See* N.M. R. APP. PROC. § 12-102(A)(1) (Repl. Pamp. 1992). The New Mexico Supreme Court no longer has exclusive jurisdiction over appeals in contract cases. *See id.* § 12-102 cmts. (Repl. Pamp. 1997) (citing Sept. 1, 1995 amendment).

9. Garcia v. Middle Rio Grande Conservancy Dist., 121 N.M. 728, 734, 918 P.2d 7, 13 (1996).

10. *See* Hartbarger v. Frank Paxton Co., 115 N.M. 665, 668, 857 P.2d 776, 779 (1993). Employment contracts that do not explicitly state a definite duration are considered to be for an indefinite period and terminable at will. *See id.* This is because there is no consideration other than performance of duties and payment of wages. *See* Melnick v. State Farm Mut. Auto. Ins. Co., 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988).

11. *See* Richard Harrison Winters, Note, *Employee Handbooks and Employment-at-Will Contracts*, 1985 DUKE L.J. 196, 198. According to the notion of freedom of contract, the absence of a specific term for the duration of an employment contract indicates a mutual desire of the parties to retain the freedom to end the employment contract at any time. *See id.*

12. *See Melnick*, 106 N.M. at 730, 749 P.2d at 1109.

13. *See Hartbarger*, 115 N.M. at 668, 857 P.2d at 779.

New Mexico law provides that the plaintiff in a wrongful termination or demotion action may bring suit in either tort or contract.[14] The cause of action in tort is the public policy tort of wrongful or retaliatory discharge. In appropriate cases, a plaintiff may also bring a "section 1983"[15] cause of action based on federal civil rights legislation.

B. *Sovereign Immunity*

Potential plaintiffs in employment termination or demotion cases involving governmental entities must overcome the defense of governmental immunity for causes of action based on contract. The nature of the defense under New Mexico law has evolved from common law sovereign immunity with statutory waivers to qualified sovereign immunity conferred by statute. Up until 1975, New Mexico courts recognized the common law defense of sovereign immunity.[16] However, the state legislature also provided a statutory waiver of common law sovereign immunity for causes of action based on written contracts.[17]

In 1975, in *Hicks v. State*, the New Mexico Supreme Court prospectively abolished the common law defense of sovereign immunity.[18] In response to *Hicks*, the New Mexico Legislature enacted qualified governmental immunity applicable to both tort and contract causes of action.[19] The qualified immunity established by the state legislature in tort actions is a blanket immunity, with exceptions for certain enumerated categories.[20] For contract actions, the Legislature granted governmental entities immunity from liability, subject to a waiver of immunity for actions based on written contracts.[21] In addition, the Legislature provided other statutory waivers to its grant of sovereign immunity in contract actions that are not relevant to the *Garcia* case.[22]

Finding an exception to sovereign immunity for actions based on contract may be critical to a plaintiff seeking recovery against a governmental entity for demotion or termination because tort and federal section 1983 actions also are subject to

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14. *See id.*

15. 42 U.S.C. § 1983 (1994).

16. *See* Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975).

17. *See* N.M. STAT. ANN. § 22-23-1 (Cum. Supp. 1967) ("Actions not otherwise provided by law, may be maintained and judgment enforced against the state and any of its agencies when based on a written contract.").

18. *See Hicks*, 88 N.M. 588, 544 P.2d 1153. *Hicks* was a claim against the State of New Mexico for tort damages alleging negligence in constructing, operating, and maintaining a bridge. *See id.* A school bus and a cattle truck collided on a narrow state highway bridge, killing and injuring school children and adult chaperones. *See id.* The court abolished sovereign immunity, declaring it to be a judicially-created doctrine that was no longer applicable to modern situations. *See id.* at 592, 544 P.2d at 1157.

19. *Hicks* was decided in 1975. *See id.* at 588, 544 P.2d at 1153. The original decision in *Hicks* was to be applied retroactively to all pending cases not yet adjudicated. *See id.* at 592, 544 P.2d at 1157. Upon rehearing, the New Mexico Supreme Court modified its decision in *Hicks*, deciding that the decision should be applied prospectively. *See id.* at 593, 544 P.2d at 1158. In response to the *Hicks* decision, the New Mexico Legislature enacted the New Mexico Tort Claims Act, 1976 N.M. Laws ch. 58, in its next session. *See* Garcia v. Middle Rio Grande Conservancy Dist., 121 N.M. 728, 731, 918 P.2d 7, 10 (1996). Although entitled the "New Mexico Tort Claims Act," the New Mexico Legislature also reestablished sovereign immunity for actions based on contract in the act. *See* 1976 N.M. Laws ch. 58. The New Mexico Tort Claims Act is codified at sections 41-4-1 to 41-4-27 of the New Mexico Statutes. *See* N.M. STAT. ANN. §§ 41-4-1 to 41-4-27 (Repl. Pamp. 1996).

20. *See* N.M. STAT. ANN. §§ 41-4-1 to 41-4-27 (Repl. Pamp. 1996).

21. *See id.* § 37-1-23 (Repl. Pamp. 1990).

22. *See id.* §§ 37-1-24 to 31-1-26.

sovereign immunity defenses. The statutory waivers to sovereign immunity applicable to the above two types of causes of action may be narrower than that which applies to a contract cause of action. For example, the New Mexico Tort Claims Act[23] grants governmental entities qualified sovereign immunity from claims based on the public policy tort of retaliatory discharge.[24] The exceptions to sovereign immunity for tort causes of action require a plaintiff to identify government conduct that falls within one of the categories specified in the statute rather than under the more general waiver available for contract causes of actions where the contact at issue is written.[25] Thus, in order to withstand a motion for summary judgment, a plaintiff must bring retaliatory discharge actions within one of the statutory exceptions to sovereign immunity for tort claims.[26]

Federal section 1983 causes of action also may be subject to sovereign immunity defenses.[27] For section 1983 claims brought against states in federal court, the Eleventh Amendment to the United States Constitution may confer an independent, but analogous, defense.[28] The Eleventh Amendment prevents federal court jurisdiction where "arms of the state" are named as defendants in suits brought without the consent of the state.[29] Therefore, for many plaintiffs with claims arising from termination or demotion actions of governmental employers, New Mexico's statutory written contract exception will provide the broadest waiver of sovereign immunity.

C. Scope of the Written Contract Exception

The New Mexico Supreme Court narrowed the grant of sovereign immunity conferred by section 37-1-23 in *Spray v. City of Albuquerque*.[30] In *Spray*, the court ruled that section 37-1-23 did not apply to cities, towns, or villages.[31] The court

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23. *Id.* §§ 41-4-1 to 41-4-27 (Repl. Pamp. 1996).

24. *See* Silva v. Town of Springer, 121 N.M. 428, 435, 912 P.2d 304, 311 (Ct. App. 1996).

25. *Compare* N.M. STAT. ANN. § 37-1-23 (Repl. Pamp. 1990) *with* N.M. STAT. ANN. §§ 41-4-4 to 41-4-12 (Repl. Pamp. 1996).

26. For the specific categories of tortious governmental activity for which immunity is waived, see New Mexico Tort Claims Act, N.M. STAT. ANN. §§ 41-4-5 to 41-4-12 (Repl. Pamp. 1996). These waivers of immunity provide for liability arising from operation or maintenance of motor vehicles, aircraft, or watercraft, *see id.* § 41-4-5; buildings, public parks, machinery, equipment, and furnishings, *see id.* § 41-4-6; airports, *see id.* § 41-4-7; public utilities, *see id.* § 41-4-8; medical facilities, *see id.* § 41-4-9; health care providers, *see id.* § 41-4-10; highways and streets, *see id.* § 41-4-11; and law enforcement, *see id.* § 41-4-12.

27. *See* Garcia v. Board of Educ. of Socorro Consol. Sch. Dist. 777 F.2d 1403 (10th Cir. 1985). *But see* Daddow v. Carlsbad Mun. Sch. Dist., 120 N.M. 97, 898 P.2d 1235 (1995) (holding that school districts, boards of education, and their members are not absolutely immune from suits which allege denials of due process in an employment termination action brought under section 1983, 42 U.S.C. § 1983 (1994)). State sovereign immunity defenses to section 1983 causes of action brought in state court may also be limited by the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI. *See* Howlett v. Rose, 496 U.S. 356 (1989).

28. *See* U.S. CONST. amend. XI.

29. *See Daddow*, 120 N.M. at 100-01, 898 P.2d at 1239-40 (citing Will v. Michigan Dept. of State Police, 491 U.S. 58, 70 (1989)).

30. 94 N.M. 199, 608 P.2d 511 (1980). In *Spray*, homeowners sued to enjoin the City of Albuquerque from constructing a fence that violated a contract between the homeowners and the City. *See id.* at 199, 608 P.2d at 511. On appeal, the City of Albuquerque raised the defense of sovereign immunity under section 37-1-23 of the New Mexico Statutes, N.M. STAT. ANN. § 37-1-23 (Repl. Pamp. 1990). *See Spray*, 94 N.M. at 201, 608 P.2d at 513.

31. *See id.*

reasoned that section 37-1-24,[32] (which concerned suits against cities, towns, and villages or officers thereof), could be reconciled with section 37-1-23 only if section 37-1-23 were held to be inapplicable to cities, towns, and villages.[33] After *Spray*, cities, towns, and villages could be sued on written or unwritten contracts.[34]

In *Swinney v. Deming Board of Education*, the New Mexico Supreme Court faced the same question that *Garcia* was to later pose.[35] A fractured court in *Swinney* refused to decide the issue of whether implied contracts incorporating certain written terms were within the section 37-1-23 exception.[36] The majority opinion, written by Justice Franchini, did not address the nature of the contract or the application of the sovereign immunity statute.[37] In a specially concurring opinion, Justice Ransom classified Swinney's contract as an express written contract.[38] In his dissent, then-Chief Justice Montgomery foreshadowed *Garcia* when he stated that sovereign immunity should be waived for implied contracts with operative written terms.[39]

Two years after *Swinney*, the issue of whether implied contracts are included in the written contract exception of section 37-1-23 again came before the New Mexico Supreme Court in *Garcia*.[40] This time, the court answered the question that its *Swinney* decision sidestepped.

IV. RATIONALE

In *Garcia*, the New Mexico Supreme Court held that governmental entities were liable for claims arising from implied employment contracts which contained written personnel policy statements.[41] By reaching this question, the supreme court implicitly agreed with the district court that the MRGCD was a "governmental entity" that would be entitled to sovereign immunity in a proper case.[42]

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32. N.M. STAT. ANN. § 37-1-24 (Repl. Pamp. 1990).

33. *See Spray*, 94 N.M. at 202, 608 P.2d at 514.

34. *See id.*

35. *See* Swinney v. Board of Educ., 117 N.M. 492, 873 P.2d 238 (1994). In *Swinney*, the trial court dismissed a breach of contract claim against the Deming Board of Education on the grounds that an implied contract did not fall within the written contract exception of section 37-1-23(A) of the New Mexico Statutes, N.M. STAT. ANN. § 37-1-23 (Repl. Pamp. 1990). *See Swinney*, 117 N.M. at 492, 873 P.2d at 238. The New Mexico Supreme Court affirmed, albeit with a special concurring opinion by Justice Ransom and a dissenting opinion by then-Chief Justice Montgomery, but on the grounds that tenure provisions in an employee manual did not apply to school administrators. *See id.* at 494, 873 P.2d at 240.

36. *See id.* at 495, 873 P.2d at 241 (Montgomery, C.J., dissenting).

37. *See id.* at 493-94, 873 P.2d at 239-40.

38. *See id.* at 494, 873 P.2d at 240 (Ransom, J., specially concurring).

39. *See id.* at 495, 873 P.2d at 241 (Montgomery, C.J., dissenting).

40. *See* Garcia v. Middle Rio Grande Conservancy Dist., 121 N.M. 728, 918 P.2d 7 (1996).

41. *See id.* at 734, 918 P.2d at 13.

42. *See id.* at 730, 918 P.2d at 9. Conservancy districts such as the defendant in *Garcia* are created pursuant to New Mexico statute. *See* N.M. STAT. ANN. § 73-14-1 (1978). In addition to conservancy districts, a wide variety of other so-called "quasi-municipal corporations" exist under New Mexico law. These quasi-municipal corporations include artesian conservancy districts, *see id.* §§ 73-1-1 to 73-1-27 (1978); water users' associations, *see id.* §§ 73-5-1 to 73-5-9; drainage districts, *see id.* §§ 73-6-1 to 73-6-44; irrigation districts, *see id.* §§ 73-9-1 to 73-9-62; water and sanitation districts, *see id.* §§ 73-21-1 to 73-21-54; and wind erosion districts, *see id.* §§ 73-22-1 to 73-22-5. The qualified grant of sovereign immunity under the New Mexico Tort Claims Act has previously been extended to some quasi-municipal corporations as "political subdivisions" of the state. *See* Tompkins v. Carlsbad Irrigation Dist., 96 N.M. 368, 630 P.2d 767 (Ct. App. 1981) (holding that irrigation districts are political subdivisions of the state and are entitled to qualified sovereign immunity under the New Mexico Tort Claims Act). The MRGCD and similar special districts do not fall under the exception to sovereign immunity in section 37-1-24, (concerning suits against

The *Garcia* court then examined whether an exception to governmental immunity was available to the plaintiff.[43] The court first determined whether a contract existed between the MRGCD and Garcia. Then the court determined what was the nature of the contract it found existed between the MRGCD and Garcia, including the relevance of the MRGCD's written Personnel Policy Statement.[44] The court finally considered whether the contract found should fall within the "valid written contracts" exception to sovereign immunity conferred by section 37-1-23.[45]

The court found that an implied employment contract existed between Garcia and the MRGCD based on the conduct of the two parties.[46] The court stated that the MRGCD made an offer of employment to Garcia in 1975 and that Garcia accepted the offer when he carried out the specific tasks that the MRGCD required him to perform.[47] There was mutual consideration based on the compensation paid to Garcia by the MRGCD and the performance of services by Garcia.

According to the court, a second implied contract was formed upon Garcia's promotion by the MRGCD to the position of Division Manager in 1976.[48] This second implied contract arose when the MRGCD offered the position of Division Manager to Garcia, Garcia accepted the position, and the two parties provided mutual consideration.[49] The MRGCD terminated this second implied contract by demoting Garcia in August 1990.[50]

The court next analyzed whether this second implied contract was terminable at will.[51] The court noted that because of the at will nature of employment in New Mexico, implied employment contracts are terminable at the will of either party, absent a contract term stating otherwise.[52] Therefore, the court reasoned, Garcia's second implied contract in which he was promoted to Division Manager could be terminated by the MRGCD at any time, unless a contract term was implied to restrict the MRGCD.[53]

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cities, towns, villages, or officers thereof), which is limited to actions against "any city, town, or village in this state." N.M. STAT. ANN. § 37-1-24 (Repl. Pamp. 1990).

43. *See Garcia*, 121 N.M. at 731, 918 P.2d at 10. Contractual exceptions to sovereign immunity are enumerated in sections 37-1-23 to 37-1-26 of the New Mexico Statutes. *See* N.M. STAT. ANN. §§ 37-1-23 to 37-1-26 (Repl. Pamp. 1990). For actions sounding in tort, the New Mexico Tort Claims Act, *id.* § 41-4-1 (Repl. Pamp. 1996), provides a general grant of sovereign immunity to governmental entities, subject to waiver of sovereign immunity in certain instances.

44. *See Garcia*, 121 N.M. at 731, 918 P.2d at 10.

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See* Hartbarger v. Frank Paxton Co., 115 N.M. 665, 668, 857 P.2d 776, 779 (1993). Wrongful discharge in violation of public policy constitutes a second exception to the employment at will doctrine. *See Garcia*, 121 N.M. at 731, 918 P.2d at 10. The contract term may be implied as well. *See Hartbarger*, 115 N.M. at 669, 857 P.2d at 780 ("'An implied-in-fact contract term . . . is one that is inferred from the statements or conduct of the parties.'" (quoting Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1036 (Ariz. 1985) (en banc) (alteration in *Hartbarger*)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 5 cmt. b (1981) (contract term may be implied as reflecting the presumed intentions of the parties or based on considerations of public policy).

53. *See Garcia*, 121 N.M. at 731, 918 P.2d at 10.

The *Gracia* court held that the MRGCD's Personnel Policy Statement was part of the implied employment contract between the MRGCD and Garcia.[54] The court noted that employee handbooks, personnel policy guides, and similar documents may constitute implied employment contracts or implied contract terms.[55] However, not all such documents will constitute implied contracts.[56] The test to determine whether a document rises to the level of an implied contract, according to the court, is the degree of the employee's reliance and promissory estoppel: when the document modifies the employment relationship so that an employee could reasonably rely on an employer conforming to its procedures, the document's terms will be deemed part of the implied contract.[57] The court applied this test and found that the comprehensive nature of the MRGCD's Personnel Policy Statement controlled the MRGCD's employer-employee relationships.[58] The court also found that employee reliance upon the printed policy statement was reasonable because of the specific language contained within the policy.[59] Therefore, the court concluded that the MRGCD's Personnel Policy Statement was part of the implied employment contract between the MRGCD and Garcia.

The court next concluded that the waiver of governmental immunity granted by section 37-1-23(A) applies to implied contracts with incorporated written terms.[60] The court noted two policy reasons for the waiver of sovereign immunity for written contracts.[61] First, due to the volume of contracts that governmental entities make, contract terms that are not put in writing are likely to be forgotten.[62] Hence, waiver of sovereign immunity encourages parties that contract with governmental entities to put the contract in writing.[63] Second, written contracts enable courts to determine

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54. *See id.* at 732, 918 P.2d at 11.

55. *See id.* at 731, 918 P.2d at 10; *see also* Forrester v. Parker, 93 N.M. 781, 782, 606 P.2d 191, 192 (1980) (personnel policy guide may constitute an implied contract). The *Garcia* court did not clearly indicate whether it treated the MRGCD's Personnel Policy Statement as an implied employment contract or an implied term in the employment contract. At one point in its opinion, the court "h[el]d that the [MRGCD] Personnel Policy [Statement was] part of [the] MRGCD's and Garcia's implied employment contract." *Garcia*, 121 N.M. at 732, 918 P.2d at 11. In its conclusion, the court restated its holding "that the Personnel Policy [Statement] constitutes an implied employment contract." *Id.* at 734, 918 P.2d at 13. The court analyzed offer, acceptance, and consideration for the implied employment contract as a whole and did not address these elements for the Personnel Policy standing on its own. *See id.* at 731, 918 P.2d at 10. Therefore, it is more likely than not that the court considered the MRGCD's Personnel Policy Statement to be a term in the implied employment contract.

56. *See id.* at 732, 918 P.2d at 11.

57. *See id.*; *see also* Newberry v. Allied Stores, Inc., 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989); Lukoski v. Sandia Indian Mgmt. Co., 106 N.M. 664, 666-67, 748 P.2d 507, 509-10 (1988); *Forrester*, 93 N.M. at 782, 606 P.2d at 192.

58. *See Garcia*, 121 N.M. at 732, 918 P.2d at 11.

59. The court noted the following language in the MRGCD's Personnel Policy Statement:

> An employee may be demoted or reclassified to another position and pay for which he is qualified, or have his pay in the same position reduced (a) when he would otherwise be terminated; or (b) when he does not possess the necessary qualifications to render satisfactory service in the position he holds, or is recommended for separation during probation; or (c) when he voluntarily requests such demotion or reclassification.

Id. (quoting MRGCD Personnel Policy Statement, § 502).

60. *See id.* at 734, 918 P.2d at 13.

61. *See id.* at 733, 918 P.2d at 12.

62. *See id.*; *cf.* Sena Sch. Bus Co. v. Board of Educ. of Santa Fe Public Schs., 101 N.M. 26, 29, 677 P.2d 639, 642 (Ct. App. 1984).

63. *See Garcia*, 121 N.M. at 732-33, 918 P.2d at 11-12.

more readily whether a contract involves a proper governmental business function or an *ultra vires* action on the part of the entity.[64]

Having identified the above two policy goals for waiver of sovereign immunity, the court concluded that the written MRGCD Personnel Policy Statement satisfied them. The court stated that because the MRGCD's Personnel Policy Statement was written, its terms were memorialized, thus satisfying both policy goals, as described above, of a waiver.[65]

V. ANALYSIS

The New Mexico Supreme Court's extension of the section 37-1-23(A) waiver of sovereign immunity to implied contracts with written terms continues a trend of decisions in New Mexico that limits sovereign immunity. Previously, the court held that cities, towns, and villages may be sued for unwritten contracts.[66] The court also recently limited sovereign immunity defenses in tort actions[67] and federal section 1983 civil rights actions.[68]

The court's decision to incorporate the MRGCD's written policy manual into Garcia's implied employment contract is consistent with a long series of New Mexico cases over the past two decades.[69] In prior breach of implied contract employment cases, the court recognized the validity of implied contracts and developed a two-part test to determine if an alleged implied contract existed. Under the test, the existence

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64. *See id.* at 733, 918 P.2d at 12. The court noted that "governmental entities cannot enter contracts that would either curtail their authority or otherwise fall outside of their designated powers." *Id.* An example of an employment contract that was outside the designated power of the officials purporting to authorize it was discussed in *Trujillo v. Gonzales*, 106 N.M. 620, 747 P.2d 915 (1987). In *Trujillo*, two county commissioners agreed to hire a county road superintendent for a two-year term. *See id.* at 620-21, 747 P.2d at 915-16. The oral agreement to retain the employee for two years was held to be beyond the power of the commissioners. *See id.* at 622, 747 P.2d at 917.

65. *See Garcia*, 121 N.M. at 733-34, 918 P.2d at 12-13.

66. *See* Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980). In *Spray*, the court interpreted conflicting language between section 37-1-23 and section 37-1-24 of the New Mexico Statutes to mean that cities, towns, and villages do not share the governmental immunity for unwritten contracts under section 37-1-23 of the New Mexico Statutes that other governmental entities possess. *See id.* at 202, 608 P.2d at 514. Section 37-1-24 provides that:

> [n]o suit, action or proceeding at law or equity, for the recovery of judgment upon, or the enforcement or collection of any sum of money claimed due from any city, town or village in this state, or from any officer as such of any such city, town or village in this state, arising out of or founded upon any ordinance, trust relation or contract written or unwritten . . . shall be commenced except within three years next after the date of the act of omission or commission giving rise to the cause of action.

N.M. STAT. ANN. § 37-1-24 (1990 Repl. Pamp.). By comparison, section 37-1-23 provides that "[g]overnmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." N.M. STAT. ANN. § 37-1-23 (1990 Repl. Pamp.).

67. *See* Weinstein v. City of Santa Fe, 121 N.M. 646, 916 P.2d 1313 (1996). In *Weinstein*, the court held that the City of Santa Fe could be held liable under the New Mexico Tort Claims Act for the failure of police officers to forward the necessary paperwork to prosecute a rape suspect. *See id.* at 649-51, 916 P.2d at 1316-318.

68. *See* Daddow v. Carlsbad Mun. Sch. Dist., 120 N.M. 97, 898 P.2d 1235 (1995). The *Daddow* court held that school districts, boards of education, and "[board] members were not absolutely immune from suits [brought under 42 U.S.C. section] 1983" which alleged denial of due process in an employment termination action. *See id.* at 99, 898 P.2d at 1237.

69. *See, e.g.*, Swinney v. Deming Bd. of Educ., 117 N.M. 492, 873 P.2d 238 (1994); Newberry v. Allied Stores, Inc., 108 N.M. 424, 773 P.2d 1231 (1989); Vigil v. Arzola, 101 N.M. 687, 687 P.2d 1038 (1984); Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980).

of an implied contract is first based on the words and conduct of the parties.[70] Then, a personnel policy guide becomes part of the implied contract if it "control[s] the employee-employer relationship."[71] The test to determine if such a policy guide consistently controlled the relationship is whether an employee can reasonably expect an employer to conform to the procedures it outlines.[72]

The *Garcia* court, in dicta, reminded employers that employment at will is still the law in New Mexico.[73] However, if a public or private employer chooses to issue a personnel policy manual upon which its employees could reasonably rely, then that employer will be held to the terms of its manual under contract law.[74] The court pointed out that employers may freely disclaim the inclusion of the policy statement in the employment contract with language in the personnel manual.[75] Hence, the practical effect of *Garcia* on employment law may be nothing more than encouraging governmental entities to place disclaimers in their policy manuals.

The *Garcia* court based its holding on two policy reasons for preferring written contracts over other types of contracts.[76] By choosing to frame the purpose for the exception to sovereign immunity as a preference for written contracts,[77] the court's holding was assured because the reasons for preferring written contracts over oral or nonverbal contracts also will apply to written terms that are incorporated in implied contracts.

The *Garcia* court could have reached the conclusion that section 37-1-23(A) only applies to express written contracts had it chosen to analyze the legislative grant of sovereign immunity as analogous to the New Mexico Tort Claims Act. The present version of the written contract exception to sovereign immunity was enacted by the New Mexico Legislature, as a response to the *Hicks v. State* decision,[78] in the same piece of legislation as the New Mexico Tort Claims Act.[79] Prior to 1976, the statutory

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70. *See Forrester*, 93 N.M. at 782, 606 P.2d at 192.

71. *Id.*

72. *See Garcia*, 121 N.M. at 732, 918 P.2d at 11; *Newberry*, 108 N.M. at 427, 773 P.2d at 1234; *Forrester*, 93 N.M. at 782, 606 P.2d at 192.

73. *See Garcia*, 121 N.M. at 731, 918 P.2d at 10.

74. *See id.* at 732, 918 P.2d at 11.

75. *See id.* Holding that employers are obligated under contract law to comply with specific terms in employee policy manuals that they are not obligated to issue would appear to discourage employers from issuing manuals or providing specific termination or demotion procedures. Alternatively, employers could seek to avoid contractual liability by issuing disclaimers that the handbook does not constitute a contract. If the disclaimer made employee reliance unreasonable, a contract would not be implied from its terms.

76. *See id.* at 733, 918 P.2d at 12; *see also supra* notes 61-64 and accompanying text. The two policy reasons identified by the *Garcia* court were to encourage parties who contract with the government to memorialize the terms by putting the contract in writing and to facilitate court determination of whether a governmental entity was acting *ultra vires*. *See Garcia*, 121 N.M. at 733, 918 P.2d at 12. After identifying two policy reasons for preferring written contracts, the court apparently shifted the burden to the defendant, stating that the defendant failed to introduce any competing policy justifications that would lead to a contrary result. *See id.* at 733-34, 918 P.2d at 12-13.

77. The court responded to the MRGCD's argument that contracts implied in fact from a personnel policy manual are not "written" contracts within the meaning of section 37-1-23 of the New Mexico Statutes by observing that the waiver of sovereign immunity in that section "has the practical effect of encouraging parties who contract with governmental entities to do so in writing." *Id.* at 732-33, 918 P.2d at 11-12. The court did not discuss the distinctions between express and implied written contracts, but instead noted that implied written contracts hold the same advantages over unwritten contracts as express written contracts hold. *See id.*

78. 88 N.M. 588, 544 P.2d 1153 (1975).

79. *See* 1976 N.M. Laws ch. 58. For a discussion of the events that led to enactment of the New Mexico Tort Claims Act, see *supra* note 19.

written contract exception provided that "[a]ctions not otherwise provided by law" could be brought and "judgment[s] enforced against the state and any of its agencies when based on a written contract."[80] The language of the statutory written contract exception was modified to make the exception consistent with the approach of the New Mexico Tort Claims Act,[81] granting "governmental entities" blanket immunity "from actions based on contract, except actions based on a valid written contract."[82] The language of the modified written contract exception clarifies that sovereign immunity in contract actions against governmental entities is the rule, absent an exception for "valid written contracts" or other exceptions provided by law.[83]

Viewed in this context, a waiver of immunity for causes of action based on written contracts is one born out of necessity. Blanket governmental immunity from contract liability, without exception, would stifle private parties from dealing with the state and local government because private parties would be unable to enforce agreements. The written contract exception to immunity may be viewed as a limited exception, without which parties would cease to contract with the government, rather than as a preference for written contracts.

Following this line of analysis, the scope of the written contract exception should encompass only those contracts that the private party sought to make enforceable against the government. Parties entering into express written contracts have a greater expectation of enforceability because the language of the agreement has been memorialized and the parties have clearly manifested their intent to be bound.

The court's expansion of the written contract exception does not necessarily further the policy goal of encouraging parties to enter into commercial transactions with governmental entities. Implied contracts are different in nature from express contracts. Implied contracts arise from promises inferred from the words or conduct of the parties in the absence of express bargained-for terms.[84] A governmental employer and a prospective employee are free to enter into an express written employment contract, which would be enforceable under the written contract exception even before the *Garcia* expansion. The additional encouragement that the *Garcia* decision provides to parties seeking to transact business with governmental entities appears to be minimal, in light of the fact that the parties in *Garcia* chose to forgo the option of an express contract.

VI. IMPLICATIONS

The formal holding in *Garcia* is written narrowly to encompass only implied employment contracts with written terms embodied in such documents as personnel

80. N.M. STAT. ANN. § 22-23-1 (Cum. Supp. 1967).

81. *See id.* § 41-4-4(A) (Repl. Pamp. 1996).

82. *Id.* § 37-1-23 (Repl. Pamp. 1990).

83. *See id.* § 37-1-23 (Repl. Pamp. 1990). The *Garcia* court did not address the meaning of the word "valid" in the context of the written contract exception. At first glance, the term might appear redundant because the plaintiff in a contract action against a governmental entity still would have to prove validity of the contract after overcoming the governmental immunity defense. However, the word "valid" would have meaning by precluding actions for *quantum meruit* against a governmental entity based on an invalid written contract.

84. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

policy statements and employee handbooks.[85] However, the court's reasoning can apply to any implied-in-fact contract with written terms.

An employment contract is implied from the words or conduct of the parties that manifests their mutual assent to the implied terms.[86] Implied-in-fact contracts may arise in other contexts besides employment. For example, implied contracts might be inferred from the conduct of governmental agencies providing services such as education, public utilities, irrigation, law enforcement, and public safety.[87] Contracts also may be implied based on the conduct of the parties in commercial transactions under the Uniform Commercial Code.[88]

Governmental entities such as the MRGCD routinely conduct their operations under the direction of boards or commissions that issue written policy statements, resolutions, ordinances, and similar documents. Any of these written documents may constitute terms to implied contracts to the extent that they control the governmental entity in its relationship with other parties.

School boards and related governmental entities that are involved in education may encounter difficulties which result from the court's holding in *Garcia*. School handbooks, policy manuals, and similar written documents are similar to employee handbooks because they are sufficiently detailed to control the relationship between a school district and a student. The *Garcia* holding provides no principled distinction which would permit waiver of sovereign immunity in an employment context while retaining sovereign immunity in an educational setting. A torrent of litigation against public school districts based on implied contracts could result if subsequent court decisions do not clarify or limit the *Garcia* holding.

As the *Garcia* court noted, not all personnel manuals may constitute terms to an implied contract.[89] The test of whether a policy manual gives rise to implied contract terms that bind the employer is whether it "controlled the employer-employee relationship and an employee could reasonably expect his employer to conform to the procedures it outlines."[90] If the holding in *Garcia* is extended outside the context of employment law, then a similar test ought to be applied to determine whether written policies should be incorporated into implied contracts. For example, purchasing policies of a governmental entity might give rise to implied contracts if the vendor could reasonably expect the governmental entity to conform to those procedures. Written policies of the governmental entity in performing services might be a source

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85. *See* Garcia v. Middle Rio Grande Conservancy Dist., 121 N.M. 728, 734, 918 P.2d 7, 13 (1996).

86. *See* Conduit Corp. v. Kemble, 110 N.M. 173, 179, 793 P.2d 855, 861 (1990).

87. For illustration, in an educational setting an implied contract might arise from a written curriculum guide that provides very specific topics to be covered in a course of study. The attendance of the student, payment of any fees, and other participation in school activities by the student and family could provide adequate consideration for the school district's promise to provide education in accordance with the curriculum guide.

88. *See* U.C.C. § 2-204(1) (1977). The Uniform Commercial Code has been adopted by New Mexico. *See* N.M. STAT. ANN. §§ 55-1-101 to 55-12-109 (1993 Repl. Ramp. & 1996 Cum. Supp.); *see also id.* N.M. STAT. ANN. ch. 55, art. 1, General Provisions, Compiler's notes. The classic example of an implied contract based on the conduct of the parties in commercial transactions is the "battle of the forms," where the seller ships goods to the buyer and the buyer makes payment, despite the fact that the terms contained in the purchase order and the invoice conflict. In such a case, a contract is implied in fact, with terms incorporated pursuant to the provisions of the Uniform Commercial Code. *See* U.C.C. § 2-207(3) (1977).

89. *See Garcia*, 121 N.M. at 732, 918 P.2d at 11.

90. *Id.*; *see* Newberry v. Allied Stores, 108 N.M. 427, 773 P.2d 1234 (1989); Lukoski v. Sandia Indian Mgmt. Co., 106 N.M. 664, 667, 748 P.2d 507, 509 (1988).

of contractual liability (assuming other contractual requirements, such as mutual consideration, are satisfied) if the recipient of the services held a similar, reasonable expectation.

VII. CONCLUSION

The *Garcia v. Middle Rio Grande Conservancy District* decision provides plaintiffs with a cause of action against governmental entities for breach of implied contracts. The reasoning in *Garcia* may apply beyond the employment context, permitting plaintiffs to cite written language in policy statements, ordinances, manuals, or similar documents as a basis for a governmental entity's contractual liability. To be incorporated in the implied contract, a writing must be specific enough for the plaintiff to expect the governmental entity to conform to it and the plaintiff must have reasonably relied on the writing. Governmental entities can disclaim contractual liability by including language in the particular writing that the writing is not to be the basis of any implied contract. Plaintiffs are likely to attempt to broaden the *Garcia* holding beyond the employment context, particularly into the areas of education and provision of government services. If they are successful, the New Mexico Supreme Court will need to decide whether it should limit the *Garcia* decision so that not every reasonably specific policy or manual that gives rise to reliance also gives rise to implied contract liability of a governmental entity.

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