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Claiming Employment Discrimination in New Mexico under State and Federal Law

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CLAIMING EMPLOYMENT DISCRIMINATION IN NEW MEXICO UNDER STATE AND FEDERAL LAW

I. INTRODUCTION

Employees in New Mexico are protected from various forms of employment discrimination under both federal and state law. Under various provisions of federal and state statutes, it is unlawful for an employer to discriminate against an employee on the basis of race, age, sex, physical or mental disability, religion, national origin, color, or ancestry. Potential remedies for employer violations of these laws include reinstatement, backpay, actual damages, liquidated damages, punitive damages, and attorneys' fees. Not all employers, however, are absolutely prohibited from discriminating against their employees. In addition to a number of defenses available to an employer, each of the federal and state employment discrimination laws requires a minimum number of employees before an employer is subject to the provisions of the respective laws.

The primary object of this comment is to provide the practitioner with a broad overview of the employment discrimination laws available in New Mexico. Both the substantive provisions and procedural requirements of the laws are discussed to highlight the variations. On the state level, this comment discusses the New Mexico Human Rights Act.[1] On the federal level, this comment discusses Title VI of the Civil Rights Act of 1964,[2] the Equal Pay Act of 1963,[3] the Age Discrimination in Employment Act of 1967,[4] and the new Americans with Disabilities Act of 1990.[5] Because the federal Civil Rights Act of 1964 and the New Mexico Human Rights Act provide the broadest coverage, they are discussed more extensively than the other employment discrimination laws available to aggrieved New Mexico employees.

II. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964[6]

Title VI of the Civil Rights Act of 1964 contains the employment provisions of a sweeping piece of federal legislation aimed at eliminating discrimination in the workplace. In addition to the employment provisions of Title VI, the Act also makes it unlawful to discriminate with respect to housing and public accommodations. The passage of Title VI was in essence the genesis of other federal and state legislation enacted with the purpose of eliminating discrimination in the workplace. Indeed, our own New Mexico Human Rights Act tracks many of the provisions of Title VI.

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1. *See infra* notes 33-88 and accompanying text.
2. *See infra* notes 6-32 and accompanying text.
3. *See infra* notes 89-102 and accompanying text.
4. *See infra* notes 103-114 and accompanying text.
5. *See infra* notes 115-123 and accompanying text.
6. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

A. *Substantive Provisions*

Title VI of the Civil Rights Act of 1964 ("Title VI" or "Act") makes it unlawful for an employer to discriminate on the basis of race, color, religion, sex, or national origin.[7] An employer must be in an industry affecting commerce and employ a minimum of fifteen employees to be subject to the provisions of the Act.[8] If a complainant establishes a *prima facie* case of employment discrimination under Title VI, a number of defenses are available to the employer. However, if the employer fails to successfully defend against an employment discrimination claim, the potential remedies available to the complainant employee include reinstatement or hire,[9] backpay,[10] and attorneys' fees.[11]

B. *Procedural Requirements*

An aggrieved employee must file a written complaint with the federal Equal Employment Opportunity Commission ("EEOC").[12] The complaint must be filed with the EEOC within 180 days after the alleged discriminatory act was committed.[13] Upon the filing of the complaint, the EEOC serves notice on the employer and commences its investigation into the alleged discriminatory act.[14] If the EEOC determines that a valid claim exists, it will try to resolve the matter through informal methods of conference, conciliation, and persuasion.[15]

If conciliation fails, the EEOC may bring a civil action against the employer.[16] The EEOC must also notify the claimant if it dismisses the charge or if it fails to reach a conciliation agreement with the affected parties. After giving notice, the claimant has ninety days within which to bring a civil action in federal court.[17]

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7. *Id.* § 2000e-2(a).
8. *Id.* § 2000e(b).
9. Goldstein v. Manhattan Indus., 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985).
10. 42 U.S.C. § 2000e-5(g) (1988); *see also* Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).
11. *See* 42 U.S.C. § 2000e-5(k) (1988).
12. *Id.* § 2000e-5(b).
13. *Id.* § 2000e-5(e). In New Mexico, the 180 day statute of limitations is not necessarily an absolute bar to a timely filing with the Equal Employment Opportunity Commission. The State of New Mexico is a deferral state. In deferral states, a further provision in section 2000e-5(e) suggests that an aggrieved employee may file a timely charge with the EEOC up to 300 days after the alleged unlawful employment practice occurred. In New Mexico, the Equal Employment Opportunity Commission and the New Mexico Human Rights Commission have a work share agreement. Under this agreement, the respective commissions agree to refer claims to each other. This referral process ensures that a claim is deemed filed at both the federal and state commission, if filed timely with either commission.
14. *Id.* § 2000e-5(b). The New Mexico work share agreement also specifies that the respective commissions will be responsible for investigating a case if it comes before them. Upon completion of the investigation, the respective commission forwards its findings to the other, thus avoiding duplication of investigative efforts.
15. *Id.*
16. *Id.* § 2000e-5(f).
17. *Id.*

C. *Common Law*

An analysis of the definition section of the Act demonstrates that Congress failed to statutorily define the crucial concept of "discrimination." As a result, the courts have stepped in to provide a common law definition. Since the adoption of the Act, the courts have recognized and applied two primary theories of discrimination: disparate treatment and adverse impact.

1. Disparate Treatment

The common law doctrine of disparate treatment is premised upon a showing of overtly different treatment of an employee by an employer solely because of the employee's race, color, religion, sex, or national origin. Thus, the intent of the employer is often a critical issue in these cases. In the landmark case of *McDonnell Douglas Corp. v. Green*,[18] the United States Supreme Court set forth the standards governing the consideration of disparate treatment claims.

In *McDonnell Douglas*, the Court stated that a disparate treatment *prima facie* case is established by showing: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, the plaintiff was rejected; and (4) after plantiff's rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.[19]

If an employee establishes a *prima facie* case, the burden of proof shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[20] Once the employer articulates a legitimate, nondiscriminatory reason for rejecting the employee, the employee is afforded an opportunity to show that the articulated reason for his rejection is in fact pretextual.[21] Thus, under the Court's analysis in *McDonnell Douglas*, the employee must demonstrate two elements to prevail. The employee must prove the *prima facie* elements discussed above and also prove that the employer's articulated reason for not hiring him was a mere pretext.

For the defendant employer to prevail in a disparate treatment case, he must articulate a legitimate, nondiscriminatory, nonpretextual reason for an employee's rejection. A valid reason for an employee's rejection may include the bona fide occupational qualification ("BFOQ") defense, which is available to the employer with respect to certain prohibited activity.[22] Absent the BFOQ defense, the employer carries the burden of

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18. 411 U.S. 792 (1973).
19. *Id.* at 802.
20. *Id.*
21. *Id.* at 804.
22. 42 U.S.C § 2000e-2(e) (1988). This section states in part that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise . . . ." *See, e.g.*, Backus v. Baptist Medical Center, 510 F. Supp. 1191 (E.D. Ark. 1981) (court upheld the exclusion of male nurses from a hospital's obstetrics and gynecology department).

proving a legitimate, nondiscriminatory reason for rejecting the employee. The defendant employer must be aware, however, that providing a legitimate, nondiscriminatory reason does not necessarily ensure that the employer will prevail, as the employee maintains the opportunity to prove that the articulated reason is pretextual, and thus may ultimately defeat the employer's defense.

2. Adverse Impact

The common law doctrine of adverse or disproportionate impact is a somewhat less intuitive concept of discrimination. Rather than showing overtly differential treatment, as in disparate treatment analysis, adverse impact analysis seeks to unearth underlying discriminatory policies and procedures which may be neutral on their face. Because it is the impact of facially neutral policies and procedures which becomes the critical issue, intent has traditionally been less of a factor in these types of cases.

A long line of federal court decisions have failed to provide an adequate objective standard for determining what constitutes adverse impact.[23] However, in *Albemarle Paper Co. v. Moody*,[24] the United States Supreme Court articulated the subjective elements of a plaintiff's *prima facie* adverse impact case. The plaintiff must show that

> tests . . . select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employer does then meet the burden of proving that his tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'[25]

The first element of the plaintiff's case thus is to show that the policy, procedure, test, or selection device adversely impacts upon the protected class. The use of statistics is often critical at this stage.[26] If the plaintiff demonstrates adverse impact, the burden shifts to the employer defendant to validate his selection process. Validation is the process by which the defendant employer satisfies his burden of proof that his selection devices are sufficiently "job related." If the employer successfully validates his test, the burden swings back to the employee to prove the existence of a better selection device.

The common law doctrine of adverse impact discrimination may very well be a dead letter after the United States Supreme Court's decision

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23. Some federal courts have adopted a "four-fifths rule." Guardians Ass'n v. Civil Service Comm'n, 690 F.2d 79 (2nd Cir. 1980). Under the four-fifths rule, an adverse impact *prima facie* case may be established by showing a selection rate for members of a protected class of less than 80% of the rate of the non-protected class. *Id.*

24. 422 U.S. 405 (1975).

25. *Id.* at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

26. *See* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978).

in *Wards Cove Packing Co., Inc. v. Atonio*.[27] The Court's decision was a radical clarification of the existing common law burdens of proof in favor of the defendant employer.

Under *Wards Cove*, a general showing of racial imbalance in the employer's workforce is insufficient to sustain the plaintiff's *prima facie* case. As a general rule, the plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.[28] If the plaintiff successfully establishes the *prima facie* case of disparate impact, the burden shifts to the employer defendant to offer any business justification for the use of his selection device or employment practice.[29] Although the employer carries the burden of producing evidence of a business justification for his employment practice, the burden of persuasion never leaves the employee plaintiff.[30]

In addition to disparate treatment and adverse impact, a third cause of action may be available to an aggrieved employee on the basis of an employer's retaliation against an employee for invoking the protection of Title VI. In this type of action, an employer cannot discriminate against an employee simply because the employee opposed the employer's unlawful discriminatory practices, filed a charge, testified, assisted, or participated in any investigation, proceeding, or hearing under Title VI.[31]

Claims of disparate treatment are by far the majority of the cases investigated by the federal Equal Employment Opportunity Commission in New Mexico. Thus, the common law substantive requirements of *McDonnell Douglas* provide the basic legal framework most likely to apply to an aggrieved New Mexico claimant under Title VI. Although *McDonnell Douglas* sets forth the general rule, subsequent cases clarify important nuances indicated by the *McDonnell Douglas* rule.[32] Thus, practitioners must view *McDonnell Douglas* as only the starting point for further research.

The adverse impact doctrine is now disfavored in the federal courts. In addition to the Supreme Court's *Wards Cove* decision, there are a number of factors reducing the appeal of the adverse impact doctrine to most prospective claimants. Even before *Wards Cove*, the *prima facie* statistical requirements of the adverse impact doctrine were a costly and time consuming endeavor for most prospective claimants. And, discriminatory employment policies and procedures over the last twenty-seven years have arguably declined as a direct result of prospective disparate treatment employer liability.

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27. 490 U.S. 642 (1989).
28. *Id.* at 657.
29. *Id.* at 658.
30. *Id.* at 659.
31. 42 U.S.C. § 2000e-3(a) (1988); *see, e.g.*, Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).
32. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Green, 438 U.S. 567 (1978).

III. THE NEW MEXICO HUMAN RIGHTS ACT[33]

A. *Substantive Provisions*

The New Mexico Human Rights Act ("Human Rights Act" or "Act") makes it an unlawful discriminatory practice for an employer to discriminate on the basis of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, or medical condition.[34] An employer must employ a minimum of four employees to be subject to the provisions of the Act.[35] Potential remedies available to an aggrieved employee include actual damages and attorneys' fees.[36] However, the bona fide occupational qualification defense is available to the employer with respect to all prohibited activity.[37]

B. *Procedural Requirements*

An aggrieved employee must file a written complaint with the New Mexico Human Rights Commission.[38] The complaint must be filed with the Commission within 180 days after the alleged discriminatory act was committed.[39] The Commission must then promptly investigate the alleged discriminatory act.[40] If the Commission determines that probable cause exists, it must try to resolve the matter through persuasion and conciliation.[41] If the Commission determines that probable cause does not exist, it must notify the complainant and respondent of the dismissal of the complaint.[42] If conciliation fails, the Commission must issue a written complaint in its own name against the employer.[43] The employer is then required to appear at a hearing before the New Mexico Commission to answer the allegations set forth in the complaint.[44] The district court may grant injunctive relief to ensure that orders of the New Mexico Commission are effective.[45]

C. *Common Law*

Over the past decade, a number of cases have sought to define and clarify the substantive provisions and procedural requirements of the New Mexico Human Rights Act. In *Human Rights Commission of New Mexico v. Board of Regents of University of New Mexico College of Nursing*,[46]

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33. N.M. STAT. ANN. §§ 28-1-1 to -15 (Repl. Pamp. 1987).
34. *Id.* § 28-1-7(A).
35. *Id.* § 28-1-2(B).
36. *Id.* § 28-1-13(D).
37. *Id.* § 28-1-7(A).
38. *Id.* § 28-1-10(A).
39. *Id.*
40. *Id.* § 28-1-10(B).
41. *Id.* § 28-1-10(C).
42. *Id.* § 28-1-10(B).
43. *Id.* § 28-1-10(D).
44. *Id.*
45. *Id.* § 28-1-10(E).
46. 95 N.M. 576, 624 P.2d 518 (1981) [hereinafter *College of Nursing*].

the New Mexico Supreme Court addressed the issue of whether the University of New Mexico, in administering its academic program, is "a public accommodation" within the definition of New Mexico Human Rights Act section 28-1-2(G).[47] In this case, a black nursing student claimed that the university discriminated against her on the basis of race in evaluation procedures. The claimant further alleged that the university was a public accommodation, an entity covered by the Act.

The Act explicitly makes it an unlawful discriminatory practice for any person in any public accommodation to make a distinction based on race.[48] The court held that the University of New Mexico is not a "public accommodation" within the meaning of the Act.[49] The court reasoned that the prohibition against discrimination in public accommodations arose from the common law duties of innkeepers and public carriers to provide their services to the public without unreasonable conditions.[50] In closing, the court warned that their holding should be construed narrowly and was applicable only under the circumstances at bar.[51]

In *Bottijliso v. Hutchinson Fruit Co.*,[52] the New Mexico Court of Appeals generally discussed the Human Rights Act in the context of a wrongful discharge case.[53] The issue before the court was whether a cause of action exists in tort against a prior employer for discharge because of the exercise of one's rights under the Workman's Compensation Act.[54] The plaintiff claimed wrongful discharge grounded in tort on the basis that he was terminated immediately upon filing a claim under the Workman's Compensation Act.[55]

The court rejected the plaintiff's claim, but in so doing emphasized a particular section of the New Mexico Human Rights Act.[56] Under section 28-1-7(I)(2), it is an unlawful discriminatory practice for any person or employer to engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or who has filed a complaint, testified, or participated in any proceeding under the Human Rights Act.[57] In sum, New Mexico employers are expressly prohibited from retaliating against employees who oppose unlawful discrimination, file a complaint, testify, or participate

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47. *Id.* at 577, 624 P.2d at 519.
48. N.M. STAT. ANN. § 28-1-7 (Repl. Pamp. 1987).
49. *College of Nursing*, 95 N.M. at 577, 624 P.2d at 519.
50. *Id.*
51. *Id.* at 578, 624 P.2d at 520.
52. 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981).
53. In addition to the statutory protection against discrimination discussed in this comment, the New Mexico courts have begun to recognize the common law doctrine of wrongful termination. The doctrine of wrongful termination is premised upon the common law doctrines of tort and breach of contract. Aggrieved New Mexico employees who do not qualify for coverage under the various statutory provisions discussed in this comment may nevertheless be able to bring a successful action for wrongful termination. *See* Survey, *Employment Law*, 21 N.M.L. REV. ____(1991).
54. *Bottijliso*, 96 N.M. at 790, 635 P.2d at 993.
55. *Id.*
56. *Id.* at 793, 635 P.2d at 996.
57. *Id.*

in proceedings under the Act. The plaintiff in this particular case arguably would have prevailed if the Workman's Compensation Act had contained a similar provision.

In *Dominguez v. Stone*,[58] the court of appeals reversed the district court's grant of summary judgment with respect to the plaintiff's claims of defamation of reputation[59] and intentional infliction of emotional distress.[60] The court, however, also held that actions would not lie under section 1983[61] or the New Mexico Human Rights Act. The court's discussion of the Act was primarily related to procedural matters.[62]

In affirming the district court's summary judgment with respect to the plaintiff's Human Rights Act claim, the court of appeals concluded that it did not have subject matter jurisdiction.[63] The court reasoned that if an appeal is to be taken from the district court's decision with respect to a Human Rights Act action, that appeal must be made directly to the New Mexico Supreme Court.[64] The court left open the question of whether compliance with the administrative procedures of the Act is a prerequisite to immediate judicial review.[65]

In *Jaramillo v. J.C. Penny Co., Inc.*,[66] the court of appeals seemingly reversed itself by addressing the specific issue of administrative compliance under the Human Rights Act. The court held that compliance with the grievance procedure proscribed by the Act is indeed a prerequisite to suit under the provisions of the Act.

In *Vigil v. Arzola*,[67] the New Mexico Court of Appeals again discussed the Act in the context of a wrongful discharge case.[68] The *Vigil* decision held that tort actions for wrongful termination may be sustained by proving employee termination in contravention of a generally accepted public policy.[69] The court identified a violation of the Act as contrary to New Mexico public policy and thus arguably an accepted public policy for wrongful termination analysis.[70]

Two recent New Mexico Supreme Court decisions have especially sought to clarify the substantive provisions of the Act. In *Smith v. FDC Corp.*,[71] a fifty-nine-year-old Native American worker brought suit against his former employer alleging age and race discrimination in his termination. The primary issue before the supreme court was whether the district court's findings of discrimination and damages were supported by sub-

58. 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981).
59. *Id.* at 214, 638 P.2d at 426.
60. *Id.* at 215, 638 P.2d at 427.
61. *Id.* at 216, 638 P.2d at 428.
62. *See supra* notes 38-45 and accompanying text.
63. *Dominguez*, 97 N.M. at 216, 638 P.2d at 428.
64. *Id.*; *see also* N.M. STAT. ANN. § 28-1-13(C) (Repl. Pamp. 1987).
65. *Dominguez*, 97 N.M. at 216, 638 P.2d at 428.
66. 102 N.M. 272, 694 P.2d 528 (Ct. App. 1985).
67. 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983).
68. *See supra* note 53.
69. *Vigil*, 102 N.M. at 688, 699 P.2d at 619.
70. *Id.* at 688-89, 699 P.2d at 619-20.
71. 109 N.M. 514, 787 P.2d 433 (1990).

stantial evidence. The court held that the district court's findings were supported with respect to both discrimination and damages.

By applying federal common law, the supreme court concluded that Smith had indeed been discriminated against. However, the court warned that any reliance on the methodology adopted in the federal courts "should not be interpreted as an indication that [New Mexico has] adopted federal law as [its] own."[72] Proceeding, the court stated: "[O]ur analysis of this claim is based on [the] New Mexico statute and our legislature's intent, and, by this opinion, we are not binding New Mexico law to interpretations made by the federal courts of the federal statute [Title VI]."[73]

Although the court discussed the *McDonnell Douglas* methodology,[74] its decision in fact turned on other federal court cases standing for the proposition that the *McDonnell Douglas* analysis may be bypassed by a showing of intentional discrimination through direct evidence.[75] The court held the new *Wards Cove*[76] analysis inapplicable to the facts of this case and withheld further opinion as to its applicability to New Mexico law.[77] The plaintiff, however, did sustain his claim under the Act by demonstrating substantial direct evidence of discrimination based on age and race.[78]

Because of the plaintiff's "situation," the supreme court concluded that "it was not inappropriate for the [district] court to estimate future lost earnings based upon . . . past income."[79] Elsewhere in the decision, the court upheld other aspects of the district court's award of damages[80] and attorneys' fees.[81]

The New Mexico Supreme Court discussed three important issues relating to the Act in *Behrmann v. Phototron*:[82] (1) whether the district court erred in giving both a *McDonnell Douglas*[83] and *Price Waterhouse*[84] instruction, thereby misleading the jury; (2) whether the district court erred in refusing to admit evidence of the Human Rights Commission's determination; and (3) whether the court erred in instructing the jury that it could consider prospective damages.[85]

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72. *Id.* at 517, 787 P.2d at 436.
73. *Id.*
74. *Id.* at 517-18, 787 P.2d at 436-37.
75. *Id.* at 518, 787 P.2d at 437.
76. *See supra* notes 27-30 and accompanying text.
77. *Smith*, 109 N.M. at 518, 787 P.2d at 437.
78. *Id.* at 519-20, 787 P.2d at 438-39.
79. *Id.* at 521, 787 P.2d at 440.
80. *Id.* at 520-21, 787 P.2d at 439-40.
81. *Id.* at 521-22, 787 P.2d at 440-41.
82. 110 N.M. 323, 795 P.2d 1015 (1990).
83. *See supra* notes 18-21 and accompanying text.
84. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In *Price Waterhouse*, the Supreme Court expressed the view that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. *Id.* at 244-45.
85. *Behrmann*, 110 N.M. at 324-25, 795 P.2d at 1016-17.

The supreme court affirmed the action of the district court on all issues. The court concluded that this was not a case where the two instructions (*i.e.*, *McDonnell Douglas* and *Price Waterhouse*) were repetitious or contradictory or unduly emphasized evidence introduced by a party.[86] Furthermore, the court concluded that the Commission's determination was properly excluded evidence on the grounds that section 28-1-13(B)[87] of the Act did not apply as there was no "record" of a Commission hearing. The Commission's conclusion of no probable cause resulted only from an investigation. Finally, the court concluded that prospective damages were in fact included within the scope of the Act's provision for actual damages under section 28-1-13.[88]

IV. THE EQUAL PAY ACT OF 1963[89]

A. Substantive Provisions

The Equal Pay Act of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938.[90] The Equal Pay Act makes it unlawful for an employer to discriminate on the basis of sex.[91] An employer is subject to the Equal Pay Act if he engages in interstate commerce,[92] employs at least two employees,[93] and earns a gross income in excess of $500,000.[94] Potential remedies available to an aggrieved employee include frontpay,[95] backpay,[96] liquidated damages if wilful violation of the Equal Pay Act can be shown,[97] and attorneys' fees.[98] The BFOQ defense is not available to the employer with respect to prohibited activity.

B. Procedural Requirements

An aggrieved employee may proceed directly to either federal or state court.[99] A jury trial is available. Although administrative proceedings are

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86. *Id.* at 327, 795 P.2d at 1019.

87. The court stated that the New Mexico Human Rights Commission has the duty to file with the district court "so much of the transcript of the record as the parties requesting the transcript designate as necessary . . . ." N.M. STAT. ANN. § 28-1-13(B) (Repl. Pamp. 1987).

88. *Behrmann*, 110 N.M. at 328, 795 P.2d at 1020.

89. 29 U.S.C. § 206(d) (1988).

90. 29 U.S.C §§ 201-19 (1988).

91. Section 206(d)(1) reads in part that "[n]o employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to the opposite sex . . . for equal work . . . ."

92. Section 206(b) reads: "Every employer shall pay to each of his employees . . . who . . . is employed in an enterprise engaged in commerce . . . not less than the minimum wage rate." Commerce is defined as "trade, commerce, transportation, transmission, or communication among the several states . . . ." 29 U.S.C. § 203(b).

93. The term "enterprise engaged in commerce" is further defined as "an enterprise [that] has employees engaged in commerce . . . ." 29 U.S.C. § 203(b). Because Congress used the term "employees" rather than "an employee," the Act has been construed to require two employees.

94. *Id.* § 203(3)(1)(A)(ii).

95. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982).

96. Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984).

97. *Id.*

98. Hensley v. Eckerhart, 434 U.S. 412 (1978).

99. Osoky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983).

available by filing a complaint with the EEOC, the employee should beware of the possibility of losing his individual right to go to court if the EEOC exercises its authority and files suit on behalf of the employee.[100] Although a two year statute of limitations normally applies,[101] it is possible to extend the statute of limitations to three years in the case of a wilful violation of the Act.[102]

V. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967[103]

A. *Substantive Provisions*[104]

The Age Discrimination in Employment Act of 1967 ("ADEA") makes it an unlawful discriminatory practice for an employer to discriminate on the basis of age.[105] An employer must be in an industry affecting commerce and employ a minimum of twenty employees to be subject to the ADEA.[106] Potential remedies available to an aggrieved employee include backpay,[107] frontpay,[108] liquidated damages if a wilful violation of the ADEA can be shown,[109] and attorneys' fees.[110] The bona fide occupational qualification defense is available to the employer if he can show a valid safety concern.[111]

B. *Procedural Requirements*

Since 1978, ADEA claimants have been required to conform to many of the procedural requirements applicable to Title VI claimants.[112] An ADEA claimant must comply with administrative procedures before the EEOC prior to taking his claim to state or federal court.[113] The plaintiff must make a timely demand in order to exercise his right to a jury trial.[114]

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100. EEOC v. Home of Economy, Inc., 712 F.2d 356 (8th Cir. 1983).
101. 29 U.S.C. § 216(c) (1988).
102. EEOC v. Central Kansas Medical Center, 705 F.2d 1270 (10th Cir. 1983).
103. 29 U.S.C. §§ 621-34 (1988).
104. For a discussion of the interplay between the New Mexico Human Rights Act and the Age Discrimination in Employment Act, see Canepa & Reecer, *Age Discrimination in Employment: A Comparison of Federal and State Laws and Remedies in New Mexico*, 7 N.M.L. REV. 11 (1976-77).
105. 29 U.S.C. § 623(a) (1988).
106. *Id.* § 630(b).
107. Blim v. Western Elec. Co., 731 F.2d 1473 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984).
108. Smith v. Consolidated Mut. Water Co., 787 F.2d 1441 (10th Cir. 1986).
109. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).
110. Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).
111. 29 U.S.C. § 623(f) (1988).
112. *See* Reorganization Plan No.1 of 1978, § 2, 3 C.F.R. § 321 (1978).
113. *See supra* notes 12-17 and accompanying text.
114. Scharnhorst v. Independent School Dist., 686 F.2d 637 (8th Cir. 1982), *cert. denied*, 462 U.S. 1109 (1983).

VI. THE AMERICANS WITH DISABILITIES ACT OF 1990[115]

A. *Substantive Provisions*

The Americans with Disabilities Act of 1990 ("ADA") makes it an unlawful discriminatory practice for a "covered entity" to discriminate against a "qualified individual with a disability."[116] The ADA defines a "covered entity" as an employer, employment agency, labor organization, or joint labor-management committee.[117] The ADA defines a "qualified individual with a disability" as "an individual with a disability who can perform the essential functions of the employment position that such individual holds or desires to occupy."[118] "Disability" is further defined as "a physical or mental impairment that substantially limits one or more life activities . . . ."[119]

An employer must be engaged in an industry affecting commerce and employ a minimum of fifteen employees to be subject to the provisions of the ADA.[120] Potential remedies available to an aggrieved employee include those available under Title VI.[121] The bona fide occupational qualification defense is not available to the employer with respect to the prohibited activity.

B. *Procedural Requirements*

The employment provisions of the ADA will not take effect until July 26, 1992.[122] When the ADA does take effect, it will be administered by the EEOC.[123]

VII. SUPPLEMENTARY FEDERAL ACTIONS

A. *Substantive Provisions*

There are a number of federal alternatives which may be available to an aggrieved New Mexico employee. These actions may be brought pursuant to the Reconstruction Civil Rights Acts. The Reconstruction Civil Rights Acts include the Civil Rights Act of 1866,[124] section one of the the Civil Rights Act of 1871,[125] and section two of the Civil Rights Act of 1871.[126] These Acts were enacted by the United States Congress

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115. 42 U.S.C. §§ 12101 to -213 (1990).
116. *Id.* § 12102(a).
117. *Id.* § 12101(2).
118. *Id.* § 12101(8).
119. *Id.* § 12102(2).
120. *Id.* § 12101(5)(A).
121. *Id.* § 12107(a); *see supra* notes 9-11 and accompanying text.
122. *Id.* § 12108.
123. *Id.* § 12107; *see supra* notes 12-17 and accompanying text.
124. 42 U.S.C. § 1981 (1988).
125. *Id.* § 1983.
126. *Id.* § 1985(c).

shortly after the Civil War to ensure enforcement of the thirteenth and fourteenth amendments.

Section 1981 and section 1983 actions may be of particular interest to an aggrieved employee because of the potential remedies available to a successful plaintiff. Should the employee prevail on one of these claims, a jury[127] may award both compensatory and punitive damages against the employer.[128]

Section 1981 claims are typically brought in conjunction with the thirteenth and fourteenth amendments, and an aggrieved employee may bring a claim against a public or private employer who fails to enter into or enforce the terms of an employment contract based on race or national origin.[129] Section 1983 claims are typically brought in conjunction with the fourteenth amendment, and an aggrieved employee, not qualifying for protection under Title VI, may bring an action against an employer acting under color of state law with respect to the violation of any employment right on the basis of race,[130] sex,[131] religion,[132] or national origin.[133]

B. Procedural Requirements

Section 1981 and section 1983 claims may be brought in either state or federal court. Section 1981 and section 1983 claims do not stand alone. These claims must be brought in conjunction with a statute or a constitutional amendment. There is a three year statute of limitations under the New Mexico personal injury laws.[134]

VIII. CONCLUSION

An aggrieved employee in New Mexico has a number of state and federal law alternatives available to remedy employment discrimination. However, each of the available laws confers specific rights to certain protected classes of individuals. An employee must be a member of a protected class to qualify for the rights provided by a particular law. Qualification for protection under a particular law does not absolutely ensure that the right or remedy will necessarily follow. Each of the laws

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127. There has been much debate over the availability of jury trials in these actions. The issue turns on whether the plaintiff seeks equitable or legal relief. *See* Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182 (11th Cir. 1985).

128. Smith v. Wade, 461 U.S. 30 (1983).

129. See Reiss, *Requiem for an Independent Remedy: The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961 (1977). The courts have held that the right "to make and enforce contracts" on an equal basis, referred to in section 1981, includes the right to enter into and enforce employment contracts. Thus, section 1981 prohibits discriminatory employment practices in recruitment, hiring, compensation, assignment, promotion, layoff, and discharge of employees. *Id.*

130. Scott v. University of Del., 385 F. Supp. 937 (D. Del. 1974).

131. Weise v. Syracuse Univ., 522 F.2d 397 (2nd Cir. 1975).

132. Sherbert v. Verner, 374 U.S. 398 (1963).

133. Puntolillo v. New Hampshire Racing Comm'n, 390 F. Supp. 231 (D.N.H. 1975).

134. N.M. STAT. ANN. § 37-1-8 (Repl. Pamp. 1990); *see also* Wilson v. Garcia, 777 F.2d 113 (3rd Cir. 1985), *aff'd*, 482 U.S. 656 (1987).

contains substantive requirements for establishing a *prima facie* case. Even if an employee establishes a *prima facie* case, the employer may have a number of defenses which will defeat the employee's claim.

There are a number of procedural requirements in addition to the substantive provisions of the respective laws. Among these procedural requirements are express statutes of limitation which set forth specific time requirements in which to bring an action. An action filed beyond these time requirements risks immediate dismissal without ever reaching the merits of the employee's case. Although the area of employment discrimination law is a complex, dynamic, and rapidly changing field,[135] this comment has attempted to provide the practitioner with a broad overview of the substantive and procedural employment discrimination law issues currently confronting aggrieved New Mexico employees.

DAVID L. CEBALLES

135. Over the last two years the United States Congress has debated a new Civil Rights Act which would substantially impact the law of employment discrimination. This year's House Bill 1 and Senate Bill 611 would make substantial amendments to Title VII of the Civil Rights Act of 1964 so as to strengthen protections against discrimination in employment. *See* H.R. 1, 102nd Cong., 1st Sess. (1991); S. 611, 102nd Cong., 1st Sess. (1991). In 1990, a presidential veto was narrowly sustained regarding similar legislation.