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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 11/3/2026 12:11 PM
Mark Reynolds

CHRISTINA SENA,

Plaintiff-Appellant,

v. **No. A-1-CA-42989**

NEW MEXICO STATE PERSONNEL OFFICE and NEW MEXICO DEPARTMENT OF HEALTH,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Bryan Biedscheid, District Court Judge

Michael Schwarz
Santa Fe, NM

for Appellant

Miller Stratvert P.A.
Paula Maynes
Jennifer D. Hall
Philomena M. Hausler
Albuquerque, NM

for Appellees

MEMORANDUM OPINION

WRAY, Judge.

{1} The opinion filed on October 1, 2026, is hereby withdrawn and this opinion is substituted in its place, following Plaintiff Christina Sena's motion for rehearing, which this Court denies. Plaintiff was terminated from her employment as a

recreational therapist 1 (RT-1) at the New Mexico Behavioral Health Institute (NMBHI) after a random drug test returned positive for marijuana. Plaintiff brought suit against Defendants New Mexico Department of Health (NMDOH) and the New Mexico State Personnel Office (NMSPO) for declaratory judgment; violation of the Lynn and Erin Compassionate Use Act (the CUA), NMSA 1978, §§ 26-2B-1 to -10 (2007, as amended through 2023); and violation of the New Mexico Human Rights Act (the NMHRA), NMSA 1978, §§ 28-1-1 to -14 (1969, as amended through 2024).[1] Plaintiff appeals the district court's grant of summary judgment on all three counts, and we consider Plaintiff's arguments in two categories: (1) Plaintiff was not subject to random drug testing; and (2) Defendants violated the NMHRA by denying Plaintiff's request to accommodate her asserted disability. *See* Rule 1-056(C) NMRA (providing the standard for summary judgment). We affirm.

DISCUSSION

{2} We review the district court's grant of summary judgment de novo. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks and citation omitted). The first category of arguments on appeal, regarding

[1] The CUA and the NMHRA have been amended since Plaintiff was terminated from her employment. The amendments do not substantively affect our analysis, and we therefore cite the current version of the statute.

the propriety of the random drug test, relate to Plaintiff's request for declaratory judgment (Count one) and the claim under the CUA (Count two). The second category of arguments is tied to the NMHRA (Count three).[2]

I. Plaintiff's Random Drug Test

{3} Random drug testing is permitted by statute for NMDOH employees who are "health care providers." *See* NMSA 1978, § 9-7-18(A) (2011). NMDOH regulations also provide that "[a]ll direct health care providers" are deemed to be "employed in safety-sensitive positions" and random drug testing is permitted. 7.25.2.8(A) NMAC; *see* § 26-2B-9(A), (B)(2) (exempting safety-sensitive positions from the employment protections afforded by the CUA). NMSPO regulations previously included a "cutoff concentration" that was used to determine whether a drug test was negative. *See* 1.7.8.13(B)(1) NMAC (10/1/2010).[3] Plaintiff argues that (1) the RT-1 position did not satisfy the criteria to be subject to random drug tests; (2) the RT-1 position was improperly designated as safety-sensitive; and (3) the cutoff threshold set by the State Personnel Board (the Board) to establish the presence of drugs is arbitrary and capricious. Plaintiff's arguments implicate statutes and the

[2]We decline to address Plaintiff's argument that a motion in limine should have been granted, because we affirm the district court's grant of summary judgment on all three counts. *See Crutchfield v. N.M. Dep't of Tax'n & Revenue Dep't*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 ("A reviewing court generally does not decide academic or moot questions.").

[3]This regulation was amended and renumbered in 2025.

administrative code, and we read "[t]he statutory and administrative code provisions at issue . . . together so as to give effect to their meaning." *See AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶ 14, 284 P.3d 1118.

A. The Criteria for Random Drug Tests

{4} Plaintiff first argues that she was not subject to random drug testing because in the RT-1 position, she was not a "health care provider furnishing direct patient care." A "health care provider" is defined by statute as "any health care staff member who is licensed, certified or otherwise authorized or permitted by law to provide direct unsupervised health care to a patient." Section 9-7-18(E)(1); *see* 7.25.2.7(D) NMAC (same). The corresponding NMDOH regulation states that "'[d]irect care' means health care providers authorized or permitted to offer health care services directly to a patient without another employee's assistance or presence." 7.25.2.7(A) NMAC. The evidence showed that Plaintiff was "authorized or permitted by law to provide direct unsupervised health care to a patient." *See* § 9-7-18(E)(1). Plaintiff's job description included the following essential duties: "[a]ssess[ing] patients, perform[ing] treatment planning, and facilitat[ing] activities using and maintaining therapy equipment, and maintaining documentation." NMDOH offered evidence that Plaintiff provided group therapy to patients, led the groups, documented care in the medical record, and was "authorized to provide this health care without another provider's assistance or presence."

{5} Plaintiff maintains that she was not a health care provider based on evidence that she was not licensed, always worked with a coworker, was directly supervised, and did not provide patient care. A health care provider, however, is defined by the statutes and regulations according to what an employee is authorized or permitted to do—and not how a particular employee performs a job. Plaintiff's job description authorizes a person in the RT-1 position to perform direct care functions and does not require supervision or the presence of another employee. Plaintiff's evidence about how she performed the job therefore does not rebut Defendants' evidence that she was authorized and permitted to provide direct care unsupervised. As a result, Plaintiff was a health care provider who was subject to random drug testing.

B. The Safety-Sensitive Designation

{6} Plaintiff next argues that no evidence established that the Board properly designated the RT-1 position as safety-sensitive. *See* 1.7.8.9(C) NMAC (2/12/2010) ("The [B]oard shall review and approve annually the positions designated as safety-sensitive.").[4] Specifically, Plaintiff points to testimony that NMSPO receives "no justification" and "[t]here is no documentation provided to [NM]SPO other than the agency's confirmation that it does meet the definition for safety[-]sensitive."

[4]This regulation was amended in 2025 and this provision, requiring annual review, was removed.

Plaintiff therefore concludes that the RT-1 position "was not properly designated as safety[-]sensitive."

{7} Although NMSPO has retained the ultimate authority to question and approve the listings, it has delegated to the agencies any obligation to ensure that the requirements for safety-sensitive positions remain satisfied. *Cf. Loc. 2238 of AFSCME v. Stratton*, 1989-NMSC-003, ¶¶ 19-22, 108 N.M. 163, 769 P.2d 76 (determining that collective bargaining rules implemented by other state agencies are permissible provided that the board retains the power to approve the terms of employment). Defendants provided evidence that every year, NMSPO sends a notification to the agencies with safety-sensitive designated positions. Agencies are directed to renew their listings and "ensure that those positions continue to meet . . . the definition for safety[-]sensitive." After that review, agencies notify NMSPO of "any changes or nonchanges for the Board to consider." NMSPO compiles the listings for the Board to consider, the Board reviews the listings, and the listings are approved at an annual meeting. Agencies can attend the meeting and provide verbal input "if the Board seeks additional clarification on changes." The safety-sensitive designation for Plaintiff's position had "not been changed since the original designation," indicating that "the Board has not had questions on it." Defendants additionally provided unrebutted testimony that the review process described takes place annually. For this reason, we conclude that the Board satisfied its obligation

to review the safety-sensitive designation recommended by NMDOH. As such, the RT-1 position was properly designated as safety-sensitive.

C. Correlation Between the Regulatory Cutoff and Safety-Sensitive Positions

{8} Plaintiff's third argument relates to the definition of safety-sensitive and the threshold limits for drug use set forth in a previous version of 1.7.8.13 NMAC (10/1/2010). The definition of "safety[-]sensitive" was "a position approved as such by the [B]oard, including a supervisory or managerial position in which impairment by drug or alcohol use would constitute an immediate or direct threat of injury to public health or safety." 1.7.8.7(M) NMAC (10/30/2012).[5] Plaintiff, citing the CUA, contends that no scientific evidence correlates any amount of medical cannabis with "an immediate or direct threat of injury or death,"[6] *see* § 26-2B-3(Q), and for this reason, "the regulation is arbitrary and capricious and not supported by substantial evidence."

{9} We disagree with Plaintiff, because the safety-sensitive designation correlates to the objective nature of the position. The "cutoff concentration" was used to determine whether a drug test was negative, *see* 1.7.8.13(B)(1) NMAC (10/1/2010), but that cutoff was not associated with impairment or the definition of "safety-

[5]This regulation was amended in 2025, after the complaint in the present case was filed.

[6]Although Plaintiff cites the slightly different CUA "safety-sensitive position" definition, we rely on the regulatory definition in effect at the time.

sensitive position." Under 1.7.8.7(M) NMAC (10/30/2012), a "safety-sensitive position" is a "position" the performance of which "would" pose a threat if the employee were impaired by drugs or alcohol. The regulation did not require a level of a drug in an employee's system to establish that the employee was actually impaired. *See id.* Instead, as the district court noted, a safety-sensitive designation depends on "the nature of the position." The "safety-sensitive" designation contemplates that for some positions, the risk associated with any level of alcohol or drugs in an employee's system is too great.

{10} The essential duties and responsibilities for a person working in an RT-1 position at NMBHI supports such a determination. The job description includes:

> Assesses patients, performs treatment planning, and facilitates activities using and maintaining therapy equipment, and maintaining documentation.
>
> Provides psychosocial skills training, basic living skills and therapeutic socialization activities for outpatient groups.
>
> . . . .
>
> Facilitates and monitors clients to safely create, assemble, disassemble, repair and refurbish products made from varying materials.
>
> Leads clientele and institutional residents in recreational activities and implements therapeutic programming that stresses improvement of individual residents as part of a coordinated treatment plan.
>
> Coordinates recreational activities with nursing staff and other departments and works with the visual or hearing impaired to provide modified recreation.

> Arranges trips outside the institution for residents and teaches a variety of sports-related life skills.
>
> Attends and participates in treatment team meetings, interdisciplinary care plans, completes assessments and progress notes.

Plaintiff worked directly in a health care setting with at-risk individuals suffering from mental health disorders and substance abuse. *See* 7.21.1.7(B)(1) NMAC (defining "behavioral health" as "[t]he umbrella term for mental health and substance abuse," which includes "both mental health (MH), including psychiatric illnesses and emotional disorders, and substance abuse (SA), including addictive and chemical dependency disorders, and includes co-occurring MH and SA disorders and the prevention of those disorders"). Plaintiff testified that 90 percent of the patients she interacted with were nonviolent, which indicates that the other 10 percent were violent. The nature of these patient interactions implicates the safety of both patients and employees. Because Plaintiff was employed in a "safety-sensitive position," it was not necessary to show that she was actually impaired. Instead, for this position, NMSPO has generally determined that an employee who is impaired by drugs or alcohol "would constitute an immediate or direct threat of injury to public health or safety." *See* 1.7.8.7(M) NMAC (10/30/2012). For this reason, we reject Plaintiff's position that the regulation needed correlate a particular level with impairment or that her drug test needed to correlate with a level that established impairment.

D. The Random Drug Test Was Justified

{11} As a direct health care provider in a properly designated safety-sensitive position, Plaintiff was lawfully subject to a random drug test to determine the presence or absence of a prohibited substance. Having considered Plaintiff's contentions related to the district court's grant of summary judgment on Counts one and two, we affirm.

II. The NMHRA

{12} Plaintiff also contends that the termination of her employment violated the NMHRA. In relevant part, "[i]t is an unlawful discriminatory practice for . . . an employer, unless based on a bona fide occupational qualification or other statutory prohibition, . . . to discharge . . . or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of . . . physical or mental disability, [or] serious medical condition." Section 28-1-7(A). Under Section 28-1-7(J), an employer may not "refuse . . . to accommodate a person's physical or mental disability or serious medical condition, unless such accommodation is unreasonable or an undue hardship." With this legal context, we provide some additional background.

{13} After a positive drug test result, Plaintiff received a notice of contemplated action (the first NCA) that informed her that she would be terminated from her employment as a result of the positive test. Plaintiff responded to the first NCA by

informing NMDOH that she had a disability and requested three alternative accommodations: continued medical cannabis use, transfer to a non-safety-sensitive position, or attempting to work without using medical cannabis. NMDOH rescinded the first NCA in order to review Plaintiff's requested accommodations but ultimately denied the accommodations for three reasons: (1) the request was made after the first NCA was issued; (2) federal funding might be threatened by permitting employees to use medical cannabis; and (3) such an accommodation would create undue hardship for NMDOH and require an indefinite exception to a rule that has a safety purpose. At the summary judgment hearing, the district court determined that (1) Plaintiff requested the accommodation too late; and (2) the NMHRA was not violated because NMDOH concluded "that there was not, in fact, reasonable accommodation under the circumstance."[7]

{14} On appeal, Plaintiff maintains that requesting accommodations after the first NCA was "not barred" and makes four arguments. First, Plaintiff contends that federal law did not prohibit her use of medical cannabis at home, only at work. Second, Plaintiff argues that NMDOH did not prove that it would lose federal funding by accommodating the use of medical cannabis. Third, Plaintiff points to

[7]The district court also found that permitting medical cannabis use could negatively impact federal funding, but that finding was related to whether Plaintiff was protected by the CUA, *see* § 26-2B-9(A), and not to whether Defendants had violated the NMHRA.

competing federal authority on the subject of accommodations requested after a notice of potential disciplinary action, to evidence that she had been discouraged from seeking an accommodation, and to NMDOH's rescinding of the first NCA—effectively eliminating the lateness of her request. Fourth, Plaintiff asserts that because employees are often unfamiliar with their rights, public policy supports late requests for reasonable accommodations. Because Defendants did consider Plaintiff's late accommodation request and provided other bases for denying her requested accommodations, we decline to consider Plaintiff's second and third arguments. We additionally need not address Plaintiff's remaining arguments related to federal law because as we explain, Plaintiff has not challenged the district court's alternative holding.

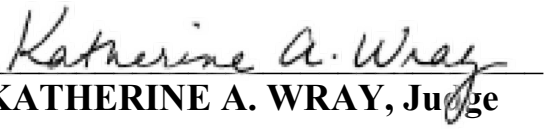
{15} The district court concluded that NMDOH determined that no reasonable accommodation was available for Plaintiff's asserted disability. In briefing, Plaintiff has not addressed this conclusion or NMDOH's determination that (1) it could not reasonably accommodate Plaintiff's request to continue using medical cannabis in her current position; (2) modification and subsequent application of the drug testing policy would be an undue hardship; and (3) NMDOH could not reasonably accommodate Plaintiff's request to transfer into a non-safety-sensitive position. At oral argument, Plaintiff did not point to disputed material facts that a reasonable accommodation would include allowing Plaintiff to continue to use medical

cannabis while in a safety-sensitive position. To the contrary, Plaintiff acknowledged that if the position were properly designated to be safety-sensitive, NMDOH should have accommodated her by transfer to a non-safety-sensitive position. In addition to this issue, Plaintiff also raised at oral argument Defendants' insufficient engagement in an interactive process to craft a reasonable accommodation. These issues were not addressed in Plaintiff's briefing before this Court and were therefore abandoned. *See City of Santa Fe v. Komis*, 1992-NMSC-051, ¶ 22, 114 N.M. 659, 845 P.2d 753 ("Issues not briefed will not be reviewed by this Court."); *Hinger v. Parker & Parsley Petroleum Co.*, 1995-NMCA-069, ¶ 45, 120 N.M. 430, 902 P.2d 1033 ("We do not directly address an issue raised for the first time at oral argument."). As a result, even if we were to conclude that Plaintiff's claim was timely, Plaintiff has not provided any basis for reversing the district court's grant of summary judgment on the merits, because Plaintiff has not shown a disputed issue of material fact as to NMDOH's denial of her request for an accommodation. *See Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-048, ¶ 14, 114 N.M. 228, 836 P.2d 1249 (stating that a moving party can establish a prima facie case for summary judgment by "negating at least one of the essential elements upon which the plaintiff's claims are grounded").

CONCLUSION

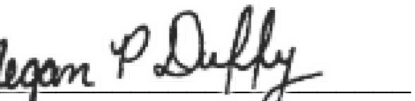
{16} For the foregoing reasons, we affirm.

{17} **IT IS SO ORDERED.**



KATHERINE A. WRAY, Judge

WE CONCUR:



MEGAN P. DUFFY, Judge



ZACHARY A. IVES, Judge