

**FIRST JUDICIAL DISTRICT COURT  
SANTA FE COUNTY  
STATE OF NEW MEXICO**

**REBECCA DUFFIN, KELLY ROSSI  
and CASSANDRA BRULOTTE,  
Plaintiffs,**

v.

**MARK D'ANTONIO, GERALD BYERS,  
the THIRD JUDICIAL DISTRICT  
ATTORNEY'S OFFICE, and THE STATE  
OF NEW MEXICO,**

**Defendants.**

**COMPLAINT FOR DAMAGES FOR VIOLATIONS OF THE FAIR PAY FOR WOMEN  
ACT AND THE NEW MEXICO WHISTLEBLOWER PROTECTION ACT AND FOR  
DECLARATORY RELIEF FOR VIOLATIONS OF THE NEW MEXICO  
CONSTITUTION'S FREE SPEECH CLAUSE**

Plaintiffs Rebecca Duffin, Kelly Rossi and Cassandra Brulotte bring these claims for monetary damages and equitable relief for violations of the Fair Pay for Women Act (referred to hereafter as the "FPFWA"), NMSA 1978, §§ 28-23-1 to -6; the Whistleblower Protection Act (referred to hereafter as the "WPA"), NMSA 1978, §§ 10-16C-1 to -6; and the New Mexico Constitution's Free Speech Clause, N.M. Const. art. II, § 17.

**INTRODUCTION**

As arms of law enforcement, state prosecutors are tasked with the awesome responsibility of promoting safety and wellbeing in our communities. We have entrusted them with the power to act on behalf of the State of New Mexico to indict and prosecute our fellow citizens when wrongs have been committed. When those who have been bestowed with such power are the very ones inflicting harm, the damage to society is severe and lasting. One might assume that a prosecutor's office would be the last place an employee would be subjected to lawlessness and

chauvinism. However, for three female district attorneys in the Third Judicial District Attorney's Office ("DA's Office") in Doña Ana County, their very workplace was just that – a hotbed of discrimination, harassment, and retaliation that culminated in three exceptional attorneys being forced out of their jobs after years of dedicated service to the State of New Mexico and their profession, all on account of their gender and their exercise of constitutionally protected speech.

The claims in this Complaint boil down to blatant and unlawful gender discrimination in myriad forms, including Plaintiffs being paid less than their male counterparts and facing retaliation when they raised concerns about gender discrimination to their superiors. Plaintiffs in this matter seek redress for the violations of law described below.

### **JURISDICTION, VENUE AND PARTIES**

1. Jurisdiction and venue are proper pursuant to NMSA, § 38-3-1 and N.M. Const. Art. VI, § 13.
2. Rebecca Duffin was an employee of the DA's Office at all times relevant to this complaint. Ms. Duffin is a woman. She is a resident of Doña Ana County, New Mexico.
3. Kelly Rossi was an employee of the DA's Office at all times relevant to this complaint. Ms. Rossi is a woman. She is a resident of Hamilton County, Ohio.
4. Cassandra Brulotte was an employee of the DA's Office at all times relevant to this complaint. Ms. Brulotte is a woman. She is a resident of Bernalillo County, New Mexico.
5. Defendant Mark D'Antonio is a resident of Doña Ana County, New Mexico.
6. Defendant Gerald Byers is a resident of Doña Ana County, New Mexico.
7. The DA's Office is an employer for purposes of the FPFWA and a public employer for the purpose of the WPA. It is the former employer of the Plaintiffs in this case.

8. Defendant State of New Mexico (“State”) is now and was at all times material to this Complaint responsible for the operations and acts of the DA’s Office. NM Const. Art. VI, § 24.

### **PLAINTIFFS’ ALLEGATIONS**

#### **I. History of Discrimination within the Doña Ana County District Attorney’s Office**

9. Defendant D’Antonio is the current District Attorney for the Third Judicial District of New Mexico. He was elected in 2012 and reelected in 2016.

10. In 2013, Mr. D’Antonio hired Mr. Byers as a Deputy District Attorney.

11. In February of 2014, Defendant D’Antonio promoted Defendant Byers to a more senior supervisory position. Following that promotion, multiple attorneys in the DA’s Office complained about Defendant Byers’ mistreatment of female staff.

12. After several male attorneys expressed concerns, Defendant D’Antonio demoted Defendant Byers back to Deputy District Attorney in May of 2014.

13. In December of 2015, Defendant D’Antonio again promoted Defendant Byers, this time to the position of Chief Deputy District Attorney, which is the position he currently holds.

14. During both Defendant D’Antonio’s and Defendant Byers’ tenures at the DA’s Office, multiple women have raised concerns about sex discrimination against and harassment of female employees.

15. Since 2014, there have been at least two lawsuits against these Defendants related to sexual harassment in the workplace, and Plaintiffs are aware of female employees who filed internal complaints and left the DA’s Office due to the hostile work environment.

16. Over the course of Mr. Byers’ tenure as Chief Deputy, and as a result of the discrimination and harassment that permeated the DA’s Office, the number of female attorneys working there plummeted. In June of 2015 there were seven female attorneys. In July of 2018,

two and a half years after Mr. Byers assumed the role of Chief Deputy, the number of female attorneys was down to two.

## **II. Unequal Pay**

17. Despite performing the same job under the same conditions and having equal or more experience than male prosecutors in the office, Plaintiffs were paid less and received fewer promotions than their male counterparts.

### **A. Plaintiff Cassandra Brulotte**

18. Plaintiff Brulotte has been licensed to practice law since 2010 and had seven years of legal experience at the time she was hired by the DA's Office.

19. Before joining the Office, Plaintiff Brulotte served as a staff attorney at Alaska Legal Services for nearly three years. After that she was hired at New Mexico Legal Aid ("Legal Aid") where she worked for a year as a staff attorney and then was promoted to managing attorney, a position she held for two years.

20. As a Legal Aid attorney Plaintiff Brulotte gained extensive experience in civil litigation in a variety of areas of law.

21. She authored briefs, engaged in discovery, conducted and defended depositions, participated in oral argument, and represented clients in a significant number of trials.

22. As a managing attorney at Legal Aid, she was responsible for supervising staff attorneys.

23. In February of 2017, the DA's Office extended an offer to Plaintiff Brulotte for a Magistrate Court Prosecutor position with a salary of \$50,000 per year.

24. Plaintiff Brulotte declined this offer as it was less than she was earning in her position at Legal Aid.

25. The DA's Office returned with a higher offer of \$55,000, which Plaintiff Brulotte accepted.

26. She began working at the DA's Office in March of 2017.

27. After starting her position as a Magistrate Court prosecutor, Plaintiff Brulotte soon learned that a male attorney, Bradley Bartlett, who was hired at approximately the same time as her, was earning \$55,000 per year for the same position as hers.

28. Unlike Ms. Brulotte, however, Mr. Bartlett did not have to negotiate his salary. His initial offer was \$55,000 per year.

29. Upon hire, Mr. Bartlett had substantially less experience than Plaintiff Brulotte, lacking trial, courtroom and supervisory experience.

30. During Ms. Brulotte's tenure at the DA's Office, three additional men were hired in positions parallel to hers.

31. All had less than one year of legal experience (with no trial experience), yet all started at a salary of \$55,000.

32. Because of her years of experience, Ms. Brulotte was expected to take on many supervisory roles in the magistrate court unit.

33. At one point in early 2018, management informed Ms. Brulotte that she was assigned to act as a mentor on all domestic violence cases in the office, but would not be considered an official supervisor because she wasn't "ready."

34. Ms. Brulotte acted as the de facto supervisor for the three new male hires, but was not compensated for these additional duties.

35. In May of 2018, despite having only four months of experience as an attorney, Brian Gelecki (one of the individuals mentored by Plaintiff Brulotte) was promoted to the position of

Children's Court Attorney. Mr. Gelecki was given a raise despite lacking the requisite experience to fulfill several requirements of the job, including responding to the on-call phone, covering the in-jail docket, and appearing for the DA's Office at felony arraignments.

36. Prior to offering this position to Mr. Gelecki, Defendant Byers offered it to Justin Garwood, another male attorney *who had been mentored* by Plaintiff Brulotte.

37. While Mr. Garwood had more experience than Mr. Gelecki, he had less experience than Plaintiff Brulotte. Mr. Garwood ultimately declined the offer because he did not feel ready to assume that role.

38. Plaintiff Brulotte was not considered for the promotion, despite receiving a favorable evaluation and having practiced law for substantially more time than her male counterparts.

39. The promotion would have come with higher pay.

#### B. Plaintiff Rebecca Duffin

40. Plaintiff Duffin was hired as an associate trial attorney in February of 2012 by Amy Orlando who was the District Attorney for the Third Judicial District at the time.

41. When Mr. D'Antonio was elected District Attorney, he promoted Plaintiff Duffin to the position of Assistant Trial Attorney and gave her a \$5,000 raise.

42. Ms. Duffin's male colleague, David Clements, was also promoted, however, he was given a \$7,000 raise, despite having similar experience and tenure within the office as Plaintiff Duffin.

43. Under the prior administration, Mr. Clements and Plaintiff Duffin had received similar pay.

44. In June 2014, Plaintiff Duffin was promoted to a Senior Trial Attorney position.

45. In 2013, she was put in charge of a grant application for federal funds related to domestic violence. She was also put in charge of submitting the required reporting for the funding. Her compensation was not increased to reflect these new responsibilities.

46. In December of 2015, Defendant Byers was promoted to Chief Deputy District Attorney, which put him in a position of authority over all of the attorneys in the Office.

47. As articulated in more detail below, over the years Defendant Byers' hostile and discriminatory treatment of women in the Office caused a rift in his relationship with Plaintiff Duffin, who refused to tolerate his conduct.

48. In April of 2018, Mr. Byers began increasing Plaintiff Duffin's caseload.

49. Mr. Byers nearly doubled her caseload over the course of the subsequent two months.

50. Plaintiff Duffin was not compensated or given a raise for the additional work.

51. At the same time, the caseload for several of her male counterparts decreased.

52. Daniel Sewell, another attorney in the office, had a caseload of 51 while she carried a caseload of approximately 180.

53. Mr. Sewell was paid \$20,000 more per year than Plaintiff Duffin.

54. Other male attorneys in the DA's Office with similar positions as Plaintiff Duffin carried between approximately 50 and 135 cases.

55. As discussed *infra*, Plaintiff Duffin was illegally suspended from her position. Two days prior to that suspension, Defendant Byers transferred 22 cases to her from another senior staff attorney who, even before the transfer, had a significantly lighter caseload than Plaintiff Duffin.

56. That attorney was also paid \$20,000 more than Plaintiff Duffin.

57. At the time of her suspension, Plaintiff Duffin had a caseload of approximately 180 active cases.

58. The male attorney hired to take over a majority of Plaintiff Duffin's caseload, George Harrison, was paid \$16,000 more per year than Plaintiff Duffin was paid for the same work.

59. Mr. Harrison had no prosecutorial experience when hired. Unlike Plaintiff Duffin, Mr. Harrison was not responsible for grant applications and reporting and had no supervisory responsibilities.

C. Plaintiff Kelly Rossi

60. Plaintiff Rossi was hired in July of 2016 for the position of Trial Attorney.

61. Because of the superb quality of her work, Ms. Rossi quickly began to handle high profile, difficult cases.

62. She was carrying a caseload typical of a Senior Trial Attorney while still holding the title of Trial Attorney.

63. Despite managing similar or, in some cases, more difficult cases than her male counterparts, she was paid less for her work.

64. Beginning in 2017, Plaintiff Rossi raised the issue of unequal pay with her supervisor, Davis Ruark.

65. Mr. Ruark acknowledged the inequity between what Plaintiff Rossi was earning and what male attorneys in the office were earning.

66. In early 2018, after Mr. Ruark's departure from the office, Plaintiff Rossi raised the issue of unequal pay with her new supervisor, Heather Chavez.

67. Ms. Chavez agreed that Plaintiff Rossi deserved a promotion and a raise for the caliber and amount of cases she was handling but she would not receive a promotion for several months.

68. After successfully prosecuting a murder in March of 2018, Plaintiff Rossi approached Mr. D'Antonio about the fact that she was being paid less than men for similar work.

69. After submitting a written request for a promotion – a process her male colleagues did not have to undergo to be considered for a raise – she was promoted to the position of Senior Trial Attorney in May of 2018.

70. As discussed *infra*, Defendants D'Antonio and Byers constructively terminated Plaintiff Rossi in June of 2018, one month after her promotion.

71. The male attorney hired to take over Plaintiff Rossi's caseload had less prosecutorial experience than her yet started at a salary of \$12,000 more per year than she was making at the time of her discharge.

### **III. Whistleblower Retaliation**

72. Over the course of their respective tenures with the DA's Office, Plaintiffs made both formal and informal complaints about the rampant sex discrimination within the DA's Office, including pay inequity and other improper conduct engaged in by Defendant Byers. Plaintiffs also made complaints regarding the unequal pay of their Latino colleagues.

73. In November of 2017, the attorneys of the DA's Office gave Mr. D'Antonio notice of their intent to unionize.

74. Plaintiff Rossi was among the attorneys who personally gave Defendant D'Antonio the notice.

75. The impetus for unionizing was Defendant Byers' mistreatment of women in the office, a fact that was communicated directly to Mr. D'Antonio.

76. Plaintiffs Rossi and Duffin voted in favor of unionization.

77. Plaintiff Brulotte would have voted to unionize but was not eligible to vote because she had not been at the DA's Office for the requisite time needed to cast a vote.

78. It was well known within the office that all three Plaintiffs were supporters of unionizing.

79. All three women were eventually either terminated or constructively discharged for alleged "insubordination."

80. In addition to Plaintiffs' participation in the staffs' efforts to unionize, Defendants also knew that Plaintiffs had reported illegal and/or inappropriate activity, such as:

- a. Pay inequity for women in the office;
- b. Mr. Byers' abusive conduct towards female employees;
- c. Pressure by Mr. Byers to provide false information on a grant application;
- d. Pressure by Mr. Byers to prosecute matters in which there was information available that exonerated defendants; and
- e. Work conditions, such as audits of files, that only applied to female employees.

A. Plaintiff Rebecca Duffin

81. As early as April 2015, Plaintiff Duffin began to raise concerns with Defendant D'Antonio about Defendant Byers' inappropriate treatment of female attorneys within the Office.

82. This treatment included yelling at female attorneys with a hostile tone and raised voice, physically blocking them from leaving offices, belittling and demeaning them and bullying them.

83. Plaintiff Duffin informed Defendant D'Antonio that Defendant Byers did not treat male attorneys or male staff similarly.

84. In February of 2016, Plaintiff Duffin mistakenly omitted a document from a federal grant application, which resulted in the DA's Office losing the grant.

85. Plaintiff Duffin took full responsibility for her mistake and endeavored to fix it by contacting the grant administrator to see what could be done.

86. After learning about the mistake, Defendant Byers pressured Plaintiff Duffin to simply lie and say that the document was submitted but that, due to a technical error with the computer system, a portion of the transmission did not go through.

87. Plaintiff Duffin refused to do so and consulted with colleagues about how best to approach the situation. Upon learning of Plaintiff Duffin's conversation with colleagues and the grant administrator Defendant Byers became enraged and confronted her while visibly shaking with anger.

88. After witnessing Defendant Byers' reaction, Plaintiff Duffin filed a Human Resources complaint regarding the incident because she feared for her safety.

89. On February 25, 2016, the Human Resources manager called a formal meeting with Plaintiff Duffin to address the complaint.

90. Defendant Byers insisted that the meeting not take place in his absence, despite this being contrary to DA Office Human Resources protocol.

91. He followed Plaintiff Duffin down the hall, shouting that he would attend the meeting and blocked her path as she attempted to access the room where it would be held.

92. The Human Resources manager ultimately informed Defendant Byers that he could not attend the meeting.

93. The incident caused Plaintiff Duffin extreme distress.

94. In November of 2017, Defendant D'Antonio conducted a meeting with DA Office supervisors, including Defendant Byers, during which he expressed concern about a newly-implemented office policy that, unbeknownst to him, had been put into place by Defendant Byers.

95. The new policy was a directive by Defendant Byers that prohibited the filing of misdemeanor cases in district court for any reason.

96. When the issue arose, Defendant Byers pretended to know nothing about the policy.

97. When Plaintiff Duffin reminded him that he was the one who had instituted the policy, he became enraged and slammed his notebook on the table, threw a pen in her direction, and stormed out of the room.

98. Defendant D'Antonio apologized to Plaintiff Duffin for Defendant Byers' conduct.

99. Later that month, Defendant D'Antonio told Plaintiff Duffin that he had recently stopped Mr. Byers from terminating her, admitting that there was no reason to fire her. Defendant D'Antonio also admitted that Defendant Byers had wanted to fire Plaintiff Rossi.

100. In early January of 2018, Defendant Byers ordered Plaintiff Duffin's direct supervisor, Davis Ruark, to complete a full audit of one of her homicide cases.

101. Plaintiff Duffin is not aware of any other attorney in the office during her tenure who had one of his or her cases audited.

102. Mr. Ruark informed her that he believed that Defendant Byers was looking for any reason to discipline her.

103. In late January 2018, Plaintiff Duffin again raised her concerns about Defendant Byers' conduct to Defendant D'Antonio after overhearing a phone conversation in which Defendant Byers berated a female staff member, reducing her to tears.

104. On February 18, 2018, Defendant D'Antonio informed his staff via e-mail that supervision of the majority of the female attorneys would be transferred from Defendant Byers to an alternate supervisor.

105. Despite this pronouncement, supervision was never actually transferred, and Defendant Byers continued to exercise authority as a de facto supervisor.

106. On March 5, 2018, with Defendant D'Antonio's consent, Defendant Byers sent out an e-mail rescinding the new supervisory scheme and reverting to the one in place prior to the February 18<sup>th</sup> e-mail.

107. In April of 2018, Plaintiff Duffin came to believe that the evidence submitted against a defendant charged with First Degree Murder was insufficient and in fact pointed toward his innocence.

108. Plaintiff Duffin informed Defendant Byers of the insufficient evidence.

109. Nevertheless, Defendant Byers ordered Plaintiff Duffin to try the homicide case.

110. Plaintiff Duffin refused to pursue the prosecution, and Defendant Byers once again visibly shook with anger and assumed a posture that appeared to be designed to and was, in fact, physically intimidating.

111. Defendant Byers eventually allowed dismissal of the case. However, his conduct toward Plaintiff Duffin became more and more hostile thereafter.

112. Shortly after this incident, Defendant Byers drastically increased Plaintiff Duffin's caseload, nearly doubling it over the course of the subsequent two months.

113. As described in further detail below, on June 22, 2018, Defendant Byers called Plaintiff Duffin into a meeting during which he informed her that the signs posted on her office door, including a "No Mansplaining" sign, constituted political speech and ordered her to remove them.

114. The Office's employee handbook does not contain language about "political speech." It does, however, describe prohibited conduct related to "political activities," which it defines as conduct related to political candidates and political elections.

115. When Plaintiff Duffin asked what specific items constituted "political speech" Defendant Byers refused to answer and immediately suspended her for insubordination.

116. He told her to collect all of her personal belongings and to leave the building immediately.

117. After six years of serving as a highly respected state prosecutor for the Office, Plaintiff Duffin was removed from the building by an armed investigator.

118. Plaintiff Duffin was further advised that she could not return to the Doña Ana County Building and was banned from speaking to any of her co-workers.

119. In the days that followed her suspension, Plaintiff Duffin was harassed by DA Office investigators who sat in their cars outside of her home and called her personal cell phone from unknown numbers, demanding that she come out of her house to speak with them. They also followed her around town while she was driving.

120. At one point the investigators followed Plaintiff Duffin and Plaintiff Brulotte to a local eatery where they proceeded to take pictures of them from afar.

121. On July 6, 2018, Plaintiff Duffin was required to submit to an interview with an armed investigator from the DA's Office.

122. During the course of this interview Plaintiff Duffin again raised concerns about Defendant Byers' treatment of her and other women in the DA's Office.

123. On July 12, 2018, the Office e-mailed Plaintiff Duffin a letter informing her that she was terminated for alleged "insubordination."

124. On October 17, 2018, in a hearing before the New Mexico Public Employee Labor Relations Board, Defendant D'Antonio testified under oath that Plaintiff Duffin was a very capable lawyer, that he had a good relationship with her and that she was a valuable employee.

B. Plaintiff Cassandra Brulotte

125. For the first several months of Plaintiff Brulotte's employment with the DA's Office Plaintiff Duffin was her supervisor. During that time, Plaintiff Brulotte reported several incidents to Plaintiff Duffin in which Defendant Byers had treated her inappropriately.

126. Plaintiff Duffin relayed those concerns to her own supervisors.

127. In May of 2018, following Mr. Gelecki's promotion, Plaintiff Brulotte reported her concerns regarding gender discrimination in the DA's Office to Deputy District Attorney Heather Chavez.

128. Nothing was done to address her concerns.

129. On June 14, 2018, Plaintiff Brulotte's supervisor, Daniel Sewell, informed her that he had received complaints that Ms. Brulotte did not smile enough to her co-workers.

130. Defendant Byers, Mr. Sewell's direct supervisor, was one of the individuals who complained.

131. Mr. Sewell instructed Plaintiff Brulotte to smile and greet people in the hallway in order to improve office morale, which he acknowledged was quite low.

132. Upset by this request, Plaintiff Brulotte proceeded to ask all of the male attorneys in the office if they had ever been instructed to smile more.

133. None of the male attorneys stated that they had been instructed to smile more.

134. On June 21, 2018, Mr. Sewell inquired into the meaning of the sign on Plaintiff Brulotte's office door that stated, "No Mansplaining."

135. That same day, Plaintiff Brulotte witnessed a conversation between Defendant D'Antonio and Plaintiff Rossi in which Defendant D'Antonio complimented the signs on Plaintiff Rossi's door, which included a "No Mansplaining" sign. He did not request that Plaintiff Rossi take it down nor did he indicate that it was inappropriate.

136. After Plaintiff Brulotte explained the meaning of the term "mansplaining" to Mr. Sewell, he informed her that it was sexist against men and ordered her to take the sign down.

137. Plaintiff Brulotte proceeded to inform Mr. Sewell of several examples of actual sexism that she had endured during her time at the DA's Office, including his recent instruction to her to smile more.

138. Another example she raised was the office dress code, which dictates the type of underwear female staff can wear but does not do the same for male staff. In response, Mr. Sewell told Plaintiff Brulotte that she was dressed inappropriately because she was wearing a sleeveless blouse which, according to him, was sexist against men because men are not allowed to wear such shirts.

139. Other examples Plaintiff Brulotte brought to the attention of Mr. Sewell included having been passed over for a promotion in favor of less qualified male attorneys, being asked if

she was wearing a thong, and having been called a “carpet muncher” (derogatory slang for a lesbian woman) on a regular basis by a fellow employee.

140. Mr. Sewell continued to insist that she remove the artwork from her office.

141. On June 22, 2018, Plaintiff Brulotte filed a complaint with Human Resources concerning the discriminatory treatment she had endured throughout her tenure at the DA’s Office.

142. Approximately three hours later she was called into a meeting with Defendant Byers during which he informed her that the signs on her door violated office policy and ordered her to remove them.

143. When Plaintiff Brulotte asked Defendant Byers if she could speak with Defendant D’Antonio about the signs since he had complimented Plaintiff Rossi’s identical sign the evening before, Defendant Byers told her no and instructed her to gather her belongings and to leave the building pending an investigation into her actions.

144. An armed investigator supervised Ms. Brulotte as she took down the art in her office and gathered her belongings.

145. She was then removed from the building by the armed investigator.

146. On June 25, 2018, Plaintiff Brulotte was ordered to meet an armed investigator in a Walgreens parking lot.

147. She complied, and was given a letter informing her that she was being placed on administrative leave.

148. The investigator told her that she was not to return to the government building that houses the DA’s Office, despite the building also housing myriad other government services.

149. The investigator also informed her that she was prohibited from speaking with any of her co-workers.

150. On July 6, 2018, immediately prior to an interview regarding her alleged insubordination, two armed investigators followed Plaintiff Brulotte as she went to lunch.

151. Later that afternoon she underwent an interview with an armed investigator.

152. On July 12, 2018, Plaintiff Brulotte was fired for insubordination.

153. Upon being fired, Plaintiff Brulotte filed for unemployment benefits.

154. Despite having been employed by the DA's Office for well over a year, Defendants filed an appeal of those benefits, alleging that no one with her name or social security number had ever worked there.

155. The issue was ultimately resolved in Plaintiff Brulotte's favor after she provided extensive proof of her tenure with the DA's Office to the Administrative Law Judge overseeing the appeal.

156. On October 17, 2018, in a hearing before the New Mexico Public Employee Labor Relations Board, Defendant D'Antonio testified under oath that Plaintiff Brulotte was a "fine attorney" and that she had quite possibly received more praise from judges than any of his other employees. He also testified that her case notes were exemplary and that he was happy to have her in his office.

### C. Plaintiff Kelly Rossi

157. In April of 2017, Defendants D'Antonio and Byers called Plaintiff Rossi into a meeting and told her that they needed a "pretty, young prosecutor" at the table during a highly publicized murder trial that was to take place the following month.

158. The men explained that there was an attractive female attorney at the defense counsel's table and they did not want the jury's attention focused solely on her.

159. Plaintiff Rossi was humiliated by this request and by the fact that because of this she became known as "Ms. Third Judicial District Attorney" as if she were a contestant in a beauty pageant.

160. To make matters worse, her participation in the case was heavily circumscribed, and her advice was routinely ignored.

161. The clear implication to Plaintiff Rossi was that her role was to sit at the table and look pretty.

162. Later that year, on November 2, 2017, Defendant Byers requested that Plaintiff Rossi attend a meeting with several attendees concerning a high-profile case which was assigned to her.

163. While the purpose of the meeting was to discuss the case generally, Defendant Byers brought up the issue of an arrest warrant for an accomplice in the case, which Plaintiff Rossi had assisted law enforcement in obtaining.

164. Prior to this meeting, Plaintiff Rossi had informed Defendant Byers about seeking an arrest warrant for the accomplice and informed him that she believed that there was probable cause, to which he did not object.

165. However, at this meeting Defendant Byers raised concerns with the arrest warrant, saying that he did not believe there was sufficient probable cause to support it.

166. During the meeting, Defendant Byers asked Plaintiff Rossi if she had conferred with other attorneys in the office before informing the law enforcement officer that probable cause existed, to which she responded that she had.

167. Defendant Byers angrily demanded that she inform him which attorneys she had conferred with.

168. Because Plaintiff Rossi took full responsibility for the decision, was uncomfortable discussing internal matters in front of people from outside the DA's Office, and was fearful that if she divulged the names Defendant Byers would reprimand the attorneys she had spoken to, she was hesitant to give him the names.

169. One of the attorneys she conferred with was Plaintiff Duffin.

170. Plaintiff Rossi was hesitant to divulge that she consulted with Plaintiff Duffin because she knew that Defendant Byers was looking for any excuse to discipline Plaintiff Duffin.

171. Plaintiff Rossi requested permission to leave the room for a moment because she was very uncomfortable. Defendant Byers refused this request and again demanded the names of the attorneys with whom she had spoken.

172. Defendant Byers became increasingly angry and insistent. His tone was hostile, condescending and threatening. He was visibly furious and his hands were shaking.

173. Plaintiff Rossi ultimately gave Defendant Byers the names of the attorneys with whom she had conferred, but he nonetheless continued to speak to her in a hostile and disrespectful tone.

174. When Plaintiff Rossi stood to leave at the conclusion of the meeting, Defendant Byers ordered her to remain seated in the conference room while the other attendees were allowed to leave.

175. Defendant Byers continued his abusive treatment. During his fit of rage, he demanded that she answer all questions with either "yes, sir" or "no, sir."

176. Defendant Byers did not require attorneys in his office to refer to him as “sir” prior to this, nor subsequently.

177. Defendant Byers’ body language was such that Plaintiff Rossi could draw no other conclusion than that he was intending to physically intimidate and humiliate her.

178. The following day, November 3, 2017, Plaintiff Rossi filed a complaint with Whitney Safranek, the sole Human Resources employee for the DA’s Office.

179. Ms. Safranek’s direct and only supervisor was Defendant Byers.

180. In Plaintiff Rossi’s complaint, she specifically mentioned that she was concerned about retaliation.

181. Less than two weeks after filing her complaint, Defendant Byers accidentally sent Plaintiff Rossi an e-mail that was intended for her direct supervisor. In that e-mail, Defendant Byers criticized Plaintiff Rossi for sending an office-wide e-mail requesting legal authority on a time-sensitive issue that unexpectedly arose during a trial, which was a common practice in the office.

182. Such a request was not unusual and not the sort of action that would garner criticism from a supervisor. Attorneys within the DA’s Office regularly utilized the office’s listserv for similar questions; however, Defendant Byers took it as an opportunity to criticize Plaintiff Rossi to her direct supervisor.

183. In response to her November 3<sup>rd</sup> complaint, Plaintiff Rossi was told that an investigation would ensue.

184. She was asked to provide a list of witnesses, which she did.

185. None of those witnesses were ever interviewed.

186. The investigator assigned to the complaint did, however, interview Plaintiff Rossi. During the interview, he asked her if she had ever witnessed Defendant Byers treating other female employees unfairly, to which she responded in the affirmative and provided examples.

187. At the completion of this sham investigation, instead of offering findings related to her complaint, Defendant D'Antonio retaliated against Plaintiff Rossi, reprimanding her for "promulgating rumors" pursuant to the disclosures she made about Defendant Byers' behavior during her interview and placing a letter of reprimand in her file.

188. This reprimand was a clear signal to women in the office that if they spoke up they would not only be discredited, but also punished.

189. On January 30, 2018, Plaintiff Rossi witnessed Defendant Byers yelling at a female office staff member so severely that it brought the staff member to tears.

190. Plaintiff Rossi explicitly informed Defendant D'Antonio that Defendant Byers was mistreating women in the office and requested that he do something about it.

191. In her most recent evaluation at the DA's Office, Plaintiff Rossi received a performance appraisal of "Exceeds Expectations." The evaluation went on to say that, "Ms. [Rossi] is an extremely valuable asset to this office. She fights for the right legal rulings as well as for the right decisions in cases."

192. Defendant D'Antonio signed and approved this evaluation as did Plaintiff Rossi's immediate supervisor, Davis Ruark.

193.

194. In April of 2018, Defendant D'Antonio nominated Plaintiff Rossi for the District Attorney Association's Wayne Johnson Jurisprudence Award, which recognizes the work of a district attorney who has excelled in his or her position.

195. As a result of her exceptional work, Plaintiff Rossi was the recipient of the award that year.

196. Over the course of the first half of 2018, Defendant Byers nearly doubled Plaintiff Rossi's caseload, increasing it from 115 to over 200 cases.

197. During this time Plaintiff Rossi also continued to witness Defendant Byers' inappropriate and discriminatory treatment of other women in the office.

198. On June 26, 2018, Defendant Byers ordered Plaintiff Rossi to remove signs from her office door that included a "No Mansplaining" sign as well as other female empowerment signs.

199. Plaintiff Rossi requested to speak with Defendant D'Antonio about the issue because he had recently viewed her signs and spoke approvingly of them.

200. Defendant Byers informed Plaintiff Rossi that he took her response as a refusal and suspended her immediately.

201. Plaintiff Rossi was removed from the building by an armed investigator and ordered not to come back into the government complex or onto county property, even though the complex was Plaintiff Rossi's voting site and contained many different government agencies. Plaintiff Rossi was also ordered not to speak to any DA Office employees.

202. After leaving the building, Plaintiff Rossi went to a local restaurant to have lunch with Plaintiffs Duffin and Brulotte. The investigator followed her there.

203. Plaintiff Rossi resigned on June 28, 2018, two days after being placed on administrative leave and after discovering that the same investigator who had mishandled her initial complaint about Defendant Byers' behavior was also tasked with interviewing her regarding the June 26, 2018 meeting with Defendant Byers.

204. In addition to demanding the return of her work laptop and badge, the investigator also demanded that Plaintiff Rossi provide him with her medical records in order to prove that she had been to the doctor's office following her suspension as she had informed the DA's Office she had.

205. Plaintiff Rossi found the conditions at work to be intolerable, as would have any objectively reasonable woman in her situation.

206. Plaintiff Rossi resigned rather than be terminated, which was clearly the intended employment action ahead.

207. Shortly after Plaintiff Rossi resigned, investigators left items from her office packed in cardboard boxes on her doorstep in spite of Plaintiff Rossi making clear that she was not comfortable with the investigators coming to her home. In the boxes were personal items from her office, such as photographs and decorations, packed directly alongside rotting food from her mini-fridge. The temperature outside was over 100 degrees when the investigators left the spoiled food with her possessions at her front door.

208. On October 17, 2018, in a hearing before the New Mexico Public Employee Labor Relations Board, Defendant D'Antonio testified under oath that Plaintiff Rossi was "one of the finest attorneys" and "brilliant legal minds" that he had encountered in a long time. He further testified that he "respected her immensely" and that they had had a great working relationship.

#### **IV. Free Speech Violations**

209. DA's Office attorneys regularly posted signs on their doors and within their offices.

210. The content of the signs included things such as cartoons, humorous sayings, memes, news articles, and quotes relevant to issues of public concern. Oftentimes the signs included language that was satirical, expressed strong views about defendants in the criminal justice

system, or espoused views pertinent to the attorneys' prosecutorial work. One such example was a drawing of two caricatures with the wording "Meth Man" and "Heroin Boy" above it.

211. Plaintiffs Duffin, Rossi and Brulotte all had female empowerment signs posted on their doors and inside their offices. A male attorney, Alexander Rossario, also posted female empowerment materials on his office door.

212. The women posted their signs as a statement opposing sex discrimination and in solidarity with other women across the country who have valiantly stood up to sexism in all of its forms, especially in the legal profession.<sup>1</sup>

213. The signs included inspirational quotes and poems from courageous women in history who have stood up to people in power, the definition of "sexism," Time Magazine's "Silence Breaker's" cover (in which several courageous women from the #MeToo movement are highlighted), and a variety of sayings, including:

- "The Future is Female"
- "No Mansplaining"
- "Pretty is not the rent you pay to exist in the world as a woman."

214. As prosecutors whose caseloads largely focused on crimes involving domestic violence and sexual assault (the majority of which included female victims), Plaintiffs also utilized the signs as a means of creating a safe and inspirational environment for these victims, law enforcement officers who were agents on such cases, and the victim advocates.

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<sup>1</sup> Liane Jackson, *Race and gender bias is rampant in law, says new report that also offers tools to fight it*, (Sept. 6, 2018, 8:26 PM) [http://www.abajournal.com/news/article/race\\_and\\_gender\\_is\\_bias\\_rampant\\_in\\_law\\_says\\_new\\_report\\_that\\_also\\_offers\\_too](http://www.abajournal.com/news/article/race_and_gender_is_bias_rampant_in_law_says_new_report_that_also_offers_too).

215. On June 22, 2018, Plaintiffs Brulotte and Duffin were both summoned to separate meetings with Defendant Byers during which he informed them that their signs were considered “political speech” in violation of office policy and ordered the women to remove them.

216. The Third Judicial District Attorney’s Office Internal Policies and Procedures do not directly address “political speech.”

217. The New Mexico District Attorneys’ Personnel & Compensation Plan is also silent on “political speech,” and only prohibits “political activities” such as endorsing political candidates or partisan voting initiatives while on duty and using their office or official authority to influence the result of an election.

218. At her meeting with Defendant Byers, Plaintiff Brulotte requested to speak with Defendant D’Antonio before removing them, as he had previously complimented Plaintiff Rossi’s signs, which were substantially similar to hers and Plaintiff Duffin’s.

219. During her meeting with Defendant Byers, Plaintiff Duffin requested clarification from him on the policy’s definition of “political speech,” which he refused to provide.

220. Defendant Byers interpreted the women’s inquiries as insubordination, immediately suspending them and ultimately firing them on July 12, 2018.

221. Neither Plaintiff Duffin nor Plaintiff Brulotte was afforded an opportunity to provide a written reply to the allegations of insubordination, an opportunity that had been afforded to previous employees facing similar allegations in the past.

222. Plaintiff Rossi did not meet with Defendant Byers about her signs until June 26, 2018, as she was out of the office on previously-approved leave.

223. As with Plaintiffs Brulotte and Duffin, Defendant Byers told Plaintiff Rossi to remove her signs. She asked if she could speak with Defendant D'Antonio who had previously admired her signs and provided no indication that he disapproved of them.

224. In addition to claiming that the signs violated office policy, Defendant Byers told Plaintiff Rossi that "Our doors are not to be considered billboards for political speech," and ordered her to remove them immediately. Plaintiff Rossi requested clarification regarding which signs he wanted her to remove and which office policy she was violating.

225. Defendant Byers refused to answer, deemed her request insubordination and immediately suspended her. Defendant Byers had an armed investigator escort her out of the building, and ordered her to turn in her badge and work laptop.

226. Plaintiff Rossi resigned on June 28, 2018 because the work environment at the Office had become intolerably toxic and because she believed she was slated for termination anyway. Her belief was informed by the fact that Defendant D'Antonio had previously admitted to her that Defendant Byers wanted her fired.

227. At a public hearing before the Public Employee Labor Relations Board in October 2018, Defendants D'Antonio and Byers testified under oath that the decision to discipline the Plaintiffs was made prior to any investigation into their conduct.

## **CAUSES OF ACTION**

### **COUNT I**

#### **Violation of the Fair Pay for Women Act, NMSA 1978, §§ 28-23-1 to -6**

228. The Plaintiffs incorporate the preceding paragraphs as though they were fully stated herein.

229. The FPWA requires employers, including the DA's Office, to pay employees of both sexes equal wages for equal work, when performed under similar working conditions.

230. Despite these legal obligations, as explained above, the Office failed to comply with its obligations under the FPFWA when it paid Plaintiffs Duffin, Rossi and Brulotte substantially less than their male counterparts.

231. The DA's Office was and is aware that it may not pay employees differently merely because of sex.

232. There is no operative seniority system, merit system or measure of production that explains the disparity in pay between the DA's Office employees who are men and those who are women.

## **COUNT II**

### **Violation of the Whistleblower Protection Act, NMSA 1978, §§ 10-16C-1 to -6**

233. The Plaintiffs incorporate the preceding paragraphs as though they were fully stated herein.

234. Defendants each qualify as a "public employer" under NMSA 1978, § 10-16-2.

235. Plaintiffs each qualify as a "public employee" under NMSA 1978, § 10-16C-2(B).

236. Plaintiffs each had a good faith belief that the acts committed by Defendants, and described above, were improper and/or unlawful.

237. All three Plaintiffs communicated information to their employer regarding improper and unlawful acts of sexism, sexual harassment, unequal pay relating to both sex and race, and sex discrimination within the Office.

238. Plaintiff Duffin objected to participating in an activity that would have constituted an unlawful or improper act when she refused to lie about the circumstances surrounding the accidental omission of a document in a federal grant application.

239. Plaintiff Duffin also objected to Defendant Byers' demand to prosecute a defendant whom she believed to be innocent. Such a demand constituted an unlawful or improper act.

240. Plaintiffs' reporting of these improper and unlawful acts and Plaintiff Duffin's refusal to engage in an unlawful and improper act constituted protected actions under NMSA 1978, § 10-16C-3(A) and (C).

241. Defendants retaliated against Plaintiffs for engaging in activities protected by the Whistleblower Protection Act when they drastically increased the caseloads of Plaintiffs Duffin and Rossi after the women engaged in protected activity, suspended all three Plaintiffs for "insubordination," terminated Plaintiffs Brulotte and Duffin, and constructively discharged Plaintiff Rossi.

**COUNT III**  
**Violation of Article II, Section 17 of the New Mexico Constitution**  
**(Freedom of Speech)**

242. The Plaintiffs incorporate the preceding paragraphs as though they were fully stated herein.

243. Article II, Section 17 of the New Mexico Constitution guarantees the right to free speech.

244. This right extends to public employees who speak on issues of public concern.

245. Sexism, misogyny, sex-based discrimination and sexual harassment are all issues of public concern.

246. Defendants violated Plaintiffs' free speech rights protected under the New Mexico Constitution when they suspended and fired Plaintiffs Brulotte and Duffin, and when they suspended and constructively discharged Plaintiff Rossi for engaging in protected speech.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request this Court grant the following relief:

- A. Declaratory judgment based on Article II, Section 17 of the New Mexico Constitution;
- B. Actual damages;
- C. Compensatory damages;
- D. Punitive damages;
- E. Damages in the amount of the Plaintiffs' unpaid wages;
- F. All other applicable damages set out in NMSA Section 28-23-6;
- G. All other applicable damages set out in NMSA Section 10-16C-4;
- H. Attorney's fees; experts' fees and costs;
- I. Pre- and post-judgment interest; and
- J. Such other and further relief as this Court deems just and proper.

Respectfully submitted by:

**/s/ Leon Howard**

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