CLARK V. NEW MEXICO DEPARTMENT OF HOMELAND SECURITY

COL. RICHARD A. CLARK, RET.,
Plaintiff-Appellant,
v.
NEW MEXICO DEPARTMENT OF HOMELAND SECURITY AND EMERGENCY MANAGEMENT,
GREGORY A. MYERS, CABINET SECRETARY,
and ANITA TALLARICO a/k/a ANITA STATMAN, DEPUTY CABINET SECRETARY,
Defendants-Appellees.

No. A-1-CA-35143

COURT OF APPEALS OF NEW MEXICO

December 7, 2017

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, Francis J. Mathew, District Judge

COUNSEL

Michael Schwarz, Santa Fe, NM, For Appellant

Hinkle Shanor L.L.P, Ellen S. Casey, Jaclyn M. McLean, Santa Fe, NM, For Appellees

JUDGES

STEPHEN G. FRENCH, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, M. MONICA ZAMORA, Judge

AUTHOR: STEPHEN G. FRENCH

MEMORANDUM OPINION

FRENCH, Judge.

{1} Plaintiff appeals from two orders of the district court which: (1) enforces a settlement agreement between the parties which includes a release of Plaintiff's claims against the New Mexico Department of Homeland Security and Emergency Management (DHSEM), and its cabinet secretary and deputy cabinet secretary, for violations of the Uniformed Services and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4335 (2012); and (2) dismisses Plaintiff's USERRA's claims on the basis of sovereign immunity. We affirm the order enforcing the settlement agreement, which renders Plaintiff's argument concerning the second order moot.

BACKGROUND

{2} Col. Richard A. Clark, Ret., (Plaintiff) sued the DHSEM, DHSEM's former Cabinet Secretary, Gregory A. Myers, and DHSEM's former Deputy Cabinet Secretary, Anita Tallarico a/k/a Anita Statman (Statman), for violations of the USERRA, and the New Mexico Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010). Plaintiff alleged that he was wrongfully demoted in retaliation for cooperating with the investigation into a USERRA claim brought by a former DHSEM employee against the United States Department of Labor. Plaintiff sought injunctive relief, monetary damages, attorney fees, and court costs.

{3} After months of discovery, Defendants moved to dismiss Plaintiff's damages claims under USERRA for lack of subject matter jurisdiction. The district court granted Defendants' motion and dismissed Plaintiff's USERRA claims for monetary damages against DHSEM in light of this Court's decision in *Ramirez v. State ex rel. Children, Youth & Families Dep't*, 2014-NMCA-057, 326 P.3d 474, *rev'd by* 2016-NMSC-016, 372 P.3d 497[1], which held the state is immune to suits alleging violations of USERRA, and Plaintiff's USERRA claims for monetary damages, injunctive relief, and declaratory relief against Defendants Myers and Statman for failing to meet the definition of "employer" under USERRA.

{4} Plaintiff's remaining claims for injunctive and declaratory relief under USERRA, and alleged violations of the WPA, became the subject of settlement negotiations. Over the course of several months, the parties exchanged letters and emails listing the terms of the agreement, and both parties used "track changes" to edit a draft settlement agreement incorporating those terms. Once the parties appeared to have come to a final agreement on the terms and the language in the draft document, Plaintiff became concerned about the term reinstating Plaintiff as an employee at DHSEM. Throughout these settlement negotiations, the parties continued with discovery, pursuing depositions, interrogatories, requesting production of documentation, and engaging in other discovery-related motion practices. Eventually, Defendants filed a motion seeking a protective order and stay of litigation while they prepared a motion to enforce the settlement agreement, which the district court granted. Defendants then moved to enforce the settlement agreement and attached the draft edited by both parties. The district court granted the motion to enforce at the end of a hearing on the motion and directed Defendants to draft an order reflecting its ruling.

DISCUSSION

{5} Plaintiff appeals the order dismissing his USERRA claims and the order enforcing the settlement agreement. We address the order enforcing the settlement agreement first because the agreement contains a provision releasing all of Plaintiff's claims against Defendants under USERRA; therefore, if the order enforcing the settlement agreement is affirmed, Plaintiff's argument concerning the dismissal of his USERRA claims is moot.

Order Enforcing the Settlement Agreement

{6} Plaintiff argues that the order enforcing the settlement agreement must be reversed because the parties had not reached a final agreement on its terms. Plaintiff claims that the settlement agreement was exchanged in draft form only, and also that he never agreed to the term concerning his reinstatement. The threshold issue is, therefore, whether the parties entered into a binding settlement agreement. The facts surrounding the settlement negotiations, and the term of reinstatement in particular, are necessary for this inquiry and are set forth with specificity below.

Facts Surrounding the Settlement Agreement Negotiations

{7} Plaintiff first sent Defendant a settlement offer with specific terms and conditions, including amounts for the payment of back wages, emotional distress, and attorney fees and costs. Plaintiff's offer also proposed to reinstate Plaintiff "back to his position before his demotion or a position of similar wage, advancement opportunities, and stature." Plaintiff noted the availability of a bureau chief position and told Defendants that they should consider this position for Plaintiff's reinstatement.

{8} Defendants responded, stating that Plaintiff would remain in the same position he had occupied (Homeland Security Specialist) and receive $34.00 per hour, pending approval by the director of the State Personnel Office (SPO). Defendants also asked Plaintiff if he was "interested in engaging in settlement negotiations in this matter[,]" and if so, suggested vacating upcoming depositions and extending outstanding discovery so that the parties would not incur additional costs and fees while attempting to settle.

{9} Plaintiff 's counsel said that he discussed the letter with Plaintiff, and "it is rejected." Plaintiff again listed the terms that he would agree to, and specifically stated that Plaintiff "will be promoted to the position vacated by Valli Wasp, which [Plaintiff] understand[s] to be Preparedness Unit Manager range 75 and paid $34.00 an hour." Plaintiff gave Defendants six days to accept what he called his "counteroffer."

{10} Defendants responded within the six days allotted by Plaintiff, submitting to him a "response and counteroffer" transferring Plaintiff to a "Line Manager position" and describing the duties associated with the position. The "Line Manager position" would be titled "Facilities, Fleet and Records Manager," and Plaintiff would manage and supervise "two employees, DHSEM facilities, and DHSEM's Records Archives." The

response stressed that the position "is critical to DHSEM and is currently being updated to cover a recognized mission support shortfall." Consistent with prior exchanges, DHSEM agreed to pay Plaintiff $34.00 per hour.

{11} Plaintiff replied, "[w]e are close but we are not there yet[,]" and expressed concern about another term in the agreement: the wording of the release of Plaintiff's claims. Defendants asked Plaintiff if he would like to see "a full settlement and release agreement[,]" to which Plaintiff said he would like to see "[j]ust a draft of [Defendants'] proposed language."

{12} For the first time throughout their exchange, the parties began editing a document, as opposed to sending letters listing the specific terms to be added to the document. Defendants sent a draft of the settlement agreement prepared from their "standard settlement and release agreement." Defendants asked Plaintiff to edit the document using "track changes." The term addressing Plaintiff's reinstatement, like Defendants' last exchange, transfers Plaintiff to the Line Manager position titled "Facilities, Fleet and Records Manager" with an hourly salary of $34.00.

{13} Plaintiff emailed Defendants to say he rejected the terms. Plaintiff proposed certain changes within the body of his response, but he did not edit the draft document. Plaintiff did, however, expressly state that "[Plaintiff] accepts being placed into the position of Line Manager" and that the "counteroffer" expired the following day. Defendants replied the same day, stating that the response served as Defendants' response and counteroffer to Plaintiff's counteroffer, and asking whether Plaintiff edited the language in the draft settlement agreement.

{14} Plaintiff again stated, "We are almost there." He edited the draft settlement document in "track changes" and listed the changes made in the body of his email response. The draft sent to Defendants states, "D[HS]EM shall transfer [Plaintiff] to the working title position of Facilities, Fleet and Records Manager, where he will supervise two employees and be paid $34.00 per hour." Importantly, Plaintiff also edited the release language to include the USERRA claims so that it covered "any and all claims for damages, attorney's fees and declaratory and injunctive relief that were or could have been brought against DHSEM under USERRA[.]" Plaintiff agreed to cancel the upcoming depositions if Defendants accepted the draft that day.

{15} The same day, Defendants told Plaintiff that DHSEM agreed to the terms but they were "still awaiting word from [r]isk [m]anagement[.]" After Plaintiff said he understood that DHSEM approved his redlined suggestions in the document and inquired about the time it might take risk management to give final approval, Defendants clarified by explaining that DHSEM had accepted the items listed in the body of Plaintiff's email, but not yet the redlined draft of the document because Defendants were still "working on tweaking some of the language." Defendants said they were "close to finalizing [Defendants'] suggested revisions to the [s]ettlement [a]greement," and they would send them soon. The parties discussed vacating an upcoming

deposition because they were nearly finished with the settlement agreement, and Plaintiff agreed to do so.

{16} The following day, Defendants sent Plaintiff two versions of the draft of the agreement that was approved by DHSEM—one copy of the version showing the edits made in "track changes," first by Plaintiff and then by Defendants, and one "clean" copy with the changes incorporated. The term concerning reinstatement read: "Effective February 1, 2015, D[HS]EM shall transfer [Plaintiff] to the position of Facilities, Fleet and Records Manager (working title), at a rate of $34.00 per hour." Plaintiff responded thirty minutes later, saying he checked the SPO website and was concerned about the position offered to Plaintiff. He became skeptical and said Defendants "indicated it was a pay[]band 75[,]" a classification that would allow for the hourly salary offered, and that he would "need substantiation that it is." Plaintiff stated, "our offer of acceptance is revoked effective immediately" if the position was classified below a pay band 75. In the same response, Plaintiff repeated: "Please advise. I await sufficient information so we can verify the existence of this offered position. The acceptance of the offer is withdraw[n] at this time. I am in the process of scheduling Ms[.] Ortiz's deposition and filing the motion for sanctions."

{17} Four hours later, Plaintiff contacted Defendants again: "So that we are clear, there is no settlement agreement at this time. It's not settled until we have agreed on the terms. We haven't." The main problem, he claimed, is the "job issue[.]" Plaintiff said he had not previously asked Defendants about the pay band of the proposed position and that Defendants did not disclose that information throughout the negotiations. He claimed Defendants "gave every impression that it was a higher pay band than [Plaintiff's] current position[,]" and that there was no full and fair disclosure of this information, which "feeds into mistrust[.]" He detailed the reasons that caused his concern about the position and suggested that promoting Plaintiff to the position vacated by Valli Wasp—the very first position proposed by Plaintiff in the first exchange between the parties—would be "the best compromise."

{18} Defendants replied the same day, expressing frustration at the "lack of optimism" and the "distrust [that Plaintiff] feel[s] for opposing counsel, the DHSEM, and SPO." Defendants stated they consider the matter settled and were only awaiting Plaintiff's "tweaks" to the settlement document. Defendants said that they were ready to argue to the district court that "this is a done deal[,]" and insisted that "[n]one of these people or entities you rail against have done anything but attempt to negotiate with you in good faith and to provide your client with the position he told Secretary Mitchell he wanted when it was first proposed." (Emphasis omitted.) Defendant's email summarized the negotiations concerning the Line Manager position and discussed the section of the administrative code addressing the ability of SPO to pay Plaintiff $34.00 per hour in the offered position: "[Regulation] 1.7.1.13 NMAC [(2005)] gives the SPO [d]irector the authority to approve settlement agreements that do not conform to the provisions of the SPO rules. There is no restriction on the SPO [d]irector's ability to approve a salary far outside the pay band's limits." Defendants asked Plaintiff to return the draft settlement

agreement that was provided to Plaintiff the day before with any other changes he wanted to make.

{19} Three days later, Plaintiff wrote expressly to address whether the case had finally settled. He said that in offering to settle the case, DHSEM "failed to disclose a contingency" because Regulation 1.7.1.13 NMAC requires approval of the DHSEM cabinet secretary, the director of SPO, and the cabinet secretary of the Department of the Finance and Administration (DFA), but Plaintiff was not provided with any documentation showing DHSEM satisfied this requirement. Plaintiff claimed that his demotion dropped him to a position two pay bands below his original position and that he was prepared to accept an offer of a position only one pay band higher than the position to which he had dropped. Instead, DHSEM offered the position of Facilities, Fleet, and Records Manager, a position for which he had no way of verifying the pay band or reviewing the job description. Plaintiff said that Defendants may have until the end of the day to provide proof that Defendants had collected the necessary approvals and signatures, and if not, "we have no settlement agreement because it contains an undisclosed contingency." Plaintiff stated that his acceptance of Defendants' offer is revoked at the end of the same day. Defendants replied before the end of the day and provided a document from the New Mexico State Personnel Board—titled, "[r]ecruitment [w]aiver [r]equest-[s]ettlement [a]greement"—asking for approval for Plaintiff to fill the position of "Facilities & Fleet Manager (Line II), ([p]ay [b]and 70)" with an hourly salary of $34.00. The document was signed by the requesting manager/supervisor, the SPO employee who prepared the document, the human resources manager, the agency budget/CFO/ASD director, and the cabinet secretary/agency head. Defendants again asked for Plaintiff's revisions of the settlement agreement.

{20} Defendants emailed Plaintiff again the following day with a memorandum from SPO and DFA, explaining that the recruitment waiver is the personnel transaction that was required for Plaintiff's position, and that only approval by SPO was needed. In his reply, Plaintiff said that he understood that the form provided was a recruitment waiver, but because they negotiated a settlement agreement, Regulation 1.7.1.13 NMAC applied and it required the approval of three entities: DHSEM, SPO, and DFA. Plaintiff claimed that there was no documentation showing joint approval by DFA as required by the regulation, and nothing in the regulation indicated that the recruitment waiver provided was sufficient. Plaintiff referenced another regulation, Regulation 1.7.4.13 NMAC (2010), claiming that it would only allow Plaintiff to be in the offered position for one year, and "that was not disclosed to us." Finally, Defendants replied:

> Please be clear that settlement negotiations have concluded and [Plaintiff] has accepted the settlement payment of $12,945.60 (plus the new position and the other monetary and non-monetary consideration) in exchange for a complete release of claims, as detailed in the settlement document [Plaintiff is] holding. . . . [Defendants] will provide [Plaintiff] with the job description once [Plaintiff] acknowledge[s] the case is settled and provide[s Defendants] with the draft settlement document we have both worked on. If the acknowledgment of settlement and the draft agreement is not provided by 5PM today, [Defendants]

> will bring this matter before the [c]ourt. [Defendants] will also be filing a motion for protective order and notice of non appearance for any further depositions.

{21} Plaintiff said he read the memorandum provided by Defendants, saw the signatures, but insisted that one was missing, that of the Cabinet Secretary for DFA, Thomas E. Clifford, Ph.D. He said he needed this signature because it shows budget availability. Plaintiff cautioned, "Without this approval, the previously undisclosed contingency remains and therefore it would appear that when [Defendants] made this offer [Defendants] lacked authority."

{22} Defendants then told Plaintiff that they would attach a signature page to the settlement agreement "to signify DFA's approval as to budgetary availability only, pursuant to [Regulation] 1.7.1.13 NMAC." The attachment was a simple signature page to be signed by Thomas E. Clifford, Ph.D., Cabinet Secretary of DFA. Defendants asked again if they could proceed with the draft of the settlement agreement.

{23} The next day, Plaintiff told Defendants that they could not move forward with the settlement agreement: "In light of the undisclosed contingency and the inability to me[e]t it as of February 9, 2015 and as of today's date, the acceptance of the settlement offer is hereby revoked based on fraud in the inducement and misrepresentation."

{24} Two days later, Defendants moved for a protective order and stay of litigation pending determination of Defendants' motion to enforce the settlement agreement, which Defendants were in the process of drafting given the breakdown in negotiations. In his reply to Defendants' motion for protective order, Plaintiff claimed there was "no meeting of the minds on several key terms of the proposed settlement agreement, and DHSEM engaged in fraud in the inducement and misrepresentation and breached the covenant of good faith and fair dealing about the job to be offered to [Plaintiff]." The pay band issue was also discussed at length. The position DHSEM offered Plaintiff was in a certain pay band that Plaintiff later came to believe did not allow him to be paid at $34.00 per hour without the appropriate approvals. So, Plaintiff questioned whether DHSEM would be able to perform under the contract as outlined, and argued that DHSEM's failure to tell him about these contingencies in the payment constituted misrepresentation and fraud in the inducement.

{25} After the district court granted Defendant's motion for protective order, Defendants moved to enforce the settlement agreement. The district court held a hearing on the motion to enforce, granted it, and ordered Defendants to draft an order reflecting its determination. In its written order, the district court concluded that the parties had a valid and enforceable agreement, and no equitable considerations interfered with its formation: there was no mutual mistake, there was "at best" a unilateral mistake, and there was no fraud or misrepresentation.

Standard of Review

{26} We are asked to reverse the order enforcing the settlement agreement because, according to Plaintiff, one was not yet in existence. Plaintiff argues that the standard of review is de novo. He claims the issue—whether the parties reached a settlement agreement—is a legal question. Defendants argue that we review district court orders enforcing settlement agreements for an abuse of discretion, citing cases from the Tenth Circuit.

{27} Questions of contract formation potentially involve both a factual inquiry, which focuses on the words, conduct, and exchange between the parties to the contract, and a legal question, which requires the application of principles of contract law to the facts and circumstances surrounding its formation. *See Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶ 39, 124 N.M. 549, 953 P.2d 722 ("When the existence of a contract is at issue and the evidence is conflicting or permits more than one inference, it is for the finder of fact to determine whether the contract did in fact exist." (alteration, internal quotation marks, and citation omitted)); *see also Naimie v. Cytozyme Labs., Inc.*, 174 F.3d 1104, 1111 (10th Cir. 1999) (stating that the question of whether a contract exists is a mixed question of law and fact reviewed under "either the clearly erroneous standard or de novo standard depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles." (internal quotation marks and citation omitted)). The parties do not dispute any of the facts and circumstances about their negotiations leading up to the Defendants' motion to enforce. This appeal poses only a legal question, whether the exchange between the parties amounted to the formation of a contract. We review questions of law de novo. *Nat'l Union of Hosp. Emps. v. Bd. of Regents*, 2010-NMCA-102, ¶ 18, 149 N.M. 107, 245 P.3d 51 ("No facts are in dispute; the issues raised by the [u]nion are issues of law. We review the issues de novo.").

Contract Formation

{28} We understand Plaintiff's argument to be that no settlement agreement existed because (1) they had produced only a draft and they had not agreed on all of the terms; (2) Plaintiff's acceptance of the settlement agreement was contingent upon Defendants obtaining approval of the terms of Plaintiff's reinstatement at DHSEM, which they did not do; and (3) without approval, Defendants did not have the authority to bind DHSEM to the terms of the agreement.

{29} "All settlement agreements are contracts and therefore are subject to contract law[.]" *Herrera v. Herrera*, 1999-NMCA-034, ¶ 9, 126 N.M. 705, 974 P.2d 675; *see Sitterly v. Matthews*, 2000-NMCA-037, ¶ 15, 129 N.M. 134, 2 P.3d 871 (recognizing that a settlement agreement is interpreted in the same way as any other contract). "Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual assent." *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7 (internal quotation marks and citation omitted). In situations where one party makes an offer, acceptance of the offer must be unconditional. *See Silva v. Noble*, 1973-NMSC-106, ¶ 6, 85 N.M. 677, 515 P.2d 1281 ("In order to constitute a binding contract, there must be an

unconditional acceptance of the offer made."). "[A]cceptance requires manifestation of unconditional agreement to all of the terms of the offer and an intention to be bound thereby." *Id.* (internal quotations marks and citation omitted). Manifestation of agreement "may be either written or oral or by actions and conduct or a combination thereof, but regardless of the form or means used, there must be made manifest a definite intention to accept the offer and every part thereof and be presently bound thereby without material reservations or conditions." *Id.* (internal quotation marks and citation omitted). "An offeree's acceptance must be clear, positive, and unambiguous[.]" *Orcutt v. S & L Paint Contractors, Ltd.*, 1990-NMCA-036, ¶ 12, 109 N.M. 796, 791 P.2d 71; *see DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 11, 134 N.M. 630, 81 P.3d 573 (same).

{30} However, in the context of settlement agreements where negotiations are ongoing and continuous, neither the offer nor the acceptance can be identified, and the moment of formation cannot be determined, the manifestation of mutual assent may not be as clear. *See* Restatement (Second) of Contracts, § 22(2) (1981) ("A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined."). We have previously held that a contract can be enforceable where acceptance was not unequivocal. "[A] party can be considered bound by a settlement even if certain details are not worked out, if such details are not essential to the proposal or cause a change in the terms or purpose to be accomplished by the settlement." *Jones*, 1979-NMSC-103, ¶ 13.

{31} We conclude that the parties mutually assented to the term concerning Plaintiff's reinstatement at DHSEM. When Defendants first sent Plaintiff a draft of the agreement, the term reinstating Plaintiff as an employee stated that Plaintiff would be transferred to a Line Manager position titled "Facilities, Fleet and Records Manager," to be paid $34.00 per hour. In response, Plaintiff rejected some of the terms of the agreement in the body of his reply to Defendants, but he (1) left the term of reinstatement in the draft document itself as-is and, (2) expressly stated in his reply: "[Plaintiff] accepts being placed into the position of Line Manager." Plaintiff's response does not suggest that his approval of this position was tentative or somehow provisional. Moreover, the parties remained in agreement on Plaintiff's reinstatement for several of the exchanges that followed Plaintiff's clearest expression of acceptance. The parties consistently agreed on the essence of Plaintiff's reinstatement: he would be employed in a position that paid him an hourly salary of $34.00, because this salary would reinstate Plaintiff in "a position of similar wage," the request that Plaintiff made himself in his very first offer of settlement. Additionally, Plaintiff's conduct indicates his assent to the terms. He offered to cancel an upcoming deposition if Defendants accepted his edited draft of the document, and after a few exchanges that same day, Plaintiff vacated the discussed deposition.

{32} Plaintiff also argues that Regulation 1.7.1.13 NMAC required Defendants to get approval for the offered position from the director of SPO, the cabinet secretary of DHSEM, and the cabinet secretary of DFA. To the extent Plaintiff claims he did not

unequivocally accept the term of reinstatement or that his acceptance was contingent upon Defendants obtaining signatures from these three figures, we are not persuaded for two reasons.

{33} First, the parties may mutually assent to the agreement in the absence of the signatures because they are not essential to the purpose to be accomplished by Plaintiff's reinstatement. In *Jones*, the parties entered into a ten year mining lease, and the lessor initiated a quiet title suit for the purpose of cancelling the lease. 1979-NMSC-103, ¶ 2. While the quiet title suit was pending, "the parties entered into settlement negotiations." *Id.* The lessee offered to settle, and the lessor accepted the offer, but noted that the acceptance was subject to approval by her attorney. *See id.* The lessor's counsel provided notice of acceptance, but then told the lessee that the lessor "would not go forward with the settlement [because of] the alleged discovery of gold-bearing minerals[.]" *Id.* The lessor then claimed that no agreement was reached because the settlement required "a novation and a rental payment," which the lessee failed to do. *Id.* ¶ 4. We upheld the district court's order confirming that the parties entered into a binding and enforceable settlement agreement, reasoning that the lessor's acceptance was not contingent upon the lessee's conduct (the lack of a novation and the failure to pay delay rentals) because they "did not change the terms or purpose to be accomplished by the settlement offer." *Id.* ¶ 13.

{34} As in *Jones*, Defendants' failure to obtain one of the purportedly necessary signatures does not change the terms or purpose to be accomplished by the settlement offer. Even in their absence, Plaintiff is to be reinstated in a position comparable to the one he occupied before he was demoted, and he is to be compensated at an equivalent rate. As such, the details of the approval process for Plaintiff's reinstatement as a Line Manager do not affect the terms or purpose to be accomplished by the settlement agreement. *See Bogle v. Potter*, 1963-NMSC-076, ¶ 11, 72 N.M. 99, 380 P.2d 839 (holding that the failure to include in the offer letter "all details of carrying the proposal into effect to accomplish its purpose did not prevent there being a meeting of the minds" because "[t]hose details were not essential to the proposal, because, without them, the offer was not too indefinite for enforcement").

{35} On the other hand, there is no unconditional acceptance of an offer for settlement where the acceptance does not indicate an agreement between the parties on terms that are essential to the agreement. For example, in *Fratello*, there was no unconditional acceptance of the offer because it was not clear the parties agreed on a specific price and date for the delivery of the trucks that were the subject of the contract. 1988-NMSC-058, ¶ 9. Similarly, in *Silva*, there was no unconditional acceptance of an agreement where testimony showed the parties could not agree on the size of the car wash that was the subject of the agreement, or the details concerning the method of financing. *See* 1973-NMSC-106, ¶ 6. Such is not the case here, where Plaintiff has taken issue with details about one of the terms of the agreement, not the essence of the term itself, which provides for his reinstatement in a particular position with a particular hourly salary.

{36} Second, Plaintiff improperly characterizes Defendants' conduct as an "unfulfilled contingency" that was necessary for the formation of the contract. Assuming the regulation does in fact require signature approval for the position offered to Plaintiff, the requirements of the regulation are a condition precedent that operate as a prerequisite to Defendants' performance, not a prerequisite to the formation of the contract. *See W. Commerce Bank*, 1989-NMSC-046, ¶ 4 ("Generally, a condition precedent is an event occurring subsequently to the formation of a valid contract, an event that must occur before there is a right to an immediate performance, before there is a breach of contractual duty, and before the usual judicial remedies are available."). Whatever the regulation requires, it qualifies Defendants' duty to perform under the terms of the agreement, and the existence of the agreement does not hinge on a condition that qualifies one party's performance. For this reason, we also reject Plaintiff's argument that Defendants did not have the authority to bind DHSEM to the terms of the agreement absent the three signatures Plaintiff claims are required.

{37} Finally, we note that a contract can exist in circumstances in which the exchanges between the parties are preliminary negotiations and a written document is contemplated some time later. *See* Restatement (Second) of Contracts, § 27 cmt. c (1981) (listing the factors that are helpful in determining whether a contract has been concluded where the parties discuss the terms of the contract before making the final written instrument expressing its terms). In these situations, the parties must necessarily discuss the terms of the contract before they enter into it, and several other facts surrounding the negotiations between counsel for Plaintiff and for Defendants to show that the negotiations had concluded. First, the parties expressly agreed on other terms of the agreement, notably, back wages and attorney fees. Second, the terms of the agreement are not particularly complicated or detailed; they largely focus on dollar amounts. Third, the agreement is common; it is not unique in a way that would require extra care. In fact, Defendants drafted the first version of the agreement using their "standard" form for these sorts of employment claims. Finally, both parties took actions in preparation for performance under the terms of the settlement agreement during the negotiations—Plaintiff cancelled an upcoming deposition, which would have only been necessary if he continued to engage in discovery in preparation for trial rather than performance under the settlement agreement, and Defendants sought approval for Plaintiff's reinstatement (for both his position and the $34.00 hourly salary) from SPO through the use of the recruitment waiver request form.

{38} Having concluded that the parties entered into a settlement agreement because Plaintiff accepted the material terms and because the regulation at issue affects Defendants' performance under the contract and not its formation, we affirm the district court's order enforcing the settlement agreement.

Order Dismissing Plaintiff's USERRA Claims

{39} We affirm the district court's order enforcing the settlement agreement, which releases any and all claims Plaintiff could have brought against DHSEM under

USERRA. Therefore, Plaintiff's argument concerning the dismissal of his USERRA claims is moot.

CONCLUSION

{40} We affirm the order of the district court enforcing the settlement agreement.

{41} IT IS SO ORDERED.

STEPHEN G. FRENCH, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

M. MONICA ZAMORA, Judge

1Our Supreme Court reversed this Court, holding that the state has waived its immunity to private suits for monetary relief alleging violations of USERRA. *See Ramirez*, 2016-NMSC-016, ¶ 34. The basis for which the district court granted Defendants' motion to dismiss was this Court's decision, prior to its reversal, meaning that Plaintiff's USERRA claims are now viable. Nonetheless, our decision today resolves this appeal on separate legal grounds.