

New Mexico's HRD Charge Form "misleading"; Administrative Exhaustion Waived?

The New Mexico Supreme Court recently determined the Charge Form in use by New Mexico's Human Rights Bureau to be "so misleading" to claimants that administrative exhaustion of New Mexico Human Rights Act ("NMHRA") claims, where those claims exist against individuals, may be waived in some circumstances. The decision, issued in *Lobato v. State of New Mexico Environment Department*, No. 32-917, slip op. (2011), involved claims by a former State employee of discriminatory acts by his former employer. Following completion of the administrative process, the employee filed suit in U.S. District Court asserting claims against both the employer and individual supervisors. The employer moved to dismiss the individual defendants on the grounds the employee had failed to exhaust those claims. The U.S. District Court certified the matter to the New Mexico Supreme Court for consideration of whether the current HRD Charge Form provides sufficient notice to claimants of their ability to name individuals in their charge and, if not, to determine the appropriate remedy for a claimant who has otherwise failed exhaust administratively.

The NMHRA, which allows claims against both individuals and organizations, also requires that a claimant exhaust any claims under the Act by filing a charge with the New Mexico Human Rights Bureau and/or the Equal Employment Opportunity Commission ("EEOC") prior to filing suit in district court. Claimants who fail to appropriately exhaust are barred from suit. The Act requires individual claimants, in instituting their charges, to provide specific information, not only concerning the employer organization involved, but also information concerning any individuals alleged to have participated in the conduct at issue. The current HRB form does not advise claimants to include information concerning individuals, but merely asks for information concerning the organization. The failure to specifically request information concerning individuals, according to the Court, not only renders the form "inadequate to serve its statutory purpose" but renders it "affirmatively misleading."

The Supreme Court next evaluated the competing interests of the parties, balancing the employee's interest in pursuing his judicial remedies with the employer's interest in receiving adequate notice of claims against it. The Court determined that the harm to the employee in losing his right to pursue a judicial remedy outweighed the potential harm to employer in not receiving timely notice of all potential defendants. The Court relied, at least in part, on the fact that the employee's assertions against both the employer and the individuals arose from the same conduct, as alleged in the Charge. Consequently, the employer had at least constructive notice of the supervisors' alleged involvement in the conduct at issue.

The Court advised the Human Rights Bureau to revise its form to bring the requested information into compliance with claimants' rights under the NMHRA. It remains to be seen when and how the Charge Form may be revised in light of the Court's ruling. The larger question involves how the Court's decision may affect exhaustion requirements for pending charges or suits in which individual respondents/defendants have not been named. Based on the Court's opinion, it appears to be a possibility that exhaustion may be waived, at least in some instances, for claims involving individuals, particularly in cases where the conduct attributed to those individuals was outlined by the claimant in the Charge Form. Employers will, in light of the Court's ruling, have a better chance of defending against claims that exhaustion should be

waived in a particular case to the extent the individual conduct alleged differs substantially from the conduct initially alleged by claimant in the Charge Form.