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## New Mexico Charge of Discrimination Form Creates Trap for the Unwary

By Shawn Oller and Charlotte Lamont

In *Lobato v. N.M. Environment Department*, the New Mexico Supreme Court ruled that the Charge of Discrimination form used by the New Mexico Department of Workforce Solutions is so misleading that plaintiffs do not have to exhaust administrative remedies against individual defendants before suing them under the New Mexico Human Rights Act (NMHRA).

### Relevant Legal Background

The NMHRA is a comprehensive scheme enacted in 1969 for the primary purpose of providing administrative and judicial remedies for unlawful discrimination in the workplace. Unlike Title VII of the Civil Rights Act of 1964, the NMHRA permits a claim for unlawful discrimination to be alleged against individuals as well as the (typically corporate) employer. In keeping with the NMHRA's individual liability provisions, any person reporting unlawful discrimination must "file with the human rights division of the labor department a written complaint that shall state the name and address of the person alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required." Charges of Discrimination may be dual-filed with both the Equal Employment Opportunity Commission (EEOC) and the New Mexico Department of Workforce Solutions (DWS).

### Factual Background

Plaintiff Michael Lobato filed a Charge of Discrimination with the EEOC contending that his employer, the New Mexico Environment Department (NMED), discriminated against him. He filed his administrative charge using the DWS's official Charge of Discrimination form. Submitting this form to either the EEOC or the DWS constitutes filing with both agencies.

According to the instructions on the Charge of Discrimination form, Lobato was required to: (1) name the "Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency" he believed discriminated against him; (2) provide that entity's street address and phone number; and (3) explain the "PARTICULARS" of his charge. Nothing on the form instructed the plaintiff to identify individual employees involved in the alleged discrimination.

## The Litigation

Lobato filed suit in the United States District Court for the District of New Mexico based on the same work-related incidents, alleging violations of both Title VII and the NMHRA. Lobato named the NMED and multiple individual employees as defendants. The individually named defendants responded with a motion to dismiss. They argued that individuals are not subject to liability under Title VII and that Lobato failed to exhaust his remedies and preserve his right to sue them under the NMHRA because he failed to identify them by name in the Charge of Discrimination. (It was conceded, however, that Lobato's charge did reference objected-to conduct by persons in specific job positions.)

The federal court granted the defendants' motion on the Title VII claims. However, it denied the motion as to the NMHRA claims for those defendants identified by their job positions within the "PARTICULARS" narrative on the plaintiff's Charge of Discrimination and sua sponte certified two questions to the New Mexico Supreme Court. The New Mexico Supreme Court accepted certification and reformulated those questions as follows:

1. Does the DWS's Charge of Discrimination form, which instructs filers to identify the alleged discrimination by the name and address of the discriminating agency or entity but not the individual actor, provide a fair and adequate opportunity to exhaust administrative remedies against individual actions under the NMHRA?
2. If the Charge of Discrimination form is inadequate, what remedy is proper for a plaintiff who used the DWS form and consequently failed to exhaust administrative remedies against individuals?

In response to the first question, the court answered that the DWS form is inadequate and affirmatively misleading because the form directed Lobato to name the discriminating agency but failed to instruct him to identify individual agency employees involved in the alleged incidents. Asking a filer to state the "PARTICULARS" of a claim did not overcome this defect, as it did not alert the filer to the requirement that he provide the names and addresses of the individuals involved. The court also ruled that the EEOC's use of a more detailed intake questionnaire did not remedy this defect, as: (1) EEOC claims are resolved independently of DWS action; and (2) that unlike a charge of discrimination alleging a violation of the NMHRA, the names and addresses of individuals are superfluous to federal Civil Rights Act claims.

Because the NMHRA creates a cause of action against individuals, the court acknowledged that a charging party must identify all of the accused discriminators, both individuals and "employers," in the administrative complaint, and administrative proceedings must be exhausted as to them as a prerequisite to judicial remedies. The court stated that the DWS form, as it existed when Lobato filed his charge, "creates a trap for unwary claimants to forfeit their statutory rights and judicial remedies."

Having found that Lobato did not have a fair and adequate opportunity to exhaust administrative remedies against the individual-named defendants, the court turned to the question of the appropriate remedy. After weighing the potential harms to the parties, the court concluded that barring Lobato's judicial remedy solely because he followed explicit and misleading instructions in the DWS official complaint form was a far greater injustice than the less significant impact imposed on the defendants by the lack of formal notice to them of the prior administrative proceedings.

The court noted that the doctrine of exhaustion of administrative remedies arose as a way to coordinate the roles of the administrative and judicial branches, both of which are charged with regulatory duties. It also noted that rigid adherence to the doctrine is not always required. The court found that under the circumstances presented by this case, Lobato relied on the administrative procedures he was instructed to follow, but doing so threatened to foreclose a remedy to which he was entitled. Balancing the equities, the court held that, in these limited circumstances, the required administrative exhaustion of the NMHRA should not be necessary for Lobato to pursue his judicial remedies under that Act. Finally, the court recommended that the DWS revise its Charge of Discrimination form and instruct aggrieved employees in plain language to identify, by name and address, any individual who is accused of discrimination. As of the date of this ASAP, the Department has not revised its form.

## Practical Application for Employers

There may be Charges of Discrimination pending with the DWS wherein the charging party has specifically named only the employer in the charge, but the charging party may later request, and be permitted to sue individuals despite the parameters of the DWS charge. Employers who have Charges of Discrimination pending with the New Mexico DWS should: (1) immediately seek clarification from the agency (who can

seek clarification from the charging party) as to the identity of alleged individual discriminators; and (2) consider notifying individuals implicated in any pending charges of the potential risk that they may be sued under the auspices of the Lobato decision without prior notice or ability to participate in the underlying administrative proceedings.

Shawn Oller is a Shareholder in Littler Mendelson's Phoenix and Albuquerque offices, and Charlotte Lamont is Of Counsel in the Albuquerque office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Oller at soller@littler.com, or Ms. Lamont at clamont@littler.com.