

FILING CHARGES OF DISCRIMINATION – A PLAINTIFF’S PERSPECTIVE

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Filing timely and complete charges of discrimination with state and Federal agencies are required before a plaintiff can file a lawsuit in Federal or State District Court. The charge must include each discrete act of discrimination. National Railroad Passenger Corp., v. Morgan, 536 U.S. 101 (2002). The U.S. Supreme Court continues to address statutory and administrative requirements under discrimination laws when it recently upheld a jury verdict for an employee where the defendant disclosed to the Court employment of less than 15 after the trial was concluded. Arbaugh v. Y and H Corp., 126 S. Ct. 1235 (2006). (held failure to allege minimum number of employees is not jurisdictional, and must be timely raised by employer as part of motion practice). This article is written to remind regular employment law practitioners of the importance of initial charge of discrimination, and to provide an outline for other attorneys who find themselves helping employees with such charges to insure that the charge is timely and complete. Practitioners are advised to consult excellent resources available on the EEOC’s website (www.eeoc.gov), and Rules and Regulations of NMHRD (9 NMAC 1.1, et seq).

The First Step

Federal anti-discrimination laws, and the New Mexico Human Rights Act (NMSA 1978) § 28-1-10A (2005) require that one file administrative charges before filing lawsuits based on allegations of discrimination. The charges of discrimination under Federal laws are filed with the EEOC, or with the New Mexico Human Rights Department (NMHRD) for claims of discrimination under the New Mexico Human Rights Act (NMHRA). New Mexico is a dual agency state, which means a charge of discrimination filed with the EEOC, or conversely with NMHRD, will be filed with the other agency. Mitchell-Carr v. Office of Professional Employees International Union, 1999-NMSC-025, 127 NM 282.

The contents of the charge of discrimination are critical to the future direction, and oftentimes success of litigation. It is recommended that Plaintiffs prepare a charge of discrimination with a similar approach to preparing a complaint for a lawsuit. Make sure all the necessary elements to establish a prima facie case are addressed in the charge, and anticipate an employer’s non-discriminatory rational with sufficient facts to demonstrate pretext.

The charge should be in writing, and under oath for Federal claims. 42 USC § 2000(e)-5(b). Amendments are freely allowed to correct technical defects. Peterson v. City of Wichita, Kansas, 880 Fed.2d, 1307, 1308 (10th Cir. 1989). Failure to allege the precise nature of the unlawful discrimination and a discriminatory motive precludes relief in Federal courts.

Large numbers of complaints are filed with both state and Federal agencies, and the investigators are responsible for large case loads. Since investigators are responsible for preparing the charge of discrimination, it is recommended that attorneys prepare an outline of the information required on the Charge of Discrimination form (EEOC form 5 (5/01)). This will make the investigator's initial job easier, and help expedite the filing of the charge. Attorneys should also provide the names of witnesses, and direct the investigator's initial employer inquiries to pertinent documents, records, and witnesses which will support the charge.

Where to File – EEOC or HRD?

Although New Mexico is a dual agency state, there are some important considerations in the initial decision of filing a charge with HRD or EEOC:

- a. **Number of Employees:** A minimum of 15 employees are required for most Federal discrimination claims, and NMHRA allows such claims with four or more employees. NMHRA was recently amended to allow claims for sexual orientation, and spousal affiliation. NMSA 1978, § 28-1-7A (2004). Sexual orientation claims require 15 or more employees, while spousal affiliation claims require 50 or more employees.
- b. **Employer v. Individual:** The Federal Discrimination Statutes generally do not permit charges against individuals, but require the charge to be filed against the employer. NMHRA permits charges against individuals as well as employers. (§28-1-2B (2003)).

PRACTICE TIP: Determining the name of the employer can sometimes be tricky. Try and obtain W-2 forms which are supposed to have the name of the employer for IRS purposes. Although Federal claims are allowed only against an employer, it is still important to identify the individual perpetrators and persons responsible for investigating and enforcing discrimination policies and procedures.

- c. **Class Actions:** Class actions may be filed with the EEOC, but not under NMHRA.
- d. **Time Limitations:** As a result of recent amendments to NMHRA, time limitations for filing charges and pursuing lawsuits now parallel the Federal requirements. Discrimination claims must be filed within 300 days of the last act of discrimination, and lawsuits/appeals in State District Court must be filed within 90 days of receiving letters of determination from HRD, and 90 days after receiving determinations and/or Right to Sue letters from the EEOC for filing in Federal District Court. (28-1-10A and 28-1-13A (2005)).

What to Put in the Charge of Discrimination

After completing the top portion of the EEOC form 5, which includes basic identifying information of employee and employer, addresses, phone number, number of employees, the particular type of discrimination, and the last date discrimination took place, the charge should contain sufficient facts to establish a prima facie case of discrimination. Below is an outline for the prima facie requirements of various discrimination laws. The following element for each particular charge of discrimination should be used for NMHRA complaints because New Mexico generally looks to Federal civil rights adjudication for guidance in interpreting NMHRA. Ocana v. American Furniture Company, 2004-NMSC-018, ¶ 23, 135 NM 539.

A. Title VII (Race, Color, Religion, Sex, or National Origin)

1. The person is a member of a protected group.
2. The person is qualified for the position or job they hold.
3. Adverse employment action has occurred, which is motivated in part by a discriminatory motive.
4. The person has suffered losses or damages.

Complaints should also anticipate the McDonald Douglas (411 U.S. 792, 802 (1973)), burden shifting, and include facts to dispute the employer's claim that the adverse action was done for a non-discriminatory reason. The facts should demonstrate that the employer's explanation is unbelievable, contradictory, implausible, or inconsistent. Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000).

B. Age Discrimination Claims (ADEA)

1. The person is over the age of 40.
2. The person has been discharged, or other adverse employment action motivated in part by age.
3. The person is replaced with a younger employee (under the age of 40), or is younger than the charging party.
4. The person was qualified to do the job.

The McDonald Douglas burden shift also applies to ADA claims, and should be addressed in the complaint as discussed above.

C. Disability Claims (ADA)

1. The person has an impairment that substantially limits a major life activity.
 - a) Major life activity includes caring for ones self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Toyota Motor v. Williams, 534 U.S. 184 (2002), and

Bowen v. Inc Producing Management of OK, 202 F.3d 1282 (10th Cir. 2000), and 29 CFR 1630.2(i).

2. The person can perform with or without reasonable accommodations the essential functions of the employment position.
3. Discrimination has occurred against the person, i.e. adverse employment action motivated in part because of disability.

a) Reasonable Accommodation. If failure to provide such accommodation is an issue in your case, then include facts as follows:

- 1) The employee requested a reasonable accommodation. After a reasonable accommodation has been requested, employers are required to engage in interactive process with the employee to fashion a reasonable accommodation. (Martin v. Kansas, 190 F.3d 1120 (10th Cir., 1999), and Burchette v. Target Corporation, 340 F.3d 510 (8th Cir., 2003).

4. Special Problems for Disability Claims:

a) Remedial Measures. In determining if a person is a qualified individual under the ADA, one must take into account remedial measures (i.e, medications, support devices), or anything else that lessens the severity of the impairment and impact on major life activities. (See trio of U.S. Supreme Court cases, Sutton v. United Airlines, 527 U.S. 471; Albertson's v. Kirkingburg, 527 U.S. 555; and Murphy v. UPS, 527 U.S. 516 (1999). The 10th Circuit has held that the inability to perform a single, particular job does not constitute a substantial limitation on major life activity of working. Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir., 1994).

b) Regarded as Disabled. If a person does not meet the technical definition of a qualified individual, there still may be protection under the ADA if:

- 1) Has an impairment that does not limit major life activities, but is treated by the employer as having such a limitation;
- 2) Has physical or mental impairment that substantially limits a major life activity as a result of the attitude of others toward such impairment; or

- 3) Has no such impairment, but is treated by the employer as having a substantially limiting impairment. Gowesky v. Singing River Hospital Systems, 321 F.3d 503 (5th Cir. 2003, cert. denied, 124 S.Ct. 66 (2003)).
- c) Record of a Disability. This is a category of protection under the ADA which is commonly misunderstood. Simply having a record of a medical condition such as cancer or heart condition does not meet the requirements of a qualified individual under the ADA. One seeking relief under this section of the ADA must still establish an impairment that substantially limits one or more major life activities. EEOC v. R.J. Gallagher, 181 F.3d 645 (5th Cir. 1999), Sorenson v. University of Utah Hospital, 194 F.3d 1084 (10th Cir. 1999).

ADA claims are complicated, it is recommended that practitioners refer to the excellent resources provided by the EEOC through its various compliance manuals, and enforcement guidelines. (Visit www.EEOC.gov) for reference material regarding disability claims.

D. Sex Harassment / Hostile Work Environment

1. Member of protected group.
2. Subject to unwelcome sexual harassment.
3. The harassment is based on sex.
4. The harassment affects a term or condition of employment.

It is important to know if the harasser is a supervisor with immediate authority over an employee, because such may result in strict liability and/or vicarious liability. Farragher v. City of Boca Raton, 524 U.S. 775; Burlington v. Ellerth, 524 U.S. 742 (1998). Include in the charge of discrimination the name, identity, job description, and supervisory authority, if the harasser is a supervisor.

If the unwelcome sexual advances or harassment has resulted in a “tangible employment action,” i.e., termination, demotion, suspension, etc., the employer may be held to a strict liability standard. If there is unwelcome sexual advances, and/or sexual harassment that does not result in a tangible employment action, then the claim would be characterized as one of a hostile environment. The complaint must allege that the conduct, such as sexual advances, demeaning comments, were sufficiently severe or pervasive to create a hostile work environment. It must be more than an isolated comment or incident. If the harasser is not a supervisor, but a colleague, co-worker, or customer, or another non-employee, the complaint must specify that the employee reported the conduct to her supervisor or other persons responsible for enforcing harassment discrimination claims within the company. Farragher/ Ellerth, Id., and Lockard v. Pizza Hut, 162 F.3d 1062 (10th Cir. 1998). The complaint must also allege

that the employer did not exercise reasonable care to prevent and correct promptly any sexually harassing behavior. If the employer does not have a policy against sexual harassment and/or discrimination, then that employer would not be entitled to the Farragher/ Ellerth affirmative defenses.

Claims for Federal Employees

Be aware there are different administrative procedures and requirements for discrimination claims filed by Federal employees. The first step is a requirement that a contact be made with the Federal agency's EEO counselor within 45 days of the act of discrimination, or after the effective date of some personnel action related to discrimination. 29 CFR 1614.105(a)(1). The same details as discussed above for the various discrimination complaints should be included in the report to the EEO counselor of the particular Federal agency.

Practitioners should carefully review various Federal statutes and regulations for pursuing claims of discrimination for Federal employees. (29 CFR 1614.408(d)).

Contacts / Resources

1. HRD, Francie Cordova, Director, (505) 827-6838, (800) 566-9471
2. Loretta Medina, Senior trial attorney, EEOC, loretta.medina.eeoc.gov

The EEOC has recently undergone a reorganization and many southern New Mexico counties, including Grant, Hidalgo, Luna, Sierra, Otero, and Dona Ana are now included in the Dallas, EEOC District. The remainder of the state continues to be part of the Phoenix EEOC District.

Incomplete and untimely administrative charges may be fatal to an employee's valid claim of discrimination. Practitioners must understand the importance of these charges, and give sufficient attention to including the necessary elements and facts for a claim to proceed.

Finally, both state and Federal anti-discrimination laws provide for protection against retaliation. The prima facie case of retaliation should include:

1. An employee engaged in protected activity, i.e. objecting and/or reporting discrimination, participating in an investigation, or filing a charge of discrimination;
2. Adverse employment action motivated in part by retaliatory motive; and
3. Damages or losses. The McDonald Douglas burden shift applies to retaliation charges.