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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **JANET ALROY,**

3 Plaintiff-Appellant,

4 v.

NO. 31,459

5 **THE BOARD OF REGENTS OF THE**
6 **UNIVERSITY OF NEW MEXICO,**

7 Defendant-Appellee.

8 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

9 **Carl J. Butkus, District Judge**

10 Valdez and White Law Firm, LLC

11 Timothy L. White

12 Albuquerque, NM

13 for Appellant

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16 Elizabeth L. German

17 Albuquerque, NM

18 for Appellee

19 **MEMORANDUM OPINION**

20 **VANZI, Judge.**

1 In this employment discrimination case, Plaintiff Janet Alroy filed a complaint
2 against Defendant Board of Regents of the University of New Mexico (UNM) for
3 failure to reasonably accommodate her disability under the New Mexico Human
4 Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007)
5 (NMHRA). The district court granted UNM's motion to dismiss because it found that
6 the complaint did not allege an adverse employment action and because Alroy failed
7 to exhaust her administrative remedies. We reverse. We hold that the district court
8 erred in granting UNM's Rule 1-012(B)(1) NMRA motion to dismiss for lack of
9 jurisdiction and Rule 1-012(B)(6) motion to dismiss for failure to state a claim.

10 **BACKGROUND**

11 Because the parties are familiar with the facts and proceedings and because this
12 is a memorandum opinion, we provide only a brief discussion of the background of
13 this case. We include background information as necessary in connection with each
14 issue raised.

15 Alroy began working for UNM's Benefits office in January 2008. After she
16 was hired, Alroy began to experience aggressive behavior from other UNM
17 employees. She discussed the situation with her supervisor and told him that she
18 might not be able to continue in her current position because of her post-traumatic
19 stress disorder and generalized anxiety disorder. Alroy suggested that the disability

1 could be accommodated, but her supervisor said that “this type of treatment comes
2 with the job” and that she “need[ed] to learn how to let it roll off [her] back.”

3 On July 17, 2009, Alroy filed a charge of discrimination with the New Mexico
4 Department of Labor, Human Rights Division (HRD), alleging that she had informed
5 her supervisor that she would need an accommodation for her disability but that she
6 was never given one. The charge of discrimination also noted that Alroy had been
7 placed on administrative leave and that UNM was contemplating termination. Two
8 months later, on September 18, 2009, Alroy was terminated for behavior “inconsistent
9 with [her] obligation to [UNM]” and “misuse of computing services.” On May 13,
10 2010, the State of New Mexico Department of Workforce Solutions, Human Rights
11 Bureau (HRB), issued an order of nondetermination on the charge of discrimination,
12 granting Alroy the right to sue in district court.

13 Alroy timely filed a complaint in district court seeking damages for
14 discrimination on the basis of a physical handicap or serious medical condition in
15 violation of the NMHRA. UNM responded to the complaint by filing a motion to
16 dismiss pursuant to Rule 1-012(B)(1) and (6). Specifically, UNM argued that Alroy
17 did not exhaust her administrative remedies as required by the NMHRA and that she
18 failed to state a claim on the merits. After a hearing, the district court granted UNM’s
19 motion and subsequently entered a written order. The district court found that a notice
20 of contemplated action is not an adverse employment action and that Alroy failed to

1 exhaust her administrative remedies for the claim of disability discrimination. Alroy
2 filed a motion for reconsideration that was also denied by written order after a hearing.
3 Alroy now appeals the dismissal of her claim for failure to accommodate her disability
4 in violation of the NMHRA.

5 **DISCUSSION**

6 UNM based its motion to dismiss Alroy's complaint in the district court on
7 Rule 1-012(B)(1) and (6). Although it appears that the district court granted the
8 motion on both grounds, its ruling is not entirely clear. On one hand, the order
9 indicates that the court granted the motion on the basis that Alroy failed to exhaust her
10 administrative remedies because she did not timely file her charge of discrimination
11 with the HRD. On the other hand, it appears that the district court found that Alroy
12 failed to exhaust her administrative remedies because an adverse employment action
13 had not occurred at the time she filed her charge of discrimination. Because we are
14 unable to discern the precise basis for the district court's ruling, we first address
15 whether Alroy failed to exhaust her administrative remedies under Rule 1-012(B)(1).
16 We address this issue as a threshold matter because appeals from courts that lack
17 subject matter jurisdiction will confer no jurisdiction on this Court. *Human Rights*
18 *Comm'n v. Accurate Mach. & Tool Co.*, 2010-NMCA-107, ¶ 4, 149 N.M. 119, 245
19 P.3d 63. Once we have decided the jurisdictional question, we then consider whether

1 the district court erred in granting UNM's motion to dismiss for failure to state a
2 claim.

3 **Subject Matter Jurisdiction Pursuant to Rule 1-012(B)(1)**

4 Whether the district court possessed jurisdiction over the subject matter of a
5 case is a question of law that we review de novo. *Human Rights Comm'n*, 2010-
6 NMCA-107, ¶ 4. As we have noted, the district court did not address Rule 1-
7 012(B)(1) in its order of dismissal, but it did find that Alroy failed to exhaust her
8 administrative remedies for her discrimination claim. Jurisdictional issues should
9 always be resolved on appeal even if not preserved below. *Smith v. City of Santa Fe*,
10 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. Under the exhaustion of
11 administrative remedies doctrine, plaintiffs are ordinarily required to pursue
12 administrative remedies that are available to them before filing an action in court. *Id.*
13 ¶ 26. The NMHRA requires that a charge be filed with the HRD within three hundred
14 days of the alleged discriminatory action. Section 28-1-10(A). After the HRD's
15 receipt of the complaint, the person who has filed may request and shall receive an
16 order of nondetermination that may be appealed to the district court. Section 28-1-
17 10(D). The person aggrieved by an order of the commission may obtain a trial de
18 novo in the district court. Section 28-1-13(A). The district court, however, must
19 dismiss an NMHRA claim if the above prerequisites are not met. *Mitchell-Carr v.*
20 *McLendon*, 1999-NMSC-025, ¶ 17, 127 N.M. 282, 980 P.2d 65.

1 UNM argued below that Alroy did not exhaust her administrative remedies
2 because her first charge, alleging discrimination, was filed prior to any possible
3 adverse action, so it was premature. UNM further argued that because Alroy had not
4 yet received an order of nondetermination on her second charge, alleging retaliation,
5 she was not authorized to bring suit in the district court. The parties agree that the
6 complaint does not contain a claim of retaliation and, therefore, Alroy's second charge
7 is not at issue.

8 Here, Alroy discussed her symptoms of anxiety and depression due to the
9 treatment she received at work with her direct supervisor, Joseph Evans, on October
10 7, 2008. She told him that she might not be able to continue in her current position
11 and suggested that her disability could be accommodated by increasing her data entry
12 duties and decreasing her face-to-face interaction with other UNM employees or by
13 allowing her to call other Benefits employees to handle UNM employees behaving
14 aggressively. Evans told Alroy that this type of treatment came with the job and that
15 Alroy "need[ed] to learn how to let it roll off [her] back." On July 17, 2009, less than
16 three hundred days after her discussion with Evans, Alroy filed a charge of
17 discrimination based on her disability with the HRD alleging that she had informed
18 her supervisor that she would need an accommodation but that she was never given
19 one. On May 13, 2010, the HRD issued its order of nondetermination granting Alroy
20 the right to sue in district court within ninety days from the date of service of the

1 order. Alroy filed a complaint for damages on her discrimination claim in the Second
2 Judicial District Court on July 19, 2010. Based on these uncontroverted dates, Alroy
3 timely met all the deadlines required to pursue her complaint in this case and,
4 therefore, properly exhausted her administrative remedies. We now turn to the
5 question of whether Alroy properly alleged an adverse employment action in the
6 charge of discrimination and, if she did not, whether that failure to do so constituted
7 a failure to exhaust her administrative remedies.

8 **Failure to State a Claim Pursuant to Rule 1-012(B)(6)**

9 We review motions to dismiss a complaint for failure to state a claim under
10 Rule 1-012(B)(6) de novo. *Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C.*, 2005-
11 NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861. Under the New Mexico Rules of Civil
12 Procedure, we test “the legal sufficiency of the complaint, not the factual allegations
13 of the pleadings which, for purposes of ruling on the motion, the court must accept as
14 true.” *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 2, 134 N.M. 43, 73 P.3d 181
15 (internal quotation marks and citation omitted). A complaint should only be dismissed
16 under Rule 1-012(B)(6) if the non-moving party would not be entitled to recover
17 under any theory of the facts alleged. *Delfino v. Griffio*, 2011-NMSC-015, ¶ 12, 150
18 N.M. 97, 257 P.3d 917. New Mexico is a notice pleading state, and a complaint
19 requires only “a short and plain statement of the claim showing that the pleader is
20 entitled to relief[.]” Rule 1-008(A)(2) NMRA. “[I]t is sufficient that defendants be

1 given only a fair idea of the nature of the claim asserted against them . . . ; specific
2 evidentiary detail is not required at this stage.” *Mendoza v. Tamaya Enters., Inc.*,
3 2011-NMSC-030, ¶ 16, 150 N.M. 258, 258 P.3d 1050 (internal quotation marks and
4 citation omitted).

5 UNM argued, and the district court agreed, that Alroy’s complaint required
6 dismissal because neither a failure to accommodate by itself nor a notice of
7 contemplated action is an adverse employment action. UNM further contended that
8 because the termination of Alroy’s employment occurred after she had filed her charge
9 of discrimination, Alroy failed to exhaust her administrative remedies. We understand
10 UNM’s argument to be that a plaintiff alleging discrimination on the basis of physical
11 handicap and/or serious medical condition under the NMHRA must also allege that
12 she has suffered an adverse employment action—other than or in addition to—a
13 failure to accommodate and that the adverse action must occur prior to the filing of
14 the charge of discrimination. For the reasons that follow, we disagree that a plaintiff
15 must allege something more than a failure to accommodate in order to survive a claim
16 of discrimination under the NMHRA.

17 At the outset, we note that neither UNM’s nor Alroy’s briefs were particularly
18 helpful in resolution of the issue on appeal. Virtually all of the case law cited by both
19 parties involve decisions on motions for summary judgment that have a markedly

1 different standard of review than that used to evaluate motions to dismiss.¹ Indeed,
2 UNM goes so far as to cite to the federal burden-shifting methodology set forth in
3 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), which clearly has
4 no application at the motion-to-dismiss stage. Further, both parties cite to unpublished
5 decisions of other courts which, although they may be presented if a party believes the
6 cases are persuasive, have no precedential value in this Court.² *Gormley v. Coca-Cola*
7 *Enters.*, 2004-NMCA-021, ¶ 10, 135 N.M. 128, 85 P.3d 252, *aff'd*, 2005-NMSC-003,

12 ¹In any event, the cases cited by UNM do not support their position here and,
13 in fact, weigh in favor of Alroy. *See, e.g., Williams v. Phila. Hous. Auth. Police*
14 *Dep't*, 380 F.3d 751, 761 (3d Cir. 2004) (stating that adverse employment decisions
15 under the ADA include refusing to make reasonable accommodations for a plaintiff's
16 disabilities); *Nawrot v. CPC Int'l.*, 259 F. Supp. 2d 716, 721-22 (N.D. Ill. 2003)
17 (noting that, for reasonable accommodation claims, the prima facie case does not
18 require an adverse employment action); *Marshall v. Fed. Express Corp.*, 130 F.3d
19 1095, 1099 (D.C. Cir. 1997) (finding that because the plaintiff required no
20 accommodation, there could be no adverse action); *Jensen v. Wells Fargo Bank*, 102
21 Cal.Rptr.2d 55, 63 (Ct. App. 2000) (stating that an "employer's failure to reasonably
22 accommodate a disabled individual is a violation of the statute in and of itself").

23 ²Curiously, we note that the unpublished cases provided by UNM again
24 unequivocally support Alroy's position and not UNM's. *See Jones v. Wal-Mart*
25 *Stores, East, L.P.*, No. 3:07-CV-461, 2008 WL 2115612, at *4 (E.D. Tenn. 2008)
26 (finding that the plaintiff set forth sufficient allegations to state a claim under the
16 ADA based on the defendants' alleged failure to provide a reasonable accommodation
17 for the plaintiff's disability); *Boice v. Se. Pa. Transp. Auth.*, No. 05-4772, 2007 WL
18 2916188, at *15 (E.D. Pa. 2007) (stating that in failure to accommodate cases, an
19 adverse employment decision includes the employer's failure to reasonably
20 accommodate the employee's disability); *Dudley v. Dallas Indep. Sch. Dist.*, No. Civ.
21 3:99 CV2634BC, 2001 WL 123673, at *6 (N.D. Tex. 2001) (noting that the Fifth
22 Circuit has recognized that a discrimination claim under the ADA may be based on
23 the employer's failure provide the employee with a reasonable accommodation).

1 137 N.M. 192, 109 P.3d 280. As a result, few of the cases cited by the parties are
2 pertinent here where the only question we must answer is whether Alroy’s complaint
3 gave UNM “a fair idea of the nature of the claim asserted.” *Mendoza*, 2011-NMSC-
4 030, ¶ 16 (internal quotation marks and citation omitted). We begin with the law and
5 then turn to the facts in Alroy’s complaint.

6 The NMHRA provides that it is an unlawful discriminatory practice for “any
7 employer to refuse or fail to accommodate a person’s physical or mental handicap or
8 serious medical condition, unless such accommodation is unreasonable or an undue
9 hardship.” Section 28-1-7(J). Thus, a person alleging that she has been discriminated
10 against on the basis of a physical or mental handicap must only demonstrate that she
11 suffered from an impairment that the employer failed to reasonably accommodate.
12 Our New Mexico jury instructions are consistent with this statutory requirement,
13 stating that “[a]n employer violates the [NMHRA] if it refuses or fails to
14 accommodate a person’s mental or physical handicap or serious medical condition
15 [unless the accommodation is unreasonable or an undue hardship to the employer].”
16 UJI 13-2307 NMRA. Additionally, and perhaps more importantly, UJI 13-2307C
17 NMRA specifically provides that an adverse action includes a refusal to
18 accommodate. There is simply no requirement under the NMHRA or the adverse-
19 action prong of UJI 13-2307C that requires a plaintiff to prove anything more at trial
20 than that the employer refused to accommodate her disabilities. With this standard,

1 we now turn to Alroy’s complaint to determine whether UNM met its burden under
2 Rule 1-012(B)(6) and showed that Alroy’s complaint fails to state any set of facts that
3 would entitle her to relief.

4 In her six-page complaint, Alroy provided the following detailed and relevant
5 facts. Alroy suffers from post-traumatic stress disorder, a physical handicap or serious
6 medical condition as defined by the NMHRA. This disorder affects Alroy’s ability
7 to deal with anger directed at her by others. In January 2008 Alroy was hired at the
8 UNM Benefits office as a Benefits Representative. In the course of Alroy’s job
9 duties, she began to experience regular and repeated instances of aggressive behavior
10 from other UNM employees. When Alroy dealt with these behaviors, her disability
11 caused her to become visibly upset, to tremble, and sometimes to cry or become angry
12 at the way she was treated. Alroy spoke with her direct supervisor, Evans, about the
13 situation. Evans told her that this type of treatment came with the job and that Alroy
14 “need[ed] to learn how to let it roll off [her] back.” From June 2008 to October 2008,
15 Alroy had increased symptoms of anxiety and depression due to the treatment she
16 received at work and, as a result, her boyfriend broke off their relationship. On
17 October 7, 2008, Alroy discussed the situation with Evans and told him that she might
18 not be able to continue in her current position because of the toll it was taking on her
19 mental health. Alroy told Evans of her diagnoses of mood disorders, including post-
20 traumatic stress disorder, dysthymic disorder, and generalized anxiety disorder. Alroy

1 suggested that her disability could be accommodated by increasing her data entry
2 duties and decreasing her face-to-face interaction with other UNM employees, or by
3 allowing her to call other Benefits employees to handle UNM employees behaving
4 aggressively. Evans told Alroy that she should “hang in there a little longer, [as] good
5 things would be coming to pass.” Alroy was refused a reasonable accommodation.
6 On July 17, 2009, Alroy filed a charge of discrimination against UNM with the HRD,
7 alleging that she had requested accommodation, but it had not been provided. Two
8 months later, in September 2009, Alroy was fired due to her panic attacks and
9 difficulty handling other employee’s aggressive behavior. If Alroy’s disability had
10 been accommodated, her job performance would have continued to be excellent.
11 Alroy has suffered damages.

12 Taking the well-pleaded facts as true and construing them in the light most
13 favorable to Alroy, we conclude that Alroy’s complaint stated a claim for UNM’s
14 failure to reasonably accommodate her disabilities under the NMHRA upon which
15 relief may be granted. The complaint sets forth detailed factual allegations of the
16 events giving rise to Alroy’s claim and gives UNM adequate notice of the legal claim
17 asserted against it. Because we conclude that Alroy did not need to allege any adverse
18 action in addition to a failure to accommodate, we necessarily also conclude that her
19 charge of discrimination was adequately presented to the HRD. Consequently, for the
20 reasons set forth above, Alroy properly exhausted her administrative remedies. The

1 district court's dismissal of Alroy's complaint with prejudice was in error, and its
2 decision is reversed.

3 **CONCLUSION**

4 For the reasons set forth above, the district court's decision granting UNM's
5 motion to dismiss for failure to exhaust administrative remedies and failure to state
6 a claim is reversed.

7 **IT IS SO ORDERED.**

8
9

LINDA M. VANZI, Judge

10 **WE CONCUR:**

11

12 **JAMES J. WECHSLER, Judge**

13

14 **MICHAEL E. VIGIL, Judge**