

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEE PAYNE : CIVIL ACTION  
 :  
 v. :  
 :  
 CONSOLIDATED RAIL CORPORATION : 99-2801

**MEMORANDUM AND ORDER**

HUTTON, J.

February 10, 2000

Presently before this Court are Defendant Consolidated Rail Corporations's ("Defendant") Motion to Dismiss Plaintiff's Complaint Pursuant to F.R.C.P. 12(b)(6) (Docket No. 3), Plaintiff Lee Payne's ("Plaintiff") Opposition to Conrail's Motion to Dismiss Complaint (Docket No. 5), and Defendant's Reply Brief in Support of Motion to Dismiss (Docket No. 5). For the reasons stated below, Defendant's Motion is **GRANTED in part and DENIED in part.**

**I. BACKGROUND**

Accepting as true the facts alleged in the Complaint and all reasonable inferences that can be drawn from them, the pertinent facts of this case are as follows. Plaintiff commenced his employment with Defendant in 1953. At all times, he was an engineer. In the late 1980s and early 1990s, Plaintiff underwent a series of periodic hearing examinations which showed that he was suffering from a high frequency hearing loss. Defendant instructed

Plaintiff to wear a special hearing protector although he believed he could perform his job safely without accommodation.

In or about June 1992, Plaintiff was informed by a supervisor that a conductor alleged that Plaintiff was unable to hear and, therefore, was unable to safely operate a train. The supervisor told Plaintiff to go home and Plaintiff was not thereafter allowed to return to work. Approximately ten days after he was sent home from work, Plaintiff was instructed to report to the Cleveland Yard where he was to meet Ms. Darcell McGee ("McGee"), Defendant's employee in charge of Defendant's hearing program. After observing Plaintiff, McGee stated that Plaintiff could hear and that he should be cleared to return to work.

The trainmaster, who was present at Plaintiff's meeting with McGee and who heard McGee's recommendation regarding Plaintiff's fitness for work, made a phone call to the superintendent upon hearing McGee's recommendation. After his phone call, the trainmaster told Plaintiff that he could not return to work and that the superintendent had instructed him "to get rid of" Plaintiff. Plaintiff was then instructed to leave Defendant's property. He never returned to work.

Plaintiff asserts claims against Defendant under two federal statutes: (1) the Rehabilitation Act, 29 U.S.C. § 701 et seq.; and (2) the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. Plaintiff alleges that Defendant intentionally and

unlawfully discriminated against him with malice or in reckless disregard for his rights under the ADA and the Rehabilitation Act. Plaintiff filed the instant lawsuit on or about June 2, 1999.

Plaintiff, however, was a member of a class action that was filed in the Western District of Pennsylvania. See Mandichak v. Consolidated Rail Corp., CIV.A. No. 94-1701. While a class was originally certified on October 26, 1996, the class was decertified in mid-1998. Although a member of the Mandichak class which included plaintiffs that timely filed administrative charges, Plaintiff never filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), the Pennsylvania Human Relations Commission ("PHRC"), or other administrative agency.

## II. LEGAL STANDARD

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6),<sup>1</sup> this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could

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<sup>1</sup>. Rule 12(b)(6) provides that:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). A court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997).

### **III. DISCUSSION**

Defendant argues for dismissal on the grounds that, inter alia, Plaintiff failed to exhaust his administrative remedies under the Rehabilitation Act and the ADA. The Court separately considers Defendant's Rule 12(b)(6) Motion with regard to each statutory cause of action.

#### **A. Plaintiff's claims under the Rehabilitation Act**

Plaintiff seeks relief under § 504 of the Rehabilitation Act which bars, inter alia, private entities that receive federal funding from discriminating on the basis of disability. As Defendant receives federal funding, it is prohibited from discriminating on the basis of disability. Defendant argues,

however, that Plaintiff is precluded from seeking relief under § 504 because he failed to exhaust his administrative remedies prior to filing the instant lawsuit.

The Rehabilitation Act requires that some but not all plaintiffs exhaust their administrative remedies before seeking judicial relief. Plaintiff, as a non-federal employee, however, is not one such plaintiff. See, e.g., Freed v. Consolidated Rail Corp., --- F.3d ---, No. 99-1391, 2000 WL 12858, at \*5 (3d Cir. Jan. 10, 2000); Bracciale v. City of Philadelphia, No. CIV.A. 97-2464, 1997 WL 672263, at \*8 (E.D. Pa. Oct. 27, 1997).

The Freed court, upon considering the sole issue of whether a non-federal employee must exhaust administrative remedies before filing a § 504 case in federal court, reaffirmed the Third Circuit's long-standing position that § "504 plaintiffs may proceed directly to court without pursuing administrative remedies." Freed, 2000 WL 12858, at \*6. Therefore, Plaintiff's § 504 claim withstands Defendant's Rule 12(b)(6) challenge as he need not have exhausted his administrative remedies before initiating the instant matter. Additionally, the Court finds inapposite Defendant's additional arguments for dismissal of Plaintiff's § 504 claim. Defendant's Motion will be dismissed with regard to Plaintiff's Rehabilitation Act claims.

**B. Plaintiff's Claims Under the ADA**

Defendant argues that Plaintiff's claim under the ADA must be dismissed because Plaintiff failed to exhaust his administrative remedies as is statutorily required. Defendant cites Reddinger v. Hospital Cent. Serv., 4 F. Supp. 2d 405 (E.D. Pa. 1998), for the proposition that it is well settled that a plaintiff must exhaust his administrative remedies under the ADA before filing a suit in a court of law. See Reddinger, 4 F. Supp. 2d at 409. Defendant further argues that Plaintiff is not excepted from the requirements of the ADA on the basis that was he was once a member of class action in which other members timely filed administrative charges.

Plaintiff opposes Defendant's Motion on several grounds. First, Plaintiff argues that as a member of a previously certified class, he is not required to exhaust his administrative remedies under the ADA. Plaintiff acknowledges that "the ADA ordinarily requires claimants to bring their claims to the EEOC before proceeding in a judicial forum . . ." but nevertheless argues that by application of the "single filing rule," he is excepted from what is "ordinarily required." (Pl.'s Opp. to Def.'s Motion to Dismiss Compl. at 13). The "single filing rule" relieves class member of the obligation to individually exhaust administrative remedies before going forward with a class action law suit.

The Court is cognizant of the fact that federal courts within Pennsylvania have reached conflicting decisions regarding this very

issue with regard to similarly situated plaintiffs that were also members of the Mandichak class action. For example, several of the cases Plaintiff attached as exhibits to his response to Defendant's Motion hold that former Mandichak class members are not required to exhaust administrative remedies before seeking judicial determination of an ADA claim. See Mayo v. Consolidated Rail Corp., CIV.A. Nos. 96-656 (W.D. Pa. June 23, 1999); In re Consolidated Rail Corp. A.D.A. Lit., CIV.A. Nos. 98-1669, 98-1671, 98-1672, & 98-1759 (W.D. Pa. March 23, 1999).

The In re Consolidated Rail Corp. court reasoned that the single filing rule applies to decertified class actions as the rationale of the rule is not compromised where a class is decertified. In re Consolidated Rail Corp. at 8-10. The court stated that the purpose of the administrative process--provide notice to the party charged of the claims against it and provide the appropriate administrative agency with an opportunity to conciliate the parties' controversy before litigation is initiated--is still effected when piggy-backing is permitted and that to hold otherwise would make a distinction without a difference. In re Consolidated Rail Corp. at 9.

In Mayo, the court also considered this issue when ruling upon a summary judgment motion. The Mayo court, however, adopted a more moderate position on the issue although it ultimately agreed with the In re Consolidated Rail Corp. court's decision. The court

allowed piggybacking, expressly stating that its decision was reached "for purposes of consistency within this Court." Mayo at 10. The Mayo court nevertheless acknowledged that the Third Circuit has not ruled on this precise issue and that the federal circuit courts are not in agreement on whether the single filing rule applies where a class is decertified. Mayo at 9.

The Court finds that a recent Eastern District decision, however, is most instructive on the instant issue. In Koban v. Consolidated Rail Corp., No. CIV.A. 98-5872, 1999 WL 672657 (E.D. Pa. Aug. 13, 1999), the court considered whether a plaintiff's ADA claim could survive a Rule 12(b)(6) motion where the plaintiff failed to exhaust his administrative remedies. The court reasoned that because the Mandichak class action was decertified and plaintiff never filed an EEOC charge, he was precluded from pursuing his ADA claim. Koban, 1999 WL 672657, at \*2. The court also noted that the Third Circuit has never held that the single filing rule is applicable in the circumstance where a class is decertified. Koban, 1999 WL 672657, at \*1.

The Court agrees with the result reached by the Koban court.<sup>2</sup> Piggybacking in this circumstance is not consistent with the ADA's requirement that a plaintiff file an administrative charge before seeking judicial relief. While it is arguable that Defendant

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<sup>2</sup> The Court acknowledges Plaintiff's argument and the position of the In re Consolidated Rail Corp. court that Whalen v. W.R. Grace Co., 56 F.3d 504 (3d Cir. 1995), a case on which the Koban court relied, is distinguishable. Nevertheless, said reliance does not weaken the result reached by the Koban court.

received notice of the charges which became the basis for the Mandichak class action when Mandichak filed a charge that alleged class-based discrimination, the EEOC did not automatically have the opportunity to conciliate with each potential plaintiff/class member. The EEOC's want for an opportunity to conciliate with each potential plaintiff/class member is particularly apparent in the circumstance where a potential class member does not file an administrative charge and, therefore, is unknown to the administrative agency. That is the precise circumstance that Plaintiff presents to the Court. Therefore, as the EEOC never had the opportunity to conciliate Plaintiff's ADA claim and in the absence of Third Circuit guidance on this precise issue, the Court will grant Defendant's dismissal motion. Such a decision leaves whole the ADA's requirement that an aggrieved party first seek resolution of his or her claims via the invocation of an administrative agency's specialized knowledge and expertise in the area of federal discrimination law.

An appropriate Order follows.

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O R D E R

AND NOW, this 10<sup>th</sup> day of February, 2000, upon consideration of Defendant Consolidated Rail Corporations's ("Defendant") Motion to Dismiss Plaintiff's Complaint Pursuant to F.R.C.P. 12(b)(6) (Docket No. 3), Plaintiff Lee Payne's ("Plaintiff") Opposition to Conrail's Motion to Dismiss Complaint (Docket No. 5), and Defendant's Reply Brief in Support of Motion to Dismiss (Docket No. 5), IT IS HEREBY ORDERED that:

- (1) Defendant's Motion is **GRANTED** with regard to Plaintiff's Americans with Disabilities Act claim; and
- (2) Defendant's Motion is **DENIED** with regard to Plaintiff's Rehabilitation Act claim.

BY THE COURT:

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HERBERT J. HUTTON, J.