

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

GEORGE KOSLOW : CIVIL ACTION  
v. :  
COMMONWEALTH OF :  
PENNSYLVANIA, et al. : NO. 97-5951

**MEMORANDUM AND ORDER**

FULLAM, Sr.J. APRIL , 2000

Plaintiff George Koslow, an employee of the Commonwealth of Pennsylvania's Department of Corrections, brings this action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §12111 *et seq.*, the Rehabilitation Act, 29 U.S.C. §701 *et seq.*, 42 U.S.C. §1983, and the Pennsylvania Human Relations Act (PHRA), 43 P.S. §§951 *et seq.* Defendants are the Commonwealth of Pennsylvania, Superintendent Donald T. Vaughn of the State Correctional Institution at Graterford, PHICO Insurance Company, which was the workers compensation insurance carrier for the Department of Corrections until December 1997, and CompServices, Inc., the current workers compensation insurer. According to the amended complaint, plaintiff, who worked as a water treatment foreman at Graterford, injured his back on the job in June 1995. He returned to work the following month, but reinjured his back on November 1, 1996 and did not return to work until March 11, 1997, when he was placed on light

duty. In April 1997, plaintiff's physician directed plaintiff not to lift weight in excess of thirty pounds or to climb stairs repetitively. Mr. Koslow alleges that defendants have refused to accommodate his disability, and that he was instructed that he must either work without restrictions or else remain out of work and continue receiving workers compensation benefits. He also contends that in September 1999, for retaliatory reasons, defendants assigned him to a job which requires constant stair climbing.

Defendants PHICO and CompServices have filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). As a preliminary matter, it is clear that any Rehabilitation Act claim against these defendants must fail as a matter of law. The Rehabilitation Act is applicable only to federal employers and employers receiving federal funding, *see Mengine v. Runyon*, 114 F.3d 415, 418 n.2 (3d Cir. 1997), and the amended complaint contains no such allegation with regard to PHICO or CompServices.

PHICO and CompServices also argue that plaintiff's claim under the ADA must be dismissed because plaintiff has neither exhausted his administrative remedies nor alleged that he has received a right-to-sue letter from the Pennsylvania Human Relations Commission (PHRC) or from the Equal Employment Opportunity Commission (EEOC). Plaintiff responds that his claim is brought under Title II of the ADA, which prohibits discrimination in public accommodations, and which contains no exhaustion requirement. Title II, however, applies only to "public entities," defined as:

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (C) the National Railroad Passenger Corporation, and any commuter authority ....

42 U.S.C. §12131(1). Insurance carriers for public entities are not included in this list, nor is there any authority for extending liability under Title II to a private entity which contracts with, or acts as an agent for, a public entity. *See O'Connor v. Metro Ride, Inc.*, 2000 WL 280016, at \*6 (D. Minn. March 10, 2000)(to be reported at 87 F. Supp.2d 894). If plaintiff has a viable ADA claim against PHICO or CompServices as agents for his employer, it is pursuant to Title I, and he must allege that he has exhausted his administrative remedies. Plaintiff will be given leave to file a second amended complaint to include such an allegation, if he can do so consistent with the requirements of Rule 11. Plaintiff's claims against these entities pursuant to the PHRA are likewise dismissed, with leave to amend to include an allegation of exhaustion of administrative remedies if appropriate.

Finally, plaintiff's §1983 claims against PHICO and CompServices, if any, will be dismissed as well, because plaintiff has failed to allege that these defendants are state actors. I note that even if such an allegation were present, there is considerable authority for the proposition that Congress intended the ADA to be the exclusive remedy for employment discrimination based upon a person's disability. *See Metzgar v. Lehigh Valley Housing Auth.*, C.A. No. 98-3304, 1999 WL 562756, at \*4 (E.D. Pa. July 27, 1999)(citing cases).

An Order follows.

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

GEORGE KOSLOW : CIVIL ACTION  
v. :  
COMMONWEALTH OF :  
PENNSYLVANIA, et al. : NO. 97-5951

**ORDER**

AND NOW, this            day of April, 2000, IT IS ORDERED:

1. The motion to dismiss of defendant CompServices is GRANTED.
2. The motion to dismiss of defendant PHICO is GRANTED.
3. The amended complaint is DISMISSED as to these defendants ONLY.
4. Plaintiff is granted leave to file a second amended complaint within twenty

(20) days.

---

Fullam, Sr.J.