

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

JOSEPH R. RICCIARDI : CIVIL ACTION
 :
 v. :
 :
 CONSOLIDATED RAIL CORPORATION : No. 98-3420

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

September 25, 2000

Plaintiff Joseph R. Ricciardi ("Ricciardi") filed this action alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12111 et seq. ("ADA"), and of state law on July 21, 1998. The state law claims were dismissed by Judge Herbert J. Hutton on February 5, 1999; the action was subsequently transferred to this judge's docket. Defendant Consolidated Rail Corporation's ("Conrail") Motion for Summary Judgment on plaintiff's ADA claim is pending; for the reasons set forth below, Conrail's Motion for Summary Judgment will be granted.

BACKGROUND

Ricciardi was employed by Conrail in various positions for 22 years. On May 20, 1996, Ricciardi injured his back while working as "Foreman of Safety." On July 23, 1996, Conrail dismissed Ricciardi for insubordination -- failing to report for an employer-ordered medical examination.

Ricciardi previously filed an action against Conrail under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"), in April, 1997. The jury returned a verdict in favor

of Conrail in November, 1997.¹

DISCUSSION

Conrail moves for summary judgment on three grounds: 1) Ricciardi did not file a timely charge with the Equal Employment Opportunity Commission ("EEOC"); 2) Ricciardi is not a qualified individual with a disability under the ADA; and 3) Ricciardi is judicially estopped from bringing this ADA claim because his assertions conflict with previous assertions in his FELA claim.

I. Standard for Summary Judgment

Summary judgment is appropriate if there are no genuine issues of material fact and the evidence establishes that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue of material fact. See id. at 322-24. The non-movant must present evidence to support each element of its case for which it bears the burden at trial. See

¹On July 22, 1999, Ricciardi filed another FELA action alleging wrongful termination. It was dismissed by Judge Hutton on February 28, 2000 for failure to state a claim upon which relief can be granted.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in the non-movant's favor. See id. at 255.

II. Timely EEOC Charge

In order to sustain an ADA claim, plaintiff must file a charge with the EEOC within 300 days of the alleged improper employment practice if proceedings were initially instituted with a state or local agency. See 42 U.S.C. §§ 2000e-5(e)(1), 12117(a). The 300-day filing deadline is not jurisdictional but is akin to a statute of limitations. See Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982).

Plaintiff was discharged on July 23, 1996; he filed his EEOC charge on March 23, 1998 (after the expiration of the 300-day limitations period). Plaintiff claims that he contacted and filed an intake questionnaire with the EEOC in November, 1996 (within the 300-day period). When no action was taken by the EEOC, plaintiff claims he contacted the Commission by telephone on numerous occasions, but was only able to leave voice mail messages. In contrast, the EEOC asserts its records show Ricciardi's first contact with the Commission occurred on

February 18, 1998 (beyond the 300-day filing period) when it received an intake questionnaire from Ricciardi. Pretz Aff. ¶¶ 4-5.

Viewing the allegations in the light most favorable to the non-moving party and taking as true Ricciardi's assertion that he filed an intake questionnaire with the EEOC in November, 1996, even though the EEOC has no record of it, Conrail argues that filing an intake questionnaire with the EEOC does not satisfy the charge requirement. See 29 C.F.R. §1601.9 (requiring that a charge be verified). The formal charge requirement under the ADA is stricter than the standard for a charge under the Age Discrimination in Employment Act ("ADEA"). Under the ADA, a formal EEOC charge must "be in writing and signed and shall be verified."² Id. "In [ADA and] Title VII cases, intake questionnaires do not satisfy the statutory requirements for a charge because they are not verified."³ Diez v. Minnesota Mining and Mfg. Co., 88 F.3d 672, 675 (8th Cir. 1996). See also Danley v. Book-Of-The-Month Club, Inc., 921 F. Supp. 1352, 1353 & n.3 (M.D.

²Under the ADEA, "[a] charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing." 29 C.F.R. § 1626.6.

³Enforcement of the ADA is by the same powers, remedies, and procedures as Title VII. 42 U.S.C. § 12117(a). See Roche v. Supervalu, Inc., No. CIV. A. 97-2753, 1999 WL 46226 at *5 (E.D. Pa. January 15, 1999) (stating that "the procedures for instituting an ADA claim are those set forth in Title VII").

Pa. 1996)(ADEA, unlike Title VII, "does not specifically require the complaining party to verify her charge.").

Whether filing an intake questionnaire rather than a charge tolls the time limit for filing an EEOC claim is undecided by the Third Circuit; there is a split among other appellate courts. Compare Diez, 88 F.3d at 675 (intake questionnaire is not sufficient because it is not verified), and Park v. Howard Univ., 71 F.3d 904, 908-09 (D.C. Cir. 1995)(unsworn pre-complaint questionnaire filed with District of Columbia Department of Human Rights not sufficient to constitute an EEOC charge), with Peterson v. City of Wichita, 888 F.2d 1307, 1309 (10th Cir. 1989), cert. denied, 495 U.S. 932 (1990)(timely filed but unverified EEOC charge is valid when later amended as allowed by regulation), Casavantes v. California State Univ., 732 F.2d 1441, 1443 (9th Cir. 1984) (filing an unsigned and unverified intake questionnaire with the EEOC sufficient to constitute a charge), and Price v. Southwestern Bell Tel., 687 F.2d 74, 78 (5th Cir. 1982) (intake questionnaire can constitute a charge in certain circumstances).

Because a less stringent standard qualifies as an EEOC charge under the ADEA, a copy of a letter addressed to a grievant's employer can constitute a charge under that Act if the letter is "of a kind that would convince a reasonable person that the grievant has manifested an intent to activate [the ADEA's]

machinery." Bihler v. Singer Co., 710 F.2d 96, 99 (3d Cir. 1983)(holding plaintiff's letter insufficient to inform the EEOC that "he wanted it to perform its statutory function."). See Gulezian v. Drexel Univ., No. Civ. A. 98-3004, 1999 WL 153720, at *3 (E.D. Pa. March 19, 1999)(plaintiff's intake questionnaire did not constitute a charge for failing to meet the Bihler criteria); Powell v. Independence Blue Cross, Inc., No. 95-2509, 1997 WL 137198 (E.D. Pa. March 26, 1997) (despite plaintiff's filing a 34-page letter with the EEOC describing alleged discrimination under Title VII in detail, claim was barred because actual charge was filed 10 days after the 300-day time limit expired). But see Roche v. Supervalu, Inc., No. CIV. A. 97-2753, 1999 WL 46226 (E.D. Pa. Jan. 15, 1999) (plaintiff's filing an EEOC intake questionnaire satisfied the minimum requirements for filing a formal ADA charge, based on the specific facts of the case);⁴ Getz v. Commonwealth of Pa. Blindness and Visual Services, No. Civ. A. 97-7541, 1999 WL 768303, at * 5 (E.D. Pa. Sept. 28, 1999) (relying mistakenly on Gulezian and Bihler in its analysis of whether an intake questionnaire constitutes a formal charge under

⁴In Roche, the court relied on the following facts in making its determination: The plaintiff, suffering from narcolepsy, attempted to file a complaint two and a half years prior to his actual filing a formal charge and submitted two intake questionnaires in the interim. Id. at *6. Additionally, the EEOC admitted to having "erred in handling [the plaintiff's charge]" and considered the charge timely made. Id. While Roche is not binding, its facts are clearly distinguishable.

29 C.F.R. § 1601.9);⁵ Christian v. Southeastern Penn. Transp. Auth., No. Civ. A. 97-3621, 1997 WL 667123 (E.D. Pa. Oct. 1, 1997) (deciding, based upon a pro se plaintiff's claim that he sent a letter to the EEOC within the requisite time period, that plaintiff properly filed an EEOC charge).⁶

The intake questionnaire Ricciardi claims he submitted to the EEOC within the 300-day period does not constitute a charge under either standard. Even under the more lenient standard applied to ADEA claims (and sometimes in this district misapplied to ADA and Title VII claims), the intake questionnaire Ricciardi claims he submitted in November, 1996, would not lead a reasonable person to believe that he was manifesting an intent to "activate [the ADA's] machinery." Bihler, 710 F.2d at 99. To the contrary, the letter from the EEOC transmitting the questionnaire in May, 1996, clearly states that, based upon the information contained in the submitted questionnaire, the EEOC would then determine whether Ricciardi's "complaint contains substantive information that

⁵The Getz court denied summary judgment because the plaintiff's intake questionnaire, "accompanied by seven single-spaced, typed pages which substantively detailed Plaintiff's allegations of Title VII violations" met the standard set out in Bihler and adopted in Gulezian; the court erroneously adopted the more lenient standard for an ADEA charge rather than the more stringent standard required under Title VII and the ADA. See Getz, 1999 WL 768303, at *5.

⁶The memorandum and order denying defendant's motion to dismiss in Christian is devoid of any analysis of the legal standard applicable to the determination of whether a formal charge has been timely made.

would warrant a charge being filed with the EEOC." See D's Mot. for Summ. J., Ex. J, Letter from Eugene Nelson, EEOC to Joseph Bacari [sic](emphasis added). It is undisputed that Ricciardi never submitted a signed and verified charge to the EEOC within the 300-day period. Under the applicable Title VII/ADA standard, Ricciardi did not file a timely charge.

Ricciardi argues that equitable tolling should be applied. "[E]quitable tolling may be appropriate: 1) where the defendant has actively misled the plaintiff respecting plaintiff's cause of action; 2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or 3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994). Equitable tolling is only available if the plaintiff has exercised due diligence. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990).

Here, there is no evidence that Conrail actively misled Ricciardi with regard to his cause of action or that Ricciardi timely asserted his rights in the wrong forum. Ricciardi argues equitable tolling is appropriate because of an extraordinary circumstance: EEOC bureaucratic delay. See Gulezian, 1999 WL 153720, at * 4 (EEOC delayed providing plaintiff with the initial requested appointment and processing plaintiff's claim when [plaintiff] did appear; such "bureaucratic delay beyond

[plaintiff's] control [was] a sufficiently extraordinary circumstance to warrant the application of equitable tolling"). Ricciardi alleges he sent an intake questionnaire to the EEOC in November, 1996 (within the 300-day period) and made numerous telephone calls to the EEOC over the next 12 months (but never actually talked to an EEOC employee until November, 1997). See Pl's Resp. to D's Mot. for Summ. J. at 8. Plaintiff argues that "Mr. Ricciardi did everything he believed necessary to initiate EEOC proceedings." Id. at 9. Plaintiff alleges the EEOC loss of his November, 1996 intake questionnaire warrants application of equitable tolling.

But "[t]o justify equitable tolling [the court] must conclude that [the plaintiff] was prevented 'in some extraordinary way' from timely filing [his] claim because of . . . the conduct of the EEOC." Kocian v. Getty Refining & Marketing Co., 707 F.2d 748,753 (3d Cir. 1983). Due diligence is required to preserve a claim of equitable estoppel. Robinson v. Dalton, 107 F.3d 1018, 1023 (3d Cir. 1997). In Robinson, the court held that the plaintiff did not meet his burden by having one telephone conversation with an EEOC counselor within the requisite time period even though the counselor provided the plaintiff with erroneous information during that call. Id. Plaintiff's failure to confirm the information he received by telephone was a lack of due diligence; to allow a plaintiff to

successfully invoke equitable tolling in such circumstances would convert "a remedy available only sparingly and in extraordinary situations into one that can be readily invoked by those who have missed carefully drawn deadlines." Id.

Ricciardi failed to speak with any EEOC counselor during the 300-day period; despite his assertion he made numerous follow-up telephone calls, he did not actually speak with an EEOC counselor nor make written inquiry until after the limitation period had run. Mr. Ricciardi had legal representation during the 300-day period; he filed his FELA action against Conrail with the assistance of counsel on April 25, 1997. Equitable tolling is less appropriate when the litigant is not inexperienced nor proceeding pro se. Kocian, 707 F.2d at 755.

There is no evidence of Ricciardi's timely filing a charge (rather than an intake questionnaire) with the EEOC, of an extraordinary circumstance preventing him from timely filing a charge with the EEOC, or of due diligence on his part. Nor are there present other factors mandating the application of equitable tolling. The defendant's motion for summary judgment because plaintiff failed to timely file a charge with the EEOC will be granted.

III. Qualified Individual with a Disability

An ADA plaintiff must prove he is a "qualified individual with a disability," see 42 U.S.C. § 12111(8), that is, that he: 1) satisfies the requisite skill, experience, education and other job-related criteria of the position at issue; and 2) can perform the essential functions of the position at issue with or without a reasonable accommodation. See 29 C.F.R. § 1630.2(m).

Both Ricciardi and Conrail agree that Ricciardi could not return to his pre-injury job at Conrail, nor could he return to any heavy labor position at Conrail. In his first FELA action, although Ricciardi contended he was totally disabled, Ricciardi's medical experts were of the opinion that he could return to work at Conrail only if certain changes were made to the position he held prior to his injury. Ricciardi now argues that he could have returned to another type of position if Conrail had accommodated his disability without specifying the position, the accommodation necessary or if such accommodation would effect essential functions of the position.

The burden is on the plaintiff to make "'at least a facial showing that there were vacant, funded positions whose essential functions he was capable of performing.'" Donahue v. Consol. Raid. Corp., No. CIV. A. 98-3004, 2000 WL 1160947 at *6 (3d Cir. August 17, 2000)(internal citations omitted). "An employer's obligation to provide a reasonable accommodation does not require the employer to create a new job." Id. at *2. An "employee can

succeed under the [ADA] only if the employee can 'demonstrate that a specific, reasonable accommodation would have allowed [him] to perform the essential functions of [his] job.'" Id. at *5 (citing Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 319 (3d Cir. 1999)). Ricciardi has offered no evidence of any available position that would have accommodated his physical limitations.

Conrail offers evidence that in his past position in the safety department Ricciardi had to walk considerable distances, climb ladders, and lift 20-30 pounds. See Trial Transcript of Nov. 13, 1997 at 8, Ricciardi v. Consol. Rail Corp., 97-CV-2986 (E.D. Pa. 1997). Ricciardi does not dispute that these are essential functions of a job in the safety department nor does he assert he was able to perform such functions.

Ricciardi's failure to meet his burden of proving that he was qualified to perform a specific funded available job at Conrail, with or without accommodation, requires granting summary judgment even if Ricciardi's charge were timely filed because Ricciardi is not a "qualified individual" within the meaning of the ADA.

IV. Judicial Estoppel

Plaintiff 's FELA pretrial memorandum claimed he was "permanently disabled from railroad employment" and has suffered

"a permanent loss of his earning capacity." Def's Mot. for Summ. J., Ex. A at 2. Plaintiff also testified in the FELA action that he was "devastated" when informed by his doctor that he "could never return to the railroad." Def.'s Mot. for Summ. J., Ex. F at 19.⁷ Plaintiff attempted to prove he was permanently disabled and unable to work for Conrail in any capacity. This is inconsistent with plaintiff's present ADA claim that he could have continued to work for Conrail with a reasonable accommodation.

Judicial estoppel is applicable when: 1) a party's present position is inconsistent with a former position; and 2) either or both of the inconsistent positions were asserted in bad faith with the intent to play "fast and loose with the court." Motley v. New Jersey State Police, 196 F.3d 160, 164 (3d Cir. 1999)(citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)). The jury found for Conrail in the FELA action before this ADA action was filed, but it is not necessary that the party actually benefitted from the original position. See Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996).

In Cleveland v. Policy Management Systems, 526 U.S. 795

⁷This was contrary to testimony of Ricciardi's medical experts that he could not return to a railroad position involving heavy labor, but could return to a position accommodating his physical limitations.

(1999), the Supreme Court held that an award of Social Security Disability Insurance ("SSDI") benefits for claimed total disability did not preclude an ADA claim. The Court limited its decision to SSDI benefits and left open the interaction between the FELA and the ADA presented here. See id. at 802. The Cleveland holding applies to "context-related legal conclusion[s], i.e., 'I am disabled for purposes of the [disability act],'" " but not purely factual conflicts. Id. Ricciardi's claims of disability in the FELA action were factual allegations.

A finding of bad faith requires at least an inference that the party acted with intent. See Ryan, 81 F.3d at 362-64. Any benefit or advantage sought or gained by inconsistent positions may be considered evidence of bad faith. See id. at 361, 363. It was to plaintiff's advantage in the FELA action to claim total disability to obtain greater compensatory damages. In the ADA action, it is now to plaintiff's advantage to claim he can work with a reasonable accommodation. Plaintiff has not provided any reason for these inconsistent statements. It is more likely than not that one of these positions was asserted in bad faith, but since there are alternate grounds for granting summary judgment, in view of the extraordinary nature of the judicial estoppel remedy, the court will decline to grant summary judgment on this ground.

CONCLUSION

Summary judgment will be granted in favor Conrail because Ricciardi failed to timely file a charge with the EEOC; even if he filed a timely charge, Ricciardi is not a "qualified individual" within the meaning of the ADA.

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JUDGMENT AND ORDER

AND NOW, this 25th day of September, 2000, upon consideration of defendant's motion for summary judgment, plaintiff's response thereto, and defendant's reply, following a June 6, 2000 hearing, and in accordance with the attached memorandum,

It is **ORDERED** that:

1. Defendant's motion for summary judgment is **GRANTED**.
2. Defendant's Motion to Dismiss Action for Failure to Comply with Court Order or Cooperate in Discovery, or, in the Alternative, In Limine to Exclude Evidence is **DENIED AS MOOT**.
3. Judgment is **ENTERED** in favor of defendant, Consolidated Rail Corporation, and against plaintiff, Joseph R. Ricciardi.
4. The Clerk of Court is instructed to mark this case **CLOSED**.

Norma L. Shapiro, S.J.