

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

ROBERT FOREMAN	:	CIVIL ACTION
	:	
v.	:	
	:	
CONSOLIDATED RAIL CORP.	:	NO. 99-2804

MEMORANDUM ORDER

Plaintiff asserts claims against Conrail under the ADA and § 504 of the Rehabilitation Act for failing to accommodate his lower back and leg pain. Presently before the court is defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Defendant contends that plaintiff's claims should be dismissed because he has not exhausted his administrative remedies by filing a charge with the EEOC. Filing a charge with the EEOC and obtaining a right-to-sue letter according to the procedures established for Title VII claims are necessary prerequisites to a suit under the ADA. See 42 U.S.C. § 12117(a); Reddinger v. Hospital Ctr. Serv., Inc., 4 F. Supp. 2d 405, 409 (E.D. Pa. 1998).

While acknowledging that he has not filed a charge with the EEOC, plaintiff contends the filing requirement has been satisfied because he was a member of the class in Mandichak v. Consolidated Rail Corp., No. 94-1071 (W.D Pa. Oct. 24, 1996) in which several of the named plaintiffs had filed charges of disability discrimination with the EEOC. The Court in Mandichak, No. 94-1071 (W.D Pa. Oct. 24, 1996), certified for injunctive relief only a class consisting of current and former Conrail

employees who, since July 25, 1992, had been denied employment or other employment benefits by Conrail because of their disabilities. The Court denied the motion to certify a Rule 23(b)(3) class for claims for damages. The Court ultimately entered judgment in favor of defendant Conrail and vacated the previous order certifying the class, without prejudice to former class members to assert any individual claims against Conrail. See Mandichak v. Consolidated Rail Corp., No. 94-1071 (W.D. Pa. August 20, 1998) (order entering judgment).

Defendant accepts that the limitations period for filing an administrative charge was tolled during the pendency of the class action, but argues that plaintiff was required to file an individual charge upon decertification. Plaintiff contends that he should be able to rely on the charges filed by the class representatives under the "single filing" rule.

The Third Circuit has accepted that "to the extent that the class was properly certified" a class member may participate in a Title VII class action without individually filing a charge, provided that a class representative or another member of the class has filed a charge. McNasby v. Crown Cork and Seal Co., 888 F.2d 270, 282 (3d Cir. 1989), cert. denied, 494 U.S. 1066 (1990). The Third Circuit, however, has never held that the single filing rule applies to actions under Title VII by individuals who had been part of an injunctive class which was decertified.

Plaintiff's reliance on Tolliver v. XEROX Corp., 918 F.2d 1052 (2d Cir. 1990) is misplaced. The Court in Tolliver held that the "single filing rule" applied to individual suits under the Age Discrimination in Employment Act ("ADEA") while noting that the rule has been used in Title VII cases "only to permit joining a preexisting suit in which at least one plaintiff had filed a timely charge." Id. at 1057 (emphasis added). The Court in Tolliver distinguished ADEA cases on the ground that, unlike Title VII cases, they do not require a plaintiff to obtain a right-to-sue letter. The Third Circuit rejected Tolliver, holding that even in ADEA cases plaintiffs suing individually must first file an EEOC charge and reaffirming that only one who is a member of a properly certified class may piggyback even where the scope of an EEOC investigation could reasonably be expected to touch upon his situation. See Whalen v. W.R. Grace & Co., 56 F.3d 504, 507 (3d Cir. 1995). The plaintiffs in Whalen had filed EEOC charges alleging a "company-wide" policy of defendant to terminate older workers because of age.*

The Court in Mandichak denied injunctive relief and decertified the injunctive class encompassing plaintiff.

* The other cases cited by plaintiff are similarly inapposite. In Lusardi v. Lechner, 855 F.2d 1062 (3d Cir. 1988), the Court held that class members may participate in an opt-in ADEA class action without individually filing charges where a class representative had done so. Id. at 1078. The Court in Green v. United States Steel Corp., 481 F. Supp. 295 (E.D. Pa. 1979) held only that the filing requirement is tolled during the pendency of a class action. Id. at 300-01. Winbush v. Iowa, 66 F.3d 1471(8th Cir. 1995) concerned the filing requirement of interveners in a pre-existing Title VII suit. Id. at 1477.

Plaintiff has not filed an EEOC charge. He cannot now pursue the ADA claim asserted in this action.

Claims under § 504 of the Rehabilitation Act by non-federal employees, however, do not require the filing of an administrative charge. Such an employee may initiate a disability discrimination suit under §504 against an employer that receives federal funds without first filing a charge with the EEOC. See Freed v. Consolidated Rail Corporation, 2000 WL 12858, *6 (3d Cir. Jan. 10, 2000); Brennan v. King, 139 F.3d 258, 268 n. 12 (1st Cir. 1998); Tuck v. HCA Health Servs., 7 F.3d 465, 470-71 (6th Cir. 1993); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990), cert denied, 501 U.S. 1217 (1991).

ACCORDINGLY, this day of February, 2000, upon consideration of defendant's Motion to Dismiss (Doc. #3) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to plaintiff's claim for relief under the ADA and is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.