

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

MENKOWITZ, et al. : CIVIL ACTION
 : No. 97-2669
v. :
 :
POTTSTOWN MEMORIAL :
MEDICAL CENTER, et al. :

O'Neill, J. December , 1997

MEMORANDUM

Plaintiffs Elliot and Susan Menkowitz bring this action asserting violations of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-88, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as well as various state law claims. Presently before the Court is defendants' motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. Proc. 12(b)(6). For the reasons set forth below, defendants' motion will be granted.

I. STANDARD

In considering defendants' Rule 12(b)(6) motion, I accept as true the well-pleaded factual allegations in the complaint and construe them in the light most favorable to plaintiffs. I may grant the motion only if I determine that plaintiffs may not prevail under any set of facts that may be proven consistent with their allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

II. FACTUAL ALLEGATIONS

The following facts are as set forth in the complaint. Plaintiff Elliot Menkowitz, M.D., is an orthopedic surgeon who joined the medical staff of defendant Pottstown Memorial Medical Center (PMMC), a private, non-profit community hospital, in 1973.¹ Throughout his tenure at PMMC, he “voiced his concerns regarding quality of care assurance issues with PMMC, including but not limited to the requirement that the hospital adhere to mandates of medical practice sanctioned by state and federal laws and regulations.” (Compl. ¶ 20.) He was diagnosed with Attention-Deficit Disorder (ADD) in July 1995. In October, 1995 he was reappointed by PMMC to the two-year term required by PMMC’s by-laws.

In April 1996, in reaction to plaintiff’s “repeated articulated concerns regarding omissions in medical care at PMMC,” PMMC and several of the individual defendants² accused him of inappropriate behavior unrelated to his care of patients. (Compl. ¶ 21.) During the course of discussions about these accusations, plaintiff disclosed to defendants that he suffered from ADD, but assured them that the disorder had not and would not affect his treatment of patients or interactions with staff. He subsequently provided PMMC with a report from his treating psychologist and physician confirming this assurance. He also agreed in June, 1996 to be examined by another physician at PMMC’s request, and this physician also confirmed that plaintiff’s disorder “does not and would not affect his ability to treat his patients or properly

¹ Susan Menkowitz is a plaintiff in this case only with regard to Count X, which alleges loss of consortium and is derivative of Elliot Menkowitz’s state law claims. In discussing Counts I and II in this opinion, I will refer in the singular to “plaintiff,” meaning Elliot Menkowitz.

² The individual defendants are employees, staff, or officers of PMMC. There is no need to differentiate among them for purposes of this opinion.

interact with the hospital staff.” (Compl. ¶ 24.)

In the months following this “resolution” of plaintiff’s capacity to maintain his practice at PMMC, he continued to express his concerns about the quality of care provided by defendants, including “improper and unlawful patient care and insurance practices.” (Compl. ¶ 25.) Subsequently, defendants began harassing and intimidating him, unfairly singling him out for accusations of minor infractions of hospital policy. On March 18, 1997, the Staff Medical Executive Committee (MEC) voted to summarily suspend plaintiff’s medical staff privileges. The MEC did not provide plaintiff with notice or a hearing prior to its vote, and did not inform him of its decision. On March 24, 1997, the Medical Committee of PMMC’s Board of Directors held a meeting on the MEC vote and, without giving plaintiff prior notice or a hearing, approved the decision to suspend plaintiff’s staff privileges for six months. Informed of his suspension the next day, plaintiff was subsequently rebuffed in his attempts to gain a hearing as required by PMMC’s by-laws. In addition, defendants disclosed their decision to various news media, resulting in public dissemination of reports suggesting medical impropriety on plaintiff’s part. As a result of these actions, plaintiff suffered injury with regard to his earnings, insurance coverage, practice at other institutions, and personal and professional reputations, as well as emotional distress.

III. DISCUSSION

Count I: Title III of the Americans with Disabilities Act

In Count I, plaintiff asserts a violation of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 - 12188. Title III proscribes discrimination on the basis of disability in public accommodations including hospitals such as defendant PPMC.³ It provides, in part:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Plaintiff alleges that defendant PPMC⁴ failed to accommodate his ADD-related behavior, treated him disparately with regard to alleged minor infractions of hospital policies, interfered with his relationships with staff, patients, and other institutions, and refused to provide him with notice and a hearing prior to his suspension. He asserts that defendant thereby denied him the “opportunity to participate in and benefit from the goods, services, facilities, privileges, advantages and accommodations that it provides to other persons” in violation of Title III. (Compl. ¶ 46.) Defendant PPMC, on the other hand, contends that Title III addresses discrimination against individuals who patronize places that accommodate the public, not discrimination against those individuals such as defendant who work at places of public accommodation. I agree, and conclude that plaintiff therefore cannot state a claim under this

³ Defendants do not appear to dispute that PPMC is a place of public accommodation under Title III. See 42 U.S.C. § 12181(7)(F).

⁴ Only PPMC is named as defendant in Counts I and II.

title.

The ADA is not an exhaustive proscription of all disability-based discrimination by private entities such as defendant PPMC. Rather, the Act addresses two sorts of private discrimination: employment discrimination, proscribed by Title I, and discrimination in public accommodations, services, and transportation, proscribed by Title III.⁵ Title III, in turn, does not purport to protect all disabled persons from disability-based discrimination by places of public accommodation. Rather, it protects members of the public -- actual and would-be guests, customers, and clients -- who seek the “full and equal enjoyment” of the services, facilities, or other accommodations of places that serve the public. 42 U.S.C. § 12182(a); see also § 12182(b)(1)(A)(iv) (the “individuals and class of individuals” protected by this section are the “clients or customers of the covered public accommodation”).⁶ In the case of health care

⁵ Title II of the Act governs public entities, and proscribes a wide range of discriminatory practices in the services, programs, and employment practices of such entities. 42 U.S.C. §§ 12131-12165.

⁶ That the plain import of §12182(a) is to proscribe discrimination against the guests, customers, and clients of places held open for service to the general public is reinforced further by the definition of “public accommodations,” § 12181(7)(A):

The following private entities are considered public accommodations . . . if the operations of such entities affect commerce--

- (A) an inn, hotel, motel, or other place of lodging . . . ;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat , dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;

providers like PMMC, the public protected by Title III consists of persons seeking medical care, not the employees and other staff who serve them.

Likewise, Title III does not proscribe disability-based discrimination as to all facilities, services, goods, or activities controlled by a place of public accommodation. Rather, it bans discrimination with regard to such facilities, services, and accommodations as are “offered,” “afforded,” or “provided” to the public. 42 U.S.C. §12182(a); § 12182(b)(1)(B); § 12182(b)(2). Thus, in the case of health care providers such as defendant, Title III proscribes discrimination on the basis of disability in the provision of health care services and facilities. See, e.g., Sharrow v. Bailey, 910 F. Supp. 187 (E.D. Pa. 1995). Title III does not address defendant’s other activities, such as employment and staffing practices. See Motzkin v. Trustees of Boston Univ., 938 F. Supp. 983, 995-96 (D. Mass. 1996).

Plaintiff would have me hold that health care providers such as defendants serve or otherwise “accommodate” a “public” of potential staff physicians. Clearly, however, such an interpretation could result only from a tortured reading of statute that ignores the normal usages of the words “public” and “accommodate.” Moreover, plaintiff’s interpretation would suggest that employers “accommodate” a “public” of potential employees, leading to the untenable conclusion that disabled staff of any private entity which serves the public would have an action under both Title I and Title III of the ADA for employment discrimination. See, e.g., Motzkin, 938 F. Supp. at 996 (holding that private employment discrimination “is the exclusive province

(H) a museum, library, gallery, or other place of public display or collection;

of Title I”). As the legislative history states, “Title III is not intended to govern any terms and conditions of employment by providers of public accommodations . . . [E]mployment practices are governed by Title I.” S. Rep. No 116, 101st Cong., 1st Sess. 58 (1989).⁷

Plaintiff’s claim concerns a dispute over the conditions and termination of his position as a staff physician with defendant PMMC, not a service, privilege, or other accommodation PMMC offers the general public. His case concerns a contractual relationship with defendant most closely resembling employment, and is actionable under Title I if it is actionable under the ADA at all. It may be that plaintiff has not brought his action under Title I because, as an independent contractor (see Plfs. Brief at 31), he may not be an “employee” who can maintain an employment discrimination action under Title I. That plaintiff may find no relief under Title I, however, does not require that Title III be contorted beyond its plain meaning to encompass his claim.

For these reasons, I conclude that plaintiff’s claim is not actionable under Title III of the ADA. Accord Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) (employee could not maintain action under Title III against insurer and employer for alleged discrimination in benefit plan offered through employer); Leonard v. Israel Discount Bank of New York, 967 F.

⁷ The plain, limiting language of Title III is also fatal to plaintiff’s argument that the viability of his Title III claim is supported by cases recognizing similar claims brought by physicians under Title II of the ADA and under the Rehabilitation Act. In contrast to the relatively specific, narrow language of Title III, the latter both provide that no “qualified individual with a disability” shall “be subjected to discrimination” by covered entities. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). That a staff physician may maintain discrimination claims under these broadly-worded provisions is therefore in no way supportive of the viability of plaintiff’s claim under Title III. To the contrary, the contrast between the narrowly-drawn proscription of Title III and the broad language of these other provisions provides further evidence that Title III was not intended to address all discriminatory practices by covered entities, but only such discrimination as affects disabled members of the public served by them.

Supp. 802 (S.D.N.Y. 1997) (bank employee could not maintain action asserting discrimination in bank's employee disability insurance plan under Title III); Motzkin, 938 F. Supp. at 996 (professor could not maintain action under Title III against university for allegedly terminating him because of his disability).⁸

Count II: Section 504 of the Rehabilitation Act of 1973

Count II of plaintiff's complaint alleges a violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which provides in relevant part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

Defendants contend that plaintiff has failed to state a claim because he fails to allege that he was suspended "solely by reason of . . . his disability," an essential element of a claim under Section 504.⁹ See, e.g., Wagner v. Fair Acres Geriatric Ctr., 49 F.2d 1002, 1009 (3d Cir. 1995).

Again, I agree.

⁸ Since I find that plaintiff cannot state a claim under Title III even if he was discriminated against because of a disability, I need not consider defendants' argument that plaintiff has failed to allege he was "disabled" within the meaning of the ADA.

⁹ Defendants also argue that plaintiff may not pursue a civil action under this provision until he has exhausted his administrative remedies. The cases cited by defendants in support of this argument, Jeremy H. v. Mount Lebanon School Dist., 95 F.3d 272 (3d Cir. 1996) and Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1995), are inapposite. They involved the relationships between Section 504, which does not itself require exhaustion of administrative remedies, and Section 501 of the Act (governing federal employment discrimination) and the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 *et seq.* (governing discrimination in education), both of which do require that plaintiffs exhaust administrative remedies before filing civil actions. In an action such as this brought under Section 504 against a private entity and involving no potential incongruity in remedial schemes, exhaustion of administrative remedies is not required. See Jeremy H., 95 F.3d at 282; Bracciale v. City of Philadelphia, 1997 WL 672263, *3-6 (E.D. Pa. 1997).

The closest plaintiff comes to making such an allegation is his assertion that defendants wrongly suspended him without providing notice and a hearing at which he might “explain his behavior that may be related to his disorder.” Compl. ¶ 50(d). But he never alleges that he was maltreated due to his disorder or behavior resulting from the disorder, much less that he was fired solely for either reason. Indeed, to the contrary, plaintiff’s complaint appears to assert that his workplace behavior was unaffected by his disorder. Plaintiff alleges that, after informing defendants of his ADD, he (1) assured them that his ADD “did not affect his ability to treat his patients or properly interact with hospital staff,” (Compl. ¶ 22); (2) provided defendants with “a written report from his clinical psychologist and treating physician confirming that the disorder had not and would not affect his ability to treat his patients or properly interact with the hospital staff,” (Compl. ¶23); and (3) at defendants’ request, “was examined by William R. Dubin, M.D., who also confirmed that plaintiff’s disorder does not and would not affect his ability to treat his patients or properly interact with the hospital staff.” (Compl.¶ 25.) Thus, the complaint appears to deny that plaintiff’s disability affected his interactions with staff and patients.

In addition, while not expressly stating exactly what motivated his mistreatment, plaintiff strongly implies that the reason for it was his criticisms of medical care at PMMC. Plaintiff alleges that, prior to his informing defendants of his disorder, the following occurred:

20. Throughout his tenure as a member of the Medical Staff at PMMC, plaintiff voiced his concerns regarding quality of care assurance issues with PMMC, including but not limited to the requirement that the hospital adhere to mandates of medical practice sanctioned by state and federal laws and regulations.

21. In early April 1996, based on dissatisfaction with plaintiff’s repeated articulated concerns regarding omissions in medical care at PMMC, [defendants] accused plaintiff of allegedly inappropriate behavior unrelated to the quality of patient care rendered by plaintiff.

And, after plaintiff had informed defendants of his disorder and provided assurances, as previously described, that it did not affect his interactions with staff or patients, the following is alleged to have occurred:

25. In the months following the resolution of any questions of plaintiff's ability to practice medicine (and specifically orthopedic surgery while suffering ADD), plaintiff continued to express his concerns about the quality of medical care at PMMC as provided by or under the supervision of the individual defendants, including but not limited to problems of improper and unlawful patient care and insurance practices by the defendants.

26. Thereafter, defendant PMMC and the individual defendants engaged in a pattern of harassment and intimidation of plaintiff, unfairly and disparately accusing him of minor infractions of hospital policies.

27. On March 18, 1997, the MEC of the Medical Staff of PMMC, without notice to plaintiff, voted to summarily suspend plaintiff's medical staff privileges....

Thus, plaintiff not only fails to allege he was discriminated against solely because of his disability, but unmistakably implies that defendants' maltreatment was in retaliation for his criticisms of defendants' medical practices -- criticisms never alleged to be related to his disability. Thus, even taking plaintiff's allegations in a light most favorable to him, I cannot conceive of any set of facts that would both be consistent with these allegations and allow plaintiff to prevail on a claim that he was discriminated against "solely by reason of" his alleged disability. Accordingly, I conclude that plaintiff has failed to state a claim under section 504 of the Rehabilitation Act.¹⁰

¹⁰ Because I conclude plaintiff has failed to allege he was discriminated against solely for reason of his disability, I need not address defendants' argument that plaintiff has not alleged he was disabled within the meaning of the Rehabilitation Act.

Pendant State Law Claims

In addition to his claims under the ADA and Rehabilitation Act, plaintiff alleges several claims based on state law. Because I have dismissed the federal claims upon which original jurisdiction was based in this non-diversity suit and discern no compelling reason at this early stage of the litigation to continue to entertain plaintiff's state law claims, I will decline to exercise supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(c); Growth Horizons, Inc. v. Delaware Cty., 983 F.2d 1277, 1284-85 (3d Cir. 1993).