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

GEORGE COLEMAN	:	**CIVIL ACTION**
	:	
	:	
v.	:	
	:	
ALBERTSON'S, INC.	:	**NO. 04-CV-4090**
	:	

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **May 4, 2005**

Plaintiff George Coleman ("Coleman") brought this action alleging violations of the Americans with Disability Act ("ADA"), the Pennsylvania Human Relations Act ("PHRA"), and Title VII of the Civil Rights Acts of 1964 and 1991 ("Title VII") by Albertson's, Inc. ("Albertson's"). Presently before the court is Albertson's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for Coleman's failure to state a claim.

I. FACTUAL BACKGROUND

In 1991, Coleman was hired by Albertson's to drive, load, and unload trucks. On September 29, 2000, Coleman was injured in the course of his employment. He was injured again on January 27, 2001, and temporarily left work while receiving workers' compensation. On November 20, 2001, Coleman's personal physician, Dr. Randall Smith ("Dr. Smith") released him to work with a 50-pound lifting restriction. Dr. Richard Mandel ("Dr. Mandell") also examined Coleman at Albertson's request. Based on Dr. Mandel's evaluation, Albertson's informed Coleman by letter

dated December 11, 2001, that he was capable of returning to work without restrictions. Coleman was instructed to report to his normal full-time driving position on December 18, 2001.[1] Coleman subsequently wrote several letters requesting work compatible with the 50-pound lifting restriction, but Albertson's did not respond to any of Coleman's requests. At oral argument, Coleman's counsel stated he returned to work at Albertson's in 2004. The parties dispute whether he did so without restrictions.

Coleman asserts that by failing to provide him with work compatible with the 50-pound lifting restriction, Albertson's violated his right to reasonable accommodation as a disabled person under the ADA, PHRA, and Title VII. Coleman also alleges retaliation under the ADA and PHRA, and seeks punitive damages under the PHRA. Coleman filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 27, 2003.

II. DISCUSSION

Albertson's moves for dismissal of Coleman's claims under Rule 12(b)(6) on several grounds: 1) Coleman failed to file a

[1] Coleman alleges that Albertson's letter misstated Dr. Mandel's evaluation, and that Dr. Mandel placed restrictions on Coleman's ability to return to work. For the purposes of this motion, the court accepts Coleman's allegations as true. The court also notes that the December 11, 2001 letter shows it was copied to counsel for Coleman; counsel was on notice of a potential statute of limitations issue.

charge with the EEOC within the statutorily prescribed 300-day limitations period; 2) Coleman did not allege retaliation in his EEOC charge, and therefore failed to exhaust his administrative remedies with respect to this claim; 3) Coleman's claim under Title VII must be dismissed because disability is not a protected class; and 4) punitive damages are not available under the PHRA.

Under the ADA, Title VII, and PHRA, if a plaintiff fails to file a charge of discrimination within 300 days after the alleged unlawful employment practice, his claim is time-barred. 42 U.S.C. § 2000e-5(e); National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1997). The statute accrues when the employee receives notice of the unlawful practice. Delaware State College v. Ricks, 449 U.S. 250, 257 (1980).

Coleman argues the statute of limitations has not yet accrued because he was not terminated, but was continually employed by Albertson's without accommodation of the lifting restriction. By this logic, Albertson's is committing an on-going violation of his rights. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." Id. See also Sessa v. Sears Roebuck & Co., Inc., No. CIV.A.03-CV-5477, 2004 WL 2203743, *2 (E.D.Pa. Sept. 30, 2004).[2] Coleman received notice of

[2] Albertson's also cites to Zdziech v. DaimlerChrysler Corp., 114 Fed.Appx. 469 (3d Cir. 2004), a non-precedential opinion. Although Zdziech is directly on point, the courts of

Albertson's allegedly unlawful practice by its letter of December 11, 2001. Coleman did not file an EEOC charge until March 27, 2003. He failed to file an EEOC charge within 300 days, so his claim is barred by the statute of limitations.

Coleman's claim of discrimination under Title VII fails for an additional reason. Title VII only prohibits discrimination because of race, color, religion, sex, or national origin; disability is not a protected class. See 42 U.S.C. § 2000e-2. Coleman, relying on Walton v. Mental Health Ass'n. of Southeastern Pennsylvania, 168 F.3d 661 (3d Cir. 1999), argues that our Court of Appeals has considered claims of disability discrimination under Title VII. Coleman misunderstands Walton, involving a claim under the ADA. Walton merely recognized that the Supreme Court has adopted the same enforcement mechanisms for the ADA as for Title VII and the ADEA. Id. at 666.

Coleman's claim of failure to accommodate under the ADA also fails for an additional reason. The Court of Appeals has held that the inability to lift more than ten pounds does not constitute a "substantial limitation" a major life activity, as required to establish a claim under the ADA. Marinelli v. City of Erie, Pa., 216 F.3d 354, 364 (3d Cir. 2000). Coleman's own physician only restricted him from regularly lifting more than 50

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this circuit give no authority to non-precedential opinions. Third Circuit Internal Operating Procedure 5.7 (July 2002).

pounds.[3] This limitation is less restrictive than a 10-pound lifting restriction, so it cannot qualify as a "substantial limitation" a major life activity.

Coleman's claims of retaliation under the ADA and PHRA also fail. Coleman made no reference to retaliation or facts that could encompass retaliation in his EEOC charge. He failed to exhaust his administrative remedies with regard to this claim. See Burgh v. Borough Council of Borough of Montrose, 251 F.3d 465, 469 (3d Cir. 2001); Antol v. Perry; 82 F.3d 1291, 1295 (3d Cir. 1996).

Finally, Coleman's claim for punitive damages under the PHRA fails because punitive damages are not available. Hoy v. Angelone, 720 A.2d 745 (Pa. 1998).

III. CONCLUSION

For the reasons above, Albertson's motion to dismiss is granted on all claims. An appropriate order follows.

[3] This fact is included in several attachments Coleman has submitted with his pleadings. A court may consider undisputedly authentic exhibits without converting a motion to dismiss into a motion for summary judgment. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993); Fed.R.Civ.P. 10(c).

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ORDER

AND NOW, this 4th day of May 2005, for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that Defendant's motion (Doc. No. 4) to dismiss Plaintiff's complaint is **GRANTED**.

/s/ Norma Shapiro
Norma L. Shapiro, S.J.