

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JACQUELYN M. QUINT,)	
)	
Plaintiff)	
)	
v.)	Civil No. 96-71-B
)	
A. E. STALEY MFG. CO.,)	
)	
Defendant)	

ORDER AND MEMORANDUM OF DECISION

The defendant has moved for reconsideration by the Court of its memorandum of decision dated April 23, 1997, in the above-captioned matter. In particular, the defendant contends that the Court failed to consider one of the arguments advanced in its motion for a summary judgment, i.e., that the plaintiff's failure to pursue her collective bargaining agreement (CBA) remedies precludes her from raising a claim pursuant to the Americans with Disabilities Act, 42 U.S.C. §§ 12101 - 12213 (1995 & Supp. 1997) (ADA), in this matter. The defendant also requests that the Court reconsider its reliance on the Labelle affidavit in its prior decision and asks that the Court grant its outstanding motion pursuant to Federal Rule of Civil Procedure 16(f) to exclude such testimony.

As an initial matter, the Court grants the defendant's motion to reconsider its prior decision. A district court is afforded substantial discretion in ruling on a motion for reconsideration. *Serrano-Perez v. FMC Corp.*, 985 F.2d 625, 628 (1st Cir. 1993) (citations omitted). Although the Court did not reach the issue of mandatory arbitration in its prior order because it dismissed the majority of the plaintiff's claims on other grounds, the defendant correctly points out that it erroneously failed to consider that same argument with respect to the

plaintiff's remaining ADA claim. The defendant has throughout this proceeding maintained that all of the plaintiff's civil rights claims, including her ADA claim, must be dismissed due to her failure to pursue her CBA remedies. The Court also grants the defendant's motion as it relates to its request that the Court reconsider its ruling, or lack thereof, concerning the Labelle affidavit's admissibility in evidence.

I. The collective bargaining agreement

The defendant first contends that the grievance and arbitration procedures outlined in the CBA between it and the plaintiff's union provides a mandatory and exclusive remedy for the plaintiff's ADA claim. Relying on *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 432 (1996), the defendant maintains that as an employee, the plaintiff must follow the grievance procedure established by the CBA instead of filing suit in federal court. The issue then is whether the CBA compels the arbitration of the plaintiff's statutory rights. The Court is unpersuaded by the defendant's argument on this issue, and finds its reliance on *Austin* unavailing.

Unlike the instant case, the arbitration provision in the CBA at issue in *Austin* specifically listed gender and disability discrimination as claims subject to arbitration. The Fourth Circuit affirmed the trial court's dismissal of the plaintiff's Title VII and ADA claims, holding that the agreement to arbitrate the statutory claims was mandatory and enforceable. *Austin*, 78 F.3d at 886. In reaching its decision, the court noted that "the only difference between these six cases [cited in support of the holding] and this case is that this case arises in the context of a collective bargaining agreement." *Id.* at 885 (citations omitted). As the court in *Hill v. American Nat. Company/Foster Forbes Glass*, 952 F. Supp. 398 (N.D. Tex. 1996), subsequently would find,

however, "this Court agrees with the *Austin* dissent that 'the only difference makes all the difference.'" *Id.* at 404 (citing *Austin*, 78 F.3d at 886).

In the case at bar, the relevant arbitration language is found in Article 6 of the CBA. The relevant portions of that section provide that:

If the Grievance Committee decides that there is a difference or dispute concerning an alleged violation as to the terms of this Agreement, or a violation of law governing Employer-Employee relations, or any type of improper supervisory conduct, it shall be taken up between the Grievance Committee and the Management within fifteen (15) days of the alleged violation.

...

In the event a grievance is not settled . . . it shall be requested for arbitration .

...

The decision of the Arbitrator shall be final and binding on both parties hereto.

The Court is unpersuaded that such language mandates as the plaintiff's sole method of pursuing her statutory claim the arbitration process set forth above. The Court is, rather, persuaded by the reasoning in a recent Seventh Circuit Court of Appeals ruling that "the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997) (holding that worker's statutory rights, including those conferred by the ADA, are arbitrable only if worker consents to have them arbitrated).

Although the Supreme Court has not directly addressed this issue in the context of an ADA claim, two cases are cited by the parties as approximations of the Court's likely thinking on the issue. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a case relied on by the plaintiff, the Court held that the arbitration of a contractual right not to be discriminated against

does not preclude enforcement of a statutory right. *Id.* at 59-60. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), a case cited favorably by the defendant, the Court held that a stockbroker who signed a registration agreement with the New York Stock Exchange in which he consented to the arbitration of any dispute arising out of his employment but later filed an ADEA suit in federal court had to submit his claim of age discrimination to arbitration. *Id.* at 35.

Although the Court in *Gilmer* did not overrule *Alexander*, "it did say that the mistrust of the arbitral process that had permeated that opinion had been 'undermined' by subsequent decisions evincing a positive attitude toward arbitration." *Pryner*, 109 F.3d at 364 (quoting *Gilmer*, 500 U.S. at 34 n.5). The *Gilmer* Court was careful, however, to distinguish *Alexander* on at least three grounds, one of which, significant in the instant case, was that arbitration in *Alexander* had occurred in the context of a CBA, creating a "tension between collective representation and individual statutory rights." *Gilmer*, 500 U.S. at 35. On balance, this Court is of the opinion that the *Gilmer* opinion cannot, as the defendants would have it, "be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights." *Pryner*, 109 F.3d at 365.

As far as precedential authority in this circuit is concerned, the Court's research discloses that no case is directly on point. A case similar to the one at bar, however, is *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990). In *Utley*, the court held that an employee was not required to participate in arbitration of her Title VII claim prior to a judicial hearing on it, even though she had signed an agreement to arbitrate any dispute that arose between her and her employer. *Utley*, 883 F.2d at 187. In that opinion, the court noted that "[i]n this circuit the court has articulated previously that the proper inquiry regarding arbitrability . . . is one of Congressional intent." *Id.* at 186. Although the defendant correctly points out that the

ADA encourages the utilization by parties of arbitration, *see* 42 U.S.C. § 12212 (1995), "the legislative history of the statute reveals that Congress intended to encourage only *voluntary* agreements to arbitrate." *Hill*, 952 F. Supp. at 406 (footnote omitted).¹ "[T]he ADA provides a judicial forum for the resolution of disability discrimination allegations. 42 U.S.C. § 12117 [1995]. *Alexander's* preclusion of a union's prospective waiver of individual rights includes the right to a judicial forum." *Id.* Other jurisdictions are in accord with the view that a CBA cannot require an employee to exhaust their statutory claims before prosecuting them in federal court. *See Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996) (reversing trial court holding that plaintiff was required to exhaust his arbitral remedy prior to filing his Fair Labor Standards Act claim); *Hill v. American Nat. Company/Foster Forbes Glass*, 952 F. Supp. 398 (N.D. Tex. 1996) (holding that Title VII and ADA rights, by their very nature, can form no part of collective bargaining process and, thus, cannot be prospectively waived by union); *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737 (N.D. Cal. 1996) (holding that, although arbitration not in disfavor under ADA, employee's statutory rights could not be waived by CBA); *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 914 F. Supp. 454 (D. Kan. 1996) (finding that binding arbitration provisions of Railway Labor Act did not preempt employee's ADA suit); *Riley v.*

¹ The House reports to the Americans with Disabilities Act make clear what the drafters meant by the term "voluntary":

It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. *Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.*

Hill v. American Nat. Company/Foster Forbes Glass, 952 F. Supp. 398, 406 (N.D. Tex. 1996) (quoting H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), reprinted in 1990 U.S.C.C.A.N. pp. 267, 565, 598) (emphasis added).

Weyerhaeuser Paper Co., 898 F. Supp. 324 (W.D. N.C. 1995) (holding that court retained subject matter jurisdiction despite employee's failure to exhaust procedures under CBA); *Claps v. Moliterno Stone Sales, Inc.*, 819 F. Supp. 141 (D. Conn. 1993) (grievance procedures of CBA did not apply to employee's Title VII claim).

Thus, having reconsidered its prior ruling, the Court is of the view that the CBA language in the instant case does not preclude the plaintiff from pursuing her ADA claim in federal court. The defendant's motion for a summary judgment on this claim is denied.

II. The Labelle affidavit

The defendant also moves the Court to revisit its prior ruling to the extent it relied on the affidavit testimony of Dr. Jean Labelle. In denying the defendant's motion for a summary judgment on the plaintiff's ADA claim in its prior memorandum of decision, the Court cited as support the affidavit of Labelle, in which he testified to recommending a permanent lifting restriction of five pounds on an occasional basis for the plaintiff. In doing so, the Court did not formally address the defendant's outstanding motion, dated March 17, 1997, to exclude the evidence pursuant to Federal Rule of Civil Procedure 16(f). To the extent that the defendant wishes the Court to do so now, it is willing to oblige: the motion is denied.

The defendant maintains that Labelle's affidavit testimony should be excluded from the evidence because it contradicts the plaintiff's prior expert disclosure pursuant to Rule 16. Specifically, the defendant contends that because the Court's prior scheduling order required Labelle to disclose all of his opinions by a date certain, and in view of the fact that Labelle's recent opinion in the affidavit with respect to the plaintiff's lifting restriction is "substantially" different from the one he expressed earlier, it should be excluded as a violation of discovery.

Rule 16(f) incorporates the discovery sanctions set forth in Federal Rule of Civil Procedure 37(b)(2), and authorizes the court to enter an order prohibiting the introduction of designated matters in evidence if a party violates a scheduling or pretrial order. Fed. R. Civ. P. 16(f). Sanctions, of course, are a matter for the court's discretion. *Jensen v. Frank*, 912 F.2d 517, 524 (1st Cir. 1990). "The broad measure of discretion enjoyed by the district courts in managing the litigation before it includes the control of pre-trial discovery." *Serrano-Perez*, 985 F.2d at 628 (citing *Mark v. Great Atlantic & Pacific Tea Co., Inc.*, 871 F.2d 179, 186 (1st Cir. 1989); *In re Recticel Foam Co.*, 859 F.2d 1000, 1006 (1st Cir. 1988) (district judge is in unique position to balance all potentially conflicting interests among the litigants and its decisions on the scope of the discovery process ordinarily are left to the judge's informed judgment)).

The Court is unpersuaded by the defendant's contention that a sanction is appropriate in this instance. First, the Court finds that Labelle's testimony via affidavit is sufficiently similar to his earlier written reports or deposition testimony on this issue, and therefore is satisfied that such opinions were disclosed by Labelle within the requisite deadline period. As the Court found in its prior order denying the defendant's motion for a summary judgment on this claim, there is a genuine issue as to the extent of the plaintiff's alleged lifting disability, and the existence of such an issue derives in part from the various and conflicting evidence. Second, to the extent the defendant suggests that the plaintiff deliberately violated the Court's scheduling order by not timely disclosing Labelle's opinion that she is unable to lift more than five pounds occasionally, and that she misled the defendant into thinking she was able to lift ten pounds routinely, the Court is satisfied that such actions were unintentional and are the result of competing views as to what reasonable inferences may be drawn from the various evidence. The Court of course is

sympathetic to the defendant's argument that it has expended great sums of time and money hiring experts and researching the merits of the plaintiff's case, all based on prior assumptions derived from earlier discovery proceedings. Such expenditures on the part of the defendant were, however, undertaken through its own choice, and reflect the risks and challenges of litigation in this District.

Accordingly, the defendant's motion to exclude the evidence in the Labelle affidavit as part of a sanction against the plaintiff is denied.

III. Conclusion

For the foregoing reasons, the Court hereby directs that the defendant's motion for reconsideration of its prior rulings in this matter is **GRANTED**, but that the defendant's motion for a summary judgment on the plaintiff's remaining ADA claim on the basis of the collective bargaining agreement's provisions is **DENIED**, and that the defendant's motion to exclude the Labelle affidavit testimony from evidence as a sanction to the plaintiff for a discovery violation is **DENIED**.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated this 14th day of May, 1997.