

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )  
 )  
Plaintiff, )  
 )  
vs. ) NO. CIV-04-660-T  
 )  
BURLINGTON NORTHERN & SANTA )  
FE RAILWAY COMPANY, )  
 )  
Defendant. )

ORDER

Before the court is the defendant’s motion [Doc. No. 5] to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Defendant contends that the allegations in the complaint fail to state a claim upon which relief may be granted. Plaintiff has responded, and defendant has filed a reply brief in support of its motion.

The Equal Employment Opportunity Commission (“EEOC”) brought this action to pursue an alleged violation of the Americans with Disabilities Act (“ADA”) by defendant Burlington Northern & Santa Fe Railway Company (“Burlington”). The EEOC alleges that Burlington violated the ADA by withdrawing a conditional job offer to Thomas Freeman. More specifically, the EEOC alleges that Burlington withdrew the offer because it regarded or perceived Freeman as disabled.

Burlington contends that dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is warranted because the allegations show that the EEOC’s legal theory is invalid. Burlington acknowledges, however, that the invalidity on which it relies must be demonstrated by reference to material outside the scope of the pleadings. It contends that, because of the nature of this material, it can be considered as a part of the complaint and,

therefore, the court need not convert this motion to a motion for summary judgment. In response, the EEOC submits additional documents outside the scope of the complaint. Although the EEOC notes that Burlington's reference additional material, it responds to the motion as one seeking dismissal rather than summary judgment. If the motion is converted to one for summary judgment, the EEOC asks that it be given the opportunity to conduct discovery prior to responding to the motion, as provided in Fed.R.Civ.P. 12 (c) and Fed.R.Civ.P. 56(f).

As a general rule, the court cannot consider material outside the pleadings when ruling on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). "In deciding a Rule 12(b)(6) motion, a federal court generally "should not look beyond the confines of the complaint itself." MacArthur v. San Juan County, 309 F.3d 1216, 1221 (10<sup>th</sup> Cir. 2002), *citing* Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 960 (10th Cir.2001), *rev'd on other grounds*, 537 U.S. 79 (2002).

There are two exceptions to this rule. MacArthur, 309 F.3d at 1221. First, the district court may consider "mere argument" contained in the parties' memoranda concerning a motion to dismiss. Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454, 457 (10th Cir.1978). Second, "[i]t is accepted practice, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." Howsam, 261 F.3d at 961 (quotation omitted). *See also* GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir.1997). Where the defendant presents such documents, the court is not required to consider them in ruling on the motion to dismiss; rather, the court has the discretion to decide if it should do so. Prager v. LaFaver, 180 F.3d 1185, 1188-89 (10th Cir. 1999).

In this case, Burlington does not argue that the factual allegations in the complaint are deficient, but it contends that those allegations, taken as true, present an invalid legal theory. In summary, Burlington contends that Freeman does not qualify as disabled as required by the ADA because he is not substantially limited in a major life activity. The major life activity alleged by the EEOC is that of working; Burlington argues that Freeman cannot be so limited in the context of the definition of that term. As Burlington points out, the regulations applying the ADA provide that, to qualify as being substantially limited in the major life activity of working, one must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” 29 C.F.R. § 1630.2(j)(3)(i).

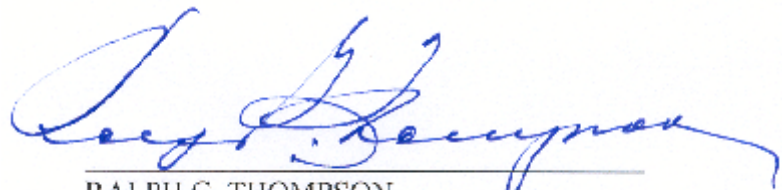
The parties’ briefs reflect that the primary question at issue is whether Freeman satisfied the definition of a qualified person with a disability. That issue, in turn, depends at least in part on the question of whether he was substantially limited in the major life activity of working. As the parties’ briefs reflect, the EEOC regulations governing the ADA require that, to be so limited, an individual must be restricted in the ability to perform a class of jobs or a broad range of jobs in various classes.

It is apparent to the court that this key question cannot be resolved by reviewing the complaint, the EEOC charge of discrimination, Burlington’s response, or the other correspondence submitted by Burlington as exhibits to its brief. While these materials outside the scope of the pleadings may be regarded as central to understanding the basis of the EEOC claim, they do not resolve the question of whether Freeman satisfies the ADA requirements of an individual substantially limited in the life activity of working. Whether he was restricted in his ability to perform a class of jobs or a broad range of jobs is a question which requires

submission of additional evidence outside the scope of the pleadings, according to the affidavit submitted by the EEOC as its Exhibit 3.

The court finds that the complaint, on its face, states a claim upon which relief may be granted and that dismissal is inappropriate. Even if the court were to consider the additional materials submitted by the parties are a part of the complaint for purposes of a motion to dismiss under Fed.R.Civ.P. 12(b)(6), those documents would not resolve the issue. Therefore, Burlington's motion to dismiss [Doc. No. 5] is DENIED.

The court declines to convert the motion to one for summary judgment because, as the EEOC notes, no discovery has been conducted. Because it is possible that discovery will impact the validity of the parties' arguments regarding the major life activity of working as applied to this case, converting the motion at this time would not be economical or in the interest of the orderly adjudication of this case. Instead, the parties can pursue dispositive motions at a later time, if same are proper under the facts developed through discovery.



RALPH G. THOMPSON  
UNITED STATES DISTRICT JUDGE