

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

CESAR M. BOCACHICA and	:	
IDALIA MALDONADO	:	
V.	:	NO. 2:18-CV-04614
SEPTA and TOTAL TRANSIT	:	
CORP.	:	
	:	

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants, Southeastern Pennsylvania Transportation Authority ("SEPTA") and Total Transit Corp., by and through their undersigned counsel, Marshall Dennehey Warner Coleman & Goggin, hereby file their Brief in Support of their Motion to Dismiss Count II of Plaintiffs' Complaint.

I. INTRODUCTION

Plaintiffs commenced this action by filing a Complaint in the Court of Common Pleas of Philadelphia on September 18, 2018. Defendants then filed a Petition of Removal with this Court on October 26, 2018.

Plaintiffs allege that on June 4, 2018, Plaintiff, Cesar M. Bocachica was a passenger/business invitee of Defendants' CCT Connect Paratransit vehicle #6780. Plaintiffs allege that the operator of the vehicle failed to properly secure the Plaintiff's wheelchair to the mechanized lift when the operator started driving the van. Plaintiff's wheelchair "toppled over backwards" at or about the intersection of 24th Street and Oregon Avenue in Philadelphia, Pennsylvania. See Plaintiff's Complaint attached hereto as Exhibit "A".

Count I of Plaintiffs' Complaint asserts that Defendants were negligent in failing to properly secure, supervise and provide proper safety measures for Plaintiff's wheelchair and person inside the van. Count II of Plaintiffs' Complaint alleges that Defendants were in violation

of Title III of the Americans with Disabilities Act, 42 U.S.C. §12181 when they failed to insure that its personnel were trained to be proficient regarding the safe operation of vehicles and equipment. In connection with Count II, Plaintiffs assert that Defendants "engaged in reckless, wanton and outrageous conduct done with reckless indifference to the interests of the Plaintiff and others similarly situated." See Exhibit "A", paragraph 20.

Pursuant to Federal Rule of Civil Procedure 12(b), Defendants hereby file the instant Motion to Dismiss Count II of Plaintiffs' Complaint.

II. QUESTIONS PRESENTED

Should Count II of Plaintiffs' Complaint should be dismissed because Plaintiffs have failed to state facts sufficient to sustain a cause of action for violation of the Americans with Disabilities Act?

SUGGESTED ANSWER: Yes.

Should all averments of reckless conduct, recklessness, wantonness, gross negligence and/or punitive damages be dismissed because Plaintiffs have failed to state facts sufficient to support such averments?

SUGGESTED ANSWER: Yes.

III. LEGAL STANDARD

Rule 8 of the Federal Rules of Civil Procedure provides that a pleading must set forth a claim for relief which contains a short Plaintiffs' statement of claims showing that the Pleader is entitled to relief; the Complaint must provide the Defendant with fair notice of the claim. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering a Rule 12(b)(6) Motion to Dismiss, the Court must accept as true all factual allegations. See Ericson v. Partis, 551 U.S. 89,

94 (2007). "While a Complaint attached by a Rule 12(b)(6) Motion to Dismiss does not need detailed factual allegations, it is Plaintiffs' obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions in a formulaic resuscitation of a cause of action will not due." Twombly, 550 U.S. at 555 (internal citations omitted). Legal conclusions without factual support are not entitled to the assumption of truth. See, Ashcroft v. Iqbal, 129 F.Ct. 1937, 1949-50 (2009). The Court must dismiss if the Plaintiffs fail to allege enough facts "to state a claim for relief that is plausible on its face." Iqbal, 129 F.Ct. at 1949 (quoting Twombly, 550 U.S. at 570).

If a non-moving party cannot prove his/her facts about a doubt, the claim must be dismissed "without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." Neitzke v. Williams, 490 U.S. 319, 327 (1989).

IV. ARGUMENT

- A. Plaintiff has failed to state facts pursuant to state a cause of action in Count II for violation of the Americans with Disabilities Act.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiffs have failed to state a cause of action upon which relief may be granted under the Americans with Disabilities Act (ADA). The ADA prohibits employers from discriminating against a qualified individual with a disability because of the disability of such individual in regard to terms and conditions of employment. 42 U.S.C.S. §12112(a). A qualified individual with a disability is defined as a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individuals holds or desires. 42 U.S.C.S. §1211(8). Without direct evidence of disability discrimination, Plaintiff must show, *prima facie*, (1) that he or she is legally disabled within the definitions of the Americans with Disabilities Act; (2) that he or she is actually qualified to perform the essential function of his or

her job either with or without a reasonable accommodation, and (3) that he or she has suffered an adverse employment action because of his or her disability. McKay v. Toyota Motor Manufacturing, USA, Inc., 110 F.3d 369, 371 (6th Cir. 1997) (emphasis added).

In the instant matter, Plaintiff, Cesar M. Bocachica has not alleges that he was employed with SEPTA and/or Total Transit Corp. at the time of the incident. He has not alleged that he has suffered any adverse employment action because of his disability because of such an employment relationship with Defendant, SEPTA and/or Defendant, Total Transit Corp. In fact, there has been no factual averment that Plaintiff was employed by either Defendant in any capacity at any time whatsoever.

Accordingly, Plaintiffs' claim under the ADA (Count II of the Complaint) must be dismissed for failure to state a claim.

B. Plaintiff has failed to state sufficient facts to sustain our request for punitive damages in this case.

Plaintiffs allege that Defendants' conduct was "reckless and wanton" and "done with reckless indifference to the interest of the Plaintiff. See Exhibit "A", paragraphs 20 and 21. However, Plaintiffs have failed to set forth a claim for punitive damages. Pursuant to the ADA, a Plaintiff may be awarded punitive damages "if he demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the failure to protect the rights of an aggrieved individual." 42 U.S.C. 1981(a)(B)(1); Donlin v. Philip Lighting North America Corp., 581 F.3d 73, 79(m)(2) 3d. Cir. 2009). "Reckless indifference to the interests of others" means that "the actor has intentionally done an act of an unreasonable character and disregard of a risk known to him were so obvious that he must be taken had been aware of it, and so great as to make it highly probable that harm would follow." Evans v. Philadelphia Transportation Company, 418 Pa. 567, 574, 212 A.2d 440 (1965).

Simply pleading outrageous conduct does not satisfy the requirement of stating facts which would form a basis for a jury concluding that the conduct was such that an award for punitive damages was warranted. Here, Plaintiffs have failed to set forth facts to demonstrate that Defendants engaged in a discriminatory practice of malice or reckless indifference.

V. CONCLUSION

Defendants respectfully request that this Honorable Court grant their Motion to Dismiss Count II of Plaintiffs' Complaint.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN AND GOGGIN**

BY: EJT9902
Edward J. Tuite, Esquire
State I.D. No. 34631
620 Freedom Business Center, Suite 300
King of Prussia, PA 19406

DATE: November 5, 2018

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CERTIFICATE OF SERVICE

I, Edward J. Tuite, certify that on this date, I served a copy of the Motion to Dismiss Count II of Plaintiffs' Complaint of the above captioned action to this Court pursuant to 28 U.S.C. § 1441 and § 1446 via electronic filing, to the following counsel:

Bernard M. Gross, Esquire
Two Penn Center, Suite 1820
1500 JFK Blvd.
Philadelphia, PA 19102

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

BY: EJT9902
Edward J. Tuite, Esquire
Attorney for Defendants SEPTA and
Total Transit Corp.