IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-747-BO-1

FRANCES A. JAMES,

Plaintiff,

v.

PETER PAN TRANSIT MANAGEMENT, INC., and THE CITY OF RALEIGH, NORTH CAROLINA,

Defendants.

MEMORANDUM AND RECOMMENDATION AND ORDER

BO-11, p.164

This cause comes before the court on separate motions for summary judgment filed by Defendants and Plaintiff's motion to compel. Plaintiff has filed responses to Defendants' motions for summary judgment, and Defendants have filed replies. Defendant Peter Pan Transit Management, Inc. has filed a response to Plaintiff's motion to compel. Therefore, these matters are now ripe for disposition.

I. Procedural Background

On September 23, 1997, Plaintiff filed this action, naming as defendants Peter Pan Transit Management, Inc. ("Peter Pan") and the City of Raleigh, North Carolina ("the City"). Plaintiff alleged the following causes of action: (1) violation of title II of the Americans with Disabilities Act ("ADA") by the City; (2) violation of section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") by Peter

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Pan and the City; (3) violation of title III of the ADA by Peter Pan; (4) violation of the North Carolina Handicapped Persons Act by Peter Pan and the City; and (5) negligence and negligence per se by Peter Pan and the City.

On November 10, 1997, Plaintiff filed a motion for leave to file an amended complaint, which the court granted on December 1, 1997. On December 2, 1997, Plaintiff filed her First Amended Complaint. On April 9, 1998, Plaintiff voluntarily dismissed her claim based on Defendants' alleged violation of the North Carolina Handicapped Persons Act.

On April 29, 1998, Plaintiff filed a motion to supplement and amend Plaintiff's complaint, which the court granted on June 1, 1998. On June 2, 1998, Plaintiff filed her Second Amended Complaint.

Plaintiff's Second Amended Complaint alleges the following causes of action: (1) violation of title II of the ADA by the City; (2) violation of section 504 of the Rehabilitation Act by Peter Pan and the City; (3) violation of title III of the ADA by Peter Pan; and (4) negligence and negligence per se by the City. Plaintiff requests injunctive relief, compensatory and punitive damages, and attorneys' fees.

On August 31, 1998, Plaintiff filed a motion to compel. On September 17, 1998, Defendant Peter Pan filed a response to Plaintiff's motion to compel.

Also on August 31, 1998, Defendants Peter Pan and

the City filed separate motions for summary judgment. On September 23, 1998, Plaintiff filed responses to Defendants' motions. On October 7, 1998 and October 14, 1998, Defendant Peter Pan and Defendant City, respectively, filed replies.

II. Summary Judgment Standard

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-movant. See Anderson, 477 U.S. at 255.

There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. See Anderson, 477 U.S. at 250. The moving party can bear his burden either by presenting affirmative evidence, or by demonstrating that the nonmovant's evidence is insufficient to establish his claim. See Celotex Corp., 477 U.S. at 331 (Brennan, J., dissenting). A trial judge faced with a summary judgment motion "must ask

himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Anderson, 477 U.S. at 252.

III. Factual Background

The Capital Area Transit ("CAT") Connector system is a public transportation system that was designed by the city of Raleigh to compliment the CAT public bus system. The CAT Connector system provides public transportation for lower density areas of the city that are not serviced by the regular CAT buses. It operates primarily as a "demand responsive" service.

To use the CAT Connector system, a passenger must call at least one hour in advance to arrange a pick up time and place. The passenger must be present at the designated pick up location five minutes prior to the designated time. If a passenger is not present when a CAT Connector vehicle arrives, the CAT Connector driver will wait up to three minutes. CAT Connector passengers can be transported to any location within a particular zone or to designated stops where they can meet other CAT Connector vehicles and CAT buses.

The CAT Connector system consists of fifteen vehicles, eleven of which are in service at one time. Each vehicle can transport fifteen passengers and is equipped with

a Braun wheelchair lift. The wheelchair lift can be operated electronically and manually. There is room in each vehicle for one wheelchair passenger in a seating area behind the driver. Wheelchairs are secured to the vehicle floor with "tie-down" straps.

Peter Pan contracted with the City in June of 1996 to operate the CAT Connector system from July 1, 1996 to June 30, 1999. The CAT bus system is not operated by Peter Pan, but by another independent contractor.

Pursuant to the contract between Peter Pan and the City, the City leases all CAT Connector vehicles to Peter Pan for $1.00 per year per vehicle. The City is responsible for route and schedule planning, while Peter Pan is responsible for hiring, firing, and training all CAT Connector employees and for maintaining all CAT Connector vehicles.

Plaintiff, a CAT Connector wheelchair passenger, has regularly used the CAT Connector system since November of 1996. She claims that she has experienced numerous problems with CAT Connector service, due to inoperable CAT Connector wheelchair lifts and improperly trained CAT Connector drivers.

Specifically, Plaintiff's evidence tends to show that the following incidents occurred:

> (1) In November of 1996, Plaintiff waited four hours for a CAT vehicle to arrive. Felicia Carter, a dispatcher, told Plaintiff that when buses are crowded, she may have to wait longer than others because she takes up more room on the vehicle than non-wheelchair passengers;

(2) In November of 1996, Plaintiff encountered at least two CAT Connector vehicles with inoperable wheelchair lifts;

(3) On December 10, 1996, at 6 p.m., Plaintiff called the CAT Connector service to be picked up at the North Hills Mall. A CAT Connector vehicle sped past Plaintiff without stopping. Plaintiff called the CAT Connector service again and a second vehicle arrived at 8 p.m, but the driver told Plaintiff that his wheelchair lift did not work. Between 9:30 and 10 p.m., a third vehicle arrived. The driver tried to operate the wheelchair lift, but it did not work. Because the mall was closing, Plaintiff boarded by dragging herself onto the vehicle. During the ride, the driver told Plaintiff that other drivers tell her that their lift is broken because they don't want to transport her. Plaintiff climbed out of the vehicle without the wheelchair lift. Later that night, Plaintiff experienced discomfort and hemorrhaging from the vaginal area. In the morning, she went to the emergency room. Plaintiff had scrapes on her back, contusions on her thighs, and vaginal bleeding. Doctors performed a Dilation and Curettage procedure;

(4) On December 27, 1996, Plaintiff called the CAT Connector service between 2 and 2:30 p.m for a 4 p.m. doctor appointment. A CAT Connector vehicle did not arrive and Plaintiff missed her appointment;

(5) On May 29, 1997, a CAT Connector driver was unable to use the "tie-down" straps to secure Plaintiff's wheelchair. The driver told Plaintiff that she had not been shown how to use the "lock-down" belt and equipment;

(6) On May 30, 1997, Plaintiff called the CAT Connector service. A vehicle arrived with an inoperable wheelchair lift. A second vehicle arrived and Plaintiff was able to board it using the wheelchair lift. However, the lift did not work when she tried to disembark and the driver operated the lift manually;

(7) On June 24, 1997, a CAT Connector driver told Plaintiff that she was delayed because the wheelchair lift on her vehicle was inoperable and she had returned to the CAT Connector bus yard to obtain another vehicle. When the driver called

ahead to Plaintiff's connecting bus to report that Plaintiff would need wheelchair assistance, Plaintiff heard several drivers on the radio system argue about who would accommodate her. At least one driver said that his wheelchair lift was inoperable;

(8) On August 2, 1997, Plaintiff attempted to board a CAT Connector vehicle, but the wheelchair lift was inoperable. Another driver provided equipment to the driver of the first vehicle, who was then able to manually operate the lift;

(9) In August of 1997, a CAT Connector driver told Plaintiff that his lift was broken;

(10) In October of 1997, as Plaintiff was exiting a CAT Connector vehicle, the lift began to descend, but stopped. Passengers on the bus lifted Plaintiff's wheelchair and placed her on the ground;

(11) In October of 1997, a CAT Connector driver arrived to pick up Plaintiff, but told her that she had to meet other customers and would return. After thirty minutes, Plaintiff called the CAT Connector service and another vehicle arrived;

(12) In October of 1997, a CAT Connector driver told Plaintiff that his lift did not work;

(13) In October of 1997, Plaintiff waited over two hours for a CAT Connector vehicle to arrive;

(14) In October of 1997, the wheelchair lift on a CAT Connector vehicle did not work when Plaintiff tried to exit. Passengers dismantled Plaintiff's wheelchair and rolled her off the bus;

(15) On November 14, 1997, Plaintiff arrived at a CAT Connector stop. The driver of bus #81 told Plaintiff that his wheelchair lift did not work. Another driver arrived and told Plaintiff that she had driven bus #81 the previous day and that the lift had been operable;

(16) On December 23, 1997, while Plaintiff waited inside a Walmart, a CAT Connector vehicle drove by her. Plaintiff called the CAT Connector service and was told that a second vehicle would arrive in forty-five minutes. At 10 p.m., Plaintiff called a third time and was told that the second vehicle had

already been to her location. Plaintiff was forced to ride home alone in her wheelchair;

(17) On December 29, 1997, a CAT Connector driver was unable to operate his wheelchair lift electronically. Another CAT Connector driver told the first driver to turn the power on. Plaintiff was then able to board the vehicle;

(18) On January 2, 1998, the wheelchair lift on a CAT Connector vehicle did not work when Plaintiff tried to exit. Several of Plaintiff's neighbors lifted her wheelchair off the bus;

(19) On March 13, 1998, the wheelchair lift was inoperable on the CAT Connector vehicle responsible for the North Hills route. Plaintiff was told that the lift on the vehicle responsible for the Lassiter Mill route was also inoperable. Plaintiff took another bus system to return home.

Peter Pan drivers undergo a forty hour training course. As part of his or her training, each driver is required to cycle the wheelchair lift both electronically and manually at least five times. Peter Pan does not conduct refresher training.

Pursuant to Peter Pan policy, drivers are required to perform pre-trip inspections of CAT Connector vehicles each day before beginning their routes. The pre-trip inspection includes cycling the wheelchair lift once electronically. If a wheelchair lift fails during a pre-trip inspection, it may still be used if the lift cannot be immediately repaired and no extra vehicles are available. The lift should then be operated manually. Drivers record the results of their pre-trip inspections on Daily Vehicle Inspection ("DVI") forms, which they turn in after their shift ends.

If a wheelchair lift fails while on route, Peter Pan's policy is as follows: (1) the driver calls in to dispatch; (2) the dispatcher walks the driver through a "13 step" trouble shooting procedure; (3) if the lift still cannot be cycled electronically, the dispatcher instructs the driver to operate the lift manually; (4) if the lift cannot be operated manually, the closest available vehicle is sent to transport the wheelchair passenger.

All CAT Connector vehicles are on a 3,000 mile preventative maintenance schedule, which includes the preventative maintenance of wheelchair lifts. In addition, the City conducts quarterly maintenance audits and inspections of CAT Connector vehicles.

IV. Defendant Peter Pan's Motion for Summary Judgment

A. Peter Pan's Compliance With ADA and Rehabilitation Act

Peter Pan argues that no genuine issue of material fact exists as to whether Peter Pan complied with the ADA and the Rehabilitation Act.

1. General Requirements of the ADA and Rehabilitation Act

Both the ADA and the Rehabilitation Act prohibit discrimination against persons with disabilities in the provision of public services. To establish a violation of the ADA and the Rehabilitation Act, a plaintiff must prove: (1) that she has a disability; (2) that she is otherwise

qualified for the employment or benefit in question; and (2) that she was excluded from employment or a benefit due to discrimination solely on the basis of disability.[1] See Doe v. University of Maryland Med. Sys. Corp., 50 F.3d 1261, 1264-65 (4th Cir. 1995).

The ADA provides that "[n]o 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." 42 U.S.C. § 12182(a) (1994). Similarly, the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . 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." 29 U.S.C. § 794(a) (1994).

The ADA provides that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities." 42 U.S.C. § 12182(b)(2)(A)(ii) (1994). In addition, discrimination includes "failure to take such steps

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[1]Peter Pan concedes that Plaintiff has a disability and is otherwise qualified for the benefit in question.

as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." Id. § 12182(b)(2)(A)(iii).

In the context of the provision of a demand responsive transportation system, the ADA provides that discrimination includes "failure of a private entity . . . to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities." Id. § 12182(b)(2)(C)(i).

2. Maintenance and Repair Requirements

The regulations promulgated under the ADA require providers of demand responsive transportation systems to "establish a system of regular and frequent maintenance checks of [wheelchair] lifts sufficient to determine if lifts are operable." 49 C.F.R. § 37.163(b) (1997). Lifts do not have to be tested daily, but a provider violates the ADA if it "neglect[s] to check lifts regularly and frequently, or . . . exhibit[s] a pattern of lift breakdowns in service resulting in stranded passengers when the lifts [have] been checked." Id. app. D § 37.163.

In addition, "accessibility features [must] be

repaired promptly if they are damaged or out of order." Id. § 37.161(b). Although "temporary obstructions or isolated instances of mechanical failure" do not violate the ADA, "repairing accessibility feature must be made a high priority." Id. app. D § 37.161.

If a lift becomes inoperable, the provider must "take the vehicle out of service before the beginning of the vehicle's next service day and ensure that the lift is repaired before the vehicle returns to service." Id. § 37.161(d). However, if no spare vehicle is available, the provider "may keep the vehicle in service with an inoperable lift for no more than . . . three days." Id. § 37.163(e). After three days, "the vehicle must go into the shop, not to return until the lift is repaired." Id. app. D § 37.163. "[I]f an accessible spare bus becomes available at any time, it must be used in place of the bus with the inoperable lift." Id.

3. Training Requirements

Providers of demand responsive systems of transportation must also "ensure that personnel are trained to proficiency . . . so that they operate vehicles and equipment safely and properly assist and treat individuals with disabilities who use the service in a respectful and courteous way." 49 C.F.R. § 37.173 (1997). "[E]very employee of a transportation provider who is involved with

service to persons with disabilities must have been trained so that he or she knows what needs to be done to provide the service in the right way." Id. app. D § 37.171. Although providers are not required to give refresher training, they must "ensure that, at any given time, employees are trained to proficiency." Id.

4. Plaintiff's Evidence [2]

Plaintiff has produced evidence that tends to show that Peter Pan did not adequately maintain the its CAT Connector wheelchair lifts. Under the ADA, providers must regularly check wheelchair lifts to determine if they are operable. See 49 C.F.R. § 37.163(b) (1997). Pursuant to Peter Pan policy, drivers should test wheelchair lifts daily and record lift failures on their DVI forms. (See Deadmond Dep. at 76) However, in their depositions, several drivers stated that they did not always test the lifts during their daily inspections or that they were aware that other drivers did not test the lifts. (See Perry Dep. at 23; Edwards Dep. at 33; Price Dep. at 35) In addition, on March 20, 1997, an inspection revealed that drivers tested only 8.3% of the wheelchair lifts before departure. (See Mem. of March 20,

[2]Because the evidence offered by Plaintiff regarding CAT buses and incidents that occurred before July of 1996, when Peter Pan began operating the CAT Connector system, is not relevant to Peter Pan's alleged violation of the ADA and the Rehabilitation Act, the undersigned will not consider that evidence. None of that evidence is included in the previous factual recitation.

Plaintiff has also produced evidence that tends to show "a pattern of lift breakdowns in service resulting in stranded passengers," which also violates the ADA. 49 C.F.R. app. D § 37.163 (1997). Plaintiff encountered vehicles with inoperable lifts on fifteen occasions between November of 1996 and March of 1998. (See James Aff. ¶¶ 6, 8, 9, 19, 21, 22, 23, 25, 27, 29, 31, 32, 33, 34, 35, 36). In her affidavit, Katherine Halpern, another CAT Connector wheelchair passenger, stated that from 1996 to 1998, she encountered inoperable wheelchair lifts on "dozens of occasions." (See Halpern Aff. ¶9(a))

Moreover, in their depositions, Peter Pan employees testified that they experienced or were aware of problems with CAT Connector wheelchair lifts. (See Carter Dep. 23, 46; Perry Dep. at 31; Edwards Dep. at 27; Price Dep. at 14; Burt Dep. at 19-20; Silver Dep. at 21, 43; Cozart Dep. at 41) One driver even stated that the wheelchair lifts "would never work." (Perry Dep. at 9) On March 27, 1997, a CAT Connector vehicle inspection revealed that the wheelchair lifts on five of the CAT Connector vehicles were inoperable.[3] (Letter from Joe Anzaldua to Mike Hailperin of April 2, 1997)

Plaintiff has also presented evidence that tends to

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[3]Plaintiff has also produced evidence showing that CAT Connector vehicles were often missing accessibility equipment, including the "stick" needed to manually operate the wheelchair lifts and the "tie-down" straps used to secure a wheelchair to the CAT Connector floor. (See Perry Dep. at 46-47; Cozart Dep. at 42; Edwards Dep. at 46-47; Price Dep. at 20; James Aff. ¶¶ 21, 34)

show that Peter Pan did not promptly repair its wheelchair lifts. The ADA prohibits providers from keeping vehicles in service with inoperable lifts for more than three days. See 49 C.F.R. § 37.163(e) (1997). Both driver Melinda Perry and mechanic Sherman Edwards testified that Peter Pan kept vehicles with inoperable wheelchair lifts in service for more than one week without repairing them. (See Perry Dep. at 34; Edwards Dep. at 25-26, 38)

In addition, Plaintiff has produced evidence that tends to show that CAT Connector drivers were not trained to proficiently operate the CAT Connector wheelchair lifts. Plaintiff's evidence indicates that drivers did not follow Peter Pan's policy of employing the "13 step" trouble shooting procedure and did not attempt to operate lifts manually. (See James Aff. ¶ 21; Halpern Aff. ¶ 9(a); Burt Dep. at 21; Carter Dep. at 35) Samuel Luke Price, the Peter Pan employee who was responsible for training new drivers from July of 1996 to March of 1997, testified that he had to go on the road to help drivers operate lifts on 100 occasions. (See Price Dep. at 26)

Viewing the evidence in the light most favorable to Plaintiff, the undersigned concludes that a genuine issue of material fact exists as to whether Peter Pan adequately maintained and repaired its CAT Connector wheelchair lifts and adequately trained its employees to operate the lifts. Therefore, the undersigned recommends that Peter Pan's motion

for summary judgment be DENIED as to Plaintiff's ADA and Rehabilitation Act claims.

B. Discrimination Solely on the Basis of Disability

Peter Pan argues that Plaintiff has not established that she has been denied benefits solely on the basis of her disability because her complaints of late pick-ups, missed connections, and rude drivers have also been made by nondisabled passengers. However, although some of Plaintiff's allegations may not relate to her disability, see Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1215 (D.C.Cir. 1997) (finding that plaintiff did not suffer discrimination "by reason of" his disability because "general rudeness to all does not violate either the ADA or the Rehabilitation Act"), Plaintiff's allegations and evidence regarding CAT Connector wheelchair lift failures raise a genuine issue of material fact as to whether Plaintiff has been discriminated against solely on the basis of her disability.

C. Compensatory and Punitive Damages

Peter Pan argues that Plaintiff is not entitled to compensatory and punitive damages for its alleged violation of the Rehabilitation Act[4] because she cannot establish that

[4]Plaintiff may not recover money damages from Peter Pan on her ADA claim because money damages are not recoverable under title III of the ADA. See 42 U.S.C. § 12188 (1994) (stating that

Peter Pan intentionally discriminated against her.

Compensatory damages are available under section 504 of the Rehabilitation Act. See Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 832 (4th Cir. 1994), Moreno v. Consolidated Rail Corp., 99 F.3d 782, 789 (6th Cir. 1996); Rodgers v. Magnet Cove Public Schools, 34 F.3d 642, 645 (8th Cir. 1994); W.B. v. Matula, 67 F.3d 484, 494 (3rd Cir. 1995). A plaintiff must show intentional discrimination, defined as disparate treatment, to recover compensatory damages. See Pandazides, 13 F.3d at 830 n.9.

In Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 832 (4th Cir. 1994), the Fourth Circuit indicated that punitive damages are available under section 504.[5] However, the court noted that a plaintiff generally has to show malice or reckless indifference to recover punitive damages. See id. at 830 n.9.

Since, as mentioned previously, a reasonable jury could find that Plaintiff was discriminated against in violation of the Rehabilitation Act, Plaintiff may be entitled to compensatory damages. In addition, Plaintiff has

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remedies available for violations of title III are the same as remedies available for violations of the Civil Rights Act of 1964).

[5]This position is in accord with the majority view. See Saylor v. Ridge, 989 F. Supp. 680, 690 (E.D.Pa. 1998) (holding that punitive damages are available under section 504 and collecting cases). But see Moreno v. Consolidated Rail Corp., 99 F.3d 782, 791 (6th Cir. 1996) (holding that punitive damages are not available under section 504).

produced evidence tending to show that CAT Connector wheelchair lift failures occurred frequently, that Peter Pan employees were aware of wheelchair lift failures, that Peter Pan sent vehicles with inoperable wheelchair lifts into service for longer than one week, that Peter Pan did not regularly inspect its wheelchair lifts, and that some Peter Pan employees could not proficiently operate the lifts. Based on this evidence, a reasonable jury could find that Peter Pan acted with reckless indifference to Plaintiff's right to access to public transportation.

Accordingly, Plaintiff may be entitled to compensatory and punitive damages under the Rehabilitation Act. The undersigned therefore recommends that Peter Pan's motion for summary judgment be DENIED as to Plaintiff's claim for money damages.

V. Defendant City's Motion for Summary Judgment

A. ADA Claim

The City argues that it is not liable for any violation of the ADA by its independent contractor, Peter Pan. It contends that it satisfied its ADA obligations by providing in its contract with Peter Pan that Peter Pan must comply with all ADA requirements that would be imposed on the City if it operated the CAT Connector system.

Title II of the ADA, 42 U.S.C. §§ 12131-12165, prohibits discrimination by public entities, while title III,

42 U.S.C. §§ 12181-12189, prohibits discrimination by private entities that provide public accommodations. See 42 U.S.C. §§ 12132, 12182 (1994). Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Id. § 12132.

When "public entities stand in very close relation to private entities that are covered by Title III . . . certain activities may be affected, at least indirectly, by both titles." Civil Rights Division, U.S. Dep't of Justice, The Americans with Disabilities Act Title III Technical Assistance Manual III-1.7000, at 7 (1993). When a public entity contracts with a private entity to provide a public service, the public entity must ensure by contract that the private entity will provide the service in accordance with title II. See id. at 7, Illustration 1. While the public entity "must ensure that its contracts are carried out in accordance with title II," the private entity "must ensure that [its service] compl[ies] with title III." See id. at 7-8, Illustration 3.

The City offers no support for its contention that a public entity is relieved of its ADA obligations when it contracts with a private entity to provide a public service. Nor does it provide support for its argument that a public

entity fulfills its title II obligations by entering into a contract with a private entity that requires the private entity to meet all title II requirements. A public entity must not only ensure by contract that the private entity with whom it contracts complies with title II, but further, must ensure that the private entity complies with the contract. See id.; see also 28 C.F.R. § 35.130(b)(1) (1997) (providing that "a public entity may not discriminate "directly or through contractual, licensing, or other arrangements, on the basis of disability") (emphasis added).

Therefore, the undersigned concludes that the City is not relieved of its title II obligations merely because Peter Pan is an independent contractor. Accordingly, the undersigned recommends that the City's motion for summary judgment be DENIED as to Plaintiff's ADA and Rehabilitation Act claims.[6]

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[6]The Department of Transportation ["DOT"] has authority to promulgate regulations implementing part B of title II. See 42 U.S.C. § 12149(a) (1994). Since Plaintiff's claim against the City arises under part A of title II, the DOT regulation that provides that a public entity that contracts with a private entity "shall ensure that the private entity meets the requirements of this part that would apply to the public entity if the public entity itself provided the service" does not apply to this case. 49 C.F.R. § 37.23 (1997). However, the undersigned nevertheless concludes that the City has an obligation to ensure that the its contracts are carried out in compliance with title II of the ADA.

B. State Law Claims

Plaintiff's state law negligence claim is based on the December 10, 1996 incident when Plaintiff allegedly dragged herself onto a CAT Connector vehicle because the vehicle's lift was inoperable. The City argues that it is not liable under state law for any negligence by Peter Pan because Peter Pan is an independent contractor. Plaintiff responds that violation of the ADA constitutes negligence per se and alternatively, that Peter Pan is not an independent contractor.

The violation of a public safety statute is negligence per se. See Hart v. Ivey, 332 N.C. 299, 303 (1992). A statute is a public safety statute if it "imposes a duty on a person for the protection of others." See id. Negligence per se is actionable if the injury caused by the negligence is of a character that the statute was designed to prevent and if the injured party belongs to a class of persons for whose protection the state was implemented. See Carr v. Murrows Transfer, Inc., 262 N.C. 550, 554 (1964).

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b) (1994). Therefore, it is unlikely that the North Carolina courts would find that the ADA is a safety statute or that violation of the ADA constitutes negligence per se.

One who employs an independent contractor is not liable for the independent contractor's negligence. See Gordon v. Garner, 127 N.C. App. 649, 658 (1997). An independent contractor is one who contracts to do work according to his own judgment and method and who is not subject to his employer except as to the result of his work. See id. "The test in determining a worker's status is whether the employer has the right to control the worker with respect to the manner or methods of doing the work or the agents to be employed by it, or has the right merely to require certain results according to the parties' contract."[7] Yelverton v. Lamm, 94 N.C. App. 536, 538 (1989).

Peter Pan is responsible for hiring, firing, and training all CAT Connector employees. (See Hailperin Dep. at 28). The City has no authority to review Peter Pan's decisions regarding hiring, firing, and training its employees. (See id.) The City leases the Cat Connector vehicles to Peter Pan, but Peter Pan is responsible for maintaining the vehicles. (See id. at 27). The City has no

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[7]Factors to be considered when determining independent contractor status include whether the persons employed: (1) are engaged in an independent business, calling, or occupation; (2) have the independent use of special skills, knowledge, or training in the execution of the work; (3) do a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) are not subject to discharge because they adopt one method of doing the work rather than another; (5) are not in the regular employ of the other contracting party; (6) are free to use such assistants as they think proper; and (7) select their own time. See Hayes v. Board of Trustees of Elon College, et al., 224 N.C. 11, 16 (1944).

authority over Peter Pan's decisions as to whom it hires to maintain the CAT Connector vehicles or what maintenance they perform, so long as Peter Pan meets the manufacturer's standards. (See id. at 27, 49) The City is responsible for route and schedule planning, but Peter Pan is responsible for managing, supervising, and carrying out the operation of the CAT Connector system. (See id. at 49).

In sum, the City does not have the right to control Peter Pan's manner or methods of operating the CAT Connector system or to control Peter Pan's employees. Instead, the City has the right to require certain results according to the parties' contract. Therefore, the undersigned finds that Peter Pan is an independent contractor and consequently, that the City, under North Carolina law, is not liable for any negligence by Peter Pan. Accordingly, the undersigned recommends that the City's motion for summary judgment be GRANTED as to Plaintiff's state law claims and that those claims be DISMISSED.

C. Incorporated Arguments

The City incorporates by reference the arguments made by Peter Pan in support of its motion for summary judgment, including Peter Pan's argument that Plaintiff has not suffered discrimination on the basis of her disability and its argument that damages are available only for

intentional misconduct.[8] For the reasons previously stated with regard to Peter Pan's motion for summary judgment, the undersigned recommends that the City's motion for summary judgment be DENIED on these issues.

VI. Plaintiff's Motion to Compel

Plaintiff moves the court to compel Defendant Peter Pan to "[p]roduce the personnel files of all Cat Connector bus drivers and dispatchers who work or have worked for the Cat Connector since November, 1996." (Pl.'s First Set of Interrogs. and Req. for Produc. of Documents No. 14) Peter Pan argues that Plaintiff's request is overbroad and not reasonably calculated to lead to the discovery of admissible evidence, and that the privacy interests of Peter Pan employees outweigh Plaintiff's need for the information contained in their personnel files.

In support of her motion to compel, Plaintiff argues that Peter Pan's personnel files may reveal that Peter Pan failed to hire qualified employees, negligently delegated tasks to unqualified, untrained, or inexperienced employees, or failed to adequately supervise employees. See Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 106 (E.D.N.C.

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[8]Plaintiff may be entitled to money damages from the City under both the Rehabilitation Act and the ADA because money damages are recoverable under title II of the ADA. See 42 U.S.C. § 12133 (1994) (stating that remedies available for violations of title II of ADA are the same as remedies available for violations of the Rehabilitation Act).

1993). Plaintiff further argues that the personnel files may reveal that Peter Pan provided minimal training, failed to provide refresher training, or failed to take disciplinary action when warranted.

Personal privacy and the confidentiality of personnel files are important public policy concerns. See Raddatz v. Standard Register Co., 177 F.R.D. 446, 447 (D.Minn. 1997); Whittingham v. Amherst College, 164 F.R.D. 124, 127 (D.Mass. 1995). However, when a public policy interest weighs against disclosure, disclosure may nevertheless be required where: (1) material is clearly relevant; and (2) the need for disclosure is compelling because the information sought is not otherwise readily available. See Blount, 162 F.R.D. at 105-106 (citing New York Stock Exchange v. Sloan, 22 Fed. R. Serv.2d 500, 505 (S.D.N.Y. 1976)).

Peter Pan has provided Plaintiff with the names of all Peter Pan employees who have worked for the CAT Connector system since November of 1996 and indicated the date on which each employee was hired, the position held by each employee, and whether the position was considered managerial. (Defs.' Resp. to Pl.'s First Set of Interrogs. and Req. for Produc. of Documents No. 3) Peter Pan has also provided Plaintiff with its training manuals and materials. (See Ex.s to Zabala Aff.) Plaintiff has deposed the Peter Pan employee who trained drivers to operate the CAT Connector wheelchair lifts

and questioned Peter Pan drivers regarding their individual training experiences. (See Price Dep. at 10-15, 27; Silver Dep. at 24-26; Perry Dep. at 12-15) In addition, the CAT Connector general manager stated in his deposition that he never fired or disciplined a driver for not knowing how to operate a wheelchair lift, for refusing to operate a wheelchair lift, or for failing to complete a daily vehicle inspection form. (See Deadmond Dep. at 111, 143-44)

Plaintiff's need for disclosure is not compelling in this case because the information that Plaintiff seeks is otherwise readily available and because the information has largely already been provided to her. Therefore, the public policy interest in maintaining the confidentiality of personnel files outweighs Plaintiff's need for disclosure, and Plaintiff's motion to compel is DENIED.

VII. Conclusion

In summary, Plaintiff's motion to compel is DENIED. It is recommended that Defendant Peter Pan's motion for summary judgment be DENIED in its entirety. It is further recommended that Defendant City's motion for summary judgment be DENIED as to Plaintiff's ADA and Rehabilitation Act claims. It is recommended that Defendant City's motion for summary judgment be GRANTED as to Plaintiff's state law claims and that Plaintiff's state law claims be DISMISSED.

SO RECOMMENDED, this 20th day of January, 1999.

ALEXANDER B. DENSON
UNITED STATES MAGISTRATE JUDGE

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