

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

RORY THOMAS LEE

CIVIL ACTION

VERSUS

NO. 09-3343

NATIONAL RAILROAD PASSENGER  
CORPORATION (AMTRAK)

SECTION "N" (4)

ORDER AND REASONS

Before the Court is the Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) and Alternative Motion Under Rule 12(e) (Rec. Doc. 7). After considering the memoranda filed in conjunction with this motion and the applicable law, the Court concludes that it has no other choice but to deny the instant motion and allow Plaintiff to voluntarily dismiss this Complaint without prejudice and pursue his administrative complaint with Occupational Safety and Health Administration ("OSHA") under 49 U.S.C. § 20109.

As explained in Plaintiff's opposition memorandum, he filed a *pro se* Complaint on April 23, 2009, alleging harassment, intimidation, and dismissal by his employer, National Railroad Passenger Corporation ("Amtrak"), under the FELA, 45 U.S.C. § 60, et seq. (Rec. Doc. 1). After filing his *pro se* Complaint, Plaintiff obtained counsel, who determined that Plaintiff had filed his *pro se* Complaint without exhausting his administrative remedy required by the Federal Rail Safety Act ("FRSA"), under 49 U.S.C. § 20109. Plaintiff's counsel then promptly assisted Plaintiff in filing his administrative Complaint with the Department of Labor through OSHA on September 28, 2009. (Exhibit

A to Rec. Doc. 12).

A claim under the FRSA must be brought first by filing a complaint with the Secretary of Labor, 49 U.S.C. § 20109(c)(1), within 180 days of the alleged violation. 49 U.S.C. § 20109(c)(A)(ii). Plaintiff may proceed to federal district court only if the Secretary does not issue a final decision within 210 days of the filing of the complaint, 49 U.S.C. § 20109(c)(3), and when the Secretary has issued a final order, appeal must be taken directly in the appropriate court of appeals. 49 U.S.C. §§ 20109(c)(4) and 42121(b)(4)(A). Plaintiff failed to exhaust his administrative remedies; thus, this Court lacks jurisdiction over this matter, which shall be dismissed without prejudice.

Accordingly,

**IT IS ORDERED** that the **Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) and Alternative Motion Under Rule 12(e) (Rec. Doc. 7)** is **DENIED**. Plaintiff is hereby allowed to **voluntarily dismiss this Complaint without prejudice**, to pursue his administrative complaint under 49 U.S.C. § 20109.

New Orleans, Louisiana, this 22nd day of January 2010.

  
KURT D. ENGELHARDT  
United States District Judge