

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2007

5
6 (Argued: September 27, 2007

Decided: October 15, 2007)

7
8 Docket No. 06-1746-cv

9 -----X
10 JOSEPH P. McINERNEY,

11
12 Plaintiff-Appellant,

13 - v. -

14 RENSSELAER POLYTECHNIC INSTITUTE;
15 THE MECHANICAL AERONAUTICAL NUCLEAR
16 ENGINEERING DEPARTMENT OF RENSSELAER
17 POLYTECHNIC INSTITUTE (MANE);
18 MANE DEPARTMENT CHAIRMAN JOHN TICHY;
19 MANE GRADUATE COORDINATOR ANTOINETTE
20 MANIATY; MANE PROFESSOR LEIK MYRABO;
21 MANE PROFESSOR KENNETH JANSEN,

22
23 Defendants-Appellees,*

24 -----X
25 Before: McLAUGHLIN, RAGGI, Circuit Judges, and RAKOFF, DISTRICT
26 JUDGE.**
27

* The Clerk of the Court is directed to amend the official caption as set forth above.

** The Honorable Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

1 Plaintiff appeals from the dismissal of his complaint by the
2 United States District Court for the Northern District of New
3 York (Hurd, J.) for failure to exhaust administrative remedies.

4 VACATED AND REMANDED.

5 JOSEPH P. McINERNEY, Lowell,
6 Massachusetts, pro se, Plaintiff-
7 Appellant.

8
9 MICHAEL E. GINSBERG, Pattison,
10 Sampson, Ginsberg & Griffin, P.C.,
11 Troy, New York, for Defendants-
12 Appellees.

13
14 PER CURIAM:

15 Joseph P. McInerney appeals from the dismissal of his
16 complaint by the United States District Court for the Northern
17 District of New York (Hurd, J.) for failure to exhaust
18 administrative remedies. Because the district court erred in
19 concluding that McInerney had an obligation to present his claims
20 under Titles III and V of the Americans with Disabilities Act of
21 1990 ("ADA"), 42 U.S.C. § 12101 et seq., to the Equal Employment
22 Opportunity Commission ("EEOC") prior to suit, we VACATE the
23 district court's judgment of dismissal and REMAND.

24 **BACKGROUND**

25 Joseph P. McInerney, pro se, who suffers from brain damage
26 and related symptoms as a result of a bacterial brain abscess, is
27 a Ph.D. candidate in the Mechanical Aeronautical Nuclear
28 Engineering ("MANE") program at Rensselaer Polytechnic Institute

1 ("RPI"). He alleges that RPI and various professors and
2 administrators in the MANE program (collectively, "Defendants")
3 failed to accommodate his disability and unlawfully retaliated
4 against him.

5 McInerney alleges that Professor Leik Myrabo, who was
6 McInerney's thesis advisor, hired him as a research assistant in
7 August 2001. Although McInerney says that Myrabo promised
8 several times to pay McInerney for his research assistance,
9 Myrabo revealed in April 2002 that he was unable to compensate
10 McInerney even though he paid other graduate students who
11 performed research for him. Myrabo proposed an alternative job
12 for McInerney in California with one of his former students.
13 McInerney turned it down, however, because his poor health would
14 not allow him to travel so far. He alleges that Myrabo
15 retaliated by, among other things, delaying a letter of
16 recommendation and approval of a scholarship application.

17 Because of his difficulties with Professor Myrabo, McInerney
18 asked the MANE department to assign him a different thesis
19 advisor. The MANE department assigned Professor Kenneth Jansen,
20 but told McInerney that Jansen would not be responsible for
21 funding McInerney's research. According to McInerney, Jansen
22 financially assisted other graduate students whom he advised.

23 In April 2003, McInerney failed his doctoral candidacy exam
24 because, he alleges, he was fatigued from his illness and was

1 asked "ill posed and unreasonable questions." When McInerney
2 explained this to John Tichy, chairman of the MANE department,
3 and asked him to speak with the professors who administered the
4 exam, Tichy allegedly told McInerney to stop using his disability
5 as an excuse.

6 McInerney claims that he was denied further accommodations
7 between September 2003 and June 2004 when Professor Jansen
8 refused to provide McInerney with extra research assistance or
9 help McInerney find a tutor. In August 2004, the MANE department
10 also rejected McInerney's request to be assigned another thesis
11 advisor.

12 In October 2005, McInerney brought this action, alleging
13 violations of Titles III and V of the ADA and Section 504 of the
14 Rehabilitation Act of 1973, 29 U.S.C. § 794. On March 24, 2006,
15 the district court dismissed the complaint in its entirety for
16 lack of jurisdiction because McInerney failed to exhaust his
17 claims with the EEOC or an appropriate state or local agency
18 prior to suit.

19 McInerney now appeals.

20 **DISCUSSION**

21 Although the district court suggested it lacked jurisdiction
22 over the case, its dismissal for failure to exhaust
23 administrative remedies is more properly characterized as a
24 dismissal for failure to state a claim pursuant to Federal Rule

1 of Civil Procedure 12(b)(6). See Fernandez v. Chertoff, 471 F.3d
2 45, 58 (2d Cir. 2006). “We review a district court’s dismissal
3 of a complaint pursuant to [Rule 12(b)(6)] de novo, accepting all
4 factual allegations in the complaint and drawing all reasonable
5 inferences in the plaintiff’s favor.” ATSI Commc’ns, Inc. v.
6 Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). The need to
7 draw all inferences in the plaintiff’s favor has heightened
8 application when the plaintiff is proceeding pro se. See Bertin
9 v. United States, 478 F.3d 489, 491 (2d Cir. 2007).

10 Applying these standards, we agree with McInerney that the
11 district court erred in dismissing his complaint. His ADA claims
12 did not require administrative exhaustion.

13 Whether an ADA claim must first be presented to an
14 administrative agency depends on which precise title of the ADA
15 the claim invokes. Title I prohibits employers from
16 discriminating against disabled employees, see 42 U.S.C. §
17 12112(a), while Title III forbids discrimination “on the basis of
18 disability in the full and equal enjoyment of the goods,
19 services, facilities, privileges, advantages, or accommodations
20 of any place of public accommodation,” id. § 12182(a). RPI, as a
21 “postgraduate private school,” is doubtless a place of public
22 accommodation. See id. § 12181(7)(J). Title V proscribes
23 retaliation because of a person’s opposition to any act or
24 practice that the ADA prohibits. See id. § 12203(a).

1 ADA Title I incorporates various provisions from Title VII
2 of the landmark Civil Rights Act of 1964. See id. § 12117(a)
3 (incorporating “[t]he powers, remedies, and procedures set forth
4 in [42 U.S.C.] sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and
5 2000e-9”). One of these provisions, section 2000e-5, requires a
6 claimant to file a charge of employment discrimination with the
7 EEOC within 180 days after the discriminatory act. See id. §
8 2000e-5(e)(1). This administrative-exhaustion provision,
9 however, is not found in ADA Title III. Instead, ADA Title III
10 incorporates only § 2000a-3(a), see id. § 12188(a)(1), providing
11 for injunctive relief against certain discriminatory acts, see
12 id. § 2000a-3(a). Title V retaliation claims in the employment
13 context require the same procedures as those under Title I, while
14 retaliation claims relating to public accommodations follow Title
15 III procedures. See id. § 12203(c). Thus, if Title III does not
16 require administrative exhaustion, Title V claims predicated on
17 asserting one’s rights under Title III require no exhaustion
18 either.

19 The language and structure of the ADA demonstrate that Title
20 III, unlike Title I, does not require administrative exhaustion.
21 “[I]t is a general principle of statutory construction that when
22 Congress includes particular language in one section of a statute
23 but omits it in another section of the same Act, it is . . .
24 presumed that Congress acts intentionally and purposefully . . .

1 .” Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002)
2 (internal quotation marks omitted). There is good reason to
3 conclude that Congress intentionally omitted the exhaustion
4 requirement for public-accommodations claims, as it would make
5 little sense to require a plaintiff challenging discrimination in
6 public accommodations to file a charge with the EEOC, an agency
7 with responsibility for and expertise in matters of employment
8 discrimination. See 42 U.S.C. §§ 2000e-5(a)-(b). Accordingly,
9 we hold that there is no administrative-exhaustion requirement
10 for ADA Title III claims or Title V claims predicated on
11 asserting one’s rights under Title III.

12 In defending the judgment of dismissal, Defendants argue
13 that McInerney’s allegations concerning his work as a research
14 assistant arise under Title I. However, we need not resolve
15 whether such work qualifies as “employment” for purposes of the
16 ADA—a question not addressed by the district court—because the
17 complaint contains ample Title III-based allegations. For
18 example, McInerney alleges that Defendants failed: (1) to appoint
19 him an adequate thesis advisor, (2) to assist him with funding
20 for his research as they did for other students, (3) to provide
21 extra instruction or a tutor, and (4) to accommodate his
22 disability at or after his doctoral candidacy exam. The district
23 court therefore erred by dismissing McInerney’s ADA claims for
24 failure to exhaust administrative remedies.

