

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FRED KING, JR.,

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Plaintiff,

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vs.

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No. 4:09cv00307 SWW/JTR

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JIMMY SANDERS, INC.,

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Defendant.

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ORDER

This is a case of alleged employment discrimination in which plaintiff Fred King, Jr., who filed the action pro se, alleges violations of the Americans with Disabilities Act (“ADA”) when he was disqualified from his commercial truck driving duties at defendant Jimmy Sanders, Inc. following his failing a Department of Transportation (“DOT”) physical due to hearing loss. Plaintiff was appointed counsel on June 9, 2009. On June 23, 2009, defendant filed a motion to dismiss [doc.#19] on grounds that plaintiff failed to exhaust his DOT administrative remedies and this Court thus lacks subject matter jurisdiction. *See Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635 (8th Cir. 2003) (prospective truck driver's failure to exhaust the administrative remedies of the DOT before bringing suit precluded action against prospective employer under the ADA for failure to hire based on driver's medical history; DOT was better equipped to handle resolution of disputes over a driver's medical qualifications). In response, plaintiff, through appointed counsel, filed a motion for voluntary dismissal without prejudice [doc.#22] agreeing that exhaustion is required and asking the Court to enter an Order of dismissal without prejudice in order to give plaintiff the opportunity to re-file in the event circumstances so warrant. Defendant responded to plaintiff’s motion for voluntary dismissal without prejudice, arguing that

any re-filed action will be time-barred and thus dismissal should be with prejudice.

The Court denies defendant's motion to dismiss [doc.#19] as moot and grants plaintiff's motion for voluntary dismissal without prejudice [doc.#22]. While it may be that any re-filed action based on the facts in this action will be time-barred, the Court declines to make such a determination without knowing the parameters of any new or re-filed action plaintiff may bring. Accordingly, this dismissal is without prejudice.

IT IS SO ORDERED this 7th day of August 2009.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE