

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 02-1182

HERMAN SIZEMORE,  
Appellant

v.

CONSOLIDATED RAIL CORPORATION

Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. Civil No. 00-cv-01025)  
District Court Judge: Honorable Robert J. Cindrich

Argued December 17, 2002  
Before: SLOVITER, RENDELL and GREENBERG, Circuit Judges

(Filed January 16, 2003)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

Herman Sizemore appeals from a summary judgment order entered in the District Court on January 3, 2002, dismissing his claim of disability discrimination against his former employer Consolidated Rail Corporation. We will affirm.

For years, Herman Sizemore was employed by Consolidated Rail Corporation ("Conrail") as a "yardmaster," a job essentially requiring him to manage the day-to-day operations of a train yard. In addition to performing his regular duties, Sizemore also frequently served as the acting "trainmaster" a position of substantially higher responsibility during periods in which the actual trainmaster was on leave. Between 1992 and 1998, Sizemore actively sought a permanent position as a Conrail trainmaster, applying through Conrail's voluntary internal placement system for approximately fifty vacant trainmaster positions throughout Conrail's network. During that period, Sizemore

was interviewed for only two of those positions, and was never hired. In 1999, Sizemore accepted a trainmaster position offered to him by Conrail's successor, Norfolk Southern, and he continues to hold that position today.

Sizemore brought suit against Conrail under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12101 et. seq. ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq., claiming that Conrail discriminated against him because of his hearing condition. Sizemore suffers from a hearing impairment that is essentially corrected by his continual use of visible hearing aids in both ears. Although Sizemore's condition is not actually disabling given his use of corrective aids, Sizemore alleged that Conrail refused to hire him for vacant trainmaster positions because it regarded him as disabled under 42 U.S.C. 12102(2). In early 2002, the District Court granted Conrail's motion for summary judgment, holding that Sizemore had failed to come forth with sufficient evidence that Conrail regarded him as disabled with regard to the major life activity of working. This timely appeal followed.

The District Court had jurisdiction under 28 U.S.C. 1331 and 1343, and we have jurisdiction pursuant to 28 U.S.C. 1291. Our review of the District Court's grant of summary judgment is plenary, and we examine the record using the same standard as the District Court, considering whether the plaintiff has established a genuine issue of material fact. See, e.g., *Witkowski v. Welch*, 173 F.3d 192, 198 (3d Cir. 1999).

After reviewing the record and hearing oral argument, we are convinced that Conrail was entitled to judgment as a matter of law. In order to establish a *prima facie* case under the ADA, Sizemore must be able to show that he (1) has a disability, (2) is a qualified individual, and (3) has suffered an adverse employment action because of that disability. *Deane v. Pocono Medical Center*, 142 F.3d 138, 142 (3d Cir. 1998) (en banc); see also *Gaul v. Lucent Techs. Inc.*, 134 F.3d 576, 580 (3d Cir. 1998). Yet Sizemore has failed to produce any evidence indicating that Conrail's employment decisions were made as a result of discrimination based on his perceived disability. Sizemore's reliance on certain comments made about him by other Conrail employees is unconvincing; the comments in question were few and limited in nature, and were made by non-supervisory employees who had no real involvement in Conrail's employment decisions. Further, there is no evidence in the record that the trainmaster position is any different for hearing purposes than the yardmaster position Sizemore actually held at Conrail. In sum, there are simply no established facts that could possibly raise an inference of a causal link between Sizemore's hearing condition, or Conrail's perception of it, and the adverse employment decisions. Summary judgment in favor of Conrail was therefore plainly warranted.

We do agree with Sizemore, however, that the District Court appears to have based its ruling on an incorrect reading of the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). The District Court found that Sizemore's claim was legally insufficient because he had provided no evidence that Conrail regarded him as disabled with regard to a "broad class of jobs," as required by *Sutton*. *Id.* at 491. Yet *Sutton* involved a plaintiff claiming that the employer regarded him as disabled with regard to the major life activity of working, *id.* at 490, and it is that type of claim that requires evidence about a class of positions. *Id.* at 491 ("When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." (emphasis added)). *Sutton* did not argue, as he could have, that the employer regarded him as disabled with regard to his sight. *Id.* at 490. Here, in contrast, Sizemore has not made a "working" claim, but has instead framed his complaint as being that Conrail regarded him as disabled with regard to the major life activity of hearing, and nobody has disputed that characterization of his claim. As there was no authority for transposing Sizemore's claim to one involving the wholly separate major life activity of working, the basis for the District Court's decision to grant summary judgment in Conrail's favor was defective.

Nonetheless, because Sizemore has failed to produce evidence sufficient to establish his *prima facie* case, the order of the District Court will be AFFIRMED.

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TO THE CLERK OF COURT:

Please file the foregoing opinion.

/s/ Majorie O. Rendell  
Circuit Judge