IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE BOICE	:	
	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 05-CV-04772
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	
Defendant.	:	

ORDER

AND NOW, this ___ day of _____, 2006, upon consideration of the Motion for Summary Judgment of Defendant Southeastern Pennsylvania Transportation Authority and Plaintiff's response in opposition thereto, it is hereby ORDERED that Defendant's motion is DENIED.

BY THE COURT:

_____
Pratter, J.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	CIVIL ACTION
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SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	
Defendant.	:	

MEMORANDUM OF LAW IN
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiff, Bruce Boice, by and through his undersigned counsel, hereby states as follows in opposition to Defendant's Motion for Summary Judgment.

I. INTRODUCTION

Plaintiff alleges that Defendant unlawfully discriminated against him on the basis of his race in violation of Title VII and 42 U.S.C. § 1981, when it terminated his employment as a maintenance manager. Plaintiff further alleges that Defendant violated the Americans with Disabilities Act when it failed to accommodate his disability.

In its motion for summary judgment, Defendant asks the Court to discredit Plaintiff's testimony regarding discrimination and instead to grant summary judgment on the ground that the weight of the evidence favors Defendant. In so arguing, Defendant misapprehends the summary judgment standard, which requires the non-movant to show only that there exists a genuine issue of material fact, and which requires the Court to view the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences in the non-moving party's favor.

When the evidence is viewed in the light most favorable to Plaintiff and all reasonable inferences are drawn in Plaintiff's favor, Plaintiff has clearly produced evidence sufficient for reasonable trier of fact to find for the Plaintiff. In particular, Plaintiff testified that Eric Thornhill, the African-American supervisor who recommended his termination, directed profanity toward white maintenance managers but not toward the African-American maintenance manager whom Mr. Thornhill supervised. This testimony constitutes direct evidence of racial animus from which a reasonable jury could infer discrimination. Plaintiff further testified that the African-American maintenance manager with whom he worked committed the same offenses for which Plaintiff was disciplined, yet was never disciplined for those offenses. Again, this testimony that a similarly situated employee of a different race was treated more favorably than Plaintiff is evidence from which a reasonable jury could find for the Plaintiff.

Defendant asks the Court to grant summary judgment on Plaintiff's ADA claim on the ground that Plaintiff never requested that Defendant accommodate his disability. This argument, however, is squarely contradicted by Plaintiff's deposition testimony that he asked Mr. Thornhill to accommodate his disability and that those requests went unheeded.

In short, Plaintiff has more than met his burden of producing sufficient evidence from which a reasonable jury could find that he was unlawfully discriminated against and that Defendant refused to accommodate Plaintiff's disability.

II. FACTS

Plaintiff is a white male who was employed by Defendant as a maintenance manager from 1989 until Defendant terminated his employment in August, 2003. Ex. A, Pl. Dep. at 10, 23, 110. The supervisor who recommended Plaintiff's termination, Eric Thornhill, is African-American, and Mr. Thornhill's wife had previously filed a complaint against Plaintiff alleging

that he discriminated against her on the basis of her race. Ex. A, Pl. Dep. at 57. Mr. Thornhill directed profanity toward Plaintiff and other white maintenance managers, but Plaintiff never observed Mr. Thornhill direct similar profanity towards Jason Griffin, the African-American maintenance manager whom Mr. Thornhill supervised. Ex. A, Pl. Dep. at 73.

Plaintiff is diabetic, and also suffers from a shrapnel wound suffered during his military service in the Vietnam war. Ex. A, Pl. Dep. at 41. When Plaintiff was moved from day shift to relief shift, Plaintiff asked his supervisor to restore him to day shift, as relief shift interfered with his ability to take his diabetes medication. Ex. A, Pl. Dep. at 49, 53. Plaintiff also asked his supervisor to provide him with a parking space close to the shop, given Plaintiff's difficulty walking. Ex. A, Pl. Dep. at 40-41. Plaintiff's supervisor, however, refused to accommodate either request.

Mr. Thornhill recommended that Plaintiff's employment with SEPTA be terminated for alleged breaches of SEPTA policy. Ex. B, Thornhill Dep. at 112. The African-American maintenance manager who worked with Plaintiff, however, committed the same offenses as Plaintiff yet was never written up for those offenses. Ex. A, Pl. Dep. at 40, 113.

III. ARGUMENT

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 and the authorities interpreting it have set a high standard for the granting of such judgment – a standard Defendant simply cannot satisfy.

Pursuant to Fed.R.Civ.P. 56(c) summary judgment is appropriate only in cases "where there is no genuine issue of material fact for the jury to decide." *Coolspring Stone Supply v. American States Life Ins. Co.*, 10 F.3d 144,148 (3d Cir. 1993). Summary judgment may be granted only when there is no dispute as to an issue of material fact and the moving party is

entitled to judgment as a matter of law. In opposition to a motion for summary judgment, the nonmoving party must demonstrate the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The burden always remains on the moving party, however, to show that a rational trier of fact could not find for the non-moving party and that there is thus no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). Defendant cannot meet that burden.

In ruling on a motion for summary judgment, the Court must accept and believe the evidence of the non-moving party (herein, the Plaintiff) as true, and must not weigh or consider the credibility of witnesses. *Anderson, supra,* 477 U.S. at 248-52. In deciding a motion for summary judgment, the Court must resolve any and all doubts in the non-moving party's favor. *Eastman Kodak Co. v. Image Technological Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076 (1992). On summary judgment, where the non-moving party's evidence contradicts the movant's evidence, then the non-movant's evidence must be taken as true. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

As will be demonstrated below, Plaintiff has adduced ample evidence to allow his claims to proceed to trial.

B. PLAINTIFF HAS PRODUCED EVIDENCE SUFFICIENT FOR A RESONABLE JURY TO FIND DISCRIMINATION ON THE BASIS OF RACE

At his deposition, Plaintiff testified that Mr. Thornhill directed profanity toward Plaintiff and other white maintenance managers, but that he never observed Mr. Thornhill direct similar profanity towards Jason Griffin, the African-American maintenance manager whom Mr. Thornhill supervised. Ex. A, Pl. Dep. at 73. This testimony, which the Court must credit on Defendant's motion for summary judgment, provides direct evidence of racial animus from

which a reasonable jury could infer that Defendant discriminated against Plaintiff on the basis of his race. *See DeWyer v. Temple Univ.*, Civ. A. No. 00-1665, 2002 U.S. Dist. LEXIS 23501, at *14 n.3 (E.D. Pa. Nov. 19, 2002) (holding that evidence of racial animus was sufficient for a jury to find employment discrimination). An inference of racial animus is further supported by Plaintiff's testimony that Mr. Thornhill's wife filed a discrimination complaint against him alleging that Plaintiff was mistreating her because she was African-American. Ex. A, Pl. Dep. at 57.[1]

Defendant further testified at his deposition that he was terminated for the same offenses that Mr. Griffin, an African-American maintenance manager, committed, yet was never disciplined for:

Q. And on what basis do you believe Eric Thornhill discriminated?

A. He fired me for the same thing that the one black foreman who works at Victory did, the same offenses.

Ex. A, Pl. Dep. at 40; *see also* Plaintiff's Response to Defendant's Statement of Undisputed Facts, ¶¶ 75-77. Plaintiff testified that Mr. Griffin was never written up for the same offenses for which Plaintiff was disciplined. Ex. A, Pl. Dep. at 68-70, 134-36. Because Plaintiff was a union representative during his employment with Defendant, he would have been notified that disciplinary action had been taken against a union employee. Ex. C, Hilsee Dep. at 60. Plaintiff has thus presented "sufficient evidence to allow a fact finder to conclude that he was treated less

[1] Defendant argues that Plaintiff may not rely on this discrimination complaint because it occurred outside the limitations period. Plaintiff is not relying on the discrimination complaint, however, as an independent basis for his cause of action. Instead, Plaintiff is simply using the complaint as evidence that acts committed within the limitations period were the result of discrimination. Plaintiff is clearly entitled to use the discrimination complaint for that purpose, as "the Third Circuit has approved the use of pre-limitations period events as evidence of discrimination with regard to post-limitations period actions." *Brethwaite v. Cincinnati Milacron Marketing Co.*, Civ. A. No. 94-3621, 1995 U.S. Dist. LEXIS 12200, at *9-*10 (E.D. Pa. Aug. 21, 1995); *see also Davis v. General Accident Ins. Co.*, Civ. A. No. 98-4736, 2000 U.S. Dist. LEXIS 17356, at *8 (E.D. Pa. Dec. 1, 2000); *Galante v. Cox*, Civ. A. No. 05-06739, 2006 U.S. Dist. LEXIS 30208, at *9-*10 (May 16, 2006) ("[A] plaintiff alleging a hostile work environment may use all conduct by the defendant over a period of time as evidence of a pattern of discrimination, so long as at least one action took place within the appropriate limitations period.").

favorably than other similarly-situated employees." *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999). This evidence that Plaintiff was treated less favorably than similarly-situated employees, together with the evidence of Plaintiff's supervisor's racial animus, is more than enough to defeat Defendant's summary judgment motion.

Defendant repeatedly attempts to discredit Plaintiff's testimony on this point by calling it conclusory or speculative. The mere fact that Defendant has evidence contradicting Plaintiff's testimony, however, does not render that testimony conclusory or speculative. Rather, Defendant's evidence contradicting Plaintiff's testimony simply creates a genuine issue of material fact, making summary judgment inappropriate.

In particular, in response to Plaintiff's evidence of discrimination, Defendant points to the testimony of several supervisors at their depositions that they were unaware that Mr. Griffin had committed any of the offenses for which Plaintiff was terminated. Def's. Br. at 6-7. Plaintiff testified, however, that by virtue of the reporting system in place at SEPTA at the time, Mr. Thornhill would have been aware of Mr. Griffin's offenses. Ex. A, Pl. Dep. at 158-60. At most, then, the testimony relied on by Defendant creates a genuine issue of material fact for a jury to resolve.

In asking the Court to disregard Plaintiff's testimony, Defendant is improperly asking the Court to make a credibility determination on summary judgment. "[C]redibility determinations that underlie findings of fact are appropriate to a bench verdict. But they are inappropriate to the legal conclusions necessary to a ruling on summary judgment." *Doeblers' Pa. Hybrids, Inc. v. Doebler*, 442 F.3d 812, 820 (3d Cir. 2006) (internal quotation marks and citation omitted).

In further support of its motion for summary judgment, Defendant repeatedly notes that Mr. Thornhill did not have authority to terminate Plaintiff's employment, and that only white

supervisors to Mr. Thornhill had that authority. Nonetheless it was Mr. Thornhill who recommended that Plaintiff be terminated, *see* Defendant's Statement of Undisputed Facts ¶ 42, and Mr. Thornhill therefore participated in the decision to terminate Plaintiff. Indeed, but for Mr. Thornhill's recommendation that Plaintiff's employment be terminated, Defendant would not have terminated Plaintiff's employment. As such, Mr. Thornhill was clearly a decision-maker for purposes of Title VII, and Plaintiff's evidence that Mr. Thornhill's decision to recommend Plaintiff's termination was racially motivated suffices for a jury to find a Title VII violation. *See Barbee v. Southeastern Pennsylvania Transportation Auth.*, Civ. A. No. 04-4063, 2006 U.S. Dist. LEXIS 50314, at *16 (E.D. Pa. July 24, 2006) ("[A] decisionmaker [for purposes of Title VII] is an individual who is involved in or participated in the decisionmaking process." (internal quotation marks omitted)).

Defendant also relies heavily on a neutral arbitrator's finding that SEPTA had just cause to terminate Plaintiff's employment. Defendant does not, and cannot, however, assert that Plaintiff is bound by the collateral estoppel effect of the arbitrator's findings, as the arbitration was not a judicial proceeding. At trial, therefore, a jury will be free to make its own findings of fact, even if those findings contradict the arbitrator's. Recognizing that Plaintiff is not bound by the arbitrator's findings, Defendant instead argues that the arbitrator's decision "should be accorded 'great weight.'" Def's Br. at 14. The weight to be accorded the arbitrator's decision, however, is irrelevant to this motion for summary judgment, since on a motion for summary judgment, "[t]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Even if the weight of the evidence favors Defendant, summary judgment is nevertheless inappropriate here because Plaintiff has produced sufficient

evidence, described above, from which a reasonable jury could find that his termination was the result of racial discrimination.

Finally, in seeking summary judgment, Defendant relies on the fact that the employee who replaced Plaintiff is white. This fact, however, does not as a matter of law preclude a finding that Plaintiff's termination was the result of racial discrimination, and Defendant itself admits that the fact that replacement was white is not dispositive. Def's. Br. at 15. Again, while Defendant no doubt has evidence that contradicts Plaintiff's evidence of racial discrimination, that evidence does not entitle Defendant to summary judgment. Rather, that evidence simply creates a genuine issue of material fact for a jury to resolve.

C. THE 1991 AMENDMENTS TO § 1981 PROVIDE PLAINTIFF WITH A VIABLE CAUSE OF ACTION

Defendant argues that Plaintiff's claim under 42 U.S.C. § 1981 fails as a matter of law, because the Supreme Court held in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 731 (1989), that 42 U.S.C. § 1983 provides the exclusive remedy for violations of § 1981 committed by state actors.

Congress's 1991 amendment to § 1981, however, supersedes the Supreme Court's holding in *Jett*. In particular, Congress amended § 1981 to provide that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). As Defendant notes, there exists a circuit split on the question whether the 1991 amendment supersedes the Supreme Court's holding in *Jett*. *Compare Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995) (holding that *Jett* survives the 1991 amendment), *with Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1214-15 (9th Cir. 1996) (holding that the 1991 amendment supersedes *Jett*). Plaintiff respectfully submits that the Ninth Circuit's reasoning is more persuasive on this

point than the Fourth Circuit's, and that this Court should accordingly follow the Ninth Circuit's holding.

In particular, the legislative history to the 1991 amendment makes clear that Congress intended by that amendment to accord the rights established by § 1981 equal protection from violation by state actors and private actors alike. "[B]y including language that explicitly protects § 1981 rights from 'impairment' by *both* private and governmental entities, the amendment makes clear that Congress intended a comparable scope of protection against each type of defendant." *Federation of African Amer. Contractors*, 96 F.3d at 1213. Because at the time Congress passed the 1991 amendment, the Supreme Court had held that § 1981 gave plaintiffs a cause of action against private defendants, *see Runyon v. McCrary*, 427 U.S. 160 (1976), it follows that by conferring the same rights on plaintiffs whose rights were violated by private and public defendants, Congress intended to give plaintiffs a cause of action against public defendants who violated § 1981. That is, "the implication of a direct cause of action against municipalities under 42 U.S.C. § 1981 advances Congress's general purpose of remedying civil rights violations and its particular purpose in enacting § 1981(c): ensuring that the well-established rights contained in the statute are guaranteed against both private parties and state actors." *Federation of African Amer. Contractors*, 96 F.3d at 1214. To hold that § 1981 creates a cause of action against private actors but not state actors would therefore clearly frustrate congressional intent.

In contrast to the well-reasoned opinion of the Ninth Circuit in *Federation of African Amer. Contractors*, the Fourth Circuit in *Dennis* simply stated in a conclusory manner that the 1991 amendments did not supersede *Jett*, without providing any reasoned analysis as to why that is the correct conclusion. The Court should therefore follow the Ninth Circuit and hold that violations

of § 1981 by state actors are independently actionable.

D. PLAINTIFF HAS PRODUCED SUFFICIENT EVIDENCE IN SUPPORT OF HIS FAILURE TO ACCOMMODATE CLAIM

To sustain a failure to accommodate claim under the ADA, Plaintiff must show he is a "qualified individual with a disability" and that he suffered an adverse employment decision as a result of his disability. *US Airways, Inc., v. Barnett*, 535 U.S. 391, 412-13 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 166 (3d Cir.2002).

The determination of whether a disability exists should be made "on a case-by-case basis." *Albertsons, Inc.v. Kirkburg*, 119 S.Ct. 2162, 2169 (citing 42 U.S.C. §§ 12102(2), 12102(2)(A)). Further, "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483, 119 S.Ct. 2139, 2147 (quoting 29 CFR pt. 1630, App. § 1630.2(j)).

"Disability" is defined for ADA purposes as any one of the following: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Thus, to establish that he has a disability for ADA purposes, Plaintiff must show that: (i) he has a physical or mental impairment that substantially limits one or more of his major life activities; (ii) that he has a record of such impairment; or (iii) that he was "regarded as" having such an impairment by Defendant. *See Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 359 (3d Cir.2000) (applying § 12102(2), supra).

"Major life activities" include but are not limited to basic functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i).

Here Defendant does not and cannot dispute that Plaintiff is disabled, for purposes of the ADA, as Plaintiff's shrapnel wound and diabetes substantially limit major life activities such as walking and caring for himself. *See* Statement of Undisputed Facts at ¶ 113.

There further can be no doubt that Plaintiff is a "qualified individual" for purposes of the ADA. Under the ADA, "[q]ualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 16 C.F.R. 1630.2(m). It is undisputed that Plaintiff had performed the essential functions of his job for fourteen years prior to his termination, and that Plaintiff is therefore a qualified individual with a disability.

1. Plaintiff Requested an Accommodation for His Disability

Defendant argues that Plaintiff's failure to accommodate claim must fail because Plaintiff never requested an accommodation for his disability. To the contrary, Plaintiff testified at his deposition that he requested accommodations for his disabilities, and that those requests went unheeded. In particular, Plaintiff testified that he explained to Mr. Thornhill that he needed a parking spot close to the shop, because of his difficulty walking: "I have handicapped tags on my car and I used to park close to the shop because that was the only parking spot when I came in, and he told me that I couldn't park there and I said, 'Well, I need a handicapped spot,' and he said, 'There is none.'" Ex. A, Pl. Dep. at 40-41. Similarly, Plaintiff testified that he told both Mr. Thornhill and Mr. Hilsee, another supervisor, that his move from day shift to relief shift interfered with his diabetes medication and asked to be restored to day shift:

Q. Did you tell Mr. Thornhill that you wanted to be on a steady shift because of your

diabetes?

A. Yes.

Ex. A, Pl. Dep. at 53; *see also* Ex. A, Pl. Dep. at 49 ("I told Mr. Hilsee that I needed to be on one shift because of my diabetes.").

In light of this testimony, Defendant's argument that Plaintiff failed to request an accommodation for his disability is completely unfounded. While Plaintiff did not avail himself of the formal avenues that existed in SEPTA for requesting an accommodation for a disability, there is no requirement in the ADA that a request for an accommodation conform to the procedure established by an employer for requesting an accommodation. To the contrary, Plaintiff's initial requests for an accommodation "trigger[ed] the employer's obligation to participate in the interactive process [of fashioning a reasonable accommodation]." *Lawrence v. Nat'l Westminster Bank*, 98 F.3d 61, 70 n.11 (3d Cir. 1996). Indeed, when Plaintiff requested an accommodation for his disability, his supervisors never suggested to him that he file a formal request for an accommodation pursuant to SEPTA's procedures.

2. Plaintiff Has Suffered Adverse Employment Action Related to Defendant's Failure to Accommodate His Disability

Defendant argues that it is entitled to summary judgment on Plaintiff's failure to accommodate claim because Plaintiff has not suffered any adverse employment action related to his disability. Defendant's argument that Plaintiff has no evidence that his termination was related to his disability is misplaced, however, as Plaintiff is not claiming that his termination was the result of discrimination on the basis of disability. To the contrary, Plaintiff's disability claim is predicated on Defendant's failure to accommodate Plaintiff's disability by requiring Plaintiff to work the relief shift and by failing to provide Plaintiff with a parking space close to the shop. Both the decision to move Plaintiff from the day shift to the relief shift and the failure

to provide Plaintiff with a parking space close to the shop constitute adverse employment actions that can give rise to a cognizable claim under the ADA for failure to accommodate a disability.

E. PLAINTIFF IS ENTITLED TO COMPENSATION FOR LOST WAGES

Defendant argues that Plaintiff's receipt of disability benefits from the VA and Social Security defeats any claim for lost wages. In so arguing, Defendant overlooks the fact that Plaintiff would be able to perform his job duties at SEPTA if SEPTA were willing to provide reasonable accommodations for his disability. It is only because SEPTA has failed to provide such accommodations that Plaintiff is unable to continue to work there. There is therefore nothing inconsistent between Plaintiff's receipt of disability benefits and his claim for lost wages from SEPTA.[2]

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that Defendant's motion for summary judgment should be denied.

TIMOTHY M. KOLMAN AND ASSOCIATES

BY: /s/ Timothy M. Kolman, Esquire

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September 5, 2006

[2] Plaintiff concedes that because SEPTA is a governmental entity, it is immune from punitive damages under Title VII and § 1981, and that punitive damages are unavailable under the Pennsylvania Human Relations Act.

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CERTIFICATE OF SERVICE

I, Michael F. Mirarchi, do hereby certify that on this date a true and correct copy of the foregoing Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment was filed electronically and is available for viewing and downloading from the ECF system.

September 5, 2006

/s/
Michael F. Mirarchi, Esquire