

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

JACQUELINE LITTLE,	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	
	:	NO. 01-4986
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
Defendant.	:	

MEMORANDUM

Pending before the Court is the Defendant Southeastern Pennsylvania Transportation Authority's ("SEPTA" or the "Defendant") Motion for Summary Judgment, Plaintiff's Opposition and SEPTA's Reply. For the following reasons I have granted in part and denied in part Defendant's motion by order dated March 31, 2003.

I. Undisputed Factual and Procedural Background

The facts underlying the instant action are stated and viewed in the light most favorable to the non-moving party, Jacqueline Little ("Little" or "Plaintiff"). Davis v. Portline Transportes Maritimo Internacional, 16 F.3d 532, 536 (3rd Cir. 1994). Jacqueline Little began working for SEPTA in 1984. In 1990, due to an injury to her back that prevented her from driving a bus, Little was reassigned to SEPTA's Security Department. SEPTA created the department to "accommodate" employees medically disqualified from other SEPTA positions.

In September 1997, SEPTA informed members of the Security Department of a planned downsizing. Employees were invited to apply for other positions at SEPTA but were informed that if they were unable to medically qualify for a position at SEPTA they could be terminated. In December 1998, SEPTA informed employees that the department would be eliminated in July

1999. Employees were again informed that if they were unable to medically qualify for a position at SEPTA they could be terminated. In April 1999, two meetings were held with Security Department employees to discuss the transition to other positions and the elimination of the department. The Security Department was eliminated on June 30, 1999.

SEPTA conducted a medical examination of Plaintiff in order to determine what positions at SEPTA she was medically qualified to perform. SEPTA determined Plaintiff was medically unqualified to drive a bus. Between December 1998 and June 1999 Little applied for several positions within SEPTA.¹ Little was unsuccessful in those attempts. On June 17, 1999, SEPTA offered Plaintiff the position of Tower Operator, with a start date of June 23rd and again informed Plaintiff that failure to find a new position by June 30, 1999 would result in her being terminated. From June 17 through August 6, 1999 Little called out sick. SEPTA sent Little a form to request Family Medical Leave Act (“FMLA”) benefits.² Little did not submit the FMLA form. SEPTA terminated Little’s employment on August 6, 1999 citing the elimination of the Security Department and her failure to obtain another position. On August 17, 1999, Little filed a discrimination charge with the Equal Employment Opportunity Commission (“EEOC”) alleging discrimination by SEPTA on account of race, sex and disability. Subsequently, Little filed the instant suit alleging gender discrimination and retaliation under Title VII and the Pennsylvania Human Relations Act (“PHRA”), and disability discrimination and retaliation

¹Little applied for the positions of Cost Containment Coordinator, Station Manager and Transportation Manager (Dispatcher).

²Under the FMLA eligible employees are entitled to twelve (12) weeks leave for certain family and medical reasons with a right to reinstatement to their former position upon the completion of the leave. See 29 U.S.C. § 2601 et seq.

under the Americans with Disabilities Act (“ADA”) and the PHRA. Although Plaintiff makes several references throughout the record to race and included race in her EEOC discrimination charge, she has limited her discrimination claims to only those based on her gender and alleged disability and by her own admission excludes racial discrimination claims.³

II. Legal Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant, to be successful, must prove that, in considering the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, . . . there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law.” See Fed. R. Civ. P. 56(c). An issue is “material” if the dispute may affect the outcome of the suit under the governing law and is “genuine” if a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248; 106 S.Ct. 2505 (1986). If, in response to a properly supported motion for summary judgment, an adverse party merely rests upon the allegations or denials in her pleading, and fails to set forth specific, properly supported evidence, summary judgment may be entered against her. See Fed. R. Civ. P. 56(e). Of course, a court must draw all reasonable inferences in favor of the party against whom judgment is sought. See American Flint Glass Workers, AFL-CIO v. Beaumont Glass Company, 62 F.3d 574, 578 (3d Cir. 1995).

³ See Plaintiff’s Opposition to Defendant’s Statement of Uncontested Material Facts at ¶14; and Plaintiff’s Memorandum in Opposition to Summary Judgement at page 1.

III. Discussion

A. Disability Discrimination under the ADA and PHRA

Plaintiff alleges she is a qualified individual with a disability. She claims SEPTA discriminated against her by failing to reasonably accommodate her disability and retaliated against her when she complained. SEPTA argues Plaintiff does not qualify for ADA protection as she does not have a physical or mental impairment that substantially limits a major life activity. In this instance the major life activity in question is working.⁴ SEPTA contends that because Plaintiff has not and cannot demonstrate that her impairment limits her ability to perform life's central functions or work in a broad class of jobs, she is not a disabled individual under the ADA and therefore no accommodation is due.

The ADA provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to "... the hiring, advancement, or discharge of an employee, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). A plaintiff establishes that she is a member of this protected class of disabled persons by showing that she has a disability. Under the ADA's definition of disability, a plaintiff must show that she has: (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment. See 42 U.S.C. § 12102(2). It is undisputed that Plaintiff injured her back in 1988 and this physical injury is a basis for Plaintiff's ADA claim. Plaintiff also claims an emotional impairment due to depression allegedly diagnosed in June 1999. The existence of an impairment alone however does not

⁴See Plaintiff's complaint at ¶15.

qualify an individual as disabled under the ADA. Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 195 (2002). Under the first prong of the ADA disability definition, a plaintiff must further show that the impairment causes a substantial limitation on a major life activity. Id. When the major life activity is working, a plaintiff is required to produce evidence that she is “unable to work in broad class of jobs” rather than any one specific job. Sutton v. United Airlines, Inc., 527 U.S. 471, 491 (1999).

There is no evidence that Plaintiff is limited in this manner. Since her 1988 injury Plaintiff has worked at SEPTA in a light duty clerical position, then as a security officer and supervisor. Since her employment with SEPTA ended in August 1999 the record shows she has been employed in customer service with Dollar Rent A Car and the Internal Revenue Service.⁵ Plaintiff offers no evidence of a limitation on her ability to work “a broad class of jobs” due to a physical or mental impairment. Therefore, there is no reasonable basis to conclude Plaintiff is disabled under the first prong of the ADA disability definition.

Plaintiff does not refute her lack of a substantially limiting impairment, she instead argues there is evidence that SEPTA “regarded” her as disabled. Under §12102(2)(C), individuals who are “regarded as” having a disability are also disabled under the ADA. Sutton, 527 U.S. at 489. A plaintiff may qualify for ADA protection under this prong in two ways: “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.” Id. When an employer misinterprets an employee’s limitation and concludes that employee is incapable of

⁵ See Deposition of Jacqueline Little, Defendant’s Exhibit 3, pages 15 - 28.

performing a wide range of jobs that employee is “regarded as” disabled by the employer and qualifies as disabled under the statute. Rinehimer v. Cemcolift, 292 F.3d 375, 381 (3rd Cir. 2002)(citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180,187 (3rd Cir. 1999)).

To support her contention that she qualifies under the “regarded as” prong, Plaintiff states the record contains evidence “that shows very clearly that SEPTA deemed her a disabled person.”⁶ Plaintiff fails to specify or identify this evidence. It is undisputed that in 1990 as a result of a back injury, SEPTA transferred the Plaintiff to the Security Department. It is also undisputed that SEPTA scheduled a medical examination for Ms. Little to determine her qualifications for job openings at SEPTA in light of the elimination of the Security Department, and that SEPTA medically disqualified Plaintiff for the position of bus operator. This demonstrates that SEPTA considered Plaintiff to have an impairment. SEPTA’s awareness of Plaintiff’s impairment is insufficient evidence to sustain a claim of disability under the “regarded as” prong. Likewise SEPTA’s consideration in granting Plaintiff a position in the Security Department as a result of her accident is also insufficient. See Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 190 (3rd Cir. 1999)(employer cooperating with impaired but not “disabled” employee is not evidence of a perception of disability under the ADA).

Plaintiff must show more to satisfy the “regarded as” prong. There are no facts showing SEPTA, correctly or incorrectly, considered Plaintiff substantially limited in a broad class of jobs. SEPTA considered Plaintiff medically qualified for at least four positions, transportation manager, station manager, cost containment coordinator and tower operator. Defendant disqualified Plaintiff for the bus driver position. Disqualification from one position does not

⁶See Plaintiff’s Motion in Opposition to Summary Judgement at page 4.

support the allegation that SEPTA regarded Plaintiff as having a substantially limiting impairment. See Sutton, 527 U.S. at 493 (preclusion from one position is an insufficient allegation to support a claim that defendant regarded plaintiff as having a substantially limiting impairment). Plaintiff has failed to offer any probative evidence that SEPTA was under any misperception regarding her impairment or that SEPTA considered her substantially limited in a broad class of jobs.

As there is no evidence of a substantial limitation on Plaintiff's ability to work or any evidence that SEPTA "regarded" her as disabled, there is no reasonable basis to conclude she qualifies as disabled under the ADA. Therefore, Defendant would not be required to accommodate Plaintiff's impairment under the ADA. Summary judgement will be granted to the Defendant on Plaintiff's ADA discrimination claim. AS the PHRA is construed consistently with the ADA, summary judgement will also be granted to the Defendant on Plaintiff's PHRA disability discrimination claim. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3rd Cir. 1996)(PHRA and ADA definition of "disability" substantially similar and consequently claims can be treated coextensively).

B. Retaliation Under the ADA and PHRA

Plaintiff has also claimed SEPTA retaliated against her by terminating her employment as a result of her concerns, expressed through her counsel to SEPTA, regarding whether SEPTA was in compliance with the ADA in its elimination of the Security Department. The ADA provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge... under [the ADA]. 42 U.S.C. §12203(a). Although Plaintiff is not a qualified individual

with a disability, her status does not dispose of the ADA retaliation claim as an individual deemed not disabled under the statute may still pursue a retaliation claim. Krouse v. American Sterilizer Co., 126 F.3d 494, 502 (3rd Cir. 1997).

SEPTA contends the retaliation claims should be dismissed as Plaintiff did not file a claim of retaliation with the EEOC and the EEOC did not investigate retaliation. On the EEOC discrimination charge Plaintiff checked the boxes for race, sex and disability.⁷ Plaintiff stated on the form that she was offered different positions from her white male counterparts in the Security Department because off her race, gender and disability and that she was not offered a vacant position that she could perform in light of her disabilities.⁸ Plaintiff states the discrimination charge form was completed by the EEOC intake officer who she did inform of her belief that the termination was related to her complaints to SEPTA about the ADA and the elimination of her department.⁹ She also states she informed Louis Marino, an EEOC investigator of her retaliation claim, showed him the correspondences between her attorneys and SEPTA and was told it would be investigated.¹⁰ Although the EEOC's final determination notice does not discuss retaliation,¹¹ Plaintiff argues she should not be penalized due to the EEOC's administrative failure in properly investigating her claims.

⁷ See Defendant's Exhibit 1 - Plaintiff's Charge of Discrimination filed with EEOC on August 17, 1999.

⁸ Id.

⁹ See Plaintiff's Exhibit 75 ¶18 - Certification of Jacqueline Little.

¹⁰ Id.

¹¹ See Plaintiff's Exhibit 42 - EEOC Determination Letter dated September 22, 2000.

Once an EEOC charge is filed, the scope of the resulting civil suit is defined by the EEOC investigation reasonably expected to grow out of the discrimination charge. Hicks v. ABT Associates, Inc., 572 F.2d 960, 966 (3rd Cir. 1978). If the EEOC's investigation is unreasonably narrow or improperly conducted the plaintiff should not be barred his right to a civil action. Id. There is a rebuttable presumption as to the regularity of EEOC investigations. Id. To overcome Defendant's argument to bar her ADA retaliation claim, Plaintiff must set forth some evidence that raises a genuine issue as to the reasonableness of the EEOC investigation. Plaintiff does this in her certification by alleging she told the investigating officer of her protected activity and her belief that it was related to her termination. Viewing these statements in the light most favorable to Plaintiff, the EEOC's failure to investigate retaliation in light of the Plaintiff's comments to the investigator and documentation provided was unreasonable. Therefore, her retaliation claim will proceed.

To prevail on her retaliation claim, Plaintiff must show a prima facie case of retaliation. This requires: (1) protected activity; (2) adverse employer action after or contemporaneous with the employee's protected activity; and (3) a causal connection between the protected activity and the adverse action. Krouse v. American Sterilizer Company, 126 F.3d 494 (3rd Cir. 1997). In letters from her attorneys to SEPTA's General Manager dated January 26 and June 21, 1999, Plaintiff expressed concern that SEPTA was not in compliance with the ADA in regards to its elimination of the Security Department. SEPTA responded to Plaintiff's letter on July 28, 1999. Plaintiff has set forth evidence that demonstrates protected activity in January and June 1999. It is undisputed that she was terminated in August 1999. The temporal connection alone is sufficient to demonstrate a causal link. Shellenberger v. Summit Bancorp Inc., 318 F.3d 183,

189 (3rd Cir. 2003)(temporal proximity between protected activity and the termination sufficient to establish link). Further evidence in support of a causal connection is Plaintiff's assertions that she did not reject the tower operator position and that her termination occurred while on approved sick leave for which she had ample accrued leave time.

As Plaintiff has establish the prima facie case the burden becomes Defendant's to articulate a legitimate business reason for the adverse action. Shaner v. Synthes, 204 F.3d 494, 500 (3rd Cir. 2000). SEPTA states Plaintiff's termination was the result of the elimination of the Security Department and her failure to obtain alternative employment within SEPTA. This satisfies Defendant's burden of putting forth a legitimate reason for the termination.

Shellenberger, 318 F.3d at 189. Little must demonstrate by a preponderance of the evidence that SEPTA's reason is a pretext and retaliation was the true reason. Krouse, 126 F.3d at 504.

Plaintiff states effective June 23, 1999 SEPTA assigned her to the position of Tower Operator. She states she never rejected the position but was out on sick leave until her termination in August. This contradicts SEPTA's stated reason for termination and is enough for a reasonable jury to conclude that SEPTA's decision was motivated by retaliatory animus. Therefore, Defendant's motion for summary judgement as to the ADA retaliation claim will be denied.

C. Title VII and PHRA Gender Discrimination Claims

In her complaint, Plaintiff alleges SEPTA refused to hire her as a transportation manager because she is female in violation of Title VII and the PHRA. The analysis for Title VII and the PHRA are identical. Goosby v. Johnson and Johnson, 228 F.3d 313, 317 (3rd Cir. 2000).

In the trial of a Title VII claim it is the plaintiff's burden to first establish the prima facie

case.¹² McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Once this occurs, the burden then becomes the defendant's to articulate a legitimate non-discriminatory reason for the employment action. Id. The Plaintiff then has the burden of proving the reason offered by the Defendant is a pretext for discrimination. Id.

Defendant argues Plaintiff has not and cannot make out a prima facie case of gender discrimination as there is no evidence that men were treated more favorably. Defendant contends that the successful candidates for the transportation manager positions in question included six males and two females. This, the Defendant argues, entitles SEPTA to summary judgement.

Plaintiff submitted an application for transportation manager in response to requisition number 99-OBU0068. Of the four applicants hired to fill that position, all were male. Plaintiff also submitted an application for transportation manager under requisition number 99-OSL0041. Of the four successful applicants for this position two were female. If you consider the requisitions independently, then Plaintiff has made out a prima facie case of discrimination for requisition 99-OBU0068.¹³ She is a female, qualified for the transportation manager position, she did not receive the position and males did. The burden now shifts to Defendant to articulate a legitimate nondiscriminatory reason for Plaintiff's non-selection. SEPTA states Plaintiff was not selected for the transportation manager position as she ranked fifth out of 22 candidates and

¹² To do so Plaintiff must offer sufficient evidence that she is: (1) a member of a protected class; (2) qualified for the position she sought; and (3) non-members of the class were treated more favorably. Goosby v. Johnson and Johnson, 228 F.3d 313, 318 (3rd Cir. 2000). Defendant concedes Plaintiff has made out elements one and two. See Defendant's Motion for Summary Judgement at pg.10 n.8.

¹³ SEPTA, without explanation, combines the two requisitions. Application for one position did not entitle an applicant consideration for the other and the ranking of candidates was exclusive to each position.

positions were offered to candidates one (1) through four (4).

Plaintiff must now point to some evidence that would establish that the reason offered by Defendant was false or a pretext and that discrimination was the true reason. Fuentes v. Perskie, 32 F.3d 759, 763 (3rd Cir. 1994). Plaintiff does not refute that she was ranked fifth or that the successful candidates for the position ranked higher. Instead, Plaintiff argues pretext. As evidence of pretext Plaintiff points to former security supervisors Kraft and Tremarki. Kraft and Tremarki applied for the position of public safety communication specialist. Little did not apply for this position. Plaintiff contends Kraft and Tremarki were ranked so low they were deemed unqualified for the position but SEPTA bumped other employees higher on the list so they could place Tremarki and Kraft. Plaintiff argues SEPTA has the ability to override the normal hiring process and did so to benefit male employees but did not extend the same consideration to her for the transportation manager position. Plaintiff argues this allegation alone is sufficient to defeat summary judgement as it is for a jury to decide whether the facts support Plaintiff's pretext argument. Plaintiff's evidence does not support these allegations.¹⁴

Assuming Plaintiff's allegations to be true (however there is no evidence to support the inference she draws) the evidence does not call into question Defendant's explanation for why Plaintiff did not receive the transportation manager position. There is no evidence that male

¹⁴ The evidence on summary judgement shows that in January 1999, Tremarki was deemed unqualified for a public safety communications specialist position under requisition number 99-0022. See Plaintiff's Exhibit 47. However, Tremarki was transferred in May 1999 under requisition number 99-9039. Id. Kraft was also deemed unqualified under requisition number 99-0022. See Plaintiff's Exhibit 50. The successful candidates for the public safety position under requisition number 99-0022 were W. Norton, L. McIntosh, J. Cullen and E. Quick, three males and one female. Id. There is no evidence to support Plaintiff's allegation that Tremarki or Kraft displaced anyone, male or female, under requisition number 99-9039.

employees were bumped ahead of the Plaintiff for the transportation manager position. As Plaintiff did not apply for the public safety communications specialist position, she, Tremarki and Kraft were not all applicants for the same position. Plaintiff has not adduced sufficient evidence to enable a fact finder to reasonably conclude that SEPTA's explanation was false and/or a pretext for discrimination as to the position for which she applied. Nor does the evidence on summary judgement show that an employment culture existed at SEPTA that favored males over females. Summary judgement will be granted to the Defendant on Plaintiff's Title VII and PHRA gender discrimination claims.

D. Retaliation Under Title VII

Plaintiff also alleges her termination is in retaliation for complaints she made against co-workers in 1996.¹⁵ Defendant again argues that Plaintiff has failed to exhaust her administrative remedies as she did not allege retaliation before the EEOC. As discussed above, Plaintiff's claims in her EEOC discrimination charge included discrimination based on race, gender and disability. Although Plaintiff did not expressly state retaliation in her written charge, the scope of the resulting civil suit is defined by the EEOC investigation reasonably expected to grow out of the discrimination charge. Hicks v. ABT Associates, Inc., 572 F.2d 960, 966 (3rd Cir. 1978). Unlike Plaintiff's retaliation claim under the ADA, however, there is no evidence to suggest this claim was brought to the attention of the EEOC. According to the Plaintiff, her statement to the

¹⁵ In 1996 Plaintiff complained to the SEPTA EEO/AA office of supervisor favoritism based on race and gender and of a sexually hostile note left on her desk. SEPTA took action on her complaint at the time it was made and one employee was reprimanded by SEPTA about the note.

EEOC only referenced her attorneys' letters to SEPTA regarding the ADA.¹⁶ The letters only reference the elimination of the Security Department and SEPTA's obligations under the ADA.¹⁷ There is no evidence that Plaintiff informed the EEOC of the 1996 incident or her belief that it was the cause of her 1999 termination. There is no evidence that she gave notice to the EEOC or SEPTA that she intended to pursue a retaliation claim under Title VII or of the possibility that such a claim existed. Plaintiff has failed to make any showing that the investigation by the EEOC could reasonably have encompassed this claim. There is insufficient evidence to demonstrate that the EEOC or the Defendant was on notice of this claim prior to Plaintiff's civil action. Therefore, she has failed to exhaust her administrative remedies and summary judgement will be granted to the Defendant on Plaintiff's Title VII retaliation claim.

¹⁶ See Plaintiff's Exhibit 75 ¶18 - Certification of Jacqueline Little.

¹⁷ See Plaintiff's Exhibit 33 - Waxman letter to SEPTA dated January 26, 1999 and Plaintiff's Exhibit 35 - Kohn's letter to SEPTA dated June 21, 1999.

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vs.	:	
	:	NO. 01-4986
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
Defendant.	:	

ORDER

AND NOW this 3rd day of April, 2003 **IT IS HEREBY ORDERED** that this memorandum be filed and docketed.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.

