

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

HAROLD MURRAY : CIVIL ACTION
 :
 v. :
 :
 :
 SOUTHEASTERN PENNSYLVANIA :
 TRANSIT AUTHORITY : NO. 96-7971

M E M O R A N D U M

WALDMAN, J.

March 9, 1998

I. INTRODUCTION

This is a Title VII case. Plaintiff alleges that he was terminated because of his race from his job as a cashier for defendant Southeastern Pennsylvania Transit Authority (?SEPTA?) in 1994. SEPTA contends that plaintiff was terminated because after an investigation the agency concluded that fare money for which he was responsible was missing.

Presently before the court is defendant's motion for summary judgment.

II. LEGAL STANDARD

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Arnold-Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only

facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. A dispute over a material fact is "genuine" only if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." Id.

All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating an absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

III. FACTS

From the evidence of record, as uncontroverted or otherwise viewed most favorably to plaintiff, the pertinent facts are as follow.

Plaintiff is a black male. He was employed for many years by SEPTA as a mechanic's helper and then as a cashier. He had been active in union affairs and at the time of his termination was a union section chairman.

In May and June of 1994 plaintiff was working at the cashier window at Booth 9-A at the 52nd Street Station on the Market-Frankford Subway Elevated Line. This window was an exact fare booth. Defendant discharged plaintiff on June 24, 1994 for the stated reason that in violation of company policy he had

engaged in ?knowingly improper registration? of fares. This essentially entails a failure to account for fares for which the receiving cashier is held responsible. It is distinct from the policy prohibiting theft. Consistent with the union contract, the discipline for a fare registration infraction is discharge.

When SEPTA's Office of Inspector General began to monitor the activity of cashiers with regard to collected fare money, SEPTA was losing \$15 million a year in stolen or unaccounted for receipts at cashier booths. In late 1991, the Office of Inspector General began conducting revenue audits and inspections.¹

At the time of plaintiff's termination each SEPTA booth utilized one of two systems to collect fares, the roll-over safe and the casino box. In December 1993 SEPTA began to replace the roll-over safes with casino boxes. By September 1994, the transition was completed and all of the exact fare booths utilized casino boxes.

In a booth equipped with a roll-over safe, the cashier collects the dollar bills paid by passengers. When fifty bills are collected, the cashier places them in an envelope which he

¹ The SEPTA Police Department conducted audits and inspections of cashiers from September 1989 until November 1991. The Department employed undercover agents from General Security Services to pass pre-recorded dollar bills to the cashiers. The Office of the Inspector General began conducting the audits and inspections in November 1991. In January 1992, the Office began the practice of hiring part time revenue agents to pass pre-recorded bills to cashiers.

signs and dates. The envelope is then placed by the cashier in the roll-over safe. The cashier is unable to open the roll-over safe. In a booth equipped with a casino box, bills collected from passengers are immediately ?plunged? into the box and there is no need for a cashier to package money into envelopes.

In a revenue audit, pre-recorded dollar bills were paid to a cashier during that cashier's shift by agents of the Inspector General. Later, revenue control agents would go through the envelopes of money and retrieve the pre-recorded bills. Because funds from several shifts are commingled in the casino boxes, revenue audits can only be conducted on a booth that utilizes a roll-over safe.

If the pre-recorded bills were not recovered after a particular shift, additional audits would be conducted. If pre-recorded bills were still not recovered, then a revenue inspection would be conducted. In an inspection, several revenue agents are sent to the cashier's booth during his or her shift. These agents pass pre-recorded dollar bills for fares to the cashier. At the end of the cashier's shift, the cashier would be informed that he or she is the subject of a revenue inspection.

The cashier and the agents would return to the booth and a supervisor would be called. The supervisor would open the roll-over safe in the presence of the cashier and all envelopes would be removed. It would be determined if the pre-recorded dollar bills were present in the envelopes where they should be. If any of such bills were not recovered, a second check would be

made of the cashier's envelopes. If bills were still missing, the envelopes of the relief cashiers were examined. If the bills were still not found, the cashier under investigation would be asked to produce any bills in his possession for comparison with the recorded serial numbers. If such bills were not found, the cashier and the booth would be searched. The station manager would be notified of the results of the revenue inspection. A revenue inspection can be conducted at a booth equipped with a casino box or a roll-over safe.

The 52nd Street Station was one of ten randomly chosen for a revenue audit in May 1994. Agents conducted an audit of Benjamin Bowman, a cashier who worked the shift prior to plaintiff. The audit resulted in several pre-recorded bills not being recovered. As a result, a revenue inspection was then conducted on May 11, 1994. All pre-recorded bills passed to Mr. Bowman during this inspection were recovered at the end of his shift.

Senior Investigator Harold Gordon of the Office of Inspector General and SEPTA Police Officer Walter B. Moore conducted the revenue inspection of Mr. Bowman. Mr. Gordon is black. Mr. Moore is a Native American. The two noticed a pattern of unrecovered pre-recorded bills passed at the 52nd Street station which appeared to be missing toward the end of Mr. Bowman's shift. After investigating gate activity at the station, Messrs. Gordon and Moore concluded that at the time of the revenue audit in early May 1994, plaintiff Murray had on

several occasions relieved Mr. Bowman early. Messrs. Gordon and Moore then suspected that some of the pre-recorded bills which had not been recovered in the earlier audit may have been passed to plaintiff. They then decided to conduct a revenue audit of plaintiff in late May 1994.

On five different days between May 26, 1994 and June 20, 1994 a revenue audit of plaintiff was conducted by undercover agents who passed pre-recorded dollar bills to plaintiff. Ten of these bills were not recovered.

Officer Moore noted that one of the unrecovered pre-recorded bills passed on June 1, 1994 was passed prior to the beginning of plaintiff's shift. Officer Moore checked the gate activity sheet and determined that plaintiff was on duty at that time. One of the bills passed on June 2, 1994 was reportedly given by undercover agents to a cashier with gray hair. Plaintiff has black hair. Officer Moore did not notice this discrepancy at the time of the audit. The records of the audit on June 3, 1994 reveal the possibility that another cashier may have been in the booth when a pre-recorded bill was passed, however, Officer Moore checked at the time and determined that plaintiff had been on duty when the bill in question was passed.

Based on the results of the revenue audits conducted in June, a revenue inspection of plaintiff was conducted on June 21 and 22, 1994.² Nine undercover agents paid fares to plaintiff

² Plaintiff worked a late shift on the night of the
(continued...)

while he was working at Booth 9-A at the 52nd Street Station. Nine pre-recorded bills were passed to plaintiff during his shift from 4:08 p.m. on June 21, 1994 until 12:38 a.m. on June 22, 1994. During his shift, plaintiff had a thirty minute luncheon break and a five minute relief break. During these periods another cashier took plaintiff's place. One bill was passed to plaintiff's relief cashier, Mr. Heistand. This bill was later recovered from an envelope prepared and signed by Mr. Heistand.

Two SEPTA officials involved in the revenue inspection of plaintiff, in addition to Messrs. Gordon and Moore, were black males. Only four of the nine pre-recorded bills passed to plaintiff were recovered during the inspection. Plaintiff and his booth were searched. The five missing bills were never recovered, however, five undercover agents had passed bills to plaintiff prior to his relief break.

After an initial hearing plaintiff was discharged on June 24, 1994 by Thomas E. Dolan, the SEPTA Superintendent of Manpower and Administration, for violation of the fare registration policy. Mr. Dolan is white. The labor union which represented plaintiff, Transportation Workers Local 234, filed a grievance protesting his discharge. After an immediate first level grievance hearing, the discharge was upheld by Mr. Dolan.

Plaintiff's statement that others had entered his booth on the night of June 21st was presented to Mr. Dolan on June

²(...continued)
21st of June 1994 which ended after midnight.

24th. A street supervisor had entered the booth as had a SEPTA police officer to use the telephone and another employee who came by to discuss union business. Mr. Dolan saw no need to interview these people because a cashier has "sole responsibility" for fares received at his booth during his shift.

Plaintiff's discharge was again upheld after a second level grievance hearing on July 15, 1994 at which defendant was represented by Zone 2 Manager Harold Savannah and Blue Line Stations General Supervisor Peter Viscusi. Mr. Viscusi is white. Mr. Savannah is black. Plaintiff's discharge was again upheld after a third level grievance hearing on August 4, 1994 by Wayne Giardinelli, SEPTA's's Labor Relations Manager. He is white.

Plaintiff's discharge was predicated on his failing the inspection and not on the audit results. Defendant did not discharge cashiers based on audit results. There is no evidence that defendant failed to discharge any cashier, regardless of race, it found after an inspection to have violated the fare registration policy.³

After plaintiff's discharge was upheld at each level of the grievance process, a decision was made by the Executive Committee of the union not to demand arbitration on the grievance.

³ Several cashiers resigned after failing an inspection rather than proceed with a termination hearing. SEPTA did not refuse to let them resign. Of those identified who did so, four were black and one was white. There is no evidence or suggestion that plaintiff asked or attempted to resign.

Damiano DiBenedetto, a white male cashier, was the subject of a revenue inspection on September 8, 1994. One pre-recorded dollar bill was not found at the end of Mr. DiBenedetto's shift.

Mr. Savannah conducted the first level grievance hearing for Mr. DiBenedetto. Mr. Savannah noticed a discrepancy between the appearance of Mr. DiBenedetto and the written description of the cashier to whom a revenue agent had passed the pre-recorded bill. Mr. Savannah noted that the agent had possibly passed the bill to a cashier on the other side of the track. Mr. DiBenedetto was subsequently discharged, however, Mr. Savannah brought the discrepancy to the attention of the Office of the Inspector General. Mr. DiBenedetto was reinstated to his position after it was determined that the pre-recorded bill had been passed to another cashier. The agent who passed the bill in question was terminated.

Each party has presented statistical data which, except as to its significance, is uncontroverted by the other. Plaintiff has presented statistics from April, May and June 1994 which show that the number of black cashiers audited over that period proportionately exceeds their presence in the employee

population.⁴ Of 1,134 audits conducted in this three month period, 83% were of black cashiers and 14% were of white

⁴ These statistics are segmented by train line and by gender as well as race. As a result, there are three months where black males appear to have been audited in numbers greater than random chance would suggest but in which black females were audited below or within the range suggested by chance. Plaintiff has not asserted a claim for gender or race plus gender discrimination. Thus these statistics must be synthesized to obtain data relevant to a claim of racial discrimination.

cashiers.⁵ At the time, 71% of the cashiers were black and 25.6% were white. Defendant's statistics show that over a four year period from the initiation of audits in October 1989 to November 1993, the last full month before the phase-out of roll-over safes, there is no disproportion by race of cashiers audited, inspected or discharged for a fare registration infraction.

IV. DISCUSSION

A plaintiff has the initial burden of establishing a prima facie case of employment discrimination. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Once a plaintiff does so, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment decision. Hicks, 509 U.S. at 507; Fuentes, 32 F.3d at 763. The plaintiff may then discredit the employer's articulated reason and show that it was pretextual from which a factfinder may infer that the real reason was discriminatory or otherwise present evidence from which one reasonably could find that unlawful discrimination was more likely than not a determinative or "but-for" cause of the adverse employment action. Hicks, 509 U.S. at 511 & n.4; Miller v. CIGNA Corp., 47 F.3d 586, 595-96 (3d Cir. 1995) (en banc); Fuentes, 32 F.3d at 763-64.

To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating such weaknesses, implausibilities, inconsistencies, contradictions or

⁵ A small percentage of cashiers are identified as "other" or "unknown."

incoherence in that reason that one reasonably could conclude it is incredible and unworthy of belief. Fuentes, 32 F.3d at 364-65; Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993). While a plaintiff may present statistical evidence in a disparate treatment case, such evidence itself "rarely suffices to rebut an employer's legitimate nondiscriminatory rationale for its decision to dismiss an individual employee." LeBlanc v. Great American Insurance Co., 6 F.3d 836, 848 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994). See also Grant v. News Group Boston, Inc., 55 F.3d 1,8 (1st Cir. 1995).

The ultimate burden of proving that a defendant engaged in intentional discrimination against the plaintiff remains at all times on the plaintiff. Hicks, 509 U.S. at 507, 511.

For purposes of this motion, defendant does not contest that plaintiff can establish a prima facie case. Rather, defendant focuses its argument on a failure by plaintiff to discredit defendant's stated legitimate reason for terminating him or otherwise to show that his race was more likely than not a determinative factor in his termination. Accordingly, the court will similarly focus its analysis.

Plaintiff points to four things in resisting summary judgment.

Plaintiff argues that he was not in fact guilty of the infraction for which he was discharged. This is not sufficient to show pretext. An employer may terminate an employee fairly or

unfairly and for any reason or no reason at all without incurring Title VII liability unless the decision was motivated by invidious discrimination. Breser v. Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995).

It is the employer's belief that plaintiff violated company policy that is important. See Fuentes, 32 F.3d at 765 ("To discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent"); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the decision maker"); Holder v. City of Raleigh, 867 F.2d 823, 829 (4th Cir. 1989) ("A reason honestly described but poorly founded is not a pretext") (citation and internal quotations omitted); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa.) (that a decision is ill-informed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995); Doyle v. Sentry Ins., 877 F. Supp. 1002, 1009 n.5 (E.D. Va. 1995) (it is the perception of the decisionmaker that is relevant); Orisakwe v. Marriott Retirement Communities, Inc., 871 F. Supp. 296, 299 (S.D. Tex. 1994) (employer who wrongly believes employee violated company policy does not discriminate when he acts on that belief).

Plaintiff also argues that a white cashier charged with violating the fare registration policy, Mr. DiBenedetto, was

treated more favorably by defendant. Specifically plaintiff contends that there was a more conscientious investigation of the charge against Mr. DiBenedetto. Plaintiff suggests that in his case the others who had entered his booth during the inspection period should have been investigated. The two cases, however, are simply not similar.

Mr. DiBenedetto was discharged because of one missing bill. The investigative report showed that this bill had been passed by an undercover agent to another cashier, apparently the one across the track from Mr. DiBenedetto. This was corroborated and Mr. DiBenedetto was reinstated. The agent who had misidentified, although correctly described, the cashier to whom he passed a pre-recorded bill was terminated. A cashier clearly cannot be accountable for a bill he never received. The termination of the agent also shows that SEPTA did not tolerate errors by investigators. Mr. Savannah, the SEPTA supervisor who initiated the reinvestigation in the DiBenedetto case, was not so moved at the second level grievance hearing by plaintiff's protestations. As noted, Mr. Savannah is black.

The report in plaintiff's case showed that he had received the five missing pre-recorded bills for which he was held accountable. Even assuming that they may all have been taken by someone to whom plaintiff gave access to his booth, Mr. Dolan's testimony that further investigation was deemed unnecessary because a cashier has sole responsibility for revenue received at his window on his shift is uncontroverted.

Plaintiff contends that defendant made "inconsistent" statements about how plaintiff came to be audited. In a response to an interrogatory signed by a SEPTA attorney, defendant stated that it did not "select" plaintiff for an audit but randomly selected the station at which he worked at the time. Messrs. Gordon and Moore then averred that they ordered an audit of plaintiff because during another audit at his station they discovered a pattern of missing bills near the turn of his shift. Every inconsistent statement during discovery is not, of course, an inconsistent reason for the adverse employment action. Further, the statements in context are not inconsistent. The only fair import of the information conveyed by defendant is that it had not simply set out to audit plaintiff. Rather, he came to be audited in the course of defendant's routine random monitoring process. The station at which he happened to work was one of ten randomly selected by the Office of Inspector General for revenue audits. Indeed, it was Mr. Bowman who was the subject of the audit and subsequent inspection which led Messrs. Gordon and Moore to become suspicious of plaintiff who was then audited.

Moreover, even if viewed as inconsistent, these statements do not reasonably support a finding that defendant has lied about the reason for discharging plaintiff or that he was terminated because of his race. That Messrs. Gordon and Moore discovered missing bills near the turn of his shift is uncontroverted. The only reason ever given by defendant for

terminating plaintiff is the finding he violated the fare registration policy.

Finally, plaintiff suggests that pretext or discriminatory intent may be found from the statistics that show "during the period Mr. Murray was audited and inspected, black cashiers were audited more often than white cashiers." Plaintiff points to the statistics for April, May and June 1994 which he contends show that black cashiers "were unfairly targeted for revenue audits."⁶

There is no contention or evidence that black cashiers were disproportionately inspected or discharged for fare registration violations at any time. Defendant's uncontroverted statistical analysis of the four year period between the initiation of audits and the last full month before the phase-out of roll-over safes shows no disproportion by race of the cashiers audited.

As noted, a cashier is not subject to discharge based on audit results but rather only on the result of an inspection. In the absence of any evidence of racial disparity in inspections or terminations, the essence of plaintiff's position appears to be that the chances suspicion will focus on a black cashier as a result of an audit is proportionately higher than for a white cashier. In other words, a black cashier who violates the fare

⁶ Presumably, plaintiff offers these statistics to show racial bias generally on SEPTA's part as plaintiff himself was audited because of the particularized suspicion of Messrs. Gordon and Moore.

registration policy is somewhat more likely to be detected than a white cashier. One, however, cannot reasonably find even this as a fact from the limited statistics presented by plaintiff.⁷

The court does not agree with defendant that the conclusion by Judge Fullam in a recent SEPTA cashier discharge case that a similar analysis based on only three months of statistics lacked probative value is literally preclusive in this case. Nevertheless, the inherent deficiency in such a three month study noted by Judge Fullam is instructive. See Davis v. Southeastern Transp. Authority, 1993 WL 169864, *4 (E.D. Pa. May 14, 1993), aff'd, 19 F.3d 642 (3d Cir.), cert. denied, 513 U.S. 837 (1994). As noted by Judge Fullam, three months of statistics do not provide a reliable base, particularly in the face of several years of countervailing statistics.

Also as noted by Judge Fullam, there is an important difference between evidence of a disparate impact and evidence sufficient to "support an inference of intentional discrimination." Id. See also Avery, 1997 WL 839275 at *14 &

⁷ The court does not suggest that the state may intentionally target persons for investigation based on race. This, in the court's view, would be incompatible with the guaranty of equal protection. See U.S. v. Avery, 1997 WL 839275, *12 (6th Cir. Nov. 3, 1997) (when state acts "to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred"). While the court believes that a practice of intentionally targeting persons for investigation solely by race would warrant injunctive relief, it expresses no opinion on whether any evidence of impropriety discovered in such an investigation must be discarded or disregarded. See Avery, 1997 WL 839275 at *16 (Boggs, J. concurring).

n.7 (even substantial disparity over two years in ratio of black investigatees to blacks in relevant population insufficient to show intentional discrimination); St. German of Alaska Eastern Orthodox Catholic Church v. U.S., 840 F.2d 1087, 1095 (9th Cir. 1988) ("discriminatory investigation claim" requires proof of discriminatory effect and discriminatory motivation, i.e., that plaintiff was "singled out" for investigation based on race or other invidious reason while those otherwise similarly situated "have not generally been proceeded against").

One cannot reasonably find from the statistics of April, May and June 1994 that defendant intentionally targeted cashiers for revenue audits because of their race, let alone made termination decisions based on race.

Random selection or distribution produces rough equality over time but not necessarily in each month or several month period. The audit programs of employers of persons handling cash would effectively be undermined if an employer could not discipline an employee accountable for missing money in any month it had failed to ensure audits were statistically proportionate as to those of that employee's race, gender, religion or national origin.

Plaintiff notes that May 1994 is the month in which he was selected for audit. This, however, does not render the statistical slice presented by plaintiff any more meaningful or probative. One cannot fairly find that after many years of statistical proportionality, defendant began to target cashiers

for audit based on race in April or May 1994 from these selected statistics. Interestingly, of the three months of data to which plaintiff points, the least disparity by race is found in May.⁸ Moreover, the proportion by race of cashiers on the Broad Street Line who were audited in May 1994 virtually mirrors their presence in the total workforce.⁹ Thus, plaintiff's hypothesis is reduced to one that SEPTA intentionally targeted black cashiers for audit in the Spring of 1994 only on the Market Street Line. This, at least in the context of the record in the instant case, is not reasonable.

More importantly, it is impossible to reconstruct by race when particular cashiers received casino boxes. Thus, it is impossible to recreate the universe of cashiers who were subject to being audited after November 1993.

Messrs. Moore and Gordon who oversaw the audit and inspection process on both lines and made the decision to audit and inspect plaintiff are minority males, as are the other two persons involved in the inspection of plaintiff. Plaintiff does not attribute racial animus to them but argues that what is important is the race of Mr. Dolan who officially terminated

⁸ Of the 331 audits in May 1994, 80% were of black cashiers and 17.8% were of white cashiers. As noted, 71% of the cashiers were black and 25.6% were white.

⁹ Of the 208 audits on the Broad Street Line in May 1994, 85.5% were of black cashiers and 14.5 % were of white cashiers. At the time, 83.7% of the cashiers on the Line were black and 15.5% were white.

plaintiff.¹⁰ Mr. Dolan's decision, however, was based on the report compiled and initialed by Messrs. Moore and Gordon on June 23, 1994. There is, moreover, no evidence to show that Mr. Dolan harbored any racial animus.

V. CONCLUSION

A fare registration infraction is a legitimate nondiscriminatory reason to discharge a cashier and one for which defendant had consistently terminated employees. Defendant has consistently maintained, after a hearing and through three levels of grievance proceedings, that plaintiff was terminated because he had violated the fare registration policy. Whether SEPTA's conclusion was correct or incorrect, plaintiff simply has not presented evidence from which one reasonably could find that SEPTA's reason is incredible and unworthy of belief or that race played a determinative role in the decision to terminate him.

Accordingly, defendant is entitled to summary judgment. Defendant's motion will be granted. An appropriate order will be entered.

¹⁰ See, e.g., Rivers v. Westinghouse Electric Corp., 451 F. Supp. 44, 49 (E.D. Pa. 1978) (noting lack of significance of statistical evidence of disparity in race of employees investigated for infractions given lack of evidence of racial bias of persons making decision to investigate plaintiff).

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 TRANSIT AUTHORITY and TOM DOLAN : NO. 96-7971

O R D E R

AND NOW, this day of March, 1998, upon
consideration of defendants' Motion for Summary Judgment and
plaintiff's response thereto, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and
accordingly **JUDGMENT is ENTERED** in the above action for the
defendant and against the plaintiff.

BY THE COURT:

JAY C. WALDMAN, J.