

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

THOMAS F. ROCHE,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 97-2753
v.	:	
	:	
SUPERVALU, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

January 15, 1999

Plaintiff commenced this action on April 22, 1997 against his employer, Supervalu, Inc., alleging violations of the American with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-12213, and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 1991 & Supp. 1997). On April 23, 1998, Plaintiff filed a second amended complaint in which he added as a defendant the Teamsters Local Union No. 429 (“Union”). This Court subsequently dismissed the Union as a defendant in this case. See Roche v. Supervalu, Inc., No. CIV.A. 97-2753, 1998 WL 437265 (E.D. Pa. July 29, 1998). Presently before the Court is Defendant Supervalu’s Motion for Summary Judgment. For the following reasons, Defendant’s motion will be **GRANTED** in its entirety.

I. BACKGROUND

Plaintiff Roche began working for Defendant in August 1973 at a warehouse located in Temple, Pennsylvania. Throughout his employment, Plaintiff was a member of the Union and subject to the terms and conditions of the collective bargaining agreement between it and Supervalu. In December of 1992, after two years of tests and surgery, Plaintiff was diagnosed with narcolepsy, a permanent neurological impairment. In March 1993, after the parties entered a Last Chance Agreement, Plaintiff's Union notified Defendant of his medical condition. Plaintiff submitted a note from his doctor indicating that he suffered from narcolepsy and that work limitations around machinery were necessary.

On or about February 10, 1994, Plaintiff filed a worker's compensation claim for "mental stress." The filing of a work-related injury claim triggered Defendant's drug/alcohol policy, which requires that a drug screen be performed. The drug screen results came up positive for marijuana, and as a result, Plaintiff was suspended from work on March 2, 1994. While Plaintiff asserts that Defendant lied about the drug test and suspended him on false charges because Plaintiff did not use marijuana, a copy of the test result relied upon by Defendant to suspend Plaintiff plainly shows a positive result. On March 30, 1994, following a negative test, Plaintiff was reinstated.

In May of 1994, after being informed that Plaintiff attempted to sell Defendant's property (a load bar left by a trucker) to an outsider, Defendant suspended Plaintiff pending an investigation. While Defendant contends that its investigation supported a finding that Plaintiff attempted to sell the property, Plaintiff again argues that he was suspended on a false charge.

Notwithstanding finding Plaintiff guilty, Defendant entered into a second Last Chance Agreement with Plaintiff.

The second Last Chance Agreement dated May 20, 1994 subjected Plaintiff to a new attendance policy recently instituted by Defendant, which applied to all employees at the Temple facility. The attendance policy set forth points that would be given for certain absences or tardy arrivals. Defendant applied a system of progressive discipline based on the number of points that an employee accumulated. Despite this attendance policy, Defendant did not assign points to Plaintiff to the extent that he identified an absence or tardy arrival as related to his disability. Plaintiff returned to work shortly after executing the agreement.

On July 17, 1994, Defendant then instituted a new employee break schedule, which eliminated a 1:00 p.m. coffee break and added a 9:00 a.m. and 12:00 p.m. break for employees working the 7:00 a.m. to 3:00 p.m. shift. This change in the break schedule prevented Plaintiff from using the 1:00 p.m. break during his shift to take a short 10 to 15-minute nap. Plaintiff objected to the schedule by contacting Judy Dreyer of Human Resources, who said she would contact his manager to complain. Plaintiff claims that his manager never contacted him to address his complaint, and Plaintiff himself did not pursue his complaint any further. Additionally, on August 2, 1994, Plaintiff was informed that due to a change in Defendant's overtime policy that he would no longer be available to take overtime on a routine basis.

During the fall of 1994, Plaintiff began to accumulate points under Defendant's attendance policy for unexcused tardiness and absences. Plaintiff received a three-day suspension in October 1994 for excessive absences. On November 22, 1994, Plaintiff was late again in violation of the attendance policy and received a five-day suspension as a result. On

December 6, 1994, Plaintiff telephoned Defendant to report that he would be unable to attend work due to a minor family illness. On December 7, 1994, Plaintiff failed to report to work, and he was fired for excessive absenteeism.

June 1995 -- Settlement Agreement and General Release

As a result of his discharge, Plaintiff filed an action in federal court alleging that Defendant violated the Family Medical Leave Act. The parties settled the action and entered into a General Release and Settlement Agreement dated June 6, 1995. Pursuant to the agreement, Plaintiff received a settlement of \$22,500 and released all claims arising out of his employment or termination thereof, including any violation under the ADA, except for the following exclusion:

Specifically excluded from this Release is a claim under the Americans with Disabilities Act as set forth in the Questionnaire dated August 10, 1994 allegedly filed by Plaintiff with the Equal Employment Opportunity Commission. No Claim other than the Claim made pursuant to the Americans with Disabilities Act in the August 10, 1994 Questionnaire is excluded from this release.

Defs. Mem. (Exhibit 22 thereto). Defendant also agreed to allow Plaintiff to return to work within five days and to restore him to the same seniority and employment benefit position.

September 1997 -- Layoff and Rebid

For over two years, Plaintiff's employment continued uninterrupted by incident. Then, in September of 1997, Supervalu initiated a layoff. In accordance with the terms of the collective bargaining agreement between Defendant and the Union, all production positions, including Plaintiff's position, were subject to a rebid. During a rebid, bargaining unit members with the most seniority select their position of choice first. More junior employees then select

from the remaining positions. As a result of the rebid, Plaintiff's then 6:30 a.m. to 2:30 p.m. shift was bid by a more senior employee. All other positions on that shift were also rebid by employees more senior than Plaintiff. Plaintiff had the opportunity to bid for a position on the 9:00 a.m. to 5:00 p.m. shift, but chose a 11:00 a.m. to 7:00 p.m. shift because he wanted to stay in the perishables department. In this position, Plaintiff primarily was able to work his original 6:30 a.m. to 2:30 p.m. shift by covering for absent employees.

In an effort to make his shift permanent, Plaintiff presented Defendant copies of three letters from Dr. Early, Plaintiff's treating physician, which discussed Plaintiff's medical condition and the reasons why Plaintiff needed to remain on that shift. Plaintiff also filed a grievance with the Union concerning his inability to bid the 6:30 a.m. to 2:30 p.m. shift, which the Union rejected as unreasonable. Plaintiff appealed the Union's decision, and the Union voted not to pursue the grievance further. Plaintiff repeatedly asked appropriate Supervalu personnel to advise him of openings for positions on the 6:30 a.m. to 2:30 p.m. shift, but he was and has not been informed of any openings.

In early December 1997, Plaintiff was required to work his scheduled 11:00 a.m. to 7:00 shift because there were no absences for which Plaintiff could fill on the 6:30 a.m. to 2:30 p.m. shift. As a result, Plaintiff took a leave of absence and returned to work in late December. Plaintiff reminded personnel of his medical condition, which required him to work on the 6:30 a.m. to 2:30 p.m. shift, and provided another letter from his treating physician. Unable to obtain his desired shift, Plaintiff took another leave of absence in January 1998, from which he did not return.

Contacts with the EEOC

Plaintiff first contacted the Equal Employment Opportunity Commission (“EEOC”) by telephone in December 1992. Plaintiff was informed at that time of the existence of a limitations period within which he must file his claim. In March 1993, Plaintiff’s wife telephoned the EEOC and was told that Plaintiff must fill out the necessary forms to file a complaint. Plaintiff’s wife informed the EEOC that Plaintiff’s condition of narcolepsy rendered him incapable of physically writing a complaint. In June 1993, Plaintiff’s wife again contacted the EEOC and was told that if Plaintiff lived outside of a fifty-mile radius, he could file a complaint over the telephone. In July 1993, Plaintiff’s wife contacted the EEOC to file Plaintiff’s complaint over the phone. Although Plaintiff provides no explanation, an EEOC representative did not take the information over the phone at that time.

From October 1993 to July 1994, Plaintiff’s wife made repeated efforts to contact the EEOC to initiate the filing of a complaint. Plaintiff himself contacted the EEOC on June 7, 1994 and initiated the procedure to file a complaint. In July 1994, the EEOC contacted Plaintiff’s wife and told her that Plaintiff’s signature would be needed even in the event of filing a complaint over the phone. During a telephone conversation that took place sometime after Plaintiff’s initial contact with the EEOC, an EEOC representative admitted that it had erred in the handling of Plaintiff’s charge of discrimination. Additionally, Plaintiff filed a complaint with the Reading Human Relations Office sometime before Plaintiff entered into the June 1995 release.

Subsequently, Plaintiff filled out and sent Questionnaires to the EEOC on June 29, 1994 and August 10, 1994. Both Questionnaires list similar allegations. In the June 29, 1994

Questionnaire, Plaintiff listed the “Type of Harm” as “Discharge, Harassment, None Acceptance [sic].” In his explanation of what occurred, Plaintiff recounted the following incidents: (1) his October 29, 1992 termination for excessive absenteeism due to narcolepsy, (2) his March 1993 reinstatement, (3) Defendant’s refusal to allow him to return to work, (4) Defendant’s failure to accommodate, and (5) incidents of harassment and policy changes that he claimed were too numerous to describe. In the August 10, 1994 Questionnaire, Plaintiff listed the type of harm as “Discharge, Harassment, Non-Compliance with ADA Ruling for Accommodation” and added the following three events to his prior explanation: Plaintiff’s positive drug test, Plaintiff’s second Last Chance Agreement, and Defendant’s change in overtime policy.

Plaintiff filed the formal Charge of Discrimination with the EEOC on or about July 7, 1995. The EEOC wrote to Plaintiff on December 17, 1997, indicating that the matter would be recommended for dismissal and issued a Right to Sue letter on January 22, 1998.

II. LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A factual dispute is “material” if it might affect the outcome of the case under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On summary judgment, it is not the court’s role to weigh the disputed evidence and decide which is more probative; rather, the court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. See Anderson, 477 U.S. at 255. If a conflict arises between the evidence

presented by both sides, the court must accept as true the allegations of the non-moving party.

See id.

If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). In doing so, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Inds. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence of the non-moving party is “merely colorable,” or is “not significantly probative,” summary judgment may be granted. Anderson, 477 U.S. at 249-50.

III. **DISCUSSION**

A. The Effect of the Release

As a preliminary matter, the Court addresses the effect of the June 1995 release on Plaintiff’s claims. As discussed earlier, Plaintiff signed a release to settle a claim of unlawful termination occurring December 1994. As a result, Defendant argues that Plaintiff is barred by the doctrine of accord and satisfaction from bringing any claim based on occurrences prior to June 6, 1995, except for the ADA claim, as outlined in Plaintiff’s EEOC questionnaire. The Court agrees. Where a release manifests an intent to settle all accounts, the release will be given full effect even as to unknown claims, unless the release itself is upset due to fraud. See Dennie v. Univ. of Pittsburgh Sch. of Med., 638 F. Supp. 1005, 1009 (W.D. Pa. 1986).

In response, Plaintiff does not contest the validity of the release, but rather argues that the release does not bar his PHRA claims because (1) the June 1995 agreement contains no express language limiting the statutes pursuant to which Plaintiff could seek relief and (2) that

Plaintiff had received assurances prior to signing the release that he was not releasing Defendant from any claims he might have for discrimination on account of his disability.

The Court rejects Plaintiff's first argument because, under the express terms of the agreement, only a claim brought pursuant to the ADA, as outlined in his August 10, 1994 Questionnaire, is specifically excluded from its coverage. Plaintiff released all other claims when he signed the agreement, including any claims for discrimination pursuant to the PHRA.

As for Plaintiff's second contention, the Court finds this argument unpersuasive as a party cannot evade the clear language of a release by contending that he or she did not subjectively intend to release the claim in question. See Jordan v. Smithkline Beecham, Inc., 958 F. Supp. 1012, 1019-1020 (E.D. Pa. 1997). Moreover, "a claimant may not seek to invalidate a release based on purported fraud where he [has] failed to return to the other party the consideration he received for the release. A party's failure to do so constitutes ratification of the release." Id. at 1020. Thus, because the agreement discharges all claims arising from the initial lawsuit, except for an ADA claim as outlined in Plaintiff's August 10, 1994 EEOC Questionnaire, the Court finds that Plaintiff's claim brought under the PHRA, pertaining to any incidents occurring prior to June 6, 1995, is barred.

Furthermore, in addition to Plaintiff's PHRA claim, Plaintiff is barred from bringing any other claim, based on events occurring prior to June 6, 1995, that is specifically excluded by the release. This would include any alleged discrimination between August 10, 1994 and June 6, 1995, such as Plaintiff's October 1994 three-day suspension and December 1994 termination. In any event, the October suspension and December 1994 termination postdate the August 10, 1994 EEOC Questionnaire and naturally, are mentioned nowhere in that

document. Accordingly, the motion is **GRANTED** as to Plaintiff's PHRA claim based on allegations prior to June 6, 1995 (the date of the release) and as to Plaintiff's ADA claim based on his October 1994 suspension and December 1994 termination.

B. The Effect of the Statutory Limitations Periods

Before reaching the merits of Plaintiff's surviving claims, the Court must examine the timeliness of Plaintiff's lawsuit. The procedures for instituting an ADA claim are those set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. See 42 U.S.C. § 12117(a). A federal court may not adjudicate a Title VII claim unless a timely charge of discrimination has been filed with the EEOC. See 42 U.S.C. § 2000e-5(e)(1); Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3rd Cir. 1990). The procedural standards under Title VII require a plaintiff to file a charge alleging a violation of the statute "within three hundred days after the alleged unlawful employment practice occurred. . . ." ¹ 42 U.S.C. § 2000e-5(e)(1). The 300-day period applies when "the person aggrieved has initially instituted proceedings with a state or local agency." See 42 U.S.C. § 2000e-5(e). As Plaintiff's first filing of a complaint was with the Reading Human Relations Commission, the Court will apply the extended 300-day limitations period and not the 180-day limitations period. See Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 751 (3rd Cir. 1983)(holding that a litigant who does not initially institute proceedings in the state agency is not entitled to the 300-day limitations period). The

¹ By contrast, to bring suit under the PHRA, a plaintiff must have filed an administrative complaint with the Pennsylvania Human Relations Commission within 180 days of the alleged act of discrimination. See 43 Pa. Cons. Stat. A. § 959(g) as amended 43 Pa. Cons. Stat. § 959(h) (1993); Woodson v. Scott Paper Co., 109 F.3d 913, 926 (3rd Cir. 1997). Because the ADA time limit is longer, the ensuing discussion encompasses Plaintiff's claims under both the ADA and the PHRA.

timeliness of a filing is determined by the date the filing is received by the EEOC. See Johnson v. Host Enterprise, Inc., 470 F. Supp. 381, 383 (E.D. Pa. 1979). However, the time limit for presenting a charge to the EEOC is not jurisdictional. Rather, it is akin to a statute of limitations and thus, is subject to waiver, equitable estoppel and equitable tolling. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

Defendant argues that Plaintiff filed a charge of discrimination with the EEOC on July 7, 1995, barring Plaintiff from stating an ADA claim based on events prior to September 10, 1994 (300 days prior to July 7, 1995) and from stating a PHRA claim based on events prior to January 8, 1995 (180 days prior to July 7, 1995). In response, Plaintiff argues that, in light of his efforts to file a complaint in December of 1992; his submission of a Questionnaires to the EEOC in both June and August of 1994; the EEOC's admission that it had erred in handling Plaintiff's charge; and the EEOC's consideration of Plaintiff's charge as being timely filed, equitable tolling is appropriate and that the Court should likewise consider his discrimination charge as being timely filed.

On these facts, the Court deems Plaintiff's earliest filing of an EEOC Questionnaire as satisfying the minimum requirements for filing a formal charge and thereby, finds that Plaintiff properly filed with the EEOC on June 29, 1994. See Powell v. Independence Blue Cross, Inc., No. CIV.A. 95-2509, 1997 WL 137198, at *4 n.2 (E.D. Pa. Mar. 26, 1997); see also Wellington Christian v. Southeastern Pa. Transp. Auth., No. CIV.A. 97-3621, 1997 WL 667123 (E.D. Pa. Oct. 1, 1997) (holding that an unverified Questionnaire suffices in place of a verified Charge). While Plaintiff also appears to rely on the continuing violation theory to save

his earlier claims, the Court finds those arguments unpersuasive and declines to recognize a continuing violation under these facts.

In finding that the June 29, 1994 EEOC Questionnaire tolled the running of the statutory limitations periods, Plaintiff is hereby barred from stating a claim under the ADA based on the events occurring prior to September 1, 1993 (300 days prior to June 29, 1994), and from stating a claim under the PHRA based on events occurring prior to December 31, 1993 (180 days prior to June 29, 1994). Thus, the following allegations are outside the 300-day limitation period and cannot be considered: (1) his October 1992 termination; (2) Defendant's failure to reinstate Plaintiff in March 1993; and (3) Defendant's failure to accommodate Plaintiff from March 1993 to August 1993.

Accordingly, the motion is **GRANTED** as to Plaintiff's discrimination claims based on activity prior to September 1, 1993.

C. The Merits of Plaintiff's Remaining ADA and PHRA Claims

The Court now turns to the merits of Plaintiff's remaining ADA and PHRA claims. The ADA prohibits discrimination "against a qualified individual with a disability because of the disability" with respect to various employment-related matters, including termination.² 42 U.S.C. § 12112(a). Discrimination includes "not making a reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is . . . an employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the

² As Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts, any analysis applied to the ADA claim applies equally to the PHRA claim. See Kelly v. Drexel, 94 F.3d 102, 105 (3rd Cir. 1996).

employer].” 42 U.S.C. § 12112(b)(5)(A). A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8).

Plaintiff claims that Defendant discriminated against him by suspending his employment, subjecting him to a new attendance policy, altering its break and overtime schedules, and instituting a layoff and rebid. In order to present a prima facie case of discrimination under the ADA, the Plaintiff must demonstrate that: (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an adverse employment decision as a result of discrimination. See Gaul v. Lucent Tech., Inc., 134 F.3d 576, 580 (3rd Cir. 1998). If the plaintiff succeeds, the burden of production shifts to the defendant to “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” Fuentes v. Perskie, 32 F.3d 759, 763 (3rd Cir. 1994). The employer satisfies its burden by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. See id. Once the employer articulates a legitimate reason for the unfavorable employment decision, the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence that the employer’s explanation is pretextual. See id. The ultimate burden of persuasion, however, remains on the plaintiff. See id.

Defendant concedes for purposes of this motion that Plaintiff has sufficiently articulated a prima facie case of discrimination. Defendant argues, however, that Plaintiff cannot

avoid summary judgment because he has failed to show that Defendant's proffered reasons for its actions were pretexts for unlawful discrimination. To show pretext sufficient to defeat summary judgment, a plaintiff may submit evidence which either: "1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Id. at 762.

After accounting for the June 1995 release and the statutory limitations periods, Plaintiff's remaining allegations of discrimination are: (1) the March 1994 suspension for a positive drug test; (2) the May 1994 suspension for selling Defendant's property; (3) the implementation of a new attendance policy and changes in break and overtime schedules; and (4) the September 1997 rebid and January 1998 leave of absence.

1. Claims (1) - (3)

a. March 1994 Suspension

As to the March 1994 suspension, Plaintiff has failed to establish that Defendant's reason for its conduct is pretextual. Defendant contends that it suspended Plaintiff because of a positive drug test. Plaintiff does not dispute the drug testing procedure, or the circumstances under which the test was given. Instead, he asserts that the drug test indicated a false positive because he did not use marijuana. Even in light of Plaintiff's assertion, the Court finds that Plaintiff has failed to demonstrate that Defendant's reason for suspending him for drug use was, in fact, pretext for a discriminatory decision based on his narcolepsy. See Ezold v. Wolf, Block, Scar & Solis-Cohen, 983 F.2d 509, 523 (3rd Cir. 1992). Accordingly, summary judgment is

GRANTED as to Plaintiff's discrimination claims based on his March 1994 suspension for a positive drug test.

b. May 1994 Suspension

As to the May 1994 suspension, Defendant contends that the suspension was based on Plaintiff's attempt to sell Defendant's property and its investigation. Plaintiff does not deny that he attempted to give away property he found at work or that the property did not belong to him; instead, he claims that he received no money for the item and that the item did not belong to Defendant. Even assuming Plaintiff's contentions to be true, the Court concludes that Plaintiff has failed to cast sufficient doubt upon Defendant's legitimate reasons for suspending Plaintiff. Moreover, even if Defendant were mistaken as to the facts following its investigation, Plaintiff is required to do more than show that Defendant's action was in error. See Ezold, 983 F.2d at 523. The Court concludes that a factfinder could not reasonably find that Plaintiff's disability was a motivating or determinative factor in Defendant's decision to suspend Plaintiff for an incident of theft. Accordingly, summary judgment is **GRANTED** as to Plaintiff's discrimination claims based on his May 1994 suspension for theft.

c. Second Last Chance Agreement and Changes in Break and Overtime Policies

As to the second Last Chance Agreement which subjected Plaintiff to a new attendance policy and the changes in Defendant's break and overtime policies, Defendant contends that the Plaintiff has failed to show that these changes were implemented as a pretext for discrimination. While Plaintiff now claims that Defendant's change in its policy regarding breaks prevented him from taking the 15 minute nap he needed, see Pl. Mem. at 4, Plaintiff's

deposition testimony belies this fact, see Roche Dep. I at 70-71. Plaintiff not only has failed to specify how the changes in Defendant's break policy prevented him from taking naps, but also he has failed to identify how Defendant's overtime policy had a discriminatory effect. He cannot point to an instance when he was denied overtime. Moreover, Plaintiff has failed to identify how Defendant's implementation of a new attendance policy had a discriminatory effect in light of Defendant's repeated accommodation of him by excusing his absences and tardy arrivals. As Plaintiff has not persuaded the court or produced evidence such that a reasonable jury could find that Defendant's business decision to implement changes in its attendance, break, and overtime policies was caused by bias towards Plaintiff's disability, see Fuentes, 32 F.3d at 763, the Court concludes that Plaintiff has not satisfied his burden to sustain his claims for discrimination. Accordingly, summary judgment is **GRANTED** as to Plaintiff's discrimination claims based on Plaintiff's second Last Chance Agreement and the changes in break and overtime policies.

2. Claim (4)

Finally, as to the 1997 layoff and rebid, and Plaintiff's subsequent leave of absence in January 1998, Plaintiff alleges both a discrimination and retaliation claim, as well as one for constructive discharge. Defendant initially argues that the collective bargaining agreement precluded it from allowing Plaintiff to remain on the 6:30 a.m. to 2:30 p.m. shift, and that under Kralik v. Durbin, such an action would have been unreasonable accommodation per se. 130 F.3d 76 (3rd Cir. 1997). It is not clear that Kralik supports this argument. This Court agrees, however, with Defendant's alternate argument that its actions cannot be characterized as a failure to accommodate Plaintiff's disability. Plaintiff had the opportunity to work an early shift. He could have bid on a 9:00 a.m. to 5:00 p.m. shift. While Plaintiff choose to bypass the

opportunity to work on that shift in order to remain in the perishables department, there is no indication in the record that Plaintiff could work only in that department. Thus, the Court finds that Defendant has met its obligation to offer a reasonable accommodation to Plaintiff.

Accordingly, summary judgment is **GRANTED** as to Plaintiff's discrimination claim on the 1997 rebid and his subsequent leave of absence.

Unlike Plaintiff's prior claims of discrimination, Defendant has not conceded to Plaintiff's establishment of a prima facie case of retaliation under the ADA. Here, Plaintiff must establish a prima facie case by proving that: (1) he engaged in some protected employee activity; (2) he thereafter suffered an adverse employment action either after or contemporaneous with the his protected activity; and (3) a causal connection exists between the protected activity and the adverse employment action. See Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3rd Cir. 1997). If Plaintiff can establish a prima facie case, the burden of production shifts to Defendant to articulate a legitimate, non-discriminatory reason for its actions. See Jalil v. Avdel Corp., 873 F.2d 701, 708 (3rd Cir. 1989). If the employer satisfied its burden, Plaintiff must be able to convince the factfinder both that Defendant's proffered explanation was false, and that retaliation was the real reason for the adverse employment action. See Krouse, 126 F.3d at 500. Plaintiff maintains the ultimate burden of proving unlawful discrimination. See id. at 501.

Defendant first contends that Plaintiff cannot show any adverse employment action. Specifically, Defendant maintains that the fact that Plaintiff did not have seniority to bid a 6:30 a.m. to 2:30 p.m. shift does not show an adverse employment action because the record does not reflect that Plaintiff could not work a 9:00 a.m. to 5:00 p.m. shift. Defendant argues that the evidence shows that Plaintiff was able and has worked longer hours both before and after

the rebid. Defendant next argues that Plaintiff has failed to prove any causal connection between a protected activity and an adverse employment action. Plaintiff filed a Charge with the EEOC in July 1995 and the purported adverse employment action took place in September 1997. Thus, Defendant suggests that the mere fact that the rebid occurred after Plaintiff filed his charge is insufficient to satisfy Plaintiff's burden of demonstrating a causal link, because timing alone does not show a causal connection unless the adverse action follows the protected activity in rapid succession. See Krouse, 126 F.3d at 503.

Finally, Defendant argues that even if Plaintiff could show a prima facie case for retaliation, Plaintiff cannot show the Defendant's reason for changing his shift was a pretext for unlawful retaliation as Plaintiff introduces no evidence that the rebid process was designed to retaliate Plaintiff. Plaintiff makes no affirmative arguments in response. The Court agrees with Defendant and finds that Plaintiff has failed to satisfy his burden to sustain his claim for retaliation as to the September 1997 layoff and rebid and his subsequent leave of absence. Accordingly, summary judgment is **GRANTED** as to Plaintiff's retaliation claim on the 1997 rebid and his subsequent leave of absence.

Finally, Defendant argues that Plaintiff has failed to establish a claim of constructive discharge on the basis of his narcolepsy because a reasonable person would not have felt compelled to resign. See Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3rd Cir. 1988). The Third Circuit has stated that courts "employ an objective test in determining whether an employee was constructively discharged from employment: whether 'the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign.'" Gray v. York Newspapers, Inc.,

957 F.2d 1070, 1079 (3rd Cir. 1992) (quoting Goss v. Exxon Office Syst. Co., 747 F.2d 885, 887-88 (3rd Cir. 1984)). Applying this objective test, the Court finds that no inference could reasonably be drawn that Defendant knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.

The Court also notes that Plaintiff has not alleged any factors that are commonly cited by employees who claim to have been constructively discharged. See Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3rd Cir. 1993). Plaintiff was never threatened with discharge, nor did Defendant ever urge or suggest that he resign. Defendant also did not demote Plaintiff, reduce his pay, or involuntarily transfer him to a less desirable position. Plaintiff had the opportunity to work an early shift, a 9:00 a.m. to 5:00 p.m. shift, but Plaintiff chose to bypass that opportunity in order to remain in the perishables department. Furthermore, Plaintiff did not resign; he took a leave of absence. Thus, the Court finds that a reasonable individual with Plaintiff's disability would not have found the unavailability of the 6:30 a.m. to 2:30 p.m. shift intolerable. As stated earlier, because Defendant provided Plaintiff with a reasonable alternative to working the 6:30 a.m. to 2:30 p.m shift (a shift that was unavailable as it was bid by more senior employees), Plaintiff has not satisfied his burden to sustain his constructive discharge claim for failure to make reasonable accommodations for Plaintiff's disability. Accordingly, summary judgment is **GRANTED** as to Plaintiff's constructive discharge claim on the 1997 rebid and his subsequent leave of absence.

3. Hostile Work Environment

Plaintiff also alleges that Defendant's actions created a hostile work environment based upon his disability. While neither the Supreme Court nor the Court of Appeals for the

Third Circuit has determined whether the ADA even permits a hostile environment claim, this Court has held that “the ADA prohibits a hostile workplace based upon a person’s disability.” Vendetta v. Bell Atlantic Corp., No. CIV.A. 97-4838, 1998 WL 575111 at *9 (E.D. Pa. Sept. 8, 1998). Furthermore, the elements of a prima facie case are the same as one advanced under Title VII, and thus Plaintiff must show that: (1) he is a qualified individual with a disability under the ADA; (2) he was subject to unwelcome harassment; (3) the harassment was based on his disability or a request for an accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of his employment as to create an abusive working environment; and (5) Defendant knew or should have known of the harassment and failed to take prompt effective remedial action. See id. “The hostility of the work environment must be determined by considering factors such as the frequency, severity, or threatening nature of the purportedly harassing conduct.” Id. (citing Presta v. SEPTA, No. CIV.A. 97-2338, 1998 WL 313075, at *13 (E.D. Pa. June 11, 1998)).

Even a cursory review of the record demonstrates that Plaintiff has failed to provide sufficient evidence of a hostile work environment claim. As Defendant points out in its memorandum, the comments and actions identified by Plaintiff cannot establish the severity or pervasiveness required to state a harassment claim. Accordingly, summary judgment is **GRANTED** as to Plaintiff’s hostile work environment claim.

4. Compensatory Damages under the ADA and PHRA

It is unnecessary for the Court to address whether Plaintiff can recover compensatory damages for pain, suffering, humiliation and/or mental anguish under the ADA and PHRA, as summary judgment is granted on Plaintiff’s discrimination claims.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion will be **GRANTED**. An appropriate order follows.

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

THOMAS F. ROCHE,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 97-2753
v.	:	
	:	
SUPERVALU, INC.,	:	
	:	
Defendant.	:	

ORDER

AND NOW this 15th day of January, 1999 upon consideration of Defendant's Motion for Summary Judgment (Docket No. 35), Plaintiff's Response (Docket No. 38), Defendant's Reply (Docket No. 43), and Plaintiff's Sur-reply (Docket No. 47), it is hereby **ORDERED**, in accordance with the accompanying memorandum, that Defendant's motion is **GRANTED** in its entirety and judgment will be entered in favor of Defendant Supervalu Inc. and against Thomas F. Roche. The Clerk shall mark this case **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.