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

DENNIS M. REESE	:	**CIVIL ACTION**
	:	
v.	:	
	:	
AMERICAN FOOD SERVICE	:	**NO. 99-1741**

M E M O R A N D U M

WALDMAN, J. **September 29, 2000**

I. Introduction

Plaintiff alleges that his employment was terminated by defendant because of his actual or perceived disability and as a result of an erroneous determination regarding his responsibility for an incident on which his termination was officially based. Plaintiff has asserted parallel claims for discriminatory discharge under the Americans with Disabilities act, 42 U.S.C. §§ 12101 et seq. ("ADA"), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. §§ 951-963, as well as common law claims for negligence and intentional infliction of emotional distress.

The court has federal question subject matter jurisdiction over the ADA claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

Presently before the court is defendant's Motion for Summary Judgment.

II. Legal Standard

In considering a motion for summary judgment, the court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also 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 are "material." See Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. See Anderson, 479 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d

Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise in the light most favorable to plaintiff, the pertinent facts are as follows.

Defendant is engaged in the business of processing frozen ground beef. Plaintiff is a forty-three year old electrician. From February 1994 until September 8, 1997, plaintiff was employed by defendant as an electrician in its maintenance department. In late February 1997, plaintiff was referred by his physician for an evaluation of abnormal liver functions to a gastroenterologist who concluded that plaintiff "probably has chronic active Hepatitis C." Shortly thereafter, plaintiff informed Gene Volz, defendant's second shift maintenance supervisor and plaintiffs's immediate superior, that he may have Hepatitis C.

After a review of pertinent test results, plaintiff was advised in mid-March 1997 by his physician, Dr. Brian Keeley, that the Hepatitis C diagnosis was confirmed. Dr. Keeley told plaintiff that he had to alert his employer to his condition because it was highly contagious and co-workers must be warned not to touch his tools. Plaintiff then informed Mr. Volz that his Hepatitis C diagnosis had been confirmed and Mr. Volz

conveyed Dr. Keeley's warning to other workers. Mr. Volz soon began treating plaintiff "differently," although precisely how is not specified. Mr. Volz continued to work on projects with plaintiff but not in as close proximity to plaintiff as he had previously.

Plaintiff continued to receive and complete the same type of work assignments as those given in the past, including work on the production floor. Defendant saw no reason to do otherwise as it employed the "universal precautions" policy set forth in OSHA regulations under which all blood spills are treated as if they contain infectious agents.

On July 28, 1997, Mr. Volz attended a blood-borne pathogen class as part of defendant's standard safety training program.[1] Upon plaintiff's return from vacation in early August, Mr. Volz related that he had learned at this class that Hepatitis C is more contagious than AIDS and can survive in dried blood for up to five days.

On August 18, 1997, after experiencing difficulty taking deep breaths and urinating, plaintiff underwent a liver biopsy. The following day, plaintiff reported to an emergency room complaining of "pain from site of the liver biopsy." The attending physician prescribed motrin, percocet and milk of

[1] Plaintiff would have attended this same class but for an intervening vacation.

magnesia and gave plaintiff a note recommending that he take one day off and then return to work on light duty for two days before resuming normal duty. The medical recommendation was approved, and defendant complied with it.

On September 6, 1997, plaintiff was assigned to replace a bushing on Screw Conveyor No. 2. This conveyor leads to a belt which carries meat to Mixer/Grinder No. 3. Mr. Volz discussed the job with plaintiff. Mr. Volz "wanted to be sure [plaintiff] knew what he was doing." Plaintiff told Mr. Volz he had done this type of job before and related how he had done so. When plaintiff related that he did the job while standing on the belt, Mr. Volz frowned and suggested that he should stand on a ladder. In performing the job on the occasion in question, plaintiff stood on the belt.

When plaintiff got his tool belt to perform this task, he did not notice any of the eleven items missing. Plaintiff completed the task in about fifteen minutes during the production workers' lunch break when the production line was shut down. After the task was completed, plaintiff checked the area and it was clean. An assistant production supervisor, Mark Stroebel, looked on the belt on which plaintiff was standing and did not notice anything on the belt.[2]

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[2]There is no evidence in the record as to precisely how much time elapsed between plaintiff's completion of his task and the check of the work area by the supervisor. There is also no competent evidence of record as to how much time elapsed between the supervisor's check of the work area and plaintiff's departure from the area.

Shortly after plaintiff completed his assigned task, the production line was reactivated. A short time thereafter, Mixer/Grinder No. 3 was disrupted. When the machine was broken down, workers discovered parts of two tools, a bulldriver and a needlenose pliers. They were identified as plaintiff's because of the orange tape on them as well as the distinctiveness of plaintiff's bulldriver, and he acknowledges that the tools were his.[3] Plaintiff states that although these tools might ordinarily be used to perform the assigned task, he did not do so. He acknowledges that these tools would be among those in his tool pouch.

As a result of this incident, 5,000 pounds of ground beef were contaminated and had to be condemned. Plaintiff discussed the incident with Mr. Volz. He stated that he had no idea how his tools got in the machine. He acknowledged that the tools could have fallen from his tool pouch, but noted that they then should have ended up in the Formax machine. Plaintiff suggested to Mr. Volz that perhaps tool pouches should no longer be worn by workers while they were on production machinery.

At the request of Ernest Carnevalino, Maintenance Department Manager, Mr. Volz prepared a memorandum regarding the incident. Mr. Volz related that plaintiff "kept saying he really did not know how [the tools] could have gotten there," that they may have fallen from his pouch when he was climbing off the belt

[3]Each worker used a different color tape to mark his tools.

but that he saw nothing on the belt after he got off. Mr. Volz also related plaintiff's statement that "maybe tool pouches shouldn't be worn up on machinery any more." Unidentified persons in management asked Mr. Volz for his opinion about whether plaintiff should be dismissed. There is no evidence of record as to what, if any, opinion Mr. Volz gave or to whom.

Defendant's employee handbook provides the following:

> Disciplinary action or termination will result from, but not be limited to, the following serious offenses:
>
> 16. Willful or careless action resulting in contamination or condemnation of company products.

Other employees received discipline short of termination for misconduct. The conduct involved in those cases, however, involved tardiness and absenteeism. Only two employees, Dave Eliot and Mark Veal, received lesser discipline for contamination of product and for each it was a first contamination offense. For plaintiff it was the second.

On October 22, 1994, soldering paste used by plaintiff in a work area near Mixer/Grinder No. 2 entered the machinery causing the contamination of 25,000 pounds of product. The incident also necessitated a complete washdown of the area which resulted in the loss of 175,000 pounds of product. For this incident plaintiff was suspended for two weeks, formally reprimanded and placed on probation for six months during which his pay increases were frozen.

Defendant has an appeal process for employees who feel aggrieved by an adverse employment action. Plaintiff was aware of this process and did not pursue it. He states this is because Mr. Volz told him "it wouldn't do any good."[4]

Within three weeks of his termination by defendant, plaintiff obtained another position as an electrician. Since his termination by defendant, plaintiff has held electrician jobs with three employers. He has worked at least forty hours per week in each of these positions and frequently between fifty and seventy hours.

IV. Discussion

A. Discrimination Claims

The same general standards, analyses and definitions apply to plaintiff's ADA and PHRA claims for discriminatory discharge. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996); Herbst v. Accident Insurance Co., 1999 WL 820194, *4 (E.D. Pa. Sept. 30, 1999).

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). In the

[4]There is no testimony or other statement of record of Mr. Volz that he made this remark. Mr. Volz was a line supervisor, one rank about plaintiff. In the absence of any showing that he was involved in the appeal process or was authorized by defendant to speak on the subject, see Fed. R. Evid. 801(d)(2), this statement is not competent evidence as to the truth of the content. The making of the statement would be admissible to show why plaintiff decided not to appeal but, without more, would not demonstrate the reasonableness of that decision.

absence of competent direct or overt evidence of discriminatory bias by the decisionmaker, see Armbruster v. Unisys Corp., 32 F.3d 768, 778, 782 (3d Cir. 1994), the court utilizes the analytic framework set forth in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), which applies to ADA discrimination claims. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156-57 (3d Cir. 1995) (applying Title VII and ADEA analysis to ADA pretext case); Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1318 n.5 (E.D. Pa. 1994) (applying Title VII analysis to ADA claim). Plaintiff has the initial burden of establishing a prima facie case of employment discrimination. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The burden then shifts to defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. See Hicks, 509 U.S. at 507; Fuentes, 32 F.3d at 763. To satisfy this burden, the defendant need not also prove that the stated reason was the actual reason. See Woodson v. Scott, 109 F.3d at 920.

Plaintiff may then discredit defendant's articulated reason and show that it was pretextual, from which one may infer the real reason was discriminatory, or by presenting evidence from which one otherwise could reasonably find that unlawful discrimination was more likely than not a motivating or determinative cause of the adverse employment action. See Hicks,

509 U.S. at 511 n.4; Fuentes, 32 F.3d at 763-64. To discredit a defendant's proffered reason for terminating plaintiff, plaintiff must present evidence exposing weaknesses, implausibilities, inconsistencies, contradictions or incoherence in defendant's reason such that a fact finder reasonably could conclude that the reason was incredible and unworthy of belief. See Fuentes, 32 F.3d at 764-65; Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992). "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253; see also Hicks, 509 U.S. at 507, 511; Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987).

To establish a prima facie case of employment discrimination under the ADA, "a plaintiff must be able to establish that he or she (1) has a 'disability,' (2) is a 'qualified individual' and (3) has suffered an adverse employment action because of that disability." Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998) (en banc) (citation omitted). The parties do not dispute that plaintiff was qualified to perform the functions of his job and that his discharge constituted an adverse employment action. Defendant argues forcefully, however, that plaintiff was not disabled or so regarded within the meaning of the ADA, and was terminated because defendant concluded that for the second time in less than

three years his negligence had resulted in the contamination of company products.[5]

For the purposes of the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Under the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"),[6] a "physical impairment" includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1).

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[5]Plaintiff also referred in his complaint to an absence of any "accommodation" by defendant but has proceeded solely on the basis of his termination. He has not pled a distinct failure to accommodate claim and makes no reference to accommodation in his response to defendant's motion. In any event, to trigger an employer's duty to make a good faith effort to accommodate a disabled employee, that employee or someone on his behalf must request accommodation. See Taylor v. Phoenixville School District, 184 F.3d 296, 319 (3d Cir. 1999). The only evidence of record of plaintiff ever requesting accommodation is the request for leave and light duty following the liver biopsy which defendant granted. Plaintiff also has not claimed or shown that he could not perform the essential functions of his job without accommodation. See Deane, 142 F.3d at 146.

[6]As the ADA does not define many of the pertinent terms, courts give substantial deference to the Regulations issued by the EEOC to implement Title I of the Act. See Deane, 142 F.3d at 143 n.4.

The term "substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Id. § 1630.2(j)(1).

Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 163.2(i)).[7]

Determining whether a person has a disability under these ADA standards requires an individualized inquiry. See Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998) (declining to consider whether HIV infection is a per se disability under the ADA); 29 C.F.R. § 1630.2(j) (determination of whether individual has disability not based on name or diagnosis of impairment but on effect of impairment on life of the individual).

Plaintiff contends that his Hepatitis C constitutes an impairment which substantially limits him in the major life

[7]The Supreme Court has questioned but not resolved whether working is a "major life activity." See Sutton v. United Air Lines, 119 S. Ct. 2139, 2151 (1999). Working is currently recognized as a major life activity in this circuit. See Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783 (3d Cir. 1998).

activities of working, sleeping, urinating, breathing and "arguably reproducing." Defendant does not contest that Hepatitis C is an impairment and one quite reasonably could so find. The condition is generally long-term and can cause serious damage to the liver. See Stedman's Medical Dictionary 784 (26th ed. 1995); Rollf v. Interim Personnel, Inc., 1999 WL 1095768, at *5 (E.D. Mo. Nov. 4, 1999).

Courts in this circuit follow the two step process suggested by the EEOC's interpretive guidelines for determining whether an individual's ability to perform a major life activity has been significantly impaired. See Mondzelewski, 162 F.3d at 783 (citing 29 C.F.R. Pt. 1630, App. § 1630.2(j)). Under this analysis, the court must first determine whether the plaintiff is significantly impaired in a life activity other than working. Id. Only if the answer to this question is negative does the court move to the second step of determining whether the plaintiff is significantly impaired in the life activity of working. Id.

If the asserted impaired function is not contained within the EEOC's enumerated exemplars of major life activities, courts must analyze the significance of the particular activity within the meaning of the ADA. See Bragdon, 524 U.S. at 638. ("the touchstone for determining an activity's inclusion under the statutory rubric is its significance"). When considering impairments of activities other than working, the inquiry is

directed at examining the plaintiff's ability in comparison with the "average person in the general population." Mondzelewski, 162 F.3d at 783; 29 C.F.R. S 1630.2(j)(1)(i).

In determining whether a disability qualifies as a substantial limitation of a major life activity, courts consider: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long term impact of or resulting from the impairment." Gordon v. E.L. Hamm & Assoc., Inc., 100 F.3d 907, 911 (11th Cir. 1996). Remedial measures or devices are considered in the "substantially impaired" analysis. See Sutton, 119 S. Ct. at 2147-49.

Sleep has been recognized as a major life activity. See McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999); Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998). Plaintiff, however, has not shown that he is significantly limited in the activity of sleeping when compared to the average adult. Plaintiff states that he occasionally experiences insomnia and must sometimes take medication to sleep. Difficulty sleeping is a common problem experienced by many people with no physical impairments. See Colwell, 158 F.3d at 644 (plaintiff could not prove that "his affliction is any worse than is suffered by a large portion of the nations adult population"). That plaintiff admittedly is able to ameliorate

his condition with medication diminishes the severity of whatever sleeping impairment he may have. See Sutton, 119 S. Ct. at 2146; Doyal v. Oklahoma Heart, Inc., 213 F.3d 492, 498 (10th Cir. 1999) (occasional insomnia treatable with medication does not render an individual substantially restricted in sleeping). One cannot reasonably find from the competent evidence of record that plaintiff is significantly limited in the activity of sleeping.

Reproduction and sexual activity have also been recognized as major life activities. See Bragdon, 524 U.S. at 638, 643; McAlindin, 192 F.3d at 1234. While persons afflicted with Hepatitis C may find their ability to procreate or have intercourse is limited by the disease, there is no evidence that plaintiff does so. He testified that he and his wife have not altered their sexual practices since he was diagnosed and that he does not use a condom regularly during sex. One cannot reasonably find from the record presented that plaintiff's sexual practices have been significantly limited. See Qualls v. Lack's Stores, 1999 WL 731758, at *3 (N.D. Tex. March 31, 1999) (that plaintiff now sometimes uses a condom during intercourse does not constitute a "substantial limitation on one's sex life.").

Breathing is a recognized major life activity, see 29 C.F.R. 1603.2(i), and the court will assume that urinating is such an activity as well. Plaintiff, however, has not shown that he is substantially restricted in these activities. The record reveals that the day after his liver biopsy, plaintiff

experienced difficulty urinating and taking deep breaths. He also states that he has experienced shortness of breath when moving through narrow crawl spaces. Plaintiff has not presented evidence from which one reasonably can conclude that he is significantly more limited than the average person in breathing or urinating on a day to day basis.

An individual's ability to work is substantially limited where he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill and abilities." Sutton, 119 S. Ct. 2139, 2151 (1999) (quoting 29 C.F.R. § 1630.2(j)(3)(i)). If jobs utilizing an individual's skills are available, he is not precluded from a "class of jobs." Id. If an array of different jobs are available, one is not precluded from "a broad range of jobs." Id.

Plaintiff has worked for three different employers as an electrician since being terminated by defendant. He acquired the first of these jobs almost immediately after leaving the defendant. He has worked at least forty hours per week at each of these positions and has frequently worked between fifty and seventy hours per week. At none of these jobs did plaintiff express an inability to handle the tasks or hours required. Plaintiff states he has experienced dizziness and shortness of breath when crawling in narrow spaces. There is no showing,

however, that these symptoms have impaired his ability to work as an electrician in any significant manner. One cannot reasonably find from the competent evidence of record that plaintiff's is substantially limited in his ability to work.

An individual may qualify as "disabled" under the ADA if he is "regarded as" having an impairment which would substantially limit one or more of his major life activities. See Deas v. River West, L.P., 152 F.3d 471, 475-76 (5th Cir. 1998). An individual is regarded as disabled if he:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or
>
> (3) Has none of the impairments defined [above] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. S 1630.2(l).

To sustain a "regarded as" claim, plaintiff must show that "the employer believed, however erroneously, that the plaintiff suffered from an 'impairment' that, if it truly existed, would be covered under the [ADA] and that the employer

discriminated against the plaintiff on that basis." Francis v. City of Meriden, 129 F.3d 281, 285 (2d Cir. 1997).

That defendant correctly regarded plaintiff as having a contagious disease does not show he was regarded as disabled. That defendant alerted co-workers that plaintiff's tools were potentially contagious and should not be handled does not evidence irrational fear or discrimination when this was done on the express advice of plaintiff's own personal physician. Accepting that Mr. Volz appeared to maintain more physical distance from plaintiff while working with him on certain jobs, there has been no showing or even suggestion that this limited at all, let alone substantially, plaintiff's ability to work or engage in any other major life activity.

Plaintiff continued to receive and perform the same type of work assignments after his diagnosis as before, subject to the universal precautions policy applicable to all employees. One cannot reasonably conclude from the competent evidence of record that plaintiff was regarded or treated by defendant as having an impairment which substantially limited a major life activity.

Plaintiff also has not shown that he "suffered an adverse employment action because of" a disability or perceived disability, Deane, 142 F.3d at 142, or presented evidence sufficient to refute defendant's stated legitimate reason for the termination.

Defendant's determination that plaintiff was responsible for the contamination of product despite his protestations was not implausible, irrational or unsupported. Plaintiff was working alone near Mixer/Grinder No. 3 just before pieces of two of his tools were retrieved from that machine. Plaintiff himself had no explanation for the occurrence other than the possibility that the tools fell from his pouch and in some manner not comprehensible to him found their way into the machine.[8] Conduct resulting in contamination of defendant's product was understandably listed as a "serious offense" which could result in termination. There is no evidence of any employee determined on two different occasions to be responsible for such an offense who was not terminated.

Even accepting that plaintiff was innocent of the infraction, an employer's legitimate reason for discharge need not be a correct or even well founded one. A plaintiff cannot discredit a proffered reason merely by showing that it was "wrong or mistaken" as the issue is whether "discriminatory animus motivated" the decisionmaker and not whether he or she was "wise, shrewd, prudent or competent." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). See also Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the

[8]At the time of his deposition two years later, plaintiff could only speculate that perhaps without his noticing they were missing, someone took his tools and "set [him] up." At the same time he acknowledged that he could identify no one who could and would have done such a thing.

decision maker"); 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).

B. Negligence Claim

Insofar as plaintiff's negligence claim is premised on an erroneous determination by defendant regarding the incident which resulted in plaintiff's termination, the short answer is that an employer may terminate an at-will employee at any time for any reason whatsoever except where a discharge violates clearly mandated public policy. See Borse v. Piece Goods Shop, 963 F.2d 611, 617 (3d Cir. 1992); Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1341, 1343-44 (3d Cir. 1990), cert. denied, 499 U.S. 966 (1991).

Insofar as this claim is predicated on a termination of employment because of a "negligent" perception by defendant that plaintiff was disabled, the short answer is that a claim for wrongful discharge may be maintained only in the absence of any statutory remedy. See Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983); Hicks v. Arthur, 843 F. Supp. 949, 957 (E.D. Pa. 1994); Clay v. Advanced Computer Applications, 559 A.2d 917, 918-19, 921 (Pa. 1989). The ADA and PHRA provide remedies for persons wrongfully terminated by employers because of real or perceived disabilities.

C. Intentional Infliction of Emotional Distress Claim

Plaintiff appears to concede that he has not sustained this claim. In his response to defendant's motion, plaintiff states that he "does not oppose the dismissal of his allegation of intentional infliction of emotional distress."

In any event, it is clear this claim is barred by the exclusivity provision of the Pennsylvania Workers' Compensation Act. See 77 Pa. Stat. Ann. § 481; Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997); Doe v. William Shapiro, Esq., P.C., 852 F. Supp. 1246, 1254 (E.D. Pa. 1994); Poyser v. Newman & Co., 522 A.2d 548, 551 (Pa. 1987).

Moreover, plaintiff has failed to present evidence of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society," Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998). See also Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (sexual discrimination insufficient to sustain IIED claim); Coney v. Pepsi Cola Bottling Co., No. CIV. A. 97-2419, 1997 WL 299434, *1 (E.D. Pa. May 29, 1997) ("highly provocative racial slurs and other discriminatory incidents do not amount to actionable outrageous conduct"); Equal Employment Opportunity Comm'n v. Chestnut Hill Hosp., 874 F. Supp. 92, 96 (E.D. Pa. 1995) (racial discrimination in employment decision insufficient to sustain IIED claim); Nichols v. Acme Markets, Inc., 712 F. Supp. 488,

494-95 (E.D. Pa. 1989) (same), aff'd, 902 F.2d 1561 (3d Cir. 1990).

V. Conclusion

One cannot reasonably find from the competent evidence in the summary judgment record that plaintiff had an impairment which substantially limited his ability to work or engage in any other major life activity, or that defendant regarded him as having such an impairment. Plaintiff has not made out sustainable common law claims of negligence or intentional infliction of emotional distress. Accordingly, defendant is entitled to summary judgment.

Defendant's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
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DENNIS M. REESE	:	**CIVIL ACTION**
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O R D E R

AND NOW, this day of September, 2000, upon consideration of defendant's Motion for Summary Judgment (Doc. #8) 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.

BY THE COURT:

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JAY C. WALDMAN, J.