

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

ROBERT SCHLEGEL,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 01-6055
	:	
BERKS AREA READING	:	
TRANSPORTATION AUTHORITY,	:	
(BARTA) and C. RICHARD ROEBUCK,	:	
in his official capacity as Assistant Executive	:	
Director,	:	
Defendants.	:	

**MEMORANDUM AND O R D E R**

LEGROME D. DAVIS, J.

JANUARY \_\_\_\_, 2003

Plaintiff Robert Schlegel (“Plaintiff”) has brought this action against Defendants Berks Area Reading Transportation Authority (“BARTA”) and C. Richard Roebuck (collectively “Defendants”), alleging disability discrimination in violation of various statutes and the Pennsylvania Constitution. Presently before this Court is Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment (“Defendants’ Motion for Summary Judgment”), filed on July 7, 2002. For the reasons set forth below, the Motion will be denied.

**I. Standard of Review**

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). The court is not required to resolve all disputed factual issues, but rather should

determine whether “the evidence is such that a reasonable [finder of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

## **II. Background and Procedural History**

Defendant BARTA is a public transit authority serving the City of Reading and the County of Berks in Pennsylvania. Defendant Roebuck is the Assistant Executive Director of BARTA. Plaintiff began working for BARTA as a bus driver in August, 1987. Plaintiff has a vision color deficiency, which he has had since birth. On January 11, 2000, Plaintiff sustained an injury to his neck and back and was out of work for approximately four months. Plaintiff filed a claim for workers’ compensation benefits, but BARTA denied the claim based on the contention that Plaintiff’s injury was not work-related. In late May, 2000, when Plaintiff sought to return to work, Defendant Roebuck informed Plaintiff that he would have to submit to a return-to-work physical examination.<sup>1</sup> After Plaintiff submitted to a physical examination, he was informed that he had failed the vision test because he is color-blind<sup>2</sup> and that he would not be permitted to drive a bus for BARTA.

In an effort to continue driving for BARTA, Plaintiff obtained a letter from an optometrist stating that Plaintiff’s “significant red/green deficiency” should not interfere with his ability to safely drive a bus because “there are positional clues on traffic lights.” However, BARTA maintained that Plaintiff was unable to drive a bus due to his color blindness, and that Plaintiff

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<sup>1</sup> According to BARTA, a policy was implemented on January 1, 2000, requiring that all employees absent from work for ninety days or more must pass a physical examination utilizing the criteria adopted by the U.S. Department of Transportation (“DOT”).

<sup>2</sup> The DOT examination requires that an employee have “the ability to recognize the colors of traffic signals and devices showing standard red, green and yellow.” 49 C.F.R. § 391.43(10).

would have to obtain a waiver of the DOT vision requirements. Plaintiff discovered that a waiver could not be obtained because BARTA, a wholly intrastate transit authority, is technically exempt from the Federal Motor Carrier Safety Regulations. See 49 C.F.R. § 390.3(f)(2).<sup>3</sup> On August 30, 2000, BARTA informed Plaintiff that, due to his failure to meet the DOT standards and his failure to apply for a waiver of the DOT standards, he would be treated as a “voluntary quit” and his employment with BARTA would be terminated as of September 15, 2000.

Plaintiff received unemployment compensation benefits beginning on January 11, 2000 and terminating on or about July 29, 2000. On August 1, 2000, Plaintiff filed a retroactive Workers’ Compensation Petition, seeking a review of the denial of his application for benefits, and seeking reinstatement of benefits as of January 19, 2000. Following litigation of Plaintiff’s Petition, Plaintiff was awarded workers’ compensation benefits beginning on January 20, 2000. Plaintiff continues to receive these benefits through the present date. In July, 2000, Plaintiff filed charges of discrimination with the Pennsylvania Human Resources Commission (“PHRC”) and with the Equal Employment Opportunity Commission (“EEOC,”). Both charges were dismissed. On December 4, 2001, Plaintiff instituted this action against Defendants BARTA and Roebuck. On July 24, 2002, Defendants filed a Motion for Summary Judgment as to all of Plaintiff’s claims, which motion is currently before this Court.

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<sup>3</sup> BARTA presently acknowledges that it has *voluntarily* elected to employ the DOT standards in examining new employees and employees absent from work for ninety days or more. See Defendants’ Brief in Support of the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (“Def.s’ Br.”) at 7. BARTA’s initial position was that all BARTA drivers are required to meet DOT standards. See Answer of Defendants . . . to Plaintiff’s Amended Complaint with Affirmative Defenses (“Def.s’ Answer”) at 6.

### III. Analysis

Defendants' first argument is that Plaintiff is judicially estopped from asserting that he is a "qualified individual" for the position of driving a bus for BARTA, and that, as a result, Plaintiff is unable to establish a *prima facie* case of disability discrimination. "When properly invoked, judicial estoppel bars a litigant from asserting a position that is inconsistent with one he or she previously took before a court or agency." Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773, 779 (3d Cir. 2001). Defendants argue that in applying for, and receiving, Workers' Compensation benefits, Plaintiff necessarily represented to the Workers' Compensation commission that he was disabled and completely unable to work, and that this position conflicts with the position that Plaintiff must adopt for purposes of this action, namely that he is able to perform the job in question.

"Judicial estoppel 'is an "extraordinary remedy"' that should be employed only "when a party's inconsistent behavior would otherwise result in a miscarriage of justice.'" Id. at 784 (citations omitted). Three requirements must be satisfied before a district court may apply the doctrine of judicial estoppel:

First, the party to be estopped must have taken two positions that are irreconcilably inconsistent. Second, judicial estoppel is unwarranted unless the party changed his or her position "in bad faith – i.e., with intent to play fast and loose with the court." Finally, a district court may not employ judicial estoppel unless it is "tailored to address the harm identified" and no lesser sanction would adequately remedy the damage done by the litigant's misconduct.

Id. at 779-80 (citations omitted). Here, although the facts might allow for the inference that the requirements for the application of judicial estoppel have been satisfied, they do not compel such an inference as a matter of law. In particular, the record of Plaintiff's workers' compensation

proceedings is unclear, at best, as to the specific position expressly adopted by Plaintiff for the purpose of those proceedings. Moreover, the facts do not compel the conclusion that any inconsistencies in the positions taken by Plaintiff are the result of “bad faith.” Rather, an inference may be drawn that Plaintiff was simply motivated to seek workers’ compensation benefits because, when he sought to return to work in May of 2000, Defendants refused to allow him to return to work as a result of his color blindness, and the waiver demanded by Defendants was, in fact, unattainable. Having carefully considered the parties’ arguments, I conclude that there exist genuine issues of material fact as to the particular position expressly adopted by Plaintiff for the purpose of the workers’ compensation proceedings, and that Defendants are not entitled to judgment as a matter of law regarding the issue of whether Plaintiff is judicially estopped from asserting that he is a “qualified individual” for the position of driving a bus for BARTA.<sup>4</sup>

Defendants next argue that Plaintiff cannot establish a *prima facie* case of disability discrimination because he cannot show that he has a “disability.” The Americans with Disabilities Act (“ADA”) provides, in pertinent part:

- The term “disability” means, with respect to an individual --
- (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.

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<sup>4</sup> This Order follows the Court’s granting of Defendants’ Motion for Reconsideration and the Court’s vacating the previous Order, filed on November 21, 2002, denying Defendants’ Motion for Summary Judgment. I note that Defendants’ Motion for Reconsideration is based, in part, on new evidence pertaining to Plaintiff’s Workers’ Compensation proceedings. I have considered this new evidence and have determined that genuine issues of material fact remain regarding the issue of judicial estoppel.

42 U.S.C. § 12102(2). Plaintiff has expressly acknowledged that he is proceeding pursuant only to subsection (C) of § 12102(2), see Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl.'s Memo") at 25, and, therefore, any arguments set forth by Defendants pertaining to subsections (A) and (B) need not be addressed. As to subsection (C), Defendants argue that BARTA merely regarded Plaintiff as having an impairment that limits his ability to operate a BARTA bus, and that operating a bus for BARTA is not a major life activity. See Def.s' Br. at 29. Plaintiff contends that BARTA regarded Plaintiff as having an impairment that substantially limits him in the major life activities of "driving" and "working."

Although the Third Circuit Court of Appeals has not specifically addressed whether driving constitutes a major life activity, courts that have addressed the issue "have concluded that driving is not the type of endeavor that may be characterized as a major life activity." Tedeschi v. Sysco Foods of Philadelphia, Inc., 2000 WL 1281266, at 5 (E.D. Pa. 2000) (citing Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998), cert. denied, 526 U.S. 1018 (1999)); see also Buskirk v. Apollo Metals, 116 F.Supp.2d 591, 597-98 (E.D. Pa. 2000). On the other hand, "working" does constitute a major life activity. See 29 C.F.R. § 1630.2(i); Olson v. General Elec. Astrospace, 101 F.3d 947, 952 (3d Cir. 1996). A person is substantially limited in the major life activity of working when 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, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). There is some evidence in the record tending to support the conclusion that BARTA regarded Plaintiff as being significantly restricted in the ability to perform a particular class of jobs, namely jobs

involving the operation of a commercial vehicle.<sup>5</sup> Thus, there are genuine issues of material fact as to whether BARTA regarded Plaintiff as being substantially limited in the major life activity of working, and Defendants are therefore not entitled to summary judgment on this issue.<sup>6</sup>

Third, Defendants set forth two arguments regarding the medical examination to which Plaintiff was subjected upon his return to work after an extended absence, which examination led to BARTA's discovery that Plaintiff is color-blind. See Def.s' Br. at 33-38 (Arguments I.B.3. and I.B.4.). Plaintiff alleges that this examination violated § 12112(d)(4)(A) of the ADA. See Count VII of Plaintiff's Second Amended Complaint ("Pl.'s Complaint") at 17; Pl.'s Memo at 41. Section 12112(d)(4)(A) of the ADA provides:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d)(4)(A). I have carefully considered the parties' arguments and have concluded that there exist genuine issues of material fact as to whether the examination in question was job-related and consistent with business necessity. For example, the medical examination here included vision tests despite the fact that Plaintiff's absence from work was not

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<sup>5</sup> For example, in Defendants' Answer, Defendants state: "It is denied that BARTA made any independent decisions relative to Plaintiff's colorblindness, but rather followed the opinion and advice of [its] medical provider relative to Plaintiff's ability to safely operate a commercial vehicle for any employer." Def.s' Answer at 6.

<sup>6</sup> Defendants also argue that they are entitled to summary judgment on Plaintiff's claims pursuant to the Pennsylvania Human Relations Act ("PHRA") and the Pennsylvania Constitution because Plaintiff is unable to establish a *prima facie* case of disability discrimination pursuant to the ADA. See Def.s' Br. at 38-39. Because I conclude that Plaintiff has set forth a *prima facie* case of disability discrimination pursuant to the ADA sufficient to withstand the Motion for Summary Judgment, this argument is rejected.

related to a problem with his vision. Moreover, the record includes at least some evidence tending to show that a test which screens for Plaintiff's particular degree of color blindness is not job-related and consistent with business necessity within the context of operating a commercial vehicle.<sup>7</sup> Thus, Defendants are not entitled to judgment as a matter of law on this issue.

Fourth, Defendants set forth arguments relating to Plaintiff's claims under 42 U.S.C. § 1983. In Count III of the Second Amended Complaint, Plaintiff alleges that Defendant Roebuck, in his official capacity, engaged in conduct that violated the ADA and the Rehabilitation Act, and that such conduct constitutes a violation of § 1983. In Count VI, Plaintiff alleges that BARTA engaged in conduct, pursuant to a policy, custom, practice or procedure, that violated the ADA and the Rehabilitation Act, and that, as a result, BARTA is subject to liability pursuant to § 1983. Defendants argue that they are entitled to summary judgment as to Count's III and VI because Plaintiff cannot establish that the acts in question violated Plaintiff's equal protection rights. See Def.s' Brief at 39-44 (Arguments I.D.1. and I.D.2.). However, Plaintiff has clarified that his § 1983 claims are not based upon an alleged violation of his equal protection rights, but rather are based upon the contention that Defendants BARTA and Roebuck violated his rights under the ADA and the Rehabilitation Act. See Pl.'s Memo at 47-48. Thus, Defendants' arguments that Plaintiff is unable to show a violation of his equal protection rights<sup>8</sup> need not be addressed.

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<sup>7</sup> The record includes the opinion of Dr. Gary L. Dietterick, O.D., that despite Plaintiff's "significant red/green deficiency," Plaintiff is "able to differentiate the red and green colors on the acuity chart," that "there are positional clues on traffic lights to enable a person with a color deficiency to determine the red and green lights," and that, in Dr. Dietterick's opinion, Plaintiff "should be able to continue his present position without any risk as a result of his color deficiency." Pl.'s Memo at Exhibit M.

<sup>8</sup> Defendants argue that BARTA's actions were rationally related to a legitimate  
(continued...)

Fifth, Defendants also argue that Defendant Roebuck is protected from all civil liability as a result of the qualified immunity defense. However, Plaintiff has sued Defendant Roebuck only in his official capacity and not in his personal capacity. See Pl.’s Complaint. A claim against a public servant “in his official capacity” seeks to impose liability only upon the entity that the public servant represents and not upon the public servant individually. See, e.g., Monell v. New York Dept. of Social Services, 436 U.S. 658, 690 n.55 (1978). In other words, Plaintiff here seeks to impose liability upon BARTA for Defendant Roebuck’s actions, and does not seek to impose liability upon Defendant Roebuck personally or to recover civil damages from him. The shield of qualified immunity applies only where an individual government official is sued in his official capacity – it does not apply where a municipality or government entity is sued under § 1983. See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993). Defendants’ arguments on this issue are therefore without merit.

Finally, Defendants argue that Plaintiff’s claims should be dismissed due to a failure to exhaust administrative remedies. Defendants’ primary contention<sup>9</sup> is that Plaintiff’s charge of discrimination filed with the Equal Employment Opportunity Commission (“EEOC”) stated only an allegation of disability discrimination, and did not expressly articulate the theory that Plaintiff

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<sup>8</sup>(...continued)

government purpose, and that Plaintiff cannot show he was treated differently than other individuals who were similarly situated. These arguments are not relevant because Plaintiff’s § 1983 claims are not based on an alleged violation of his equal protection rights.

<sup>9</sup> Defendants also argue that Plaintiff failed to exhaust remedies available to him under the collective bargaining agreement between his union and BARTA, and under the Pennsylvania Public Employees Relations Act (“PERA”). Defendants have failed to cite, and I am not aware of, any legal authority which requires a Plaintiff alleging disability discrimination to have exhausted remedies available under a collective bargaining agreement or the PERA.

was discriminated against because he was “regarded as” having a disability. Therefore, Defendants’ argue, Plaintiff should not be permitted to rely upon the “regarded as” theory here. Defendants have failed to cite any authority to support this proposition. ““The relevant test in determining whether appellant was required to exhaust her administrative remedies . . . is whether the acts alleged in the subsequent . . . suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.”” Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)). The Third Circuit Court of Appeals has gone only so far as to hold that a plaintiff alleging a particular category of discrimination (such as racial discrimination) must generally have alleged that same category of discrimination in its EEOC charge. See Spindler v. Southeastern Pennsylvania Transp. Authority, 2002 WL 31059196, at 1 (3d Cir.) (affirming District Court’s dismissal of plaintiff’s racial discrimination claims under Title VII and PHRA for failure to exhaust administrative remedies where plaintiff’s administrative complaint alleged only disability discrimination); Antol, 82 F.3d 1291 (affirming District Court’s dismissal of plaintiff’s gender discrimination claim for failure to exhaust administrative remedies where plaintiff’s administrative complaint charged only disability discrimination). I conclude that Plaintiff’s charge of discrimination filed with the EEOC alleging disability discrimination constitutes an exhaustion of administrative remedies for Plaintiff’s present action alleging disability discrimination based upon the theory that BARTA regarded Plaintiff as having a disability.

#### **IV. Conclusion**

In summary, Defendants’ Motion for Summary Judgment is denied because there exist genuine issues of material fact as to Plaintiff’s claims. An order follows.

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TRANSPORTATION AUTHORITY,	:	
(BARTA) and C. RICHARD ROEBUCK,	:	
in his official capacity as Assistant Executive	:	
Director,	:	
Defendants.	:	

**ORDER**

AND NOW, this        day of January, 2003, upon consideration of Defendants’  
Motion to Dismiss or, in the Alternative, for Summary Judgment , it is hereby ORDERED that  
the motion is DENIED.

BY THE COURT:

Legrome D. Davis