

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

MARIA A. OLSEN, )  
 ) Civil Action  
 Plaintiff, )  
 )  
 vs. ) No. 02-CV-08514  
 )  
 BOROUGH OF NEW HOLLAND, )  
 NEW HOLLAND POLICE DEPARTMENT, and )  
 EDWARD L. SPRECHER, )  
 Chief of Police, )  
 )  
 Defendants. )

\* \* \*

APPEARANCES:

NINA B. SHAPIRO, ESQUIRE,  
On behalf of plaintiff

JOHN C. BOBBER, JR., ESQUIRE,  
PHILLIP B. SILVERMAN, ESQUIRE,  
SUSAN R. ENGLE, ESQUIRE,  
On behalf of defendant

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OPINION

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on Defendants' Motion for Summary Judgment on All Plaintiff's Claims, which motion was filed September 15, 2003. For the reasons expressed below, we conclude that defendants are entitled to judgment as a matter of law on all counts of plaintiff's Complaint. Therefore, we grant defendants' motion and enter judgment in favor of defendants.

### PROCEDURAL BACKGROUND

This civil action arises from plaintiff's employment by the New Holland Police Department. On November 18, 2002 plaintiff filed a Complaint against defendants alleging violations of: (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"); (2) the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"); and (3) the Pennsylvania Human Relations Act, Act of December 20, 1991, P.L. 414, No. 51, §§ 1-11, as amended, 43 P.S. §§ 951-963 ("PHRA"). On September 15, 2003 plaintiff moved for summary judgment on all counts of plaintiff's Complaint.

For the reasons which follow, we now grant defendants' motion for summary judgment and enter judgment in defendants' favor on all counts of the Complaint.

### STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that judgment shall be rendered where it is shown that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where a moving defendant does not bear the burden of persuasion at trial, he need only point out that "there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265, 275 (1986).

Moreover, a non-moving party cannot establish that there exist genuine issues of material fact on mere allegations. The non-movant with a burden of proof must produce a sufficient evidentiary basis from which a reasonable jury could find in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S. Ct. 2505, 2510-2511, 91 L. Ed. 2d 202, 212 (1986).

#### FINDINGS OF FACT

Based upon the pleadings, record papers, depositions and exhibits of the parties, the undersigned makes the following findings of fact:

1. Plaintiff was hired as a police officer at the Borough of New Holland in 1989.<sup>1</sup>
2. Plaintiff utilized both the Department's unisex locker room with restrooms, showers and a changing area and the public ladies' restroom.<sup>2</sup>
3. In the early 1990s plaintiff reported to her supervisor, Chief Edward L. Sprecher, that someone had glued the

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<sup>1</sup> Complaint at ¶ 17; Defendants' Statement of Material Facts Which Defendants Contend There Is No Genuine Dispute ("Defendants' Statement"), filed September 16, 2003, at ¶ 1; Plaintiff's Counter-Statement of Material Facts ("Plaintiff's Statement"), filed on October 17, 2003, at ¶ 1.

<sup>2</sup> Deposition of Marie Olsen, July 31, 2003 ("7/31/03 Olsen Dep."), Exhibit L to Plaintiff's Memorandum in Support of Response in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Brief"), filed on October 17, 2003, at pages 25-29.

lock on her desk shut and glued her coffee mug to her desk.<sup>3</sup>

4. On January 2, 1993 plaintiff notified Chief Sprecher that someone altered a training request form submitted by plaintiff to read "I will perform oral sex on demand."<sup>4</sup>

5. On or about January 30, 2000 plaintiff reported to defendants a work injury caused by wearing the traditional police gun belt.<sup>5</sup>

6. Plaintiff took a workers' compensation leave of absence from May 2000 to August 2000.<sup>6</sup>

7. During her leave of absence, plaintiff and Chief Sprecher discussed alternatives to plaintiff's gun belt.<sup>7</sup>

8. Defendants fitted plaintiff with a lighter automatic weapon made of plastic.<sup>8</sup>

9. Additionally, Chief Sprecher ordered a smaller holster for plaintiff's use with her own, smaller, off-duty

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<sup>3</sup> 7/31/03 Olsen Dep. at 100; Defendants' Statement at ¶ 7.

<sup>4</sup> Memorandum from Maria Olsen to Chief Sprecher dated January 2, 1993, Exhibit D to Plaintiff's Brief.

<sup>5</sup> Complaint at ¶ 26; Medical Report Form, Exhibit P to Plaintiff's Brief; Defendants' Statement at ¶ 5.

<sup>6</sup> Deposition of Marie Olsen, July 11, 2003 ("7/11/03 Olsen Dep."), Exhibit O to Plaintiff's Brief, at pages 57, 118-119; Defendants' Statement at ¶ 7.

<sup>7</sup> Workers' Compensation Hearing Transcript, September 7, 2000 ("Workers' Comp. Tr."), Exhibit E to Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment on All Plaintiff's Claims ("Defendants' Brief"), filed on September 15, 2003, at page 22.

<sup>8</sup> 7/11/03 Olsen Dep. at 33; Defendants' Statement at ¶ 9.

weapon.<sup>9</sup>

10. While awaiting the arrival of plaintiff's smaller holster, plaintiff was assigned to work the desk for the absent police secretary.<sup>10</sup>

11. During plaintiff's leave of absence, defendants offered plaintiff a "gate keeper" position at the community pool in July 2000, which position plaintiff refused.<sup>11</sup>

12. Wearing the smaller holster and the lighter gun did not satisfy plaintiff. The parties discussed with plaintiff's doctor, Dr. Zartman, fitting plaintiff with a tactical mesh vest to carry her required equipment.<sup>12</sup>

13. Plaintiff returned to work on August 16, 2000 wearing the tactical mesh vest. At some point after returning to work, plaintiff began to alternate her use of the tactical mesh vest and the gun belt.<sup>13</sup>

14. On November 16, 2000 plaintiff informed Chief Sprecher that she could no longer alternate between the gun belt

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<sup>9</sup> 7/11/03 Olsen Dep. at 80-81; Workers' Comp. Tr. at 22; Defendants' Statement at ¶ 10.

<sup>10</sup> 7/11/03 Olsen Dep. at 80; Workers' Comp. Tr. at 22; Defendants' Statement at ¶ 11.

<sup>11</sup> 7/11/03 Olsen Dep. at 69-71, 74; Defendants' Statement at ¶¶ 22-23.

<sup>12</sup> Workers' Comp. Tr. at 22-24; Defendants' Statement at ¶¶ 12-13.

<sup>13</sup> 7/31/03 Olsen Dep. at 8-11; Workers' Comp. Tr. at 25; Defendants' Statement at ¶¶ 14, 25-26.

and the tactical vest and that she needed to see her doctor.<sup>14</sup>

15. On February 1, 2001 plaintiff was assigned to work as a light duty officer, a position that defendants created to accommodate plaintiff's hip injury. The light duty officer position was a desk position in which plaintiff was responsible for receiving complaints by telephone call or walk-in, for general clerical work assigned by the Chief of Police, for security, for the completion of Department-required forms, and for booking, fingerprinting and photographing arrestees.<sup>15</sup>

16. On November 11, 2001 plaintiff submitted a note from her doctor, Dr. Wolfe, to Chief Sprecher advising that plaintiff could not work for three weeks. On November 29, 2001 plaintiff submitted a second note from Dr. Wolfe advising her not to return to work for another month as a result of stress related to her working conditions.<sup>16</sup>

17. On May 14, 2002 plaintiff informed Chief Sprecher that Dr. Wolfe had cleared her to return to work.<sup>17</sup>

18. Defendants then offered plaintiff a position at the community pool as soon as she could return to work, which

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<sup>14</sup> Memorandum from Marie Olsen to Edward Sprecher dated November 16, 2000, Exhibit G to Defendants' Brief; Defendants' Statement at ¶ 27.

<sup>15</sup> 7/31/03 Olsen Dep. at 12, 21-24; Letter from Edward Sprecher to Marie Olsen dated January 31, 2001, Exhibit H to Defendants' Brief; Defendants' Statement at ¶ 30.

<sup>16</sup> 7/31/03 Olsen Dep. at 32-33; Defendants' Statement at ¶¶ 32-33.

<sup>17</sup> 7/31/03 Olsen Dep. at 40-41; Defendants' Statement at ¶ 34.

position plaintiff again rejected.<sup>18</sup>

19. On August 16, 2002 plaintiff received a Right to Sue Letter from the Equal Employment Opportunities Commission ("EEOC").<sup>19</sup>

20. On September 30, 2002 plaintiff took another month off from work on the advice of a Dr. McGee.<sup>20</sup>

21. On October 28, 2002 Dr. Wolfe ordered plaintiff to remain off work until January 1, 2003 because she suffered from work-related stress.<sup>21</sup>

22. On January 8, 2003 plaintiff presented Chief Sprecher with another note from Dr. Wolfe advising her not to return to work. Plaintiff has not returned to work.<sup>22</sup>

#### CONCLUSIONS OF LAW

Applying the summary judgment standard to the undisputed facts recited above, we make the following conclusions of law:

1. Plaintiff has presented no evidence from which a reasonable jury could find a hostile work environment existing

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<sup>18</sup> 7/31/03 Olsen Dep. at 44-45; Defendants' Statement at ¶¶ 35-36.

<sup>19</sup> Letter from Karen Ferguson to Marie Olsen dated August 16, 2002 ("Right to Sue Letter"), Exhibit H to the Complaint.

<sup>20</sup> 7/31/03 Olsen Dep. at 74; Defendants' Statement at ¶ 39.

<sup>21</sup> 7/31/03 Olsen Dep. at 74.

<sup>22</sup> 7/31/03 Olsen Dep. at 75-76; Letter from Marie Olsen to Edward Sprecher dated January 8, 2003, Exhibit K to Defendants' Brief; Defendants' Statement at ¶¶ 40-41.

after 1993.<sup>23</sup>

2. Plaintiff has presented no evidence from which a reasonable jury could find that a decision-maker of the Borough of New Holland had a discriminatory bias against plaintiff.

3. Plaintiff has presented no evidence from which a reasonable jury could find that she was qualified for her position as patrol officer.

4. Plaintiff has presented no evidence from which a reasonable jury could find a causal connection between any protected activity and any alleged adverse employment action.

5. Plaintiff's hip injury has not substantially limited her ability to perform any major life activity.

6. Plaintiff has presented no evidence from which a reasonable jury could find that defendants regarded her as disabled.

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<sup>23</sup> Plaintiff's Complaint, Plaintiff's Brief and Plaintiff's Statement allege various miscellaneous incidents of allegedly harassing behavior of a sexual nature. We could not make findings of fact on many of these incidents because plaintiff presented no evidence of these incidents beyond bare allegations, which allegations do not even include reference to any names, dates or locations. Simply attaching pictures of naked women and allegedly offensive articles to Plaintiff's Brief and Complaint without any context or additional evidence does not render those documents relevant for our consideration. Because plaintiff presented no more than bare allegations concerning these incidents, this court cannot rely on them to find in plaintiff's favor on this issue. See Anderson, 477 U.S. at 249-250.

## DISCUSSION

### I. Counts I and III - Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act

Defendants challenge Counts I and III of plaintiff's Complaint, wherein plaintiff alleges the following violations of Title VII and the PHRA: (1) a hostile work environment; (2) gender discrimination; and (3) retaliation. Specifically, defendants argue that Counts I and III fail as a matter of law because: (a) her hostile work environment claim is time-barred; (b) plaintiff was not "qualified" for her position; (c) plaintiff can present no evidence of pretext; and (d) plaintiff can present no evidence of retaliation.

Title VII and the PHRA make it unlawful for an employer to discriminate against an employee based on the "individual's race, color, religion, sex, or national origin". 42 U.S.C. § 2000e-2.<sup>24</sup> For the reasons stated below, we find that plaintiff has failed to state a Title VII or PHRA claim as a matter of law. Thus, we enter judgment in defendants' favor and against plaintiff on Counts I and III of the Complaint.

#### A. Hostile Work Environment

An employer may violate Title VII or the PHRA by creating an intimidating, hostile or offensive working

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<sup>24</sup> The analysis required to adjudicate a PHRA claim is identical to that performed in a Title VII claim. Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 317 n.3 (3d Cir. 2000) (citing Jones v. School District of Philadelphia, 198 F.3d 403, 410-411 (3d Cir. 1999)).

environment. Weston v. Pennsylvania, 251 F. 3d 420, 425-426 (3d Cir. 2001). In a hostile work environment case, the plaintiff must demonstrate harassment so severe or pervasive that it alters the conditions of plaintiff's employment and creates an abusive environment. Id. at 426.

To succeed on a hostile working environment claim, a plaintiff must prove the following five factors:

(1) the employee suffered intentional discrimination because of [her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (citations omitted).

To the extent that plaintiff has presented evidence of sexually harassing behavior, each such arguably sexual incident occurred approximately ten years prior to plaintiff's receipt of the August 16, 2002 Right to Sue Letter. Under Title VII, a plaintiff must file a charge of discrimination with the EEOC within 180 days of the unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). Because more than 180 days passed between these incidents and plaintiff's filing a charge of sexual harassment with the EEOC, these claims are time-barred.<sup>25</sup> To the extent

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<sup>25</sup> Plaintiff has presented no evidence that she ever instituted sexual harassment proceedings with a state or local agency with appropriate authority. Thus, the 180-day EEOC time limit, rather than the 300-day PHRA time limit applies to plaintiff's claims. 42 U.S.C. § 2000e-5(e)(1). We note, however, that plaintiff's claims are time-barred under either time limit.

Counts I and III allege a hostile working environment, those claims are dismissed as time-barred.

B. Gender Discrimination

To succeed on a gender discrimination claim, plaintiff can proceed under two methods. Foster v. New Castle Area School District, No. 03-CV-2106, 2004 U.S. App. LEXIS 7447, at \*5 (3d Cir. January 30, 2004) (citing Armbruster v. Unisys Corporation, 32 F.3d 768, 778-779 (3d Cir. 1994)). The two methods are described as follows:

Under the Price Waterhouse analysis, a plaintiff presents direct evidence that a decision-maker had a discriminatory bias. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-246, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). Under McDonnell Douglas, a plaintiff makes out a prima facie case of discrimination, and then the burden shifts to the defendant to show a non-discriminatory reason for its decision. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). The burden then shifts back to the plaintiff to show, with additional evidence, that this non-discriminatory reason was pretextual. Id. at 804.

Id. at \*5-6.

Plaintiff has presented no direct evidence to prove that a decision-maker at the Borough of New Holland had a discriminatory bias under the Price Waterhouse analysis. Therefore, plaintiff must prove her gender discrimination claim under the McDonnell Douglas burden-shifting analysis. As explained below, we find that plaintiff cannot prove a prima

facie case of gender discrimination against defendants.

A prima facie case of gender discrimination under the McDonnell Douglas analysis requires a showing that: (1) plaintiff was a member of a protected class; (2) she was qualified for the position sought; and (3) nonmembers of the protected class were treated more favorably. Rossi v. New Jersey, 39 Fed. Appx. 706, 709 n.8 (3d Cir. 2002) (citing Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 318 (3d Cir. 2002)).

Defendants argue that plaintiff cannot prove that she was qualified for her position. Plaintiff admitted at her deposition that she could not perform the essential functions of her position as a patrol officer because she could not wear the equipment belt with or without accommodation.<sup>26</sup> Thus, we find that plaintiff was not qualified for her position as patrol officer. Because plaintiff has failed to provide sufficient evidence to prove a prima facie case of gender discrimination, we find that defendants are entitled to summary judgment and dismiss plaintiff's gender discrimination claims.<sup>27</sup>

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<sup>26</sup> 7/11/03 Olsen Dep. at 29-30, 86-87.

<sup>27</sup> Even if plaintiff were able to make out a prima facie case of gender discrimination, she has presented no evidence demonstrating that the non-discriminatory motive offered by defendants is pretextual. Specifically, defendants have offered that they filled plaintiffs position because her doctor had not cleared her to return to work. In light of this position, plaintiff has failed to point to any evidence from which a factfinder could reasonably either disbelieve defendants' articulated reasons or believe that an invidious discriminatory motive was more likely than not a motivating or determinative cause of defendants' actions. See Jones v. WDAS FM/AM Radio Stations, 74 F. Supp. 2d 455, 465 (E.D. Pa. 1999).

C. Retaliation

To succeed on a Title VII retaliation claim, plaintiff must prove that: "(1) she engaged in a protected activity; (2) the employer took an adverse action against her; and (3) there is a causal link between the activity and the adverse action." Sherrod v. Philadelphia Gas Works, 57 Fed. Appx. 68, 77 (3d Cir. 2003) (citing Charlton v. Paramus Board of Education, 25 F.3d 194, 201 (3d Cir. 1994)). Plaintiff has alleged facts sufficient to sustain the first element of a retaliation claim. She engaged in a protected activity when she filed her complaint with the EEOC. We make no finding concerning the existence of any adverse employment action against plaintiff because defendants have not raised this issue. However, we find that plaintiff has presented no evidence from which a reasonable jury could find that there is a causal link between plaintiff's protected activity and any adverse employment action.

Plaintiff must do more than simply argue that such a causal connection exists. See Anderson, 477 U.S. at 249-250. The only evidence before this court supports a finding that plaintiff never returned to work after presenting Chief Sprecher with a note from her doctor on January 8, 2003 which note advised plaintiff not to return to work. We find no evidence in the record before us of any causal connection between plaintiff's protected activity and any adverse employment action taken by defendants sufficient to surmount plaintiff's burden in opposing

defendants' motion for summary judgment. Thus, we find that plaintiff cannot present evidence sufficient to support her claim against defendants for retaliation. Therefore, we grant judgment in defendants' favor on Counts I and III of the Complaint.

## II. Count II - Americans with Disabilities Act

Defendants argue that plaintiff was neither disabled, nor perceived as disabled, at the time she left her position at the Borough of New Holland. Thus, they conclude that plaintiff is unable to make a prima facie case against defendants for violating the Americans with Disabilities Act. We agree.

To make a prima facie case under the ADA, plaintiff must prove the following three elements: (1) she was disabled within the meaning of the ADA; (2) she was qualified for the position; and (3) she suffered an adverse employment action because of her disability. Deane v. Pocono Medical Center, 142 F.3d 138, 142 (3d Cir. 1998). The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Defendants agree that plaintiff's hip injury qualifies as a physical impairment under the ADA, but argues that there is no evidence that such injury substantially limits plaintiff's major life activities. See Sutton v. United Airlines, 527 U.S.

471, 482, 119 S. Ct. 2139, 2146, 144 L. Ed. 2d 450, 462 (1999). A "major life activity" is defined as encompassing such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing speaking, breathing, and working." 29 C.F.R. § 1630.2(h)(2)(I).

Plaintiff alleges that she is limited in her abilities to work, to partake in various recreational activities and to sit for prolonged periods of time.<sup>28</sup> Initially, we note that recreational activities do not constitute major life activities under the ADA. Kirkendall v. United Parcel Service, Inc., 964 F. Supp. 106, 110 (W.D.N.Y. 1997). Moreover, we find that plaintiff has presented no evidence to support her allegation that she is unable to sit for prolonged periods of time. Thus, we find that plaintiff has presented no evidence from which a reasonable jury could find that any limitations on her recreational activities or ability to sit demonstrate a physical impairment under the ADA.

Concerning the major life activity of working, "[t]he term substantially limits means 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). According to plaintiff, the only thing that

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<sup>28</sup> Plaintiff's Responses to Interrogatories from Defendants ("Plaintiff's Responses"), Exhibit L to Defendants' Brief, at ¶ 17.

she could not do in her position as patrol officer was to wear a traditional gun belt.<sup>29</sup> And according to Plaintiff's Vocational Assessment, plaintiff is able to work as a private detective, security guard, police and sheriff patrol officer and detective and criminal investigator.

On this basis, we find that plaintiff's hip injury does not prevent her from performing a broad class of jobs for which she is skilled and trained. Thus, we find that plaintiff's ability to work is not substantially limited by her hip injury. Moreover, we find that because plaintiff's hip injury has not substantially limited her ability to perform any major life activity, plaintiff is not disabled under method "A" of proving a disability under the ADA.

Plaintiff next urges that if she were not disabled under the ADA, defendants nonetheless regarded her as disabled, under method "C" of proving a disability under the ADA. To prove that defendants regarded plaintiff as disabled, plaintiff must prove that defendants: (1) mistakenly believed that plaintiff has a physical impairment that substantially limits one or more major life activities; or (2) mistakenly believed that an actual, nonlimiting impairment substantially limits one or more major life activities. Sutton, 527 U.S. at 489.

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<sup>29</sup> Plaintiff's Responses at ¶ 18.

The fact that an employer is aware of an employee's disability, or even that the employer made accommodations for a disabled employee, is insufficient to demonstrate that the employer regarded an employee as disabled. Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996); Sharkey v. Federal Express, No. 98-CV-3351, 2001 U.S. Dist. LEXIS 72, at \*21-22 (E.D. Pa. January 9, 2001); Popko v. Pennsylvania State University, 994 F. Supp. 293, 300 (M.D. Pa. 1998). To this end, plaintiff presents absolutely no evidence that defendants regarded her as disabled. Thus, we find that no reasonable jury could find that defendants regarded her as disabled. Therefore, plaintiff cannot establish the first element in her prima facie case under the ADA, and that claim must be dismissed.

#### CONCLUSION

For all the foregoing reasons, we grant defendants' motion for summary judgment and enter judgment in favor of defendants on all counts of plaintiff's Complaint.

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 NEW HOLLAND POLICE DEPARTMENT, and )  
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 EDWARD L. SPRECHER, )  
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 Chief of Police, )  
 )  
 )  
 Defendants. )

O R D E R

NOW, this 30<sup>th</sup> day of April 2004, upon consideration of Defendants' Motion for Summary Judgment on All Plaintiff's Claims, which motion was filed September 15, 2003; Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment, which response was filed October 17, 2003; and Defendant's Reply to Plaintiff's Response in Opposition to Motion for Summary Judgment, which reply was filed November 3, 2003; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion is granted.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants and against plaintiff on the Complaint.

BY THE COURT:

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James Knoll Gardner

United States District Judge