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

ANTHONY BARBEE,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-4063
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **JULY 24, 2006**

Presently before the Court are Defendant Southeastern Pennsylvania Transportation Authority's ("SEPTA") Motion for Reconsideration of this Court's May 24, 2006 Memorandum and Order (Doc. No. 35); Plaintiff Anthony Barbee's ("Barbee") Brief in Opposition (Doc. No. 36); and SEPTA's Response thereto (Doc. No. 38). For the following reasons, this Court grants in part and denies in part SEPTA's motion for reconsideration and grants summary judgment to SEPTA on Barbee's Age Discrimination in Employment Act ("ADEA") claim.

I. Motion for Reconsideration

A party may raise a motion for reconsideration within ten days from the date of entry of the judgment. See Fed. R. Civ. P. 59(e); Loc. R. Civ. P. 7.1(g). A motion for reconsideration should be granted "sparingly." Synthes v. Globus Medical Inc., No. 04-1235, 2005 WL 562764, at *1 (E.D. Pa. March 7, 2005). A motion for reconsideration may only be granted when the moving party demonstrates: (i) an intervening change in controlling law; (ii) new evidence that was not previously available; or (iii) the need to correct a clear error of law or fact or to prevent

manifest injustice. See, e.g., North River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3d Cir. 1995). In other words, a motion for reconsideration may not be based upon new arguments that could have been raised in support of the original motion. Agere Systems, Inc. v. Broadcom Corp., No. 03-3138, 2004 WL 1970111, at *1 (E.D. Pa. Sep. 7, 2004). Nor should a motion for reconsideration be used as a vehicle to "reconsider repetitive arguments that have already been fully examined by the court." EEOC v. Dan Lepore & Sons Co., No. 03-5462, 2004 WL 569526, at *2 (E.D. Pa. March 15, 2004).

For the first time, the parties raise the difference between proving Barbee's age and race discrimination claims through direct or indirect evidence. This issue was not discussed in the Court's previous Memorandum that denied SEPTA's Motions for Summary Judgment on Barbee's age and race discrimination claims. Allowing a meritless claim to proceed to trial would constitute a clear error of the law. Therefore, the Court shall reconsider its prior rulings.

An ADEA or Title VII plaintiff can make a prima facie case by (1) presenting direct evidence of discrimination that meets the requirements of Justice O'Connor's controlling opinion in Price Waterhouse,[1] or (2) presenting indirect evidence of discrimination that satisfies the framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[2] Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002). Barbee argues that because he has shown direct evidence of a

[1] The United States Court of Appeals for the Third Circuit has previously recognized that Justice O'Connor's opinion concurring in the judgment represents the holding of the fragmented Court in Price Waterhouse. See, e.g., Anderson v. Consol. Rail Corp., 297 F.3d 242, 248 (3d Cir. 2002).

[2] "In an ADEA suit alleging unlawful termination, step one of the McDonnell Douglas framework requires the plaintiff to present evidence sufficient for a reasonable trier of fact to find each element of a prima facie case. . . . Thus, the plaintiff must show (1)that he was at least forty years old, (2) that he was fired, (3) that he was qualified for the job from which he was fired, and (4) that he 'was replaced by a sufficiently younger person to create an inference of age discrimination.'" Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002).

discriminatory animus by SEPTA's decision makers when they made their decisions regarding his job, the requirements of McDonnell Douglas are inapplicable. He is correct. "The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Swierkiwicz v. Sorema N.A., 534 U.S. 506, 511 (2002). In fact, Barbee only argues that he has presented direct evidence of discrimination and ignores SEPTA's argument that he cannot meet the requirements of McDonnell Douglas.

SEPTA argues that the Court must grant reconsideration of SEPTA's motion for summary judgment and its rulings on Barbee's age and race discrimination claims to correct errors of law. Specifically, SEPTA argues that Barbee cannot meet the direct evidence requirements of Price Waterhouse or the indirect evidence requirements of McDonnell Douglas. SEPTA argues that Barbee has not presented "direct evidence" of race or age discrimination and alternatively, even if Barbee has produced "direct evidence," that SEPTA would have made the same employment decisions absent any discriminatory factor.

A. ADEA

The ADEA makes it unlawful for an employer to fire a person who is at least forty years old because of his or her age. 29 U.S.C. §§ 623(a), 631(a). To prevail on an ADEA adverse employment claim, a plaintiff must show that his or her age "actually motivated" and "had a determinative influence on" the employer's decision to fire or, in this case, remove Barbee from his position as a "Bus Operator." See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000). Here, Barbee argues that he has supported his ADEA claim with direct evidence. SEPTA disagrees. I find that Barbee has presented direct evidence of age discrimination. However, I conclude that SEPTA has met its burden of showing that it would have put Barbee on

the Medically Disqualified list even if it had not considered his age and that Barbee has presented insufficient evidence to negate SEPTA's evidence.

Regarding Barbee's ADEA claim there are three issues before the Court: (1) whether a reasonable jury could conclude that Dr. Press was a decisionmaker for the purposes of the ADEA?; (2) if Dr. Press was a decisionmaker, whether Barbee has produced direct evidence such that a reasonable jury could conclude that Dr. Press placed "substantial negative reliance" on Barbee's age in reaching his decision to place him on the Medically Disqualified list?; and (3) if Dr. Press improperly relied upon Barbee's age, whether SEPTA has established that it would have placed Barbee on the Medically Disqualified list even if it had not considered his age?

First, the Court must determine whether a reasonable jury could conclude that Dr. Press is an appropriate decisionmaker for the purposes of the ADEA. In contrast to § 1983 liability, a "decisionmaker" under the ADEA is not restricted to persons with final, unreviewable authority as determined under state law. Instead, a decisionmaker for the purposes of discrimination claims include individuals within "the chain of decision-makers who had the authority to hire and fire." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 521 (3d Cir. 1997). In other words, a decisionmaker is an individual who is "involved in" or "participated in" the decisionmaking process. See id. at 515-16; Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 (3d Cir. 1995).

In this case, both parties acknowledge that being placed on the Medically Disqualified list meant that Barbee could not return to his former position as a Bus Operator with SEPTA. Furthermore, both parties also acknowledge that Dr. Press was responsible for determining whether Barbee was medically qualified for his Bus Operator position. (SEPTA's Reply Br. at

3). Finally, Barbee testified that Dr. Press determined that Barbee was medically disqualified from the Bus Operator position. Based on this evidence, a reasonable jury could conclude that Dr. Press is within the "chain of decision-makers who had the authority" to remove Barbee from his position as a Bus Operator.

Second, the Court must determine whether Barbee has produced direct evidence such that a reasonable jury could conclude that Dr. Press, as a decisionmaker, placed "substantial negative reliance" on Barbee's age in reaching his decision to place him on the Medically Disqualified list. The Third Circuit decision of Fakete v. Aetna, Inc., 308 F.3d 335 (3d Cir. 2002), is on point. In Fakete, an ADEA plaintiff presented evidence that during an inquiry about his future with the company upon reorganization, his supervisor told him that the company was "looking for younger single people" and that plaintiff "wouldn't be happy [with the company] in the future." Id. at 336. Several months later, the supervisor fired plaintiff. Id. at 337.

The Third Circuit concluded that a reasonable jury could find, based on the supervisor's statement, that plaintiff's age was more likely than not a substantial factor in the supervisor's decision to fire plaintiff. Id. at 339. The Third Circuit emphasized that the supervisor's statement was in direct response to plaintiff's question about his future employment and that the statement unambiguously told plaintiff that he was viewed as a less desirable employee because of his age. Id. at 339-40. The Third Circuit also explained what a court should consider when determining whether a statement is "direct evidence":

> Under Price Waterhouse, when an ADEA plaintiff alleging an unlawful adverse employment decision presents "direct evidence" that his age was a substantial factor in the decision to fire him, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have fired the plaintiff even if had not considered his age. See Price Waterhouse, 490 U.S. at 265-66,

> 276-77; Walden v. Georgia-Pacific Corp., 126 F.3d 506, 512-13 (3d Cir. 1997). "Direct evidence" means evidence sufficient to allow the jury to find that "the 'decision makers placed substantial negative reliance on [the plaintiff's age] in reaching their decision'" to fire him. Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998) (quoting Price Waterhouse, 490 U.S. at 277); see also Anderson v. Consol. Rail Corp., 297 F.3d 242, 248 (3d Cir. 2002) (same). Such evidence "leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it" when he made the challenged employment decision. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1097 (3d Cir. 1995).
>
> ...[T]he adjective "direct" is imprecise because "certain circumstantial evidence is sufficient [to shift the burden of proof regarding causation], if that evidence can 'fairly be said to directly reflect the alleged unlawful basis' for the adverse employment decision." Walden, 126 F.3d at 513 (quoting Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1994)) . . . . One form of evidence sufficient to shift the burden of persuasion under Price Waterhouse is "statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus of the type complained of in the suit," Hook, 28 F.3d at 374 . . . , even if the statements are not made at the same time as the adverse employment decision, and thus constitute only circumstantial evidence that an impermissible motive substantially motivated the decision." See Rose v. N.Y. City Bd. of Educ., 257 F.3d 156, 158, 162 (2d Cir. 2001) (holding that supervisor's statements, several months before he demoted employee, that he might replace her with someone "younger and cheaper" were sufficient to shift the burden of persuasion under Price Waterhouse).

Fakete, 308 F.3d at 338-39.

With this background, the Court considered the importance of Dr. Press's alleged statement to Barbee, "you're over 50, you're disabled." According to Barbee, when he reported for his return-to-work physical examination, SEPTA's Medical Director, Dr. Richard Press, saw him in an examination room but failed to perform a physical examination. Instead, Dr. Press told Barbee, "you're over 50, you're disabled." Dr. Press then placed Barbee on the Medically Disqualified list relying on a note from Barbee's doctor which stated:

> Anthony Barbee has been treated at our center for an accident on 6/16/02, in which he sustained multiple injuries. He can return to work on December 30/02.

> He should not do commercial driving because this would aggravate his cervical radiculopathy "nerve damage."

(SEPTA's Summ. Judg. Mot., Exhibit "F"). As stated in Fakete, the only matter requiring discussion is whether a reasonable jury could find, based on Dr. Press's statement, that Barbee's age was more likely than not a substantial factor in Dr. Press's decision to place Barbee on the Medically Disqualified list. I find that a reasonable jury could so find.

Viewed favorably to Barbee, the statement "you're over 50, you're disabled" shows that Dr. Press improperly considered age as the determinative factor for who was Medically Disqualified. Dr. Press then proceeded to place Barbee on the Medically Disqualified list thereby removing Barbee from being eligible to work as a Bus Operator. In this context, a reasonable jury could find that Dr. Press's statement was a clear indicator to Barbee that he was too old to be a Bus Operator. Barbee, therefore, has presented direct evidence of discrimination for his ADEA claim.

Third, because Barbee "has succeeded in presenting the necessary quantum of direct evidence of discrimination, the burden of going forward with the evidence shifts" to SEPTA to prove that it would have placed Barbee on the Medically Disqualified list even if it had not considered his age. Glanzman v. Metropolitan Management Corp., 391 F.3d 506, 514 (3d Cir. 2004). This is a high burden on a motion for summary judgment because SEPTA "must leave no doubt that a rational jury would find" that SEPTA would have placed Barbee on the Medically Disqualified list even if it had not been for the discriminatory statement. Id. I conclude that SEPTA has met this high evidentiary standard.

It is clear from the evidence that SEPTA had in December 2002, that Barbee was

Medically Disqualified from being a Bus Operator. In June of 2002, Barbee was injured in a vehicle accident while working as a Bus Operator for SEPTA. From July 19, 2002 through December 2002, Barbee was out on sick leave. On December 18, 2002, Barbee's supervisor, Philip Hufnagle, advised him that he had used 271 sick days and that if he did not return to work, his sick leave would be exhausted on or about January 17, 2003. Barbee responded by meeting with Dr. Press of SEPTA's Medical Department to determine if he was Medically Disqualified from being a Bus Operator. Barbee presented the note from his personal physician, Deborah Lizerman, D.O., that explained that Barbee could return to work on December 30, 2002, but that he should not do commercial driving because that would aggravate his nerve damage or cervical radiculopathy. Based on Dr. Lizerman's note, Dr. Press placed Barbee on SEPTA's Medically Disqualified list pursuant to Article V, Section 504(I)(2) of the Collective Bargaining Agreement. Section 504(I)(2) defines "Medically Disqualified" as an employee who cannot return to his or her formerly permanently budgeted position with SEPTA. Since Dr. Lizerman's note indicated that Barbee should not drive commercially, and since being a Bus Operator requires commercial driving, it is clear that based on Barbee's own evidence in December 2002 that SEPTA would have placed him on the Medically Disqualified list even if it had not been for Dr. Press's discriminatory statement.

I conclude that no rational jury could doubt that SEPTA would have placed Barbee on the Medically Disqualified list even if it had not considered his age. Therefore, it would be a manifest error of law to allow Barbee's ADEA claim to proceed against SEPTA. Upon further reconsideration, the Court finds as a matter of law that Barbee's ADEA claim fails and SEPTA's motion for summary judgment on this claim must be granted.

B. Title VII

Like the ADEA, Title VII provides a cause of action for employees who have suffered some type of discriminatory adverse employment action. See Jones v. School Dist. of Philadelphia, 198 F.3d 403, 411 (3d Cir. 1999). As with his age discrimination claim, Barbee offers direct evidence of racial discrimination. Therefore, his claim must proceed through the same Price Waterhouse framework used to analyze his age discrimination claim. Unlike his ADEA claim, however, Barbee presents a valid Title VII claim for summary judgment purposes.

As with his ADEA claim, Barbee's Title VII claim raises three issues: (1) whether a reasonable jury could conclude that Linda Yoxtheimer ("Yoxtheimer") was a decisionmaker for the purposes of Title VII?; (2) if Yoxtheimer was a decisionmaker, whether Barbee has produced direct evidence such that a reasonable jury could conclude that Yoxtheimer placed "substantial negative reliance" on Barbee's race in not placing him in SEPTA's Alternate Duty Return to Work Program; and (3) if Yoxtheimer improperly relied upon Barbee's race, the issue becomes whether SEPTA has established that it could not have placed Barbee in the Alternate Duty Return to Work Program even if it had not considered his race?

First, a reasonable jury could conclude that Yoxtheimer was a decisionmaker for the purposes of Title VII. Once again, a decisionmaker for the purposes of discrimination claims include individuals within "the chain of decision-makers who had the authority to hire and fire." Walden, 126 F.3d at 521. In other words, a decisionmaker is an individual who is "involved in" or "participated in" the decisionmaking process. See id. at 515-16; Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 (3d Cir. 1995). According to Barbee, Yoxtheimer was the decisionmaker in charge of deciding who was placed in an alternate duty position. Barbee also

alleges that Yoxtheimer claimed she would do everything she possibly could to find him work within his medical restrictions. Although SEPTA disagrees, according to Barbee, Yoxtheimer was clearly involved in whether he was placed in an alternate duty position with SEPTA. Therefore, a reasonable jury could conclude that Yoxtheimer was a decisionmaker for the purposes of Title VII.

Second, Barbee has produced enough direct evidence that a reasonable jury could conclude that Yoxtheimer placed "substantial negative reliance" on Barbee's race when she failed to place him in SEPTA's Alternate Duty Return to Work Program. Once again, the Third Circuit's opinion in Fakete defines "direct evidence":

> "Direct evidence" means evidence sufficient to allow the jury to find that "the 'decision makers placed substantial negative reliance on [the plaintiff's age] in reaching their decision'" to fire him. Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998) (quoting Price Waterhouse, 490 U.S. at 277); see also Anderson v. Consol. Rail Corp., 297 F.3d 242, 248 (3d Cir. 2002) (same). Such evidence "leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it" when he made the challenged employment decision. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1097 (3d Cir. 1995). . . . [T]he adjective "direct" is imprecise because "certain circumstantial evidence is sufficient [to shift the burden of proof regarding causation], if that evidence can 'fairly be said to directly reflect the alleged unlawful basis' for the adverse employment decision." Walden, 126 F.3d at 513 (quoting Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1994)) . . . .

Fakete, 308 F.3d at 338-39.

Yoxtheimer's comments to Barbee regarding his race constitute direct evidence. Shortly after being placed on the Medically Disqualified list by Dr. Press, Barbee met with Yoxtheimer to find out whether he would be placed in an alternate duty position with SEPTA. At the meeting, Barbee alleges that Yoxtheimer stated that his dreadlocked hairstyle was "unacceptable in society" and "like the MOVE people." According to Barbee, Yoxtheimer also asked Barbee if

he was a member of MOVE. Barbee claims that MOVE is "a well-known radical, hostile violent anti-modern-society group of mainly African-Americans who terrorized the City of Philadelphia during the 1970s and 1980s, culminating in the infamous bomb dropped on their Osage Avenue compound in 1985."

Viewed favorably to Barbee, a reasonable jury could find, based on Yoxtheimer's alleged statements, that Barbee's race was more likely than not a substantial factor in Yoxtheimer's decision not to place Barbee in an alternate duty position. Specifically, Yoxtheimer's alleged statements could be interpreted as determining that Barbee's race was "unacceptable in society." In the context of whether Barbee would be placed into an alternative duty position, Yoxtheimer's alleged comments serve as a direct warning that his race would be considered as a negative factor. Therefore, Barbee has presented direct evidence to determine that Yoxtheimer, as a decisionmaker, placed substantial negative reliance on Barbee's race when she failed to place him in an alternate duty position with SEPTA.

Third, unlike Barbee's age discrimination claim, SEPTA has not met the substantial burden of establishing that it could not have placed Barbee in the Alternate Duty Return to Work Program even if it had not considered his race. Due to Barbee's successful presentation of "the necessary quantum of direct evidence of discrimination, the burden of going forward with the evidence shifts" to SEPTA to prove that it would not have placed Barbee in an alternate or light duty position even if it had not considered his race. Glanzman, 391 F.3d at 514. This is a high burden on a motion for summary judgment because SEPTA "must leave no doubt that a rational jury would find" that SEPTA would not have found an alternate duty position for Barbee even if it had not been for the discriminatory statement. Id. This Court concludes that SEPTA has not

met this high evidentiary standard because, after thoughtful consideration of both sides' arguments, there remains a genuine issue of fact as to why an alternate duty position never opened up for Barbee.

Once again, Barbee claims he was not placed in an alternate duty position because Yoxtheimer placed a substantial negative reliance on his race. SEPTA responds by arguing that this Court previously held that Barbee was not given an alternate duty position because "no alternative duty position for which he was qualified for ever materialized." (SEPTA's Resp. at 6). SEPTA references two statements from this Court's Memorandum on the parties' motions for summary judgment where Barbee's inability to be placed into an alternate duty position is discussed. The first was where this Court found that Barbee was not "regarded as" disabled under the Americans with Disabilities Act ("ADA"). Specifically, this Court described what happened after Barbee was placed on the Alternate Duty list:

> Thereafter, no [alternate duty] position became available, [Barbee's] sick leave expired, and he was terminated only after he exhausted the sick leave time available to him. After he was terminated, Barbee was placed on the Priority Rehire List, however, an alternate duty position never materialized and was taken off the Priority Rehire List in August 2003.

(Court's Mem. at 24). This analysis, while relevant for whether a jury could conclude that Barbee was "regarded as" disabled by SEPTA, sheds no light on whether Yoxtheimer kept Barbee from an alternate duty position based on his race or why an alternate duty position never materialized. In short, a finding that no alternate duty position opened up for Barbee does not preclude the possibility that Yoxtheimer, as decisionmaker who places SEPTA employees in alternative duty positions, was the reason why no alternate duty positions opened up.

The second instance where this Court discusses Barbee's inability to obtain an alternate

duty position is where this Court found that Barbee was not a "qualified individual" under that ADA. Once again, this Court described what happened to Barbee after he was disqualified to work as a Bus Operator in accordance with the Collective Bargaining Agreement:

> By dropping Barbee from its employment rolls only after he had extinguished his allotted paid medical leave, SEPTA was merely complying with its policy in the Collective Bargaining Agreement. Barbee has not shown that SEPTA applied this policy unequally, selectively, or in a discriminatory manner. After being dropped from SEPTA's employment rolls, Barbee was then moved to a Priority Recall List. Unfortunately for Barbee, he has not presented evidence that a part-time position became available anywhere in SEPTA for someone similarly situated to Barbee. . . .

(Court's Mem. at 27). The confusion appears to arise over the statement, "Barbee has not shown that SEPTA applied this policy unequally, selectively, or in a discriminatory manner." In the context of Barbee's ADA claim, that statement is correct – Barbee presented no evidence that SEPTA applied its Collective Bargaining Agreement in an unequal, selective, or discriminatory way regarding Barbee's physical impairments. However, in the context of Barbee's race discrimination claim, Barbee has presented direct evidence that SEPTA applied its Collective Bargaining Agreement in a discriminatory manner. Under the Price Waterhouse analysis, the burden then shifts to SEPTA to produce evidence that it would not have placed Barbee into an alternative duty position regardless of whether Yoxtheimer made discriminatory statements. Merely relying on the Court's statements regarding Barbee's ADA claim is not sufficient to carry this burden.

Therefore, a jury must decide whether SEPTA would not have placed Barbee in an alternate duty position even if Yoxtheimer had not allegedly made her discriminatory statements. There is no manifest error of law to allow Barbee's Title VII claim to proceed against SEPTA.

Upon further reconsideration, the Court finds as a matter of law SEPTA's motion for summary judgment on Barbee's Title VII claim must be denied.

II. CONCLUSION

For the aforementioned reasons, I find that SEPTA's Motion for Reconsideration is granted as to its Motion for Summary Judgment on Barbee's ADEA claim, but denied as to its Motion for Summary Judgment on Barbee's Title VII claim.

An appropriate Order follows.

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

ANTHONY BARBEE,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-4063
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,	:	
Defendant.	:	

ORDER

AND NOW, this 24th day of July, 2006, upon consideration of Defendant Southeastern Pennsylvania Transportation Authority's ("SEPTA") Motion for Reconsideration of this Court's May 24, 2006 Memorandum and Order (Doc. No. 35); Plaintiff Anthony Barbee's ("Barbee") Brief in Opposition (Doc. No. 36); and SEPTA's Response thereto (Doc. No. 38), it is hereby **ORDERED** as follows:

1. SEPTA's Motion for Reconsideration (Doc. No. 35) is **GRANTED IN PART** and **DENIED IN PART**;

2. SEPTA's Motion for Summary Judgment as to Barbee's ADEA claim is **GRANTED**;

3. SEPTA's Motion for Summary Judgment as to Barbee's Title VII claim is **DENIED**; and

4. Barbee's Motion for Rule 11 Sanctions is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly, Sr. J.