

**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.

FEBRUARY 1, 2007

Before this Court is Plaintiff Anthony Barbee’s Motion for a New Trial pursuant to Federal Rule of Civil Procedure 59 (Doc. No. 59), and Defendant’s response thereto. Also before this Court is the Defendant Southeastern Pennsylvania Transportation Authority’s (“SEPTA”) Motion to Dismiss Plaintiff’s Motion for a New Trial pursuant to Local Rule of Civil Procedure 7.1 (Doc. No. 74), and the Plaintiff’s response thereto. This Court has not been provided with a trial transcript and consequently cannot address the merits of Plaintiff’s Motion. Plaintiff’s failure to provide a trial transcript evidences a lack of prosecution under Local Rule of Civil Procedure 7.1(e), and therefore, Defendant’s Motion to Dismiss is granted.

I. Background

On October 31, 2006, a jury returned a verdict in favor of SEPTA and against Anthony Barbee. That jury found that SEPTA had not discriminated against Mr. Barbee on the basis of his race. Specifically, the jury found that SEPTA’s employee Linda Yoxtheimer had not made racially derogatory comments about Mr. Barbee’s hairstyle, nor had she amended his job status

because he was black. The jury weighed the testimonies of Mr. Barbee and Linda Yoxheimer, and delivered their verdict after only thirty minutes of deliberation.

Mr. Barbee initiated this lawsuit after he was terminated from his job at SEPTA. He was a member of the Transport Workers Union. The union had a collective bargaining agreement with SEPTA that required SEPTA to terminate employees who had exhausted all of their sick leave benefits. Mr. Barbee had exhausted his sick leave benefits while recovering from a wrist injury he incurred on the job. He was a bus driver. Consequently, SEPTA terminated his active employment status, and placed him on its recall list. Placement on the recall list gave Mr. Barbee priority over other applicants to be rehired for any bus driver positions that became available or any other job for which he was qualified. Mr. Barbee was not rehired because his personal physician deemed him unqualified for any full time position. The doctor said that Mr. Barbee was medically unable to return to his previous job, and the doctor found that Mr. Barbee was medically unable to perform any full time position. SEPTA only had full time positions available. Since Mr. Barbee was medically disqualified, he was not rehired. SEPTA removed him from the recall list after a few months in accord with the collective bargaining agreement. Thereafter, Mr. Barbee had no employment status at SEPTA.

Mr. Barbee then filed this lawsuit alleging that SEPTA violated 42 U.S.C. § 1983, the Fourteenth Amendment, the Racketeer Influenced and Corrupt Organizations Act, the Family and Medical Leave Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act (“Title VII”), by terminating him pursuant to the collective bargaining agreement. SEPTA moved for summary judgment on all claims. This Court granted summary judgment on all claims except the allegation of a Title VII violation. In

Mr. Barbee's deposition testimony, he said that SEPTA's employee Linda Yoxtheimer made derogatory comments about his dreadlock hairstyle and asked him whether he was part of the MOVE organization, a radical black anti-society group. Mr. Barbee alleged that he was not placed into other positions at SEPTA because of his race and hairstyle. Ms. Yoxtheimer stated that all decisions concerning Mr. Barbee were based on his status as medically disqualified. Since there appeared to be a genuine dispute concerning SEPTA's motivation in decisions about Mr. Barbee's work status, this Court denied summary judgment on the Title VII claim. A two day trial was held and a jury of his peers found that Mr. Barbee had not been subjected to race discrimination by SEPTA.

Mr. Barbee then filed a Motion for a New Trial because he believed that this Court committed errors in evidentiary determinations before and during trial that deeply prejudiced his ability to receive a fair trial. He alleged that admissible evidence was improperly excluded, inadmissible evidence was admitted in violation of evidentiary rules, the selection of jurors violated constitutional standards, and that this Court harbored an impermissible bias towards him and this case. Mr. Barbee filed this post trial motion without ordering a trial transcript. He was not excused from the requirement as he did not show good cause why he should be excused. Mr. Barbee has not since ordered a trial transcript.

II. Standard of Review

The decision to grant a new trial lies entirely within this Court's discretion. U.S. v. Schiffer, 836 F. Supp. 1164, 1169 (E.D. Pa. 1993). Where the motion is based on a matter like evidentiary rulings, this Court has broad discretion in deciding on a motion for a new trial. Klein v. Hollings, 992 F.2d 1285, 1290-91 (3d Cir. 1993). Broad discretion does not mean unfettered

discretion, and the grant of a new trial should be “limited to those circumstances where a miscarriage of justice would result if the verdict was to stand.” Olefins Trading, Inc. v. Han Yang Chem. Corp., 9 F.3d 282, 289 (3d Cir. 1993).

Federal Rule of Civil Procedure 59 sets forth the parameters under which motions for new trials may be granted. In evaluating a motion for a new trial, the Court must first determine whether an error was made and then determine whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice. Rutter v. Rivera, 191 F. Supp. 2d 584, 587 (E.D. Pa. 2002). Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. U.S. v. Sandrow, 832 F. Supp. 918 (E.D. Pa. 1993).

III. Discussion

A. Local United States District Court Rule 7.1(e)

This Motion for a New Trial is dismissed for lack of prosecution because Mr. Barbee has not provided this Court with a trial transcript. Local Rule 7.1(e) requires a movant filing a post-trial motion to order a transcript or file a motion showing good cause why he should be excused from this requirement within fourteen days after filing the post trial motion. U.S. Dist. Ct. Rules E.D. Pa. Civ. R. 7.1(e). If a movant does not order the transcript and is not excused from the requirement, a court in its discretion may dismiss any post trial motion for lack of prosecution. Id.; DVI Fin. Servs. v. Kagan, No. 00-1666, 2002 U.S. Dist. LEXIS 229, at *1 (E.D. Pa. Jan. 10, 2002). Mr. Barbee did not order a transcript, nor was he excused from this requirement¹.

¹This Court finds no reason to exercise its discretion and order a trial transcript. Courts have ordered trial transcripts where the movant for post trial relief did not abide by the dictates of Local Rule

Therefore, this Court will exercise its discretion and dismiss this Motion for lack of prosecution.

A court cannot properly evaluate a post trial motion alleging errors in evidentiary determinations made at trial when the trial transcript has not been provided. An argument that evidence was improperly admitted or excluded at trial obliges the movant to provide a trial transcript to show the errors. See Graves v. Women's Christian Alliance, No. 01-5077, 2003 U.S. Dist. LEXIS 12154 at *6 (E.D. Pa. July 3, 2003) (“Of necessity, an argument that the evidence at trial was insufficient to support the jury’s verdict requires a transcript of the testimony at trial.”); DiSalvio v. Lower Merion Sch. Dist., No. 00-5463, 2002 U.S. Dist. LEXIS 10847 at *3 (E.D. Pa. June 17, 2002) (“a transcript is necessary when the complained of error concerns the preclusion of evidence.”); Gause v. City of Phila., No. 00-1052, 2001 U.S. Dist. LEXIS 17428 at *9-10 (E.D. Pa. Sept. 27, 2001) (“the absence of the relevant portion of the trial transcript leaves this Court without any basis upon which to rule on the merits of Plaintiff’s Motion.”).

This Court is unable to address the merits of Mr. Barbee’s claims without a trial transcript. The allegations all concern issues handled at trial. Mr. Barbee claims the following: that SEPTA was allowed to admit impermissible character evidence during their cross

7.1(e). See Tumolo v. Triangle Pac. Corp., 49 F. Supp. 2d 798, 802 fn.1 (E.D. Pa. 1999) (court chose to address motion on the merits rather than dismiss for lack of prosecution). Here, there is no justification for this Court to burden itself by assuming the costs of ordering a transcript to address Mr. Barbee’s claims. Mr. Barbee was found not credible by a jury of his peers. His testimony did not support his claim that he had been subjected to race discrimination. Mr. Barbee’s litigation history consists of over thirty cases he waged against former employers and insurance companies alleging race discrimination. He did not succeed in any of these claims; many were dismissed as frivolous or fraudulent. His evidence of good cause as to why he should be excused from paying for a transcript consists of the facts that he has a new car payment and that sanctions were imposed on him by this Court because he refused to appear for a scheduled deposition. This Court will not order a trial transcript in light of Mr. Barbee’s decision not to heed the requirements of Local Rule 7.1(e).

examination of him, that the limiting instruction was inadequate, that SEPTA used their peremptory strike in a manner that violated the Equal Protection clause, that he was precluded from using Ms. Yoxtheimer's affidavit to impeach her testimony during trial, that character evidence against SEPTA was improperly excluded at trial, that the testimony of a witness not named during discovery was improperly excluded, and that this Court erred by not granting preclusive effect to findings made by a workers' compensation judge. These allegations all require an analysis of decisions made during trial. This Court cannot recall every statement made at trial, and cannot determine if errors were made without being able to reference a transcript . In the absence of evidence establishing error, the merits of Mr. Barbee's claims cannot be addressed. This Court does not recall any evidentiary errors made during trial. No reason has been presented justifying a grant of a new trial in the absence of evidence of error. No miscarriage of justice will result by letting the judgment stand. Therefore Plaintiff's Motion for a New Trial is dismissed for lack of prosecution.

An appropriate Order follows.

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SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
Defendant.	:	

ORDER

AND NOW, this 1st day of February, 2007, upon consideration of Plaintiff Anthony Barbee's Motion for a New Trial (Doc. No. 59), and the Defendant Southeastern Pennsylvania Transportation Authority's Response in Opposition, it is hereby **ORDERED** that Plaintiff's Motion for a New Trial is **DENIED**.

Upon consideration of the Defendant Southeastern Pennsylvania Transportation Authority's Motion to Dismiss Plaintiff's Motion for a New Trial (Doc. No. 74), and Plaintiff Anthony Barbee's response thereto, it is hereby **ORDERED** that Defendant's Motion to Dismiss is **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly

ROBERT F. KELLY, Sr. J.