

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

ROBERT C. PRESTA,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
et al.,	:	No. 97 Civ. 2338
Defendants.	:	

**MEMORANDUM AND ORDER**

Yohn, J.

June , 1998

Plaintiff, Robert C. Presta ("Presta"), brings this employment discrimination action against Southeastern Pennsylvania Transportation Authority ("SEPTA"), the Deputy Director of Transportation for SEPTA's Victory District John F. Lauser ("Lauser"), and the Chief District Officer for SEPTA's Victory District Luther Diggs ("Diggs"). In his five count complaint, Presta brings claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("ADA") (Count I); 42 U.S.C. § 1983 ("§ 1983") (Counts II and III); the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. § 951 ("PHRA") (Count IV); and the Pennsylvania Constitution, art. I, §§ 1, 7 (Count V). See Complaint, Counts I-V. The court has federal question jurisdiction over Presta's federal law claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over his state law claims pursuant to 28 U.S.C. § 1367.

Defendants have moved for summary judgment against Presta on Counts I and

IV, as well as on Counts II and III, insofar as these counts allege due process violations against defendants. See Defendants' Motion for Partial Summary Judgement. Presta has filed a cross-motion to amend his complaint, to sever portions of Counts I and IV, to dismiss Counts II and III as against John F. Lauser and Luther Diggs, and to dismiss Count II as against SEPTA, to the extent that this count states a due process claim. See Plaintiff's Cross-Motion to Amend His Complaint and to Sever.<sup>1</sup> For the reasons stated below, the court will grant in part and deny in part defendants' motion for summary judgment. Specifically, the court will grant defendants' motion for summary judgment with respect to Presta's claims for hostile work environment employment discrimination and discrimination in the terms of SEPTA's long-term disability insurance

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<sup>1</sup> In addition, defendants have moved to strike plaintiff's opposition to defendants' motion for partial summary judgment. Defendants argue:

The [court's Scheduling] Order clearly states that no brief may exceed twenty-five pages without leave of court. The [plaintiff's] opposition brief purports to be twenty-seven pages. In reality, the opposition brief is *sixty-seven pages* in length. The plaintiff has impermissibly attached forty pages of "disputed and undisputed facts."

Defendants' Motion to Strike Plaintiff's Opposition to Motion for Partial Summary Judgement [sic] and, in the Alternative, Defendants' Reply to Plaintiff's Opposition Brief ("Defs' Reply"), at 1.

The court's scheduling order states that "[n]o brief filed in support of or in opposition to any motion shall exceed twenty-five (25) pages in length without prior leave of court." Scheduling Order, Aug. 11, 1997, at 2 (first emphasis added). Presta's "Brief (Revised) in Opposition to Motion for Summary Judgment and in Support of Cross-Motion to Amend Complaint" is slightly more than 27 pages in length. However, only the first 25 ½ pages contain his argument in opposition to defendants' motion for partial summary judgment. The last 1 ½ pages contain Presta's argument in support of his cross-motion to amend his complaint. Because Presta's brief in opposition to defendants' motion is within the limits set forth in the court's scheduling order, the court will deny defendants' motion to strike, and will consider plaintiff's opposition papers in deciding defendants' motion for partial summary judgment. This is the first time in the court's experience that any party has filed a statement of undisputed and disputed facts that is of such a length; however, it is in technical compliance with the scheduling order. Future scheduling orders perhaps need to be amended.

policy in Counts I and IV. The court will deny defendants' motion for summary judgment with respect to Presta's failure to accommodate claim in Count I as well as with respect to Counts II and III. The court will grant Presta's cross-motion insofar as Presta seeks to dismiss all claims against Lauser and Diggs, seeks to dismiss his due process claim in Count II against SEPTA, and seeks to amend the complaint. The court will deny Presta's cross-motion insofar as he seeks to sever portions of Counts I and IV.

### **Background**

Presta began working for SEPTA as a train conductor in 1984. See Complaint ¶ 13. In 1989, he was promoted to the position of Operations Controller. See id. ¶ 15. As an Operations Controller, Presta worked in the control room at SEPTA's Suburban Division Control Center, communicating by radio with bus and trolley operators as well as with Service Managers. See Presta Dep., Oct. 1, 1997, at 23-24, 45-48; Quinn Dep. at 19-20.

On November 30, 1994, Presta briefly displayed an improper signal, causing a delay to a southbound train and a northbound train. See Pl's Exhibits, at 6. After conducting an investigation into the incident, John F. Lauser, the Deputy Director of Transportation for SEPTA's Victory District, concluded that Presta failed to report the two service delays, as required by SEPTA policy. See Pl's Exhibits, at 6. He sanctioned Presta by giving him a ten day suspension. See id. According to Presta, however, the purpose of the memorandum was "to fabricate trumped-up charges against Presta in retaliation for Presta's expression of concern regarding the Norristown

High Speed Line signal system.” Plaintiff’s Response to Defendants’ Statement of Undisputed Facts, ¶ 8.

The November 30 incident exacerbated medical problems that Presta had been experiencing since 1993. Since that time, he had been seeing Dr. Eakes, a psychologist who worked in SEPTA’s medical department.<sup>2</sup> See Presta Dep., Oct. 1, 1997, at 57-58. In December 1994, Dr. Eakes referred Presta to Cindy Kates, a psychologist who worked with the Employee Counseling Service of Pennsylvania Hospital. See id. at 64, 68-69. Presta met with Kates three times that month. See id. at 64-65. In addition, Presta consulted a psychiatrist from Delaware County Medical Associates. See id. at 62-64.

On January 3, 1995, Presta “reported off as too sick to work.” Defs’ Exhibit 16. Two days later, while still out sick, he requested an appeal of his ten-day suspension, which was scheduled to begin on January 4. See Defs’ Exhibit 6. Thompson responded that, because Presta was out sick and under the care of a physician, SEPTA would wait until he returned to work before it would schedule a hearing. See Defs’ Exhibit 7.<sup>3</sup>

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<sup>2</sup> Presta first developed stress-related symptoms in 1990 while working a double shift as Controller/Dispatcher. See Presta Dep., Oct. 1, 1997, at 58-59. In 1993, he again experienced stress, headaches, and sleeplessness as a result of his job. Presta met with Lou Cataldo, a psychologist, and missed some time from work. See id. at 54-56.

<sup>3</sup> On July 18, 1995 Luther Diggs held a hearing in connection with Presta’s appeal. On July 24, Diggs issued an opinion in which he upheld the suspension. See Defs’ Exhibit 11. When Presta requested an appeal of Diggs’ decision, Diggs told him that he had exhausted all of his appeals and that Diggs’ review of the matter was final. See Defs’ Exhibit 12. Based on further review of SEPTA policy, however, SEPTA granted Presta an additional step in the appeal process. On October 4, 1995, the

On January 6, 1995, Presta visited another psychiatrist, Dr. Sol Kadish, who diagnosed Presta as having Adjustment and Anxiety Disorders with symptoms of post-traumatic stress disorder. See PI's Exhibits, at 121. According to Dr. Kadish, these disorders were caused by working conditions in the control room. Dr. Kadish noted that the November 30 incident was one of many "stress factors" that contributed to his disorders. See PI's Exhibits, at 118.

On January 10, 1995, Presta wrote to the Assistant General Manager of Suburban Operations Thomas Cain, requesting a job reassignment from "Operations Controller" to "Service Manager." See PI's Exhibits, at 60. Presta explained, "[t]he work environment in the control center is effecting [sic] my health." Id. Cain responded in a letter, dated January 19, that there were no Service Manager positions open and that Presta could discuss the matter with Cain when Presta returned to work. See id. at 62.

The position of Service Manager, in fact, no longer existed at SEPTA at this time. On January 1, 1995, SEPTA had implemented a new salary administrative program, whereby three formerly separate positions--Operations Controller, Service Manager, and District Dispatcher--were consolidated into one new position--Transportation Manager. The program affected Presta's previous job title, grade, and salary. Specifically, his job changed from Operations Controller (Grade 10) to Transportation Manager (Grade 12). See Defs' Exhibit 18. Previously, Controllers sat in the Control Center and communicated by radio with bus and trolley operators and

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Assistant General Manager of Operations Support Division Patrick A. Nowakowski held a hearing. Two days later, Nowakowski issued his findings, concluding that, although Presta did not perform his duties in a proper manner, he would reduce Presta's suspension from ten days to five days. See Defs' Exhibit 14.

Service Managers; Service Managers spent most of their day driving around designated areas, solving service problems, taking directions from the Control Center, addressing customer concerns, and investigating accidents; and Dispatchers dispatched busses and trolleys and performed payroll functions. See Quinn Dep. at 19-20. Although the three positions were collapsed into the single position of Transportation Manager, however, the employees, for the most part, continued to do the same jobs that they had done before. That is, a Transportation Manager with control room responsibilities worked in the control room, performing the functions that a Controller used to do; a “Transportation Manager On the Street” worked “on the street” just as a Street Supervisor used to do; and a Transportation Manager with dispatcher duties worked in the Dispatcher's Office, just as a Dispatcher always did. See id. In February 1995, Dr. Kadish sent a psychiatric treatment report to SEPTA that contained the following analysis: “Decision-making is not possible if there is an element of ensuring the safety of others. [Presta] is convinced that he can no longer maintain regular attendance and accept normal hazards on his job because of his belief that he will definitely contribute to an accident.” Defs' Exhibit 19. The report also indicated Dr. Kadish's diagnosis. See id. Based on this report, SEPTA's medical department determined that Presta was medically disqualified from his job. See Defs' Exhibit 20.

On May 22, 1995, Presta wrote a letter to SEPTA's Vocational Rehabilitation department, asking whether there was any work that he could do that would “take advantage of [his] education and work experience.” Pl's Exhibits, at 66. On August 25, he wrote a letter to Dr. Robert Press, Director of SEPTA's Medical Department, stating that he “would like to have reasonable accommodations made” so that he could return

to work. See PI's Exhibits, at 109. Three days later, Presta met with Linda Yoxtheimer, the Assistant Director of Vocational Rehabilitation, to discuss the possibility of finding a new job for him at SEPTA. On October 7, he followed up with a letter to Yoxtheimer, stating: "I hope a company the size of SEPTA that receives federal money will try and find a job or modify my old job." PI's Exhibits, at 111. Also on this date, Presta sent another letter to Cain, stating:

My disqualification only prevents me from working in the control center. I have the same job title as the service managers that work out on the street. Why do I have to apply for a job I already have -- Service Manager Suburban Operations. . . . I can not [sic] return in the Control Center but I can work in the street as a Service Manager. All I want is a reasonable accommodation. A reasonable accommodation would be to allow me to work on the street.

PI's Exhibits, at 72.

On October 24, 1995, Dr. Kadish gave Presta a note indicating that he could return to work. Dr. Kadish explained, "[Presta's] stress symptoms require that the only restriction is to avoid working [in] or being near the control room." PI's Exhibits, at 77. Presta sent copies of the note to Yoxtheimer and to Dr. Press. See PI's Exhibits, at 73, 75. Dr. Press sent Presta a letter, dated November 3, 1995, which explained that because Presta was restricted from working in or near the control room, Dr. Press still regarded him as disqualified from his former job. See Defs' Exhibit 24. Dr. Press, however, referred Presta's case to SEPTA's ADA Committee so that it could determine whether he was eligible for a reasonable accommodation. See id.

On November 13, Presta wrote a letter to Yoxtheimer, requesting that he be assigned to the position of Transportation Manager in the Victory District, see PI's Exhibits, at 78--a position which SEPTA had advertised the previous June, see PI's

Exhibits, at 140, and which SEPTA had offered to Grant Tanner on October 19, but had then rescinded on October 27. See PI's Exhibits, at 100-03. On November 20, SEPTA gave the position to another employee, Brian Booker. See PI's Exhibits, at 144.

In April 1996, on the recommendation of SEPTA's ADA Committee, Cain wrote to Presta to offer him the position of Quality Control/Revenue Attendant ("QC/RA"). See PI's Exhibits, at 5. Cain wrote that "the ADA Committee has recommended that the Medical Director's determination of upholding the disqualification remains in effect, due to your not being qualified to perform the essential functions of the transportation manager job." Id. Presta declined the QC/RA position. See Defs' Exhibits 32, 33.

After turning down the QC/RA position, Presta continued to request that he be given a reasonable accommodation. See PI's Exhibits, at 81, 13-14. In addition, Presta attempted to participate in a July 1997 "seniority pick" by filling out an application for the position of Transportation Manager "out on the street." See PI's Exhibits, at 153. On April 3, 1997, Presta filed the instant action.

## **Discussion**

### **I. Defendants' Motion for Partial Summary Judgment**

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). When a court evaluates a motion for summary judgment, "the evidence of the nonmovant is to be believed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Furthermore, "in reviewing the record,

the court must give the nonmoving party the benefit of all reasonable inferences.” Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995), cert. denied. -- U.S. --, 115 S. Ct. 2611 (1995). However, the plaintiff “must present affirmative evidence to defeat a properly supported motion for summary judgment,” Anderson, 477 U.S. at 257, and “the mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.” Id. at 252. Where the record taken as a whole “could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial,’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986), and the motion for summary judgment should be granted.

Defendants argue that they are entitled to summary judgment on Presta’s claims under the ADA (Count I) and the PHRA (Count IV).<sup>4</sup> Although Pennsylvania courts are not bound by the interpretation of parallel provisions in federal employment discrimination statutes in their construction of the PHRA, see Harrisburg Sch. Dist. v. Pennsylvania Human Relations Comm’n, 466 A.2d 760, 763 (Pa. Commw. Ct. 1983), they have typically interpreted the PHRA in accord with these federal statutes. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996). In addition, the PHRA’s definition of “handicap or disability” is substantially identical to the ADA’s definition of “disability.” See Kotas v. Eastman Kodak Co., No. 95-1634, 1997 WL 570907, at \*8 (E.D. Pa. Sept. 4, 1997). The court will therefore consider Presta’s PHRA claims to be coextensive with his ADA claims.

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<sup>4</sup> Defendants also seek summary judgment on Counts II and III, insofar as they state claims for due process violations. The court will deny defendants’ motion for summary judgment on these counts, as plaintiff has moved voluntarily to dismiss these claims. See Discussion, infra Part II.A.

Presta has brought three types of claims under the ADA: (1) discrimination for failure to accommodate his disability; (2) hostile work environment discrimination; and (3) discrimination in the terms of SEPTA's long-term disability insurance policy. The court will address each of these claims in turn.

A. Failure to Accommodate

The ADA prohibits discrimination “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). The ADA defines the term “discriminate” to include:

[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A).

In order to prove a prima facie case of discrimination for failure to accommodate under the ADA, a plaintiff must show that: (1) he is a disabled person within the meaning of the statute; (2) he is “otherwise qualified” to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an adverse employment decision as a result of discrimination. See Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998). Defendants argue that plaintiff cannot satisfy any element of his prima facie case.

1. Disabled Within the Meaning of the ADA

A person is disabled within the meaning of the ADA if he:

- (A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) [has] a record of such an impairment; or
- (C) [is] regarded as having such an impairment.

42 U.S.C. § 12102(2). The Regulations to Implement the Equal Employment Provisions of the ADA (“EEOC Regulations”) define a mental impairment as “any mental or psychological disorder, such as . . . emotional or mental illness.” 29 C.F.R. § 1630.1(h)(2). The EEOC Regulations define “major life activities” to include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). These activities are “substantially limit[ed]” when one is:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly 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.

29 C.F.R. § 1630.2(j)(1). In determining whether a person is affected by a disability that “substantially limits” a “major life activity,” the court should consider several factors, including:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

Presta argues that he is mentally impaired in that he suffers from anxiety and

post-traumatic stress (“PTS”) disorders. See Brief (Revised) in Opposition to Motion for Summary Judgment and in Support of Cross-Motion to Amend Complaint (“Pl’s Mem.”) at 5. He further argues that these disorders interfere with three major life activities: interacting with others, sleeping, and working. See id. at 4. Defendants do not dispute that Presta suffers from these disorders. Rather, defendants argue that Presta cannot demonstrate that these disorders substantially limit any of his major life activities. Specifically, defendants argue that Presta “cannot establish a substantial limitation on [his ability to work] because he is only disabled from one job and not a wide range of jobs.” Defendants’ Memorandum of Law in Support of Defendants’ Motion for Partial Summary Judgment (“Defs’ Mem.”) at 7. Defendants further argue that Presta’s ability to sleep is not substantially limited because he “admits that he has not received [sic] any sleeping pill prescriptions for several months and rarely takes the medication.” Defs’ Reply, at 4 n.7 (citing Presta Dep., Dec. 5, 1997).

The first question that the court must consider is whether Presta is “substantially limited in a major life activity other than working . . . .” EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at 5 (citing 29 C.F.R. Pt. 1630 app. § 1630.2(j)). “Working should be analyzed only if no other major life activity is substantially limited by an impairment.” Id. With respect to Presta’s claim that he has been substantially limited in his ability to interact with others, the court finds compelling the Court of Appeals for the First Circuit’s analysis of the concept of “ability to get along with others”:

The concept of “ability to get along with others” is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is a skill to be prized, it is different in kind from breathing

or walking, two exemplars which are used in the regulations. Further, whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on context.

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997). Even assuming, however, that a colorable claim may be made that “ability to interact with others” is a major life activity under the ADA, the evidence here does not show any substantial limitation. On February 23, 1995, Dr. Kadish reported:

With family, friends and neighbors [Presta] becomes easily angered and argumentative over trivia. With persons in authority he has intense feelings of being unjustly criticized at work. He now has difficulty accepting remarks or even appropriate criticism from others. He avoids contact with co-workers because [sic] it only reminds him of the dangerous situations he was exposed [sic] at SEPTA and his stress symptoms get worse.

Pl's Exhibits, at 115. This evidence, alone, does not establish that Presta had significant difficulty interacting with others.

The court, therefore, will next consider Presta's claim that his impairment has substantially limited his ability to sleep. The court recognizes that the ability to sleep is a major life activity in that it is a “basic, daily function[] affecting the general population.” Dikcis v. Indopco Inc., 1998 WL 13323, at \*4 (N.D. Ill. Jan. 7, 1998) (citing 42 U.S.C. § 12101(2)); Silk v. City of Chicago, 1997 WL 790598, at \*7 (N.D. Ill. Dec. 17, 1997).

Presta has submitted several reports by Dr. Kadish in support of his claim that his ability to sleep has been substantially limited. On February 23, 1995, Dr. Kadish reported that Presta's emotional illness was causing his sleep to be “deficient” and that he was “often sleeping less than four or five hours [each night] with frequent awakenings.” Pl's Exhibits, at 112. On December 28, 1995, Dr. Kadish reported:

[Presta] awakens in the middle of the night 'upset and in a sweat.' He has nightmares of being at work, trapped and alone. . . . His sleep is deficient

and he requires a nap during the day.

Id. at 122. In October 1997, Dr. Kadish reported that Presta's emotional illness caused him to “sleep[] only two or three hours [each night] with frequent awakenings with nightmares.” Pl's Exhibits, at 126. Although Presta testified in December 1997 that he had stopped taking sleeping pills because he did not like them, see Presta Dep., Dec. 5, 1997, at 107, such “mitigating measures” are irrelevant to the court's determination of whether Presta is disabled within the meaning of the ADA. See Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir.1996) (“There is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures . . . and there is nothing in the language of the statute itself that rules out that approach.”); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 902-04 (E.D. Pa. 1997) (giving effect to the Congressional instruction that “[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids . . . .”). The court concludes that Presta has submitted sufficient evidence to raise a genuine issue of material fact as to whether his mental impairment has substantially limited his ability to sleep from January 1995 to the present. See Coghlan v. Heinz Co., 851 F. Supp. 808, 814 (N.D. Tex. 1994) (holding that affidavits submitted from plaintiff and his doctor were sufficient to establish a genuine issue of material fact as to whether the plaintiff's diabetes substantially limited his ability to sleep); cf. Dikcis, 1998 WL 13323, at \*5 (concluding that the plaintiff was not substantially limited in his ability to sleep, where he “failed to provide any information establishing how substantially or when his disability interfered with his ability to sleep”).

The court also finds that there is a genuine issue of material fact as to whether Presta suffers from a mental impairment that substantially limits his ability to work. A person is substantially limited in the major life activity of working if that person 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). An “inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” Id. To make out such a claim, a plaintiff must present demographic evidence to show what jobs in his geographic area he has been excluded from due to his disability.<sup>5</sup> See 29 C.F.R. Pt. 1630 App., § 1630.2.(j). A plaintiff's failure to present such evidence is fatal at summary judgment. See Taylor v. Phoenixville School District, 1998 WL 133628, at \*6 (E.D. Pa. Mar. 20, 1998).

Presta has submitted a report from Dr. Kadish, who concluded on October 16, 1997 that “although the only job [Presta] would be disqualified from working at Septa would be the control room, other jobs such as air traffic controller which have similar stressful working conditions would also not be suitable.” Pl's Exhibits, at 126. Dr.

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<sup>5</sup> The plaintiff should present evidence of:  
(1) the geographical area to which the individual has reasonable access;  
(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or  
(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of an impairment.  
29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C).

Kadish has explained that these “other jobs” would include jobs where Presta is “a) handling many different tasks at the same time which, b) significantly impact on the safety of others and which, c) involve working in a room where he extensively and continuously uses communication equipment.” PI's Exhibits, at 127. Presta has also submitted a report from Robert P. Wolf, a Certified Rehabilitation Economist, who has concluded:

[Presta] is precluded from performing many categories of jobs where his skills would be most transferable. . . . Specific examples of jobs that he would have been qualified for compared to other individuals with comparable training, skills, and abilities include: control tower operator, materials moving-logistics coordinator, emergency response operator, school bus coordinator and scheduler, emergency medical dispatcher, production expediter, police dispatcher, and road emergency dispatcher.

PI's Exhibits, at 131. Relying on the United States Department of Labor's Revised Handbook for Analyzing Jobs, Wolf has opined that Presta is “medically precluded from working in classes of work that include a combination of material moving and transporting, information giving, system communicating, protecting and administering.”

Id.

Rehabilitation counselor Daniel Rappucci has provided further examples of “jobs within various job classes for which Mr. Presta is not qualified because of his stress disorder.” Rappucci Report, at 1-2, Exhibit E (attached to Plaintiff's Second Supplemental Memorandum in Opposition to Motion for Summary Judgment). Presta has also submitted evidence that he lost his most recent job as a dispatcher at WaWa because of sleep disorders that are related to his anxiety and PTS disorders. See Supplemental Memorandum in Opposition to Motion for Summary Judgment, at 1. In addition, Presta has submitted evidence that his impairment prevented him from

attending an interview for two different Amtrak jobs--Tower Operator and Train Dispatcher--for which he was considered an "ideal candidate." See Plaintiff's Second Supplemental Memorandum in Opposition to Motion for Summary Judgment, at 1; Declaration of Robert C. Presta, Apr. 10, 1998, ¶¶ 1-8. The court finds that Presta has submitted sufficient evidence to raise a genuine issue of material fact as to whether his mental impairment has substantially limited his ability to work from January 1995 to the present.

## 2. Otherwise Qualified Individual

The ADA defines the term "qualified individual" as an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Third Circuit applies a two-part test to determine whether someone is "a qualified individual with a disability":

First, a court must consider whether "the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc." . . . Second, the court must consider "whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation."

Gaul, 134 F.3d at 580 (quoting 29 C.F.R. pt. 1630, App. at 353). Essential functions are defined as "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n). They do not include the marginal functions of the position. See id.

Evidence of whether a particular function is "essential" includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

If a plaintiff is unable to perform the essential functions of a position, the court must then determine whether any reasonable accommodation by the employer would permit the plaintiff to perform these functions. The EEOC Regulations provide that a “reasonable accommodation may include . . . reassignment to a vacant position . . . .”

29 C.F.R. § 1630.2(o)(2)(ii).

If an employee requests a specific accommodation, he bears the burden of showing that the requested accommodation is possible or plausible. See Gaul, 134 F.3d at 580. If the required accommodation is a transfer to another department or supervisor, the plaintiff must demonstrate that “there were vacant, funded positions whose essential duties he was capable of performing with or without reasonable accommodation, and that these positions were at an equivalent level or position as his [former job].” Id. (quotations omitted). The plaintiff must also demonstrate as part of his facial showing that the costs associated with his proposed accommodation (i.e. financial and administrative burdens on a company) “are not clearly disproportionate to the benefits that it will produce.” Id. at 580-81 (internal quotations omitted). After the plaintiff has made a prima facie showing that a reasonable accommodation was available, the employer has the burden of proving that the suggested accommodation is unreasonable or would cause undue hardship on the employer. See id.

Defendants argue that, assuming Presta is disabled within the meaning of the ADA, he is not entitled to a reasonable accommodation because he cannot perform the essential functions of his former position--Transportation Manager with controller duties--and is therefore not a "qualified individual with a disability." See Defs' Mem. at 13-14. Even if Presta is a qualified individual, defendants argue, they discharged their obligation reasonably to accommodate him because they offered him the job of Quality Control/Revenue Attendant Supervisor ("QC/RA") in April 1996. See id. at 14.

Presta responds that SEPTA's accommodation was unreasonable and made in bad faith. See Pl's Mem. at 16-17. Specifically, Presta objects because the QC/RA position was a Grade 10 position, whereas his previous position was a Grade 12. Presta also objects that he was offered this position "at the lowest possible salary of \$34,710, a \$5,000 pay reduction from [his] former salary." Id. at 17. Presta contends that there were a variety of comparable positions open at the same or similar grade and salary as his previous position for which he was qualified, but to which SEPTA refused to reassign him. See Plaintiff's Mem. at 12-14. He argues that, although he was not able to work in or near the control room, he was able to perform the essential functions of these vacant positions. Transferring him to one of these positions, in his view, would have been a reasonable accommodation.

After carefully reviewing the factual record, the court concludes that Presta has produced sufficient evidence to raise a genuine issue of material fact as to whether he is a qualified individual with a disability. Specifically, there are factual questions as to whether he can perform the essential functions of the Transportation Manager position with or without reasonable accommodation. Presta argues that from the time

that he made his first request for a reasonable accommodation in January 1995 to the time that SEPTA offered him the QC/RA position in April 1996, SEPTA had open three Transportation Manager positions at the same grade and salary as his former Transportation Manager position, whose essential functions he could have performed without any reasonable accommodation. These positions include: (1) Transportation Manager (formerly District Dispatcher) in the Frontier District (opening date 8/2/95), see id. at 141; (2) Transportation Manager (formerly District Dispatcher) in the Surface Operations (City) Division (opening date 10/25/95), see id. at 142; and (3) Transportation Manager (formerly Service Manager) in the Surface Operations (City) Division (opening date 11/15/95), see id. at 143.

With respect to the Transportation Manager (formerly District Dispatcher) position in the Frontier District, there is no mention of any control room duties under the “primary responsibilities” section of the job posting for this position. See PI's Exhibits, at 141. The posting states only that the employee “will be required to qualify and occasionally [sic] perform the duties of a frontier service manager.” Id. (emphasis added). SEPTA employees have testified that the Frontier District does not have its own control center, see Liberi Dep. at 9, and that Transportation Managers who work in the Frontier District have never been required to perform “control room duty.” See Reynolds Dep. at 23. According to Luther Diggs, “if you have a person out in Frontier, because it's remotely located, your interaction with the control center is going to be more by radio and telephone than by being physically there, because the control center

is located at Victory Avenue.” Diggs Dep. at 270.<sup>6</sup> The court finds that Presta has produced sufficient evidence to raise a genuine issue of material fact as to whether he was capable of performing the essential functions of the Transportation Manager (formerly District Dispatcher) position in the Frontier District, which opened up on 8/2/95, see PI's Exhibits, at 141, and was filled by Brenda Booker sometime before April 8, 1996, see id. at 85; Quinn Dep. at 63.

Presta has also offered evidence showing that he would not have needed to perform any control room duties for the two Transportation Manager positions in the Surface Operations Division. There is no mention of any control room duties under the “primary responsibilities” section of the job postings for these positions. See PI's Exhibits, at 139, 142, 143; see also Presta Decl., Feb. 20, 1998, ¶¶ 4-5. The court finds that there are factual issues with respect to whether Presta can perform the essential functions of these Transportation Manager positions.<sup>7</sup>

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<sup>6</sup> A January 31, 1997 intra-office memorandum specifically indicates that Transportation Managers in the Frontier District need to be cross-trained to work only as District Dispatchers, Street Supervisors, and QC/Revenue Attendant Supervisors. See PI's Exhibits, at 92.

<sup>7</sup> The court notes that Presta has identified a fourth position at the same grade and salary as his former position, which opened up between January 1995 and April 1996, and whose duties he allegedly could have performed without any accommodation at all: Telephone Information Supervisor (opening date 5/31/95). See PI's Exhibits, at 139. The court also notes that there is no mention of any control room duties under the “primary responsibilities” section of the job posting for this position. See id. Assuming that Presta was a “qualified individual with a disability” within the meaning of the ADA (i.e. assuming that Presta could perform the essential functions of his former position with or without reasonable accommodation), there are thus factual issues as to whether SEPTA could have accommodated him by reassigning him to the Telephone Information Supervisor position.

In addition, Presta argues that, during the relevant time period, SEPTA had open a Transportation Manager (formerly Service Manager) position in the Victory District, whose essential duties he could have performed with or without a reasonable accommodation. See PI's Exhibits, at 140. This position opened up on June 7, 1995, see PI's Exhibits, at 140, was offered to Grant Tanner on October 19, 1995, see id. at 100-03; Tanner Dep. at 5-11, and was ultimately filled by Brian Booker on November 20, 1995, see PI's Exhibits, at 144; Booker Dep. at 6-7.

Defendants argue that “the essential functions of a Transportation Manager [in the Victory District] include working in the Control Room and being in constant contact with the Control Room.” Defs' Mem. at 18. Specifically, they argue:

The position of Transportation Manager/Service Manager includes inter alia, reporting on duty in the Control Room at the beginning of their shift, reading and signing The Control Room Daily Log Book, picking up their equipment, including radios, meeting with supervisors, constant radio contact with the Controllers. Further in 1995, based on the Mercer Study, the positions of Controller, Service Manager and Dispatcher were merged. All Transportation Managers are now cross-trained to function as controllers.

Id. The court, however, finds that there are genuine issues of material fact as to whether these duties are essential.

With respect to the cross-training requirement, the job description for the Transportation Manager (formerly Service Manager) position in the Victory District admittedly states that the “[a]ccepted applicant will be required to qualify on all modes of operation within Suburban Operations Division and in the operation of the Suburban Division Control Center.” PI's Exhibits, at 140. However, as of May 13, 1996, Nicholas R. Fabio, President of the Transport Workers Union of America, Local 290, was aware of only seven Transportation Managers at SEPTA who were trained to work in the

control room. See also PI's Exhibits, at 82. Fabio explained that “only in a few instances do individuals who are transportation managers assigned to street duty have the requisite training to qualify them for [control room] work.” Id. Moreover, as of December 7, 1997, at least four Transportation Managers who worked in the Victory District had not yet been trained to work in the control room. See PI's Exhibits, at 88; Reynolds Dep. at 22-25. The court finds that there is a genuine issue of material fact as to whether the cross-training requirement is an essential function of this position.

There are also factual questions as to whether reporting on duty in the control room at the beginning of a shift, reading and signing the control room log book, picking up equipment from the control room, and meeting with supervisors in the control room are essential functions of the Transportation Manager position in the Victory District. None of these duties is listed under the “primary responsibilities” section of the job description for this position. See PI's Exhibits, at 140.

Even assuming that these duties are essential, the court finds that there are factual questions as to whether these duties can reasonably be accommodated. Former Transportation Manager/Street Supervisor Albert Tamburro testified that it was possible to report in to the control center either in person or by phone. See Tamburro Dep. at 15. Former Chief Supervisor of the Service Managers Ray Harmer testified that he placed copies of all notices, bulletin orders, changes to bulletin orders, schedules of the control center, and detours on a bulletin board in the supervisors' office, which was known as the “bat cave.” See Harmer Dep. at 79-80, 82. He further testified that it would have been possible to accommodate Presta by putting a sign-up sheet next to the bulletin board so that he could prove that he had read the posted items. See id. at

81. Thomas Cain similarly testified that it would have been “possible” to move the log book out of the control room to accommodate Presta. See Cain Dep. at 116.

With respect to the equipment that supervisors allegedly need to pick up from the control room, Tamburro testified that “there would have been no reason why [Presta] couldn't have his own bag [of bare necessities, i.e. camera, film, tape, hot gloves, and flashlight]” so that he would not have to go into the control room to pick up these supplies. See id. at 66-71. In addition, Director of Transportation Michael Liberi testified that Ray Harmer was assigned his own radio with its own charging capability, so that he did not have to take it back to the control room to recharge it, and that it would have been “feasible” to assign a radio and a radio charger to Presta. See Liberi Dep. at 30; see also Harmer Dep. at 72-73; Cain Dep. at 145-46.

Finally, Presta has demonstrated that, during the relevant time period, service managers gathered and had meetings in the bat cave, rather than in the control room. See Harmer Dep. at 78-79. The court finds that Presta has, at least, raised a genuine issue of material fact as to whether SEPTA could have accommodated him by permitting him to meet with his supervisors either in the bat cave or at some other location.<sup>8</sup>

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<sup>8</sup> Presta continued to request that SEPTA reasonably accommodate his disability after he turned down the QC/RA position in April 1996. Presta has shown that, between April 1996 and December 1997, another five positions opened up at his same salary and grade level, whose duties he allegedly could have performed with or without reasonable accommodations: (1) Telephone Information Supervisor (opening date 9/20/96), see PI's Exhibits, at 149; (2) Operations Administrator/Labor Relations in the Surface Operations/Administration Division (opening date 10/11/96), see id. at 150; (3) Transportation Manager (former position unspecified) in the Victory, Elmwood, and/or Frontier Districts (opening date 10/23/96), see id. at 10; (4) Supervisor, Labor Relations in the Administration/Labor Relations Division (opening date 12/16/96), see id. at 151;

Because there are factual questions as to whether Presta can perform the essential functions of the Transportation Manager position--and thus factual questions as to whether Presta is a “qualified individual with a disability”--the court will deny defendants' motion for summary judgment on Presta's failure to accommodate claim.

B. Hostile Work Environment

Limited case law exists on whether an ADA plaintiff can bring a claim for hostile work environment employment discrimination. The ADA does not explicitly prohibit this type of discrimination. Rather, it prohibits discrimination in the “terms, conditions, or privileges of employment.” 42 U.S.C. § 12112(a). However, because the Supreme Court has interpreted virtually identical language in Title VII of the Civil Rights Act to support such a claim, see Patterson v. McClean Credit Union, 491 U.S. 164, 180 (1989), courts have allowed plaintiffs to assert hostile work environment claims under the ADA. See Morgan v. City and County of San Francisco, 1998 WL 30013 (N.D. Cal. Jan. 13, 1998); Walton v. Mental Health Assoc., No. 96-5682, 1997 WL 717053 (E.D. Pa. Nov. 17 1997); Rodriguez v. Loctite Puerto Rico, Inc., 967 F. Supp. 653, 662 (D. Puerto Rico June 25, 1997); Hendler v. Intelcom USA, Inc., 963 F. Supp. 200 (E.D.N.Y. Apr. 15, 1997). Such claims are analyzed under the standards applicable to Title VII hostile work environment claims. See id.

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and (5) Transportation Manager (primarily “On the Street” duties) in the Elmwood, Victory, or 69th Street Districts (opening date 12/9/97), see id. at 11. Assuming that Presta was a “qualified individual with a disability” and that the QC/RA position was an unreasonable accommodation, there are thus factual questions as to whether SEPTA could have accommodated Presta by reassigning him to one of these five positions.

In order to state a prima facie case for a hostile work environment claim under the ADA (assuming that such a claim is legally permissible), a plaintiff must show that: (1) he is a qualified individual with a disability under the ADA; (2) he was subject to unwelcome harassment; (3) the harassment was based on his disability or on a request for an accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive working environment; and (5) defendants knew or should have known of the harassment and failed to take prompt effective remedial action. See Walton, 1997 WL 717053, at \*12 (citation omitted); Hendler, 963 F. Supp. at 207-08. With respect to the fourth prong, the plaintiff must show both that he subjectively perceived the environment to be abusive and that a reasonable person having the disability that the plaintiff has or is regarded as having would have perceived the environment to be abusive. See Morgan, 1998 WL 30013, at \*7. The hostility of the work environment must be determined by considering factors such as the frequency, severity, or threatening nature of the purportedly harassing conduct. See Walton, 1997 WL 717053, at \*12.

The court finds that Presta has failed to submit sufficient evidence to withstand defendants' motion for summary judgment on this claim even if such a claim is permissible. In order to satisfy the first element of his prima facie case, Presta must show that he is disabled within the meaning of the ADA. Although the court has concluded that there is a genuine issue of material fact as to whether Presta is disabled within the meaning of 42 U.S.C. § 12102(2)(A)--that is, there are factual questions as to whether Presta suffers from an actual disability, see Discussion, supra Part I.A.1-- Presta does not base his hostile work environment claim on this prong of the ADA's

definition of disability. He contends that the harassment was “based” not upon any actual disability that he may have had at the time, but upon a perceived disability.<sup>9</sup>

Presta thus invokes the third prong of the ADA's definition, which provides: “The term 'disability' means . . . being regarded as having . . . an impairment [that substantially limits one or more of one's major life activities].” 42 U.S.C. § 12102(2)(C). More specifically, the ADA provides that a person is “regarded as having such an impairment” 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. § 1630.2(1).

Presta appears to invoke the third prong of this definition. He contends that defendants “created a hostile environment based upon a perceived disability by making repeated and incessant taunts and references to him as 'Rainman' -- an autistic title character played by Dustin Hoffman in the . . . movie co-starring Tom Cruise.” Plaintiff's Mem. at 18. He suggests that his co-workers and supervisors regarded him as being mentally retarded--and thus substantially limited in the ability to learn--even though he

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<sup>9</sup> The court notes that Presta was diagnosed as having adjustment and anxiety disorders in January of 1995. See Pl's Exhibits, at 121, 125. Presta's hostile work environment claim revolves around comments made by his co-workers, beginning in 1992 or 1993 and continuing until Presta went on sick leave in January 1995. See Presta Dep., Oct. 1, 1997, at 98. Presta cannot argue that the harassment was “based upon” his adjustment and anxiety disorders, as he was harassed for two to three years before he was even diagnosed with these disorders.

was not, in fact, mentally retarded. See Pl's Mem. at 19 ("There is no question that 'Rainman' was a derogatory term implying that Presta was . . . substantially limited in the major life activity of learning -- i.e., 'retarded' or an 'idiot.'"). In support of this claim, Presta has submitted evidence that his co-workers and supervisors repeatedly called him "Rainman" both to his face and behind his back. See Collier Dep. at 12-15, 21-22; Daly Dep. at 26-28; Diggs Dep. at 58-59; Harmer Dep. at 33-40, 43-46; Lauser Dep. at 49-57; Presta Dep., Oct. 1, 1997, at 97-123; Tamburro Dep. at 35, 39-40; Thompson Dep. at 37-39; Voorhees Dep. at 17-19; Walmsley Dep. at 43-52, 81, 95-96.<sup>10</sup> Presta has also submitted evidence that his co-workers and supervisors called him "an idiot." See Walmsley Dep. at 81. Specifically, Harry Walmsley testified that when John Ricciutti was distributing notices in employee mailboxes and realized that he was short one notice, he said, "oh, well, . . . I just won't give one to the idiot." Id. at 63. After being asked by another employee whom he was referring to, Ricciutti replied, "Presta, who else." Id. In addition, Howard Collier testified that he once overheard Jack Lauser "saying that [Presta's] nuts, he's crazy." Id. at 22.

Presta has also submitted extensive evidence as to the meaning that his

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<sup>10</sup> According to Robert D. Voorhees, "[e]verybody had a nickname in there [i.e. the control room], just about." Voorhees Dep. at 19. Voorhees testified that the other controllers called him "BaBa," "Fat Ass," and "Lard Ass," and that Howard Collier called him "Lard Ass all the time." Id. Voorhees further testified that Bob Macon was called "Pig Pen," and that Jack Lauser was called "Sludge," "Deputy Dog," and "God." Id. Howard Collier testified that Bob Curly was called "Coke Head or Coke or something like that;" Mr. O'Rourke was called "O'Dork;" Harry Walmsley was called "Cum Ears;" and Al Tamburro was called "Crazy Al." Collier Dep. at 16-19. Albert Tamburro testified that Bob Curly was called "druggie or drunkie or something like that." Tamburro Dep. at 47.

co-workers and supervisors attached to the term, "Rainman." Francis Daly testified that SEPTA employees referred to Presta as "Rainman" because "[t]he guy was a nervous wreck when he was up there as a controller . . . ." Daly Dep. at 27. Daly understood "it as a nickname they gave [Presta], . . . trying to say he was stupid or something because I mean Rain Man portrayed in the movie is a retarded man, he's autistic." Id. However, Daly testified that none of the employees whom he had heard using the "Rainman" epithet had ever told him that he believed Presta was retarded. See id. at 27-28. Daly also testified that he does not believe that Presta is "mentally disabled" or "retarded in any way." Id. at 28.

Luther Diggs testified that he "didn't have any real understanding" of what the name meant. He explained: "[A] lot of people have nicknames around the property. I know that Bob was sort of off to himself and introverted, didn't really interact a lot with the others. Maybe that's what they're referring to." Diggs Dep. at 58-59. Charles Thompson testified that he has no idea what the term, Rainman, means. See Thompson Dep. at 39.

Harry Walmsley testified that, at the time, he did not know what his co-workers meant by the term, although he "didn't think . . . that they were paying [Presta] a compliment by calling him it." Id. at 46. He explained: "Back then when this was all going on, I never saw the movie, never had any idea what Rain Man was, I didn't understand what the remarks were . . . ." Id. At a later point in his deposition, however, Walmsley testified that after Presta explained to him who Rain Man was, he "understood what they were implying was Bob was like an airhead or something . . . ." Walmsley Dep. at 50. Walmsley testified that he knows about the movie now because

he recently saw it on cable. See id. at 46, 94. Having seen the movie, Walmsley believes that “what they [were] implying, is [Presta's] brain damaged.” Id. at 95. However, he testified that he “[a]bsolutely [did] not” think that Presta was, in fact, brain damaged. See id.

Walmsley also testified that he believed that Presta was, in general, treated unfairly at SEPTA. He explained that when Presta would ask questions, supervisors such as John Ricciutti and Jack Lauser would give Presta short answers. According to Walmsley, “[i]t was like it annoyed them when he asked them a question. In plain words, I can sum it up . . . it's like he wasn't one of the boys. . . . [I]t was like a groupie.” Id. at 76.

Howard Collier testified that he thought that Ricciutti called Presta “Rainman” because Ricciutti “thought [Presta] was crazy.” Collier Dep. at 13. Ray Harmer testified that his “own personal feeling about how [Presta's] name became Rain Man it was his style of projecting over the radio . . . . Bob had a very slow, precise way of speaking and he would not make a decision . . . right away he would think it out and it just came over that way.” Harmer Dep. at 39-40. Jack Lauser testified that “[a]t first [he] didn't know what [the term] meant.” Lauser Dep., Nov. 21, 1997, at 52. He also testified that “John [Ricciutti] . . . later told me it's 'cause of [Presta's] not letting go of something, his repetitiveness. [Presta] repeated things when he was interested or concerned about something.” Id. Lauser also testified that he thought that Presta was a competent controller and never thought of him as being mentally disturbed. See id. at 69.

Even construing this evidence in the light most favorable to Presta, the court finds that the evidence is insufficient to establish that SEPTA regarded Presta as

disabled. The evidence shows that, at most, Presta's co-workers perceived him to be “stupid,” “introverted,” “nervous,” and indecisive. It shows that some of his co-workers perceived him to be a “slow, precise” speaker who tended to repeat things that interested or concerned him. However, none of this evidence suggests that Presta's co-workers perceived him to be suffering from a mental impairment--let alone one that substantially limited his ability to learn. The evidence suggests that Presta's co-workers treated him “unfairly” for reasons having nothing to do with a perceived disability. As Harry Walmsley put it, Presta's co-workers regarded Presta as someone who “wasn't one of the boys.” Walmsley Dep. at 76. Although Presta's co-workers and supervisors engaged in behavior that was highly inappropriate, insensitive, and immature, their behavior is not actionable under the ADA. The court will therefore grant defendants' motion for summary judgment on this claim.

C. Long-Term Disability Insurance Policy

Presta also argues that SEPTA violated the ADA by maintaining a discriminatory disability insurance policy. Presta contends that SEPTA's policy is discriminatory because it provides long-term disability benefits to individuals whose disabilities are caused by mental and nervous conditions for only twenty-four months, whereas it provides benefits to individuals whose disabilities are caused by physical conditions until they reach the age of sixty-five. See Complaint ¶¶ 51-55.

Defendants argue that they are entitled to summary judgment on this claim. See Defs' Mem. at 20-21. Rather than respond to defendants' arguments, Presta has moved to sever the claim, pursuant to Federal Rule of Civil Procedure 42, so that he

can bring it in a class action against both SEPTA and the insurance provider, Allianz Life Insurance Company of North America. See Plaintiff's Mem. at 26.<sup>11</sup>

The Third Circuit recently addressed the very issue that Presta now raises. In Ford v. Schering-Plough Corp., No. 96-5674, 1998 WL 258386 (3d Cir. May 22, 1998), the court reversed the lower court's opinion insofar as the lower court held that the plaintiff--a disabled former employee--lacked standing to challenge her employer's disability insurance policy under Title I of the ADA. See id. at \*2-3. The court noted the disjunction between the explicit rights created by Title I of the ADA and the ostensible eligibility standards for filing suit under Title I:

[R]estricting eligibility to sue under Title I to individuals who can currently work with or without a reasonable accommodation prevents disabled former employees from suing regarding discrimination in disability benefits. Once an individual becomes disabled and thus eligible for disability benefits, that individual loses the ability to sue under a strict reading of Title I's definition of "qualified individual with a disability" because that individual can no longer work with or without a reasonable accommodation.

See id. at \*3. The court concluded that the term "employees," as used in the ADA, contains an ambiguity concerning the definition of "qualified individual with a disability" because there is no temporal qualifier for that definition. See id. at \*5. The court resolved this ambiguity by "interpreting Title I of the ADA to allow disabled former

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<sup>11</sup> This rule provides, in relevant part:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh amendment to the Constitution or as given by a statute of the United States.

Fed. R. Civ. P. 42(b).

employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA.” Id. But see Gonzales v. Garner Food Services, Inc., 89 F.3d 1523 (11th Cir. 1996) (refusing to grant a disabled former employee permission to challenge his employer's disability benefit plan under the ADA).

The court, however, joined a growing number of courts of appeals in holding that the defendant's insurance plan did not violate Title I. The court explained:

While the defendants' insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability. Every Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability . . . .

Ford, 1998 WL, at \*6; see also Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1015 (6th Cir. 1997) (“[T]he ADA does not mandate equality between individuals with different disabilities.”); EEOC v. CNA Ins. Co., 96 F.3d 1039, 1045 (7th Cir. 1996) (concluding that the plaintiff “suffered no discrimination cognizable under Title I of the ADA as a result of the distinction in [the defendant's] long-term disability plan between mental health benefits and other benefits”); Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 678 (8th Cir. 1996) (“Insurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability.”); cf. Moddero v. King, 82 F.3d 1059, 1062-63 (D.C. Cir. 1996) (holding that a foreign service benefit plan, which provided less coverage for treatment of mental illnesses than for treatment of physical illnesses, did

not violate the Rehabilitation Act).

The court also held that the plaintiff could not state a claim against her employer or its insurance provider pursuant to Title III of the ADA.<sup>12</sup> Because the defendants, Schering and MetLife, offered disability benefits to the plaintiff in the context of her employment at Schering, the disability benefits constituted part of the terms and conditions of her employment. See id. As terms and conditions of employment are covered under Title I--not Title III--the plaintiff could not state a claim against her employer pursuant to Title III. See id.

The court held that the plaintiff could not bring a claim against MetLife pursuant to Title III because the disability benefits did not qualify as a “public accommodation.” See id. The court reasoned that because Ford received her disability benefits via her employment at Schering, she “had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation.” Id.; see also Parker, 121 F.3d at 1010 (“A benefit plan offered by an employer is not a good offered by a place of public accommodation.”). But see Carparts Distribution Ct. Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994) (holding that Title III is not limited to physical structures).

Under Ford, Presta's challenge to SEPTA's disability benefits plan must fail.

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<sup>12</sup> Title III provides, in relevant part:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

The disparity between physical and mental disabilities in SEPTA's plan does not violate Title I, see Ford, 1998 WL, at \*6-9, and Presta cannot state a claim against SEPTA under Title III, see id. at \*12. The court will therefore grant summary judgment in favor of SEPTA and against Presta on his disability insurance policy claim, and will deny Presta's motion to sever this claim.

II. Plaintiff's Cross-Motions

A. Plaintiff's Cross-Motion to Dismiss

In Count II of his complaint, Presta alleges:

- 110. The actions and inactions of SEPTA deprived Plaintiff of his rights under the First and Fourteenth Amendments of the United States Constitution and is actionable under 42 U.S.C. § 1983.
- 111. As the direct and proximate result of SEPTA's violation of Plaintiff's right to free speech and due process, Plaintiff has suffered, inter alia, loss of income, loss of career opportunities, mental anguish and emotional distress, and attorneys' fees . . . .

Complaint ¶¶ 110-111 (emphasis added). In his brief in opposition to defendants' motion for summary judgment, however, Presta asserts that he “does not . . . intend to assert a due process claim [against SEPTA], and, to the extent that he has asserted one, hereby dismisses it.” Plaintiff's Mem. at 20 n.15. To the extent that Presta has asserted a due process claim against SEPTA in Count II of his complaint, the court grants Presta's cross-motion to dismiss this claim. In addition, the court grants Presta's cross-motion to dismiss all claims against John F. Lauser and Luther Diggs in Counts II and III of his complaint.

B. Plaintiff's Cross-Motion to Amend the Complaint

Plaintiff moves to amend his complaint so that he can assert a claim of retaliation against SEPTA and John F. Lauser based on a July, 1997 seniority picking. See Plaintiff's Mem. at 25-26.

Federal Rule of Civil Procedure 15 provides, in relevant part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a) (emphasis added). The decision to grant or deny leave to amend is committed to the sound discretion of the district court. See Foman v. Davis, 371 U.S. 178, 182 (1962). "Factors the trial court may appropriately consider in denying a motion to amend include undue delay, undue prejudice to the opposing party, and futility of amendment." Averbach v. Rival Mfg. Co., 879 F.2d 1196, 1203 (3d Cir. 1989) (citing Foman, 371 U.S. at 182).

The court finds that Presta unduly delayed filing this motion to amend. Presta filed the motion over ten months after he initiated his lawsuit, after discovery closed, and after the time for filing dispositive motions passed. However, Presta's counsel has indicated that Presta does not need additional discovery regarding this new claim and defendants' counsel, having been giving an opportunity to advise the court if defendants need additional discovery, has not so advised the court. As Presta's delay in filing this motion will not affect further discovery or the trial date, the court finds that the delay is not a significant factor in the court's decision whether to permit Presta to amend the

complaint.

Defendants, moreover, have not demonstrated that they have been unduly prejudiced by Presta's delay. In fact, defendants will likely benefit from having the new claim disposed of in this litigation, rather than in a separate one, as they will be saved the expense of litigating two actions. In addition, the court finds that the claim is not clearly futile. For these reasons, the court will grant Presta's motion to amend his complaint.

An appropriate venue is ~~in the United States District Court~~  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT C. PRESTA,	:	CIVIL ACTION
Plaintiff	:	
	:	
	:	
v.	:	
	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
et al.,	:	No. 97 Civ. 2338
Defendants.	:	

## ORDER

AND NOW, this     day of June, 1998, upon consideration of defendants' motion for partial summary judgment, plaintiff's response, defendants' reply, and plaintiff's surreply and supplemental memoranda in opposition thereto; defendants' motion to strike plaintiff's opposition to defendants' motion for partial summary judgment; and plaintiff's cross-motion to amend his complaint, to sever portions of Counts I and IV, to dismiss Counts II and III as against Jack F. Lauser and Luther Diggs, and to dismiss Count II to the extent that it states a due process claim against SEPTA, all filed from January 20, 1998 through May 29, 1998, IT IS HEREBY ORDERED that:

1. Defendants' motion for partial summary judgment in favor of defendants and against plaintiff Robert C. Presta is GRANTED with respect to plaintiff's claims for hostile work environment employment discrimination and discrimination in the terms of SEPTA's long-term disability insurance policy in Counts I and IV.
2. Defendants' motion for partial summary judgment in favor of defendants and against Robert C. Presta is DENIED with respect to plaintiff's failure to accommodate claim in Count I, as well as with respect to Counts II and III.
3. Defendants' motion to strike plaintiff's opposition to defendants' motion for partial summary judgment is DENIED.

4. Plaintiff's cross-motion to dismiss his claims against John F. Lauser and Luther Diggs in Counts II and III of the complaint is GRANTED, and John F. Lauser and Luther Diggs are dismissed as parties to this action.
5. Plaintiff's cross-motion to dismiss his due process claim against SEPTA in Count II of the complaint is GRANTED to the extent that plaintiff has asserted such a claim.
6. Plaintiff's cross-motion to amend his complaint is GRANTED.
7. Plaintiff's cross-motion to sever portions of Counts I and IV is DENIED.

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William H. Yohn, Jr., Judge