UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RICHARD SLOAN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 95-361-P-DMC***
	)	
SEBAGO, INC.,	)	
	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

This action arises out of the defendant's alleged employment discrimination based on the plaintiff's physical disabilities. The plaintiff presses claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551 *et seq.*, based on the defendant's termination of the plaintiff and alleged refusal to make reasonable accommodations to the plaintiff's disabilities. He also presses common-law claims for intentional and negligent infliction of emotional distress. The defendant moves for summary judgment on all counts. For the reasons set forth below, I grant the defendant's motion in part and deny it in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

II. Factual Context

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the following material facts: In 1970 the plaintiff began working as a utility machine operator in the defendant's Westbrook, Maine factory. Deposition of Richard Sloan ("Sloan Dep.") at 4-5. He left in approximately 1978 or 1979, but returned in approximately 1984 as a supervisory floor person in

the defendant's Bridgton, Maine factory. *Id.* at 7, 15-17. In approximately 1986 he transferred to the defendant's Westbrook plant to work as a floor person, pushing stacks of work to employees to be processed, moving racks of shoes between departments and helping machine operators. *Id.* at 18, 20. The plaintiff reported to David Randall in that job. *Id.* at 21.

About one and one-half to two years later the plaintiff was promoted to an assistant foreman position in which he assisted Randall in the stitching room. *Id.* In that job the plaintiff was responsible for monitoring quality, ordering production materials, checking time cards, signing hour time slips, meeting with salesmen and expediting shoes[2] to the stitching room. *Id.* at 22-23.

In April 1991, while bending over and twisting to access a carton of thread that was "tucked into a little corner," the plaintiff felt a snap in his back and experienced very sharp pain extending from his back into his right leg. *Id.* at 30. After several days out of work the plaintiff visited Dr. Chris Simpson, who advised the plaintiff to return to work with the recommendation that "if it hurts, don't do it." *Id.* at 31-32. The plaintiff relayed this restriction to Randall, who merely shrugged his shoulders in response. *Id.* at 33-34.

In November 1991 the plaintiff was demoted to a strictly expediting position, while Leona Flaherty, an employee with three or four months of experience in the department, was promoted to assistant supervisor. *Id.* at 23. Discussing this employment action with the plaintiff, Randall said, "I don't know what Daniel Wellehan[3] is doing. All I know is he has plans for Leona [Flaherty], and

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[2] "Expediting shoes" involved "[l]ooking for missing shoes, making sure that they progress through the factory to the next manufacturing unit," and required "continuous bending and lifting, trying to locate and move various cases of shoes." Sloan Dep. at 47.

[3] Wellehan was part owner of the corporate defendant at the time, and has been its president since 1992. He has been the company's sole owner since September 1994. Affidavit of Daniel J. Wellehan ("Wellehan Aff.") ¶ 2, Exh. 2 to Motion of the Defendant, Sebago Inc., for Summary (continued...)

they don't involve you." *Id.* In his expediting position the plaintiff received the same salary and continued to report to Randall, but he no longer had any functions relating to quality or supervision. *Id.* at 23-24. He continued his prior expediting work, and took on the added duty of expediting leather-lined shoes. *Id.* The plaintiff told Randall that he was not supposed to be doing bending and lifting, and that his new job would involve bending and lifting all day and lugging materials around. *Id.* at 24-25. Randall responded, "We want to work, don't we?" *Id.* at 25.

In the summer of 1992 Randall threw a heavy plastic box near the plaintiff while the plaintiff was discussing shoe orders with another employee. Affidavit of Plaintiff Richard Sloan ("Sloan Aff.") ¶ 4, Exh. 1 to Plaintiff's Memorandum of Law in Support of His Objection to Defendant's Motion for Summary Judgment (Docket No. 12). The plaintiff was startled and jumped out of the way. *Id.* Randall just look at the plaintiff and walked away, and the other employee told the plaintiff, "You better watch out for [Randall]. He's out to get you." *Id.* About two weeks later, while the plaintiff was standing with his back to Randall and speaking with another employee, Randall threw another heavy box toward the plaintiff. *Id.* When the box landed with a loud crash very near the plaintiff, he jumped and twisted to get out of the way, tripping over some boxes. *Id.* Randall looked at the plaintiff, laughed and walked away.[4] *Id.*

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[3] (...continued)
Judgment ("Defendant's S.J. Motion") (Docket No. 8).

[4] The plaintiff recounts other dealings between Randall and employees with disabilities. Employee Marie Law had tendinitis or carpal tunnel syndrome that restricted her to doing one specific type of shoe-stitching. Sloan Dep. at 79-80. She was often sent only the type of shoe that she could not work on, but because she was on piecework she could not earn money if she did not work. *Id.* at 80. There was also a "general harassment from the supervisor [Randall] towards [Law]." *Id.* Law eventually resigned from the company. *Id.* Employee Dorothy Demers had tendinitis or carpal tunnel syndrome, and was continuously being sent the type of work she could not do. *Id.* at 81. This forced her to choose between not working, thus not making money, or working (continued...)

The plaintiff's back pain gradually built up until he reached the end of his tolerance for pain, and on August 25, 1992 he visited Dr. Jeffrey Martin. Sloan Dep. at 32, 35, 37. Dr. Martin issued written restrictions prohibiting the plaintiff from bending at the waist, lifting over ten pounds and sitting or standing for prolonged periods. *Id.* at 36. The plaintiff gave a copy of these instructions to the defendant's industrial nurse, Ann Erickson, who provided Randall with a copy. *Id.* at 36, 38.

The plaintiff had back surgery to remove a transdural lumbar disc in October 1992, and was out of work from then until March 1993. *Id.* at 39-40. He returned to work subject to certain restrictions that Erickson obtained from the plaintiff's surgeon's office. *Id.* at 40. Again, Erickson related these restrictions to Randall. *Id.* at 42. The plaintiff tried to work subject to these restrictions, but often could not because the expediting position required bending and lifting. *Id.* As a result the plaintiff experienced a recurrence of his lower back pain. *Id.* In March 1993 Randall told the plaintiff he would talk with Wellehan about what they would be able to do about the plaintiff's restrictions. *Id.* at 104. A few days later Randall told the plaintiff he would have to continue with his job until something available came up. *Id.* In April 1993 the plaintiff was admitted to the Maine Medical Center emergency room with pain in his lower back and legs that prevented him from walking. *Id.* at 42-43. He was out of work from April 18 until May 3, 1993. *Id.* at 43. In May 1993 the plaintiff told Randall that he might have to have more surgery, and Randall simply rolled his eyes. *Id.* at 96.

On almost a daily basis between May 1993 and November 1993 the plaintiff explained to

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[4] (...continued)
on the shoes that caused injury to her hands. *Id.* at 81-82. Randall was her supervisor. *Id.* at 82. Employee Felicia Lastage had a back injury and was not supposed to do work that required bending. *Id.* at 80-81. However, she was assigned to do an operation that involved bending and lifting. *Id.* at 81. Again, Randall was her supervisor. *Id.*

Randall that his pain was "almost constant, continuous, and that it did progress through the day." *Id.* at 45-46. During this period the plaintiff suggested several ways in which his job could be altered to avoid his physical problems, but Randall did not agree to try any of these suggestions. *Id.* at 46-50.

On numerous occasions the plaintiff requested help from Randall doing bending and lifting. *Id.* at 122. On those occasions Randall would tell the plaintiff that he would have Jeanette Spear help him, but she would fail to provide the necessary help. *Id.* From approximately July to September 1993 the plaintiff requested several different positions to accommodate his condition, but in each instance the positions were filled with other employees. *Id.* at 122-24.

During the last few years in which he worked for the defendant the plaintiff experienced problems with his hands involving numbness in the fingers and tingling in the palms. *Id.* at 64-65. On July 22, 1991 an EMG examination indicated that the plaintiff had carpal tunnel syndrome. *Id.* at 63. Sometime during or after July 1991 the plaintiff told Erickson that his hands were going numb all the time. *Id.* at 66. The topic, however, came up during the course of a discussion of the plaintiff's back, and the plaintiff did not go to Erickson to ask for help or suggestions. *Id.* On the morning of November 11, 1993 the plaintiff mentioned to Bruce Pelletier, a supervisor, that his right hand and arm were going numb and he would probably need surgery for carpal tunnel syndrome, but he did not tell Pelletier that this was a problem in any aspect with relation to doing his job. *Id.* at 69, 71. The plaintiff mentioned carpal tunnel syndrome "vaguely in passing" to John Marshall, Jr.,[5] but never asked him for any accommodation related to his carpal tunnel syndrome. *Id.* at 73, 75.

In March 1993 the defendant began to experience a downward trend in production. Wellehan

[5] John Marshall, Jr. is referred to in the summary judgment record both as the production manager, Wellehan Aff. ¶ 7, and as Vice-President of Manufacturing, Exh. D to Wellehan Affidavit.

Aff. ¶ 4. By October and November 1993 the defendant had experienced 23% and 31% reductions in production, respectively. *Id.* The company experienced a dramatic drop in revenue during the last six months of 1993. *Id.* ¶ 5. On October 18, 1993 Wellehan and John Marshall, Sr.[6] "sent a memorandum to department heads requesting that they reevaluate their current and future staffing with the view towards reducing costs and increasing efficiency." *Id.* ¶ 6. "[T]his reevaluation was necessitated by the slowdown in sales, manufacturing and operations, and an impending computer conversion." *Id.*

In response, John Marshall, Jr. sent a memorandum on October 29, 1993 recommending that the plaintiff's position be eliminated because

> [t]he reduction in WIP (from typically 40,000 pairs to 20,000 pairs) makes [the plaintiff]'s job of expediting shoes expendable. Shoes which in prior years would need to be organized and expedited currently "run" through the Stitching Room without the need for his supervision. This, with reduction in WIP, the increase in FG inventory and the direction to sourcing more goods offshore, this position should be eliminated.

Exh. D to Wellehan Aff. at 1.

On November 11, 1993, with Randall present, John Marshall, Jr. informed the plaintiff that his position was eliminated. Sloan Dep. at 29; Wellehan Aff. ¶ 8. The plaintiff was one of three salaried employees and three hourly employees who were laid off at that time. Wellehan Aff. ¶ 8. The plaintiff's position has not been reinstituted. *Id*. Shortly after the plaintiff's termination the defendant created several new positions for which the plaintiff was qualified, and which had duties that fell within the plaintiff's work restrictions. Sloan Aff. ¶ 8.

At the same time the defendant eliminated the plaintiff's position, claiming it was

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[6] John Marshall, Sr. was at the time a Sebago executive. Memorandum of Law in Support of Defendants' Motion for Summary Judgment (Docket No. 9) at 2 (incorporated statement of material facts).

expendable, the defendant maintained another position in the same department, assistant supervisor, which was less critical to the operation of the department. Sloan Dep. at 120. This was the position from which the plaintiff was demoted in November 1991. The employee who replaced the plaintiff in that position, Leona Flaherty, still occupied that position at the time of the plaintiff's termination. *Id.* at 120-21. In contrast to the plaintiff, who had knowledge of the materials involved in shoe making, Flaherty said she knew nothing about any of these supplies. *Id.* at 121.

The plaintiff described his reaction to his termination as follows: "If they had taken a 2 x 4 and smacked me on the side of the head, I wouldn't have been any more surprised or shocked or devastated." Sloan Dep. at 29. For a period of about six months following the termination the plaintiff, who "had never really drank," drank so heavily that "those six months were a blur." *Id.* at 112-13. On Thanksgiving of 1993 the plaintiff attempted suicide by taking an overdose of Tylenol with codeine. *Id.* at 115. Following his termination the plaintiff kept to himself and wanted nothing to do with his friends or family. *Id.* at 118.

On February 2, 1994 the plaintiff filed a written application for disability benefits with the Social Security Administration ("SSA"). Application for Disability Insurance Benefits, Exh. 3 to Defendant's S.J. Motion. In the application the plaintiff stated, "I became unable to work because of my disabling condition on November 11, 1993. I am still disabled." *Id.* at 1. The plaintiff's application was initially denied, but on April 1, 1995 an Administrative Law Judge found that the plaintiff had been under a disability, as defined in the Social Security Act, since November 11, 1993, and that he was therefore entitled to disability insurance benefits. Decision at 1, 4, Exh. 4 to Defendant's S.J. Motion.

II. Legal Analysis

A. ADA and MHRA Claims

The ADA and the MHRA prohibit discrimination in employment against a qualified individual with a disability because of the individual's disability. 42 U.S.C. § 12112(a); 5 M.R.S.A. § 4572(2).[7] A "qualified individual with a disability" is "an individual with a disability 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). For purposes of this motion the defendant does not dispute that the plaintiff has a disability within the meaning of the ADA. However, the defendant argues that the plaintiff is estopped from claiming that he was a qualified employee with a disability at the time of his termination, and that the plaintiff has produced no evidence that the defendant's proffered reason for terminating him was a pretext for disability discrimination.

1. Discriminatory Termination

The defendant argues that, because of the plaintiff's representation to the SSA that he was unable to work on the date of his termination, he is estopped from now claiming that he was able to perform the essential functions of his job on that date. The doctrine of judicial estoppel is intended to protect the integrity of the judicial process and prevent parties from abusing the process by "achieving success on one position, then arguing the opposite to suit an exigency of the moment." *UNUM Corp. v. United States*, 886 F. Supp. 150, 157 (D. Me. 1995) (quoting *Teledyne Indus., Inc.*

[7] The MHRA is to be interpreted in accordance with federal discrimination law. *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596, 606 (Me. 1994); *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 74-75 (Me. 1993), *cert. denied*, 128 L.Ed.2d 364 (1994).

v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir. 1990)). To apply the doctrine, a court must first determine that a litigant made certain representations in a prior legal proceeding in order to obtain a particular benefit from the tribunal. *Id.* at 158. "Administrative and quasi-judicial proceedings, such as those conducted by the SSA, are considered prior legal proceedings under the doctrine of judicial estoppel." *Simo v. Home Health & Hospice Care*, 906 F. Supp. 714, 718 (D.N.H. 1995) (citing *UNUM Corp.*, 886 F. Supp. at 158). "Additionally, the position taken in the second litigation must be 'inconsistent with one successfully and unequivocally asserted by that same party in a prior proceeding' regarding a matter 'material' to the outcome of the prior proceeding." *UNUM Corp.*, 886 F. Supp. at 158 (quoting *Brewer v. Madigan*, 945 F.2d 449, 455 (1st Cir. 1991), and citing *United States v. Kattar*, 840 F.2d 118, 130 n.7 (1st Cir. 1988)). Finally, the doctrine should not be applied "in the absence of 'deliberate dishonesty [or] . . . any serious prejudice to judicial proceedings or to the position of the opposing party.'" *Id.* (quoting *Desjardins v. Van Buren Community Hosp.*, 37 F.3d 21, 23 (1st Cir. 1994)).

The plaintiff in *Simo*, in order to prevail on her Rehabilitation Act claim, had to prove that when she was terminated she was an otherwise qualified handicapped employee, i.e., that she could perform the essential functions of the position with or without reasonable accommodation, without endangering the health and safety of herself or others. *Simo*, 906 F. Supp. at 718. However, on her application for disability benefits, which was ultimately granted, the plaintiff represented to the SSA that she "became unable to work because of [her] disabling condition on" the date of her termination, and that she was still disabled. *Id.* at 716-17. Invoking the doctrine of judicial estoppel, the court reasoned that the plaintiff was precluded from asserting facts in support of her claim that she was otherwise qualified. *Id.* at 721 (holding alternatively that the plaintiff failed to show that she was

otherwise qualified).

Here, the plaintiff's claim that, on the date of his termination, he could perform the essential functions of his job with or without reasonable accommodation contradicts his representation to the SSA. Unquestionably, the representation was material to the prior proceeding and was made to obtain disability insurance benefits, which he ultimately received. To permit the plaintiff to assert materially inconsistent factual positions in successive proceedings in order to optimize his recovery would be to countenance a fraud either on this court or on the SSA. Accordingly, the plaintiff is estopped from asserting that, on November 11, 1993, he was able to perform the essential functions of his job, with or without reasonable accommodation.

Even if the plaintiff could prove that he was a qualified individual on the date of his termination, he could not maintain an ADA or MHRA claim based on his termination. A plaintiff may indirectly prove an ADA violation using the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Katz v. City Metal Co.*, ___ F.3d ___, 1996 WL 354699 at *8 n.2 (1st Cir. July 2, 1996). Assuming, *arguendo*, that the plaintiff has made the required *prima facie* showing, the burden shifts to the defendant to produce sufficient competent evidence, taken as true, to permit a rational fact finder to conclude that there was a nondiscriminatory reason for the termination. *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir. 1995). The defendant has amply met this burden by submitting evidence that the plaintiff's position was eliminated pursuant to the force-reduction program instituted by Wellehan and John Marshall, Sr., and the recommendation by John Marshall, Jr.

In this context, the plaintiff must next proffer sufficient admissible evidence, if believed, to prove that the defendant's stated reason was merely a pretext for disability discrimination. *Id.* at

1091-92. The plaintiff has produced no evidence that disability discrimination played any role in the decision to eliminate his position. The only suggestion in the record of discriminatory animus involves Randall, but the plaintiff has produced no evidence that Randall was involved in the decision to eliminate his position.[8] Accordingly, the plaintiff may not base his ADA or MHRA claims on his termination.

2. Failure to Make Reasonable Accommodations

Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified" employee with a disability, unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of its business. 42 U.S.C. § 12112(b)(5)(A). The plaintiff points out that the defendant's summary judgment memorandum does not address the allegation that, during his employment, the defendant refused to make reasonable accommodations to the plaintiff's disabilities.

In response, the defendant first argues that the alleged failure to accommodate the plaintiff "is rendered moot by his admission of inability to work as of the date of his termination, which precludes him from recovering damages associated with his termination." Memorandum of the Defendant, Sebago Inc., in Reply to Plaintiff's Objection to Summary Judgment (Docket No. 15) at 4. The application for disability insurance benefits merely addressed the plaintiff's status on November 11, 1993. The defendant does not cite, nor have I discovered, any authority for the proposition that the plaintiff must be able to recover for his termination in order to recover for the

[8] Randall's mere presence when John Marshall, Jr. informed the plaintiff that his position was eliminated does not reasonably permit an inference that Randall had any input in the decision-making process.

defendant's prior refusal to make reasonable accommodations. On the contrary, failure to make a reasonable accommodation, without more, is actionable under the ADA. 42 U.S.C. § 12112(b)(5)(A).

The defendant also argues that the plaintiff's sole remedy for any physical or mental injuries alleged to have been sustained on the job is pursuant to the Maine Workers' Compensation Act of 1992, 39-A M.R.S.A. § 101 *et seq*. However, compensatory and punitive damages are available for intentional discrimination in violation of the ADA, 42 U.S.C. § 1981a(a)(2), and the court may award civil penal damages, costs and attorney fees and costs under the MHRA, 5 M.R.S.A. §§ 4613(2)(B)(7), 4614. Accordingly, the defendant has not shown that it is entitled to judgment as a matter of law on the ADA and MHRA claims insofar as they allege failure to make reasonable accommodations to the plaintiff's disabilities.[9]

B. Intentional Infliction of Emotional Distress

To recover for intentional infliction of emotional distress, the plaintiff must prove that the defendant's conduct "was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community.'" *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979) (quoting *Restatement (Second) of Torts* § 46

[9] Although the plaintiff notified the defendant that he had carpal tunnel syndrome, the summary judgment record reveals no evidence that he notified the defendant of any limitations resulting from his carpal tunnel syndrome, or that he suggested reasonable accommodations for that condition. Accordingly he may not base his ADA and MHRA claims on failure to make reasonable accommodations to his carpal tunnel syndrome. *See Taylor v. Principal Fin. Group, Inc.*, ___ F.3d ___, 1996 WL 350705 at *9 (5th Cir. June 26, 1996) (where disability, resulting limitations and necessary reasonable accommodations are not apparent to employer, initial burden rests on employee to identify disability and resulting limitations, and to suggest reasonable accommodations); 29 C.F.R. § 1630.9, App. ("In general . . . it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.").

cmt. d (1965)). No rational jury could find that the defendant's alleged termination and refusal to accommodate the plaintiff's disabilities, or even the alleged treatment of the plaintiff by Randall, his supervisor, constituted extreme and outrageous conduct. *See Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499, 501 (Me. 1989) (evidence that employer humiliated plaintiff at staff meetings and demoted him without cause "falls far short" of being extreme and outrageous).

C. Negligent Infliction of Emotional Distress

To prevail on his claim for negligent infliction of emotional distress the plaintiff must prove that the defendant was negligent, that the plaintiff suffered emotional distress that was a reasonably foreseeable result of that negligence, and that the resulting emotional distress was severe. *Braverman*, 859 F. Supp. at 607 (citing *Bolton v. Caine*, 584 A.2d 615, 617-18 (Me. 1990), and *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282 (Me. 1987)). The defendant argues that there is no evidence either of negligence or of severe emotional distress.

The plaintiff alleges that, during his employment, the defendant refused to accommodate his disability and required him to perform tasks that aggravated his condition. However, it is clear from the summary judgment record that the alleged severe emotional distress resulted solely from the plaintiff's termination. Thus, the foregoing allegations cannot support the plaintiff's claim for negligent infliction of emotional distress.

The plaintiff also claims that he was fired because of his partial disability. As discussed above, the plaintiff is estopped from claiming that he was able to work on November 11, 1993, the date on which he was terminated. Even if the defendant did terminate him because of his disability, a rational fact finder could not conclude that terminating an employee who was unable to work was

negligent, i.e., that a reasonably prudent person or corporation would not do the same in the management of their affairs. *See Braverman*, 859 F. Supp. at 607. Accordingly, I grant the defendant's motion for summary judgment on Count IV.

D. Punitive Damages

Punitive damages are available for intentional discrimination in violation of the ADA upon a showing that the defendant engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The summary judgment record supports an inference that Randall, the plaintiff's supervisor, maliciously refused to make reasonable accommodations to the plaintiff's disability, or acted with reckless indifference to the plaintiff's rights under the ADA. I therefore deny the defendant's motion for summary judgment on the prayer for punitive damages.

III. Conclusion

*For the foregoing reasons, the defendant's motion for summary judgment is **GRANTED** as to Counts I (ADA) and II (MHRA) insofar as they are based on discriminatory termination or on failure to make reasonable accommodations to the plaintiff's carpal tunnel syndrome, **GRANTED** in full on Counts III (intentional infliction of emotional distress) and IV (negligent infliction of emotional distress), and otherwise **DENIED**.*

Dated this 31st day of July, 1996.

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David M. Cohen

United States Magistrate Judge