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

ALEXANDER C. DISANTE, Plaintiff, v. WILLIAM J. HENDERSON, Postmaster General, and UNITED STATES POSTAL SERVICE, Defendants.	: : : : : : : :	CIVIL ACTION NO. 98-5703

Memorandum and Order

YOHN, J. March 1, 2000

Alexander DiSante ("plaintiff") filed this action alleging that his employer, the United States Postal Service ("defendant" or "USPS")[1], unlawfully discriminated against him and demoted him by reducing his pay and service grade. In response, defendant has filed a motion to dismiss the action pursuant to Fed. R. Civ. P. 12(b) or, in the alternative, for summary judgment. That motion is before the court.

Plaintiff alleges that, in the spring of 1992, defendant began to discriminate against him in the terms and conditions of his employment. He alleges that the discrimination was based on his disability or his employer's perception thereof, was based on his gender, and was in retaliation for his complaints of discrimination. Ultimately, plaintiff was demoted in December

[1] The basis of liability of Postmaster General William J. Henderson is neither articulated nor controverted. Therefore, he remains a party to the action. For convenience, however, I will refer to defendants in the singular, as "defendant" or "USPS."

of 1995. Plaintiff sought administrative relief from the demotion. Unsatisfied, he filed this action in October of 1998, filed an amended complaint in December of 1998, and filed a second amended complaint in October of 1999.

The second amended complaint is in eight counts and includes allegations of discrimination on the basis of disability, on the basis of gender, and in retaliation for engagement in protected activity. Also, the complaint includes several state law claims. Defendant filed a motion to dismiss the complaint or, in the alternative, for summary judgment. For the reasons that follow, I will deny defendant's motion as to the federal claims of employment discrimination under Title VII and the Rehabilitation Act. I will grant defendant's motion as to all other claims.

BACKGROUND

Construing the facts in the light most favorable to the plaintiff,[2] this is what happened.

In April of 1974, plaintiff began working for defendant as a letter carrier. *See* Second Amend. Compl. ¶ 15 (Doc. No. 12) ("Compl."). Thereafter, plaintiff "received promotions until he became the manager of the Frankford [S]tation in March of 1990, a management position with a government classification of EAS-19." *See* Compl. ¶ 15.

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[2] As explained in the next section, I find that Fed. R. Civ. P. 12(b)(1) does not provide the proper framework under which to analyze defendant's motion. Under Fed. R. Civ. P. 12(b)(6), plaintiff's allegations, and all reasonable inferences therefrom, are presumed true. Under Fed. R. Civ. P. 56, the court should believe plaintiff's evidence and reasonable inferences therefrom. In either event, plaintiff benefits from a presumption of truth if plaintiff has met its burden of production. Therefore, I provide background based on plaintiff's allegations and, where controverted by defendant, based on evidence produced by plaintiff. Where plaintiff fails to meet its burden of production, I will so note in the course of this memorandum.

In the Spring of 1991, at a Merit Systems Protection Board ("MSPB") hearing concerning another employee, plaintiff offered testimony adverse to his manager, Marc Winokur. *See id.* ¶¶ 16-18. In July of 1991, plaintiff was removed from his managerial position at Frankford Station ("Frankford") and sent to another station in a non-supervisory capacity. *See id.* ¶ 61. In February of 1992, while being reprimanded by Winokur, plaintiff told him that he was taking Prozac to treat his Obsessive-Compulsive Disorder. *See id.* ¶ 19. Thereafter, plaintiff alleges, he was transferred to different work sites in a manner not consistent with defendant's customary practice. *See id.* ¶ 25.

In June of 1993, plaintiff's new manager, James Adams, suspected plaintiff of using cocaine and erroneously reported plaintiff Absent Without Leave ("AWOL"). *See id.* ¶¶ 27-29; *see also* Pl. Mem. in Opp'n to Def. Mot. at Ex. C (Doc. No. 16) (hereafter "Pl. 3d Mem.").

In December of 1994, plaintiff's new manager, James Vance, investigated plaintiff for failure to distribute employee surveys. *See* Pl. Revised Mem. in Opp'n to Def. Mot. at Ex. I ¶¶ 13-14 (Doc. No. 15) (hereafter "Pl. 2d Mem."). Pending the outcome of the investigation, plaintiff was assigned to the Human Resources Department doing work ordinarily done by "level 5 clerks." *See* Compl. ¶ 34. Following investigation, plaintiff was issued a warning letter on March 3, 1995. *See* Pl. 2d Mem. Ex. I ¶ 15. At that time, Florence Paluszek was plaintiff's manager. Plaintiff informed Paluszek of the letter but Paluszek refused to return plaintiff to his position as manager of Frankford. *See id.* ¶ 16. On March 6, 1995, plaintiff filed an informal EEO complaint against Paluszek for threatening to have him permanently removed from his employment. *See id.* ¶ 17. That complaint was withdrawn on June 6, 1995. *See* Def. Mot. to Dismiss or for Summary Judgment of Pl. 2d Amend. Compl. Ex. 2 (Doc. 13) (hereafter "Def. 2d

Mot.") (identifying number of complaint filed that date) *and* Def. Mot. for Summary Judgment Ex. 4 (Doc. 10) (hereafter "Def. 1st Mot.") (certifying withdrawal of informal complaint).

On April 24, 1995, Paluszek ordered plaintiff to return to Frankford. *See* Pl. 2d Mot. Ex. I ¶ 20.[3] On April 25, 1995, plaintiff called in sick. *See id.* ¶ 23. Thereafter, plaintiff applied for worker's compensation. *See* Compl. ¶¶ 35-36. Plaintiff's application for worker's compensation was denied on the grounds that his stress was not job related. *See id.* ¶ 36. Plaintiff was assigned to Schuykill Station on August 5, 1995, under the supervision of James Adams. *See id.* ¶ 39; Pl. 3d Mem. Ex. E.[4]

On September 26, 1995, plaintiff was assigned to Frankford. *See* Pl. 3d Mem. Ex. E.[5] On October 24, 1995, it is alleged that plaintiff forgot to activate the Frankford alarm system and failed to ship collection mail when required to do so. *See* Def. 1st Mot. at 12-13 & Ex. 12. On October 25, 1995, it is alleged that plaintiff conducted himself in an insubordinate and inappropriate manner. *See id.* at 13-14 & Ex. 12. Finally, it is alleged that plaintiff refused to follow orders given by Paluszek on October 30, 1995. *See id.* at 14 & Ex. 12. On October 30, 1995, Paluszek placed plaintiff on Administrative Leave, thereafter replacing him with a female employee. *See id.* ¶¶ 53-54. On December 23, 1995, plaintiff was demoted from his EAS-19

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[3] On June 14, 1995, plaintiff filed an EEO complaint against Paluszek for threatening to remove him permanently from Frankford and for ordering his to return to Frankford on April 24, 1995. *See* Def. 2d Mot. Ex. 2 at 2. That complaint is on appeal in the administrative process. *See* Pl. 3d. Mem. at 6.

[4] On August 10, 1995, plaintiff filed three EEO complaints regarding defendant's failure to return plaintiff to work following his disability leave. *See* Pl. 3d Mem. at 6; Def. 1st Mot. at 4. Two were settled and one was dismissed. *See* Pl. 3d Mem. at 6; Def. 1st Mot. Ex. 5.

[5] Plaintiff alleges that between April of 1995 and November of 1995, Paluszek issued orders barring plaintiff from remaining on the Frankford premises. *See* Compl. ¶ 41.

position of Manager of Customer Service to an EAS-16 position of Supervisor of Customer Service. *See* Compl. ¶ 65.

On May 23, 1996, Paluszek recommended that plaintiff be excluded from a merit pay bonus. *See* Pl. 3d Mem. Ex. F. On June 28, 1996, plaintiff filed an EEO complaint challenging his exclusion from an Economic Value Added ("EVA") bonus for fiscal year 1995. *See* Pl. 3d Mem. at 6. That complaint was settled on April 29, 1998. *See* Def. 2d Mem. Ex. 3.

On October 2, 1996, Dennis Carr, successor to Paluszek, recommended that plaintiff be excluded from a 1996 fiscal year EVA bonus. *See* Compl. ¶ 70; Pl. 3d Mem. Ex. G.[6] In December of 1996, plaintiff filed an informal EEO complaint objecting to his exclusion from the fiscal year 1996 bonus. *See* Pl. 3d Mem. at 6. That complaint was to be heard by the MSPB but was withdrawn prior to the hearing and was included in this amended complaint. *See* Pl. 3d Mem. at 7.

Plaintiff's complaint is in eight counts. The first count alleges that due to his disability or defendant's perception thereof, defendant discriminated against plaintiff in his employment in violation of the Americans with Disabilities Act and the Rehabilitation Act. *See* Compl. ¶¶ 21-49. Count II alleges plaintiff suffered unlawful gender-based discrimination in violation of Title VII of the Civil Rights Act of 1964. *See id.* ¶¶ 50-58. Count III alleges that plaintiff was subject to discrimination in retaliation for his protected pursuit of administrative relief. *See id.* ¶¶ 59-78. Count IV seeks relief for violation of the Pennsylvania Human Relations Act. *See id.* ¶¶ 79-83. Count V alleges that defendant has deprived plaintiff of the right to participate in the Civil

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[6] Carr's recommendation was based in part on an alleged April 24, 1996, "Notice of Proposed Removal" given to plaintiff. *See* Compl. ¶¶ 71-72; Pl. 3d Mem. Ex. G. Plaintiff says he never received such notice. *See* Compl. ¶ 72.

Service Retirement Plan. *See id.* ¶¶ 84-88. Count VI alleges that defendant has breached an implied covenant of good faith and fair dealing. *See id.* ¶¶ 89-92. Counts VII and VIII seek damages for the intentional and negligent infliction of emotional distress, respectively. *See id.* ¶¶ 93-96 & 97-100.

Defendant moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. I will treat each count separately. I will deny defendant's motion with respect to the claims under the Rehabilitation Act and Title VII and I will grant defendant's motion as to all other claims.

STANDARD OF REVIEW

I. DISCRIMINATION UNDERLYING THIS ACTION

Defendant appears to suggest that a failure to exhaust administrative remedies deprives the court of subject matter jurisdiction. *See* Def. 1st Mot. at 3-4. Defendant argues that the only issues before the court are those presented to the Merit Systems Protection Board ("MSPB") and decided on January 27, 1998. *See* Def. 1st Mot. at 3 & Ex. 3.[7] The MSPB addressed the

[7] Defendant suggests five actions that the court should not consider because they are untimely or previously resolved: 1) Plaintiff's March 6, 1995 EEO complaint that Paluszek told employees plaintiff would be removed from his position; 2) Plaintiff's allegation that he was discriminated against between March 3, 1995, and April 19, 1995, by being excluded from Frankford and plaintiff's allegation that he was discriminated against on April 24, 1995, by being

question of the propriety of plaintiff's demotion. *See* Def. 1st Mot. Ex. 3 at 1-2; Pl. 3d Mem. Ex. D at 2. There is no dispute that the issue of the demotion is before the court. Plaintiff concedes that "certain administrative claims were dismissed, withdrawn or settled" but argues that "[p]laintiff cannot be precluded from describing the conduct complained in [sic] within his administrative complaints because they support his allegations of discrimination, harassment and retaliation." *See* Pl. 3d Mem. at 5-6. Plaintiff's admission that discrimination prior to plaintiff's demotion is of evidentiary value only is subject to one exception.

The one exception concerns a dispute over the EVA bonuses for which plaintiff may be eligible. Plaintiff argues that he was unlawfully denied both a 1995 bonus and a 1996 bonus. *See* Pl. 3d Mem. at 6-8. Plaintiff then concedes that the dispute over the 1995 bonus was settled. *See id.* at 7. In response to plaintiff's amended complaint including a claim for the 1996 bonus, defendant argues that the dispute settled was for the 1996 bonus and that the settlement agreement erroneously referred to the 1996 bonus as the 1995 bonus. *See* Def. 2d Mot. at 2-3. Defendant presents evidence to that effect. *See id.* Ex. 5 ¶¶ 4-5. Plaintiff points out that defendant has taken inconsistent positions regarding whether the 1995 bonus was settled. *See* Pl. 3d Mem. at 7-8; *compare* Def. 1st Mot. at 4 *with* Def. 2d Mot. at 2-3. Plaintiff also points to the face of the settlement agreement, *see* Pl. 3d Mem. Ex. C, and a letter explaining the conditions of the 1995 EVA bonus, *see id.* Ex. H, to demonstrate that there was a 1995 EVA bonus from which he was excluded. Plaintiff has created a genuine issue of material fact as to which bonus

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ordered to return to Frankford; 3) Plaintiff's complaints of discrimination in not being permitted to return to work in a timely fashion following disability leave; 4) Plaintiff's complaint for a 1995 Economic Value Added ("EVA") bonus; and 5) Plaintiff's claim that he was improperly denied Worker's Compensation benefits. *See* Def. 1st Mot. at 3-4.

dispute was settled. Because plaintiff's amended complaint includes a claim for the 1996 bonus, and because defendant has not challenged it for failure to exhaust administrative remedies, *see* Def. 2d Mot. at 2-3, I will consider plaintiff's claim for denial of the 1996 bonus.

I conclude that two adverse actions are properly before the court to support plaintiff's legal claims: plaintiff's demotion and the denial of plaintiff's 1996 bonus. Other allegedly discriminatory acts are, by concession, considered for evidentiary value.

Defendant moves to dismiss the complaint pursuant to the three Federal Rules of Civil Procedure. Defendant does not identify, however, which rule should apply to its motion with respect to each claim. Nonetheless, because I find Rule 12(b)(1) to be inapplicable,[8] I will set forth the standards of review for Rule 12(b)(6) and Rule 56. In applying defendant's motion to each separate count, I will explain which rule guides my analysis.

II. RULE 12(B)(6)

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, the court must accept as true all well-pleaded allegations of

[8] Claims under Title VII are properly presented to the court only after administrative remedies have been exhausted. *See, e.g.*, *Anjelino v. New York Times*, 200 F.3d 73, --, 1999 U.S. App. Lexis 31523, at *34 (3d Cir. Dec. 2, 1999). The same is true for claims under the Rehabilitation Act. *See Spence v. Straw*, 54 F.3d 196, 201 (3d Cir. 1991). However, in the context of Title VII, a failure to timely exhaust remedies is properly considered under the framework of Rule 12(b)(6). *See Anjelino*, 200 F.3d 73; *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997); *Hornsby v. United States Postal Svc.*, 787 F.2d 87, 89 (3d Cir. 1986). Therefore, I will not apply the standard of review reserved for a Rule 12(b)(1) motion to plaintiff's Title VII or RHA claims.

fact, and any reasonable inferences that may be drawn therefrom, in the plaintiff's complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff's cause of action." *Nami*, 82 F.3d at 65.

Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Id.; Nami*, 82 F.3d at 65.

"If, on a [Rule 12(b)(6)] motion . . . to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See* Fed. R. Civ. P. 12(b).

III. RULE 56

Pursuant to Federal Rule of Civil Procedure 56, a motion for summary judgment will be granted "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmovant bears the burden of persuasion at trial, the moving party may meet its initial burden and shift the burden of production to the nonmoving party "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Thus, summary judgment will be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

When a court evaluates a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Additionally, "all justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* Even so, the nonmovant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Id.* at 252. Thus, "[w]here 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).

DISCUSSION

I. VIOLATION OF TITLE VII

Because I will consider evidence beyond the pleadings in resolving defendant's motion to dismiss the Title VII claims, the motion will be treated as one for summary judgment.

A. Gender-Based Discrimination in Employment

Title VII of the Civil Rights Act of 1964, as amended, prohibits "discrimination based on race, color, religion, sex, or national origin" by a federal employer. *See* 42 U.S.C. § 2000e-16(a). Because such discrimination ordinarily will not be explicit, courts have defined a burden-shifting analysis by which the merits of a claim are to be analyzed. *See Iadimarco v. Runyon*, 190 F.3d 151, 157-58 (3d Cir. 1999) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) and *Texas Dept. Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

First, plaintiff must establish a prima facie case. *See Iadimarco*, 190 F.3d at 157. Then, defendant must offer a legitimate, non-discriminatory reason for the employment action. *See id.* Finally, plaintiff must demonstrate that the employer's reason is pretextual, or that discriminatory animus actually motivated the action in dispute. *See id.* at 158.

1. Prima Facie Case

A prima facie case of unlawful discrimination under Title VII is comprised generally of four elements: 1) the plaintiff is a member of a protected class, 2) the plaintiff is qualified for the job, 3) the employer took an adverse action that affected the terms and conditions of the plaintiff's employment, and 4) the circumstances permit an inference of unlawful discrimination. *See Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 411 (3d Cir. 1999). The Third Circuit has warned, however, that there is no mechanical formula for stating a prima facie case. *See id.* at 411. Rather, a prima facie case should be based on the facts of each case. *See id.* Plaintiff has presented sufficient evidence to support a prima facie case.

Defendant first concedes that plaintiff is both a member of a protected class and suffered an adverse employment action. *See* Def. 1st Mot. at 11-12. Defendant then argues that plaintiff fails to state a prima facie case because plaintiff wasn't qualified for his job. *See* Def. 1st Mot. at 12. I disagree. Plaintiff has presented evidence that he was qualified to do the job. *See* Pl. Mem. in Opp'n to Def. Mot. Ex. J at 13 (quoting Paluszek testifying that plaintiff's performance in September of 1995 was "normal") (hereafter "Pl. 1st Mem."); *see also id.* Ex. J at 409; *id.* at 481; *id.* at 370-71. I find that plaintiff has produced evidence which creates a genuine issue of material fact as to his qualification for the EAS-19 position at Frankford.

Defendant argues also that plaintiff fails to state a prima facie case because plaintiff was replaced by an employee in his protected class. *See* Def. 1st Mot. at 12. Specifically, defendant concedes that plaintiff was temporarily replaced by Julie Hughes, *see* Def. 1st Mot. at 11 n.7 and 15, but argues that plaintiff was replaced permanently by an unnamed "white male over the age

of forty," *see id*. Defendant produces no evidence in this regard, and plaintiff points to none in response. I conclude that even if true, defendant's factual allegation is not fatal to plaintiff's claim. The Third Circuit has held that a plaintiff need not prove that other employees outside the protected class were treated more favorably. *See Pivirotto v. Innovative Sys. Inc.*, 191 F.3d 344, 353 (3d Cir. 1999). Rather, plaintiff must offer "evidence 'adequate to create an inference'" of unlawful discrimination in employment. *See Pivirotto*, 191 F.3d at 355. Plaintiff does this.

Plaintiff's evidence is that he was treated less favorably than his subordinate, Julie Hughes, in Paluszek's investigation of unshipped mail. *See* Pl. 3d Mem. at 16 *and* Pl. 3d Mem. Ex. J at 282-84 & 298-315 (discussing Paluszek's investigation of unshipped mail as to plaintiff and Hughes). Also, plaintiff and defendant agree that Hughes was plaintiff's immediate replacement following his demotion. *See* Pl. 3d Mem. at 16 *and compare* Compl. ¶ 54 *with* Def. 1st Mot. at 11 n.7 & 15. Although proof of differential treatment of "a single member of the non-protected class is insufficient to give rise to an inference of discrimination" at the pretext stage, "such an inference may be acceptable at the prima facie stage of the analysis" *See Simpson v. Kay Jewelers*, 142 F.3d 639, 646 (3d Cir. 1998). *But see Pivirotto*, 191 F.3d at 359 (citing *Simpson* to support the conclusion that plaintiff's "evidence of the allegedly better treatment of male employees [was] weak and not probative of discrimination" in analyzing plaintiff's prima facie case). The fact that Hughes was treated differently in the investigation of unshipped mail, and then succeeded plaintiff after his demotion, permits an inference that plaintiff was demoted because of his gender. Therefore, I find that plaintiff states a prima facie case of gender-based discrimination.

2. Defendant's Legitimate Reason

Defendant, faced with a prima facie case of unlawful discrimination, may defeat the inference it creates by offering a non-discriminatory reason to explain the employment action. *See Iadimarco*, 190 F.3d at 157-58; *Jones*, 198 F.3d at 410. Defendant's letter recommending demotion lists four grounds justifying reduction in pay and grade: 1) plaintiff's failure to set the alarm at Frankford on October 24, 1995; 2) plaintiff's failure to ship all collection mail for delivery on October 24, 1995; 3) plaintiff's insubordination and inappropriate conduct on October 25, 1995; and 4) plaintiff's insubordination on October 30, 1995. *See* Def. 1st Mot. Ex. 12. Each is non-discriminatory. Therefore, the burden shifts back to plaintiff to demonstrate that defendant's proffered reasons are pretextual.

3. Pretext Analysis

Once defendant articulates legitimate reasons for the employment action, plaintiff must prove that those reasons are pretextual. To do so, plaintiff must produce "'some evidence, direct or circumstantial, from which a fact finder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" *See Jones*, 198 F.3d at 413 (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).

> [T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer . . . . Rather, the nonmoving plaintiff must demonstrate such weaknesses,

> implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them without credence.

See Jones, 198 F.3d at 413 (quoting *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108-09 (3d Cir. 1997) (en banc)).

I find that there is sufficient evidence in the record to permit a reasonable fact finder rationally to disbelieve defendant's proffered legitimate reasons. First, as to the unshipped mail, plaintiff presents deposition testimony revealing an alleged investigation by Paluszek which appears limited in scope and which appears unnecessary both due to her early conclusion that plaintiff would be disciplined and due to her ultimate opinion that plaintiff, as station manager, bore responsibility for the unshipped mail. *See* Pl. 3d Mem. Ex. J at 282-305. Also, plaintiff presents testimony of other employees which indicates that it would be implausible that plaintiff could have exited the building while the mail was in place. *See* Pl. 3d Mem. Ex. L at 407. Combined, the evidence is sufficient to permit a fact finder to disbelieve the employer's suggestion that failure to ship mail was a reason for demotion.

Second, as to the unset alarm, plaintiff admits to being the last out of the building and does not recall the alarm one way or another. *See* Def. 1st Mot. Ex. 9 at 625-29. Plaintiff alleges, however, that standard practice would have resulted in a phone call to his residence by the postal police to inform him that the alarm had not been set. *See id.* at 628-29. He received no such phone call. *See id.* Moreover, plaintiff knew of standard procedure because he and others had failed, on prior occasions, to properly activate the alarm. *See id.* at 629. Again, a reasonable fact finder, weighing such evidence, could conclude that the failure to set the alarm was not the reason for plaintiff's demotion.

Third, regarding the insubordination and inappropriate behavior of October 25, 1995, defendant says that plaintiff isolated himself in a supervisor's office and then conducted himself in a manner unbecoming a manager when he said loudly to other employees "I'll see you at the bar." *See* Def. 1st Mot. Ex. 12. Plaintiff explains that he was in the office because Paluszek told him he was being demoted from manager to supervisor and because he was depressed. *See id.* Ex. 9 at 633-34. Also, plaintiff presents testimony of other employees that his conduct was neither boisterous nor disruptive. *See* Pl. 3d Mem. Ex. L at 409; *id.* at 316-17; *id.* at 377. If plaintiff's evidence is believed, a reasonable fact finder could conclude that defendant's explanation is implausible.

Finally, regarding plaintiff's insubordination of October 30, 1995, defendant alleged that plaintiff arrived early at Frankford, refused to leave the premises when ordered to do so, and then refused to meet Paluszek when ordered to do so. *See* Def. 1st Mot. Ex. 12. Plaintiff testifies that he was given confusing instructions by Paluszek and that he was punished for doing what he was instructed to do. *See* Def. 1st Mot. Ex. 9 at 639-42. A reasonable fact finder could conclude that defendant's explanation was pretextual.

I conclude that plaintiff has presented a prima facie case of gender-based discrimination in employment, that defendant has proffered legitimate reasons for the adverse employment action, and that plaintiff has presented evidence from which a reasonable fact finder could rationally conclude that the employer's proffered reason is pre-textual. Therefore, I will deny defendant's motion as to Count II.

B. Retaliation for Opposing An Unlawful Employment Practice

Title VII prohibits discrimination against employees who "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *See* 42 U.S.C. § 2000e-3(a).

The burden shifting framework applied to the gender discrimination claim applies also to claims of retaliatory discrimination. *See Krause v. American Fertilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 & n.20 (3d Cir. 1997). To begin, plaintiff must show: 1) that he engaged in protected conduct; 2) that he suffered adverse employment action after or contemporaneous with the protected conduct; and 3) that there is a causal link between the conduct and the adverse action. *See Krause*, 126 F.3d at 500 & 506; *Woodson*, 109 F.3d at 920. Defendant challenges plaintiff's prima facie case by offering a legitimate reason to explain the demotion: "[P]laintiff was demoted because of his inability to perform the duties of a manager for the USPS." *See* Def. 1st Mot. at 18. In so doing, defendant purports to challenge the causal connection between plaintiff's protected conduct and his demotion.

Temporal proximity between the protected conduct and the adverse action may support an inference of retaliation. *See Woodson*, 109 F.3d at 920-21. Plaintiff presents a time line summarizing provable events which reveals that in the nine months preceding his demotion, plaintiff filed four EEO complaints and one application for worker's compensation. *See* Pl. 3d Mem. Ex. A. Plaintiff's time line reveals a pattern of adverse action in close proximity to

protected conduct. *See id.* Therefore, I find that plaintiff states a prima facie case of unlawful retaliatory discrimination. I find also that defendant has offered legitimate reasons for the demotion.

Finally, I find that plaintiff provides evidence which, if believed, "demonstrate[s] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions." *See Jones*, 198 F.3d at 413; *see supra*, Part I.A.3. Therefore, I will deny defendant's motion for summary judgment as to Count III of the complaint concerning retaliation for protected activity.

II. VIOLATION OF THE ADA

In Count I, Plaintiff alleges that various acts and omissions by defendant were in violation of his rights under the Americans with Disabilities Act, 42 U.S.C. § 12112 ("ADA"). *See* Compl. ¶¶21-49. Defendant moved to dismiss Count I because the ADA does not apply to federal employers. *See* Def. 1st Mot. at 6-7. Plaintiff has not responded to the argument. Therefore, pursuant to Local Rule 7.1, I will grant the motion to dismiss the ADA claim for lack of timely response. *See* E.D. Pa. Loc. R. Civ. P. 7.1.[9]

[9] Moreover, defendant is correct. By the terms of the ADA, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." *See* 42 U.S.C. § 12112(a). The United States is excluded from liability as a "covered entity." *See* 42 U.S.C. §§ 12111(2) & 12111(5)(B)(i). Because USPS is a branch of the United States, the ADA does not govern its conduct. *See Mengine v. Runyon*, 114 F.3d 415, 418 (3d Cir. 1997) (characterizing USPS as a federal employer); *Shiring v. Runyon*, 90 F.3d 827, 830 (1996) (noting that ADA does not govern federal employers); *Abdullah-Johnson v. Runyon*, No. 94-5240, 1995 U.S. Dist. Lexis 3253, at *15 (E.D. Pa. Mar. 9, 1995). Therefore, without looking beyond the pleadings, I would dismiss the ADA claim pursuant to Rule 12(b)(6).

III. VIOLATION OF THE REHABILITATION ACT

Because I will look beyond the pleadings to consider defendant's motion as to plaintiff's Rehabilitation Act claim, I will consider the motion as one for summary judgment.

The Rehabilitation Act ("RHA") provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap . . . be subjected to discrimination . . . under any program or activity conducted by any Executive agency." *See* 29 U.S.C. § 791(b). *See also* 29 U.S.C. § 794. The burden-shifting approach of Title VII cases is used to analyze claims under the rehabilitation act. *See Crawley v. Runyon*, No. 96-6862, 1998 U.S. Dist. Lexis 9603, *32 (E.D. Pa. June 30, 1998) (applying burden-shifting framework to disparate treatment claim under the RHA).

Plaintiff's prima facie case requires him to show that: 1) he is disabled; 2) he is otherwise qualified to perform the essential functions of the job, with or without accommodation, 3) he suffered adverse action in his employment; and 4) circumstances of the adverse action permit an inference that it was because of his disability. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996); *Crawley*, 1998 U.S. Dist. Lexis 9603, at *32. I conclude that plaintiff states a prima facie case.

First, plaintiff is disabled within the meaning of the statute if he "(1) has a physical or mental impairment that substantially limits one or more of such person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." *See* 29 U.S.C. § 706(8)(B); 29 C.F.R. § 1614.203(a)(1) (2000). Plaintiff maintains that defendant

regarded him as disabled.[10]

To maintain such a claim, plaintiff must prove that defendant treated him as disabled, that is, substantially limited in "one or more major life activities." *See* 29 C.F.R. 1614.203(a)(5); *Taylor v. Pathmark Stores*, 177 F.3d 180; 192 (3d Cir. 1999); *Crawley*, 1998 U.S. Dist. Lexis 9603, at *27. It is not sufficient for plaintiff to show that defendant knew of his impairment. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996); *Crawley*, 1998 U.S. Dist. Lexis 9603, at *27 n.20. Nonetheless, plaintiff need not prove animus on the part of defendant; an innocent mistake may still support liability. *See Taylor v. Pathmark Stores*, 177 F.3d at 191; *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3d Cir. 1998).

Plaintiff alleges that once defendant became aware of his impairment, defendant treated him unfavorably. *See* Compl. ¶¶ 42-44. Defendant does not respond. Plaintiff reiterates his allegations and provides evidence that permits an inference that Paluszek regarded him as disabled. Plaintiff provides evidence that Paluszek believed he sees "things that don't exist."

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[10] Defendant notes that plaintiff has said that his disability did not interfere with his ability to do his job or to function in the workplace. *See* Def. 1 Mem. at 9 (citing Def. 1st Mem. Ex. 1 at 135-37). Plaintiff has testified that he is not disabled. *See* Def. 1st Mot. Ex. 9 at 137. Plaintiff points to no evidence that he was in fact disabled to the extent that any impairment "substantially limits one or more major life activities," which include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1614.203(a)(3). Because plaintiff has not met his burden to produce evidence of disability, I conclude that plaintiff has created no genuine issue of material fact as to his actual disability under the RHA.

Plaintiff also maintains that he has a record of disability within the meaning of the RHA. *See* Pl. 3d Mem. at 10. Such a claim requires evidence to the effect that plaintiff "has a history of, or is classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities." *See* 20 C.F.R. § 1614.203(a)(4). Plaintiff points to no evidence of a history or classification of a substantially limiting impairment. As already observed, plaintiff presents no evidence of any limit of a major life activity. Therefore, I conclude that plaintiff has created no genuine issue of material fact as to his record of disability.

See Pl. 1st Mem. Ex. D at 29. In addition, plaintiff provides evidence that Paluszek escorted him from the workplace *for his safety* after she relieved him from duty. *See* Pl. 3d Mem. Ex. J at 339-40 & 342.[11] Finally, plaintiff presents evidence that he was regarded as not fit for duty at Frankford. *See* Pl. 3d Mem. Ex. K at 58-60 & 81-85. Plaintiff states a prima facie case of being regarded as disabled.

Defendant does not articulate a legitimate reason for demoting plaintiff. Moreover, plaintiff has presented sufficient evidence that defendant's proffered reasons for demotion are pretextual to survive summary judgment. *See supra*, Part I.A.3. Therefore, I will deny defendant's motion for summary judgment on plaintiff's RHA claim.

IV. VIOLATION OF THE PENNSYLVANIA HUMAN RELATIONS ACT

In Count IV, plaintiff alleges that defendant's conduct violates the Pennsylvania Human Relations Act, 43 Pa. C.S.A. §951. Defendant moves to dismiss the count because Title VII provides the exclusive remedy for gender-based employment discrimination by a federal employer. *See* Def. 1st Mot. at 18. Plaintiff does not respond. I will grant the motion to dismiss Count IV as unopposed for lack of timely response.[12] *See* E.D. Pa. Loc. R. Civ. P. 7.1.

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[11] Paluszek could recall only three other employees escorted out of the workplace: one of whom was accused of theft of mail, *see* Pl. 3d Mem. Ex. J at 343-44, one of whom was escorted out by police officers, *see id.* at 352-53, and one of whom was accused of mishandling finances, *see id.* at 353-54.

[12] Moreover, defendant is correct. Plaintiff's exclusive remedy for discriminatory employment practices against the federal government lies in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. *See Brown v. General Svcs. Admin.*, 425 U.S. 820, 835 (1976); *Owens v. United States*, 822 F.2d 408, 410 (3d Cir. 1987) (holding that Title VII preempts

V. CIVIL SERVICE RETIREMENT ACT

In Count V of his second amended complaint, plaintiff alleges that his demotion interfered with his participation in the Civil Service Retirement Act, 5 U.S.C. § 8331. *See* Compl. ¶¶ 84-88. Defendant responded that plaintiff failed to exhaust his administrative remedies and failed to join the proper defendant. *See* Def. 1st Mot. at 21. Plaintiff has not responded. I will grant the motion to dismiss Count V as unopposed for lack of timely response.[13] *See* E.D. Pa. Loc. R. Civ. P. 7.1.

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constitutional claims); *Holmes v. Federal Aviation Admin.*, No. 98-5071, 1999 U.S. Dist. Lexis 14955, at *6-7 (D.N.J. Sept. 29, 1999) (dismissing state law employment discrimination claims). Consequently, I would dismiss plaintiff's PHRA claim pursuant to Rule 12(b)(6).

[13] Because the claim is insufficiently briefed, I decline to offer any further conclusion of law in dicta. I note, however, that plaintiff appears to allege that contributions to his retirement annuity will be inadequate. By statute, the Office of Personnel Management ("OPM") has authority to administer the Civil Service Retirement Plan and to adjudicate claims related thereto. *See* 5 U.S.C. § 8347(a)-(b). Defendant appears to be correct in suggesting that the claim must be presented first to the OPM and, although defendant cites no case law, the question may turn on the separate question whether plaintiff's demotion was proper. *See, e.g.*, *Reed v. OPM*, 32 M.S.R.P. 290, at *5-6 (M.S.P.B. Feb. 11, 1987) (barring claims not presented to OPM and denying claim for annuity adjustment when based on pay award, not retroactive grade change).

VI. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

In Count VI of the complaint, plaintiff alleges that defendant promised to treat him fairly and honestly when he began working for defendant. *See* Compl. ¶¶ 90-91. Defendant moves to dismiss the count because Pennsylvania law does not permit an independent cause of action for breach of the covenant of good faith and fair dealing. *See* Def. 1st Mot. at 22. Plaintiff has not responded. Therefore, I will grant the motion to dismiss count VI as unopposed for lack of timely response. *See* E.D. Pa. Loc. R. Civ. P. 7.1.[14]

VII. INTENTIONAL & NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

In Counts VII and VIII, plaintiff seeks damages for the intentional and negligent infliction of emotional distress, respectively, caused by the discriminatory acts and omissions of defendant and defendant's employees. *See* Compl. ¶¶94 & 98. Defendant moved to dismiss the counts first, because Title VII provides the exclusive statutory remedy for employment discrimination claims and second, because plaintiff has failed to exhaust administrative remedies required to

[14] Moreover, defendant is correct that Pennsylvania does not recognize an independent cause of action for breach of a covenant of good faith and fair dealing. *See Drysdale v. Woerth*, No. 98-3090, 1998 U.S. Dist. Lexis 18589, at *12 (E.D. Pa. Nov. 18, 1998) (noting that Pennsylvania courts only recognize a duty of good faith and fair dealing in performing existing contracts, not as an independent cause of action); *Somers v. Somers*, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992). Also, defendant correctly argues that federal employees serve by appointment, not by contract of employment. *See* 39 U.S.C. § 1001(a); *Sims v. Local 308 Mailhandling*, No. 93-6814, 1994 U.S. Dist. Lexis 8151, at *12-13 (E.D. Pa. June 15, 1994). Plaintiff's employment, therefore, is not pursuant to an enforceable contract. Consequently, I would dismiss Count VI for failure to state a claim upon which relief may be granted.

maintain suit under the Federal Tort Claims Act, 28 U.S.C. § 2401(b). *See* Def. 1st Mot. at 19-20. Plaintiff did not respond to defendant's motion. Therefore, I will dismiss Counts VII and VIII of the complaint as unopposed for lack of timely response. *See* E.D. Pa. Loc. R. Civ. P. 7.1.[15]

CONCLUSION

Plaintiff filed this action against Henderson and the USPS for injury arising out of unlawful employment discrimination. I will deny defendant's motion to dismiss the claims under the Rehabilitation Act and Title VII. I will grant the defendant's motion to dismiss all other claims.

An appropriate order follows.

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[15] Moreover, defendant is correct. First, Title VII does provide the exclusive remedy for employment discrimination by a federal employer. *See supra*, note12. Second, Congress has waived federal immunity to suit in tort under the Federal Tort Claims Act, subject to conditions and limitations. *See* 28 U.S.C. §§ 1346(b) (1993) (jurisdiction in tort suits), 2761-80 (1994) (jurisdictional prerequisites), 2401(b) (1994) (limitations period for tort claims and suits); *McNeil v. United States*, 508 U.S. 106, 113 (1993); *Reo v. United States Postal Svc.*, 98 F.3d 73, 75 (3d Cir. 1996). Under the FTCA, an injured party may seek money damages from the United States for wrongful acts or omissions of federal employees occurring within the scope of their employment if a private party could be held liable for such act or omission under the law of the jurisdiction. *See* 28 U.S.C. § 1346(b); *Reo v. United States Postal Svc.*, 98 F.3d at 75. No suit may be instituted, however, until an administrative claim for relief is filed with the agency responsible for the injury. *See* § 2675(a); *McNeil v. United States*, 508 U.S. at 112. I would grant defendant's motion to dismiss Counts VII and VIII for failure to state a claim upon which relief may be granted.

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

ALEXANDER C. DISANTE, Plaintiff, v. WILLIAM J. HENDERSON, Postmaster General, and UNITED STATES POSTAL SERVICE, Defendants.	: : : : : : : :	CIVIL ACTION NO. 98-5703

Order

And now, this day of March, 2000, upon consideration of plaintiff's Second Amended Complaint (Doc. No. 12), defendants' Motion for Summary Judgment (Doc. No. 10), defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (Doc. No. 13), plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. No. 14), plaintiff's Revised Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. No. 15), and plaintiff's Memorandum in Opposition to Defendants Motion for Summary Judgment or Motion to Dismiss (Doc. No. 16), it is hereby ORDERED that the motion to dismiss or, in the alternative for summary judgment:

1) is DENIED with respect to plaintiff's Rehabilitation Act claims in Count I and with respect to plaintiff's Title VII claims in Counts II and III;

2) is GRANTED with respect to plaintiff's claims for punitive damages; and

3) is GRANTED with respect to all other of plaintiff's claims.

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William H. Yohn, Jr., Judge