UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARCEL DESROSIERS, Plaintiff v. MARVIN T. RUNYON, U.S. Postmaster General, and MICHAEL FORTUNATO, individually, Defendants	Civil No. 97-391-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Defendants United States Postal Service ("USPS") and Michael Fortunato have moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff Marcel Desrosiers's Amended Complaint in its entirety or, in the alternative, with respect to Counts V and VI, to substitute the United States for Defendant Michael Fortunato. Counts I, II, and III allege violations of the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, specifically, denial of employment opportunities and failure to reasonably accommodate Mr. Desrosiers, failure to participate in an interactive process to find a position which would accommodate Mr. Desrosiers' limitations, and the constructive

discharge of Mr. Desrosiers. Count IV alleges that the Postal Service retaliated against Mr. Desrosiers for pursuing EEOC complaints, in violation of Title VII, 42 U.S.C. § 2000e *et seq.* The remaining two counts of the Complaint raise state-law claims of intentional infliction of emotional distress (Count V) and negligent infliction of emotional distress (Count VI).

A motion to dismiss tests the legal sufficiency of the complaint and, thus, does not require the court to examine the evidence at issue. *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). A Rule 12(b)(6) motion requires the court to take all of the plaintiff's factual averments as true and indulge every reasonable inference in the plaintiff's favor. *Talbott v. C.R. Bard, Inc.*, 63 F.3d 25, 27 (1st Cir. 1995). The plaintiff, however, must "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988). It is not necessary for the court to accept "bald assertions" or "unsubstantainted conclusions." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). The facts as recited by the plaintiff must "'at least outline or adumbrate' a viable claim," in order for the complaint to satisfy Rule 12(b)(6). *Gooley*, 851 F.2d at 515 (quoting *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)).

I. DISCUSSION

A. Count I: Rehabilitation Act -- Disability Discrimination

In Count I, Plaintiff alleges that despite documentation of his disability and his request for

accommodation, the USPS failed to reasonably accommodate him.[1] Amended Complaint (Docket No. 9) ¶¶ 27-30. Although Plaintiff's Complaint does not specify the time period encompassed by this claim, the Court now understands from Plaintiff's response that this claim is based on Plaintiff's condition as it existed from September 1996 through January 1997. Defendants respond that Plaintiff's work restrictions during this time period -- "day-shift work within thirty minutes or miles of his home . . . and to be free from *unreasonable* stress" -- simply do not constitute a cognizable disability under the Act. Amended Complaint ¶ 16.

Section 501 of the Rehabilitation Act imposes an affirmative duty upon the USPS to structure its procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion. 29 U.S.C. § 791. Section 504 of the Act prohibits discrimination against individuals with handicaps by reason of their handicap "under any program or activity conducted . . . by the United States Postal Service." 29 U.S.C. § 794(a). Congress has provided private rights of action under both sections. 29 U.S.C. § 794a(a). The regulations promulgated under this section emphasize the agency's responsibility to make reasonable accommodations for qualified handicapped applicants or employees:

> An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

29 C.F.R. § 1613.704(a). This regulation includes three basic elements: (1) the plaintiff must be

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[1]In Count I, Plaintiff also alleges what the Court understands to be the substance of Plaintiff's claim under Count II. That is, that Defendant refused to engage Plaintiff in an interactive process to identify the limitations which resulted from his disability and then ultimately failed to accommodate Plaintiff. Hence, this portion of his Rehabilitation Act claim is discussed under Count II.

a qualified individual with a handicap; (2) the agency must make "reasonable accommodation" for the handicap; and (3) an accommodation need not be made if it would impose an "undue hardship." 29 C.F.R. § 1613.704(a).

In order to establish a prima facie case for a Rehabilitation Act violation, Desrosiers must show that he: (1) has a disability within the meaning of the Act; (2) is qualified to perform the essential functions of the job, with or without reasonable accommodation; (3) was the subject of an adverse employment action by a company subject to the Act; (4) was replaced by a nondisabled person or was treated less favorably than nondisabled employees; and (5) suffered damages as a result. *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996)[2]; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In order to satisfy the disability element of the prima facie case, Plaintiff must: (1) have a "physical or mental impairment" that (2) "substantially limits" (3) "a major life activity." 29 U.S.C. § 706(8)(B)*; see also Soileau v. Gilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997)(quoting 42 U.S.C. § 12102(2)(A)).

In arguing that Plaintiff has not satisfied the prima facie burden of the disability elements, Defendants rely on *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437 (6th Cir. 1991). Defendants misunderstand the holding in *Pesterfield*. In *Pesterfield*, the court affirmed that the plaintiff was not a "'qualified handicapped person' since he was not capable of performing the essential functions of his work.'" *Id*. at 441. The *Pesterfield* court quoted the district court with approval on its finding that "'[g]iven plaintiff's inability to tolerate even the slightest hint of

[2]In some instances, the Court has relied on the Americans with Disabilities Act ("ADA") cases for support. The Rehabilitation Act authorizes reliance on ADA standards. 29 U.S.C. § 794(d)("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act. . . .").

rejection or criticism, it would be impossible for him to perform the essential functions of his work.'" *Id*. at 442. Thus, *Pesterfield*'s holding regarding the ability to perform the essential functions of a job simply does not support Defendants' assertion regarding the cognizability, for disability purposes, of this Plaintiff's illness.

Defendants also assert that Plaintiff's work restrictions do not combine to constitute a disability. To have a cognizable disability, the Court thinks it appropriate, at this stage in the proceedings, to look at the condition itself in order to determine whether Plaintiff is alleging a physical or mental impairment which substantially limits a major life activity. The Amended Complaint states that Mr. Desrosiers' condition is "a mental/psychiatric disability, major depressive disorder." Amended Complaint ¶ 10. It is well-established from decided cases that depression and other psychological disorders qualify as "mental impairments" under the ADA. *See Soileau*, 105 F.3d at 15 (chronic depressive disorder qualified as impairment but plaintiff failed to show condition substantially limited a major life activity); *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1284 (7th Cir. 1996) (plaintiff's past and continuing battle with bipolar disorder and paranoid schizophrenia qualified as disability under ADA); *Pesterfield*, 941 F.2d at 441 (plaintiff with depression was "qualified handicapped person" under Rehabilitation Act, and "handicap" substantially limited his ability to work, but plaintiff was not capable of performing the essential functions of his job and there was no reasonable available accommodation which would have permitted him to perform essential functions of his job)*; Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1404, 1408 (5th Cir. 1983) (depression considered a mental impairment under the Rehabilitation Act)*; Sarko v. Penn-Del Directory Co.*, 968 F. Supp. 1026, 1035 (E.D. Pa. 1997)(depression constitutes mental

impairment under ADA but plaintiff failed to show depression substantially limited major life activity of working); *Marschand v. Norfolk and Western Ry. Co.*, 876 F. Supp. 1528, 1530, 1538 (N.D. Ind. 1995) (post-traumatic stress disorder, manifested by tension, anxiety, and depression, constitutes a mental impairment under the ADA).

A physical or mental impairment, standing alone, is not necessarily a disability as contemplated by the ADA. The impairment must substantially limit a major life activity. Plaintiff alleges that his mental impairment substantially limits a major life activity, and Defendants do not challenge Plaintiff on these points. Amended Complaint ¶ 25. Thus, for purposes of this Motion to Dismiss, Plaintiff has set forth the prima facie elements of a disability as required under the Act. In addition, Defendants do not challenge Plaintiff's pleading on the other four elements of his prima facie Rehabilitation Act case. The Court will, therefore, deny Defendants' Motion to Dismiss on Count I.

B. Count II: Rehabilitation Act -- Failure to Engage in, or Breakdown in, the Interactive Process

In Count II, Plaintiff contends that the USPS refused to engage in, and/or caused a breakdown in, the interactive process to identify and assess the scope of his limitations and to determine what accommodations are available to allow Mr. Desrosiers to overcome his limitations in the workplace. Amended Complaint ¶¶ 36-38. Plaintiff asserts that these allegations support a claim distinct from the discrimination claim he presents in Count I. Defendants contend that there is not a separate cause of action for a failure to engage in, or causing a breakdown in, the interactive process.

In order "to determine the appropriate reasonable accommodation it may be necessary for

the covered entity to initiate an informal, interactive process . . . . " 29 C.F.R. § 1630.2(O)(3). However, the failure of an employer to engage in an interactive process does not, in and of itself, stand as a violation of the Rehabilitation Act. The interactive process is only one means by which an employer can achieve a reasonable accommodation. *See Jacques*, 96 F.3d at 515 ("There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide *reasonable accommodation* that amounts to a violation of the ADA."(emphasis added)). Indeed, there may well be situations where a covered entity does not need to engage in an interactive process in order to provide an employee with a reasonable accommodation. For example, if an employer makes a reasonable accommodation which is satisfactory to the employee without engaging in a dialogue with that employee, no Rehabilitation Act violation has occurred.[3] The issue is whether the plaintiff has been reasonably accommodated, not whether there has been any sort of interactive process between the employer and employee. The interactive process may be relevant evidence for a finding on the issue of reasonable accommodation, but it is not determinative. The Court agrees with Defendant in finding this claim redundant of Count I and will, therefore, grant Defendants' Motion to Dismiss on Count II.

C. Count III: Rehabilitation Act -- Constructive Discharge

Plaintiff has couched his claim in Count III in terms of constructive discharge under the

[3]The regulations allow for the circumstance where no interactive process is utilized by using permissive rather than mandatory language.

Rehabilitation Act. The Court of Appeals for the First Circuit has used the term "constructive discharge" to describe employer action that makes work "'so arduous or unappealing, or working conditions so intolerable, that a reasonable person would feel compelled to forsake his job rather than to submit to looming indignities.'" *Vega v. Kodak Caribbean*, Ltd., 3 F.3d 476, 480 (1st Cir. 1993); *accord Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir. 1994). A Rehabilitation Act complaint, incorporating allegations of constructive discharge, must nonetheless establish that the constructive discharge is the result of discriminatory actions or violations of the Rehabilitation Act.

Mr. Desrosiers' Amended Complaint specifically alleges:

> 42. By refusing to reasonably accommodate his disability, thereby continuing his employment in a suitable position, and denying him employment opportunities, the Postal Service rendered Mr. Desrosiers unable to perform his job and therefore effectively terminated or constructively discharged him from his employment because of his disability.
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> 43. By engaging in numerous acts of discrimination directed at Mr. Desrosiers, the Postal Service created an intolerable, hostile work environment, constructively discharging him as a result.
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> 44. The Postal Service's termination or constructive discharge of Mr. Desrosiers because of his physical disability constitutes discrimination against Mr. Desrosiers with respect to the terms, conditions, or privileges of employment in violation of the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*
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> 45. In constructively discharging Mr. Desrosiers because of his physical disability, the Postal Service acted with malice or with reckless indifference to the federally protected rights of Mr. Desrosiers.

Amended Complaint ¶¶ 42-45. The allegations in paragraph 42 asserting constructive discharge mirror those found in Count I of Plaintiff's Complaint relating to Defendants' refusal to accommodate Plaintiff, whereas the constructive discharge allegations in paragraph 43 seem to address an entirely different set of acts or conduct based on a hostile work environment.

Defendant, apparently addressing paragraph 43, contends that Plaintiff cannot make out a claim based on these allegations because he did not resign within a reasonable time after the rejections or denial of promotion.

In the instant case, the evidence may establish that Defendant engaged in deliberate actions of discrimination against Plaintiff. It is also possible that the evidence may establish that a reasonable person in Mr. Desrosiers' situation would have felt compelled to resign as a result of the various actions on the part of his supervisors. The Amended Complaint does not explicitly spell out what were the "numerous acts of discrimination." Nevertheless, Defendants' motion is addressed solely to the face of a pleading, and "[t]he court's function . . . is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court cannot conclude that it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, the Court will deny Defendants' Motion to Dismiss Count III.

D. Count IV: Title VII Retaliation

Plaintiff contends that, as a result of his pursuit of EEOC complaints, the Postal Service retaliated against him by denying him employment opportunities, failing to engage in the interactive process, and refusing to accommodate his disability. Amended Complaint ¶ 51. Defendants contend that Plaintiff must show more than the employer's knowledge of his participation in the EEOC complaint process in order to survive a motion to dismiss. Plaintiff's Amended Complaint alleges that his EEO-related activity included: the filing of an EEO

complaint on December 13, 1996, alleging disability discrimination and retaliation; the filing of an affidavit on behalf of another postal service employee, Richard Fagone, in November of 1996; filing another EEO complaint on March 28, 1996, which alleged discrimination based on his disability and national origin, as well as retaliation for prior EEO activity; and the filing of an EEO complaint in 1990 (subject matter unknown). Amended Complaint ¶¶ 6(a), 14.

To establish a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in protected conduct under Title VII; (2) he suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir. 1996). Defendants argue that Plaintiff has failed to allege specific facts to establish a causal connection between any protected activity, in this case the filing of the EEOC complaints, and the adverse employment action.

The adverse employment action in this case is the Postal Service's failure to offer Mr. Desrosiers a position which he requested in September of 1996. This negative employment action was not an instantaneous event. Rather, it took place over the course of five months -- September 1996 through January 1997 -- during which time the Postal Service failed to find Plaintiff a suitable position.

Some cases involving a causal link have focused on the temporal proximity between the employee's protected activity and the adverse employment action, because this is an obvious method by which a plaintiff can proffer circumstantial evidence "'sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action.'" *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3r Cir. 1997)(quoting *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990)). Circumstantial evidence of a "pattern of

antagonism" following the protected conduct can also give rise to the inference. *Kachmar*, 109 F.3d at 177 (citing *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 895 (3rd Cir. 1993)). These are not the exclusive ways to show causation; indeed, the proffered evidence, as a whole, may suffice to raise the inference. *Kachmar*, 109 F.3d at 177. Here, the protected activity alleged in the Amended Complaint occurred on March 28, 1996, and December 13, 1996. The temporal connection between the March 28 and December 13, 1996, EEOC complaints and the five months -- September 1996 through January 1997 -- of alleged adverse employment action is sufficient to survive a motion to dismiss. The Court will, therefore, deny Defendants' Motion to Dismiss Count IV.

E. Count V: Intentional Infliction of Emotional Distress

Defendants first contend that workplace harassment is, as a matter of law, insufficient to make out a claim for intentional infliction of emotional distress. Plaintiff disagrees. In the alternative, Defendants contend that Mr. Fortunato was acting within the scope of his employment when he was engaged in the activities which gave rise to the intentional infliction of emotional distress claim and, thus, that the Court should permit the United States to be substituted for Mr. Fortunato on this claim. Plaintiff disagrees, asserting that Mr. Fortunato's acts of discrimination were outside the scope of his employment. The Court will address the arguments in turn.

1. Allegations Insufficient as a Matter of Law

A successful claim for intentional infliction of emotional distress in Maine consists of

proof that:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain that such distress would result from his conduct; (2) the 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"; (3) the actions of the defendant caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so "severe" that "no reasonable man could be expected to endure it."

Henriksen v. Cameron, 622 A.2d 1135, 1139 (Me. 1993)(citing *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979)(quoting *Restatement* (Second) *of Torts* § 46 (1965)).

Defendants correctly point out that merely distasteful workplace conduct does not constitute intentional infliction of emotional distress in Maine. However, the instant allegations of disability discrimination make this case distinguishable from *Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499, 501 (Me. 1989), and *Duplessis v. Training & Development Corp.*, 835 F. Supp 671, 682 (D. Me. 1993), relied upon by Defendants. Specifically, in *Staples*, the Law Court affirmed the trial court's grant of summary judgment on the plaintiff's claim for intentional infliction of emotional distress. In doing so, the court declared that the employer's conduct, consisting of humiliating an employee at a staff meeting and demoting that employee without cause, fell far short of what would be required to send a claim for intentional infliction of emotional distress to a jury. *Staples*, 561 A.2d at 501.

In *Duplessis*, although the plaintiff made serious allegations, similar to the ones presented in the instant case, of discrimination based on his national ancestry and hostile work environment, the court found that the evidence adduced at trial was insufficient to prevail on any of the plaintiff's claims including his tort claims for emotional distress. On this Motion to Dismiss, by contrast, all factual allegations in the Complaint must be taken as true, and all

reasonable inferences must be construed in favor of Plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Without more of a factual predicate, the Court must necessarily find that the allegations are sufficient to survive Defendants' Motion to Dismiss.

2. Motion to Substitute the United States for Defendant Fortunato

In 1988, Congress amended the Federal Tort Claims Act ("FTCA") to reinforce federal employees' immunity from tort actions. These amendments -- commonly known as the Westfall Act because they were a response to *Westfall v. Erwin*, 484 U.S. 292, 300 (1988) -- provide that an action against the United States is the only remedy for injuries caused by federal employees acting within the scope of their employment. 28 U.S.C. § 2679(d)(1). The Westfall Act establishes a process often referred to as "Westfall certification." After a federal employee is sued, the Attorney General[4] reviews the case to determine if the employee was acting within the scope of their employment when he or she engaged in the allegedly harmful conduct. The Attorney General may then file a Certification of Scope of Employment, a document certifying that the employee was acting within the scope of his or her employment. *Id.* The Attorney General then notifies the court that the United States should be substituted as party-defendant for the federal employee. *Id.*

The United States Attorney for the District of Maine has certified that at the time of the alleged conduct, Defendant Michael Fortunato was acting within the scope of his employment as an employee of the United States. Certificate of Scope of Employment (Docket No. 6). *See* 28

[4]The Attorney General has delegated certification authority to the United States Attorneys. 28 C.F.R. § 15.3(a).

U.S.C. § 2679(d)(1)("Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.").

Although Westfall certification serves as prima facie evidence that Defendant Fortunato was acting within the scope of his employment, *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991), it does not conclusively establish that the United States should be substituted as party-defendant. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (plurality opinion); *Brown*, 949 F.2d at 1011-12. Plaintiff challenges the United States Attorney's certification, claiming that the pleaded facts allege that Mr. Fortunato acted outside the scope of his employment, requiring the Court to independently review the case and determine whether the defendant was in fact acting within the scope of his or her employment. *Gutierrez de Martinez*, 515 U.S. at 435-36. If the court finds that the employee was acting outside the scope of his or her employment, the court must refuse to substitute the United States. *Id.* If the court agrees with the certification, then the case proceeds against the United States under the FTCA.[5] 28 U.S.C. § 2679(d)(4).

In *Nasuti v. Scannell*, 906 F.2d 802, 813 n.16 (1st Cir. 1990), the Court of Appeals for the

[5]The Westfall Act amended the FTCA to make an action against the United States the exclusive remedy for money damages for any injury arising from the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Thus, tort actions may not be maintained against federal employees in their individual capacities where the alleged tort was committed within the scope of employment.

First Circuit clearly held that in situations such as this one, where a plaintiff asserts that a defendant acted outside the scope of his or her employment despite the Attorney General's certification to the contrary, the burden of proof is on the plaintiff. *See also Rogers v. Management Technology, Inc.*, 123 F.3d 34, 36-37 (1st Cir. 1997)(the plaintiff has the burden of proof in respect to overturning the Attorney General's scope certification); *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996).

State law controls the determination of whether a federal employee was acting within the scope of employment. *Aversa*, 99 F.3d at 1209; *Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991). Maine courts apply section 228 of the *Restatement (Second) of Agency* on the issue of scope of employment. *McLain v. Training and Development Corp.*, 572 A.2d 494, 497 (Me. 1990); *O'Brien v. United States*, 236 F. Supp. 792, 797 (D. Me. 1964). That section provides:

> (1) Conduct of a servant is within the scope of employment if, but only if:
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> > (a) it is of the kind he is employed to perform;
> >
> > (b) it occurs substantially within the authorized time and space limits;
> >
> > (c) it is actuated, at least in part, by a purpose to serve the master; and
> >
> > (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
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> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 228, at 504 (1958).

Plaintiff alleges that the conduct of Mr. Fortunato was outside the scope of his employment because "his conduct was not conduct he was employed to perform, occurred outside the authorized time and space limits of the employment, and was not actuated at all by a

purpose to serve master." Amended Complaint ¶ 55. Since Defendants have filed a Westfall certificate and have moved to substitute the United States, Plaintiff now has the burden of coming forward with specific facts in rebuttal. *Brown*, 949 F.2d at 1012. Here, Plaintiff failed to submit any evidence indicating that Mr. Fortunato was not acting within the scope of his employment; Plaintiff instead relied on the Amended Complaint. The Court, however, cannot make a de novo determination on the issue of scope of employment on the current state of the record; that is, without any facts.

While absolute immunity generally confers immunity from suit and not just from liability, immunity resulting from substitution arises only after there has been a judicial determination that the defendant was acting within the scope of employment. Thus, the mere status of being a federal employee does not guarantee total immunity from the judicial process. In some cases, the facts surrounding the scope of employment inquiry can be determined based on the certification and the pleadings. Moreover, *Nasuti* authorizes the Court to hold an evidentiary hearing to resolve this immunity-related question. Once discovery has taken place, either party can file a motion requesting a hearing on the issue or file sworn testimony with the Court in order to facilitate the resolution of this issue. On this undeveloped record, however, the Court does not have the facts necessary to make the substitution decision. Accordingly, the Court will deny Defendant Fortunato's Motion to Substitute without prejudice to the issue being raised at a time when the case is more fully developed.

F. Count VI: Negligent Infliction of Emotional Distress

Defendants contend that Plaintiff's negligent infliction of emotional distress claim must

fail against both Defendants because: (1) he has failed to allege the necessary underlying tort; and (2) he failed to allege an underlying breach of a duty. Plaintiff has not responded to either of these arguments. Defendant Postal Service additionally requests the Court to dismiss Plaintiff's claim for negligent infliction of emotional distress because: (1) Plaintiff has failed to comply with the administrative prerequisites; (2) damages for emotional distress under a tort theory cannot be recovered against the Postal Service; (3) Plaintiff has no other remedy on which to recover for alleged emotional distress flowing from personnel actions; and (4) Title VII and the Rehabilitation Act are Plaintiff's exclusive remedies for his claims which he alleges in tort. Finally, Defendant Fortunato again asserts that the United States should be substituted for him because his actions were within the scope of his employment. The Court will address the arguments in turn.

1. Underlying Tort

In order to state a claim for negligent infliction of emotional distress, Plaintiff must allege as follows:

> [O]ne, that the defendant was negligent, that is that the defendant acted or failed to act in a manner which a reasonably prudent person or corporation would act in the management of their affairs taking into account all of the circumstances of the case; two, that emotional distress to the plaintiff was a reasonably foreseeable result of the defendant's negligent act; and three, that the plaintiff suffered severe emotional distress as a result of the defendant's negligence.

Packard v. Central Maine Power Co., 477 A.2d 264, 268 (Me. 1984). Defendants argue that an underlying tort is necessary in order to append a negligent infliction of emotional distress claim. Plaintiff has not responded to this argument.

Defendants rely on *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 622 (Me. 1996), and

Roy v. Runyon, 954 F. Supp 368, 381 (D. Me. 1997), to support their assertion that in Maine an underlying tort is necessary in order to state a claim for negligent infliction of emotional distress. Despite the Law Court's statement in *Gayer* that "[r]ecovery for negligent infliction of emotional distress is premised on the existence of an underlying tort or, in limited circumstances, contract breach", *Gayer*, 687 A.2d at 621, in Maine it is not necessary to have an underlying tort to state a claim for negligent infliction of emotional distress. The statement regarding the requirement of an underlying tort was not necessary to the holding in *Gayer* and must necessarily be limited to the facts of that case, which involved a claim for negligent infliction of emotional distress based on a breach of contract. Moreover, the underlying tort requirement is inconsistent with the Law Court's explicit holdings in *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1283, 1285-86 (Me. 1987)(Law Court abandoned the underlying tort requirement in cases involving negligent infliction of emotional distress), and *Rowe v. Bennett*, 514 A.2d 802, 806 (Me. 1986). In the absence of a clear statement overruling *Gammon*, the Court concludes that *Gammon* -- holding that a plaintiff need not prove an underlying tort to state a claim for negligent infliction of emotional distress -- continues to be the law in Maine. *Roy* relies exclusively on *Gayer* and, therefore, the Court will not factor it into the analysis on the issue of negligent infliction of emotional distress.

Defendant also relies on a mischaracterized holding in *Krennerich v. Inhabitants of the Town of Bristol*, 943 F. Supp 1345, 1357 (D. Me. 1996). In *Krennerich*, this Court found that the plaintiff's complaint failed to mention negligence or the other two elements of a claim for negligent infliction of emotional distress. In this case, by contrast, Plaintiff's Complaint explicitly alleges negligence on the part of Defendants, emotional distress to Plaintiff that was a

reasonably foreseeable result of Defendants' negligent act, and that Plaintiff suffered severe emotional distress as a result of Defendants' negligence. Amended Complaint ¶¶ 60-62.

2. Failure to Allege Breach of a Duty

Defendant has correctly stated that in order to establish liability for negligent infliction of emotional distress, a plaintiff must show that the defendant owes a duty of care to the plaintiff. *F.D.I.C. v. S. Prawer & Co.*, 829 F. Supp. 439, 451 (D. Me 1993). However, on the currently pending Motion to Dismiss, *proof* of the elements of any cause of action is not required. This case is only at the pleading stage. Indeed, Defendants have not yet answered the Amended Complaint. It is sufficient at this stage in the proceedings for Plaintiff to have alleged negligence; such negligence necessarily includes a breach of a duty.

3. Additional Arguments in Support of Dismissing Count VI Against the Postal Service

Defendant Postal Service argues four additional reasons why it should be dismissed: (1) Plaintiff failed to comply with the administrative prerequisites necessary to assert tort claims against the government; (2) Plaintiff may not recover for emotional distress under any tort theory against the Postal Service; (3) Plaintiff has no other remedy on which to recover for alleged emotional distress flowing from personnel actions; and (4) Title VII and the Rehabilitation Act are Plaintiff's exclusive remedies for his claims. Plaintiff does not respond to Defendant's first three arguments, stating only that "the other bases for dismissal . . . were raised in *Larose v. Runyon*, [Docket No. 97-231-P-C,] and were rejected by Judge Carter in his ruling upon the recommended decision of the Magistrate Judge, the complete record and the full briefing by the

postal service's able attorneys."[6] Marcel Desrosiers's Response to Defendants' Motion to Dismiss and Substitute (Docket No. 7) at 11.

The arguments regarding the FTCA and the FECA were raised as objections to the Magistrate Judge's Recommended Decision on the Motion to Dismiss in *LaRose v. Runyon*, Docket No. 97-231-P-C, and the plaintiff opposed those arguments on the ground that they were not timely raised. This Court ultimately denied all of the objections and adopted Magistrate Judge Cohen's Recommended Decision. Although not apparent from the face of this Court's Order Affirming the Recommended Decision of Magistrate Judge Cohen, the Court denied the objections not on the merits of the arguments but, rather, on the basis that they were untimely raised. Because Plaintiff's counsel may have misunderstood the Court's ruling in *LaRose v. Runyon*, Docket No. 97-231-P-C, to have been on the merits of the arguments, the Court will now provide Plaintiff an opportunity to respond to the first three of Defendant's bases for dismissal.

On the Postal Service's fourth basis for dismissal, the Court notes that "[w]hile it is true that the plaintiff would be barred from receiving separate emotional damages for employment discrimination covered by Title VII . . ., it does not follow that the plaintiff is barred from recovering emotional distress damages for injuries distinct from the alleged Title VII . . .

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[6]The Court cautions counsel that they should respond to all of the arguments raised by opposing counsel in a dispositive motion. That is, if counsel wishes to assert and preserve an argument, it must be fully articulated in the motion or supporting memoranda of the case, itself. Referring the Court to unpublished orders and litigants supporting memoranda in other cases, past or pending, is not sufficient. Counsel should not attempt to place the onus on the Court to exhume files in other cases in order to understand the arguments. Although those files may, under certain circumstances, be available to the Court to examine, the Court of Appeals will certainly not have the same opportunity to discover the party's arguments. Thus, those arguments will not be preserved for appellate use.

discrimination." *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 34 (D. Me. 1995). Plaintiff alleges damages in Count VI that are supplemental to the damages provided for by Title VII and the Rehabilitation Act. The Court finds it necessary to have the parties establish a factual predicate for Plaintiff's state-law claim in order to determine whether it is based exclusively on facts that are not separate from the damages covered by Title VII or Rehabilitation Act. On the record now before the Court, a determination on the exclusivity of the remedy cannot be made. Therefore, the Court will deny Defendant Postal Service's motion arguing the basis of exclusivity of Title VII remedies.

4. Motion to Substitute the United States for Defendant Fortunato

Defendant Fortunato again asserts that he was acting within the scope of his employment and, therefore, the United States should be substituted as the party-Defendant in his place. As the Court discussed *supra*, the current state of the record prevents the Court from making the de novo determination on the scope of employment.

II. CONCLUSION

Accordingly it is **ORDERED** that Defendants' Motion to Dismiss be, and it is hereby, **DENIED** on Counts I, III, IV, V and **GRANTED** on Count II. It is further **ORDERED** that Plaintiff respond to Defendant Postal Service's three arguments in support of dismissing Count VI by May 18, 1998, and that Defendants file any reply thereto by May 29, 1998. It is further **ORDERED** that Defendants' Motion to Substitute on Counts V and VI be, and it is hereby, **DENIED** without prejudice to the arguments being raised at a time when the record is more developed.

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GENE CARTER
District Judge

Dated at Portland, Maine this 29th day of April, 1998.