UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL SELLAR,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 97-0208-B**
	)	
STATE OF MAINE, BUREAU OF MAINE STATE POLICE, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION

Plaintiff, Michael Sellar, brings this action against the defendants State of Maine, Bureau of Police [hereinafter "State Police"] Lieutenant Colonel Malcolm T. Dow, Sergeant Edward C. Bonney, Sergeant Wesley D. Hussey and Sergeant Kelly J. Barbee alleging that the defendants discriminated against him on the basis of his disability. The Plaintiff brings this claim pursuant to 42 U.S.C. section 1983 alleging that the defendants discriminated against him in violation of the Equal Protection Clause of the United States Constitution and the Maine Constitution (Count I). The plaintiff also asserts that the defendants' actions violated provisions of the American with Disabilities Act, 42 U.S.C. 12101, *et seq.*, the Maine Human Rights Act, 5 M.R.S.A. section 4551, *et seq.*, and the Federal Rehabilitation Act, 29 U.S.C. section 794, *et seq.* (Counts II, III & IV). Before the Court is the defendants' Motion for Summary Judgment, the plaintiff's Response and the defendants' Reply. For the reasons delineated below, I recommend that the Court GRANT the defendants' Motion on all counts in the Complaint.

I. Summary Judgment

Summary judgment is appropriate only 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). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

II. Background

On November 5, 1996 the plaintiff entered the Maine State Police Academy to receive the requisite training to become a Maine State Trooper.[1] After graduating from the Academy the plaintiff, like all other graduates from the Academy, entered the Field Training Officer Program ["FTO Program"]. All graduates who enter the program are referred to as probationary officers.

[1] Upon graduation for high school, the plaintiff spent six years in the Navy as a sonar operator. After leaving the Navy the plaintiff received certification in Basic Law Enforcement and worked for several companies in Florida as a security officer.

Under the FTO Program a probationary officer receives field training and performance evaluation under the guidance of an experienced state trooper for a forty-five day period. During the FTO Program the supervising state trooper is required to complete Daily Operating Reports ["DOR"] that highlight the probationary officer's strengths and weaknesses.

The first ten days of the plaintiff's training passed with little incident.[2] On day eleven the plaintiff's FTO supervisor wrote that the plaintiff needed to work on his grammar and spelling in reports. The supervisor made similar observations on days thirteen and fifteen. The plaintiff received a new FTO, Sergeant Raymond Bessette, on day eighteen. Around that time Sergeant Hussey, the plaintiff's shift supervisor, reviewed the plaintiff's previous reports, and discovered numerous deficiencies with the plaintiff's organizational skills, grammar and spelling.

The DORs over the next several weeks indicate various deficiencies with the plaintiff's performance that are unrelated to the plaintiff's ability to write. For example, the plaintiff received a "needs improvement" or "unacceptable" grade for his knowledge of the traffic code in the field, appropriate use of radio procedures, voice command, problem solving, and radio articulation on at least one day from days eighteen to twenty-six.

In addition to the problems listed above, the plaintiff still had difficulty writing out his reports. The defendants arranged for the plaintiff to meet with Jo Ann Pritchard, a special education teacher, to evaluate the plaintiff's problems with his written work and issue a report to the State Police. In her report Ms. Pritchard wrote that while the plaintiff possessed average or above-average scores in abstract reasoning, visual processing and comprehensive-knowledge, he

[2] On days two and three the supervising officer indicated that the plaintiff needed to improve on his use of the radio. Additionally, on day three the plaintiff received a "needs improvement" grade on the accuracy of the forms he completed.

had significant weaknesses "in fluent, accurate processing of symbols particularly under pressure to maintain focused attention (Processing Speed) and in working memory." The report concluded that the plaintiff's disability in working memory "appear[s] to be impacting Mr. Sellan's [sic] ability to spell and perform written work following the correct conventions of print, including mechanics and syntax."

At a brief meeting with Sergeant Hussey on June 13, 1996 (FTO day thirty), Pritchard indicated to Hussey that the plaintiff had a learning disability and told Hussey to call back with any questions about the report. Shortly after receiving the report, Hussey told a fellow state trooper, Dan Ryan, that the report indicated that the plaintiff suffered from "dyslexia" and that the plaintiff had a problem transposing numbers. Hussey also told Ryan that he could not see how the plaintiff could maintain his credibility with report writing with "this possible handicap". (Plaintiff's Statement of Material Facts at 5). Plaintiff's second FTO, Trooper Bessette, also heard rumors that the plaintiff suffered from a number reversal problem.[3]

The criticism of the plaintiff's job performance was not limited to his writing abilities. On Day twenty-nine of the FTO Program the plaintiff received a "needs improvement" or "unacceptable" rating on the following categories: investigative skill, self-initiated activity, voice command, appropriate use of radio procedures and radio articulation. On day thirty-two the FTO supervisor wrote that the plaintiff did not know the proper radio codes. On day thirty-three the plaintiff did not take proper notes when interviewing a respondent. On day thirty-eight the plaintiff began to write out a traffic summons instead of a criminal summons. On two occasions

[3] Although the defendants challenge the accuracy of the above facts, for the purposes of this motion we view the record in a light most favorable to the plaintiff.

in his last week in the FTO Program, the plaintiff headed in the opposite direction of the intended destination. On day forty-one the FTO supervisor wrote that the plaintiff missed hearing his call sign on the radio. On day forty-four the plaintiff was on the radio when he forgot what to say.

The acting Troop Commanders, Sgts. Barbee, Bonney and Hussey, recommended to Lt. Col. Dow that the plaintiff be terminated as a Maine State Trooper. Lt. Col. Dow accepted the recommendation and offered the plaintiff the opportunity to resign. Shortly afterward, the plaintiff resigned.

III. Discussion

A. Count I - Section 1983 Claim

Plaintiff brings a civil rights claim under section 1983 claiming that the defendants violated his constitutional rights under the Equal Protection Clause of the United States Constitution and the Maine Constitution. The defendants now move the court for summary judgment. In his Response, the plaintiff indicated that he does not object to the defendants' Motion for Summary Judgment as to the section 1983 claim. Accordingly, I recommend that the Court GRANT the defendants' Motion for Summary Judgment on Count I of the Complaint.

B. Count II - American with Disabilities Act

Plaintiff alleges that the defendants' dismissed him in violation of the ADA. Specifically, the plaintiff alleges that the State Police dismissed him because he has an impairment that substantially limits his ability to write and to work. Additionally, the plaintiff maintains that the learning disability causes him to reverse numbers in pressure situations. To establish a *prima facie* case under the ADA the plaintiff must prove: (1) that he was disabled under the act; (2) that he was able to perform the essential functions of the job with or without reasonable

accommodations ("qualified individual with a disability"); and (3) that the employer fired him in whole or in part because of his disability. *Katz v. City Metal*, 87 F.2d 26, 30 (1st Cir. 1995).

a. First Element - Disability

To establish a "disability" under the ADA an individual must have: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. 42 U.S.C. section 12102(c); *Abbot v. Bragdon*, 107 F.3d 934, 938 (1st Cir. 1997). Although the plaintiff asserts he fulfills all three prongs of 42 U.S.C. 12102(c), he need only establish one.

(i) First Prong - 12012(c)(A)

To establish a "disability" under the first prong of 42 U.S.C. 12102(c) the plaintiff must prove that he has (a) a physical or mental impairment; (2) that affects a major life activity; (3) to a major degree. *Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 155 (1st Cir. 1998). Plaintiff argues that he has a learning impairment that substantially limits his ability to perform the major life activity of writing and working. The defendants concede that the plaintiff has an impairment but challenge whether the impairment affects a major life activity. Alternatively, the defendants argue that if the plaintiff's impairment affects a major life activity, that impairment does not substantially limit the major life activity.

Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) define "major life activities" as " functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. section 1630.2(i). Working is clearly a "major life activity"; whether "writing" is a "major life activity" is not as clear.

The defendants argue that writing is not a recognized major life activity but rather a subclass within the recognized life activity of learning.[4] Additionally, the defendants point out that writing is not mentioned as a major life activity in the "comprehensive EEOC regulations, or in the voluminous EEOC guidelines for employment cases under the ADA." Defendants' Reply at 2. Although it is true "writing" is not identified as a "major life activity" in the regulations, the list of activities listed under "major life activities" are by no means exhaustive. *Abbot v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997). The ADA is a remedial statute that "should be construed broadly to effectuate its purposes." *Arnold v. United Parcel Service*, 136, 854, 861 (1st Cir. 1998) (quoting *Tcherepnin v. Knight*, 389 U.S. 332 (1967)). Therefore "it seems consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination." *Id.* The regulations promulgated by the EEOC appear to support a broad reading of "disability" by stating that a major life activity "are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt. 1630, App. Section 1630.2(i).

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[4] In the Complaint the plaintiff claims that his impairment substantially limits the major life activity of learning. Plaintiff appears to abandon that contention in his Response and now argues that he has a learning impairment that substantially limits the major life activity of writing. Learning is a "major life activity" under the ADA. 29 C.F.R. section 1630.2(i). Generally, Courts that have determined whether a plaintiff has an impairment that affects the major life activity of learning by comparing the plaintiff's general ability to learn to that of the average person. *Price v. National Bd. of Medical Examiners*, 966 F. Supp. 419, 428-29 (S.D. W.Va. 1997). *Knapp v. Northwestern Univ.*, 101 F.3d. 473, 481 (7th Cir. 1996); *reh'g and suggestion for reh'g denied en banc denied* (1997), *cert. denied* (1997). Plaintiff's expert, Jo Ann Pritchard, determines whether one has a learning disability by testing one's cognitive ability. The plaintiff's "cognitive ability" score fell in the 65th percentile, well above that of the average person in his age group. Based on the plaintiff's expert's report the plaintiff does not have an impairment that affects the major life activity of learning.

Although the ability to write may vary among the adult population, the average person is able to convey their thoughts through the basic activity of writing with little or no difficulty. Interpreting the term "disability" broadly, one court has found that "Writing is indisputably a major life activity." *See Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094, 1117 (S.D. N.Y. 1997).[5] Accordingly, the Court is satisfied that "writing" is a "major life activity" under the ADA.

In addition to proving that he has an impairment and that the impairment affects the major life activities of working and writing, the plaintiff must demonstrate that the impairment substantially limits the major life activity of writing and working. The term "substantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.
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> 29 C.F.R. section 1630.2(j)(1).

The following factors are used to determine if an individual is substantially limited in a major life activity:

> (i) the nature and severity of the impairment;
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> (ii) the duration or expected duration of the impairment; and
>
> (iii) the permanent or long term impact, or the expected permanent or long term impact of

[5] Although the defendants spend much time arguing that the *Bartlett* opinion stands alone for the proposition that "writing" is a "major life activity", the defendants fail to cite *any case* where a court specifically held that "writing" is not a "major life activity".

or resulting from the impairment.

29 C.F.R. section 1630.2(j)(2).

Whether an impairment "substantially limits" a major life activity is a "fact intensive inquiry." *Merry v. A. Sulka & Co.*, 953 F. Supp. 922, 926 (N.D. Ill. 1997).

The plaintiff argues that there are genuine issues of material fact as to whether his learning impairment substantially limits the major life activity of writing. The Court agrees. The plaintiff was tested by Jo Ann Pritchard when he was employed by the defendants. Pritchard determined that the plaintiff suffered from a learning disability that placed him in the bottom 10th percentile when testing written language. To cast Pritchard's finding in clearer terms, the plaintiff's ability to write is equivalent to that of an elementary-level student. Certainly the report's finding raises an issue of fact as to whether plaintiff's impairment "significantly restricts" his ability to write when compared to the average person in the general population. *See* 29 C.F.R. 1630(j)(1)(ii). The Court is satisfied that the report raises genuine issues of material fact as to whether the plaintiff's impairment substantially limits the major life activity of writing.

Both sides also spare over whether plaintiff's impairment substantially limits his ability to perform the major life activity of working. Having decided that writing is a major life activity, the Court need not determine whether the plaintiff was substantially limited in working. *Katz*, 87 F.3d at 31 n.3; *Pryor v. Trane Co.*, 138 F.3d 1024, 1027 (5th Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998). Although the regulations set forth a definition of when an individual is substantially limited in working, "We need not consider the permutations of that definition, however, because if an individual is substantially limited in a major life activity other than working, or is so regarded, 'no determination should be made as to whether

the individual is substantially limited in working'" *Id.* (quoting 29 C.F.R. Pt. 1630, App., at 403).

ii. Second Prong - 12102(c)(B)

Plaintiff also argues that he had a record of impairment. Specifically, the plaintiff maintains that the Pritchard report established a record of his disability. To establish a record of impairment under the second prong the plaintiff must show that he was "classified or misclassified as having a mental or physical impairment that substantially limits a major life activity." *Sherrod v. American Airlines Inc.*, 132 F.3d 1112, 1120-21 (5th Cir. 1998). The Court is satisfied that the Pritchard report classified the plaintiff with an impairment and that the report raises genuine issues of material fact on whether the record of impairment was one that substantially limited the major life activity of writing.

iii Third Prong - Regarded as Having a Disability

The plaintiff also argues that he was regarded as having a disability by the defendants. To be regarded as having a disability, "an individual who has an impairment that is not substantially limiting (or has no impairment at all) is nevertheless 'disabled' if he is treated by the employer as having an impairment that does substantially limit major life activities." *Katz*, 87 F.3d at 32. An individual "could have a 'disability' under both prong one (having an impairment that substantially limits a major life activity) and prong three ('regarded as' having such an impairment) at the same time; one does preclude the other." *Arnold,* 136 F.3d at 860. The plaintiff has presented the following facts. That one of the plaintiff's supervisors, Sgt. Hussey, told a fellow state trooper that Pritchard's report indicated that the plaintiff was "dyslexic". Hussey also told the state trooper that he could not see how the plaintiff could function as a state trooper without properly filling out reports or properly issuing summons or complaints. In

addition, Trooper Bessette heard through “the unofficial State Police rumor mill” that plaintiff had a problem with reversing numbers. (Plaintiff's Statement of Material Facts at 5). Although the defendants' dispute these facts, it is the proper function of the jury to resolve these factual issues. Accordingly, the Court is satisfied that the plaintiff has presented genuine issues of material fact regarding whether the defendants regarded him as being disabled.

b. Second Element - Qualified Individual

The defendants argue that if the court determines there are genuine issues of material fact on the question of whether the plaintiff is "disabled", summary judgment is still appropriate because the plaintiff is not a "qualified individual with a disability" to be a State Trooper. A "qualified individual with a disability" is an:

> individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position
>
> 29 C.F.R. section 1630.2 (m).

Essential functions are "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. section 1630.2 (n).

The defendants argue that irrespective of the plaintiff's impairment that affects the plaintiff's written work, the plaintiff could not perform other duties that are essential to being a State Trooper. First, the defendants point to the plaintiff's failure to proceed in his cruiser in the correct direction when all the plaintiff had to do was re-trace his steps. Second, the defendants point to the plaintiff's failure to hear his call signal and properly monitor his radio. Third, the defendants point to the plaintiff's inability to properly complete reports. For example, at times,

the plaintiff filled in the wrong boxes when he completed the reports, and in one instance he began to issue a traffic summons instead of issuing a criminal summons.[6]

Generally, the court will not "second-guess the employer's judgment in describing the essential functions of the job." *DePaoli v. Abbott Laboratories*, 140 F. 3d 668, 673 (7th Cir. 1998). *Also see E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 147 (1st Cir. 1997). Courts have cast a broad net when describing the essential functions needed to be a law enforcement officer. The ability to "patrol be foot or automobile; apprehend violators; direct traffic; operate tractors, towing equipment, and emergency equipment; enforce traffic regulations; and maintain records . . .clearly strike at the heart of a police officer's job." *Santos v. Port Auth. of N.Y. & N.J.*, No. CIV. 94-8427, 1995 WL 431336, at *2 (S.D.N.Y. July 20, 1998). "[T]he ability to make a forcible arrest, drive a vehicle under emergency conditions and qualify with a weapon are all essential functions . . . ." *Champ v. Baltimore County*, 884 F. Supp. 991, 998 (D. Md. 1995). It is also essential that a police officer be honest. *Hartman v. City of Peluma*, 841 F. Supp. 946 (N.D. Cal. 1994).

The willingness of the courts to cast a wide net when listing the essential function of law enforcement officers can be attributed to the heavy responsibility law enforcement officers bear to protect the public. In this case, the plaintiff's inability to re-trace his steps and head in the proper direction when driving the cruiser could cause significant harm. A quick response to a

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[6] Plaintiff argues that on numerous instances he received "acceptable" ratings on the DOR checklist in a number of categories that the defendants cite as the reason for his termination. Although the plaintiff is correct, the Court is not hamstrung by only the rating the plaintiff received on the first page of the DORs. Primarily, the deficiencies of the plaintiff's performance noted above occur on the second page of the DORs. These deficiencies, along with DOR checklist demonstrate that the plaintiff was unable to perform the essential functions of the job.

scene is needed to protect the public and prevent any harm that has already occurred from escalating. Likewise, the inability of the plaintiff to monitor radio traffic and immediately recognize his call sign may not only cause harm to those individuals he is called to assist but to other state troopers who rely on other troopers to arrive at the scene as support. Properly completing reports are essential to enforcing traffic regulations and other laws and are therefore an essential function of the job. Because no genuine issues of material fact exist as to whether the plaintiff can perform the essential functions of the job needed to be a law enforcement officer with or without accommodation, I recommend that the Court GRANT the defendants' motion for summary judgment.

Count III - Maine Human Rights Act

In Count III the plaintiff reiterates his claim under the MHRA. "The Maine Supreme Court has indicated that analogous federal law informs the interpretation of the MHRA." *Abbot*, 912 F. Supp at 591 (citing *Bowen v. Department of Human Services*, 606 A.2d 1051, 1053 (Me. 1992); *Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261-62 (Me. 1989)). Accordingly, I Recommend that the defendants' motion for summary judgment be granted as to Count III.

Count IV - Federal Rehabilitation Act

Interpretation of section 504 of the Rehabilitation Act is identical to Title I of the ADA. 29 U.S.C. section 794(d) ("The standards used to determine whether this section [section 504 of the Rehabilitation Act] has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the American with Disabilities Act of 1990. . . .") Having recommend that the defendants' motion on Count II (ADA title I claim) be granted, I recommend that the defendants' motion for summary judgment be granted as

to Count IV.

Conclusion

For the reasons delineated above I recommend that the Court GRANT the defendants' motion for summary judgment on all Counts in the Complaint.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
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> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated on June 24, 1998.