COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LISA C. BROWNLEE,	:	
Complainant	:	PHRC CASE NO. 200706428
v.	:	EEOC CASE NO. 17F200862073
	:	
SEPTA,	:	
Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. In approximately 1998, the Complainant, Lisa C. Brownlee, (hereinafter "Brownlee"), was diagnosed with diabetes. (N.T. 174).
2. The Respondent, SEPTA, also known as The Southeastern Pennsylvania Transportation Authority, operates several forms of public transportation, including buses. (N.T. 88).
3. SEPTA has approximately 9,000 employees. (N.T. 59).
4. A Collective Bargaining Agreement between SEPTA and Transport Workers Union Local 234, (hereinafter "TWU"), governs the employment of SEPTA union employees. (N.T. 94).
5. SEPTA buses are either 40' or 60' long. (N.T. 94).
6. A 40' bus has a seating capacity of 55 passengers and a maximum capacity of 66. (N.T. 94).
7. A 60' bus has a seating capacity of 70 passengers and a maximum capacity of 99. (N.T. 94).
8. Brownlee is the sole caregiver of her three children ages 12, 16 and 23. (N.T. 187)
9. On July 10, 2000, SEPTA hired Brownlee as a bus driver (N.T. 96, 174, 200).
10. At the time Brownlee was hired, Brownlee took oral medications to control her diabetes. (N.T. 175-76).
11. In January 2008, Brownlee began to take insulin to treat her diabetes. (N.T. 176).

*To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

12. Dr. Seth Braunstein, the chief of the University of Pennsylvania Hospital's diabetes program, offered expert testimony through deposition regarding his medical opinion of whether a bus driver who has diabetes and is insulin dependent poses an increased safety risk for developing hypoglycemia. (R.E. BB at pp. 8, 20).

13. Dr. Braunstein explained that there are two types of diabetes mellitus:

    Type I diabetes where the body cells that produce insulin have died and in order to sustain life, insulin is required; and Type 2 diabetes where the body's blood sugar levels can usually be managed with proper diet and exercise. (R.E. BB at pp. 16, 17).

14. Some individuals with Type 2 diabetes require medication. (RE BB at p. 17).

15. Dr. Braunstein further explained that often the natural progression of Type 2 diabetes is that management by diet and exercise eventually requires oral medication and ultimately insulin. (R.E. BB at p. 17).

16. Individuals with diabetes who are insulin dependent are more prone to develop hypoglycemia, a condition where the blood sugar level of the body is too low which can result in symptoms of disorientation, confusion, loss of motor skills, lack of judgment, loss of consciousness, seizures and even death. (R.E. BB at p. 12).

17. Insulin is used to lower the body's blood glucose level. (N.T. 45; R.E. BB at p. 19).

18. If the body's blood glucose levels are too high, the consequences can be fatigue, increased urination, dehydration, increased risk of infection, blurred vision, light-headedness, fainting spells, feeling ill generally and possible long-term damage to the eyes, kidneys, nerve endings, blood vessels, heart with risk of heart attack, stroke, kidney failure, loss of vision and amputation. (R.E. BB at p. 19).

19. Dr. Braunstein offered his medical opinion that a person who operates a commercial vehicle, who is on insulin is an increased safety risk to individuals both inside and outside of the vehicle and property because the driver could lose control of the vehicle. (R.E. BB at p. 20).

20. Dr. Braunstein indicated that sometimes individuals who have diabetes have no immediate warning signs and adverse reactions can be very sudden. (R.E. BB at p. 21-22).

21. In his opinion, there is no time that an insulin dependent person would be considered not at risk. (R.E. BB at p. 25).

22. Approximately fifteen years earlier, Dr. Richard A. Press, SEPTA's Medical Director, had developed a Diabetes Mellitus Monitoring Program (hereinafter "DMMP"). (N.T. 25-26, 32, 58-59, 72).

23. The DMMP was developed for SEPTA employees in safety sensitive positions. (C.E. 5).

24. Operating a SEPTA bus is a safety sensitive position. (N.T. 204).

25. Under the DMMP, employees who have diabetes were seen yearly by SEPTA's Medical Department for a review of their medications, diet, exercise program, weight, blood pressure, vision, etc. (C.E. 5).

26. Employees participating in the DMMP also had to file quarterly reports with respect to their blood glucose levels. (C.E. 5).

27. An employee whose report indicated a high level would be seen by the medical department and followed closely until the employee and the employee's physician brought the employee's glucose level into better control. (C.E. 5).

28. One of the DMMP standards states, "...standards may exist for certain forms of treatment. For example, insulin therapy is not allowed for CDL holders without a waiver from DOT." (C.E. 5).

29. In developing the DMMP, Dr. Press expressly adopted the Physical Qualification Standards

for commercial vehicle drivers in the Federal Motor Carriers Safety Regulations, C.F.R. §39-41(b)(3). (C.E. 6, 19).

30. This federal regulation states in pertinent part, "(b) a person is physically qualified to drive a commercial motor vehicle if that person-... (3) has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control..." (C.E. 6).

31. Dr. Press credibly testified that although SEPTA was not required to adopt federal standards, he chose to do so as a matter of prudence and business necessity. (N.T. 61, 62).

32. Dr. Press testified that he considered the federal regulation to have been carefully crafted, reasonable, thoughtful, scientifically accurate, defensible, and kept current by a committee of experts. (N.T. 63).

33. Dr. Braunstein offered that in his expert opinion, SEPTA's adoption of the DMMP was appropriate and reasonable given the risk of property damage, and the risk of injury to a bus driver, occupants of a bus, and those outside of a bus. (R.E. BB 28-29).

34. Indeed, Dr. Braunstein testified that in his expert opinion, because they are a direct threat of harm to the public, insulin dependent diabetics should not be permitted to drive a bus. (R.E. BB 32, 34).

35. Under the DMMP, a waiver program is available. (N.T. 68, 78).

36. To be granted a waiver, an employee was required to have an extensive history of good blood level control, and an in depth review of medical records by a panel of experts. (N.T. 78).

37. SEPTA's waiver process takes approximately three months and waivers have been successfully obtained. (N.T. 82-83, 305, 317).

38. In or about December 2007 or January 2008, Brownlee's physician, Dr. Mazzotta, prescribed that Brownlee begin to take insulin to bring her blood sugar level into control. (C.E. 4).

39. As part of the DMMP, Brownlee was required to come to SEPTA's medical department every three months and submit reports from her treating physician. (N.T. 205-06).

40. On March 18, 2008, Brownlee met with Dr. K. Gares from SEPTA's medical department and reported that she had started taking insulin. (N.T. 76; C.E. 4)

41. Dr. Gares informed Brownlee that she would be medically disqualified from driving a bus because she was on insulin. (N.T. 176).

42. Dr. Gares also informed Brownlee that she would be referred to SEPTA's Vocational Rehabilitation Department. (N.T. 177).

43. SEPTA has a program where medically disqualified employees are assisted by the Vocational Rehabilitation Department in concert with the Medical Department to attempt to find alternative positions in SEPTA. (N.T. 164).

44. SEPTA sets aside certain positions for employees who have been medically disqualified. (N.T. 299).

45. Once SEPTA learned on March 18, 2008 that Brownlee was on insulin, Brownlee was medically disqualified. (N.T. 42-43, 72; C.E. 19).

46. Brownlee was immediately placed on sick leave. (N.T. 79).

47. In a letter to Brownlee dated March 18, 2008, Dr. Press forwarded to Brownlee SEPTA's Notice of Disqualification. (C.E. 2).

48. Dr. Press's March 18, 2008 letter to Brownlee also informed her to contact Linda Yoxtheimer, (hereinafter "Yoxtheimer"), SEPTA's Vocational Rehabilitation Specialist, in order to review alternative job opportunities or accommodations that may be appropriate. (N.T. 70, 150; C. E. 2).

49. Dr. Gares indicated in her medical notes of March 18, 2008, that Brownlee had indicated she would apply for a waiver. (N.T. 69; C.E. 4).

50. SEPTA's DMMP advises an employee where to apply for a waiver. (N.T. 68, 212; C.E. 5).

51. When specifically told she could seek a waiver, Brownlee expressed that seeking a waiver takes so much time and she sees no point in filing for a waiver. (N.T. 210, 211-12, 266-67).

52. Brownlee did not file for a waiver. (N.T. 211).

53. When Brownlee met with Yoxtheimer in late March 2008, Yoxtheimer told Brownlee about a Cashier position that was due to start April 28, 2008. (N.T. 180, 299).

54. By letter to Brownlee dated March 21, 2008, from Philip Hufnagel, the Deputy Director of Transportation at the depot where Brownlee worked, Hufnagel advised Brownlee that her sick leave would expire on April 21, 2008. (N.T. 89, 91, 179, 213; C.E. 22).

55. In an effort to help Brownlee, Yoxtheimer asked Hufnagel if Brownlee could use vacation from April 21, 2008, until April 28, 2008. (N.T. 113, 214-15, 287).

56. Hufnagel informed Yoxtheimer that Brownlee would not be permitted to use vacation time once her sick leave expired on April 21, 2008. (N.T. 115, 288).

57. Hufnagel told Yoxtheimer that he had spoken with the union and the union agreed that Brownlee could not use vacation time once her sick leave ended. (N.T. 118).

58. Yoxtheimer contacted the union and SEPTA's labor relations department and was told by both that nothing could be done for Brownlee once her sick leave expired. (N.T. 288, 289).

59. Brownlee also contacted the union and was informed by a union representative that Brownlee could not use vacation time once her sick leave expired on April 21, 2008.

(N.T. 182, 209-210, 222-223).

60. Upon the expiration of sick leave, Brownlee was terminated on April 21, 2008. (N.T. 115, 137-38, 185-86; C.E. 22).

61. After her termination, the union filed a grievance on behalf of Brownlee in which the union only contested Hufnagel's calculation of Brownlee's sick time. (N.T. 144, 146, 217-18).

62. The grievance was denied. (N.T. 145).

63. On March 1, 2008, the day after Brownlee was medically disqualified from driving a bus, Brownlee filed for total disability benefits through the Social Security Administration, (hereinafter "SS"). (N.T. 225).

64. Supplementing her SS claim, Brownlee submitted several doctor's reports and statements seeking to have SS find that as of March 19, 2008, she was totally disabled. (R.E. N, O, P, and R).

65. On February 12, 2009, Brownlee's doctor, Dr. Mazzotta, filed with SS a Medical Source Statement-Ambulatory Function which reported that Brownlee had been treated for anxiety, DJD knees, and diabetes for 5 years. (R.E. N).

66. Dr. Mazzotta also reported that Brownlee has both knee and back pain and is limited to both standing and sitting for 30 minutes at one time and for 60 minutes during a workday. (R.E. N)

67. On June 17, 2009, Dr. Thomas W. Murphy, Brownlee's physician/psychologist filed with SS a Medical Source Statement of Ability to do Work-Related Activities (Mental). (R.E. O).

68. Dr. Murphy reported that Brownlee's ability to understand, remember, and carry out instructions are affected by Brownlee's impairment. (R.E. O).

69. Dr. Murphy listed Brownlee's restrictions as "Marked to understand and remember short, simple instruction, Moderate to carry out short, simple instructions, Marked to understand and remembers detailed instructions, Marked to carry out detailed instructions, and Moderate to make judgments on simple work-related decisions." (R.E. O).

70. Dr. Murphy further indicated that Brownlee's ability to respond appropriately to supervision, co-workers, and work pressures was affected. (R.E. O).

71. Dr. Murphy also indicated that Brownlee is panicked if she has to go out in public unaccompanied by a friend or relative. (R.E. O).

72. On June 16, 2008, Dr. Jerry Ginsberg provided SS with a Medical Source Statement of Claimant's ability to perform work-related physical activities. (R.E. P).

73. Dr. Ginsberg indicated that Brownlee has restrictions of standing and walking only one hour a day or less. (R.E. P).

74. In a verified Work History Report filed with SS by Brownlee on April 24, 2008, Brownlee lists that she had been a bank teller from 1996-2000. (R.E. Q).

75. In a Function Report filed with SS by Brownlee, Brownlee represented that since 2005, her conditions affected lifting, squatting, bending, standing, reaching, kneeling, climbing stairs, completing tasks, and concentration. (R.E. R).

76. In another Disability Report submitted to SS, SS was told that Brownlee was fired due to illnesses: high blood pressure, left knee, panic attacks, and diabetes. (R.E. S).

77. In this Disability Report, SS was told that since January 2006, Brownlee has had difficulty standing, walking, and sitting because her left knee gives out and she has panic attacks. (R.E. S).

78. Sometime after August 2008, Brownlee updated the Disability Report that had

been given to SS by saying her condition was worse as of April 1, 2008. (R.E. T).

79. The updated report told SS that Brownlee has problems with her feet and cannot stand or walk for long periods of time and that since April 2008, Brownlee has an additional back problem. (R.E. T).

80. In an August 4, 2008, request to SS for a hearing by an SS ALJ, Brownlee indicated that she is disabled and cannot work due to medical conditions. (R.E. U).

81. After a hearing, the ALJ's findings indicate that Brownlee testified that she has limitations for standing and sitting as a result of a knee injury. (R.E. M).

82. Brownlee also testified in front of SS's ALJ that she had been fired for missing too much work, and due to anxiety and depression. (R.E. M).

83. A vocational expert offered that there were no jobs in the national economy that Brownlee could perform. (R.E. M).

84. SS's ALJ found that Brownlee was unable to perform past work of bus driver or bank teller as the demands of work exceed Brownlee's residual capacity. (R.E. M).

85. The ALJ further found that Brownlee's acquired job skills do not transfer to other occupations within her residual functional capacity and that given Brownlee's age, education, work experience and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that Brownlee can perform. (R.E. M).

86. Based on Brownlee's application filed on March 19, 2008, Brownlee was deemed disabled and supplemental security income was authorized as of March 19, 2008. (R.E. M).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over Brownlee, SEPTA and the subject matter of the complaint under the PHRA.
2. The parties have fully complied with the procedural prerequisites to a Public Hearing.
3. Brownlee is an individual within the meaning of Section 5(a) of the PHRA.
4. SEPTA is an employer within the meaning of Section 4(b) of the PHRA.
5. The complaint filed in this case satisfied the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discriminating against individuals because of an individual's disability.
7. Brownlee has the burden to establish a *prima facie* case by a preponderance of evidence by showing:
    a. That she is a disabled person within the meaning of the PHRA;
    b. That she is a qualified individual with a disability; and
    c. That she suffered an adverse employment decision because of her disability.
8. Brownlee failed to establish a *prima facie* case of discrimination because, by filing for disability benefits with the Social Security Administration, she is estopped from establishing that she was "qualified" for employment with SEPTA.

OPINION

This case arises on a complaint filed by Lisa C. Brownlee (hereinafter "Brownlee"), against SEPTA verified on May 12, 2008, at PHRC Case No. 200706428. In her complaint Brownlee alleged that on April 21, 2008, SEPTA discharged her from her position as a Bus Operator because of her disabilities: diabetes, high blood pressure and panic attacks. Brownlee's claim alleges a violation of section 5 (a) of the Pennsylvania Human Relations Act of October 1955, P.L. 744, as amended, 43 P.S. §§951 et.seq. (hereinafter "PHRA").

On September 2, 2008, Brownlee verified an amended complaint. The amended complaint added an allegation that SEPTA refused to accommodate Brownlee's disabilities by not giving Brownlee another position and terminating Brownlee five days before a Cashier training position was to begin. The amended complaint's added claim also alleges a violation of Section 5 (a) of the PHRA.

Pennsylvania Human Relations Commission (hereinafter"PHRC") staff conducted an investigation and found probable cause to credit Brownlee's allegations. Subsequently, the PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. However, these efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on February 17 and 18, 2010 before Permanent Hearing Examiner Phillip A. Ayers. SEPTA was represented by Danielle Banks, Esquire. PHRC staff attorney Lisa M. Kaplan represented the state's interest in the complaint.

Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. The post-hearing brief on behalf of SEPTA was received on May 5, 2010 and the post-hearing brief on behalf of the State's interest in the complaint was received on May 7, 2010.

A review of Brownlee's amended complaint reveals that the two counts found there are closely related. In effect, the two counts collectively allege that SEPTA terminated her rather than taking measures to facilitate Brownlee staying on as a SEPTA employee after April 21, 2008 until April 28, 2008. As indicated in the Findings of Fact, on March 18, 2008, SEPTA medically disqualified Brownlee from operating a bus once SEPTA learned that Brownlee was taking insulin in an effort to control her diabetes. Once she was medically disqualified, Brownlee was immediately placed on sick leave. Subsequently, on March 21, 2008, Brownlee was notified that her sick leave would expire on April 21, 2008.

While both of the post-hearing briefs of the parties address the March 18, 2008 medical disqualification, Brownlee's Amended Complaint does not allege that removing her as a Bus Operator on March 18, 2008 was discriminatory. Instead, Brownlee's allegations focus on her contention that she was terminated on April 21, 2008, rather than be allowed to, in some way, bridge the gap between April 21, 2008, when her sick leave expired and April 28, 2008, when a Cashier position would be available.

Recognizing that SEPTA takes admirable measures to accommodate employees who become medically disqualified for a position, it is difficult to imagine that SEPTA did not allow Brownlee to use available leave balances, or place her on administrative leave between April 21, 2008 and April 28, 2008. When an employer knows that a position will become vacant in a short period of time, that employer may be required to keep an employee on and offer that position to that employee. *See* Monette v. EDS Corp., 5 AD Cases 1326, 1338 (6th Cir. 1996). Despite the

difficulty of understanding how SEPTA terminated Brownlee rather than allow her to, in some way, bridge this one week gap, there is another significant factor that works to negate Brownlee's entire PHRA claim.

On March 19, 2008, the day after Brownlee was medically disqualified as a Bus Operator, Brownlee filed for Disability Insurance Benefits with the Social Security Administration ("SS"). (R.E. M at p.6) In doing so, Brownlee claimed that she was disabled and medically unable to work. A fundamental conflict exists between seeking substantial social security disability payments by claiming to be unable to work under the Social Security Act and then filing a PHRC claim which requires a Complainant to prove that she is qualified to do a job. To make out a *prima facie* case of disability discrimination a Complainant must show: (1) that she is a disabled person within the meaning of the PHRA; (2) that she is a qualified individual with a disability, meaning that with or without reasonable accommodation, she is able to perform the essential functions of the job; and (3) that she suffered an adverse employment decision because of her disability. See Degroat v. Power Logistics, 118 Fed. Appx. 575 (3rd Cir. 2004). Fundamentally, the second element, establishing that she is a qualified individual, presents a problem for a Complainant who has applied for disability benefits. In effect, on one hand, on March 19, 2008, Brownlee sought SS disability benefits claiming to have been unable to work and, on the other hand, Brownlee claims that she was discriminated against because she was able to work but SEPTA prevented her from being able to begin working as a Cashier on April 28, 2008.

In order to protect the integrity of the adjudicatory process, the doctrine of judicial estoppel has been applied to prevent a litigant from benefiting from asserting inconsistent positions. The doctrine is designed to prevent a litigant from changing positions as it suits their

needs. *See* Ryan Operations G.P.V. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3rd Cir.1995). The basic principle of judicial estoppel is that absent a good explanation, a party should not be allowed to gain an advantage in litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory. (8 Charles A. Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure §4477 (1981).

Clearly, inconsistency arises when a PHRC case implicates a disability claim under the PHRA and a Complainant has also applied for and has been granted SS benefits. This type of fundamental inconsistency is presented by the circumstances in this case. Here, Brownlee's PHRC claim is that she was terminated because of medical conditions and also denied an accommodation that entailed permitting her to, in some way, bridge the gap between the expiration of her sick leave and the point at which a job opening would become available. Brownlee's PHRC claim suggests that Brownlee would have been able to work as a Cashier if only SEPTA would have allowed her to remain a SEPTA employee until April 28, 2008, when the Cashier job began.

A blatant inconsistency arises because, on March 19, 2008, Brownlee applied for and subsequently was granted SS benefits under the theory that she was totally disabled and therefore unable to work after March 19, 2008. The question in this case is what is the proper effect of Brownlee's representations to SS when she applied for disability benefits on her PHRA claim.

In the case of Cleveland v. Policy Management Corp., 526 U.S. 795 (1999), the U.S. Supreme Court analyzed the application of judicial estoppel in cases where such inconsistencies are found. Generally, a unanimous Supreme Court concluded that there is no "inherent conflict" between the Americans with Disabilities Act ("ADA"), and SS because the ADA contemplates the possibility of an employee being qualified with or without reasonable accommodation and

the guidelines governing claims for SS benefits do not. Id at 802-03. Although the U.S. Supreme Court held that no "special negative presumption" should be applied automatically, the Court specifically acknowledged that "nonetheless, in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. Id at 805. The court declared that an ADA complainant who was awarded SSDI benefits should be required to provide a sufficient explanation for the inconsistency. When, like in the present case, a Complainant has asserted total disability to SS, that Complainant may not simply ignore statements made to SS in support of seeking benefits. Instead, a Complainant must offer a "sufficient explanation" to resolve the contradiction. Otherwise, claiming to be "totally disabled" without an explanation negates an essential element of a Complainant's *prima facie* case.

The explanations contemplated by Cleveland must demonstrate that the representations to SS leave room for the possibility that the Complainant is able to meet the essential demands of the job to which a Complainant claims a right. Importantly, the Third Circuit has made clear that the required explanation is not satisfied by simply pointing out differences between a claim for benefits to SS and a claim of disability under a civil rights statute. Motley v N.J. State Police, 196 F.3d, 160, 165 (3rd Cir. 1999).

Turning to the facts and circumstances of Brownlee's case, as a threshold matter, we find that Brownlee's representations to SS that she was totally disabled are manifestly inconsistent with her claiming that she was qualified for the open Cashier position.

In the collective unambiguous and seemingly informed documentation submitted in support of Brownlee's application for SS benefits, the clear representation was made that Brownlee became unable to work because of disabling conditions as of March 19, 2008. The documentation submitted to SS, in effect, represented that Brownlee was rendered virtually

incapacitated with pervasive limitations on her ability to perform the most basic tasks. The documentation Brownlee submitted to SS regarding the severity of her disabilities and the resultant limitations come from medical professionals with direct knowledge of Brownlee's conditions. Consistently, Brownlee and her treating physicians made clear to SS that her various medical conditions caused her to be unable to work and rendered her totally disabled.

Consistent with the documentation submitted, SS determined that Brownlee was permanently and totally disabled and therefore entitled to SS benefits. Indeed, in determining that Brownlee was disabled since March 19, 2008, the SS declared, "considering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant can perform." (R.E. M) When the opportunity was extended to Brownlee to, in effect, explain the inconsistency, all Brownlee could offer was, "They said I couldn't work, so what else was I supposed to do--go on welfare and take care of two children and a mortgage and have a house on welfare?" (N.T. 243-44). Of course, this assertion utterly fails to reconcile Brownlee's assertions of being totally disabled she made to SS with the requirement, to establish that she was qualified to work as a SEPTA Cashier.

In this case, Brownlee presented no evidence regarding how an accommodation of the medical conditions she told SS rendered her totally disabled might enable her to perform the essential functions of the Cashier position. Instead, the accommodation Brownlee claims she was denied has no direct relationship to the actual tasks associated with the Cashier position. The alleged failure to accommodate that Brownlee submits concerns SEPTA's not keeping her on as an employee after her sick leave expired. Brownlee made no effort to establish that an accommodation of her medical conditions would have allowed her to perform the essential

functions of a Cashier. Accordingly, Brownlee has not adequately explained why she should not be judicially estopped from claiming she was qualified to work for SEPTA in any capacity after March 19, 2008.

Because Brownlee is estopped from establishing that after March18,2008, she was "qualified" for employment with SEPTA, Brownlee failed to establish a *prima facie* case. The extensive assertions made to SS indicating an inability to work showed that Brownlee was not "qualified". Accordingly, judgment should be entered for SEPTA and Brownlee's PHRC claim dismissed.

COMMONWEALTH OF PENSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LISA C. BROWNLEE,	:	
Complainant	:	
	:	
v.	:	**PHRC CASE NO. 200706428**
	:	**EEOC CHARGE NO. 17F200862073**
SEPTA,	:	
Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Facts, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELAITONS COMMISSION

October 6, 2010
Date

By: Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LISA C. BROWNLEE,	:	
Complainant	:	
	:	
v.	:	**PHRC CASE NO. 200706428**
	:	**EEOC CHARGE NO. 17F200862073**
SEPTA,	:	
Respondent		

FINAL ORDER

AND NOW, this 26th day of October, 2010, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Facts, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Findings of Facts, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

that the complaint in this case be, and the same hereby is, dismissed.

By: _____
Stephen A. Glassman,
Chairperson

Attest: _____
Dr. Daniel D. Yun, Assistant Secretary