

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL HAMMEL,

Plaintiff,

v.

EAU GALLE CHEESE FACTORY,

Defendant.

OPINION and ORDER

02-C-0405-C

In this civil action, plaintiff Paul Hammel alleged that defendant Eau Galle Cheese Factory had terminated him because of his blindness, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Before trial, I granted plaintiff's motion for summary judgment in part, finding that plaintiff was an individual with a disability of legal blindness, that defendant was aware of plaintiff's disability and that defendant fired plaintiff because of his disability. I found also that no reasonable jury could find in favor of defendant on its affirmative defense that plaintiff posed a direct threat at the time he was terminated. The only issue left for trial was that of plaintiff's qualifications for the job of laborer at the cheese factory. Following trial, I entered an opinion and order in which I found that plaintiff was not a qualified individual because he was not capable of performing

the essential functions of his job, with or without a reasonable accommodation. I found that it was not possible to know from the evidence to what extent plaintiff's inability to perform properly was caused by his blindness and to what extent by his unwillingness to accept direction and his lack of motivation but that it was not necessary to sort out the contributing factors. In combination, they prevented plaintiff from performing the cheese factory job and plaintiff's expert's suggested accommodations would not have enabled him to do so.

Objecting to the decision, plaintiff has filed a timely motion to alter the judgment or in the alternative for a new trial, pursuant to Fed. R. Civ. P. 52 and 59. He argues that it was error for the court to find that he was not a qualified individual. He contends that the court should have granted his motion for a judgment as a matter of law at the conclusion of his case-in-chief because he proved the elements of his claim: (1) he had years of experience in general laborer positions and was qualified in terms of training and experience for his position with defendant; (2) the evidence he presented established that defendant could have implemented reasonable accommodations that would have helped him perform capably; and (3) defendant never told him he was performing inadequately and was in danger of losing his job and never initiated any discussion with him about possible accommodations.

The evidence at the conclusion of plaintiff's case was not as clear cut as plaintiff makes it out to be. A significant question remained about his ability to perform the essential functions of the cheese factory job. Defendant believed that he possessed the appropriate

educational background, employment experience and skills; otherwise, it would not have hired him. What was unclear was the extent to which he could perform the essential tasks he was hired to perform. Plaintiff's evidence did not resolve that question. There was testimony that plaintiff had bumped into carts, failed to stack the rounds of cheese on the carts properly, failed to turn the rounds as required and performed some tasks too slowly to keep up with production demands. I was not persuaded at the conclusion of plaintiff's case that he was entitled to judgment as a matter of law and I have not changed that opinion in light of plaintiff's motion to amend the judgment.

As a second ground for the motion to amend or alter the judgment, plaintiff argues that the court erred in considering other reasons that defendant may have had for firing him rather than focusing on whether his *disability* prevented him from performing adequately. Plaintiff says that the court found that he was not a qualified individual under the Americans with Disabilities Act because his bad attitude prevented him from being able to perform the essential functions of his job. That is not an accurate characterization of the finding. It was that it was not possible to sort out the causes for plaintiff's inability to perform properly and that it was not necessary to do so because "[e]ven if plaintiff had been physically capable of performing the essential tasks of his job, he was not a qualified individual under the ADA because of his unwillingness to make the adaptations, take the care or exert the effort necessary to allow him to perform the essential elements of the job." June 26 Order and Op.,

dkt. #78, at 2.

Not surprisingly, plaintiff places great emphasis on the court's alleged error in considering his lack of motivation and unwillingness to accept instruction in finding him unqualified to perform the essential functions of the job. Plaintiff cites a number of cases in which courts have focused only on the plaintiff's physical or mental capability to perform a particular job and have not considered whether the plaintiff has performance problems. However, those cases offer no assistance because they do not include any discussion of the interplay of disability and lack of motivation. Plaintiff's case is unusual, if not unique. In the vast majority of Americans with Disabilities cases, the issue of lack of motivation or willingness to accept instruction and criticism never arises and the only question is whether the plaintiff's physical or mental disabilities prevent him from performing the essential duties of the job with or without reasonable accommodation. In plaintiff's case, however, the employer was dealing with an employee who not only had severe vision problems but lacked motivation to learn the routine of his job, to take steps to accommodate his vision problems and to use care in working. What his employer saw was an employee who ran a pallet of cheese rounds into the wall, dropped rounds of cheese onto the table tops, used the cheese grinder in an unsafe manner, could not be counted on to trim the cheese rounds carefully or turn and stack the rounds properly, bumped into the racks of cheese on a frequent basis and had many near-misses with his coworkers as they walked around the make

room. When he failed to improve his work performance in response to suggestions from his coworkers, defendant concluded that his blindness disqualified him from the position of general laborer. Defendant might have been wrong about its conclusion; an equal or even bigger reason may have been plaintiff's attitude. (Plaintiff's work attitude may have been the result of mental and emotional problems that disabled him from holding a long term job. From the present record there is no way of knowing that, although plaintiff's work history suggests that it may be true.) Whether defendant made an accurate evaluation of the causes of plaintiff's inability to perform his job does not matter. In either case, plaintiff was not qualified for the position.

In the June 26 opinion and order, I agreed with plaintiff that defendant had failed to carry out its duty to initiate discussions with plaintiff about possible accommodations it could make to ease plaintiff's difficulties. Certainly defendant would have a stronger position in this lawsuit had its manager talked with plaintiff about his vision problems and consulted with someone knowledgeable about blind workers in a factory setting. At the least, this might have given defendant a clearer understanding of the reasons for plaintiff's poor performance, that is, what part was attributable to his vision problems and what part was caused by his attitude. However, defendant's failure to engage in the accommodation process does not require a finding in plaintiff's favor unless plaintiff can show that accommodations existed that would have enabled him to perform his job tasks adequately.

Plaintiff had not made that showing. His expert identified only two steps that defendant could have taken, along with several adaptive steps that *plaintiff* could have taken, none of which involved any special equipment or changes in factory procedures. Plaintiff spent eight to nine months at BLIND, Inc., a rehabilitation center, where he was taught techniques to compensate for his loss of vision, and spent time at both DAC and Ability Building Center, two other programs that worked with persons with disabilities. He has had many opportunities to learn adaptive measures. Defendant never prevented him from making use of the measures he had learned. At trial, plaintiff noted, for example, that when he had worked at Ralston-Purina, he had worn a baseball cap to protect his head from bumping. Tr. Trans. I-A-77. He could have worn the same protective headgear at the cheese factory to avoid hitting his head against a cheese rack.

Plaintiff argues that the holding in this case will allow employers to avoid discussing possible accommodations for disabled employees because the employers can say that the employee had such a bad attitude that no reasonable accommodation would have worked. Plaintiff's fears are overblown. An employer cannot avoid liability simply by saying that an employee had such a bad attitude that no reasonable accommodation was possible. At a minimum, the employer has to prove that the employee did have a bad attitude, tie it to a particular accommodation and show why that accommodation would not have worked in light of the employee's attitude.

The steps that plaintiff's expert identified for defendant to take were directed toward the stamping process and the presence of hoses on the floor. Defendant had responded to the stamping problems by relieving plaintiff of this task and plaintiff's expert acknowledged that plaintiff could adapt to the hose problem by shuffling as he walked. In this case, I cannot conclude that a "reasonable accommodation" includes those actions that the employee himself could have taken to improve his performance.

Nothing in plaintiff's motion for alteration of the judgment persuades me that the judgment should be amended in any respect. That motion will be denied.

In support of the motion for a new trial, plaintiff argues that once the court had decided his motion for summary judgment and held that defendant terminated him because of his blindness, it was prejudicial error to allow defendant to present evidence about his reckless behavior, refusal to follow job directions and bad attitude. This was particularly true, plaintiff maintains, after the court refused to reverse its decision on summary judgment in response to defendant's motion for reconsideration filed just before trial began.

This argument is a variation of the one that plaintiff advanced in support of its motion for alteration or amendment of the judgment. It rests on plaintiff's argument that a court is limited to considering only disability when evaluating an employee's qualifications to perform in the work setting. As I have explained, I am not persuaded either that an employer is limited in this way or that an employer is required to sort out the precise causes

of an employee's inadequate performance. (This does not mean that an employer is not required to initiate discussions with an employee about a disability and implement reasonable accommodations for the employee once the employee makes the employer aware of a disability.) It was not unfair prejudice to plaintiff to allow defendant to introduce evidence of plaintiff's carelessness, refusal to take instruction and apparent lack of motivation to perform his work properly. It is true that the evidence was not relevant to defendant's decision to fire plaintiff because that issue had been decided, but it was relevant to plaintiff's qualifications to perform the essential tasks of his job, which was the issue left open for trial.

Plaintiff argues that the court erred in allowing defendant to introduce evidence that plaintiff had received \$5,000 from his family for providing care for his father. Plaintiff objects to any consideration of this evidence. He alleges that defendant's counsel acted improperly in persuading plaintiff's brother to send her a copy of the letter he wrote plaintiff at the time he sent the money and that she failed to disclose the document to plaintiff in response to plaintiff's Fourth Request for Production of Documents, served on defendant on April 19, 2001. Defendant's counsel denies that she did anything improper in securing the letter but does not deny that it was covered by the request for production. Instead, she argues that the evidence was used for impeachment only and therefore, she did not have to produce it in advance of trial and, moreover, admission of the evidence was not prejudicial

to plaintiff.

It appears from defendant's counsel's contemporaneous notes that she was forthright in her discussions with plaintiff's brother. He may have misunderstood her position but if so, it does not seem to have been as a result of any misrepresentations that she made to him. As to the letter, defendant was under an obligation to turn it over if it was covered by the request for production of documents, even if she intended to use it solely for impeachment purposes. Although Fed. R. Civ. P. 26(a)(1) and (3) exempts materials to be used solely for impeachment purposes from initial and pretrial disclosures, there is no similar exemption in Fed. R. Civ. P. 34, which covers requests for the production of documents.

Plaintiff asks the court to sanction defendant for its action in introducing the letter after withholding it from plaintiff. This request will be denied for two reasons. First, plaintiff's counsel was given an opportunity to advise the court before the end of trial if he could find the request for production that covered the letter; he did not do so. Second, the letter had no effect on the outcome of the trial. Plaintiff's credibility would have been badly damaged without the introduction of the letter, given the number of instances in which defendant was able to show that he had been less than candid about important matters, such as his prior work history.

I note however, that plaintiff is in a difficult position to assert undue surprise when he was the one who received the gift from his family. Had he told the truth when he was

asked about it, defendant would have had no basis upon which to introduce the letter to the contrary.

Plaintiff contends that he is entitled to a new trial because the court erred in limiting his expert witness's testimony. The witness's testimony was limited to the opinions he had included in the report turned over to defendant in advance of trial and in an affidavit he had prepared three months before trial in opposition to defendant's motion for summary judgment. This was not an error; it was an appropriate response to plaintiff's expert's failure to keep defendant apprised of the changes in his opinions. The expert was not allowed to testify about what stereotypes defendant might have held about blind persons because his testimony was based upon the stereotypes that persons in general have about blind persons. Such evidence would not have been relevant to determining what defendant thought about plaintiff.

Finally, plaintiff argues that the court erred in allowing Michael Berger to testify about plaintiff's work experience immediately prior to his employment with defendant. Although I do not agree that it was error to allow him to testify for impeachment purposes even if defendant did not supply his name to plaintiff before trial, his testimony did not affect the outcome of the case. As the June 26 order indicates, plaintiff's prior experience at the lumber yard served merely to provide support for defendant's assessment of his abilities. It was not of any independent probative value in determining whether plaintiff had

shown that he was qualified to perform the essential tasks of the job of general laborer.

In summary, I conclude that plaintiff has failed to show that he is entitled to a new trial.

ORDER

IT IS ORDERED that plaintiff Paul Hammel's motion for alteration of the June 27, 2003 judgment or, in the alternative, for a new trial is DENIED.

Entered this 27th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge