IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL HAMMEL,

OPINION and ORDER

Plaintiff,

02-C-0405-C

v.

EAU GALLE CHEESE FACTORY,

Defendant.

- -

This civil action for injunctive, declaratory and monetary relief was tried to the court on plaintiff's claim that defendant terminated him because of his disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The primary issue at trial was whether plaintiff was a qualified individual under the ADA, that is, whether he was an individual with a disability who could perform the essential functions of the job of a general laborer in a cheese factory, with or without reasonable accommodation, § 12111(8), but the parties adduced evidence relevant to damages as well.

The question of qualification is complicated by the fact that it is not clear how much of the difficulty plaintiff had in performing the essential functions of his job was caused by

his physical disability and how much by other factors, such as his apparent lack of interest in learning and performing the essential functions. I conclude that it is not necessary to sort out the separate causes. Even 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. I conclude, therefore, that defendant did not discriminate against plaintiff by firing him because it believed his disability prevented him from performing his job. I conclude also that although defendant failed to carry out its obligation to discuss possible work accommodations with plaintiff, plaintiff failed to show that there were any accommodations defendant could have made that would have enabled him to perform adequately. Without such a showing, defendant is not liable for its failure to broach the issue of accommodations despite its knowledge of plaintiff's disability.

From the record and from the evidence adduced at trial, I find the following facts.

FACTS

Plaintiff Paul Hammel was born in 1950. When he was seven, he lost an eye to congenital glaucoma. He adjusted to this loss: he graduated from high school and worked for a number of years as a construction worker and as a pipefitter. Around 1990, he noticed some loss of vision in his remaining eye, which he attributed to needing new glasses, but was

actually the recurrence of his glaucoma. This time, surgery stopped the progression of the disease but left him with only a very narrow field of vision in the central portion of his eye. He is considered legally blind for the purpose of receiving Social Security disability benefits. Unlike persons with other kinds of disabilities, persons who are legally blind remain eligible for disability benefits even if they engage in substantial gainful employment, provided that they do not earn more than the maximum allowed, which in 2003 is $1,330.00 a month. Plaintiff would have earned more than the allowable maximum had he worked for defendant for a month.

When plaintiff had to stop working as a pipefitter in 1991, he was awarded a disability pension from the pipefitters' union. This pension would cease if he lost his Social Security disability benefits.

Since 1991, plaintiff has worked as a landscaper, home health care provider and remodeler. In 1995, he spent eight to nine months at BLIND, Inc., a rehabilitation center, learning techniques to compensate for his loss of vision. The table below shows his work history from 1992 to date.

1/92-5/93	16 months	No work or vocational efforts
5/93-2/94	9 months	Wabasha County DAC * (PART TIME)
2/94-4/95	14 months	No work or vocational efforts
4/95-12/95	8 months	BLIND, Inc. - vocational program *

1/96-7/96	6 months	Application for BEP benefits withdrawn due to personal life issues	
7/96-10/97	15 months	No work or vocational efforts	
10/97	1 month	Interspace Simulation	(PART TIME)
11/15/97-11/4/98	12 months	Sears - stocker through Ability Building Center * (Terminated for performance problems)	(PART TIME)
11/4/98-4/23/99	6 months	No work or vocational efforts	
4/23/99-10/27/99	6 months	Ability Building Center * (direct employee)	(FULL TIME)
11/99-1/8/00	2 months	Schlosser Lumber	(FULL TIME)
1/8/00-1/27/00	3 weeks	Eau Galle Cheese	(FULL TIME)
2-3/00	2 months	Steve Schlosser	(PART TIME)
4/00-8/01	16 months	No work history	
8/01-12/01	4 months	Hans Peter - Lake City (not verified)	(PART TIME)
12/01-6/03	18 months	No work or vocational efforts	

* BLIND, Inc., DAC and the Ability Building Center are programs for helping person with impairments improve their vocational skills or obtain jobs.

During some of the periods shown as "no work or vocational efforts," plaintiff worked odd jobs for which he was paid cash or reduced rent that he did not report on his

income tax returns.

Plaintiff applied for work as a general laborer with defendant Eau Galle Cheese Factory in Durand, Wisconsin, a maker of hard Italian cheese. He dropped off an application in late December 1999 or early January 2000, and was interviewed and hired a few days later. Either at the time he left his application or during his interview, he told Ron Hemmy, defendant's business manager, that he had restricted vision in one eye and no vision at all in the other. Before Hemmy hired plaintiff, he checked with defendant's owner, John Buhlman, and two of the three supervisors in the factory to see whether they would have any concern about working with a visually impaired employee. All of them were willing to give it a try. Hemmy told plaintiff he wold have a probationary period of 90 days. He gave plaintiff a check list of his duties, described their general nature and asked John Anibas, a supervisor, to help plaintiff become acquainted with the work. Anibas worked alongside plaintiff. He and plaintiff's co-workers helped show plaintiff how to perform the essential duties of a general laborer in a cheese factory.

Defendant employs about 25 people, the majority of whom are general laborers. Their duties include work in both the "make room" and the "brine room." In the make room, a drain table runs the width of the room. The employees stand at the table, a few feet apart from each other, filling round metal forms with handfuls of cheese curds they take out of the whey in the drain table. (A "cheesemaker" comes to work shortly after midnight and

begins the process in which the milk separates into curds and whey.) Running at right angles to the drain table are press racks. As the employees fill each metal form, they walk it back to the nearest press rack, stack it and repeat the procedure until the racks are full. At that point, they pull a press lever to squeeze excess moisture out of the forms. Next, the employees remove the pressed forms from the racks, grab a clean form, take it and the filled one to a flat topped work table located behind the press racks, where they set down both forms, trim the rind on the filled form, turn the cheese out, lay cheesecloth over the new form and flip the cheese into it. At some point, the newly filled forms are placed on a pallet that one employee takes to the brine room for further processing, sometimes with the help of a hydraulic or motorized pallet jack. Then the employees clean up the make room and prepare to start the process all over again for the next of the 10 to 11 batches of cheese they produce each work day. All of their work takes place in a relatively large, open room in which the employees are moving quickly and almost constantly from drain table to press rack and back and from press rack to work table and doing so in close proximity to one another.

In the brine room, an employee soaks the cheeses in brine, flips and salts them and then allows them to dry. When they are completely dry, he wraps them in shrink wrap and places them on pallets. At some point while the cheese is in the brine room, an employee stamps each wheel with the date and batch number.

Because all of the supervisors work alongside the general laborers in the plant, they

are in a position to observe each employee's work performance. They are readily available to listen to any complaints the employees have about each other. Both Buhlman, the owner, and Hemmy, the business manager, spend most of their time in their offices, but Hemmy makes it a practice to walk the factory floor at least once a day.

John Anibas supervised the brine room. He noticed that when plaintiff was supposed to turn the cheese rounds in the brine, he failed to turn all of them. Anibas told plaintiff about it the next morning but plaintiff still missed some. Anibas noticed that plaintiff had difficulty placing dried cheese wheels on the pallet correctly and did not always stamp each cheese as he was supposed to. Also, plaintiff did not keep the stacks of cheese wheels level when it was necessary to do so. Anibas told plaintiff about the stamping problem and about his not stacking the cheese wheels properly and reported the problems to Hemmy. Anibas never told plaintiff he was at risk of losing his job if his performance did not improve, although he believed that plaintiff worked too slowly at his tasks to keep up with the speed of cheese production and that he talked on the telephone too much. Anibas talked to plaintiff about his excessive use of the telephone. Anibas decided that plaintiff would be more successful in the make room, so he scheduled him to work there on a regular basis, despite the fact that defendant's practice was to rotate the general laborers between make room and brine room.

Doug Smith was a supervisor in the make room. He never observed plaintiff not

doing his job properly and never told him that he was doing it improperly. However, he did observe plaintiff's job performance decline steadily and his attitude begin to sour. In Smith's view, plaintiff acted as if he did not care whether he was there or not. He walked away from his post whenever he wanted to go outside for a cigarette. When Smith told him to "knock it off," plaintiff responded by saying to Smith in an offensive tone of voice, "Here I am, Dougie, Dougie, what do you want me to do now?" At that time, Smith considered terminating plaintiff, but did not. Smith told plaintiff that he could not be leaving his post all the time and that he had to use the telephone less often. After that, plaintiff never used the same offensive tone of voice to Smith. However, he continued to take unauthorized cigarette breaks.

Dan Simpson supervised plaintiff in the make room. He thought plaintiff seemed eager to work during his first week but seemed to lose interest during the second week, when he spent more time talking with his co-workers and taking breaks than doing his job. Simpson observed him slamming cheese rounds down on the work table where they were transferred to the cheesecloth-lined wheels, posing a risk to other workers who were at the same table. The wheels weigh about 30 pounds or more and could inflict injury if they landed on someone's hand or foot.

Simpson observed plaintiff hit his head on the press rack a couple of times. Plaintiff made a point of showing Simpson the bruises on his legs, presumably from bumping into

things. On several occasions, Simpson saw that plaintiff put his hands on top of the grinding machine when he was using it to grind discarded cheese rinds and told him not to, but plaintiff never stopped. Defendant's owner, John Buhlman, saw plaintiff putting his hands on top and told Simpson not to let plaintiff operate the grinder any more. When Simpson told plaintiff he could no longer operate the grinder, plaintiff acted disgusted with Simpson.

Robert Pelke works for defendant as a cheesemaker. He rented housing to plaintiff and his wife. He was asked whether he would have any concerns if defendant hired plaintiff. and said he would not, although he does not like the idea of working with a person for whom he is a landlord. He thought that plaintiff worked hard and had a good attitude during the first week but that his attitude changed during the second week. Instead of looking for ways to help, he spent his time on the phone, going outside for cigarette breaks or chatting with other employees. Pelke thought that plaintiff tended to disappear when he was needed, that he ran into other people and equipment and that he acted reckless, especially when he was working with the trimming knife. Pelke talked to Anibas about what Pelke viewed as plaintiff's recklessness and carelessness. When plaintiff was terminated, Pelke assumed it was for his carelessness and bad attitude.

Joseph Sabelko is a general laborer. He showed plaintiff how to perform certain tasks, such as trimming cheese and filling the hoops. When Sabelko tried to tell plaintiff how to do something, such as trimming cheese, plaintiff would turn away and refuse either to listen

or to change his procedure. Sabelko worked closely with plaintiff and was often bumped by him, although Sabelko was never hurt.

Steven Steller worked with plaintiff in the make room when Steller was not involved in cheesemaker duties. He thought plaintiff's work ethic seemed to go down hill after his first week. Plaintiff was careless when he brought the cheese wheels to the work tables and tended to throw them down on the table before turning them. Steller saw plaintiff bump into the press rack and observed him drive the pallet into the wall, causing hoops of cheese to fall off. He thought that plaintiff turned the cheese well during the first week and does not think that his subsequent carelessness was related to his visual impairment. He heard other employees complain about plaintiff and his performance and the risks he posed.

No one asked plaintiff whether there were any changes defendant could make that would help plaintiff work more effectively. Plaintiff never asked for any changes or brought up the subject. No one told plaintiff that his overall performance was substandard, that there were concerns about his vision or that his work ethic and attitude were problems. No one told him that he was at risk of losing his job for any reason.

On January 25 or 26, 2000, Buhlman, Hemmy and the three supervisors (Simpson, Smith and Anibas) met to discuss their concerns about plaintiff. All agreed that he should be terminated. On January 27, 2000, Hemmy called plaintiff into his office and told him that the supervisors had reported that plaintiff's vision impairment interfered "to some

extent" with his work and caused them concern for his safety and the safety of his co-workers. At some later time, Hemmy told plaintiff's wife that plaintiff had been terminated because of safety concerns. In a memo dated February 3, 2000, Hemmy wrote that plaintiff had been terminated for "non disciplinary reasons."

Richard Davis is an assistant director for employment programs at BLIND, Inc., a rehabilitation facility in Minneapolis, Minnesota. His job involves helping visually impaired persons find jobs suited to their skills, looking for job opportunities for clients, talking to potential employers about jobs, placing persons in jobs and then following up the employee's job performance. He never saw plaintiff at work at the defendant cheese factory, but visited the factory twice and prepared a videotape of its operations.

Defendant never consulted a vocational specialist about ways of accommodating plaintiff's vision problems. Had it called on Davis, he would have talked with both parties, found out what problems they were having and then tried to build a common level of understanding. As accommodations, he would have suggested that plaintiff not use the power pallet until he became familiar with its use and the layout of the plant. He would have suggested to plaintiff that he put his hands in front of him as he familiarized himself with the press rack, so as to avoid bumping his head or shins on the rack. He would have recommended to plaintiff that he call out something like, "Behind you," to avoid bumping into his co-workers, that he run his hands up and down the stacks of cheese wheels to make

sure that they were in proper order and that, when he was turning a cheese wheel, place his right hand on top of the wheel and his left hand on the bottom and then flip the wheel. That way, he would know when his hands were reversed that the cheese wheel was upside down.

Davis would have suggested to defendant that a supervisor or co-worker check on plaintiff's stamping and teach him how to hold the stamp to make sure that it printed, that the factory not leave hoses out in the walkways or, if it did, announce the fact, and that plaintiff should have been encouraged to slow down when walking so as to avoid bumping into people. He believes that these were accommodations that would have eliminated plaintiff's work problems. Davis believed that plaintiff's job with defendant was well within his abilities and that it was a safe working environment for him.

When plaintiff filled out his application for defendant, he did not disclose all of the jobs he had held during the preceding 23 years. Instead, he summarized his work history to make it appear that he had held just four jobs and that he had been employed consistently since March 1977. For example, he listed Fisk Enterprises as his employer for the period June 1993 through September 1997. In fact, as he testified, this was a mistake; he had worked for Fisk from 1996 to 1997 only. He did not list the job at Schlosser Lumber that he left in December 1999 after being criticized for not working and for failing to follow directions. He omitted the period during which he was in an addiction program; he did not

indicate that his job at Sears had been part-time only; and he listed his job at Ability Building Center as lasting eleven months when he had worked there only six months.

Plaintiff testified that from November 2001 to July 2002, he had lived with his parents and helped to take care of his father and received no compensation for this work. He did not mention that his brother had written him a check for $5000 as a gift for taking care of his father.

Michael Berger was plaintiff's supervisor when plaintiff worked at Schlosser Lumber shortly before taking the job with defendant. He found it difficult to work with plaintiff. Although he explained to plaintiff a number of times what he was doing wrong when he was supposed to pile certain sized boards in certain piles, plaintiff failed to do his work properly. When Berger expressed any criticism, plaintiff's response was to become upset. On one occasion, when Berger told plaintiff he had not done the sorting correctly, plaintiff pulled out his false eye, showed it to Berger and told him, "You can't fire me, I'm disabled. I'll sue you." On the last day that plaintiff worked for Schlosser Lumber, he stood around and refused to do any work. Berger told him to get started; plaintiff unleashed a string of expletives and walked off the job.

OPINION

The Americans with Disabilities Act prohibits employment discrimination against a

qualified individual with a disability because of the disability. 42 U.S.C. § 12112. To prove a violation of the act, a plaintiff must show that he is a person with a disability, that his employer was aware of his disability, that he is a qualified person, capable of performing the essential functions of the job, with or without accommodation, and that his employer fired him because of his disability. Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). In an order entered before trial, addressing the parties' cross motions for summary judgment, I found as a matter of law that plaintiff was an individual with a disability (he is legally blind), that defendant was aware of his disability and that defendant fired plaintiff because of his disability. I left open the question of plaintiff's qualifications for the job. Also, I determined 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.

Days before the trial began, defendant moved for reconsideration of the summary judgment order, arguing that it had been premature for the court to find that plaintiff had been fired because of his disability when numerous factual issues existed with respect to the adequacy of plaintiff's job performance and whether that performance met defendant's legitimate expectations. Defendant asserted that evidence developed after entry of the order on summary judgment would establish that defendant did not base its decision to fire plaintiff on his disability, or at least solely on his disability. Rather, it contended, the decision was based on plaintiff's reckless behavior, refusal to follow job directions and bad

attitude. Defendant asked for an opportunity to prove the real reason for plaintiff's firing or, alternatively, to show that even if discriminatory intent had entered into the decision, defendant would have fired plaintiff regardless of his vision problems. In addition, defendant pointed out that it was plaintiff's obligation to show why there was no inconsistency between his claim that he is a fully qualified individual under the ADA and his receipt of full Social Security disability benefits.

I denied defendant's motion for reconsideration on two grounds. First, it was untimely. The order on the parties' motion for summary judgment was entered on April 15, 2003, but the motion for reconsideration was not filed until June 6, 2003, two working days before the start of trial. Second, the motion rested on evidence that should have been developed before defendant filed its motion for summary judgment. Summary judgment is not a dress rehearsal or practice run; it "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999).

When defendant moved for summary judgment, it failed to show the existence of any dispute about the reasons for plaintiff's termination. The undisputed facts established that defendant fired him because its decision makers believed he could not see well enough to be a safe and productive employee. Defendant's business manager told plaintiff this was why

he was being fired; he told plaintiff's wife that the termination was for safety reasons; and in a letter he wrote concerning plaintiff's eligibility for unemployment benefits, he said it was for "non disciplinary reasons." Defendant's owner testified at his deposition that the "problem" with plaintiff's performance was that he could not see. Although defendant argued that plaintiff's vision was not the real reason he was fired, it proposed no findings of fact to support its argument that plaintiff had a bad attitude or to show that plaintiff's co-workers had ever expressed their concerns about plaintiff's attitude to the decision makers who fired plaintiff.

The evidence at trial painted a more complete picture of plaintiff and of the workplace. First, it showed conclusively that plaintiff had difficulties with work that were not the result of his poor vision but were related to his poor attitude, his carelessness and his unwillingness to accept criticism and take direction. Second, it showed the actual work of the cheese factory and the need for care in the processing of the cheese, both to insure the quality of the final product and to keep the processing operation running smoothly and safely. Third, it showed that the workplace was one in which the supervisors had direct knowledge of the general laborers and their performance because they worked alongside them. This evidence resolved the question I had earlier about the decision makers' knowledge of plaintiff's work deficiencies.

The employment provisions of the ADA protect only "qualified individuals," that is,

individuals with disabilities who are capable of performing the essential functions of the job they hold, with or without a reasonable accommodation. 42 U.S.C. § 12112 and § 12111(8). The mix of plaintiff's poor work ethic and his vision impairment complicated defendant's evaluation of plaintiff's work skills. Defendant was dealing with an employee who might have been physically capable of performing the tasks that make up the job of general laborer in a cheese factory had he been motivated to do so. Without the necessary motivation and willingness to accept instruction and direction, however, he was not capable of performing the essential functions of the job, with or without a reasonable accommodation. The net effect was that plaintiff was not a qualified individual within the terms of the act.

From an employer's standpoint, it makes little difference whether a disabled employee is unable to perform the essential tasks of his job because of a physical or mental disability or is unwilling to do so. In either case, the result is the same. The employee cannot perform the essential elements of his job. In this respect, plaintiff's situation is like that of the plaintiff patrol officer in Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995), who was fired because he failed to monitor his diabetic condition and, probably as a result, experienced a disorienting reaction during which he drove at high rates of speed through residential neighborhoods. In affirming the district court's dismissal of the action, the court of appeals observed that the village had hired Siefken knowing he was diabetic;

"apparently, it believed that Siefken could monitor his condition sufficiently to allow him to perform the duties of a patrol officer"; and it fired him "only when he proved [the village] wrong." Id. at 666. In terminating Siefken, the village relied on his failure to keep himself functional. It is possible that Siefken could not have monitored himself any more closely than he did; not all diabetic reactions are predictable and not all diabetic conditions are controllable, but this was not determinative. Whether Siefken was careless or careful, the fact that the reaction occurred was proof that he was not qualified to perform the duties of a patrol officer.

Siefken demonstrates that it is irrelevant whether an employer terminates an employee because it believes his disability disqualifies him from working safely and efficiently or because it believes that the employee is unwilling to exert the effort needed to perform the tasks despite his impairment. In Siefken's case, it was irrelevant to the village whether his diabetes was uncontrollable or whether he had failed to do whatever was necessary to keep it under control. In either event, Siefken had demonstrated that he was unable to perform his job in a way that met defendant's reasonable expectations. In a similar fashion, it was irrelevant to defendant whether it was plaintiff's vision impairment or his refusal to take the proper care that caused him to bump into his co-workers or the equipment, to run pallets into the wall, to fail to turn and stack the cheese properly or to slam the cheese rounds down on the table. Whatever the cause, plaintiff demonstrated his

inability to perform the essential tasks of his job in a way that met defendant's reasonable expectations.

Plaintiff argues that defendant never gave him a fair chance to show his ability to perform his job properly because it never initiated any interactive discussion about possible accommodations. It is undisputed that plaintiff never asked for any accommodation but, as I noted in the order denying defendant's motion for summary judgment, defendant never told plaintiff he was not meeting its expectations. An employer has an obligation to bring up the matter of accommodations once it knows about an impairment and observes that the impaired employee is having difficulty performing some tasks correctly. Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996) (employee begins accommodation process by informing employer of disability; when employer knows of disability, its "liability is triggered for failure to provide accommodations"). Defendant's failure to open up the subject does not mean that it is liable to plaintiff. Plaintiff must still show that the outcome of the process would have made a difference, that is, that accommodations existed that could have enabled the employee to perform his job safely and effectively. Mays v. Principi, 301 F.3d 866, 870 (7th Cir. 2002). In this case, with two exceptions, the only "accommodations" plaintiff's expert identified relate to adaptive measures that *plaintiff* could have utilized without any discussion with defendant. He could have used his hands to insure that the cheeses were flipped and stacked properly; he could

have called out to other employees that he was behind them; and he could have familiarized himself with the press rack by holding out his hands in front of him.

The only suggested accommodations that relate to defendant deal with the hose on the floor and the stamping process. Plaintiff's expert testified that a hose on the floor could be a danger to any employee, sighted or not, and suggested that whenever a hose was left on the floor, an employee should call out to warn the others. However, he agreed that plaintiff could have avoided the hose by shuffling his feet as he walked. As to the stamping process, the expert's suggestion involves close supervision and direction, at least at first, to teach plaintiff just how to hold the stamp to obtain a clear print on every cheese. It does not address the problem of insuring that every cheese round carries a legible stamp. Given the critical importance of the stamp, it might be necessary for another employee to check each round to make sure that the stamp worked. Courts have been loath to require accommodations that involve the use of another employee to do part of an ADA claimant's job. See, e.g., Peters v. City of Mauston, 311 F.3d 835, 845-46 (7th Cir. 2002) (request for accommodation unreasonable if it requires another person to perform an essential function of job) (citing, inter alia, Hanson v. Henderson, 233 F.3d 521, 523-24 (7th Cir. 2000; Cochrum v. Old Ben Coal Co., 10 F.3d 908, 912 (7th Cir. 1996)). Defendant dealt with the problem by keeping plaintiff in the make room, where stamping was not part of the job. Although that was a unilateral decision and not the result of any discussion between the

parties, it relieved plaintiff of the need to perform one task with which he was having trouble. The fact is that no accommodation would make a difference for an employee unwilling to exercise care, accept instruction or take responsibility for getting his work done properly. Like the plaintiff in Siefken, 65 F.3d 664, plaintiff could have taken responsibility for his disability. He could have used adaptive measures like those his expert described and exercised more care in handling his tasks. The slamming or dropping of the cheese rounds is a good example. It does not require sight or any special accommodation to set an object down on a table carefully. Anyone can assess the top of a table with his body as he stands against it and then lower the object down to that level. Plaintiff sabotaged his own chances because of his refusal to follow directions, shoulder his share of the workload and perform his assigned tasks carefully.

As a good management practice, defendant's business manager or one of plaintiff's direct supervisors should have taken plaintiff aside early in the second week when his work performance began to deteriorate and spoken frankly to him about what he would need to do in order to keep his job. Employees deserve this kind of candor and direction. Defendant's business manager should have told plaintiff exactly why he was being fired rather than try to sugar coat the news. However, neither of these failings make defendant liable to plaintiff under the ADA. To establish such liability, plaintiff must prove that he was qualified to perform the essential functions of the job of general laborer in the cheese

factory, with or without accommodations, but that defendant fired him anyway, simply because of his disability. Plaintiff cannot make this showing. To the contrary, the evidence at trial established that defendant had ample reason for finding that plaintiff lacked the qualifications to perform the essential functions of his job, with or without accommodation. He had trouble keeping up with the production pace; he did not turn or stack the cheese properly; he slammed cheese rounds on the table; he ran the pallet into the wall; he ran into his co-workers at times or bumped them; and he disregarded his supervisors' and co-workers' attempts to instruct him.

Although defendant reached its decision to terminate plaintiff after a relatively short time, plaintiff's prior work history supports defendant's assessment of his work ethic and abilities. Plaintiff's experience at Schlosser Lumber was similar to his experience at the cheese factory. Sears terminated him for performance problems in 1998.

This conclusion makes it unnecessary to consider the damages to which plaintiff would be entitled had he proved that defendant violated the ADA when it terminated him in January 2000. I note however that it is extremely unlikely that plaintiff could have proved any damages of any significance. Not only does his work record show no employment in the previous nine years lasting longer than six months but plaintiff would have become ineligible for both his Social Security and his union disability pension had he continued to work for defendant.

ORDER

IT IS ORDERED that the clerk of court enter judgment in favor of defendant Eau Galle Cheese Factory and against plaintiff Paul Hammel on plaintiff's claim that defendant terminated him in violation of the Americans with Disabilities in Employment Act.

Entered this 26th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge