IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and KEVIN ARMSTRONG, Intervening Plaintiff, v. NORTHWEST AIRLINES, INC., Defendant.	)	No. 00-2916 M1/A

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE FOR NEW TRIAL

Before the Court is Defendant's Motion for Judgment as a Matter of Law or in the Alternative for New Trial, filed on November 12, 2002. Plaintiff Equal Employment Opportunity Commission (the "EEOC") responded in opposition on November 27, 2002.

The Equal Employment Opportunity Commission (the "EEOC") filed suit under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 et seq. (the "ADA"), against Defendant Northwest Airlines ("Northwest") alleging that Defendant failed to hire Mr. Kevin

207

Armstrong because of his disability, insulin-dependent diabetes. A jury trial in this matter took place from October 21-25, 2002, concluding with a verdict in favor of Intervening Plaintiff Kevin Armstrong in the amounts of $20,967.15 back pay and $19,250.00 compensatory damages.

Defendant moves for judgment as a matter or law or in the alternative for new trial pursuant to Rules 50(b) and 59(a) of the Federal Rules of Civil Procedure. Defendant avers that Plaintiffs failed to present sufficient proof that Defendant regarded Armstrong as substantially limited in a major life activity, the Court committed reversible error in its rulings on the admission or exclusion of evidence and that the Defendant's proposed jury instructions and verdict form are proper and in accordance with the applicable law.

For the following reasons, the Court DENIES Defendant's motion.

Discussion

Following a jury verdict, judgment as a matter of law, pursuant to Fed. R. Civ. P. 50, is proper only when there are no facts to support the verdict so that a reasonable jury could not have found for the nonmoving party. More v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1078 (6th Cir. 1999).

Plaintiffs submitted sufficient proof to support their burden of showing that Defendant regarded Mr. Armstrong as substantially limited in the major life activity of working. Plaintiffs presented

deposition testimony of Dr. Kevin O'Connell showing that he believed that Armstrong was always at risk of sudden incapacitation and altered states of consiciousness. Mark Williams, Defendant's human resources official stated through deposition testimony, that at the time Armstrong applied for the position in question, Williams contacted a manager in Memphis and was told that, with the restrictions placed on Armstrong by Dr. O'Connell, there were no jobs available for Armstrong in Memphis. Moreover, Plaintiffs demonstrated that Dr. O'Connell, upon whose recommendation Defendant relied, never actually examined Armstrong. Dr. Myers gave testimony establishing that Dr. O'Connell was mistaken about Armstrong's restrictions and symptoms. Such evidence created a question of fact for the jury to decide whether Defendant regarded Mr. Armstrong as disabled.

Defendant further argues that working is not a major life activity and, therefore, Defendant is entitled to judgment as a matter of law. The Court previously addressed this argument in its Order Denying Defendant's Motion for Summary Judgment entered September 30, 2002. As the Court stated in that order, the Sixth Circuit has determined that working is a major life activity under the ADA. Mahon v. Cromwell, 295 F.3d 585, 590 (6th Cir. 2002).

Accordingly, the Court DENIES Defendant's motion for judgment as a matter of law.

In support of their motion for a new trial, Defendant asserts

that the Court committed harmful error in several of the Court's evidentiary rulings. Defendant asserts that the Court erred in allowing Dr. Myers and Dr. Levin to testify as experts. Defendant also asserts that the Court erred in excluding Dr. O'Connell's expert report; erred in excluding evidence of other medical conditions from which Armstrong suffered; erred in excluding Northwest's interactive process; and erred in excluding evidence of accidents at Northwest caused by employees' lack of attention.

The authority to grant a new trial is almost entirely within the discretion of the trial court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). In Strickland v. Owens Corning, 142 F.3d 353, 357 (6th Cir. 1998), the court explained the procedure a trial court should follow in ruling on a motion for a new trial:

> [I]n ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, the trial court must compare the opposing proofs, weight the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence. It should deny the motion if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable.

For the reasons stated during trial regarding Defendant's motions in limine and for the reasons stated in the EEOC's reply brief, the Court concludes that it did not err in allowing Dr. Myers and Dr. Levin to testify, nor did it err in excluding the expert report of Dr. O'Connell; evidence of Armstrong's other medical

conditions; evidence of Northwest's interactive process; and evidence of other accidents at Northwest Airlines.

Finally, Defendants argue that the Court erred in rejecting Northwest's proposed jury instructions involving Northwest's Safety Protocol; Business Necessity; FAA mandate; Different Safety Standards; ADA Interactive Process; McDonnell-Douglas; and Direct Threat. The Court will briefly address each argument.

Defendant presented no evidence during trial that Defendant relied on a safety protocol to disqualify Mr. Armstrong from the position in question. Therefore, a jury instruction on safety protocol would have been inappropriate.

Similarly, there was no evidence that Defendant had in place a qualifying standard that affected all insulin-dependent diabetics that would trigger the business necessity defense.

Kevin Frommelt, Defendant's manager of safety and regulatory compliance testified at trial that there is no federal regulation applicable to insulin-dependent diabetics in the ESE position; i.e., there is no federal provision that requires Defendant to reject Armstrong. Therefore, a jury instruction on Defendant's federal safety mandate would have been improper.

Defendant also argues that it was entitled to a jury instruction that it is not liable because it refused to adopt the lower safety standards of Northwest Airlink and Airtran. A comparison of the safety standards of the various airlines was not

at issue in this case, nor was there any evidence put on by either party about the safety standards of Airtran or Airlink that would justify such a comparison. Mr. Armstrong's testimony regarding his employment position at those airlines involved the essential functions of the jobs, and had nothing to do with safety standards. Therefore, a jury instruction on those airlines safety standards would have been inappropriate.

Next, Defendant avers that the Court should have included a jury instruction regarding the fact that it had an interactive procedure in place. Reasonable accommodation was not an issue in this case because Mr. Armstrong never requested an accommodation. Therefore, a jury instruction on the interactive process is not appropriate in a case that does not involve the issue of reasonable accommodation.

Defendant argues that the burden-shifting analysis of McDonnell-Douglas v. Green, 411 U.S. 792 (1973) applies to this case. However, the Sixth Circuit has held that when, as in this case, there is direct evidence that the employer's decision was based on the employee's disability, the burden-shifting framework is not appropriate because the basis for the employer's decision "sought to be extracted through application of McDonnell Douglas...is already established." Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1180-81 (6th Cir. 1996).

Defendant also avers that the Court committed harmful error in

failing to include its direct threat jury instruction that states even where the likelihood of an accident is small, a direct threat still exists if the severity and scale of potential harm is significant. The Sixth Circuit has established that a direct threat means there "is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Hamlin v. Charter Township of Flint, 165 F.3d 426, 431 (6th Cir. 1999). In determining if an individual poses a direct threat, the following factors have to be evaluated: "(1) the duration of the risk; (2) the nature and severity of the harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm." Id. Defendant did not tie any proof that accidents at the airports can cause harm to individual employees or others to Armstrong. Defendant's proposed jury instruction would, therefore, circumvent the requirement that an individualized assessment be conducted in determining the risk.

Finally, Defendant argues that the Court erred in rejecting Defendant's proposed "threat to safety" defense. Defendant raised the defense that Armstrong posed a direct threat to the safety of himself and others. The Court concludes that the verdict form appropriately addressed the direct threat defense as defined in the jury instructions.

Accordingly, the Court concludes that it did not commit harmful

error in failing to include Defendant's above-mentioned proposed jury instructions.

For the reasons stated above, the Court DENIES Defendant's motion for judgment as a matter of law or in the alternative for new trial.

So ORDERED this 22 day of Sept., 2003.

JON P. McCALLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 207 in case 2:00-CV-02916 was distributed by fax, mail, or direct printing on September 23, 2003 to the parties listed.

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