

Lukens. He had frequently been disciplined for violating company rules, primarily with respect to failing to report for work, without providing his employer with timely notice of his intention to be absent. Eventually, in 1992, matters had reached a critical stage. It was clear that the defendant had ample grounds for discharging plaintiff at that time but, at the request of plaintiff and his union representative, the defendant agreed to give plaintiff one final chance to mend his ways. The parties entered into a written "last chance" agreement, which provided that any further violation within the next three years would automatically result in immediate discharge.

In October 1994, plaintiff suffered a job-related injury in a fall from a ladder. His injuries included a fractured thumb and post-concussion syndrome. He had also, either as a result of that accident or an aggravation of an earlier injury, experienced back problems. Plaintiff was awarded workers' compensation benefits, and did not return to work at Lukens until December 20, 1994. Because of medical restrictions, plaintiff was assigned light duty.

Plaintiff reported for work, and performed the assigned light duty (apparently, answering the telephone and sweeping up) for two days, December 20th and 21st, 1994. Plaintiff was scheduled to return to work at 7:00 a.m. on December 22nd. In accordance with his usual routine, and fully intending to report for work on that day, plaintiff arose sometime between 4:00 a.m. and 4:30 a.m., had coffee, and engaged in a dice game with a friend

with whom he shared a house. Plaintiff's wife, a registered nurse, was working the night shift, and was not due home until approximately 9:00 a.m.

At some point, either after engaging in the dice contest for some time (as testified by plaintiff on deposition), or immediately upon awakening (as reported to the company's medical personnel later that morning), plaintiff experienced numbness in his arms, and concluded that he would be unable to work that day. It was not until 6:15 a.m. that plaintiff telephoned his supervisor, informing that gentleman that he would not be reporting for work that day, but would go directly to the dispensary at the plant.

Plaintiff did not immediately proceed to the plant. Plaintiff and his brother, and the dice-playing friend, were still at the house when plaintiff's wife returned from her work at about 9:00 a.m. Shortly thereafter, plaintiff's brother drove plaintiff to the plant (according to the brother) or plaintiff drove himself to the plant, accompanied by the brother (according to plaintiff). At the dispensary, plaintiff complained to the doctor in attendance about his arm numbness. The doctor concluded that plaintiff should not work that day. According to the doctor, plaintiff was exhibiting signs of severe anxiety, in addition to the arm numbness. Perhaps more important, the doctor claims to have detected a strong odor of alcohol on plaintiff's breath.

It is undisputed that, in addition to advising plaintiff to report to his own doctor for further examination concerning his

arm numbness, defendant's medical director requested plaintiff to report to the security office for a breathalyzer test-- this in view of the strict company policy against permitting any employee to work if alcohol-impaired.

Plaintiff agreed to take the breathalyzer test but, after leaving the dispensary, changed his mind and visited the union office, to find out if he could be required to take a breathalyzer test. On the theory that, since plaintiff had not been, and would not be, working that day, the union representative advised him that the company could not compel a breathalyzer test. Plaintiff left the premises without submitting to a breathalyzer test. Plaintiff did not return to work the following day, nor did he notify the company of his intention to remain off-duty.

The company took the position that his late phone call on the 22nd, and his failure to provide any notice on December 23rd, constituted violations which triggered the automatic discharge contemplated by the "last chance" agreement. A disciplinary hearing was convened, at the end of which plaintiff was finally discharged.

Defendant argues that plaintiff cannot succeed under the FMLA because his own complaints to the medical director on December 22nd, and the totality of information available to the defendant at the time of the discharge, did not establish a "serious health condition" sufficient to trigger the protection of the FMLA. The interim regulations in effect at the time of plaintiff's discharge defined a "serious health condition" as

... an illness, injury, impairment or physical or mental condition that involves:

- (1) Any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;
- (2) Any period of incapacity requiring absence from work, school or other daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or
- (3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for prenatal care.

... "Continuing treatment by a health care provider" means one or more of the following:

- (1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.
- (2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services ... or ... on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider -- for example, a course of medication or therapy -- to resolve the health condition.
- (3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured....

29 C.F.R. §825.114 (1994).

There is no evidence that plaintiff's arm numbness required continuing treatment or that it resulted in a period of

incapacity of more than three days. Giving plaintiff the benefit of the doubt, however, and assuming that there may be a legitimate dispute of fact as to the existence of a serious health condition, I am nevertheless persuaded that, as a matter of law, plaintiff's FMLA claim fails. The interim regulations state: "It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances." 29 C.F.R. §825.303 (1994). Plaintiff never requested medical leave. More importantly, plaintiff had been returned to light-duty work which he was apparently able to perform for two days at least, and nothing which occurred thereafter would have put the defendant on notice of a condition which would trigger the FMLA. Plaintiff himself has stated that his arm numbness subsided the same day it appeared.

With respect to the Americans With Disabilities Act claim, this case is remarkable for the fact that the principal "disability" now asserted on behalf of plaintiff is an alleged cognitive defect. Plaintiff is dyslexic, apparently, and has always had difficulty reading and writing. Allegedly, he overcame these difficulties primarily through developing an excellent memory. In recent months, however, plaintiff has also sustained memory deficits and has trouble remembering even recent events. For present purposes, it will be assumed that the memory loss is entirely traceable to the October 1994 concussion, although it was first disclosed after this suit was filed. In addition to the cognitive difficulties, plaintiff also, as noted above, sustained

a fractured thumb and back problems.

In order to state a prima facie case under the ADA, plaintiff must show: (1) that he is a disabled person within the meaning of the statute; (2) that he is qualified, with or without reasonable accommodation, to perform the essential functions of his job; and (3) that he was terminated because of his disability. See McNemar v. The Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997). As in a Title VII case, once plaintiff has established his prima facie case, the burden shifts to the defendant, who must proffer a legitimate, nondiscriminatory reason for the adverse employment action. If defendant does so, plaintiff must come forth with evidence that to show that the proffered reason is pretextual. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). This may be accomplished either by discrediting the proffered reason, or by adducing evidence that discrimination was more likely than not a motivating or determinative cause of the employment action. See Fuentes v. Perskie, 32 F.3d 759, 764-65 (3d Cir. 1994).

Plaintiff, however, has failed to establish -- directly or circumstantially -- any causal relationship between his alleged disability and the discharge decision. There can be no doubt that the defendant has advanced valid, non-discriminatory reasons for firing plaintiff: he violated the "last chance" agreement. And plaintiff cannot establish that the stated basis for the disciplinary decision was pretextual. Indeed, on this record, no

rational jury could find discrimination.

The most that can be said is that, but for plaintiff's unique position as vulnerable to immediate discharge because of his earlier infractions, a more sympathetic employer might (at least in the absence of reason to suppose that plaintiff had been drinking) have excused the technical violation of the two-hour requirement for advance notice of prospective absence. But, given the fact that defendant's medical director had informed the defendant that he had detected a strong odor of alcohol (an assertion which the decision-makers had no reason to disbelieve), and given the fact that plaintiff admittedly failed to submit to a breathalyzer test, and given the fact that on an earlier occasion plaintiff had similarly refused to complete a breathalyzer test, no rational jury could conclude that the stated reason for firing plaintiff was a pretext for discrimination. The law does not require that an employer be sympathetic, only that it not engage in unlawful discrimination.

Defendant's motion for summary judgment will therefore be granted. An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL NANOPOULOS	:	CIVIL ACTION
	:	
v.	:	
	:	
LUKENS STEEL COMPANY	:	NO. 96-6483

O R D E R

AND NOW, this day of July, 1997, IT IS ORDERED:

1. Defendant's motion for summary judgment is GRANTED.
2. This action is DISMISSED WITH PREJUDICE.

John P. Fullam, Sr. J.