

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

JAY A. HINNERSHITZ : CIVIL ACTION

v.

ORTEP OF PENNSYLVANIA, INC. : NO. 97-7802  
d/b/a D. J. WITMAN CO. :

O'Neill : December , 1998

MEMORANDUM

Plaintiff Jay A. Hinnershitz alleges that defendant Ortep of Pennsylvania, his employer, violated both the Americans with Disabilities Act (“ADA”), 42 U.S.C.A. §§ 12101-12213 (1995 & Supp. 1998), and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. C.S.A. §§ 951-963 (1991 & Supp. 1998), when it terminated his employment. More specifically, plaintiff claims that he was unlawfully discharged because he is a recovering alcoholic.

This Court has subject matter jurisdiction over plaintiff’s ADA claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over plaintiff’s state law claim pursuant to 28 U.S.C. § 1367(a). Presently before the Court are defendant’s motion for summary judgment and plaintiff’s cross-motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Upon review of the evidence submitted by both parties, I conclude that plaintiff has failed to establish that he was “qualified” to perform the essential functions of his position and, in the alternative, has failed to offer any evidence suggesting that defendant’s articulated reasons for

discharging plaintiff were a pretext for disability discrimination. As a result, I will grant defendant's summary judgment motion and deny as moot the cross-motion submitted by plaintiff.

Defendant is in the business of providing fuel oil and servicing oil burners in the Reading, Pennsylvania area. Plaintiff was hired by defendant in 1987 and eventually rose to the position of oil truck driver. In this capacity plaintiff drove a 13-ton oil truck and made fuel oil deliveries, primarily during the winter season. Subsequently, plaintiff was trained to clean oil burners, and these duties became a part of his employment. When he was not driving oil trucks, he cleaned oil burners located at customer residences and businesses. Plaintiff was employed as a driver/cleaner until his alleged unlawful discharge in August 1996.<sup>1</sup>

Plaintiff is a recovering alcoholic and has a long history of alcohol abuse. However, during the course of plaintiff's employment, defendant never had evidence that plaintiff drove an oil truck under the influence of alcohol or drank alcohol during working hours.

On May 5, 1996, plaintiff approached his supervisor, Ron Trupp, and requested vacation time

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<sup>1</sup> Although plaintiff argues in his response to defendant's motion that he was employed as a burner cleaner and not as a driver at the time of his discharge, he offers no factual support for this contention. Indeed, this contention is expressly contradicted by plaintiff's own statements. Plaintiff, in the statement of material, undisputed facts presented as part of his motion for partial summary judgment, states that "when [plaintiff] was fired, he held the position driver/cleaner." See ¶ 86 of plaintiff's Memorandum in Support of Jay A. Hinnershitz Motion for Partial Summary Judgment. Moreover, plaintiff testified at deposition that he remained classified as an oil truck driver even when cleaning furnaces. He stated that "as a driver doing the cleanup, [he] got paid a driver's wage." See Deposition of Jay A. Hinnershitz, p. 37. He also stated that unlike the service technicians who performed cleanups, as a driver he was not on the service schedule. Id. Furthermore, plaintiff estimates the value of his lost wages by reference to the range of wages paid by defendant to other oil truck drivers. See ¶ 102 of plaintiff's Memorandum in Support of Jay A. Hinnershitz Motion for Partial Summary Judgment.

Plaintiff cannot now create a factual dispute concerning his employment classification by alleging that he did not drive an oil truck after February or March 1996.

in order to complete in-patient treatment at the Caron Foundation, a drug and alcohol rehabilitation center. Plaintiff checked in on the same day and stayed in the facility for the next nineteen (19) days.

Defendant's written substance abuse policy states that an employee may take a voluntary medical leave for the purpose of entering a substance abuse treatment program approved by the company's medical review officer. Under this policy an employee who takes such a voluntary medical leave may return to work provided the employee successfully completes the approved treatment program.

In a letter dated May 6, defendant stated the terms under which it would grant plaintiff a voluntary medical leave. According to this letter, plaintiff's voluntary medical leave was subject to evaluation by defendant's medical review officer, Dr. John Stuhler of Substance Abuse Management, Inc. Since plaintiff's return to work was to be conditioned upon Dr. Stuhler's approval, plaintiff was required to sign a release whereby Dr. Stuhler would receive plaintiff's treatment records. In addition, plaintiff would be subject to drug and/or alcohol screening after his return to work and would be required to complete any ongoing treatment program recommended by the Caron Foundation. As instructed, plaintiff signed this letter to indicate that he understood and accepted these terms.

While at the Caron Foundation, plaintiff was treated by several doctors, including Dr. William Clements and Dr. William Santoro, for detoxification and its accompanying physical symptoms. He also attended sessions with two therapists, Anthony Tomeo and Albert Pohl, each of whom was licensed by the state as a certified addiction counselor.

Before discharging plaintiff from inpatient rehabilitation, the Caron Foundation recommended an out-patient treatment program consisting of: (1) counseling sessions with a

therapist from Caron Counseling and (2) attendance at Alcoholics Anonymous (AA) meetings four times a week for an indefinite period of time. Plaintiff's therapist, Albert Pohl, believed that plaintiff needed both continuing treatment to reinforce the power and scope of his alcoholism and connections with the local recovering community --AA. Plaintiff agreed to follow this treatment program and was discharged on May 24.

Plaintiff attended his first scheduled counseling session on May 28 with Caron Counseling therapist Donald Durand. He told Durand that he did not feel the need for continued counseling and that he would not attend further sessions. Plaintiff stopped attending counseling sessions and did not speak to Durand or to anyone at Caron Counseling until August 4. Plaintiff did not attend any AA meetings after leaving inpatient rehabilitation.

Plaintiff then returned to work on June 4, at which time Ron Trupp insisted that plaintiff sign a return to work agreement based upon the recommendations of Dr. Stuhler. This agreement stated, in relevant part, that plaintiff's continued employment was subject to the completion of an outpatient program consisting of AA meetings four times a week indefinitely and counseling sessions at the Caron Foundation three times a week for three months. Plaintiff signed this agreement but did not inform Trupp that he had already stopped attending counseling sessions and AA meetings.

On or about July 10, Trupp received a letter from Caron Counseling stating that plaintiff had not attended any recommended counseling or AA sessions and that his case would therefore be closed AMA --against medical advice. Trupp then informed plaintiff that he was being terminated for his failure to comply with the treatment program and with his return to work agreement.

On July 23, plaintiff, two union officials, Trupp, and defendant's manager of employee relations Suzanne Burkhardt met to discuss this situation. Defendant maintained that plaintiff

needed to complete the treatment program recommended by the Caron Foundation and approved by Dr. Stuhler. Plaintiff believed that defendant had no right to require that he attend outpatient treatment sessions. As a settlement of the dispute, the parties entered into a letter of agreement in which defendant agreed to reinstate plaintiff in exchange for plaintiff's promise "to complete the recommended outpatient program, including but not limited to AA meetings four times per week indefinitely and counseling sessions at the Caron Foundation three times per week for three months." The agreement also stated that "should [plaintiff] fail to attend any prescribed AA or counseling meetings, his employment will be terminated...." Plaintiff read and executed the agreement on July 31. He returned to work the next day.

On August 4, plaintiff again met with Donald Durand at Caron Counseling. He informed Durand that he did not believe he needed further counseling and wished to have his outpatient treatment program reevaluated. Durand discussed this request with his superiors and subsequently informed plaintiff that Caron Counseling would not change its treatment philosophy to accommodate plaintiff. Caron Counseling then gave plaintiff a therapeutic discharge and recommended that he contact a counselor named William Jeter.

Durand also sent a letter to defendant indicating that plaintiff was receiving a therapeutic discharge and might be able to continue treatment with some other therapist. When Trupp received this letter, he contacted Suzanne Burkhardt. Burkhardt then contacted Durand to determine if a "therapeutic discharge" indicated completion of the treatment program and was informed that it did not. She then asked Dr. Stuhler, defendant's medical review officer, if plaintiff's transfer to William Jeter was consistent with the treatment program originally prescribed. Dr. Stuhler stated that he would need to speak with Durand in order to determine if an alternative treatment program would

be appropriate. Durand agreed to talk with Dr. Stuhler if plaintiff signed a release.

Burkhardt subsequently drafted a release. It authorized Durand to discuss with Dr. Stuhler the circumstances of plaintiff's therapeutic discharge "in order that Dr. Stuhler may determine whether the change in required therapy is suitable to [defendant] as a replacement for the regimen prescribed by the Caron Foundation for purposes of the letter of agreement executed on July 31." Plaintiff refused to sign this release and was subsequently discharged.

#### I.

Summary judgment is appropriate if the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, a court's responsibility is not to resolve disputed issues of fact but to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). The moving party bears the initial burden of identifying those portions of the record which it believes indicate the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party must then point to specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). It must raise "more than a mere scintilla of evidence in its favor" to defeat the summary judgment motion; it must produce evidence on which a jury could reasonably find for the non-moving party. Liberty Lobby, 477 U.S. at 251. Though the non-moving party may not rely upon unsupported allegations or mere suspicions, id., at 248, it is entitled to have all reasonable inferences drawn in its favor. Id., at 255.

#### II.

Plaintiff alleges violations of both the ADA and the PHRA. Since the PHRA utilizes the same analytical framework as that established under the ADA, I will analyze the federal and state

claims together. Kelly v. Drexel University, 907 F. Supp. 864, 871 (E.D. Pa. 1995); Doe v. Kohn Nast & Graf, 862 F. Supp. 1310, 1323 (E.D. Pa. 1994).

The ADA prohibits employers from discriminating against a “qualified individual with a disability.” 42 U.S.C.A. § 12112(a). To analyze a claim for disability discrimination under the ADA, this court must apply the burden-shifting framework first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997). Under that framework the plaintiff has the burden of proving a prima facie case by a preponderance of the evidence. Id. To establish a prima facie case of discriminatory discharge, plaintiff must show that: (1) he is disabled as that term is defined by the ADA; (2) he is qualified, with or without reasonable accommodation, for the position; (3) he was discharged despite those qualifications; and (4) after the termination, the position remained open and the employer sought applicants with the plaintiff’s qualifications. Id. If plaintiff presents sufficient evidence to establish a prima facie case, then defendant must articulate a legitimate, non-discriminatory reason for discharging plaintiff. Id. Finally, if defendant does articulate such a reason, the burden shifts back to plaintiff, who must then prove that defendant’s articulated reason is merely a pretext for discrimination. Id.

The first element of a prima facie case has been established. Though the ADA does not designate any impairment as a disability per se, alcoholism is a condition which can rise to the level of a disability. Under the Act an individual is disabled if that individual has “a physical or mental impairment that substantially limits one or more major life activities,” or has “a record of such impairment,” or is “regarded as having such an impairment.” 42 U.S.C.A. § 12102(2). In the present case it is not disputed that as an alcoholic plaintiff was “regarded as having such an

impairment” by defendant.

Plaintiff, however, fails to establish the second element of his prima facie case --that he was “qualified” to be employed as a driver/cleaner. The ADA defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that individual holds or desires.” 42 U.S.C.A. § 12111(8). Since driving fuel oil trucks was an essential function of plaintiff’s employment position, plaintiff must establish that he was qualified to perform this function. Under Department of Transportation (DOT) regulations, a person is not physically qualified to drive a commercial vehicle, such as a fuel oil truck, if that person has a “current clinical diagnosis of alcoholism.” Qualifications of Drivers, 49 C.F.R. § 391.41(b)(13) (1998). These regulations also state that an employer shall not permit an unqualified individual to drive a commercial vehicle.<sup>2</sup> 49 C.F.R. § 391.11(a). Furthermore, any driver whose ability has been impaired by a physical or mental injury or disease “must be medically examined and certified...as physically qualified to operate a commercial motor vehicle.” 49 C.F.R. § 391.45(c).

Defendant contends that plaintiff needed to attend the prescribed counseling sessions and AA meetings in order to avoid having a “current clinical diagnosis of alcoholism” and points to evidence in support of this contention. One of the doctors who examined plaintiff at the Caron Foundation, Dr. William Clements, testified that, based on his review of plaintiff’s records, plaintiff would still have a current clinical diagnosis of alcoholism at the time of his discharge from inpatient treatment. Dr. Stuhler, who as defendant’s medical review officer was responsible for administering the

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<sup>2</sup> I note that the ADA specifically allows employers to require that an employee comply with DOT regulations regarding alcohol and the illegal use of drugs if that employee is subject to such regulations. 42 U.S.C.A. § 12114(c)(5)(C).

company's drug and alcohol program in compliance with DOT regulations, believed that outpatient treatment was necessary for plaintiff to return to work. Another Caron Foundation physician, Dr. William Santoro, stated that a person who refuses to undergo recommended outpatient therapy following inpatient rehabilitation would have a current clinical diagnosis of alcoholism. Defendant's expert witness, Dr. John Steinberg, testified that plaintiff's decision to ignore the judgment of his treatment professionals and to discontinue his outpatient treatment indicates a current clinical diagnosis of alcoholism. Accordingly, defendant asserts that plaintiff was not "qualified" under DOT regulations and thus cannot establish a prima facie case of disability discrimination.

Defendant also argues that it offered plaintiff a reasonable accommodation: attendance at the recommended counseling sessions and AA meetings. That plaintiff did not desire this accommodation is irrelevant. Under the ADA an employer is obligated to provide an employee with a "reasonable accommodation", not the accommodation the employee requests or prefers. Aka v. Washington Hospital Center, 156 F.3d 1284, 1305 (D.C. Cir. 1998), quoting Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996). When an employee rejects a reasonable accommodation necessary to enable him to perform essential functions of the position held, the employee will not be considered a "qualified individual with a disability." 29 C.F.R. § 1630.9(d) (1998).

Plaintiff offers no contrary evidence on this issue except for his own self-judgment that he did not need to attend counseling or AA meetings. Such evidence is insufficient to create a genuine issue of material fact as to whether plaintiff was "qualified" to be employed as a driver/cleaner. Plaintiff's personal opinion is immaterial to this issue, since DOT regulations require that a medical examiner determine if a person is physically qualified to drive a commercial motor vehicle. See 49 C.F.R. § 391.41(a) (requirement that driver of commercial motor vehicle possess medical examiner's

certificate that driver is physically qualified); 49 C.F.R. § 391.45(c) (drivers impaired by a physical or mental injury or disease “must be medically examined and certified...as physically qualified to operate a commercial motor vehicle.”) Since plaintiff cannot establish that at the time of his discharge he was a “qualified individual with a disability”, defendant is entitled to judgment as a matter of law.

Even if plaintiff could establish each of the elements of his prima facie case, defendant has articulated legitimate, non-discriminatory reasons for plaintiff’s discharge --plaintiff’s violation of defendant’s substance abuse policy and DOT regulations by refusing to complete prescribed outpatient treatment; his refusal to cooperate in efforts to determine if an alternative treatment program would comply with defendant’s substance abuse program and defendant’s obligations under DOT regulations; and his breach of the June 4 return to work agreement and the July 19 settlement agreement. Plaintiff has offered no evidence that defendant’s asserted reasons were a pretext for discrimination.

According to plaintiff, defendant has been unable “to get its story straight” and has offered three different versions of why plaintiff was fired. The evidence, however, does not support this contention. In a letter to plaintiff dated August 19, Ron Trupp explained the reasons for plaintiff’s discharge by summarizing plaintiff’s repeated refusal to attend outpatient treatment, to abide by various agreements with defendant, or to allow defendant to approve an alternative outpatient treatment program. Trupp concluded by stating that: “thus, [plaintiff’s] employment was terminated ... for violation of the company policy with regard to our Drug and Alcohol policy.” Though defendant has subsequently provided more detailed explanations to the Pennsylvania Human

Relations Commission and to this Court, it has not offered new or inconsistent justifications.<sup>3</sup> Despite plaintiff's arguments to the contrary, defendant's subsequent explanations are not evidence of pretext. Indeed, these explanations demonstrate defendant's various efforts to accommodate plaintiff's disability.

As further evidence of pretext, plaintiff asserts that defendant's substance abuse policy contains no written provisions which require an employee to "sign a return to work agreement or to give up his rights to determine the course of his own medical treatment and embark on whatever course the company's Medical Review Officer recommends." Again, the evidence does not support this contention. First, nothing in the record suggests that defendant forced plaintiff to surrender his right to make medical treatment decisions. Plaintiff chose to seek treatment at the Caron Foundation, and it was the outpatient treatment program recommended by that facility, which plaintiff originally agreed to follow, that defendant made a condition of plaintiff's return to work. When plaintiff decided that a new treatment program would be preferable, defendant sought permission to speak with plaintiff's therapists so its medical review officer could determine if this new program was a legitimate alternative. Second, defendant's written drug and alcohol testing policy states that the company's medical review officer must approve the treatment program for which an employee seeks a voluntary medical leave. It further states that "at the conclusion of such treatment program ..., the employee may return to work provided the employee produces documentation of the employee's successful completion of the rehabilitation program...." Under these terms defendant had a right to

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<sup>3</sup> Defendant stated in its response to the PHRC that it had discharged plaintiff for the following reasons: failure to comply with DOT regulations governing commercial drivers; failure to comply with defendant's drug and alcohol policy; failure to comply with the return to work agreement; failure to comply with the settlement agreement; and concern for public safety. These reasons have also been articulated to the Court.

insist that plaintiff complete his treatment program or to require that any alternative program meet with the approval of its medical review officer.

Finally, plaintiff argues --somewhat bewilderingly --that under defendant's interpretation of DOT regulations, its decision to allow plaintiff to return to work while he still had a current clinical diagnosis of alcoholism would constitute a violation of federal law.<sup>4</sup> Even if true, I fail to see how

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<sup>4</sup> I note that in making this argument plaintiff continues to assert that he was employed as a burner cleaner and not as a driver at the time of his discharge and thus was not subject to DOT regulations. I have already addressed this assertion and have found that it is unsupported by the record. See discussion supra note 1.



any reasonable jury could infer evidence of pretext or discrimination from an employer's decision, in violation of federal regulations, to bring a diagnosed alcoholic back to work. Instead of offering evidence that defendant's articulated reasons are not credible, plaintiff again underscores defendant's efforts to accommodate plaintiff's disability.

In sum, plaintiff has failed to establish that he was "qualified" under DOT regulations to perform the essential functions of his position. Alternatively, he has offered no evidence suggesting that defendant's articulated reasons for the discharge were a pretext for discrimination. As a result, I will grant defendant's motion for summary judgment. Plaintiff's cross-motion will be denied as moot. An appropriate order follows.

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