

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

GARY L. RINEHIMER : CIVIL ACTION  
 :  
 v. :  
 :  
 CEMCOLIFT, INC. : NO. 98-562

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

February 1, 2001

Plaintiff Gary L. Rinehimer ("Rinehimer"), alleging violations of the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 et seq. ("FMLA"), the Americans With Disabilities Act of 1990, 42 U.S.C. §§12101-12117 ("ADA"), and the Pennsylvania Human Relations Act, 43 Pa. Con. Stat. Ann. §§951-963 ("PHRA"), filed a complaint against his employer, defendant Cemcolift, Inc. ("Cemcolift") on February 4, 1998. Summary judgment was granted in favor of Cemcolift on the ADA and PHRA claims by Order dated March 17, 1999.<sup>1</sup> A three-day jury trial on the FMLA claim resulted in a verdict for Cemcolift. Presently before the court is Rinehimer's motion for judgment as a matter of law ("JMOL") and a new trial. For the reasons set forth below, Rinehimer's motion will be denied.

BACKGROUND

Rinehimer, an employee of Cemcolift since October, 1990,

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<sup>1</sup>Rinehimer moved for reconsideration of the summary judgment entered against him and in favor of Cemcolift on the ADA and PHRA claims. This court denied the motion by Order dated May 7, 1999.

contracted pneumonia on December 30, 1996; he spent twenty-two days in a hospital, followed by nine days in a rehabilitation facility. At the time Rinehimer became ill, he was employed as an inventory and shipping foreman in Building C, a position he had held at Cemcolift since 1995.<sup>2</sup> During his illness, Rinehimer stayed in touch with Cemcolift personally and through his wife. On February 2, 1996, Rinehimer advised Cemcolift that he did not know when he could return to work and that he had an appointment with his doctor on February 15, 1996, at which time he expected the doctor to advise him when he could do so.

On February 9, 1996, Cemcolift hired a new employee to perform the duties Rinehimer had performed prior to his illness. On February 15, 1996, Rinehimer met with Kenneth Herrmann, the Cemcolift Building C manager, and gave him a doctor's note dated that day stating that Rinehimer could return to work part-time for several weeks, then full-time if he had no difficulties. The note also stated that Rinehimer was to avoid dust and fumes and to take appropriate precautions. Kenneth Herrmann advised Rinehimer there were no part-time positions available at that time and Rinehimer could return to work when his doctor gave him clearance to return full-time.

Rinehimer submitted another note from his doctor dated

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<sup>2</sup>Rinehimer was employed by Cemcolift as an elevator assembler from October, 1990 to December, 1994, and then promoted to a working foreman position.

February 26, 1996, that he could return full-time on March 4, 1996, but he was to avoid unusual dust or fumes as much as possible. Rinehimer did return to work full-time on March 4, 1996. Initially, he filed blueprints in a closed office in Building C, away from the sawdust and paint fumes of the manufacturing floor; two weeks later, he went to Building A<sup>3</sup> to assemble a machine. These positions were not equivalent to his former position as working foreman in terms of duties and responsibilities, but Rinehimer received the same wages and benefits as before he became ill.

After two weeks in Building A, Rinehimer requested to return to his position in Building C as working foreman. Walter Herrmann, Jr., vice-president of Cemcolift, informed Rinehimer that Cemcolift would not return him to his prior position until Rinehimer's doctor gave him a written release to work in such an environment. Rinehimer asked permission to use a respirator to work in Building C. In accordance with OSHA regulations, Rinehimer took a pulmonary function test administered by a Cemcolift nurse to determine whether he could use a respirator safely. On April 3, 1996, Cemcolift's doctor advised Cemcolift that Rinehimer could not use a respirator safely. That same day, Rinehimer met with Walter Herrmann, Jr., who told Rinehimer the

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<sup>3</sup>There was only one small area where welding was performed in Building A; an exhaust system ventilated that area.

company's doctor advised that he could not wear a respirator so he could not return to his previous job in Building C until Rinehimer's doctor released him to do so or he signed a release absolving Cemcolift of liability should Rinehimer become ill on the job in Building C. Rinehimer did not provide a medical release from his doctor or his own release to Cemcolift.

On April 4 or 5, 1996, Rinehimer attended an exit interview with Walter J. Herrmann, president of Cemcolift, Kenneth Herrmann and William Conklin, office manager. Rinehimer was again informed he could return to his prior position in Building C only if given a medical release by his physician or if he released Cemcolift from any liability for returning him to his prior position. In the alternative, Rinehimer was told he could apply for unemployment compensation or file a disability insurance claim. Rinehimer refused to sign a release and his employment was terminated.

#### **DISCUSSION**

Rinehimer has moved for JMOL and for a new trial under Fed. R. Civ. P. 50(b) and 59(a)&(e), on the following grounds: (1) the jury's determination that he did not prove by a preponderance of the evidence that he was not returned to the same or equivalent position was against the weight of the evidence; (2) the jury's verdict that there was no implied request for additional leave based on Cemcolift's determination that he was not medically or

physically able to perform essential job functions because of a serious health condition was against the weight of the evidence and the law; (3) Cemcolift had the obligation to provide him with up to twelve weeks additional leave with or without his request if it determined he was not medically or physically able to perform essential functions of a position because of a serious health condition;<sup>4</sup> (4) Cemcolift's summary judgment motion should not have been granted on his ADA and PHRA claims; (5) it was error for the court to admit the double hearsay expert opinion evidence of Dr. Robert Davis; (6) it was error to charge the jury that Cemcolift had no obligation to make a reasonable accommodation because it confused the jury regarding Cemcolift's FMLA obligations; and (7) an employer may not discharge an employee it perceives as disabled on the ground that the employee is a direct threat to himself, but not to others.

A. **Rule 50(b)**

Under Fed. R. Civ. P. 50(b), a party who moves for judgment as a matter of law at the close of all the evidence may renew the request for judgment as a matter of law within ten days of entry of judgment (and may alternately request a new trial under Rule 59). In ruling on the renewed motion when a verdict was entered by the jury, a court may: (1) allow the judgment to stand; (2)

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<sup>4</sup>Because this ground is so closely tied to Rinehimer's second ground for his motion, the two will be discussed together.

order a new trial; or (3) direct entry of judgment as a matter of law. Fed. R. Civ. P. 50(b). Rinehimer requests the court to direct entry of judgment as a matter of law.

In determining a motion for JMOL, a court must decide "not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury properly could find a verdict for that party." CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, 9A FEDERAL PRACTICE AND PROCEDURE §2524, at 253-54 (2d ed. 1995 & West Supp. 2000).

In determining whether the evidence presented at trial is sufficient to withstand a motion for judgment as a matter of law, the district court is not free to weigh the parties' evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead, it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences that may be drawn from the evidence.

Id. at 255-59. See also Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2110 (2000) (reversing the court of appeals in overturning the district court's denial of JMOL in an ADEA action). A motion for JMOL should be granted when the verdict returned by the jury is erroneous under the existing law. See Marinelli v. City of Erie, Pa., 216 F.3d 354, 359 (3d Cir. 2000) (vacating final judgment in favor of plaintiff and remanding to the district court to enter JMOL).

B. **Rule 59**

A motion for a new trial must also be made within ten days

of entry of judgment. Fed. R. Civ. P. 59(b). "A new trial may be granted . . . in an action in which there has been trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). As when deciding motions for JMOL, the court considers the evidence in the light most favorable to the non-movant. Taylor v. Garwood, No. Civ. A. 99-2478, 2000 WL 1201558, at \*2 (E.D. Pa. Aug. 15, 2000).

The standard for granting a new trial is broader than that for granting JMOL. "The court has the power and duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice." CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, 11 FEDERAL PRACTICE AND PROCEDURE §2805, at 55 (2d ed. 1995 & West Supp. 2000); see also Lind v. Schenley Indus., Inc., 278 F.2d 79, 88 (3d Cir. 1960).

In considering a motion for a new trial on the ground that the verdict was against the weight of the evidence, the trial court should: (1) assess the character of the evidence; (2) consider the simplicity or complexity of the governing legal principles; and (3) refrain from altering the verdict unless it is seriously erroneous. Id. "The judge's duty is essentially to see that there is no miscarriage of justice." Id.

In deciding a motion for a new trial on the ground that evidence was improperly admitted, wide discretion is accorded the

trial judge. Id. at 90; see also Taylor, 2000 WL 1201558, at \*1 (new trials may be granted when the admission of evidence was a substantial error).

C. **Timeliness and Propriety of Motion**

Rinehimer filed his initial motion for JMOL and a new trial on June 9, 2000, eight days after the entry of judgment against him at trial. His motion is timely as to issues heard at trial, but untimely as to Rinehimer's contention the court should not have granted summary judgment on his ADA and PHRA claims and that under the ADA, an employer may not discharge an employee it perceives as disabled on the grounds that the employee is a direct threat to himself.

Summary judgment was granted on Rinehimer's ADA and PHRA claims on March 17, 1999. Plaintiff timely moved for reconsideration and the court denied that motion on May 7, 1999, more than a year prior to the trial. Rinehimer's motion for JMOL and a new trial on these issues is untimely.

Even if the motion was timely filed, Fed. R. Civ. P. 50 and 59 are inapplicable. Rule 50 and 59 motions apply only to actions in which there has been a jury trial on the issues for which the movant is seeking post-trial relief; one cannot seek JMOL or a new trial on a summary judgment decision. Rinehimer's motion will be denied with regard to matters concerning Rinehimer's ADA and PHRA claims.

D. The jury's finding that Rinehimer did not prove by a preponderance of the evidence that he was not returned to the same or equivalent position was against the weight of the evidence, but non-determinative.

There was no disagreement at trial that prior to his taking medical leave, Rinehimer held a "working foreman position" that was "part of lower management," see Tr. at 25, Docket #50, and that when he returned to work at Cemcolift in March, 1996, Rinehimer filed blueprints and assembled machinery, see Tr. at 26, Docket #50. He was not returned to an equivalent position having the same or substantially similar duties and responsibilities<sup>5</sup> even though he was paid the same salary and received the same benefits he received as a working foreman.

At the close of all the evidence, the jury was instructed that "[i]t's not enough that [Cemcolift] would pay the same wages, which evidently there seems no dispute that when he came back he was paid the same as before. The argument is that he says it was not a management position and you'll have to consider that in terms of the [FMLA]." Tr. at 64, Docket #48. The jury was asked to determine whether Rinehimer "proved by a preponderance of the evidence, that upon his return from medical

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<sup>5</sup>29 C.F.R. §825.215(a) provides that, "[a]n equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including the privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority."

leave for a serious condition, he was not placed in the same position he held when leave commenced or an equivalent position with equivalent benefits, pay and other terms and conditions of employment." Tr. at 4, Docket #51. Contrary to the weight of the evidence, the jury found that he was returned to the same or equivalent position. Id. However, this does not require granting JMOL or a new trial.

Under the FMLA, in order to prove a prima facie case, the plaintiff must show not only that he was not returned to the same or equivalent position but that he was able to perform the essential functions of such a position. See 29 C.F.R. §825.214(b). See also Reynolds v. Phillips & Temro Indus., Inc., 195 F.3d 411, 414 (8th Cir. 1999)(quoting 29 C.F.R. §825.214(b)). The jury found that Rinehimer was not able to perform the essential functions of his former position.<sup>6</sup> Rinehimer did not challenge this finding. Even if he had, viewing the facts established at trial in the light most favorable to Cemcolift,

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<sup>6</sup>The jury answered "no" to the following interrogatory: "Has the plaintiff proved by a preponderance of the evidence that upon his return to work full time, he was able to perform the essential function of his job in Building C in view of his physical condition and the statements of his physician?" The jury was charged, with regard to this issue, that the plaintiff must prove by a preponderance of the evidence, "that he was able to perform - that he was not unable to perform an essential function of the position because of the continuation of his serious health condition - in which case, he would have no right to restoration to another position under the [FMLA] . . . ." Tr. at 60, Docket #50.

the jury reasonably could have found that Rinehimer was unable to perform the essential functions of his prior position in Building C.

Rinehimer's motion for JMOL will be denied because the jury's finding that he was not returned the same or equivalent position upon his return from medical leave did not effect the judgment against him since he was unable to perform the essential functions of his prior position. There is no serious error in need of the court's correction.

E. **The jury's finding that Rinehimer did not make an implied request for additional leave was not against the weight of the evidence.**

Rinehimer argues that because Cemcolift viewed him as unable to perform the essential functions of his position, it had a duty to advise him of his rights under the FMLA, including his entitlement to an additional three weeks of FMLA leave. There is no sua sponte obligation imposed on the employer. See 29 C.F.R. §825.301(c); 29 C.F.R. §825.302(c); Fry v. First Fidelity Bancorporation, No. Civ. A., 1996 WL 36910, \*6 (E.D. Pa. Jan. 30, 1996). If an employee gives notice to his employer of his need for leave, then the employer is obligated to notify the employee of his rights under the FMLA.

Rinehimer also argues that the jury's conclusion he did not

impliedly<sup>7</sup> request additional FMLA leave was against the weight of the evidence.<sup>8</sup> He contends his job was threatened during his FMLA leave (when he was in the rehabilitation center) because Cemcolift hired a replacement and a Cemcolift employee informed him he was being replaced. The testimony at trial was unclear whether the employee who informed Rinehimer he was being replaced did so as a friend or at the direction of Cemcolift.<sup>9</sup> The jury could reasonably have found that the employee visited and informed Rinehimer as an act of friendship, not on direction from Cemcolift management.

Rinehimer also argues that even if he never requested additional FMLA leave on returning to work March 4, 1996, he did

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<sup>7</sup>Rinehimer admits he never expressly requested additional FMLA leave.

<sup>8</sup>The jury interrogatory concerning this issue read: "Has the plaintiff proved by a preponderance of the evidence that he made an express or implied request for additional leave, but as a result of a threat by the defendant that he'd lose his job, [was] forced to return to work prior to the expiration period allowed by the [FMLA]?" The jury was specifically instructed that "[u]nder the [FMLA], to be entitled to leave, the employee has to in some way notify the employer or make a request. The request can be express, that is , you can say, I want leave under the [FMLA], but it can also be implied. You don't have to use the words Family and Medical Leave Act, it just has to be clear to the defendant that you're seeking additional time because of your serious physical condition." Tr. at 68, Docket #48.

<sup>9</sup>The jury was instructed that it must "determine that [the visit by the employee warning Rinehimer that he was being replaced] was either conveyed by a high-placed officer or management employee of the company, or that it was sent by them to him to warn him to come back." Tr. at 62, Docket #48.

ask to use a respirator to enable him to return to his prior position in Building C. Rinehimer contends that this request to use a respirator was sufficient to place Cemcolift on notice that it needed to interact with him regarding his medical problems and continued employment. The jury could reasonably have found that Rinehimer's request to use a respirator did not imply a request for additional FMLA leave.

Even if Cemcolift, by forcing Rinehimer to return to work after nine weeks, denied his implied request for additional leave, the jury had to find that at the end of the twelve-week leave period to which he was entitled, he would have been able to perform the duties of his prior position; the jury would have had to find that the additional leave would have made a difference. See 29 C.F.R. §824.214. When Rinehimer's job was terminated on April 5, 1996, the doctor's note advising him to steer clear of unusual dust or fumes was still in effect. The jury could reasonably have found that even if Rinehimer had been allowed an additional three weeks medical leave, on his return he still would not have been able to perform the duties of his prior position in Building C.

The jury's finding that Rinehimer did not make an implied request for additional FMLA leave was not against the weight of the evidence; it was not made in error. Rinehimer's motion for JMOL will be denied on this ground.

F. It was not error for the court to admit the alleged double hearsay expert opinion evidence of Dr. Robert Davis.

Rinehimer argues that the only way the jury could have concluded that he could not perform the essential functions of his position was reliance on the statement of Dr. Davis, Cemcolift's doctor, that Rinehimer could not wear a respirator safely. Walter Herrmann testified that the company's safety director was told by Dr. Davis that Rinehimer could not wear a respirator. Rinehimer avers that this was inadmissible double hearsay; on plaintiff's objection to this statement at trial, the court responded that it would not strike the testimony, but the jury was to "accept [the statement by Dr. Davis] as an explanation for what the witness did, not for the truth of whether the doctor actually said that."<sup>10</sup> Tr. at 49, Docket #50. This limiting instruction complies with Fed. R. Evid. 105, which provides that "[w]hen evidence is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court . . . shall restrict the evidence to its proper scope and instruct the jury accordingly."

This statement of Dr. Davis was also before the jury on

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<sup>10</sup>Under Fed. R. Evid. 801(c), hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

cross-examination of Kenneth Herrmann by Rinehimer's counsel.<sup>11</sup>

At the time Rinehimer's counsel elicited this "inadmissible double hearsay" testimony, he did not move to strike or otherwise object.

Regardless of how the testimony came in or whether the limiting instruction was sufficient, this testimony was not the only evidence the jury could have relied on to determine that Rinehimer could not have performed the essential functions of his position. Rinehimer's doctor's note advised that he should avoid unusual dust or fumes as much as possible; he could not do this by returning to his prior position in Building C. Under the FMLA, Cemcolift was not required to provide Rinehimer with an accommodation (such as wearing a respirator) to enable him to perform the essential functions of his position. See 29 C.F.R. §825.214(b). See also Tardie v. Rehabilitation Hosp. of Rhode Island, 168 F.3d 538, 544 (1st Cir. 1999)(unlike the ADA, 29 C.F.R. §825.214(b) "omits the qualifying 'with or without reasonable accommodation' language."); Ellis v. Mohenis Servs., Inc., No. Civ. A. 96-6307, 1998 WL 564478, \*5 (E.D. Pa. Aug. 24,

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<sup>11</sup>On cross-examination, Kenneth Herrmann was asked whether Dr. Davis recommended that Rinehimer be given the opportunity to wear a mask. Tr. at 36, Docket #50. In response, he stated that Cemcolift sent Rinehimer to Dr. Davis for a pulmonary function test and Dr. Davis told the company's safety director that Rinehimer could not wear a respirator because it would restrict his breathing and Rinehimer was not breathing "up to a hundred percent as it is." Id.

1998)(distinguishing the leave provisions of the FMLA from the reasonable accommodation obligations of the ADA). Whether he could have performed the essential functions of his position in Building C with a respirator is irrelevant to his FMLA claim.

Rinehimer's motion for JMOL will be denied for error in admitting the alleged double hearsay testimony of Dr. Robert Davis.

G. **It was not error to charge the jury that Cemcolift had no obligation to make a reasonable accommodation.**

The charge Rinehimer claims confused the jury is as follows:

The [FMLA] does not require an employer to make reasonable accommodations to an employee, such as furnishing a respirator to an employee. Although some employees do wear - do use respirators and some use dust masks, which is what - is meant when they refer to nuisance masks. You know, those things you put over your nose - I think you can buy them in the drugstore.

If you find that Mr. Rinehimer was unable to perform duties as a working foreman in Building C of Cemcolift's manufacturing plant because of the continuation of his serious health condition, and the statements of his physician as you interpret them because there's been a dispute about the meaning of what the doctor said, then you may find that Cemcolift did not violate the [FMLA] by not returning Mr. Rinehimer to his position as a working foreman in Building C.

Tr. at 63, Docket #48.

This charge immediately follows instructions to the jury concerning FMLA leave. The charge is clear and correct: under the FMLA, there is no obligation for an employer to provide a reasonable accommodation to an employee to facilitate his return to the same or equivalent position at the conclusion of his

medical leave.

Rinehimer's motion for JMOL will be denied on the ground that the jury charge regarding the inapplicability of "reasonable accommodation" to FMLA claims was confusing or erroneous.

H. **New Trial**

Although the standard for granting a new trial under Rule 59 is more expansive than that for granting a Rule 50 JMOL, a new trial is not mandated here. The evidence at trial supported the jury's findings, except for its finding that Rinehimer was returned to the same or equivalent position upon his return from medical leave; that finding was not determinative of his claim. The governing legal principles were clear and simply conveyed to the jury in the form of the charge and interrogatories. There was no miscarriage of justice requiring the court to alter the verdict.

**CONCLUSION**

Rinehimer's motion for JMOL or a new trial on the ground that summary judgment on his ADA and PHRA claims should be reversed will be denied as untimely and inapplicable. Rinehimer has also failed to show there was no evidence on which the jury could have reasonably relied in reaching its verdict or that the verdict was otherwise erroneous under existing law. In the court's judgment, a new trial is not necessary to prevent injustice. His motion for JMOL or a new trial will be denied on

all remaining grounds.

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 CEMCOLIFT, INC. : NO. 98-562

ORDER

AND NOW, this 1st day of February, 2001, upon consideration of plaintiff Gary L. Rinehimer's motion for JMOL or a new trial [Docket #49, 53], and the response thereto, for the reasons set forth in the court's Memorandum attached hereto, it is **ORDERED** that plaintiff's motion is **DENIED**.

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S.J.