

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

FURMAN PACE, III,  
Plaintiff,

v.

EUREKA, INC. d/b/a  
J.D.M. MATERIALS COMPANY,  
Defendant.

CIVIL ACTION

NO. 97-3245

MEMORANDUM

BRODERICK, J.

April 8, 1998

Plaintiff Furman Pace III has filed this suit against his former employer, defendant Eureka, Inc. d/b/a J.D.M. Materials Company, alleging claims under Title I of the Americans With Disabilities Act, 42 U.S.C. §§ 12111-12117 ("ADA") and Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 ("ERISA"). The plaintiff was employed at the defendant's concrete plant in Norristown, Pennsylvania from 1980 until his termination in 1996. The defendant has filed a motion for summary judgment to dismiss both of these claims and the plaintiff's claim for punitive damages. For the reasons set forth below, the Court will grant summary judgment to the defendant on the plaintiff's ERISA claim but will deny summary judgment on the plaintiff's ADA and punitive damages claims. The Court will also rule on the plaintiff's motion to amend his complaint and other discovery and pre-trial motions.

## **I. BACKGROUND**

The plaintiff commenced this action with the filing of a two count complaint on May 6, 1997 alleging claims under Title I of the ADA and Section 510 of ERISA. The Court held an initial pretrial conference on July 21, 1997, after which it issued a scheduling order setting the discovery deadline for October 22, 1997 and trial for November 12, 1997. On September 9, 1997, counsel for the defendant filed a motion to compel the plaintiff's deposition, after the plaintiff and his counsel walked out of his deposition while in progress. The plaintiff opposed the defendant's motion and filed his own motion for a protective order. On October 24, 1997, the Court dismissed both motions as moot, having been advised that the parties had completed the plaintiff's deposition.

The defendant filed the instant motion for summary judgment on October 29, 1997. On November 3, 1997, after the defendant had filed for summary judgment and just nine days before the scheduled trial date, the plaintiff filed a motion to amend his complaint to add the following six new claims: (1) violation of the Pennsylvania Human Relations Act; (2) violation of the Family Medical Leave Act; (3) violation of Section 503 of the Rehabilitation Act; (4) intentional infliction of emotional distress; (5) loss of consortium on behalf of newly added plaintiff, Hattie Pace; and (6) a separate count for punitive damages. The plaintiff also filed motions for an extension of

discovery, to compel discovery, and for an order precluding the defendant from raising the defense of undue hardship at trial.

The plaintiff served his motion to amend his complaint and the other motions on the defendant at the Final Pretrial Conference on November 4, 1997, just eight days prior to the scheduled trial date. Given the flurry of motions and the fact that the plaintiff had not yet responded to the defendant's summary judgment motion, the Court determined that it would postpone the trial until after it had ruled on the summary judgment motion and other motions, if necessary. The parties have now filed a response to each of the pending motions, and the Court will dispose of these motions and additional pre-trial motions in this Memorandum and Order.

## **II. STATEMENT OF UNDISPUTED FACTS**

The plaintiff, Furman Pace, was employed by defendant J.D.M. Materials Company in Norristown, Pennsylvania from 1980 until his termination in 1996. The defendant is a manufacturer of ready-mix concrete. From 1987 until his discharge, the plaintiff held the position of "loader-operator," which requires the operating of a front-end loader to transport and deliver gravel and other materials within the plant. The plaintiff would also occasionally drive a dump truck outside of the plant to pick up stone from a nearby quarry and to remove snow. The plaintiff and all union employees at the Norristown plant were required to hold a commercial driver's license and a certificate from the

Pennsylvania Department of Transportation ("DOT"). It is disputed whether the plaintiff's position required him to drive a truck or hold a federal DOT certificate.

Persons must undergo a medical examination every two years in order to obtain a state or federal DOT certificate. In 1991, the plaintiff was diagnosed with diabetes mellitus and has been insulin-dependent ever since. Under both state and federal regulations, a person with insulin-dependent diabetes is generally not qualified to operate commercial motor vehicles or obtain DOT certification. 49 C.F.R. § 391 et seq.; 67 Pa. Code § 231 et seq. Pennsylvania (but not federal) regulations provide for waiver of the physical qualification requirements under certain circumstances.

The plaintiff obtained a valid DOT certificate in 1990, 1992, and 1994. In 1996, however, a new company-selected physician examined the plaintiff and refused to certify him because of his insulin-dependent diabetes. The doctor also refused to recommend a waiver under state regulations. Soon thereafter, the plaintiff was terminated from his employment. In a letter dated March 7, 1996, a company vice president wrote: "This letter will serve as your official notification that your employment has been terminated this date. This action comes as a direct result of medical test results received . . . that stated your status as an insulin dependent diabetic. This decision to terminate is required by the [U.S. Department of Transportation regulations]." After his termination, the plaintiff's family

doctor, a board-certified endocrinologist, certified that the plaintiff qualified for a federal DOT license and the plaintiff sought to return to his job. The defendant has not rehired the plaintiff.

### III. DISCUSSION

#### A. Motion for Summary Judgment

The law is clear that when a motion for summary judgment is filed, the non-moving party cannot rest on the mere allegations of the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Rather, in order to defeat the motion for summary judgment, the non-moving party, by its own affidavits, or by depositions, answers to interrogatories or admissions on file, as stated in Rule 56(e), "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

As Celotex teaches, "the plain language of rule 56(c) mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Where the nonmoving party fails to make such a showing with respect to an essential element of its case, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of a non-moving party's case

necessarily renders all other facts immaterial." Id. at 323. The moving party is entitled to a judgment as a matter of law whenever the nonmoving party has failed to make a sufficient showing on an essential element of its own case with respect to which it has the burden of proof.

1. Employee Retirement Income Security Act

In Count II of his complaint, the plaintiff contends that the defendant discharged him for the purpose of interfering with his pension and disability benefits. Section 510 of ERISA, captioned "Interference with protected rights," provides in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

29 U.S.C. § 1140. Congress enacted this section "primarily to prevent employers from discharging or harassing their employees in order to keep them from obtaining ERISA-protected benefits." Kowalski v. L&F Products, 82 F.3d 1283, 1287 (3d Cir. 1996) (citing Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir. 1987)).

To establish a prima facie case under Section 510 of ERISA, "an employee must demonstrate (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment

of any right to which the employee may become entitled." Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997) (citing Gavalik, 812 F.2d at 852). Most importantly, the plaintiff must also prove that the defendant had specific intent to interfere with ERISA-protected rights. As the Third Circuit recently stated:

Interpreting section 510 of ERISA in Gavalik, we held that in order to recover under section 510, a plaintiff need not prove that "the sole reason for his [or her] termination was to interfere with [employee benefits]." Nonetheless, a plaintiff must demonstrate that the defendant had the "specific intent" to violate ERISA. Proof of incidental loss of benefits as a result of a termination will not constitute a violation of section 510.

Dewitt, 106 F.3d at 522 (citing Gavalik, 812 F.2d at 851).

The defendant contends that summary judgment should be granted because the plaintiff cannot establish his prima facie case under Section 510 of ERISA. After reviewing the plaintiff's response to the summary judgment motion, the Court agrees that the plaintiff has failed to meet his burden through the use of affidavits, depositions, answers to interrogatories or admissions on file of setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The plaintiff has not raised a genuine issue for trial that the defendant discharged him for the purpose of interfering with his pension or disability benefits.

It is undisputed that the plaintiff has received and continues to receive benefits from his union. Moreover, to the extent that the plaintiff is claiming that his discharge

prevented him from accruing more years of service and therefore larger pension benefits, the Third Circuit has expressly rejected such a basis for an ERISA violation. Turner v. Schering-Plough Corp., 901 F.2d 335 (3d Cir. 1990). "'[W]here the only evidence that an employer specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence sufficient to separate that intent from the myriad of other possible reasons for which an employer might have discharged him'" and "summary judgment [is] properly granted." Id. at 348 (quoting Clark v. Resistoflex Co., 854 F.2d 762, 771 (5th Cir. 1988)).

Accordingly, because the plaintiff has failed to raise a genuine issue of material fact concerning an element of his prima facie case under Section 510 of ERISA, the Court will grant summary judgment to the defendant on this claim.

## 2. Americans With Disability Act

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). 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. § 12111(8).

To establish a prima facie case under the ADA, a plaintiff must demonstrate that: (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998).

The defendant contends that summary judgment should be granted because the plaintiff cannot establish the first prong of his prima facie case, that is, that he is disabled within the meaning of the ADA. The ADA defines the term "disability" as either: (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2); Olson v. General Electric Astrospace, 101 F.3d 947, 952 (3d Cir. 1996). It is undisputed that the plaintiff has diabetes and is required to take insulin. The defendant claims, however, that the plaintiff is not disabled because he stated to the EEOC that he is not disabled and also because his personal physician testified that his diabetes is under control.

Without deciding the issue, the Court finds that there is a genuine issue of material fact concerning whether or not the

plaintiff is disabled. Although the defendant cites case law in which courts have held that diabetes is not a disability under the ADA, the Third Circuit has relied on the legislative history of the ADA and the EEOC's interpretive guidelines in stating that "[P]ersons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of disability, even if the effects of the impairment are controlled by medication." Matczak v. Frankford Candy and Chocolate Co., 1997 WL 786925, No. 97-1057, at \*4; 11 Nat. Disability Law Rep. ¶ 243 (3d Cir. Nov. 18, 1997). Moreover, there is a genuine issue of material fact as to whether the plaintiff is disabled under the third prong of the statutory definition ("being regarded as having such an impairment"), since the plaintiff was discharged because his insulin-dependent diabetes prevented him from obtaining federal DOT certification. A reasonable factfinder could conclude that the plaintiff was terminated from his job because the defendant regarded him as disabled. Olson, 101 F.3d at 953-54.

The defendant also contends that the plaintiff cannot establish the second prong of his prima facie case, that he is a "qualified individual with a disability." 42 U.S.C. § 12111(8). A two-part test is used to determine whether someone is "a qualified person with a disability." Gaul, 134 F.3d at 580 (citing 29 C.F.R. pt. 1630). First, the court must consider whether "the individual satisfies the prerequisites for the position, such as possessing the appropriate educational

background, employment experience, skills, licenses, etc." Id. Second, the court must consider "whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation." Id. The determination of these issues goes to the heart of this case. The defendant contends that the plaintiff is not qualified for the loader-operator position because he cannot qualify for a federal DOT license, which the defendant claims is required for one of the essential functions of the position. The plaintiff, however, contends that a federal DOT license is not a prerequisite for his position, that interstate driving is not an essential function of his position, and that other employees in similar positions do not have such licenses. These are clearly genuine issues of material fact which preclude summary judgment.

Moreover, there is no merit to the defendant's contention that the plaintiff's ADA claim should be dismissed because he failed to pursue federal DOT, state DOT, and his union's administrative procedures following his license denial. The primary issue in this case is whether a DOT certificate was required for the plaintiff's job and whether the defendant discriminated against him because of a disability, not whether the plaintiff was wrongfully denied a DOT certificate. As stated above, there is a genuine issue of material fact concerning the license requirement for the plaintiff's job.

The defendant also contends, on the basis of McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996), that the

plaintiff should be judicially estopped from asserting that he is a qualified individual with a disability because he has certified in applications for disability benefits that he is disabled. The Court declines to follow McNemar in the instant case. First, the panel decision in McNemar "has been the object of considerable criticism" in the Third Circuit and elsewhere, and the current Chief Judge of the Third Circuit has stated that McNemar was wrongly decided and should be reconsidered at first opportunity. Krouse v. American Sterilizer Co., 126 F.3d 494, 502 & nn. 3 & 4 (3d Cir. 1997). Moreover, the doctrine of judicial estoppel requires that the party who asserted inconsistent positions did so in bad faith. Id. at 501. The Court does not find that the plaintiff acted in bad faith by certifying in his disability applications that he was unable to perform his job duties, since the defendant told him that he was being terminated because his insulin-dependent diabetes prevented him from performing his job.

Finally, there are many other material issues of fact which preclude summary judgment, such as whether the defendant could reasonably accommodate the plaintiff by altering or changing his duties, whether the plaintiff's insulin-dependent diabetes poses a significant and unreasonable risk to himself and others, whether the defendant has articulated a legitimate, non-discriminatory reason for terminating the plaintiff, and whether the plaintiff has demonstrated evidence of pretext. Accordingly, for these reasons and for the reasons set forth above, the

defendant's motion for summary judgment on the plaintiff's ADA claim will be denied.

### 3. Punitive Damages

Title I of the ADA explicitly adopts the remedies of Title VII of the Civil Rights Act, including with the enactment of the Civil Rights Act of 1991 the provision of punitive damages. 42 U.S.C. § 12117(a); 42 U.S.C. 1981a(a)(2). Punitive damages may be awarded if "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). At this stage of the proceedings, the plaintiff has satisfied his burden of raising a genuine issue of material fact that he is entitled to punitive damages. Among other genuine issues of material fact, the plaintiff claims that his employer deliberately deleted a passage from the company's standard termination letter explaining options for re-employment. Accordingly, the defendant's motion for summary judgment on the plaintiff's punitive damages claim will be denied.

### B. Motion to Amend Complaint

The plaintiff filed a motion to amend his complaint on November 3, 1997, after the discovery period had expired and just nine days before trial. The plaintiff seeks to amend his

complaint to add the following six new claims: (1) violation of the Pennsylvania Human Relations Act; (2) violation of the Family Medical Leave Act; (3) violation of Section 503 of the Rehabilitation Act; (4) intentional infliction of emotional distress; (5) loss of consortium on behalf of newly added plaintiff, Hattie Pace; and (6) a separate count for punitive damages.

Rule 15(a) of the Federal Rules of Civil Procedure provides that after the filing of a responsive pleading, a party may amend his complaint "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The decision to grant or deny leave to amend is committed to the sound discretion of the district court. Foman v. Davis, 371 U.S. 178, 182 (1962). "Factors the trial court may appropriately consider in denying a motion to amend include undue delay, undue prejudice to the opposing party, and futility of amendment." Averbach v. Rival Manufacturing Co., 879 F.2d 1196, 1203 (3d Cir. 1989) (citing Foman, 371 U.S. at 182).

The Court finds that these factors justify denial of the plaintiff's motion to amend his complaint. The plaintiff filed his motion to amend almost six months after he initiated his lawsuit and just nine days before the trial date. At no time prior to his motion to amend did he ever ask for more time to pursue his proposed new claims. Both the defendant and the Court understood that trial would begin as scheduled on November 12, 1997. Justice does not require the Court to permit the plaintiff

to serve the defendant with a motion to amend on the day of the Final Pretrial Conference, just eight days before trial.

Moreover, the defendant would be severely prejudiced by allowing the plaintiff to add new claims at this late date. Although some of the proposed claims have the same elements of liability as the plaintiff's ADA claim, he also seeks to raise new claims under the Family Medical Leave Act and for intentional infliction of emotional distress and loss of consortium. This would require extensive new discovery, including the addition of a new plaintiff (the plaintiff's spouse), depositions and expert examinations. Furthermore, the plaintiff has not adequately demonstrated why he failed to assert these claims earlier. The Court will permit the plaintiff to alter his theory under Title I of the ADA if he so chooses in the Final Pretrial Order. However, the Court will not permit the plaintiff to completely alter the nature of his lawsuit by adding new claims for relief at this late date. Justice does not require that the plaintiff be permitted to reinvent his lawsuit immediately prior to trial. Accordingly, the plaintiff's motion to amend his complaint will be denied.

C. Motions to Extend and Compel Discovery

The plaintiff has also filed motions for a brief extension of discovery, to compel discovery, and for an order to compel the defendant to produce the president of the company or another corporate representative for deposition. The plaintiff seeks to

compel discovery regarding several areas which the Court has determined are relevant and necessary for the plaintiff's case at trial. For instance, the plaintiff has requested information concerning the total number of persons employed by the defendant and related entities, the net worth of the defendant and related entities, the corporate individual(s) responsible for compliance with the ADA, other claims or complaints for disability discrimination against the defendant and related companies, and any persons involved in the alleged requirement that persons in the plaintiff's position be certified under DOT guidelines. These are all issues that directly relate to the plaintiff's ADA or punitive damages claims. Moreover, the plaintiff sought discovery on these issues prior to the discovery deadline, but the defendant objected to his requests. Therefore, the Court will grant a brief extension of discovery and permit discovery in these areas prior to trial. However, discovery concerning the defendant's financial worth shall be subject to a confidentiality agreement executed by the parties.

Accordingly, the plaintiff's motions for a brief extension of discovery and to compel discovery will be granted.

D. Motions to Preclude Testimony/Evidence at Trial

The plaintiff has filed a motion to preclude the defendant from raising the defense of "undue hardship" at trial. Liability under Title I of the ADA may be imposed on employers who refuse to make "reasonable accommodations to the known physical or

mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . . ." 42 U.S.C. § 12112(5)(A) (emphasis added). Thus, "undue hardship" is a defense to liability under the ADA, and the factfinder may consider several factors enumerated by the statute. 42 U.S.C. § 12111(10). Accordingly, the plaintiff's motion to preclude the defendant from raising this issue (if it chooses) will be denied.

The defendant has filed a motion styled as a "motion to strike" and several supplemental motions to preclude the plaintiff from introducing certain expert testimony and evidence at trial. The defendant seeks to prevent the plaintiff from: (1) introducing the testimony and/or report of any expert witness; (2) calling Dr. Carla Territo, an ophthalmologist who treated the plaintiff, as a fact witness; (3) calling Laurie Watson, the plaintiff's treating therapist, as a fact witness; and (4) designating any additional expert and/or fact witnesses.

The thrust of the defendant's motions appears to be that the plaintiff's expert designations are untimely and prejudicial to the defendant. Although Rule 26 of the Federal Rules of Civil Procedure discusses the time frame for disclosure of expert testimony, that rule specifically directs that expert disclosures "shall be made at the times and in the sequence directed by the Court." Fed. R. Civ. P. 26(c). As heretofore stated, the Court will permit a short extension of discovery. Accordingly, the

defendant's motions "to strike" and several supplemental motions to preclude expert testimony at trial will be denied.

#### **IV. CONCLUSION**

For the reasons set forth above, the defendant's motion for summary judgment will be granted in part and denied in part. The Court will grant summary judgment to the defendant on the plaintiff's ERISA claim but will deny summary judgment on the plaintiff's ADA and punitive damages claims. The Court will also deny the plaintiff's motion to amend his complaint, will grant the plaintiff's motion for a limited extension of discovery and to compel discovery, and will deny the plaintiff's and defendant's motions to preclude testimony and/or evidence.

An appropriate Order follows.

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

FURMAN PACE III,  
Plaintiff,

v.

EUREKA, INC. d/b/a  
J.D.M. MATERIALS COMPANY,  
Defendant.

CIVIL ACTION

NO. 97-3245

**ORDER**

**AND NOW**, this 8th day of April, 1998; for the reasons set forth in the Court's Memorandum of this date;

**IT IS ORDERED:** The defendant's motion for summary judgment (Document No. 16) is GRANTED IN PART and DENIED IN PART. Summary judgment is granted to the defendant on the plaintiff's claim under Section 510 of ERISA, 29 U.S.C. § 1140. Summary judgment is denied on the plaintiff's claim under Title I of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12111-12117, and the plaintiff's claim for punitive damages under the ADA.

**IT IS FURTHER ORDERED:** The plaintiff's motion to amend his complaint (Document No. 17) is DENIED.

**IT IS FURTHER ORDERED:** The plaintiff's motions for a limited extension of discovery (Document No. 18-1) and to compel discovery (Document No. 18-2) are GRANTED. Prior to the discovery deadline to be set by separate Order this date, the defendant shall produce Mr. James Morrissey or another corporate representative for deposition concerning: (1) the total number of

persons employed by the defendant and related entities; (2) the net worth of the defendant and related entities; (3) the corporate individual(s) responsible for compliance with the ADA; (4) other claims or complaints of disability discrimination against the defendant and related entities; and (5) any persons involved in the alleged requirement that persons in the plaintiff's position be certified under DOT guidelines. All discovery concerning the defendant's finances shall be subject to a confidentiality agreement executed by the parties.

**IT IS FURTHER ORDERED:** The plaintiff's motion to preclude the defendant from raising the issue of "undue hardship" at trial (Document No. 18-3) and the defendant's motion "to strike" and supplemental motions to preclude expert testimony and evidence at trial (Document Nos. 19, 20, 23 & 25) are DENIED.

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RAYMOND J. BRODERICK, J.