IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 18, 2018
Lyle W. Cayce
Clerk

No. 17-60766
Summary Calendar

TAMISHA PEGUES,

Plaintiff - Appellant

v.

MISSISSIPPI STATE VETERANS HOME,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:15-CV-121

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Tamisha Pegues appeals the jury's verdict that the Oxford Veterans Home (the "Oxford Home") did not fail to accommodate her disability under the Rehabilitation Act of 1973. She also argues that the district court erred in rejecting her proposed jury instruction regarding the requirement for an employer to engage in an interactive process prior to firing a disabled individual. For the reasons explained below, we AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background

Pegues was employed as a direct care worker at the Oxford Home, one of the four branches of veterans' homes under the purview of the Mississippi Veterans Affairs Board (the "Board").[1] There are approximately 145 to 150 veterans at the Oxford Home at any given time. Direct care workers have a number of responsibilities at the Oxford home including, inter alia, cleaning and dressing residents, helping residents lie down and sit up, transporting residents to and from the dining hall, assisting residents with eating, repositioning and checking residents when they are in bed, and generally being on call for the residents should they need assistance. Many of those duties require physical force, and Stephanie Spears, the assistant director of nursing at the Oxford Home, estimated that seventy to eighty percent of direct care workers' responsibilities included physical work. A written job description for the position of "direct care worker" stated that "physical requirements" for the job include doing "heavy work," including a need to "frequently exert force equivalent to lifting up to approximately 50 pounds and/or occasionally exert force equivalent to lifting up to approximately 100 pounds." Although the Oxford Home has a lift,[2] a patient has to be placed into the lift by the direct care workers. Many of the patients at the Oxford Home weighed over 200 or 300 pounds. During Pegues's shift, there would "ideally" be three or four workers per fifty patients, though in reality, there would sometimes be only one or two.

In December 2013, Pegues injured her back when an elderly woman fell while Pegues and another direct care worker were helping her stand. Pegues's

[1] Although the named appellant is the Mississippi State Veterans Home, the parties stipulated at trial that the Board was the proper defendant, and thus, is the entity we reference as the appellant.

[2] A former supervisor at the Oxford Home, Faye Miller, testified that a lift "is like a big blanket . . . [with] connectors that go to the lift." Two direct care workers were needed to

physician initially cleared her to work about a week later, but in January her physician requested a three week leave of absence for Pegues. Upon her return on February 24, 2014, Pegues's physician requested that she be placed on light duty.

The Board's workers' compensation insurance carrier encouraged the veterans' homes in Mississippi, including the Oxford Home, to accommodate light duty assignments for a "trial period" to see whether light duty was feasible. A light duty run generally consisted of residents that were less reliant on assistance with movement, and potentially fewer patients than a full duty worker would care for. Amanda May, administrator of the Oxford Home, expressed concern with employees being on light duty, because "[i]t would cause hardship on everyone working with them" and it was hard to "take care of the employees as well as the veterans" when an employee was on light duty.

During the time when Pegues was on light duty, she received assistance from "[e]very [direct care worker] that worked that hall" to "help [her] with all the job descriptions of the job." With the help of her coworkers, she stated she could do the job. She stated that no coworker or patient ever complained about her ability to do the job.

However, in March 2014, the workers' compensation insurance carrier determined that light duty was not feasible in the Mississippi veterans' homes, including the Oxford Home. Around that same time, Pegues had an issue with her supervisor, Faye Miller, and wrote to the workers' compensation insurer

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place a resident on a lift. One direct care worker would be at the back of the bed and "fold [the lift] up, and . . . put it underneath [the resident] while they're turned on one side. Then [the direct care worker] turn[s] them back toward" the other direct care worker positioned on the front side of the bed. The direct care worker at the front of the bed "would hold" the resident, while the direct care worker at the back of the bed "would turn [the resident] up." Then the direct care workers "would roll the lift seat out underneath the [resident] and make sure it's positioned correctly . . . [and] then connect them, one side at a time, the head, the arm and the leg; and the arm and the leg on the other side." Miller stated that both direct care workers "would have to use physical force" when using the lift.

stating that Miller was making her work outside of her restrictions. That same day, the insurer contacted the Oxford Home's business office manager, Corliss Sullivan, with regard to Pegues's complaint. Pegues states that she received a phone call later that day from Sullivan in which Sullivan told her, "since [the Oxford Home] do[esn't] know what you can do or not do . . . we no longer have light duty." At some point, Miller also refuted Pegues's allegations, countering that Pegues had refused to help with certain tasks that she should have been able to accomplish due to complaints about pain. Miller further stated that Pegues sometimes would not perform her light duty work and be on her phone, so other nurses would have to tend to patients. Pegues was ultimately terminated on April 2, 2014. Her termination notice stated that Pegues "ha[d] been terminated due to not being able to fulfill the duties required."

Pegues initially sued a number of individuals and entities in relation to her termination, but only her claim of violation of the Rehabilitation Act of 1973 (the "Act") against the Board went to a jury trial. Before the jury received its instructions, Pegues argued that the instructions should include a mandate that, when an employee is disabled, "the law requires the employer to engage in a good–faith discussion or an interactive process with the employee before terminating the employee. The purpose of this discussion is to determine if there's an accommodation that may be made in order to keep from terminating the employee." The Board argued that such an instruction was improper, because the instruction did not contain the requisite requirement that an employee be a "qualified employee" before an interactive process is required. Thus, the interactive process is simply part in parcel with an employer's accommodations for an individual. The district court rejected Pegues's proposed instruction on the basis that "it's duplicative and not a fair statement of the law and the facts in this case."

After deliberation, the jury found the Board not liable on the basis that the Board did not fail to accommodate Pegues. It made no finding on whether Pegues was a "qualified individual" under the Act. Pegues moved for judgment as a matter of law ("JMOL") under Federal Rule of Civil Procedure 50(b), or, in the alterative, a new trial, both of which the district court denied. Pegues timely appealed the denial of her motion, including the rejection of her jury instruction.

II. Standard of Review

"We review de novo the district court's denial of a motion for judgment as a matter of law, applying the same standard as the district court." *Heck v. Triche*, 775 F.3d 265, 272 (5th Cir. 2014) (quoting *Foradori v. Harris,* 523 F.3d 477, 485 (5th Cir. 2008)). The standard of review is "especially deferential," and "we draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party." *Id.* at 273 (quoting *Flowers v. S. Reg'l Physician Servs. Inc.,* 247 F.3d 229, 235 (5th Cir. 2001), and *Foradori,* 523 F.3d at 485). Thus, we reverse such a denial "only if the evidence points so strongly and so overwhelmingly in favor of the nonmoving party that no reasonable juror could return a contrary verdict." *Foradori*, 523 F.3d at 482. As the party with the burden of proof, Pegues could not rest on mere deficiencies in proof in her efforts to prevail. *See generally Carley v. Crest Pumping Techs., L.L.C.*, 2018 U.S. App. LEXIS 12669 *10 (5th Cir. May 16, 2018) (where no evidence was presented on an issue, the party with the burden of proof loses). We review a trial court's decision to deny a new trial for abuse of discretion. *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998) (per curiam).

The standard of review for a denial of a proposed jury instruction is abuse of discretion. *See Jowers v. Lincoln Elec. Co.*, 617 F.3d 346, 352 (5th Cir. 2010). "[R]eversal is appropriate whenever the charge as a whole leaves us with

substantial and ineradicable doubt whether the jury has been properly guided in its deliberations and the challenged instruction affected the outcome of the case." *Id.* (internal ellipses and quotation marks omitted) (quoting *Bender v. Brumley,* 1 F.3d 271, 276–77 (5th Cir. 1993)). That being said, we afford district courts "wide latitude in fashioning jury instructions and ignore technical imperfections." *Id.* (quoting *Bender*, 1 F.3d at 276).

III. Discussion

The Act prohibits discrimination on the basis of disability by entities that receive federal funding, including private entities. *Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002) (citing 29 U.S.C. § 794(b)(3)). Its legal mandates are identical to those under the Americans with Disabilities Act ("ADA"). *See* § 794(d). Under the ADA, an employer must institute reasonable accommodations for the disability of an employee, unless those accommodations would cause an undue hardship to the employer. 42 U.S.C. § 12112(b)(5). Here, Pegues argues that the Board, in instituting a no light duty policy and terminating her, failed to accommodate her disability due to her back pain.[3] Thus, Pegues had to prove at trial that "(1) [she] is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations." *Claiborne v. Recovery Sch. Dist.*, 690 F. App'x 249, 254 (5th Cir. 2017) (per curiam) (alteration in original) (quoting *Feist v. La., Dept of Justice, Office of the Att'y Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)).

We conclude that Pegues has not met the high burden necessary to overcome the jury verdict that the Board did not fail to reasonably accommodate her. "As a matter of law, it is an unreasonable accommodation

[3] The parties stipulated at trial that Pegues's injury was a disability for the purposes of the Act.

for the employer to have to exempt the employee from performance of an essential function of the job." *Jones v. Kerrville State Hosp.*, 142 F.3d 263, 265 (5th Cir. 1998) (per curiam). Therefore, a reasonable accommodation could not result in Pegues being completely exempted from lifting. Even assuming that direct care workers often assisted one another with moving and lifting patients, it was reasonable for the jury to conclude that an accommodation that absolved Pegues of lifting on her own was unreasonable.

The evidence supported a conclusion that each employee must be able to do substantial lifting which was a large part of the job. Notably, the duties of direct care workers, especially with respect to the fact that they deal with older patients, undoubtedly require extensive care to avoid catastrophic injuries. Pegues concedes as much; she notes that when she injured her back, she needed to stop the woman from falling, "because of her age -- if she had fell and hurt herself, she may have died," which required Pegues to "risk[] [her]self" to do her job. This fall happened when Pegues was at full health and being assisted by another direct care worker; if the fall happened now, with Pegues physically hampered, even with the assistance of another employee, it is not clear that Pegues would still be able to have the same reactions to protect her patients. This reasonably indicates that Pegues was not able to perform her job as required, even with assistance as an accommodation. *See Daugherty v. City of El Paso*, 56 F.3d 695, 696 (5th Cir. 1995) ("[Q]ualification standards may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." (internal quotation marks omitted) (citing 42 U.S.C. §§ 12111(3), 12113(b))), *holding modified by Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002).

Moreover, on light duty, Pegues was not assigned to work with moving the less-mobile patients, which consequently left performance of those essential duties to other employees. This would be an undue hardship in and of itself. *See Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (per curiam)) ("[A]n accommodation that would result in other employees having to work harder or longer is not required under the ADA."). Thus, Pegues has failed to sustain her burden of showing that no reasonable juror could find as this jury did.[4]

Accordingly, we AFFIRM the district court's judgment.

[4] We agree with the district court that her proposed jury instruction about the interactive process would have misguided, rather than assisted, the jury.