

IN THE COURT OF APPEALS OF IOWA

No. 3-723 / 13-0012
Filed October 2, 2013

PHILLIP M. BROWN,
Plaintiff-Appellee/Cross-Appellant,

vs.

MYSTIQUE CASINO,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dubuque County, Thomas A. Bitter, Judge.

An employer appeals the award of damages to an employee on his claim under the Americans with Disabilities Act that he was wrongfully discharged. The employee cross-appeals, claiming the amount of damages was insufficient.

REVERSED ON APPEAL; DISMISSED ON CROSS-APPEAL.

Nicholas J. Kilburg, Robert Hogg, and Patrick M. Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

Matthew L. Noel of The Noel Law Firm, P.C., Dubuque, for appellee.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

VOGEL, P.J.

An employer, Mystique Casino, appeals the award of damages to a former employee, Phillip Brown, on his claim that he was a person with a disability, and under the provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a), he had been improperly terminated from his employment. Mystique Casino claims Brown failed to show he had a disability within the meaning of the ADA. Mystique Casino also claims that if Brown had a disability, he failed to show he was discharged because of his disability. Brown cross-appeals, claiming the district court erred by striking the jury's award of compensatory damages and claims the court erred by denying his request for front pay. We find Brown was terminated for failure to submit to a drug test, a non-discriminatory reason. We therefore reverse the decision of the district court, concluding the company's motion for judgment notwithstanding the verdict should have been granted. We dismiss the cross-appeal.

II. Background Facts & Proceedings

In 1980 Brown injured his left leg while working on an oil rig. As a result he has a drop foot, where he cannot lift his left foot up, and wears a leg brace on his left leg. He has taken pain medication, such as narcotic analgesics, for twenty-five to thirty years, but successfully performed jobs as a mechanic, welder, and fabricator.

Brown began working for Mystique Casino in October 1999 as a maintenance laborer.¹ In 2006 a supervisor, Robert Kaesbauer, became aware Brown was taking a narcotic drug, hydrocodone, while on the job. Because of

¹ At that time the casino was known as Dubuque Greyhound Park and Casino.

safety concerns, Brown was informed he could not operate any power tools or drive any vehicles off the premises while on the medication. Kaesbauer testified that after about four months Brown told him he was off of the medication and Kaesbauer released him to normal duties. Notwithstanding his representation to Mystique Casino, Brown continued to take his prescription narcotic analgesics while at work.

In February 2010 Brown asked for and received a leave of absence because he was having problems with his left leg.² After about four weeks, Brown sought to return to his job, but Mystique Casino informed him he would need a medical release to return. Brown provided a letter signed by his physician, Dr. Mark Fortson, which detailed Brown's prescriptions for hydrocodone, oxycodone, and hydromorphone, but also noting other non-opiate medications were available for pain control. Mystique Casino, believing the narcotics were prescribed for short-term use, stated Brown could not return to the job until he was off his narcotic medications. At the suggestion of Dr. Fortson, Brown and Mystique Casino eventually came to a compromise which prohibited Brown from bringing his narcotic pain medication onto the casino property, but he could use them while away from the job site. Brown returned to work on May 27, 2010.

On June 10, 2010, Brown cut his finger while at work, and reported it to the shift supervisor. In a hurry to leave work when his shift was over, Brown declined to show the injury to the EMT who was just coming to work. When

² Brown requested temporary disability benefits, and this request was denied by the employer or the insurer. Brown did not challenge the denial.

Brown returned to work the next day his immediate supervisor, William Wolfe, insisted that an EMT at the casino look at the injury. Wolfe testified the EMT made the decision that Brown needed to go to Finley Hospital for further medical evaluation as to whether stitches were needed. Brown testified the EMT told him it was not worth a trip to the hospital, but he had to go. Wolfe accompanied Brown to the hospital.

At the hospital, Wolfe stated that under the company's drug and alcohol policy, Brown was required to have a drug test because he had been involved in an accident which resulted in an injury. Brown refused to submit to the drug test. Wolfe and medical personnel informed Brown that the test was only to check for illegal substances, not prescription medications. Brown still refused the drug test. Under the company's drug and alcohol policy, a refusal was considered the same as a positive test result. Mystique Casino terminated Brown from his employment.

Brown filed an action against Mystique Casino claiming that he had a disability, and the company violated the ADA by discharging him based on his disability.³ In its answer, Mystique Casino asserted Brown was discharged for violating the company's drug and alcohol policy, not because of a disability.

The case proceeded to a jury trial. At the close of plaintiff's evidence, Mystique Casino made an oral motion for a directed verdict claiming Brown had not presented any evidence that he was terminated because of a disability. The court denied the motion, stating, "it's a jury question as to whether or not there

³ Prior to filing suit, Brown obtained a right-to-sue letter from the Iowa Civil Rights Commission. See Iowa Code § 216.16 (2009).

was an accommodation provided and whether or not it was reasonable.” After it had presented its case, Mystique Casino renewed its motion for directed verdict, which the court also denied, “for the same reasons given earlier.” The jury found Brown’s impairment was a motivating factor in Mystique Casino’s decision to terminate him. The jury awarded Brown back wages of \$75,000 and compensatory damages of \$60,000. The jury also found that Mystique Casino “made a good-faith effort and consulted with the plaintiff to identify and make a reasonable accommodation.”

Mystique Casino filed a motion for judgment notwithstanding the verdict claiming (1) Brown failed to prove an ADA disability, (2) Brown failed to show the existence of any impairment that was a motivating factor in its decision to terminate him, and (3) based on the jury’s verdict on reasonable accommodation, Brown was not entitled to compensatory damages. Brown also requested front pay, which is an equitable remedy, and attorney fees. A combined hearing was held on these matters.

The district court determined the jury’s award of compensatory damages should be stricken based on the jury’s finding that the company had made reasonable accommodation for Brown’s disability. It also denied Brown’s request for front pay. The company’s motion for judgment notwithstanding the verdict was denied. Brown was awarded attorney fees of \$18,865. Mystique Casino appeals the decisions of the district court, and Brown cross-appeals.

II. Disability

Mystique Casino claims Brown failed to show he had a disability within the meaning of the ADA because he did not show he had an impairment that

substantially limited his ability to perform his work. While this issue was raised in the company's motion for judgment notwithstanding the verdict, it was not raised in its motion for directed verdict. "A motion for judgment notwithstanding the verdict must stand on grounds raised in the motion for directed verdict." *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 695 (Iowa 2013). Mystique Casino's motion for directed verdict, both after the close of plaintiff's case, as well as after the close of all evidence, focused on the reason for termination—Brown's refusal to submit to a drug test following an on-the-job injury as opposed to any violation of the ADA. Mystique Casino also objected to the marshaling instruction which incorporated the elements of proving an ADA violation. However, Mystique Casino's objection to the instruction harkened back to the reason for termination, not to a failure to prove any element under the ADA, which it only later asserted in the motion for judgment notwithstanding the verdict. We determine this issue has not been preserved for our review because it was not raised in the company's motion for directed verdict, or even when the jury instructions were given. See *Jacobson v. Benson Motors, Inc.*, 260 N.W.2d 396, 405 (Iowa 1974) (noting that where a party did not move for a directed verdict on an issue, that issue could not be considered on appeal); *Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905, 909 (Iowa Ct. App. 1982) (noting a party must make timely objections to jury instructions, on the ground raised on appeal, in order to preserve error).

In his petition, Brown claimed Mystique Casino failed to make a reasonable accommodation for him because it prohibited him from working while taking his medication. Thus, for purposes of this case, Brown's disability is not

his leg injury, but rather his inability to perform major life activities without using prescription pain medication.

III. Motivating Factor

Section 12112(a) of the ADA provides, “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

In order to establish a claim of disability discrimination under the ADA, a plaintiff is required to prove (1) he had a disability under the ADA, (2) he was qualified to perform the essential functions of his job with or without reasonable accommodation, and (3) he suffered an adverse employment action because of his disability. *Hansen v. Seabee Corp.*, 688 N.W.2d 234, 238 (Iowa 2004). If a plaintiff is able to establish a prima facie case by these elements, the defendant then has the burden to offer a legitimate nondiscriminatory reason for the termination. *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6 (Iowa 2009). “If the employer offers a legitimate nondiscriminatory reason, the plaintiff must show the employer’s reason was pretextual and that unlawful discrimination was the real reason for the termination.” *Id.* at 6-7.

Under the third factor necessary to establish a prima facie case, a plaintiff must show the employee’s disability was a motivating factor in the employer’s decision to take an adverse employment action. See *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 67 (Iowa 2013) (discussing sex discrimination under the Iowa Civil Rights Act).

Mystique Casino contends the district court should have granted its motion for judgment notwithstanding the verdict because Brown presented no evidence that his disability was a factor, much less a motivating factor, in the decision to discharge him from employment. It contends Brown's claim that he was discharged because of his disability is based entirely on speculation.

Our review of a district court's ruling on a motion for directed verdict or a motion for judgment notwithstanding the verdict is for the correction of errors at law. *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa 2011). We consider whether there is substantial evidence in the record to support the elements of the plaintiff's claim. *Deboom*, 772 N.W.2d at 5. "Evidence is substantial when 'reasonable minds would accept the evidence as adequate to reach the same findings.'" *Id.* (citation omitted). In considering whether there is substantial evidence, we "view the evidence in the light most favorable to the nonmoving party and take into consideration all reasonable inferences that could be fairly made by the jury." *Pavone*, 801 N.W.2d at 487.

"The ADA specifically provides that employers have the right to prohibit drug-related misconduct at the workplace." *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir. 1995). The ADA does not prohibit employers from testing for illegal drugs or from making employment decisions based on drug test results. See 42 U.S.C. § 12114(d)(2). Under Mystique Casino's drug and alcohol policy, the company could request a drug test based on:

Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under Iowa Code Chapter 88, or resulted in damage to property, including to

equipment, in an amount reasonably estimated at the time of the accident to exceed \$1,000.00.^[4]

Brown testified that he received an injury to his finger while at work on June 10, 2010 and that he reported it to the security supervisor. With no EMT on duty at that hour, Brown “glued” it shut himself, then bandaged the area. Brown stated an EMT was coming on duty as he left for the day, but, in a hurry to get home, Brown did not allow the EMT to check his injured finger. At trial, the company offered a report authored by the attending EMT, stating Brown had told her that “he had cut the knuckle down to the bone.”

The next day, the employer required Brown to be examined by an EMT. There is a difference of opinion as to whether the EMT recommended Brown go to the hospital to have his injury checked out. Brown asserts that his injury was fairly minor and that the EMT told him that it did not warrant a trip to the hospital.⁵ On the other hand, Wolfe testified the EMT determined Brown’s injury needed further medical evaluation as to whether stitches were needed or not. Brown testified a doctor changed the dressing, but did not provide any other medical care. However, Brown recalled the doctor opined that had he come to the hospital the prior night, when the accident happened, he would have put a stitch in the cut.

⁴ This provision in the policy largely follows the statutory language of Iowa Code section 730.5(8)(f).

⁵ Although not explicitly stated by Brown, it appears his claim may be based on section 88.6. The company’s drug and alcohol policy states the company can request a drug test if a record or report of an employee’s injury could be required under chapter 88. Section 88.6(3)(b) provides an employer should maintain records of injuries “other than minor injuries requiring only first aid treatment and which do not involve medical treatment.”

Brown claimed that Mystique Casino's request that he submit to a drug test was not reasonable and that it was made only to provide the company with a pretext for discharging him. However, Mystique's position is that Brown's theory is pure speculation, wholly lacking in any evidentiary support. Brown claims substantial evidence supports the verdict, but the only "evidence" he presented is a theory that the company allowed him to return to work, then waited for him to suffer an injury, knowing he would be required to take a drug test and further knowing that he would refuse the drug test. Brown raises an interesting theory, but he has presented no evidence to support his claim.

The record shows the company was reluctant, for safety reasons, to allow Brown to return to work while he was taking prescription narcotic analgesics. Nonetheless, Mystique allowed Brown to continue to work, with the agreement he would only use his narcotic medications off the job site. After his injury on June 10, 2010, Brown refused drug testing. Under company policy, if an employee suffers an injury while on the job, drug testing is required. Brown admitted that his supervisor, who was present at the hospital, told him that if the drug test only showed the presence of prescription drugs, Brown had no concerns. The human resource director confirmed this, testifying that Brown would not have been terminated if the only drugs in his system were Brown's prescription medications. Brown testified he was aware that his refusal of the drug testing at the hospital could be grounds for his termination. We determine the district court erred in not granting Mystique Casino's motion for judgment notwithstanding the verdict, as there was no evidence of the company, following

company policy, used the drug test after an accident as a pretext for terminating Brown's employment.

We therefore reverse the district court's denial of Mystique Casino's motion for judgment notwithstanding the verdict. In light of our decision, we do not address the claims raised in Brown's cross-appeal that the court improperly determined he was not entitled to compensatory damages or front pay. Costs of this appeal are assessed to Brown.

REVERSED ON APPEAL; DISMISSED ON CROSS-APPEAL.