

2000 WL 1458808
United States District Court, N.D. Illinois.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
CAMBRIDGE INDUSTRIES, INC., United Automobile, Aerospace and Agricultural Implement Workers of
America, Local 1766, and International Union United Automobile, Aerospace and Agricultural Implement
Workers of America, Defendants.

No. 98 C 4413. | Aug. 30, 2000.

Opinion

MEMORANDUM OPINION AND ORDER

GETTLEMAN, District J.

*1 Plaintiff United States Equal Employment Opportunity Commission, on behalf of 16 individuals (“Claimants”), has sued defendant Cambridge Industries, Inc., alleging that defendant violated the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (“ADA”), by rejecting otherwise qualified work applicants based on an abnormal result on a pre-employment nerve conduction test of the median nerve.¹ The 16 applicants were rejected between November 3, 1994, and January 16, 1995. Defendant has moved for summary judgment, arguing that plaintiff cannot establish that defendant regarded the Claimants as disabled. For the reasons set forth below, defendant’s motion is granted.

Facts/History

Prior to August 1, 1994, Rockwell International Corp. (“Rockwell”) operated a manufacturing plant in Centralia, Illinois. The plant made plastic parts for automobiles, such as hoods, fenders and tailgates. During 1992 and part of 1993, as part of its employment application process, Rockwell administered a nerve conduction test to test susceptibility to certain conditions, the most common being carpal tunnel syndrome (“CTS”). An abnormal result on the test excluded applicants from certain entry level positions including trimmer, finisher, final finisher, assembler, RTM operator, molder, and multi-operating positions. The first four of those positions made up over 90% of the persons hired at the Centralia factory. Plaintiff sued Rockwell on behalf of 72 rejected applicants. On August 13, 1999, this court granted summary judgment to Rockwell, holding that plaintiff had failed to present any evidence that Rockwell perceived the claimants as disabled within the meaning of the ADA. *EEOC v. Rockwell International Corp.*, 60 F.Supp.2d 791 (N.D.Ill.1999).

Defendant purchased the facility from Rockwell on August 1, 1994. During the period in question, November 3, 1994, through January 16, 1995, Cambridge continued Rockwell’s practice of requiring the nerve conduction test of all applicants for those entry level positions requiring repetitive or continuing motion and/or constant use of vibratory power tools. It is undisputed that neither Rockwell or Cambridge administered the test to applicants for positions other than those requiring constant motion and/or constant use of vibratory tools.

Discussion

To invoke protection under the ADA, plaintiff must establish that the Claimants suffered from a disability as defined in the Act. *Skorup v. Modern Door Corp.*, 153 F.3d 512, 514 (7th Cir.1998). Disability is defined as: a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; b) a record of such impairment; or c) being regarded as having such an impairment. 42 U.S.C. § 12102(2). It is undisputed that none of the 16 Claimants

actually suffered from or had a record of any impairment that substantially limited one or more of the major life activities. Therefore, the sole issue is whether defendant regarded Claimants as having such an impairment when it rejected their employment applications based on the abnormal nerve conduction test results. *See Rockwell*, 60 F.Supp.2d at 793.

*2 Plaintiff alleges that defendant perceived or regarded Claimants as having an impairment that substantially limited them in the major life activity of working. In this context, “substantially limited” means “significantly restricts the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” *Id.*; 29 C.F.R. § 1630.2(j)(3)(i). “To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.” *Sutton v. United Airlines*, 527 U.S. 471, 119 S.Ct. 2139, 2151 (1999).

Thus, “an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work; rather, the impairment must substantially limit employment generally.” *Skorup*, 153 F.3d at 514–15. “Section 12102(2)(A) looks for proof beyond the plaintiff’s inability to satisfy the expectations of a single employer; to be ‘substantial’, a limitation on the ability to work must be one that affects the plaintiff’s ability to perform a class or broad range of jobs before it qualifies as a disabling limitation under the ADA. For purposes of § 12102(2)(C), the employer’s perception of the plaintiff’s inability to work must have a comparable breadth.” *Id.* at 515. Therefore, as this court held in *Rockwell*, 60 F.Supp.2d at 793, to defeat defendant’s motion for summary judgment, plaintiff must present some evidence establishing a genuine issue of material fact as to whether defendant perceived Claimants as being substantially limited from employment generally, rather than from the specific jobs in question.

The EEOC regulations identify several factors that courts “should consider when determining whether an individual is substantially limited in the major life activity of working, including the number and types of jobs utilizing similar training, knowledge, skills or abilities, within [the] geographical area [reasonably accessible to the individual], from which the individual is also disqualified.” *Murphy v. United Parcel Services, Inc.*, 527 U.S. 516, 119 S.Ct. 2133, 2138 (1999) (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(B)).

In *Rockwell*, the plaintiff relied on the report of vocational expert Michael Brethauer to establish that Rockwell had perceived the claimants as substantially limited from employment generally. Brethauer described Rockwell’s perception of the claimants as an inability to work in occupations that involve continuing repetitive motions and/or vibratory power tools. He then opined that Rockwell’s perception of the claimants resulted in a substantial loss of each claimant’s access to the relevant labor market. To reach that opinion, Brethauer first estimated the number of occupations each claimant could perform based on his or her job history and education, by retrieving information from the Dictionary of Occupational Titles (“DOT”) about the training and skills required of other occupations. He then determined a lesser number that would be available to each claimant if he/she was regarded as unable to perform jobs that require “continuing repetitive motions and/or vibratory power tools.” He then calculated the percent reduction between those two numbers.

*3 Rockwell challenged Brethauer’s report and testimony as inadmissible under Fed.R.Evid. 702, 703, and *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993). After holding a “*Daubert*” evidentiary hearing, the court held that Brethauer’s report and testimony were inadmissible for a variety of reasons. “First, the report fails to meet the reliability requirements. Brethauer’s testimony clearly establishes that he failed to follow the methodology and principles normally applied by vocational experts and that he himself normally applies when performing his function as a vocational expert.” *Rockwell*, 60 F.Supp.2d at 797. Additionally, the court determined that Brethauer’s report was too general to be of use to the jury. Brethauer failed to take into account the specific job market in the geographical area. The report failed to contain evidence on the number of jobs from which the claimants could be excluded because of the perceived impairment, instead analyzing job titles in the DOT. Without evidence of the number of jobs contained in each job title, the report supplied no information from which a jury could determine the number of jobs from which the claimants were considered excluded. *Id.* at 798.

Plaintiff has submitted essentially the same report in the instant case, which defendant challenges on the same grounds. For the same reasons set forth by the court in *Rockwell*, the court now concludes that Brethauer’s report and testimony is inadmissible under Fed.R.Evid. 702, as interpreted by *Daubert*, and by Fed.R.Evid. 703.²

Recognizing that Brethauer’s report is insufficient, plaintiff also relies on the report of Dr. James Witte, a labor market sociologist, who concluded that in 1995 and 1996, occupations associated with a high incident of CTS represent a broad range of jobs in the Centralia labor market. Defendant argues that Dr. Witte’s testimony is inadmissible under Fed.R.Evid.

702 and *Daubert* and, even if admissible, fails to raise a genuine issue of material fact as to whether defendant regarded claimants as substantially limited in the major life activity of working.

In *Daubert*, 509 U.S. at 589, the Supreme Court interpreted Fed.R.Evid. 702 as requiring that “the trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” To do so, the “district court is required to determine 1) whether the expert would testify to valid scientific knowledge, and 2) whether the testimony would assist the trier of fact with a fact at issue.” *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586 (7th Cir.2000).

In analyzing reliability, the court’s role is to determine whether the expert is qualified in the relevant field and to examine the methodology used by the expert in reaching his conclusions. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153 (1999). In the instant case, there is no question as to Dr. Witte’s qualifications as a labor market sociologist. The reliability inquiry, however, does not end with Dr. Witte’s qualifications. Even “[a] supremely qualified expert can not waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method.” *Clark v. Takata Corp.*, 192 F.3d 750, 759 n. 5 (7th Cir.1999).

***4** In analyzing the relevance of the proposed expert testimony, the court must consider whether the testimony “assists the trier of fact in understanding the evidence or determining a fact.” *United States v. Hall*, 165 F.3d 1095, 1101–02 (7th Cir.1999). In simple terms, this step requires the court to determine if the testimony is relevant, because “[e]xpert testimony which does not relate to an issue in the case is not relevant and, ergo non-helpful.” *Porter v. Whitehall Labs, Inc.*, 9 F.3d 607, 614 (7th Cir.1993).

Dr. Witte was retained to consider or determine the number of jobs in the relevant labor market that were similar to those from which the claimants were rejected based on the nerve conduction test. When questioned by the court, Dr. Witte stated that nothing in his report answers the ultimate question: how many jobs in the relevant market during the relevant time period required the use of continuous repetitive motion and or use of vibratory power tools. Defendant suggests that because he has no answer for that specific question, his report is not relevant. Defendant’s approach is overly simplistic. An “expert need not have an opinion on the ultimate question to be resolved by the trier of fact to satisfy [the relevancy] requirement.” *Smith v. Ford Motor Company*, 215 F.3d 713, 718 (7th Cir.2000). The question is whether Dr. Witte’s data and opinions (assuming that they are based on reliable methodology) can assist the trier of fact in reaching the ultimate issue. *Walker*, 208 F.3d at 587.

Because, according to Dr. Witte, no data is available from which to determine the number of jobs requiring continuous repetitive motion and/or use of vibratory power tools (absent conducting an actual survey of employers) during the relevant time period, Dr. Witte was forced to resort to backing his way in by conducting an analysis of occupations listed in the DOT, broken down into categories based on reported incidents of CTS³ (or days lost from work based on reports of CTS). What Dr. Witte ultimately found was that 19 particular occupations that had the highest incidents of reports of CTS had a relationship to occupations that were characterized as either operating, controlling, manipulating, or handling. By performing this analysis, Dr. Witte reached the conclusion that 13 percent of the jobs in the relevant area are in occupations where the relationship to “things” are characterized by operating, controlling, manipulating and/or handling.

The problems with this conclusion are numerous. First, Dr. Witte admitted that he does not know if someone employed in manipulating is necessarily doing continuous repetitive motion or using vibratory power tools. More importantly, however, is the manner in which he reached the conclusion. In reaching the 13 percent figure, Dr. Witte included all occupations that reported the highest incidents of CTS. Unbeknownst to Dr. Witte, however (for he was not told), the Claimants were not tested for nor excluded from all jobs that result in high incidents of CTS, but only certain specific jobs that require continuous repetitive motion and/or use of vibratory power tools. As a result, included among Dr. Witte’s 13 percent figure are a number of jobs from which Claimants were indisputably not excluded. For example (and there are many others), among the 13 percent figure, the occupation that far and away reported the most incidents of CTS (almost 20 percent of all incidents) was secretary. Yet, it is undisputed that defendant did not require secretarial applicants to take the nerve conduction test. Thus, the value of Dr. Witte’s 13 percent figure is minimal, and the court concludes that his testimony is more likely to confuse a jury than help it.

***5** Under *Daubert*, the question of whether the expert is credible or whether his theories are correct given the circumstances of a particular case is a factual one left for the jury, after the expert has been subject to cross examination. *Walker*, 208 F.3d at 589–90. It is not the court’s role to determine whether the expert is correct. *Id.* It is the court’s role, however, to determine if the testimony is pertinent. In the instant case, because Dr. Witte’s ultimate conclusion (even if correct) is irrelevant to the question to be decided by the trier of fact, it is inadmissible under *Daubert*.

To be sure, as plaintiff has argued, it need not establish a precise percentage of jobs that defendant's perception would have precluded claimants from performing. Plaintiff must, however, set forth evidence from which the trier of fact can determine general guideposts, such as whether the perceived impairment foreclosed Claimants from accepting a few, many, or most of the jobs in a particular class or broad range of classes. *Skorup*, 153 F.3d at 514. Plaintiff's own guidelines, 29 C.F.R. 21.1630.2(j)(3)(ii), provide the factors to be considered in determining whether an individual is substantially limited in the major life activity of working. Those factors include: a) the geographical area to which the individual has reasonable access; b) the job from which the individual has been disqualified and the number and types of jobs utilizing similar training, knowledge, skills or abilities within the geographical area, from which the individual is also disqualified because of the perceived impairment (class of jobs) and; c) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area from which the individual is also disqualified because of the perceived impairment (broad range of jobs in various classes). In the instant case it is undisputed that the perceived impairment was the inability to perform continuous repetitive motion and/or use of vibratory power tools. Plaintiff has simply presented no evidence to establish any guideposts by which a court or a jury could determine the number of jobs in the relevant labor market during the relevant time period from which this impairment would have excluded the Claimants.

Moreover, even if admissible, Dr. Witte's testimony is not a sufficient basis upon which to deny summary judgment to defendant. As noted, Dr. Witte concludes only that 13 percent of the available jobs result in high incidents of CTS. Incidents of CTS is not, however, the issue, and plaintiff has presented no evidence from which to determine from how many of the occupations listed among the 13 percent from which Claimants would have been excluded, based upon the perception of an inability to perform continuous repetitive motion and/or use of vibratory power tools. Without such information, plaintiff has no evidence to create a genuine issue of material fact as to the issue of whether Claimants were substantially limited in the major life activity of working. Accordingly, defendant's motion for summary judgment is granted. Because the remaining defendants were added as relief defendants only, the case is dismissed as to them.

Conclusion

*6 For the reasons set forth above, defendant's motion for summary judgment is granted.

Parallel Citations

10 A.D. Cases 1747, 19 NDLR P 121

Footnotes

¹ United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1766, and International Union United Automobile, Aerospace and Agricultural Implement Workers of America were added as relief defendants.

² In *Rockwell*, the court also found that Brethauer had included in his report calculations on which he did not and would not normally rely simply to appease plaintiff's counsel. Although it is not clear that such impropriety occurred in the instant case, in light of Brethauer's candid admissions in *Rockwell*, this court has no confidence in Brethauer's ability to bring reliable, scientifically based testimony to the instant matter. In any event, as noted above, the report in the instant case, like the report in *Rockwell*, fails to meet *Daubert*'s relevancy requirements.

³ Witte himself admitted that his analysis was somewhat questionable because it is based on reported cases of CTS, rather than confirmed incidents, and there is no way of knowing whether the CTS reported was caused by work or something unrelated to work.