IP 03-1005-C H/K Nicholas v Acuity Lighting Gp [2]
Judge David F. Hamilton Signed on 3/2/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JARROD D. NICHOLAS,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:03-cv-01005-DFH-TAB
	)	
ACUITY LIGHTING GROUP, INC.,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JARROD D. NICHOLAS, Plaintiff, v. ACUITY LIGHTING GROUP, INC. d/b/a LITHONIA LIGHTING/HI-TEK GROUP, Defendant.	)))))))))))	CASE NO. 1:03-cv-1005-DFH-TAB

ENTRY ON DEFENDANT'S MOTION *IN LIMINE*

One central issue in the trial of this case under the Americans with Disabilities Act ("ADA") will be whether the ability to perform the duties of a number of different positions is an essential function of the position plaintiff lost. Plaintiff contends that he could perform the essential functions of several positions, with or without reasonable accommodation. Defendant contends that a person in plaintiff's position is required to be able to rotate among all positions, so that the ability to perform the duties of all positions is essential. See *Nicholas v. Acuity Lighting Group, Inc.*, 2005 WL 280341 (S.D. Ind. Jan. 4, 2005) (denying summary judgment).

Defendant has filed a motion *in limine* to exclude any mention or evidence of other employees of defendant whose duties may have been modified in the past.

See Docket No. 65. The court took the matter under advisement following the final pretrial conference attended by the parties' counsel on February 17, 2006. Docket No. 79 ¶ 10. Defendant then submitted an additional memorandum in support of its motion on February 28, 2006. Docket No. 80.

As the court noted in denying summary judgment, the experience of others in the same or similar jobs is relevant evidence as to which functions are essential to a job. See *Nicholas*, 2005 WL 280341, *10-12, quoting 29 C.F.R. § 1630.2(n), and discussing several appellate cases. Defendant argues, however, that admission of evidence pertaining to modifications provided for other employees would contravene a federal regulation pertaining to Equal Employment Opportunity Commission conciliation efforts. The regulation provides in relevant part:

> Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

29 C.F.R. § 1601.26(a). The plain language of the regulation makes clear that evidence such as conciliation agreements, concessions made during negotiations, and offers of compromise, for example, would likely not be admissible in this case. See *EEOC v. Knight's Inc.*, 112 F.R.D. 371, 376 (E.D. Ark. 1986) (denying defendant's motion to compel discovery of documents reflecting EEOC conciliation efforts).

The defendant has failed to demonstrate that this regulation would require exclusion of evidence that defendant has modified an employee's job responsibilities by not requiring the employee to rotate jobs, for example, merely because the modifications resulted from an EEOC conciliation agreement. The plain language seems to be limited to things said or done "during and as part of" the conciliation process. Defendants have not pointed to any authority, and the court has found none, supporting the proposition that 29 C.F.R. § 1601.26(a) is so broad as to prohibit evidence of actions taken as a result of the conciliation process, especially if those actions are inconsistent with an employer's position in the lawsuit.

The court also is not persuaded that admitting evidence pertaining to modifications of other workers' responsibilities would improperly "punish" the defendant for its "generosity." See *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023-24 (7th Cir. 1997). In *Sieberns*, the court affirmed a grant of summary judgment in favor of the defendant, stating that the ADA did not require the defendant to find another position for the plaintiff when it rightfully determined that he was not qualified for the position for which he applied. Although the defendant considered whether the plaintiff could perform another job at the store, the court explained, such an inquiry could not be considered a concession by the defendant that it was either (1) required to find or create a position the plaintiff could perform, or (2) required to engage in an interactive process with the plaintiff to determine if there were any other jobs he could

perform. *Id.* Finding otherwise, the court stated, would punish the defendant for going beyond its duties under the ADA. Defendant has not demonstrated how the rule articulated in *Sieberns* applies to the present case, or why such a rule renders evidence of modifications to the responsibilities of other employees inadmissible.

Defendant's supplemental memorandum points to authority for the proposition that settlement documents pertaining to other employees may, in some cases, be inadmissible under Rules 401 and 403 of the Federal Rules of Evidence. See Docket No. 80, citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1138-39 (5th Cir. 1983). It remains unclear to the court, however, exactly what evidence plaintiff intends to offer regarding modifications for other employees and how probative that evidence might be.

In light of the limits on admissibility of evidence pertaining to events taking place as part of EEOC conciliation procedures and the uncertainty as to exactly what evidence is at issue on defendant's motion, the court finds that the best course of action is to grant defendant's motion *in limine* regarding evidence of other employees whose duties have been modified by the defendant so that plaintiff can inform the court more specifically about the issue before it is presented to the jury. The parties, their attorneys, and all witnesses are instructed not to mention, refer to, interrogate concerning, or attempt to convey such evidence to the jury in any manner, direct or indirect. If plaintiff wishes to introduce such evidence, plaintiff may request outside of the presence of the jury

the court's permission to offer such evidence. The court will be prepared to address this matter before opening statements on the first day of trial.

So ordered.

Date: March 2, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

James E. Ayers
WERNLE RISTINE & AYERS
ayersj@wralaw.com

Sylvia Abra Bier
LOCKE REYNOLDS LLP
sbier@locke.com

James D. Masur, II
LOCKE REYNOLDS LLP
jmasur@locke.com

Heather L. Wilson
LOCKE REYNOLDS LLP
hwilson@locke.com