

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEC 6 1999

PATRICK FISHER
Clerk

TOMMY GARRISON,

Plaintiff-Appellant,

v.

BAKER HUGHES OILFIELD
OPERATIONS, INC. d/b/a Centrilift,
Inc.,

Defendant-Appellee.

No. 98-5074
(D.C. No. 97-CV-82-H)
(N.D. Okla.)

ORDER AND JUDGMENT *

Before **BALDOCK** , **PORFILIO** , and **BRORBY** , Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiff brought this suit under the Americans with Disabilities Act (ADA), complaining that defendant violated the ADA when it withdrew a conditional offer of employment and did not hire him. At trial, plaintiff objected to several of the jury instructions before the case was submitted to the jury. The jury returned a general verdict in favor of defendant on both of plaintiff's claims under the ADA. Plaintiff made post-trial motions for judgment as a matter of law and a new trial, again taking issue with the jury instructions. The district court denied the motions, and this appeal followed. ¹

Plaintiff complains that the jury was incorrectly instructed on his claims under the ADA. He alleged that defendant violated the ADA when it failed to

¹ The notice of appeal states that this appeal is taken from the district court order denying the motions for judgment as a matter of law and a new trial.

The proper way to appeal rulings on such motions is to appeal from the entry of judgment on the verdict. This type of appeal allows the appellant to challenge all prior nonfinal orders and all rulings that produced the judgment.

When a party files a notice of appeal that is technically defective because it designates the appeal as from the denial of a motion for judgment [as a matter of law] or for new trial, we may treat the appeal as taken from the final judgment if the appeal is otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced.

Grubb v. FDIC , 868 F.2d 1151, 1154 n.4 (10th Cir. 1989) (citations omitted).

Thus, we will treat this appeal as taken from the entry of judgment on the jury verdict.

hire him. He was offered a job conditioned upon his successful completion of a physical examination. After independent investigation, defendant became aware of several worker compensation claims filed by plaintiff in the past. Plaintiff claimed that it was discovery of the worker compensation claims that prompted defendant to withdraw its offer of employment, in violation of the ADA.

Defendant countered that after the worker compensation claims came to light, it became apparent that plaintiff had made false representations on his medical history form completed as part of the physical examination, and plaintiff's false representations were the reason defendant did not offer him the job.

The trial court instructed the jury on plaintiff's second claim under the ADA as follows:

AMERICANS WITH DISABILITIES ACT: CLAIM TWO
MEDICAL EXAMINATIONS AND INQUIRIES--ELEMENTS OF
THE CLAIM

Plaintiff can only recover for a violation of the medical examination and inquiry provisions of the Americans with Disabilities Act if Plaintiff first proves that Defendant regarded Plaintiff as having a disability, as defined in earlier instructions.

Accordingly, you are instructed that in order to recover under this claim, Plaintiff must prove the following elements:

1. Defendant regarded Plaintiff as having a disability;
2. Defendant made Plaintiff an offer of employment conditioned upon Plaintiff's successful completion of a medical examination by Defendant's doctor; and
3. Plaintiff successfully completed the medical examination by Defendant's doctor.

Appellant's App. Vol. I at 76. Plaintiff objected to this instruction before the case went to the jury and also challenged it in his post-trial motions. In its order denying the motions, the district court relied on *Griffin v. Steeltek, Inc.*, 964 F. Supp. 317, 319 (N.D. Okla. 1997), in finding that recovery under 42 U.S.C. § 12112(d)(3) requires proof that an employer regards a job applicant as having a disability. See Appellant's App. Vol. I at 100-101. After the district court entered its order and its judgment became final, this court reversed the *Griffin* decision, holding that "[a] job applicant need not make a showing that he or she is disabled or perceived as having a disability to state a prima facie case under 42 U.S.C. § 12112(d)(2)." *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1455 (1999). Following the analysis in *Griffin*, this holding is equally applicable to claims under § 12112(d)(3). Cf. *Griffin*, 160 F.3d at 593-94 (discussing policy and language supporting holding).

When a party objects to instructions given at trial, we conduct a de novo review to determine whether, as a whole, the instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards.

Kinser v. Gehl Co., 184 F.3d 1259, 1272 (10th Cir. 1999) (quotations omitted).

The instruction that plaintiff challenges, directing that plaintiff must show that defendant regarded him as having a disability before he can recover under the ADA, is directly contrary to this court's holding in *Griffin* and is an incorrect statement of the law. Because the instruction did not correctly state the law,

we must reverse the judgment entered on the jury verdict and remand this case for a new trial on plaintiff's claim of violation of 42 U.S.C. § 12112(d)(3). *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1511 (10th Cir. 1997) (reversing and remanding for new trial based on improper jury instruction).

Defendant argues that the incorrect instruction was harmless error in this case because plaintiff did not introduce evidence from which the jury could have returned a verdict in his favor, even if the instruction had correctly stated the law. *See Appellee's Br.* at 4. However, the jury delivered a general verdict, answering in the negative the inquiry whether on claim two the plaintiff had "proven by a preponderance of the evidence that defendant violated the medical examination and inquiry provisions of the [ADA]." Appellant's App. Vol. II at 345-46. Because this was a general verdict, we cannot say that the jury did not base its finding on the erroneous instruction. "[W]here a jury instruction is legally erroneous, we must reverse if the jury might have based its verdict on the [erroneous] instruction." *Coleman v. B-G Maintenance Management of Colo., Inc.*, 108 F.3d 1199, 1202 (10th Cir. 1997). The form of the verdict prevents us from determining whether the erroneous instruction was harmless error in this case.

The jury was erroneously instructed that plaintiff must prove defendant regarded him as having a disability to prevail on his claim that defendant violated

the medical examinations and inquiries provisions of the ADA. Consequently, we must REVERSE the judgment entered on the jury verdict and REMAND the case to the district court for a new trial.

Entered for the Court

Bobby R. Baldock
Circuit Judge