IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-01727-WJM-STV

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

WESTERN DISTRIBUTING COMPANY, d/b/a Western Distributing Transportation Co., a Colorado corporation,

Defendant.

PLAINTIFF EEOC'S MOTION FOR RELIEF UNDER RULES 59 AND 60

I. Introduction

The EEOC files this motion under Rules 59(e) and 60(b)(6) seeking an order holding that in the Phase I trial the EEOC proved the alleged pattern or practice of disability discrimination based on a full-duty policy. The jury found the full-duty policy existed; this policy is discriminatory as a matter of law because it replaced the individualized assessment required by the ADA with the arbitrary requirement that an employee be released to return to work "full duty," without any medical restrictions. The policy thereby necessarily denied both reasonable accommodations and employment opportunities to qualified individuals with disabilities, as alleged in Claims 1 and 2 of the EEOC's Complaint. Having proved the existence of a discriminatory policy, the EEOC is entitled to a rebuttable presumption in Phase II that the challenged adverse actions, taken against qualified individuals with disabilities, were made pursuant to Western's discriminatory full-duty policy.

Alternatively, the EEOC requests the Court grant a new trial on Claims 1 and 2 under Rules 59(a) and 60(b)(6).[1]

II. Argument

A. The jury found Western's "full-duty" policy existed.

At trial, the EEOC proved the existence of Western's full-duty policy. Throughout this case, the EEOC has alleged that Western maintained a discriminatory full-duty policy. *See, e.g.*¸ ECF 1 at 6-8. As the Court found, "[t]he full-duty policy took center stage in the trial, starting from the very first witness." ECF 1090 at 5. The jury found in favor of the EEOC on Claim 3 ("Disparate Impact") regarding the full-duty policy. ECF 1086 at 4 (verdict form listing standard #1 as proven by the EEOC); ECF 1080 at 42 (jury instruction identifying standard #1 as "the alleged 'full-duty' policy"). The Court explained the necessary and unavoidable conclusion from this result: "The *only way* to make sense of the jury's verdict is to conclude that it found *Plaintiff had proved the existence of the full-duty policy*—otherwise it could not have found that the full-duty policy had a disparate impact on individuals with disabilities." ECF 1090 at 6 (emphasis added).

B. Western's full-duty policy is *per-se* discriminatory.

Western's full-duty policy, as evidenced at trial, is a policy stating that an employee is not allowed to return to work from a medical leave unless the employee is released to return to "full duty" or has been "discharged" from the physician's care. EEOC's Trial Ex. 2 at 23. Western's safety managers Respass and Padilla confirmed that they would not schedule a driver for a DOT medical certification appointment at

[1] Purusant to D.C.Colo.LCivR 7.1 the EEOC conferred with Defendant about this motion and Defendant opposes the relief sought by the EEOC.

Aviation unless the employee was released to "full duty", without medical restrictions. And Mr. Respass affirmed the same full-duty policy applied regardless of whether the employee was on medical leave because of a work-related condition or a non-work-related condition.

Since the mid-1990s, federal courts have consistently held that such policies violate the ADA. *See McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (collecting cases). "All courts that have examined the question . . . agree that a 100% rule is impermissible as to a [qualified individual with a disability]." *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001); *see also Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 195 (3d Cir. 2009); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998); *Sowers v. Bassett Furniture Indus., Inc.*, 4:19 CV 00039, 2021 WL 276169, at *10 (W.D. Va. Jan. 27, 2021); *Harris v. City of Lewisburg, Tenn.*, 1:15-CV-00114, 2017 WL 3237780, at *9 (M.D. Tenn. July 31, 2017); *Taylor v. Trees, Inc.*, 58 F. Supp. 3d 1092, 1110 (E.D. Cal. 2014); *Barton v. Checkers Drive-In Restaurants, Inc.*, CIV.A. 11-186, 2011 WL 1193061, at *3 n. 19 (E.D. La. 2011); *Warmsley v. New York City Transit Auth.*, 308 F. Supp. 2d 114, 122 (E.D.N.Y. 2004); *EEOC v. Yellow Freight Systems, Inc.*, No. 98 CIV. 2270, 2002 WL 31011859, at *20 (S.D.N.Y. Sept. 9, 2002); *Hutchinson v. United Parcel Serv.,* 883 F. Supp. 379, 397 (N.D. Iowa 1995); *Heise v. Genuine Parts Co.*, 900 F. Supp. 1137, 1152 & n. 10 (D. Minn. 1995).

In *Gardenhire v. Manville*, the Tenth Circuit adopted the *McGregor* analysis in explaining that full-duty "policies are considered discriminatory because they 'permit [ ] employers to substitute a determination of whether a qualified individual is 100% healed

from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.'" 722 F. App'x. 835, 839–40 (10th Cir. 2018) (alteration in original) (quoting *McGregor,* 187 F.3d at 1116.) The Court rejected Gardenhire's appeal because there was insufficient evidence that the alleged policy actually existed or that he was qualified under the ADA. But the Court left no doubt that where such a policy is found to exist, as it has in this case, the policy is discriminatory.

While courts most commonly use the terms "fully healed" or "100% healed" and not "full duty," the distinction is semantic and not substantive – a policy like Western's that requires employees to return to work without restrictions violates the ADA. *See Dease v. Morton Elec., Inc.*, 6:20-CV-386-GAP-DCI, 2021 WL 8773308, at *4 (M.D. Fla. May 20, 2021) ("This letter, like the letter in *Pyzynski*, 'informed [Dease that] he could not return to work until he could perform his duties without any restrictions.'"); *Jacobson v. Capital One Fin. Corp.*, 16-CV-06169 (CM), 2018 WL 6817064, at *20 (S.D.N.Y. Dec. 12, 2018) ("It is true that a policy requiring a plaintiff to be 100% healed before returning to work—in essence, a policy that forbids an employee from returning to work until s/he can work without restrictions—would violate the ADA."); *Davis v. Munster Med. Research Found., Inc.*, 213 F. Supp. 3d 1074, 1095 (N.D. Ind. 2016) ("A policy that requires 'all employees to return to work without medical restrictions' may be referred to as a '100% healed policy.'"); *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1437 (N.D. Cal. 1996), *aff'd sub nom. Norris v. Sysco Corp.*, 191 F.3d 1043 (9th Cir. 1999) ("In this case, a reasonable jury could have concluded from the evidence that Allied had a policy that an employee had to be released to return to work without any

medical restrictions before the employee could be permitted to return to work. . . . Such a policy would be a *per se* violation of the ADA, as it would fly in the face of the ADA's requirement that employers reasonably accommodate employees with disabilities.").

C. Relief under Rule 59(e) is appropriate at this time.

Under Rule 59(e), the Court has authority to alter or amend the judgment to prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Courts and commentators generally agree that the time period for filing a Rule 59 motion "sets only a maximum period and does not preclude a party from making a Rule 59 motion before a formal judgment has been entered." *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989); *Cline v. Utah*, No. 20-4086, 2021 WL 3611751, at *1 (10th Cir. Aug. 16, 2021); *Larez v. City of Los Angeles*, 946 F.2d 630, 636 (9th Cir. 1991).[2] Accordingly, the EEOC brings this motion before judgment has entered because amendment of judgment as reflected in the verdict form is necessary to prevent clear error and/or manifest injustice. To the extent the judgment entered will reflect the findings on the jury's verdict form, the EEOC moves for an amendment of that judgment to reflect a finding that the EEOC proved the existence of a *per se* discriminatory policy warranting a Phase II rebuttable presumption.

D. Because the EEOC proved that Western maintained a discriminatory "full-duty" policy, Rule 59(e) relief is needed to prevent clear error and/or manifest injustice.

The EEOC has a limited initial burden, which if successfully proven, then shifts to the defendant. In a pattern-or-practice case, the "initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy" or "standard operating

[2] *Hilst,* decided in 1989, refers to a ten-day time period. The 2009 amendment to Rule 59 changed the timing requirement from ten to 28 days. Fed. R. Civ. P. 59, 2009 Advisory Committee note.

procedure" of the employer. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 360 (1977); *Apsley v. Boeing Co.*, 691 F.3d 1184, 1194 (10th Cir. 2012); *Thiessen v. Gen. Electric Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001). At this initial "liability" stage, the EEOC "is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy," but only "that such a policy existed." *Teamsters*, 431 U.S. at 360; *Coe v. Yellow Freight Sys. Inc.*, 646 F.2d 444, 449 n.1 (10th Cir. 1981); *EEOC v. W. Distrib. Co.*, 322 F. Supp. 3d 1100, 1103, 1109 (D. Colo. 2018) (the EEOC need only prove the "discriminatory policy existed," ECF 166 at 3-4, 17). Upon establishing a policy of employment discrimination, reasonable grounds exist to "infer that individual [] decisions were made in pursuit of the discriminatory policy and to require the employer to come forth with evidence dispelling that inference. *Teamsters*, 431 U.S. at 358-359 (citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)).

In this case, the jury's verdict finding a full-duty policy warrants a Phase II presumption. Western's full-duty policy replaces the individualized reasonable accommodation process with a categorial "100% healed" or "no restrictions" standard found to be inherently discriminatory in the cases discussed above. Consequently, the policy is *per se* discriminatory, and the EEOC has proven its pattern or practice claims against Western. Thus, it would be clear error to proceed to Phase II of this litigation without the presumption of discrimination required under *Teamsters.* Moreover, where the EEOC has met its Phase I burden of proving a discriminatory employment policy, it is manifestly unjust to the EEOC, and the aggrieved individuals for whom it seeks relief, to litigate the Phase 2 individual claims without the evidentiary presumption required by

Teamsters. The Court should amend the expected judgment (based on the verdict form) to hold that Western engaged in a pattern or practice of discrimination and hold that the case proceed to Phase II with the *Teamsters* presumption that Western's challenged employment decisions – its failure to accommodate, failure to rehire, and discharge decisions regarding each aggrieved individual – were made pursuant to its discriminatory full-duty policy.

D. In the alternative, the Court should award a new trial under Rule 59(a).

Rule 59(a) permits a district court to order a new trial. Fed. R. Civ. P. 59(a). A new trial is permitted on all or some of the issues "for any of the reasons for which a new trial has heretofore been granted in an action at law in federal court." *Id*. Such a motion may be granted based on any error so long as "the district court concludes the 'claimed error substantially and adversely' affected the party's rights." *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1217 (10th Cir. 2008).

Here, the error warranting a new trial is the failure to instruct the jury that full-duty or "no restrictions" policies are discriminatory, or otherwise explain why such policies or practices inherently violate the ADA.[3] As evidence of that error, the jury returned a verdict indicating the existence of a full-duty policy that caused a disparate impact on individuals with disabilities. ECF 1090 at 5; ECF 1086 at 4. The EEOC's proposed instruction No. 26 included instruction that the full-duty policy was discriminatory, ECF 992-1 at 39, and during the charging conference on Friday, January 27, 2023, the

[3] The EEOC recognizes that the Tenth Circuit and this Court have held that motions under Rules 59 and 60 are not an opportunity to relitigate issues previously addressed by the Court. *Guara v. City of Trinidad*, 10-CV-02529-WJM-KMT, 2013 WL 627139, at *1 (D. Colo. Feb. 20, 2013) (quoting *Servants of Paraclete*, 204 F.3d at 1012). Therefore, the EEOC does not re-raise in this motion all prior issues overruled by the Court. The EEOC raises this particular issue because the jury verdict is an intervening event that the Court did not previously have the opportunity to consider in conjunction with the EEOC's prior objection.

EEOC objected to the proposed instructions articulating the elements of proof for the two pattern-or-practice claims, ECF 1080 at 36, 27, asserting the jury should be instructed that the "full-duty policy, if shown to exist as alleged, is *per se* discriminatory as a matter of law." ECF 1093-01 at 2, 4, Jan. 27, 2023, Tr. 16:12-22; 18:17-20. The EEOC's objections were overruled, *id*. at 4 – 5, Tr. 18:1-2; 19:1-4, and the jury was given no instruction that the full-duty policy, as alleged, was discriminatory. Without being instructed that the full-duty policy was inherently discriminatory, the jury could not fairly appreciate that the policy it found to exist was, in fact discriminatory, and the discriminatory policy established the alleged pattern or practice of disability discrimination.

A new trial is appropriate because the rights of the EEOC and the aggrieved individuals for whom it seeks relief, are substantially and adversely affected. *Henning,* 530 F.3d at 1217. Specifically, the adverse effect on the EEOC and aggrieved individuals is having to proceed with litigating the Phase 2 individualized issues without the presumption of discrimination that flows from having proved the existence of a discriminatory policy. *Teamsters,* 431 U.S. at 362. And the effect of the *Teamsters* presumption is substantial. As the Supreme Court explained "[t]he employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decision making." *Id.* The presumption is not dispositive of claimant rights in Phase II, where the EEOC will still have to prove that each aggrieved individual is a member of the protected class – that is, a qualified individual with a disability, as defined in the ADA. *See id.* (setting out the scope of individuals

"presumptively entitled to relief" subject to a showing by the employer that the decision was not based on its discriminatory policy). But the burden "then rests on the employer to demonstrate that the individual [employee] was denied an employment opportunity for lawful reasons." *Id.* Here, where the EEOC has proved the existence of a discriminatory employment policy, denial of the *Teamsters* presumption is both substantial and adverse, justifying a new trial. *Henning,* 530 F.3d at 1217.

Accordingly, if the Court denies the relief sought under Rule 59(e) to alter or amend the judgment, it should grant a new trial under Rule 59(a) on Claims 1 and 2.

E. Based on the unique circumstances in this case, the Court should provide relief under Rule 60(b)(6).

The EEOC also moves for relief under Rule 60(b)(6). This rule permits the court to alter a "final judgment, order, or proceeding . . . [for] any [] reason justifying relief from the operation of the judgment". Fed. R. Civ. P. 60(b)(6). A district court has discretion to grant relief as justice requires under Rule 60(b). *Servants of Paraclete,* 204 F.3d at 1009. Relief under this rule is appropriate "when circumstances are so 'unusual or compelling' that extraordinary relief is warranted." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) (quoting *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1147 (10th Cir. 1990)). The circumstances here are unusual or compelling for a number of reasons.

First, cases that allege a pattern or practice of discrimination and are bifurcated under *Teamsters* are themselves unusual. Such cases under the ADA are even more uncommon if for no other reason than the ADA was not enacted until 1990, thirteen years after the Supreme Court decided *Teamsters.* Phase I jury trials are similarly uncommon because jury trials were not available for Title VII and ADA cases until

enactment of the Civil Rights Act of 1991. Thus, *Teamsters* itself, and many of the cases applying or interpreting it, were decided before such cases could be tried to juries. In short, there is a dearth of caselaw regarding Phase I jury verdicts, particularly in ADA cases. *See also EEOC v. Bass Pro Outdoor World, LLC*, 4:11-CV-3425, 2014 WL 6453606, at *3 (S.D. Tex. Nov. 17, 2014) ("Settlement pressures typically end large-scale employment discrimination cases before the entry of an appealable final judgment.").

Second, the procedural posture of the case is unique, in that there is a Phase I jury verdict, but no judgment has entered and final judgment is not appropriate until after Phase II is complete. *See, e.g.*, *Atlas Powder Co. v. Ireco Inc.*, CIV. C86-0023, 1992 WL 12014476, at *1 (D. Wyo. Aug. 28, 1992) (holding in an order entering "judgment on issues determined in phase one," that the order was "not a final, appealable Judgment because a number of issues remain to be determined in phase two of this case"). Thus, the usual procedures for relief from final judgment are not available.

Third, it is both unusual and a compelling reason for relief that the Phase I jury found the existence of a full-duty policy but no presumption of discrimination arises from the claims alleging a pattern or practice of discrimination based on that same discriminatory full-duty policy. Indeed, because the jury was not instructed that the full-duty policy was discriminatory as a matter of law, this case is set to erroneously and unjustly proceed down a path where the jury found a discriminatory policy but the EEOC will be denied the presumption it is entitled to based on such finding. As a result, the circumstances are most unusual and unfair, providing compelling reasons warranting the exercise of this Court's discretion.

Accordingly, the EEOC asks for relief from the Phase 1 trial proceeding. Specifically, the EEOC requests the Court order that any Phase 2 trials will proceed with the *Teamster*'s presumption that each qualified individual with a disability denied a reasonable accommodation and/or denied an employment opportunity by Western is entitled to relief, unless Western demonstrates that the individual was denied a reasonable accommodation and/or denied an employment opportunity for lawful reasons. Alternatively, the EEOC requests the Court grant a new trial on Claims 1 and 2, for the reasons articulated above.

III. Conclusion

The EEOC respectful requests the Court grant relief under Rule 59(a), 59(e), or 60(b)(6), providing the EEOC a rebuttable presumption in Phase 2, or ordering a new trial on Claims 1 and 2.

Dated: February 27, 2023

Respectfully submitted,

s/ Karl Tetzlaff
Karl Tetzlaff
Trial Attorney
Telephone: 720.779.3619
E-Mail: karl.tetzlaff@eeoc.gov

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DENVER FIELD OFFICE
950 17th Street, Suite 300
Denver, Colorado 80202

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all attorneys of record and other persons who have appeared or otherwise requested such electronic service in this action.

s/ *Karl Tetzlaff*

Karl R. Tetzlaff
Attorney for Plaintiff EEOC

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

WESTERN DISTRIBUTING COMPANY, a Colorado Corporation doing business as Western Distributing Transportation Corp.,

Defendant.

REPORTER'S TRANSCRIPT
(JURY TRIAL - DAY 13)

Proceedings before the HONORABLE WILLIAM J. MARTINEZ, Judge, United States District Court for the District of Colorado, commencing at 9:25 a.m., on the 27th day of January, 2023, in Courtroom A801, United States Courthouse, Denver, Colorado.

APPEARANCES

KARL R. TETZLAFF, MICHAEL J. LaGARDE, and RITA BYRNES KITTLE, U.S. Equal Employment Opportunity Commission, 950 17th Street, Suite 300, Denver, Colorado 80202, appearing for the plaintiff.

STEVEN W. MOORE, HEIDI K. WILBUR, RENEE J. SHEYKO, Fox Rothschild, LLP, 1225 17th Street, Suite 2200, Denver, Colorado 80202, and NICOLE H. HOWELL, Fox Rothschild, LLP, 4050 Pennsylvania Avenue, Suite 2000, Kansas City, Missouri 64111, and NICHOLAS J. WALKER, Fox Rothschild, LLP, 4900 Main Street, Kansas City, Missouri 64111, appearing for the defendant.

being just disparate impact. We believe it's both a disparate treatment and impact claim. We understand the Court's ruling.

THE COURT: All right. So we don't need to spend any more time on that. Your objection's overruled. Next objection.

MS. KITTLE: Well, I was -- if I could add to that, instead of just saying "disparate impact" we feel that it should say something about the qualification standards, instead of just disparate impact.

THE COURT: Objection's overruled. Next objection.

MS. KITTLE: Okay. On page 36, the Commission objects to the instruction without instructing the jury that the full-duty policy, if shown to exist as alleged, is *per se* discriminatory under the -- *McGregor v. National Railroad Passenger Corp*, 187 F.3d 1113, 1113, Ninth Circuit, 1999, and also endorsed by the Tenth Circuit's *Gardenhire* cases, and I don't have the cite for that.

THE COURT: What do you mean by "endorsed"?

MS. KITTLE: Well in *Gardenhire*, the Court says that that same premise, that a full-duty policy is discriminatory -- *per se* discriminatory under the ADA.

THE COURT: Mr. Walker.

MR. WALKER: Your Honor, we disagree with that. This has already been briefed on summary judgment. We have

submitted our prior objections with respect to that. No -- I would say a couple of things: One, the way that they -- they're trying to point to full duty and say if there's full duty then there's automatic discrimination, but the parties have a very differing view of what the full duty even means. They're using it as a legal term, but it's used here as a lay term, has different definitions depending on which party is discussing that. So we think that would be completely inappropriate.

And aside from that, in order to show -- and it's one of the things that I'm going to bring up, but in order to show that there was a discrimination with respect to reasonable accommodations, they have to show a number of things: One, that the individuals, the claimants here at issue, actually could perform the essential functions of their position; two, that they actually requested accommodation; three, that an accommodation was reasonable; and, four, that that reasonable accommodation was denied. And that stuff is absent from this instruction.

And it's -- and it is required -- in our belief, it's required in order to show that there is actually any discrimination with respect to failure to accommodate. They have to show that with regard to the claimants, there's a pattern or practice of actually failing to accommodate those individuals. There is no *per se* discrimination here.

THE COURT: All right. Thank you. The plaintiff's objection's overruled. Next objection.

MS. KITTLE: Well, we have the same objections for the instructions on page 37.

THE COURT: All right. So in order for that objection to make sense in my mind, you're saying that pattern -- the employment opportunities referenced for -- in Claim 2 include within it failure to reasonably accommodate, which is what Claim 1 is?

MS. KITTLE: No, I'm saying that I -- that both of these instructions on page 36 and 37 involve both of the policies. I mean, they don't expressly talk about the policies, but the pattern or practice of denying accommodation is -- encompasses both of the policies. And then the pattern or practice of discharging employees because of their disabilities involves both of the policies.

What we're saying is that we think the jury should be instructed that the full-duty policy, if it is shown to exist as alleged, is *per se* discriminatory as a matter of law.

THE COURT: All right.

MS. KITTLE: So the EEOC should not have to prove the full-duty policy as discriminatory because it is as a matter of law. And we think that applies to both of the instructions.

THE COURT: To the extent that objection -- that same objection's made with respect to the elements instruction for Claim 2, that objection's also overruled. Next objection.

MS. KITTLE: On page 38, the EEOC objects to an undue hardship defense instruction being given at all because, as we asserted in our motion yesterday, the defendant has not put on evidence of undue hardship. They've put on some evidence about the cost of various accommodations, they have not put on any evidence to suggest that the company cannot afford the cost, whatever the cost may be. So we think it's -- the jury should not be instructed at all on undue hardship because there's not evidence to support it.

THE COURT: All right. Is that the extent of your objection? I just want to make sure that you -- there's not other parts of it that will be coming after I address it.

MS. KITTLE: I -- that's the only post-it note stuck on this page, Your Honor.

THE COURT: That's -- okay. That's the objection, undue hardship defense?

MS. KITTLE: Yes.

THE COURT: The objection is overruled. In my view there's enough evidence for this defense -- affirmative defense going to the jury. Next objection.