Douglas BLACK, Plaintiff–Appellant,

v.

ROADWAY EXPRESS, INC., Defendant–Appellee.

No. 00–6439.

United States Court of Appeals, Sixth Circuit.

Argued: March 7, 2002.

Decided and Filed: July 22, 2002.

Over-the road truck driver filed complaint against employer, alleging disability discrimination under Americans with Disabilities Act (ADA). The United States District Court for the Eastern District of Tennessee, James H. Jarvis, J., granted summary judgment for employer. Driver appealed. The Court of Appeals, Moore, Circuit Judge, held that: (1) evidence that employer failed to provide driver with trucks equipped with cruise control despite knowledge of driver's knee injury was direct evidence of discrimination under ADA, but (2) driver did not meet burden of proving he was disabled.

Affirmed.

1. Federal Courts ⚿776, 813

Court of Appeals reviews de novo a district court's order denying summary judgment, if the denial is based on purely legal grounds; if the denial is based on the district court's finding of a genuine issue of material fact, review is for abuse of discretion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Courts ⚿776

District court's denial of plaintiff's motion for summary judgment, on purely legal ground that it was granting defendant's motion for summary judgment, would be reviewed de novo. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. Civil Rights ⚿173.1

Evidence that trucking company refused to provide over-the-road driver with trucks that had cruise control even though it knew of driver's knee injury was direct evidence of discrimination under ADA. Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42 U.S.C.A. § 12112(b)(5)(A).

4. Civil Rights ⚿173.1, 240(2)

If an employee has direct evidence of discrimination in violation of the ADA, the employee then bears the burden of proving that he or she is disabled, and that he or she is otherwise qualified for the position despite his or her disability without accommodation from the employer, with an alleged essential job requirement eliminated, or with a proposed reasonable accommodation; employer bears the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship on the employer. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

5. Civil Rights ⚿173.1

Over-the-road truck driver's knee injury did not substantially limit him in any major nonwork life activities and driver therefore was not disabled under ADA on that basis; most of alleged limitations related to activities that were not major life activities, and affidavits of driver and his orthopedic surgeon were contradicted by other evidence, including deposition taken for purposes of state workers' compensation action. Americans with Disabilities Act of 1990, § 3(2)(A), 42 U.S.C.A. § 12102(2)(A).

which a truck driver alleged that he was disabled from the class of truck driving jobs because he could not operate trucks with a certain clutch configuration. The court in that case explained that relevant questions in regard to the truck driver's claim were "how many truck driving jobs require the ability to operate a truck with a clutch or how often the painful configuration of the Peterbilt seat occurs . . . ." *Best*, 107 F.3d at 548.

[8] Although we disagree with the district court's reasoning, we nonetheless agree with the district court's conclusion that no reasonable jury could find Black substantially limited in the major life activity of working. As evidence of his substantial limitation in the major life activity of working, Black submitted the affidavit and report of Dr. Julian Nadolsky ("Nadolsky"), Ed.D., a vocational expert ("VE"). Nadolsky attested that "it is my opinion that in the geographical area to which Mr. Black has reasonable access, he is disqualified because of his impairment from both a class of jobs and a broad range of jobs in various classes." J.A. at 436 (Nadolsky Aff.). In his report, Nadolsky concluded that:

> In summary, without a cruise control accommodation, Mr. Black will be totally disabled for employment in his regular job as a Tractor Trailer Truck Driver and in other semi-skilled driving occupations. And, because of the additional restrictions or limitations placed on him by Dr. Johnson, Mr. Black will be disqualified for employment in approximately 75% percent of the types of jobs for which he does not have skills, but could have performed prior to sustaining a work-related injury of his right knee . . . . Mr. Black, therefore, has a physical disability that substantially limits his ability to engage in the major life activity of working.

J.A. at 488 (Nadolsky Report). Nadolsky based both his affidavit and his report almost entirely on Johnson's affidavit and the restrictions Johnson placed on Black in 1997.

In *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 598–99 (6th Cir.1999), we concluded that a VE's testimony that the plaintiff's "physical impairments precluded her from engaging in most of [sic] jobs in the local and national economy as a registered nurse" did not create a genuine issue of material fact because it was "merely conclusory." Nadolsky's affidavit and report are similarly conclusory. In the report, which the affidavit entirely relied on, Nadolsky simply reviewed the evidence of Black's physical impairment and then concluded that Black is significantly restricted from the class of truck driving jobs and from a broad range of jobs in various classes. Nadolsky, however, did not provide any evidence regarding the number of trucking jobs from which Black is disqualified or the number of other jobs from which Black is disqualified. *See id.* In particular, Nadolsky did not provide any evidence that Black would need to be accommodated by the provision of trucks with cruise control in a significant percentage of truck driving jobs.[13] Furthermore, the evidence of Black's physical impair-

13. We note that the EEOC interpretive guidance states that "[t]he terms 'number and types of jobs,' . . ., are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (*e.g.* 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." 29 C.F.R. pt. 1630, App. § 1630.2(j). However, Nadolsky did not produce even this showing of evidence in regard to how many trucking jobs Black would qualify for without the guaranteed provision of cruise control.