IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

ANDREW DEUSCHLE,

Intervenor Plaintiff,

vs.

WERNER ENTERPRISES, INC.,

Defendant.

8:18-CV-329

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on the plaintiffs' motion for judgment on Count III (filing 353) of their operative complaint (filing 112). Count III asserts that the defendant, Werner Enterprises, Inc., violated the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq*., by illegally classifying deaf drivers during the job application process. *See* § 12112(b)(1). Filing 112 at 7. The Court will deny the motion.[1]

I. BACKGROUND

The parties went to trial in front of a jury on Count I of the plaintiffs' complaint, and the jury returned a verdict in Werner's favor. Filing 342. Having presided over that trial, and trial of a companion case two months later (case no. 8:18-cv-462), the Court is quite familiar with the facts. To the extent

[1] Werner's argument that Count III is moot, filing 359 at 19, is moot.

those facts remain disputed, the Court finds the following narrative to have been proved by a preponderance of the evidence.

Andrew Deuschle applied to work for Werner in 2015. He is deaf, with a commercial driver's license and an exemption from the Federal Motor Carrier Safety Administration (FMCSA) physical qualification standards concerning hearing for interstate drivers. *See* 80 Fed. Reg. 22,768-01 (Apr. 23, 2015). Werner did not hire Deuschle. Deuschle and the Equal Employment Opportunity Commission (EEOC) sued Werner, alleging that Werner discriminated against Deuschle on the basis of his deafness.

During discovery, EEOC identified what it characterizes as a "policy regarding deaf truck driver job applicants" implemented by Werner sometime after Deuschle applied to work there. *See* filing 97 at 1. The document outlines a workflow for Werner's recruiters to follow "when a driver answers Yes to having either an MCSA-5870 or FMCSA Waiver."[2] Filing 112-2 at 1. If a recruiter is "aware of an FMCSA waiver – or a hearing issue (IE: leaving a message on a relay service)," a recruiter may not preapprove the application. The application is, instead, sent to the "manager basket." The policy workflow for deaf applicants differs because deaf applicants are not preapproved and are not invited to orientation, even if a deaf driver meets the hiring criteria. *See* filing 355-4 at 1. The plaintiffs amended their complaint in February 2020 to add an additional claim against Werner based on the policy specific to deaf applicants. *See* filing 97.

Ben Pile, currently a manager for Werner's placement driver program,[3] testified at trial that the policy started "around 2016," after Deuschle applied

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[2] The MCSA-5870 is a form for diabetes. *See* 49 C.F.R. 391.46.

[3] The placement driver program is Werner's training program for drivers with less than three months experience, previously known as the student driver program. Filing 298 at 3. At the

to work there. Filing 351 at 95-96. Pile indicated that Werner's recruiting department has not used the policy since at least February 2020, and the department "does not intend to re-implement that hiring process in the future." Filing 360-1 at 2. The plaintiffs presented evidence that Werner does not hire deaf drivers unless those drivers have been trained by other companies. For example, Jamie Hamm, Werner's vice president of safety and compliance, testified that there is "no safe way" for a deaf person to complete Werner's training, so Werner did not hire deaf drivers with less six months' trucking experience. Filing 351 at 160.

At trial and in post-trial briefing, neither party provided evidence of any deaf drivers who applied while the training document was in effect, much less evidence of whether they were or were not hired.

II. PROCEDURAL MATTERS

Werner moved to strike some of the plaintiffs' post-trial offers of exhibits for being undisclosed, unauthenticated, lacking foundation, and containing hearsay. Filing 357. The Court is construing the motion to strike as an objection to some of the plaintiffs' evidence. Relatedly, Werner contends that the plaintiffs submitted their motion for judgment on Count III, filing 353, without filing a separate brief, and the Court should deny the motion based on that deficiency alone. *See* filing 359 at 7-9.

It's unclear why, given the strength of its substantive arguments, Werner wasted its time with arguments that the plaintiffs didn't follow the rules. It is well-settled that cases should be determined on the merits, not on technicalities. *E.g., Belcourt Pub. Sch. Dist. V. Davis*, 786 F.3d 653, 661 (8th

time Deuschle applied, and for at least some of the time the policy at issue was in place, Werner required the placement driver program for drivers with less than six months' experience.

Cir. 2015). The Court finds no merit to the assertion that Werner was somehow prejudiced by the plaintiffs' technical inadequacies.

The plaintiffs assert they did not include certain exhibits in the pretrial conference order because they understood that *those* exhibits would be presented to the jury. The purpose of requiring parties to disclose evidence prior to trial is to prevent unfair surprise in front of a jury. *See* NECivR 16.2(a)(1). It makes sense, and is "good cause" under NECivR 16.2(a)(1), that the plaintiffs wanted to separate the jury trial evidence from the present claim to be determined by the Court. This unique bifurcated proceeding indicates that the plaintiffs were justified and reasonable in their understanding of the purpose of the exhibits in the pretrial conference order. Any prejudice resulting from the plaintiffs' proposed evidence can be easily cured because there's not a jury present, and Werner has had sufficient time to review the evidence and make its substantive objections (which it obviously did). *See* filing 358.

Relatedly, the Court does not read the plaintiffs' brief, filing 353, as a "threadbare motion that provides sparse citations to authority supporting the merits" of their case. Filing 359 at 8. It's a relatively short brief, to be sure, but Werner's brief would have been considerably shorter without several pages complaining about the plaintiffs' purported procedural shortcomings. The Court is not convinced that it should treat the plaintiffs' failure to file a separate brief as an "abandonment of the motion." Filing 359 at 7 (quoting NECivR 7.1(a)(1)(B)).

Werner *substantively* contends that some of the plaintiffs' submitted evidence lacks foundation, is unauthenticated, and contains hearsay. *See* filing 358. Specifically, Werner objects to a purported Werner policy titled "Guidelines to Working a Driver's File" (filing 355-4), some emails from 2017 between Werner's safety director and a competing trucking company's safety

director (filing 355-6), and chat messages between unidentified Werner employees (filing 355-7 and filing 355-8).

The Court agrees that the chat messages and the emails lack foundation and authentication. The plaintiffs have not identified the individuals in the chat messages, except that they are Werner employees. *See* filing 353 at 6. But their job positions, duties, or relevance to the present lawsuit or to Werner's operations are unspecified. The chat messages in filing 355-7 and the emails are also irrelevant because contents of the messages do not reference the policy at issue in Count III. The Court will sustain Werner's objection to that evidence.

The Court is satisfied that filing 355-4 is what the plaintiffs purport it to be. *See* Fed. R. Evid. 901. The appearance, contents, substance, and distinctive characteristics are satisfactory evidence of the document's authenticity, particularly when compared to documents whose authenticity Werner does not challenge. *See id.*; *compare* filing 355-4, *with* filing 97-2. The plaintiffs have also provided sufficient foundation for the document. Werner's objection to this evidence is overruled.

III. DISCUSSION

The ADA prohibits "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." § 12112(b)(1). The plaintiffs have the burden to show that Werner had a classification policy that "adversely affected" a qualified individual with a disability. *Id.*; *see St. Martin v. City of St. Paul*, 680 F.3d 1027, 1032 (8th Cir. 2012); *EEOC v. C.R. England, Inc.,* 644 F.3d 1028, 1039 (10th Cir. 2011).

The plaintiffs have indicated, expressly and repeatedly, that Count III hangs on the training document identified in filing 97-2. That document,

despite Werner's arguments to the contrary,[4] facially segregates applicants on the basis of their deafness. But, as this Court explained in its order on the parties' motions for summary judgment, filing 292 at 19, and in its order on Werner's motion to reconsider, filing 323, the face of the policy does not indicate any adverse action. And the plaintiffs have not shown that any qualified deaf applicant was not hired because of Werner's "manager basket" policy.

The plaintiffs claim that Werner did not produce any deaf applicants it hired while the policy was in effect, so Werner's policy necessarily caused an adverse failure to hire qualified deaf applicants. *See* filing 353 at 4. But this argument impermissibly shifts the burden of proof to Werner; it is the plaintiffs' obligation to show an adverse employment action. *See C.R. England*, 644 F.3d at 1040; *Muldrow v. City of St. Louis,* 30 F.4th 680, 687 (8th Cir. 2022).

Werner certainly has a policy, unwritten but evident, that it did not hire deaf drivers with less than six months of over-the-road truck driving experience when Deuschle applied to Werner (and, at least as of the trial in June 2023, Werner did not hire deaf drivers with less than three months' experience). *See* filing 298 at 3; filing 351 at 160 (Jamie Hamm's testimony); filing 341 at 12 (jury instruction on Werner's requested business necessity affirmative defense, describing Werner's policy that it required "drivers with less than 6 months' experience to engage in instantaneous two-way communication as part of the trainer-observed over-the-road component of its placement driver program"); case no. 8:18-cv-462 filing 316.

[4] Werner argues that the training document "was applicable to applications from *any* exemption-holder, not merely deaf drivers." Filing 365-1 at 3. But that's demonstrably untrue on the face of the policy, which explicitly outlines a policy for handling applicants with any "hearing issue," not even drivers with an FMCSA waiver. It's clear the focus of the policy is on an applicant's ability to hear, not with FMCSA waiver requirements. *See* filing 112-2 at 1.

Despite this, the plaintiffs have failed to show the requisite elements of their unlawful classification claim under the ADA. The plaintiffs have not presented any evidence of a qualified deaf individual who suffered an adverse employment action (i.e., the person was not hired) when their application was sent to the "manager basket" pursuant to the policy identified in Count III. The Court cannot identify, nor have the plaintiffs provided, any case law or statute which permits the Court to grant relief based on a hypothetical, unidentified qualified individual who could have or would have suffered an adverse employment action based on a facially discriminatory policy.

While Werner is a likely target for discrimination lawsuits so long as it refuses to hire inexperienced truck drivers on the basis of their deafness, this Court cannot grant the plaintiffs their requested relief in this particular lawsuit. Accordingly,

IT IS ORDERED:

1. The defendant's motion for leave to file a sur-reply brief (filing 365) is denied as moot.

2. The defendant's motion to strike (filing 357) is granted in part and denied in part.

3. The plaintiffs' motion for judgment on Count III (filing 353) is denied.

4. A separate judgment will be entered.

Dated this 11th day of January, 2024.

BY THE COURT:

John M. Gerrard
Senior United States District Judge