

NEBRASKA SUPREME COURT

Arens v. NEBCO, Inc.

291 Neb. 834 (2015) · No. No. S-14-290 · Decided September 18, 2015

SUMMARY

The Nebraska Supreme Court addressed Lenard Arens’ disability discrimination claims against NEBCO, Inc. under the Nebraska Fair Employment Practice Act. The court analyzed evidentiary exclusions, directed-verdict standards, reasonable accommodations, and the business-necessity standard for requiring an employee to undergo a medical examination. It reversed the judgment for NEBCO and remanded for a new trial.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Connolly, J.; Heavican, C.J.; Wright, J.; Stephan, J.; Miller-Lerman, J.; Cassel, J.; McCormack, J. (participating on briefs)
JURISDICTION	Nebraska
DECIDED	September 18, 2015
DOCKET	No. S-14-290
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Arens appealed from a jury verdict for NEBCO in his disability-discrimination action under the Nebraska Fair Employment Practice Act. He challenged evidentiary rulings excluding testimony and exhibits and the denial of motions for directed verdict and a new trial.
STANDARD OF REVIEW	Relevance rulings are reviewed for abuse of discretion. Factual findings underlying hearsay rulings are reviewed for clear error, while the ultimate hearsay determination is reviewed de novo, except for residual-hearsay rulings. Directed-verdict rulings are reviewed by giving the nonmoving party the benefit of all evidence and reasonable inferences and asking whether the party was entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential
PARTIES	Lenard Arens v. NEBCO, Inc.

TOPICS

disability discrimination

ada / disability

evidence

hearsay

standard of review

PRACTICE AREAS

employment law

disability discrimination

evidence

appellate procedure

QUESTIONS PRESENTED

1. Whether the trial court erred by excluding Utley's testimony as irrelevant.
2. Whether the trial court abused its discretion by excluding Utley's reports as hearsay and by refusing to admit the reports in part.
3. Whether the evidence compelled a directed verdict in Arens' favor on his claim that NEBCO's stated reasons for its employment actions were pretextual.
4. Whether NEBCO's required fit-for-duty examination and psychological counseling were unlawful under Neb. Rev. Stat. § 48-1107.02(10).
5. What standard governs whether an employer has a business necessity for requiring an employee, rather than an applicant, to undergo a medical examination.

HOLDINGS

1. The trial court erred in excluding Utley's testimony as irrelevant because the testimony had a rational, probative connection to whether Arens was a qualified individual with a disability, whether NEBCO knew of his impairments, and whether NEBCO had previously considered accommodations for those impairments reasonable.
2. The reports satisfied the foundational requirements for treatment as business records, but the trial court did not abuse its discretion in excluding the exhibits wholesale because they contained inadmissible opinions and diagnoses and Arens did not limit his offer to admissible portions.
3. Excluding Utley's testimony was reversible error because the testimony was not cumulative and was Arens' best evidence of NEBCO's knowledge of his mental impairments and its prior willingness to accommodate them.
4. The trial court properly denied Arens' general motion for directed verdict because reasonable jurors could draw contrary inferences concerning whether NEBCO's stated reasons for transferring and terminating him were pretextual.
5. Under Neb. Rev. Stat. § 48-1107.02(10), an employer requiring an employee to undergo a medical examination must show that the business necessity is vital to the business, that the employer has a legitimate, nondiscriminatory reason to doubt the employee's ability to perform essential job functions, and that the examination is no broader than necessary.

KEY QUOTATIONS

“Accordingly, to show a business necessity for requiring an employee (as distinguished from an applicant) to submit to a medical examination under § 48-1107.02(10), an employer has the burden to show that (1) the business necessity is vital to the business; (2) it has a legitimate, nondiscriminatory reason to doubt the

employee's ability to perform the essential functions of his or her duties; and (3) the examination is no broader than necessary.” (291 Neb. 865-866)

“An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can “perform job-related functions.”” (291 Neb. 866)

“Requiring an employee to submit to a medical examination is consistent with a business necessity only if the employer shows significant evidence that a reasonable person would doubt that the employee could perform the essential functions of the job, with or without reasonable accommodations, because of a medical condition.” (291 Neb. 867)

FACTUAL BACKGROUND

Arens worked for NEBCO from 1976 until 2010 and sustained a knee injury and a later traumatic brain injury that affected his climbing ability, memory, attention, concentration, and emotional functioning. NEBCO had previously accommodated some of his limitations, including assigning him to a tractor-trailer position and providing written instructions. In December 2010, after vehicle incidents and alleged failures to file reports, NEBCO transferred him to concrete-truck driving, required a fit-for-duty examination that he failed, required employer-mandated counseling, and terminated him after he did not attend the counseling.

PROCEDURAL HISTORY

The Lancaster County District Court entered judgment on a jury verdict in favor of NEBCO. Arens appealed, arguing that the exclusion of vocational rehabilitation counselor David Utley's testimony was erroneous and prejudicial, that the evidence compelled a directed verdict on pretext and unlawful medical examinations, and that the court applied the wrong legal standard. The Nebraska Supreme Court reversed and remanded for a new trial.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Conduct a new trial. If the medical-examination issue arises again, apply the business-necessity standard adopted under Neb. Rev. Stat. § 48-1107.02(10), including whether there was significant evidence that a reasonable person would doubt Arens' ability to perform the essential job functions with or without reasonable accommodations.

CASES CITED

- McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)
- Griffith v. Drew's LLC, 290 Neb. 508, 860 N.W.2d 749 (2015)
- Credit Mgmt. Servs. v. Jefferson, 290 Neb. 664, 861 N.W.2d 432 (2015)
- State v. McCave, 282 Neb. 500, 805 N.W.2d 290 (2011)

- First Express Servs. Group v. Easter, 286 Neb. 912, 840 N.W.2d 465 (2013)
- Melanie M. v. Winterer, 290 Neb. 764, 862 N.W.2d 76 (2015)
- Brennan v. Reinhart Institutional Foods, 211 F.3d 449 (8th Cir. 2000)
- Gallegos v. Swift & Co., 237 F.R.D. 633 (D. Colo. 2006)
- State v. Robinson, 272 Neb. 582, 724 N.W.2d 35 (2006)
- State v. Thorpe, 280 Neb. 11, 783 N.W.2d 749 (2010)
- Hansen v. Fincantieri Marine Group, LLC, 763 F.3d 832 (7th Cir. 2014)
- Pace v. National R.R. Passenger Corp., 291 F. Supp. 2d 93 (D. Conn. 2003)
- State v. Huston, 285 Neb. 11, 824 N.W.2d 724 (2013)
- Holman v. Papio-Missouri River Nat. Resources Dist., 246 Neb. 787, 523 N.W.2d 510 (1994)
- Steinhausen v. HomeServices of Neb., 289 Neb. 927, 857 N.W.2d 816 (2015)
- Ipock v. Union Ins. Co., 242 Neb. 448, 495 N.W.2d 905 (1993)
- Marshall v. EyeCare Specialties, 291 Neb. 264, 865 N.W.2d 343 (2015)
- IBP, Inc. v. Sands, 252 Neb. 573, 563 N.W.2d 353 (1997)
- Trosper v. Bag 'N Save, 273 Neb. 855, 734 N.W.2d 704 (2007)
- Balames v. Ginn, 290 Neb. 682, 861 N.W.2d 684 (2015)
- Fletcher Cyclopedia of the Law of Corporations § 789 (rev. vol. 2010)
- Kroll v. White Lake Ambulance Authority, 691 F.3d 809 (6th Cir. 2012)
- Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005)
- Kroll v. White Lake Ambulance Authority, 763 F.3d 619 (6th Cir. 2014)
- Wisbey v. City of Lincoln, Neb., 612 F.3d 667 (8th Cir. 2010)
- Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)
- Conroy v. New York Department of Correctional Services, 333 F.3d 88 (2d Cir. 2003)
- Sullivan v. River Valley School District, 197 F.3d 804 (6th Cir. 1999)
- Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010)
- Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3d Cir. 2001)
- Gajda v. Manhattan and Bronx Surface Transit Operating Authority, 396 F.3d 187 (2d Cir. 2005)
- Jacobitz v. Aurora Co-op, 291 Neb. 349, 865 N.W.2d 353 (2015)