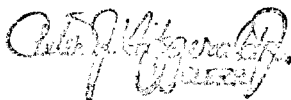
NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL,
FIFTH CIRCUIT
FILED JAN 29 2002



DAVID DIMAGGIO	**COURT OF APPEAL**
VERSUS	**FIFTH CIRCUIT**
WAL-MART STORES, INC.	**STATE OF LOUISIANA**
	01-CA-977

APPEAL FROM
THE FIRST PARISH COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 114-637, DIVISION "A,"
HONORABLE GEORGE W. GIACOBBE, PRESIDING.

JANUARY 29, 2002

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges James L. Cannella
Thomas F. Daley and Walter J. Rothschild.

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AFFIRMED.

Plaintiff, David DiMaggio, filed this tort suit against Wal-Mart Stores, Inc. ("Wal-Mart") alleging that he suffered permanent hearing loss as a result of excessive noise levels at Wal-Mart in their Tire and Lube Express Department where he worked. Trial was held in First Parish Court for the Parish of Jefferson on July 22, 1999. On September 24, 1999, the trial judge rendered a judgment in favor of Wal-Mart and dismissed Mr. DiMaggio's demand. In his judgment, the trial judge found that Mr. DiMaggio had failed to prove that his hearing loss was caused by his employment at Wal-Mart. Mr. DiMaggio filed a motion for new trial which was denied by the trial court. Thereafter, he filed a motion for appeal which was granted by the trial court on May 17, 2000.

Mr. DiMaggio worked for Wal-Mart in their Tire and Lube Express ("TLE") centers from May of 1994 until May of 1997. Mr. DiMaggio testified that he initially performed oil changes, battery maintenance, and tire repair and replacement. He later performed front end work and alignments. While working in the TLE centers, Mr. DiMaggio used various tools, such as pneumatic impact wrenches, tire machines, grinders, air chisels, and ball peen hammers. Mr. DiMaggio testified that he experienced ringing in his ears after performing various tasks in the TLE centers. He further testified that after a year of employment at Wal-Mart, he began to have a difficult time

understanding what people were saying to him, and people were noticing that he often did not hear them.

It was discovered that Mr. DiMaggio had a hearing impairment when he underwent a pre-employment physical examination when he applied for a new job. In December of 1997, Mr. DiMaggio had an audiological examination which was performed by Mr. Robin Morehouse of Louisiana State University Medical Center. Mr. Morehouse concluded that Mr. DiMaggio suffered from mild sensorineural hearing loss in his right ear and moderate sensorineural loss in his left ear due to excessive noise level exposure.

DISCUSSION

On appeal, Mr. DiMaggio asserts as his sole assignment of error that the trial court was clearly wrong in finding that Mr. DiMaggio's hearing loss was not in fact caused by his employment at Wal-Mart Stores, Inc. We disagree.

The Occupational Safety and Health Administration ("OSHA") sets forth standards providing that protection against the effects of noise exposure must be implemented by employers when sound levels exceed certain levels. 29 CFR 1910.95. The permissible sound levels set forth by OSHA are measured using a time weighted average to indicate what sound levels are safe. The permissible sound exposures are set forth in 29 CFR 1910.95 as follows:

Duration per day, hours	Sound level, dBA, slow response
8	90
6	92
4	95
3	97
2	100
1 ½	102
1	105
½	110
1/4 or less	115

29 CFR 1910.95 further provides that when the daily noise exposure is composed of two or more periods of different levels of noise exposure, their combined effect should be considered. According to the chart, an average sound level of 90 decibels (dB)

constitutes a safe noise level for eight hours. The chart further provides that 92 dB is a safe level for six hours, 95 dB is a safe level for four hours, and so forth.

Although Mr. DiMaggio contends that the noise levels during his employment at Wal-Mart exceeded OSHA standards, the evidence presented at trial does not support his position. Mr. DiMaggio's expert, Mr. Morehouse, testified that he performed a study at Pep Boys to measure the sound levels created by activities similar to those performed by Mr. DiMaggio at Wal-Mart. Mr. DiMaggio testified that the testing done by Mr. Morehouse at Pep Boys was performed under similar circumstances to which he had been exposed and that the testing was done using the same equipment that he had used. This testing revealed that the ambient noise level in the repair shop at Pep Boys was 74 dB. Further testing by Mr. Morehouse revealed that a pneumatic grinder used in patching a tire measured 107-108 dB, a tool used to remove lug nuts measured 78-79 dB, re-installing lug nuts was 124 dB, filling a tire with air using a tire changing machine was 134 dB, and performing front end work using a ball peen hammer measured 129 dB. However, the use of each of these tools occurred only for short periods of time and there was no evidence presented that these sound levels were endured for periods of time in excess of the OSHA guidelines. Mr. Morehouse testified that impact noise levels of 140 dB or greater should not be endured for any length of time without hearing protection. However, there was no evidence presented to indicate that the noise levels at Wal-Mart ever reached 140 dB.

Mr. Victorio Angulo-Escudero develops industrial safety programs for Wal-Mart, and he testified via his deposition that he performed audio studies at the Kenner Wal-Mart in April of 1999 on a busy day in the TLE department. He stated that the time weighted average of noise in the TLE was 80.9 dB, which is within the limits of the OSHA standards. Neither Mr. Morehouse nor Mr. Angulo-Escudero produced any evidence to indicate that Wal-Mart was in violation of the OSHA standards. As stated above, 29 CFR 1910.95 provides that employers are required to implement safeguards to protect their

employees from noise exposure when the sounds levels exceed those set forth in the OSHA standards. The plaintiff has failed to establish that the OSHA standards were exceeded or that the sound levels in Wal-Mart caused the hearing loss that he sustained.

At trial, both Mr. Ronnie Brennan, who was the service manager at the store where the plaintiff worked, and Mr. Brent Rome, who is Wal-Mart's Tire and Lube Express District Manager, testified that Mr. DiMaggio did not request any hearing protection while working at Wal-Mart, and Mr. Rome stated that no other Wal-Mart employee has complained about excessive noise, hearing loss, or needing hearing protection.

Mr. Morehouse testified that Mr. DiMaggio had reported to him that he had a history of listening to loud music, and he indicated that loud music can be a cause of hearing loss. Mr. DiMaggio admitted that he liked loud music and that his parents had cautioned him that his hearing could be damaged by excessively loud music. Mr. George Young, who formerly worked at Wal-Mart in the TLE department with Mr. DiMaggio, testified that he attended a party at Mr. DiMaggio's house where the music was very loud. Mr. DiMaggio testified that on one occasion, his neighbors had complained to him about his loud music late at night.

Mr. DiMaggio also admitted that he had participated in the activity of exploding plastic oil bottles in trash cans to create a loud noise while working at Wal-Mart. Mr. Young testified that he was present on several occasions when Mr. DiMaggio participated in exploding oil bottles, and he stated that it was similar to the sound of fireworks. He further testified that it was louder than most of the noises in the TLE, including the tire changing machine, and that it was done for horseplay. Mr. Morehouse performed tests in which he exploded oil bottles in trash cans and they measured 86-89 dB.

A court of appeal may not set aside the findings of the trial court unless they are clearly wrong or manifestly erroneous. Rosell v. ESCO, 549 So. 2d 840 (La. 1989); LaSalle v. Benson Car Co., Inc., 00-1459 (La. App. 5 Cir. 1/30/01), 783 So. 2d 404, 408. Pursuant to this standard, the issue is whether the trier of fact's conclusion was

reasonable, not whether it was right or wrong. Stobart v. State, DOTD, 92-1328 (La. 4/12/93), 617 So. 2d 880, 882. The trial court's findings are entitled to great deference. Atwood v. State Farm Automobile Insurance Co., 95-454 (La. App. 5 Cir. 12/13/95), 666 So. 2d 1187, 1189.

In the present case, the plaintiff has failed to establish that Wal-Mart violated OSHA standards regarding permissible sound exposure. Furthermore, the testimony and evidence show that the plaintiff had been exposed to high sound levels in situations other than those to which he was exposed while working in the Wal-Mart TLE centers.

Whether an action is the cause-in-fact of the harm is a factual determination that is usually left for the trier of fact. Boykin v. Louisiana Transit Co., 96-1932 (La. 3/4/98), 707 So. 2d 1225, 1231; Lasyone v. Kansas City Southern R.R., 00-2628 (La. 4/3/01), 786 So. 2d 682, 691. We have carefully reviewed the record in this matter, and we find that it was reasonable for the trial court to conclude that the plaintiff did not prove that any conduct or negligence by Wal-Mart was the cause of the hearing loss sustained by Mr. DiMaggio. Therefore, we cannot say that the judgment of the trial court was clearly wrong or manifestly erroneous, and we affirm the judgment in favor of the defendant, Wal-Mart Stores, Inc.

AFFIRMED.