NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1313

JUANITA JACKSON

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

DATE OF JUDGMENT: MAY 31 2019

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 610412, SECTION 24, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE R. MICHAEL CALDWELL, JUDGE

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BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

Disposition: AFFIRMED.

WILL Dissent with Reasons
JEW Welch Jr. concurs in result

CHUTZ, J.

Defendant-appellant, Department of Public Safety and Corrections (DPSC), appeals the trial court's judgment granting a judgment notwithstanding the verdict (JNOV) after a jury concluded that plaintiff-appellee, Juanita Jackson, had not suffered a disability entitling her to damages under the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. (the Rehab Act) and the Louisiana Employment Discrimination Law, La. R.S. 23:301, et seq. (LEDL).[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 24, 2012, Jackson filed a petition for damages against DPSC (Office of Juvenile Justice). Having worked for DPSC since 1997, Jackson was eventually promoted into the position of Juvenile Justice Specialist 3 at the Jetson Center for Youth (Jetson). According to Jackson, beginning in 2010, when she was required to work in Winter Unit of Jetson, she experienced severe asthmatic reactions. It was undisputed that Winter Unit was a cellblock that housed the most aggressive juveniles. It was also undisputed that Winter Unit was not well-ventilated and at times contained mildew. Jackson sought medical treatment as a result of the asthma attacks she experienced while working in Winter Unit.

When her medical providers restricted her from working in Winter Unit, Jackson requested that DPSC accommodate her in accordance with the medical restriction. DPSC cleaned the mildew present in the Winter Unit and agreed "that any problems such as the visible mildew [she] saw in Winter Unit [would be] abated" by housekeeping prior to the time she was required to report for duty. In addition, DPSC advised Jackson "reasonable effort will be made to assign [her] to

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[1] The trial court sustained an exception of lack of subject matter jurisdiction and dismissed Jackson's claims under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. Citing ***Holliday v. Bd. of Sup'rs of LSU Agr. and Mechanical Coll.***, 2014-0585 (La. 10/15/14), 149 So.3d 227, this court subsequently denied Jackson's writ, challenging the trial court's dismissal of her ADA claim. See ***Jackson v. La. Dep't of Pub. Safety and Corr.***, 2015-0820 (La. App. 1st Cir. 9/9/15) (unpublished writ action), writ denied, 2015-1850 (La. 11/16/15), 184 So.3d 29.

well-ventilated areas" but if she had to be placed in an area she believed was not sufficiently ventilated, a surgical mask from the infirmary would be provided to her by her supervisor. Jackson wanted a permanent exemption from working in Winter Unit, but DPSC declined to accommodate her, maintaining that, for purposes of security and due to an employee shortage, it was an essential function of every juvenile justice specialist to be able to work anywhere in the facility where youth were present, including Winter Unit.

Jackson's last day of work was August 19, 2011. In April 2012, after all her leave time had been expended, Jackson was separated from her employment for non-disciplinary reasons.

In the petition for damages she filed against DPSC, Jackson averred that she had been discriminated against on the basis of her asthma disability. She claimed DPSC had wrongfully terminated her and failed to provide her with reasonable accommodations and, therefore, was entitled to damages. DPSC answered Jackson's petition, asserting affirmative defenses, denying the allegations against it, and demanding a jury trial.

A four-day jury trial was held, commencing on December 11, 2017, after which the jury returned a verdict finding that Jackson did not have a disability. Pursuant to the verdict-form instructions, the jury pretermitted answers to the remaining questions presented to it. On January 12, 2018, based on the jury's conclusion that Jackson did not suffer a disability such that DPSC was liable to her, the trial court signed a judgment dismissing Jackson's claims with prejudice.

On January 29, 2018, Jackson filed a motion for JNOV or, in the alternative, a new trial. After a hearing, the trial court granted a JNOV on the issue of whether Jackson had a disability and a new trial on the remaining issues that the jury had pretermitted. A judgment in conformity with its ruling was signed on April 10,

2018. DPSC filed this appeal, challenging the propriety of the trial court's grant of JNOV.[2]

DISCUSSION

At trial, the jury was charged with the elements required for Jackson to establish that DPSC was liable to her. The first interrogatory on the jury verdict form was "Did [Jackson] have a disability," for which the jury checked "No." Without objection by the parties, in conjunction with this inquiry, the trial court charged the jury as follows:

> A "disability" is a physical impairment that substantially limits one or more major life activities. In determining whether [Jackson's] impairment substantially limits her ability to breathe, you should compare her ability to breathe with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. Temporary impairments with little or no long-term impact are not sufficient.

See ***Bazert v. State, Dep't of Pub. Safety & Corr.***, 99-2115 (La. App. 1st Cir. 9/22/00), 768 So.2d 279, 282, writ denied, 2000-2937 (La. 12/15/00), 777 So.2d 1229 (citing 42 U.S.C. § 12102(2) of the ADA).[3] See also La. R.S. 23:322(6) (defining an "impairment" as an intellectual disability, any physical or physiological disorder or condition, or prior mental disorder or condition); La. R.S. 23:322(7) (stating that the term "major life activities" means functions such as

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[2] The parties have not appealed the grant of new trial, and we find no abuse of discretion by the trial court in granting the motion. See La. C.C.P. art. 1972(1) (permitting the trial court to grant a new trial when the verdict or judgment appears clearly contrary to the law and the evidence); ***Henry v. Sullivan***, 2016-0564 (La. App. 1st Cir. 7/12/17), 223 So.3d 1263, 1272 ("The denial of a motion for new trial ... should not be reversed unless there has been an abuse of the trial court's discretion.").

[3] Although the trial court dismissed Jackson's claim for relief under the ADA, see n.1, supra, it nevertheless appears to have used portions of the ADA's statutory framework in setting forth the requisite elements for her claims for relief under the Rehab Act and the LEDL in instructing the jury. Adequate jury instructions are those that fairly and reasonably point out the issues and provide correct principles of law for the jury to apply to those issues. ***Marie v. Allstate Ins. Co.***, 2016-1643 (La. App. 1st Cir. 6/14/17), 224 So.3d 372, 379. Mindful that the parties have not complained about the applicability of the elements contained in the ADA statutory framework to Jackson's claims under the Rehab Act and LEDL, and concluding that the jury instructions are sufficiently adequate, we review the propriety of the trial court's grant of a JNOV on the issue of disability based on the instructions provided to the jury by the trial court.

caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working); and La. R.S. 23:323 (prohibiting discrimination by an employer against a qualified person with a disability on the basis of that disability).

A JNOV is a procedural device authorized by La. C.C.P. art. 1811, by which the trial court may modify the jury's findings to correct an erroneous jury verdict. ***Wood v. Humphries***, 2011-2161 (La. App. 1st Cir. 10/9/12), 103 So.3d 1105, 1109, writ denied, 2012-2712 (La. 2/22/13), 108 So.3d 769. Article 1811 states, in pertinent part:

> A. (1) Not later than seven days, exclusive of legal holidays, after the clerk has mailed or the sheriff has served the notice of judgment under [La. C.C.P. art.] 1913, a party may move for a judgment notwithstanding the verdict....
>
> (2) A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.
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> B. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or render a judgment notwithstanding the verdict....
>
> C. (1) If the motion for a judgment notwithstanding the verdict is granted, the court shall also rule on the motion for a new trial, if any.

Article 1811 does not set out the criteria to be used when deciding a motion for JNOV. ***Wood***, 103 So.3d at 1110. However, the Louisiana Supreme Court has established the standard to be used in determining whether a JNOV is legally called for, stating:

> JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be

> resolved in favor of the non-moving party. This rigorous standard is based upon the principle that "[w]hen there is a jury, the jury is the trier of fact."

Joseph v. Broussard Rice Mill, Inc., 2000-0628 (La. 10/30/00), 772 So.2d 94, 99 (citations omitted).

In this case, the trial court had to first determine whether the facts and inferences point so strongly and overwhelmingly in favor of Jackson that reasonable jurors could not arrive at a contrary verdict. Stated simply, if reasonable persons could have arrived at the same verdict, given the evidence presented to the jury, then a JNOV is improper. See ***Cavalier v. State, ex rel. Dep't of Transp. and Dev.***, 2008-0561 (La. App. 1st Cir. 9/12/08), 994 So.2d 635, 644. An appellate court reviewing a trial court's grant of a JNOV employs the same criteria used by the trial court in deciding whether to grant the motion. See ***Smith v. State, Dep't of Transp. and Dev.***, 2004-1317 (La. 3/11/05), 899 So.2d 516, 525. In other words, the appellate court must determine whether the facts and inferences adduced at trial point so overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary finding of fact. If the answer is in the affirmative, then the appellate court must affirm the grant of the JNOV. However, if the appellate court determines that reasonable minds could differ on that finding, then the trial court erred in granting the JNOV, and the jury verdict should be reinstated. Neither the trial court nor this court may substitute its evaluation of the evidence for that of the jury, unless the jury's conclusions totally offend reasonable inferences from the evidence. ***Gutierrez v. Louisiana Dep't of Transp. and Dev.***, 2011-1774 (La. App. 1st Cir. 3/23/12), 92 So.3d 380, 386, writ denied, 2012-1237 (La. 9/21/12), 98 So.3d 343.

On appeal, DPSC maintains that the jury could have found that Jackson's breathing was not substantially limited. Pointing to portions of Jackson's medical record and some of the testimony of her medical providers, DPSC suggests that the

jury could have reasonably found Jackson's testimony regarding the frequency of her asthma symptoms was not supported by the evidence and, therefore, that her asthma did not substantially limit her ability to breathe as compared to an average person.

Although DPSC correctly notes that Jackson's immunologist, Dr. James Kidd, testified Jackson's pulmonary function studies were "technically normal," he further explained that in the context of the serial pulmonary function studies, Jackson had some reversibility, indicating that she had sustained wheezing. Dr. Kidd also stated Jackson's lung function was at normal levels a week after she had regularly taken steroid medication, which allowed for the increased lung function and indicated that she had asthma. Dr. Kidd explained Jackson was an atopic individual, meaning that she has a tendency to have allergies, and he outlined seven allergens for which she skin-tested positively that were likely present in the cellblock environment and could have triggered her severe asthma response. Thus, Dr. Kidd recommended that Jackson move to a ventilated area where she would have far less exposure to the environmental allergens. He opined that there was a definite correlation between Jackson's history, physical and laboratory findings, and environmental exposure for him to make a connection between her wheezing and the job-related activities. Dr. Kidd diagnosed Jackson's condition as occupational asthma and, because Jackson knew which areas of Jetson triggered her asthmatic response, recommended as the primary treatment that she be removed from Winter Unit. We find that DPSC's representation of Dr. Kidd's testimony as sufficient evidence to support a finding that Jackson's lung function level was "normal" is a mischaracterization and incomplete evaluation of his testimony. Moreover, while a trier of fact may believe in whole or part the testimony of any witness, see ***Gutierrez***, 92 So.3d at 387, DPSC offered no controverting testimony -- medical or otherwise -- or other evidence by which the

jury may have concluded that Jackson's ability to breathe while working in Winter Unit was comparable to that of an average person.

Similarly, DPSC asserts that Jackson's smoking habit of half a pack of cigarettes a day justifies the jury's conclusion that her ability to breathe was not substantially limited. Her medical record contained instances of clear lungs despite her undisputed allergy to tobacco leaf particle. Although the record is replete with medical evidence showing that, despite her allergy to tobacco leaf particle, Jackson was able to smoke without sustaining a severe asthmatic reaction -- suggesting that Jackson could breathe comparably to an average person when she smoked tobacco cigarettes -- the record is devoid of any evidence to support a finding or a reasonable inference that she could likewise breathe comparably to an average person when she was exposed to the occupational allergens present in Winter Unit.

Moreover, we note that nothing in the record supports a finding or a reasonable inference that it was her allergy to tobacco leaf particle, rather than an occupational allergen present in Winter Unit, that caused her severe asthmatic reaction on the days she worked in the cellblock. DPSC produced no testimonial or documentary evidence of anyone who identified that Jackson had smoked in close temporal proximity to the time she had a severe asthmatic reaction at Winter Unit.

We also find without merit DPSC's suggestion that Jackson's medical records contradicted her testimony as to the duration and severity of her asthma symptoms since at times while visiting her medical care provider she exhibited no wheezing and her lungs were clear. DPSC presented no evidence to support a finding or reasonable inference that at the time of her exposure to the occupational allergens in Winter Unit, Jackson did not have a severe asthmatic reaction or otherwise breathed like an average person. Importantly, in light of Dr. Kidd's recommendation of her physical removal from the Winter Unit as Jackson's primary treatment, DPSC offered nothing to counterbalance the natural effect of

gradual restoration to a more normal breathing capacity she would experience once she was away from the occupational allergens that triggered her severe response such that by the time she saw a medical care provider, she no longer exhibited the severe asthmatic reaction.

In addition to Jackson's testimony detailing instances of asthma attacks in the cellblock, the testimony of a former coworker, Kelly Johnson, corroborated an incident where Johnson took over Jackson's duties at Winter Unit because of Jackson's inability to breathe. Additionally, at the time of two incidents, Jackson provided Jetson with written reports detailing her asthmatic reaction while she had been present in Winter Unit. And the medical record for treatment she received at Lane Regional Hospital in Zachary, Louisiana, likewise documented an instance where Jackson reported to the emergency room with limited breathing capacity after having worked in Winter Unit. In light of the uncontroverted evidence establishing that Jackson had severe asthmatic reactions while working in Winter Unit, the record fails to support DPSC's contention that the jury could reasonable find Jackson's breathing was not substantially limited.

DPSC next contends the jury could have found Jackson's testimony about her asthma symptoms was not credible. In light of the evidence contained in this record, we disagree that any rejection of Jackson's credibility could support the jury's conclusion that she did not have a disability.

As we have noted, in ruling on a motion for JNOV, neither the trial court nor this court is permitted to evaluate questions of witness credibility, but must constrain its evaluation to the facts contained in the record and the inferences to be made therefrom. Although DPSC vigorously asserts that Jackson failed to prove the presence of mold (one of the known occupational allergens for which Jackson skin-tested positive) and offers evidence from DPSC personnel and records tending to support that assertion, Dr. Kidd identified other occupational allergens that were

likely present in Winter Unit which could have been the source of Jackson's severe asthmatic response. Without any evidence controverting Dr. Kidd's testimony of the likely presence of dust mites; skin cells enhancing dust mite production; rodent dander; insect parts contained in house dust; and locker room fungus (Trichophyton) in the correctional institutional environment, all to which Jackson's skin-testing indicated she was allergic, the jury was without evidence to make an implicit finding that mold was the sole allergen which triggered her asthmatic reaction, regardless of whether mold was not present in Jetson.

DPSC urges that a jury could have rejected Jackson's testimony that some allergen in Winter Unit caused her severe asthmatic reaction because she was able to retain substantially normal breathing function despite her daily cigarette smoking habit, which must have included the regular ingestion of tobacco leaf particle. But DPSC offered no testimony or other evidence that the cigarettes Jackson smoked correlated to the tobacco leaf particle allergy from which she suffered. And even if a jury could have reasonably inferred that Jackson was able to ingest tobacco leaf particle without significantly undermining her ability to breathe, DPSC did not provide the jury with any evidence from which it could draw the conclusion that the other occupational allergens to which she was exposed at Winter Unit would have had affected her breathing in a similar manner as the ingestion of tobacco leaf particle ostensibly had. Importantly, Jackson's uncontroverted testimony was that she had a severe asthmatic reaction while present in Winter Unit, which she corroborated with Johnson's testimony, written reports submitted to Jetson contemporaneously with two asthmatic reactions, and Lane Memorial Hospital Emergency Room records. DPSC did not offer any evidence to the contrary which would have allowed the jury to not only reject her testimony as not credible but to also make a finding or reasonably infer that she

had not experienced a severe asthmatic reaction while in Winter Unit; or that something other than the occupational allergens caused her asthma attack.

Lastly, DPSC claims that Jackson's medical care providers based their opinions correlating her asthmatic reactions in Winter Unit to occupational allergens only on the history that Jackson provided to them. Therefore, DPSC reasons that the jury was free to discount the opinions of Jackson's medical care providers and conclude that Jackson did not have a disability. As we have already concluded, DPSC did not offer the jury any evidence of another source that could have triggered her asthmatic reactions. As such, Jackson's uncontroverted evidence supports her medical care providers' opinions relating her exposure to occupational allergens in Winter Unit and the asthma attacks. The jury simply had no countervailing evidence to allow it to find to the contrary. Cf. e.g., ***Martinez v. Connecticut, State Library***, 817 F.Supp.2d 28, 53 (D. Conn. 2011) (state library employee with chronic asthma exacerbated by cold temperatures was not able to prove disability as required to support disability discrimination action against employer; although asthma affected employee's respiratory system, limiting her ability to breathe, which was major life activity, employee was not required to work in extreme temperatures, and there was no evidence that employee suffered frequent asthmatic episodes at work, the asthma could not be controlled by medication, or that the employee was unable to perform any aspect of her job functions).

Accordingly, in light of the evidence presented at trial, we find the trial court correctly determined that the jury erred in its conclusion that Jackson did not have a disability. The facts and inferences point so strongly and overwhelmingly in favor of Jackson that reasonable persons could not arrive at a contrary verdict. See e.g., ***Bazert***, 768 So.2d at 281, 283 (asthmatic condition of security guard at state penitentiary was a physical impairment that substantially limited his undisputed

life activity of breathing where, after reassignment to area of penitentiary increased his exposure to irritants coupled with his inability to leave the area to obtain occasional fresh air, aggravated his asthmatic condition to such severity that he was medically restricted from working in the area).

DECREE

For these reasons, the trial court's judgment is affirmed. Appeal costs in the amount of $4,050.50 are assessed against appellant-defendant, Department of Public Safety and Corrections.

AFFIRMED.

JUANITA JACKSON

VERSUS

LOUISIANA DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS

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BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

LANIER, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent. Based on my review of the record, and in light of the rigorous standard in reviewing a JNOV, I find that the JNOV was improperly granted in this case. I disagree with the majority's conclusion that the facts and inferences point so strongly and overwhelmingly in favor of Jackson that reasonable persons could not arrive at a contrary verdict. Accordingly, I dissent.