No. 99-7073

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

JIMMY L. DUNCAN,

Plaintiff-Appellee

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE ON REHEARING EN BANC

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The United States and the Equal Employment Opportunity Commission, as amici curiae, respectfully submit this Certificate pursuant to Circuit Rule 28(a)(1).

A. Parties and Amici: Except for the following, all parties, intervenors, and amici appearing before the district court and this Court are listed in the Brief of the Appellant:

The United States (amicus)

The Equal Employment Opportunity Commission (amicus)

The Equal Employment Advisory Council (amicus)

B. Rulings Under Review: References to the rulings at issue appear in the Brief of the Appellant.

C. Related Cases: References to related cases at issue appear in the Brief of the Appellant.

Respectfully submitted,

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GLOSSARY

ADA = Americans with Disabilities Act

EEOC = Equal Employment Opportunity Commission

WMATA = Washington Metropolitan Area Transit Authority

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents an important issue under the Americans with Disabilities Act (ADA); namely, the nature of the evidence the plaintiff must present to establish that he is disabled because he has a physical impairment that substantially limits his ability to work. It arises in an employment discrimination suit under Title I of the Act, 42 U.S.C. 12111 et seq. The Attorney General and the Equal Employment Opportunity Commission (EEOC) have principal authority to enforce Title I, and the court's decision could have a significant effect on those enforcement responsibilities.

QUESTIONS PRESENTED

Plaintiff, an unskilled worker with a history of performing heavy labor, injured his back, which restricted his lifting to

approximately 20 pounds.[1/] He alleged that as a result he is disabled under the ADA because he is substantially limited in the major life activity of working. The issues presented are:

1. Whether plaintiff is disabled because he is significantly restricted in the ability to perform a "class of jobs" involving heavy manual labor; and

2. Whether plaintiff must offer expert testimony and statistical evidence regarding the number of jobs available to unskilled heavy manual laborers in his geographical area.

INTRODUCTION AND SUMMARY

On January 28, 2000, a panel of this Court issued its decision vacating the jury verdict in favor of plaintiff. 201 F.3d 482. On March 31, 2000, the Court granted plaintiff's petition for rehearing en banc and vacated the panel decision. Subsequently, the Court ordered supplemental briefing. For the reasons set forth below, we believe that the panel majority applied an overly stringent standard for determining whether an unskilled laborer has an impairment that substantially limits his ability to work, and that sufficient evidence was introduced to establish that plaintiff was significantly restricted in his ability to perform a class of jobs involving heavy labor.

[1/] Although plaintiff's doctor testified that the 20 pound restriction was an approximate restriction, and that he could possibly lift between 20 and 30 pounds (see J.A. 251-252), as a general matter the parties (and the panel) have characterized this case as involving a 20 pound lifting restriction. See Duncan v. WMATA, 201 F.3d 482, 486-487 & n.2 (D.C. Cir. 2000) (panel decision).

ARGUMENT

I

PLAINTIFF IS SIGNIFICANTLY RESTRICTED IN HIS ABILITY TO TO PERFORM THE CLASS OF JOBS INVOLVING HEAVY MANUAL LABOR

In order to state a claim under the ADA, the plaintiff must establish that he is a "qualified individual with a disability." 42 U.S.C. 12112(a). A "disability" is defined to include an impairment that "substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2). The statute does not further define these terms, but the regulations do.[2/]

Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, * * * and working." 29 C.F.R. 1630.2(i). With respect to the major life activity of working, the term "substantially limits" means:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job

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[2/] In Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2141 (1999), the Supreme Court noted that no agency was given authority to promulgate regulations implementing the generally applicable provisions of the ADA, and declined to consider what deference they were due. In our view, these regulations adopted by an enforcing agency are entitled to judicial deference. Indeed, the panel majority, although declining to follow one example set forth in the EEOC's Interpretive Guidelines, see 201 F.3d at 489 n.4; note 7, infra, did not find that the regulations themselves were not valid or not entitled to deference. Moreover, decisions after Sutton have continued to give weight to these regulations. See, e.g., Burns v. Coca-Cola Enter., No. 98-6535, 2000 WL 1022686, at *6 & *10 n.6 (6th Cir. July 24, 2000); Fjellestad v. Pizza Hut, 188 F.3d 944, 948-949, 954 n.8 (8th Cir. 1999); Muller v. Costello, 187 F.3d 298, 312 n.5 (2d Cir. 1999); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 307 (3d Cir. 1999); see also Bragdon v. Abbott, 524 U.S. 624, 647 (1998).

> does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. 1630.2(j)(3)(i). The regulations identify other factors that "may" be considered if necessary to determine whether the individual is substantially limited in the major life activity of working, including the "geographical area to which the plaintiff has reasonable access," and the "number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographic area, from which the individual is also disqualified." 29 C.F.R. 1630.2(j)(3)(ii). Even when consideration of these factors is necessary to make such a determination, the regulations explain that "the term[] 'number and types of jobs' * * * [is] not intended to require an onerous evidentiary showing." 29 C.F.R. Pt. 1630, App. at 1630.2(j).[3/]

In this case, plaintiff has limited education, training, and work skills, and a history of performing unskilled heavy labor jobs involving "medium" and "heavy" lifting.[4/] For such a person

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[3/]WMATA asserts in its supplemental en banc brief (pp. 13-15) that the court should find that "working" is not a major life activity, citing Sutton, 119 S. Ct. at 2151. WMATA did not raise this issue in its initial briefs filed with this Court, and the panel did not address it. Thus, although we disagree with WMATA on this point, see, e.g., Burns, 2000 WL 1022686, at *8 (post-Sutton decision noting that "working is generally accepted as a major life activity"), we do not believe the issue is appropriately before this Court. See 201 F.3d at 485 (parties agree "working" is the "activity involved and that it is a major life activity under the ADA"). If the Court is inclined to address this issue, we respectfully request leave to file an additional supplemental brief addressing the issue.

[4/]Department of Labor Regulations, 20 C.F.R. 404.1567, use the terms "very heavy," "heavy," "medium," "light," and "sedentary" to classify jobs by their physical exertion requirements. "Very heavy work" entails lifting more than 100 pounds, with frequent

the inability to lift more than 20-30 pounds significantly restricts his ability to perform a "class of jobs."[5/]

1. The determination whether a person is substantially limited in the major life activity of working "requires a court to consider the individual's training, skills, and abilities in order to evaluate whether the particular impairment constitutes for the particular person a significant barrier to employment." Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 784 (3d Cir. 1998) (internal quotation marks omitted). This follows from the notion that the ADA is "concerned with preventing substantial personal hardship in the form of significant reduction in a person's real work opportunities." Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996). Thus, in all cases there must be an individual assessment. See Burns, 2000 WL 1022686, at *5 ("a physical condition that would not substantially limit one person's ability to work could substantially limit another's depending on each person's occupation and * * * qualifications").

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lifting of objects weighing over 50 pounds. "Heavy work" entails lifting up to 100 pounds on occasion, and frequently up to 50 pounds. "Medium work" entails lifting up to 50 pounds on occasion, and frequently up to 25 pounds. "Light work" entails lifting up to 20 pounds on occasion, and frequently up to 10 pounds. "Sedentary work" entails lifting no more than 10 pounds.

[5/]The regulations provide that the plaintiff can establish a "substantial limitation" by showing that he is significantly restricted in the ability to perform either a "class of jobs" or a "broad range of jobs in various classes." Where, as in this case, the evidence establishes that plaintiff is restricted from performing all of the jobs in at least one "class of jobs," it is unnecessary to further determine whether he is also restricted from performing a "broad range of jobs in various classes."

The first step is to determine the relevant class of jobs (or, in other cases, the broad range of jobs in various classes). This determination begins by identifying the particular job the plaintiff can no longer do because of his impairment, and determining what specific training, knowledge, skills, and job-related abilities are utilized by that particular job. Based on that information, the court determines the appropriate "class of jobs" -- i.e., the group of other, related jobs that requires similar training, knowledge, skills, and abilities. See Webb, 94 F.3d at 488 (in determining relevant class of jobs court should consider the job from which plaintiff was fired and the specialized skills that he developed in that job).

This determination is often straight-forward. For example, in Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 303 (4th Cir. 1998), the plaintiff was a maintenance supervisor, and the court concluded that the relevant class of jobs was maintenance supervisory work, not maintenance work in general, because of the supervisory responsibilities involved in plaintiff's position. Similarly, in DePaoli v. Abbott Laboratories, 140 F.3d 668, 673 (7th Cir. 1998), the court concluded that assembly line work was the relevant class of jobs, not merely the particular production line job the plaintiff had with her employer. See also Best v. Shell Oil Co., 107 F.3d 544, 548 (7th Cir. 1997) (truck driving constitutes class of jobs). Some courts, however, reject the collection of jobs identified by the plaintiff as too narrow to constitute a "class." In Sutton, for example, the Court held

that "global airline pilot" was not broad enough to be considered a class, and determined that the plaintiff was still able to perform other pilot jobs. 119 S. Ct. at 2151; see also Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999) (being regarded as unable to drive commercial vehicles did not render mechanic regarded as significantly restricted in the ability to perform a class of jobs using his skills, since it was not disputed that there were other jobs he could perform as a mechanic); Muller, 187 F.3d at 313 (class is not as narrow as correctional officer, but includes other kinds of jobs relating to security or law enforcement).

Once the relevant class of jobs has been determined, the final step is to determine whether plaintiff, given his impairment, is "significantly restricted" in the ability to perform all or most of the jobs within the class, "as compared to the average person having comparable training, skills, and abilities"; i.e., as compared to a similar worker without the plaintiff's impairment. 29 C.F.R. 1630.2(j)(3)(i). The plaintiff need not be totally unable to work to be substantially limited in the major life activity of working. See, e.g., Burns, 2000 WL 1022686, at *7.

2. The instant case presents the circumstance where the job from which the plaintiff has been disqualified requires no particular skills, training, or expertise. But it does require specific abilities; namely, the ability to perform heavy manual labor -- here, medium and heavy lifting. Indeed, plaintiff's

entire work history involves such lifting. In these circumstances, we believe that such heavy labor jobs define the relevant "class" of jobs. As noted above (note 4), the Department of Labor classifies jobs by their physical exertion requirements, using the terms "very heavy work," "heavy work," and "medium work." These classifications support the conclusion that a class of jobs can be defined by exertional requirements. Such heavy labor is distinguishable from the broader category of unskilled labor -- these jobs have certain distinctive characteristics that define a recognizable "class" of more strenuous, physically demanding jobs (e.g., furniture mover).

Numerous cases support the conclusion that for employees with a background of heavy manual labor the inability to lift heavy objects may limit their ability to perform a class of jobs. For example, in Mondzelewski the court concluded that an unskilled laborer whose back injury restricted his lifting was significantly restricted from performing a class of jobs. 162 F.3d at 785. Similarly, in Wellington v. Lyon County School District, 187 F.3d 1150 (9th Cir. 1999), the court concluded that plaintiff's limited training, skills, and abilities raised a question of fact whether his lifting restriction limited his ability to perform the class of jobs involving construction, maintenance, and plumbing (his previous work experience). Other courts have recognized that, as a general matter, jobs requiring medium or heavy lifting may constitute a class of jobs. See, e.g., Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 11 (1st Cir.

1999); Whitfield v. Pathmark Stores, Inc., 39 F. Supp. 2d 434, 442-443 (D. Del. 1999); Frix v. Florida Tile Indus., Inc., 970 F. Supp. 1027, 1033-1034 (N.D. Ga. 1997); Rochford v. Town of Cheshire, 979 F. Supp. 116, 119-120 (D. Conn. 1997); see also Burns, 2000 WL 1022686, at *6-*8; McKay v. Toyota Motor Mfg., 110 F.3d 369, 377 (6th Cir. 1997) (Hillman, J., dissenting).[6/]

The EEOC Interpretive Guidelines also address this question. In explaining that an "individual is substantially limited in working" if the individual is "significantly restricted in the ability to perform a class of jobs * * * when compared with the ability of the average person with comparable qualifications to perform those same jobs," the Guidelines give this example:

> an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs.

29 C.F.R. Pt. 1630, Section 1630.2(j). WMATA does not directly argue, and the panel majority did not hold, that medium or heavy

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[6/]At the same time, as the panel decision reflects, there are cases involving lifting restrictions where the court rejects plaintiff's argument that he was substantially limited in his ability to work. These cases are largely fact-bound, and typically the plaintiff did not identify the relevant class of jobs or show that he was significantly restricted from an entire class. See, e.g., Helfter v. United Parcel Serv., Inc., 115 F.3d 613 (8th Cir. 1997); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996); Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996). Other similar cases do not involve unskilled laborers or the specific class of heavy labor jobs. E.g., Snow v. Ridgeview Med. Ctr., 128 F.3d 1201 (8th Cir. 1997) (laboratory and radiological technician); Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998) (police officers), cert. denied, 526 U.S. 1018 (1999); Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997) (total patient care nurse).

lifting (heavy labor) could not constitute a class of jobs. Although the panel did not agree with this example, see 201 F.3d at 489 n.4,[7/] other courts have relied upon it. See Burns, 2000 WL 1022686, at *6; DePaoli, 140 F.3d at 673; Whitfield, 39 F. Supp. 2d at 442-443; Frix, 970 F. Supp. at 1034. We believe that for unskilled workers the guideline correctly provides that as compared with other unskilled workers with a similar background (the "average persons with comparable qualifications to perform those same jobs"), a person whose impairment prevents him from performing medium or heavy lifting is significantly restricted in his ability to perform a class of jobs.

In sum, in determining whether the plaintiff is significantly restricted in his ability to work in a "class of jobs" the court must examine the job from which plaintiff was disqualified and the particular knowledge, training, skills, and abilities utilized in that job. For an employee who has always worked as an unskilled laborer performing medium and heavy lifting, jobs requiring medium or heavy lifting may constitute the relevant class (or classes) of jobs for purposes of

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[7/]We also believe the EEOC Interpretive Guidelines, along with the regulations, are entitled to deference. See note 2, supra. At a minimum, as the district court stated, administrative interpretations of the Act by the enforcing agency, even if not controlling upon courts by reason of their authority, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." J.A. 17-18 (quoting Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 672 (1st Cir. 1995) (internal quotation marks omitted)). In any event, in view of the language of the regulations, the analogous caselaw discussed above, and logic, the Court can affirm without relying on this one example in the Interpretive Guidelines.

determining whether the particular employee, as a result of his impairment, is substantially limited in his ability to work.

II

PLAINTIFF COULD ESTABLISH THAT HIS IMPAIRMENT SIGNIFICANTLY RESTRICTS HIS ABILITY TO PERFORM A CLASS OF JOBS WITHOUT INTRODUCING EXPERT TESTIMONY OR STATISTICAL EVIDENCE

Plaintiff introduced sufficient evidence from which a jury could reasonably conclude that he was unable to perform a "class" of jobs; thus, expert testimony or statistical evidence concerning the number of jobs from which he was disqualified was unnecessary in this case. Since plaintiff's impairment precluded him from doing the very thing that defines the relevant "class" of jobs (heavy labor, or medium or heavy lifting, by unskilled laborers), there was no need for him to introduce additional evidence of the availability of other jobs requiring similar training, knowledge, and skills in the relevant job market. On the other hand, in cases where the class of jobs involves more diverse skills, knowledge, and training -- see, e.g., Murphy, 119 S. Ct. at 2138-2139 (automotive mechanic) -- an impairment that limits a person from some jobs in the class would not necessarily preclude him from performing other, related jobs in the same class. In this situation, additional evidence may be necessary to establish the relevant number of jobs the person is unable to perform within the larger class of related jobs.

Nothing in Sutton or the regulations requires that plaintiff introduce quantitative or expert evidence addressing the

availability of jobs in the relevant job market.[8/] Similarly, the decisions cited by the panel majority, see 201 F.3d at 487, do not support the notion that plaintiff must present expert and statistical evidence concerning the number of jobs from which he is precluded, particularly in cases involving unskilled workers. For example, in Colwell the plaintiffs were police officers, and the court stated that there must be evidence of the "kinds of jobs" for which they were disqualified, but did not require expert or quantitative evidence of the relevant job markets. 158 F.3d at 643-644. In Bolton v. Scrivner, 36 F.3d 939, 944 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995), the plaintiff was an order selector in a grocery warehouse, and the court found that evidence that he was limited in his ability to stand, lift, and walk did not show he was restricted from a class of jobs because it did not address his "vocational training, the geographical area to which he has access, or the number and type of jobs demanding similar training from which [he] would also be disqualified." This conclusion is not inconsistent with the view that in some cases, depending on the employee's training and skills, such evidence may be necessary to establish that the employee is substantially limited in the ability to work. At the same time, the court did not suggest that such evidence, or other

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[8/] The panel majority questions the continued validity of pre-Sutton cases addressing plaintiff's showing of a substantial limitation in the major life activity of working. See 201 F.3d at 487 n.3. Sutton, however, has not changed the law on this point. See generally 201 F.3d at 496-497 (Edwards, C.J., dissenting) (no distinction between pre-Sutton and post-Sutton cases); see also note 2, supra.

statistical or expert evidence, was necessary in all cases. See also Muller, 187 F.3d at 313 (correctional officer); Thompson, 121 F.3d at 540 (total patient care nurse).[9/]

By contrast, other decisions make clear that evidence of the employee's particular background, work experience, and training, coupled with the nature of the impairment, may establish that the employee is significantly restricted from performing a class of jobs, without consideration of statistical or expert evidence. For example, in Wellington, 187 F.3d at 1155, the court relied on plaintiff's evidence of his limited education and work experience in manufacturing, construction, heavy maintenance, and plumbing in concluding that, given his training, skills, and abilities, his impairment (carpel tunnel syndrome) raised a question of fact whether he was restricted from performing that class of jobs. The court did not suggest that expert or quantitative evidence was necessary.[10/]

[9/]Other cases cited by WMATA in its supplemental en banc brief (pp. 8-10) do not suggest that the plaintiff must proffer expert and quantitative evidence to establish that he was substantially limited in the major life activity of working; moreover, these cases do not involve unskilled laborers. See, e.g., Marinelli v. City of Erie, No. 99-3027, 2000 WL 802933, at *9 (3d Cir. June 22, 2000) (general assertions of doctor that city crew worker capable of only "medium range of exertion" not sufficient to establish that he was substantially limited in the major life activity of working); Broussard v. University of Cal., 192 F.3d 1252 (9th Cir. 1999) (animal care worker); Doren v. Battle Creek Health Sys., 187 F.3d 595 (6th Cir. 1999) (pediatric nurse); Hurley v. Modern Continental Constr. Co., 54 F. Supp. 2d 85 (D. Mass. 1999) (construction project engineer).

[10/]See also Quint, 172 F.3d at 11-12; Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996); Frix, 970 F. Supp. at 1033-1034; Rochford, 979 F. Supp. at 119-120; Smith, 897 F. Supp. at 427-428.

In sum, there is no basis for requiring a plaintiff to establish by expert testimony and statistical evidence the number and types of jobs for which he is disqualified in the relevant geographical area. The nature of the relevant evidence depends on plaintiff's particular background, training, skills, and work experience as reflected in the job from which he has been disqualified. Where the plaintiff has particular skills and experience that are transferable to other, related jobs, in the relevant class, the number and types of such jobs in the relevant geographic area may be relevant to whether he is restricted in his ability to perform a class of jobs.

Where, however, as in this case, the plaintiff has presented evidence that he has a work history of unskilled heavy labor involving medium and heavy lifting, and that his impairment significantly restricts his ability to perform such labor, such evidence alone will be sufficient for a jury to conclude that he is substantially limited in the major life activity of working because he is unable to perform all of the jobs in a class (or classes) of jobs utilizing the same training, knowledge, skills, and abilities (i.e., medium and heavy lifting). In these circumstances, the plaintiff's impairment significantly restricts his ability to perform all such work that defines the class, which other individuals without the impairment but with similar skills, training, and ability are able to do. Thus, we agree with the district court in this case that, "given the evidence * * * regarding Mr. Duncan's permanent degenerative disc

condition, * * * his long history of employment in the field of heavy labor, his lack of skills in other areas, and his inability to obtain any other employment, * * * the jury had sufficient evidence from which it could reasonably conclude that Plaintiff was * * * substantially limited in his ability to work, within the meaning of the ADA." J.A. 19.[11/]

CONCLUSION

The judgment of the district court on the jury verdict, and the order denying WMATA's motion for judgment as a matter of law, should be affirmed.

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[11/] WMATA states in its supplemental en banc brief (p. 11) that it is not arguing that the Court "adopt a rule that, in order to prevail, a plaintiff must in every case proffer expert testimony from a vocational rehabilitation specialist." But WMATA suggests (pp. 11-12) that in this case plaintiff could have satisfied his evidentiary burden by introducing, e.g., evidence of "a detailed log of jobs he sought and their physical requirements" or testimony from a "fact witness" that he could not work for any of the other employers who regularly seek unskilled laborers even with his particular lifting limitation. Again, however, in our view even this type of evidence is unnecessary where, as here, given the plaintiff's background, skills, and abilities his particular impairment precludes him from performing all such work that defines the relevant class of jobs.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2000, two copies of the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae on Rehearing En Banc were served by first-class mail, postage prepaid, on the following counsel of record:

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