

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ALLYN ROBERTS,

Plaintiff,

v.

THE CITY OF DES MOINES, IOWA, JONATHAN
GANO, and JAMES WELLS

Defendants.

Case No. LACL 144995

**DEFENDANTS' PROPOSED JURY
INSTRUCTIONS**

JURY INSTRUCTION NO. 1

Statement Of The Case. Members of the Jury: In this case Mr. Roberts, the Plaintiff, claims that Defendants, Jonathan Gano, James Wells, as well as the City of Des Moines discriminated against him on the basis of disability when they removed him from employment in the position of Arborist for the City of Des Moines.

The Defendants deny these claims.

If the evidence establishes any of his claims, the Plaintiff requests an award of lost income from the date of the incident and into the future from the defendants as well as emotional distress damages.

This statement is given to you solely to inform you, by way of a summary, of the parties' respective claims. Neither the claims made nor this Instruction is to be considered as evidence.

JURY INSTRUCTION NO. 2

Duties Of Judge And Jury, Instructions As Whole. My duty is to tell you what the law is. Your duty is to accept and apply this law.

You must consider all of the instructions together because no one instruction includes all of the applicable law.

The order in which I give these instructions is not important.

Your duty is to decide all fact questions.

Do not be influenced by any personal likes or dislikes, sympathy, bias, prejudices, or emotions.

Authority

Roushar v. Dixon, 231 Iowa 993, 2 N.W.2d 660 (1942)

Iowa Model Jury Instruction 100.2

JURY INSTRUCTION NO. 3

Burden Of Proof, Preponderance Of Evidence. Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

Authority

Mabrier v. A.M. Servicing Corporation of Raytown, 161 N.W.2d 180 (1968)

Iowa Model Jury Instruction 100.3

JURY INSTRUCTION NO. 4

The fact that Defendant is a municipality should not affect your decision. All persons are equal before the law, and corporations or municipalities, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

Authority

Pfab v. United Wisconsin Ins. Co., No. 2:10-cv-01024-JSS, Docket # 52, Final Jury Instructions No. 2 (N.D. Iowa Mar. 31, 2012).

Brown v. The McGraw-Hill Cos., No. 06-CV-34-LRR, Final Jury Instructions No. 6 (N.D. Iowa Oct. 2, 2007).

JURY INSTRUCTION NO. 5

Evidence. You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony in person or by deposition.
2. Exhibits received by the court.
3. Any other matter admitted (e.g. answers to interrogatories, matters which judicial notice was taken, and etc.).

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

The following are not evidence:

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

Authority

Iowa Rules of Evidence.

Iowa Model Jury Instructions 100.4

JURY INSTRUCTION NO. 6

Deposition Testimony. Certain Testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

Authority

Iowa R. Civ. P. 1.704

Farley v. Seiser, 316 N.W.2d 857 (Iowa 1982)

JURY INSTRUCTION NO. 7

Interrogatories. During this trial, you have heard the word “interrogatory”. An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

Authority

Iowa Rules Civ. Proc., rule 126

Iowa Model Jury Instruction 100.6

JURY INSTRUCTION NO. 8

Stipulated Testimony. Counsel have stipulated to certain facts as agreed upon as true and correct. Consider stipulated testimony as if it had been given in court.

Authority

Iowa Model Jury Instruction 100.8

JURY INSTRUCTION NO. 9

Credibility Of Witnesses. You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and,
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

Authority

Burger v. Omaha & C.B. St. Ry. Co., 139 Iowa 645, 117 N.W.35 (1908)

JURY INSTRUCTION NO. 10

Contradictory Statements, Non-Party, Witness Under Oath. You have heard evidence claiming name of witness made statements before this trial while under oath which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as if they were made at this trial. Decide whether to consider the earlier statements for any purpose and what weight to give them.

Authority

Iowa Model Instructions Civil 100.13

JURY INSTRUCTION NO. 11

Expert Witnesses. You have heard testimony from persons described as experts.

Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

Authority

Crouch v. National Livestock Remedy Co., 210 Iowa 849, 231 N.W. 323 (1930).

JURY INSTRUCTION NO. 12

General Instruction To Jury. Upon retiring you shall select a foreperson. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but are judges - judges of the facts. Your sole interest is to find the truth and do justice.

INSTRUCTION NO. 13

Your verdict on the Plaintiff's claim of discrimination based upon disability must be for the Plaintiff against the Defendants if the Plaintiff has proved all of the following elements:

1. Plaintiff had an impairment;
2. Plaintiff had a disability, meaning his impairment substantially limited his ability to perform his work with the City of Des Moines as an Arborist;
3. The City of Des Moines removed the Plaintiff from his position as an Arborist;
4. Plaintiff could not have performed the essential functions of the position of Arborist with or without reasonable accommodation, at the time the City of Des Moines removed him from the position;
5. Plaintiff's disability was a motivating factor for the termination.

Unless all of the above elements are proven by Plaintiff your verdict must be for the Defendants.

Authority:

8th Cir. Civil Jury Instructions, Section 9.40.

INSTRUCTION NO. 14

Your verdict must be for the Plaintiff and against Defendants if all of the following elements have been proved:

First, the Plaintiff had a permanent impairment to his ability to work aerially ("in the air") and climb as a manifestation of an illness; and

Second, such limitations substantially limited the Plaintiff's ability to perform his job of Arborist; and

Third, the Defendants knew of the Plaintiff's impairment; and

Fourth, the Plaintiff could have performed the essential functions, as defined in Instruction No. __ of the Arborist position at the time the City of Des Moines removed him from the position if the Plaintiff had been allowed not to perform the listed essential functions of working aerially or climbing; and

Fifth, providing the requested accommodations of allowing the Plaintiff to perform the position of Arborist without being required to perform aerial work or climbing and that such accommodation would have been would have been reasonable as described in Instruction No. ____; and

Sixth, the City of Des Moines failed to provide the requested accommodations and failed to provide any other reasonable accommodation.

If any of the above elements has not been proved, [of if the Defendants are not entitled to a verdict under Instruction No. __,] then your verdict must be for the Defendants.

Authority

8th Circuit Model Instruction 9.42

INSTRUCTION NO. 15

An essential function of the position means the fundamental job duties of the Arborist position the plaintiff wished to hold. It does not include the marginal functions that may occur through the course of a job.

You must consider the employer's judgment as to what functions of a job are essential. If any employer has prepared a written description before advertising or interviewing applicants for the job, this description is evidence of the essential functions of the job.

Other factors that may bear upon whether a job function is essential include, but are not limited to:

- (1) whether the reason the position of Arborist exists is to perform these functions (aerial work and/or claiming)
- (2) whether there are a limited number of employees available among whom the performance of that job function can be distributed;
- (3) whether the job function is highly specialized, and the person in that particular position is hired for his expertise or ability to perform the particular function;
- (4) the amount of time spent performing the job function;
- (5) the consequences of not requiring an individual in the position of Arborist to perform the function;
- (6) the terms of any collective bargaining agreement;
- (7) the work experience of employees who have held the position.

Authority

29 C.F.R. §1630.2(n)(2)

Hill v. Walker, 737 F.3d 1209, 1217 (8th Cir. 2013)

INSTRUCTION NO. 16

To establish the plaintiff's claim that the defendants discriminated against the plaintiff in on the basis of disability by failing to provide a reasonable accommodation, the plaintiff must prove, by a preponderance of the evidence, each of the following three elements:

1. the plaintiff is a "qualified individual" as defined in Instruction No. ____;
2. the defendant received adequate notice of the plaintiff's disability and desire for a reasonable accommodation; and
3. a reasonable accommodation is available that would have enabled the plaintiff to perform the essential functions of the job of Arborist.

Under the law, an accommodation by the defendant may include, but is not limited to:

- (1) job restructuring;
- (2) reassignment to a vacant position;

It is for you to determine whether the accommodations requested by the plaintiff are reasonable.

A reasonable accommodation does not include changing or eliminating any essential function of employment, shifting any of the essential functions of the subject employment to others, or creating a new position for the disabled employee.

If the plaintiff rejects a reasonable accommodation that could enable the plaintiff to perform the essential functions of the position, the plaintiff cannot be considered qualified for the position.]

[An accommodation is generally not reasonable when it consists of a request to be reassigned to another job position that would be in violation of an employer's seniority system. This general rule, however, does not apply if the plaintiff has proved, by a preponderance of the evidence, special circumstances such as [[the seniority system provides for exceptions] [the employer has exercised changes to the seniority system] [*state other special circumstance*]].]

JURY INSTRUCTION NO. 17

To establish a retaliation claim, Mr. Roberts must show:

1. Mr. Roberts complained about disability discrimination;
2. The Defendants took adverse action against him; and
3. The Defendants took adverse employment action because of Robert's complaints of disability discrimination.

If Roberts has failed to prove any of these propositions, he is not entitled to recover on this claim of retaliation. If he has proved all of these propositions, he is entitled to damages in some amount.

Authority

University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013)

Wright v. St. Vincent Health Sys., 730 F.3d 732, 737 (8th Cir. 2013)

JURY INSTRUCTION NO. 18

Proximity in time between protected conduct and an adverse employment action is not enough evidence for you to conclude that the protected conduct caused the adverse employment action. Plaintiff must prove by a preponderance of the evident that Plaintiff's removal from the Arborist position because of his prior complaint of disability discrimination.

Authority

JURY INSTRUCTION NO. 19

Compensatory damages represent the amount of money you award the Plaintiff which will fairly and justly compensate him for damages you find he has sustained as a direct result of the Defendants' conduct. Because Plaintiff asserts two claims against the defendants – namely, a discrimination claim and an equal protection claim – he can recover compensatory damages for one or both claims. Remember, the Plaintiff must prove his damages by the greater weight of the evidence. I will now explain the type of compensatory damages that may be available to Plaintiff for his two claims:

Lost wages, emotional pain and suffering, loss of enjoyment of life, inconvenience (calculated from the time of the injury to the date of your verdict).

I will now tell you some final rules to remember when determining compensatory damages in this case. Throughout your deliberations, you must not engage in any speculation, guess, or conjecture. The amount you assess for compensatory damages must not exceed the amount cause by the Defendants as proved by the evidence.

You are also instructed that a plaintiff has a duty under the law to "mitigate" his or her damages – that is, to exercise reasonable diligence under the circumstances to minimize his or her damages. Therefore, if you find that the Defendants have proven by the greater weight of the evidence that Mr. Roberts failed to seek or take advantage of opportunity that was reasonably available to him, you must reduce her damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.

Authority

JURY INSTRUCTION NO. 20

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go into the jury room, you must select one of your members as your foreperson. That person will preside over your discussion and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to an individual judgment, because the verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone – including me – how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form into the jury room, and when each of you has agreed on the verdict your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

JURY INSTRUCTION NO. 21

If you find in favor of Plaintiff under Instruction No. ___ and/or ___, then you must award Plaintiff such sum as you find will fairly and justly compensate Plaintiff for any damages you find Plaintiff sustained as a direct result of the Defendants' actions. Plaintiff's claim for damages includes ___ distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages and fringe benefits Plaintiff would have earned as an Arborist with the Defendants through the date of your verdict, minus the amount of earnings and benefits the Plaintiff received from the Defendant City of Des Moines or any other source during that time.

Second, you must determine the amount of any other damages sustained by Plaintiff, emotional distress or future lost wages and benefits. You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

You are also instructed that Plaintiff has a duty under the law to "mitigate" her damages – that is, to exercise reasonable diligence under the circumstances to mitigate his damages. Therefore, if it has been proved that the Plaintiff failed to seek or take advantage of an opportunity that was readily available to him, you must reduce his damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way or punishment or sympathy.

Authority

8th Cir. Civil Jury Instr. Damages:Actual §5.70.

JURY INSTRUCTION NO. 22

If arriving at an item of damage, you cannot arrive at a figure by taking down the estimate of each jury as to an item of damage and agreeing in advance that the average of those estimates shall be your item of damage.

Authority

Iowa Model Jury Instruction 200.38 (quotient verdict)

JURY INSTRUCTION NO. 23

Use of Electronic Devices. You may not communicate about this case before reaching your verdict. This includes cell phones and electronic media such as text messages, Facebook, MySpace, LinkedIn, YouTube, Twitter, email, etc.

Do not do any research or make any investigation about this case on your own. Do not visit or view any place discussed in this case, and do not use Internet maps, Google Earth, or any other program or device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge. This includes using the Internet to research events or people referenced in the trial.

This case will be tried on evidence presented in the courtroom. If you conduct independent research, you will be relying on matters not presented in court. The parties have a right to have this case decided on the evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we do not know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this state and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions may result in the case having to be retried and could result in you being held in contempt and punished.

It is important that we have your full and undivided attention during this trial.

Authority

Iowa Model Jury Instruction 100.23

JURY INSTRUCTION NO. 24

During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them, and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room and they will be destroyed.

Authority

Iowa Model Civil Jury Instruction §100.21

JURY INSTRUCTION NO. 25

Elements - Damage. If you find plaintiffs are entitled to recover damages, you shall consider the following items:

Past Medical Expenses

Future Medical Expenses

Loss of Full Mind and Body – Past

Loss of Full Mind and Body – Future

Physical and Mental Pain and Suffering – Past

Physical and Mental Pain and Suffering – Future

The amount you assess for physical and mental pain and suffering in the past and future and loss of function of the mind and body in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Authority

Iowa Model Civil Jury Instruction 200.1

JURY INSTRUCTION NO. 26

Definition of Present Value. Future damages must be reduced to present value. "Present value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the plaintiff for future losses.

Authority

Iowa Model Jury Instruction 200.35B

Iowa Code section 624.18 (2), 668.3(b)

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)

In Re Millard Estate, 251 Iowa 1282, 105 N.W.2d 95 (1960)

JURY INSTRUCTION NO. 27

Attorney's Fees - Interest. In arriving at your verdict, you may not consider court costs, attorney's fees, or interest on the award. These items are not elements of damages. I will decide these issues.

Authority

Iowa Model Civil Instructions No. 2500.9

JURY INSTRUCTION NO. 28

Return of Verdict – Forms of Verdict. I am giving you one verdict form. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict must be signed by your foreman or forewoman.

After deliberating for six hours from _____ o'clock _____.m. excluding meals or recesses outside your jury room, then it is necessary that only (seven) (six)* of you agree upon the answers to the questions. In that case, the verdict must be signed by all (seven) (six)* jurors who agree.

When you have agreed upon the verdict and appropriately signed it, tell the Court Attendant.

Authority

Iowa Model Jury Instruction 300.1

JURY INSTRUCTION NO. 29

Upon retiring you shall select a foreperson. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

Your attitude at the beginning of deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but are judges – judges of the facts. Your sole interest is to find the truth and do justice.

Authority

Iowa Model Civil Jury Instruction 100.18

JURY INSTRUCTION NO. 30

Your verdict in this case will be in the form of answers to specific questions or interrogatories. You are to answer these interrogatories by applying the law given to you in these instructions to the facts as you find them to be established by the evidence.

If your answer is “no” to Interrogatory No. 1, then you should answer no further interrogatories as your deliberations are at an end.

If you answer “yes” to Interrogatory No. 1 then you should then go on to answer Interrogatory No. 2 and insert the specific amount of damage you find the plaintiff entitled to recover on these counts, then proceed to Interrogatory No. 3 to consider the percentage of fault, if any, the plaintiff’s actions played in his injury.

Your foreman should sign the Special Interrogatories for you.

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ALLYN ROBERTS,

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v.

THE CITY OF DES MOINES, IOWA, JONATHAN
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Defendants.

Case No. LACL 134756

SPECIAL VERDICT FORM

Interrogatory No. 1: Did the Plaintiff prove his claim of discrimination on the basis of disability? (Answer "Yes" or "No", please mark an "X" in the appropriate space)

_____ Yes

_____ No

If you answered "No" do not proceed to answer any more of the interrogatories below. If you answered "Yes" then proceed to Interrogatory No. 2 below.

Interrogatory NO. 2: Did Plaintiff prove his claim of a discriminatory failure to accommodate?

_____ Yes

_____ No

Interrogatory No. 3: Did Plaintiff prove his claim of retaliation?

_____ Yes

_____ No

Interrogatory No. 4: State the amount of damages sustained by the plaintiff by defendant's fault as to each of the following items of damage. Do not take into consideration any reduction of damages due to plaintiff's fault. If the plaintiff has failed to prove any item of

damage, or has failed to prove that any item of damage was caused by defendant's fault, enter 0 for that item.

Past Lost Earnings and Benefits	\$ _____
Future Lost Earnings and Benefits	\$ _____
Past Emotional Distress	\$ _____
Future Emotional Distress	\$ _____
TOTAL	\$ _____

Dated __ May 2021

FOREPERSON*

*To be signed only if verdict is unanimous

Respectfully submitted,

/s/ John O. Haraldson

John O. Haraldson AT0003231

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ATTORNEY FOR DEFENDANTS

Original filed via EDMS.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and a true copy of the foregoing was electronically sent via the Clerk of Court.

/s/ John O. Haraldson

John O. Haraldson