

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ALLYN WAYNE ROBERTS, Plaintiff, vs. CITY OF DES MOINES, Defendant.	Case No. LACL144995 PLAINTIFF'S PROPOSED JURY INSTRUCTIONS
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COMES NOW Plaintiff Allyn Roberts and requests that the jury be instructed as set forth in these proposed Instructions and Verdict Form.

/s/ Amy Beck
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ATTORNEYS FOR PLAINTIFF

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. 1

Instruction Before Voir Dire

Members of the Jury Panel, if you have a cell phone or any other wireless communication device with you, please take it out now and turn it off. Do not turn it to vibration or silent; power it down. During jury selection, you must leave it off. (Pause for thirty seconds to allow them to comply, then tell them the following:)

If you are selected as a juror, you will have to keep your cell phones off at all times when you are present in court. You may use your cell phones during breaks.

I understand you may want to tell your family, close friends, and other people about your participation in this trial so that you can explain when you are required to be in court, and you should warn them not to ask you about this case, tell you anything they know or think they know about it, or discuss this case in your presence. You must not post any information on social media, or communicate with anyone, about the parties, witnesses, participants, claims, evidence, or anything else related to this case, or tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. If you discuss the case with someone other than the other jurors during deliberations, you may be influenced in your verdict by their opinions. That would not be fair to the parties and it would result in a verdict that is not based on the evidence and the law.

While you are in the courthouse and until you are discharged in this case, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as a phone, computer, camera, texting, messaging app, posting on Facebook, Twitter, Instagram, or any other social network, or in any other way communicate to anyone any information about this case until I accept your verdict or until you have been excused as a juror.

Do not do any research -- on the Internet, in libraries, in the newspapers, or in any other way -- 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 programs or other 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 until you have been excused as jurors.

The parties have a right to have this case decided only on evidence they know about and that has been presented here in court. If you do some research or investigation or experiment that we don't 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. Each of the parties is 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 country and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.

Authority

8th Circuit Model Civil Jury Instruction 1.1 (with changes to update technology)
Iowa Civil Jury Instruction 100.23

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. 2

Statement of the Case

This is a civil case brought by Plaintiff Allyn Roberts against Defendant City of Des Moines. Allyn was employed by the City for 22 years, from 1996 to 2018. For approximately 21 years, Allyn served as a full-time Tree Trimmer or Arborist.

On May 25, 2017, Allyn was diagnosed with Parkinson's disease. The parties agree that Allyn's Parkinson's constituted a disability under the law and that Allyn engaged in protected activity by requesting reasonable accommodations for his Parkinson's. Allyn alleges that Defendant discriminated against him because of his disability when they refused to provide reasonable accommodations and fired him. Allyn also alleges that Defendant retaliated against him by firing him when he requested reasonable accommodations for his disability.

If you find Allyn's allegations are true, then Defendant violated his civil rights, and you will be required to decide how much they pay him in money damages. Allyn claims damages for lost wages and benefits he would have earned had he not lost his job and compensation for his emotional pain, suffering, mental anguish and loss of enjoyment of life.

Defendant denies Plaintiff's claims in their entirety.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

Authority

Iowa Civil Jury Instruction 100.1

PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. 3

Juror Questions

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate. Before I excuse each witness, I will offer you the opportunity to write out a question on your notepad. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or that I will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Authority

Ninth Circuit Manual of Model Civil Jury Instructions 1.15 (as modified).

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 1

Additional Instructions

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room.

In considering these instructions, the order in which they are given is not important.

Authority

8th Circuit Model Civil Jury Instruction 3.1

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 2

Judge's Opinion

I have not intended to suggest what I think your verdict should be by any of my rulings or comments during the trial.

Authority

8th Circuit Model Civil Jury Instruction 3.2

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 3

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

Iowa Civil Jury Instruction 100.9

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 4

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

100.3 Burden of Proof, Preponderance of Evidence

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 5

Deposition Testimony

Certain testimony was read or placed into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing or by videography. Consider that testimony as if it had been given in court.

Authority

Iowa Civil Jury Instruction 100.5

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. 6

Parties

The fact that one of the parties to this case is part of the government and the other party is a human being should not affect your decision. All parties are equal before the law and entitled to the same fair and conscientious consideration.

In reaching your verdict, you may not consider how any money damages may be paid.

Authority

Iowa Civil Jury Instruction 100.20 (modified)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 7

Statements by a Party Opponent

You have heard evidence claiming Allyn Roberts, Jonathan Gano, James Wells, and other employees of the City of Des Moines made statements before this trial.

If you find such statements were made, you may regard the statements as evidence in this case the same as if the statements had been made under oath during the trial.

If you find such statements were made and were inconsistent with the witness' testimony during the trial, you may also use the statements as a basis for disregarding all or any part of that witness' testimony during the trial, but you are not required to do so. You should not disregard any person's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

Authority

Iowa Civil Jury Instruction 100.15

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 8

Contradictory Statements, Non-Party, Witness Under Oath

You have heard evidence claiming [name(s) of witness(es)] 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 Jury Instruction 100.14

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 9

Contradictory Statement, Non-party, Witness Not Under Oath

You have heard evidence claiming witnesses made statements before this trial which were inconsistent with what the witness said in this trial.

Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements of witnesses were made and whether they were inconsistent with testimony given. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given, but you are not required to do so.

However, you should not disregard the testimony if other believable evidence supports it or if for some other reason you believe it.

Authority

Iowa Civil Jury Instruction 100.13

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. 10

Agents

A city or other governmental agency can act only through its officers, employees, or other agents. Any acts or omissions of an officer, employee, or agent of Defendant City of Des Moines are held in the law to be the acts or omissions of the Defendant itself, and these acts or omissions are chargeable to and imputed to the Defendant.

A City is also charged with the knowledge of its employees. .

Authority

Bethards v. Shivers, Inc., 355 N.W. 2d 39 (1984)

Iowa Civil Jury Instruction 730.1

8th Circuit Model Jury Instruction 5.23

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. 11

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. Stipulations which are agreements between the attorneys.
4. 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. Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

The following are not evidence:

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

Authority

Iowa Civil Jury Instruction 100.4

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. 12

Opinion Evidence, Expert Witness

You have heard testimony from a person described as an expert. 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

Iowa Model Civil Jury Instruction No. 100.12

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

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. 13

Objections

From time to time during the trial, I was called upon to make rulings of law on objections or motions made by the lawyers. It is the duty of the lawyers for each party to object when another party offers testimony or other evidence that the lawyers believe is not properly admissible. You should not show prejudice against a lawyer or the party they represent because the lawyer made objections. You should not infer or conclude from any ruling or other comment I made that I had any opinions on the merits of the case favoring one side or the other. If I sustained an objection that goes unanswered by the witness, you should not draw any inferences or conclusions from the question itself.

Authority

Comes, et al. v. Microsoft, CL 82311 (Nov., 2006)

Kunzman v. Enron Corp., Case No. C-94-3044-MWB, Preliminary Instruction No. 13 (N.D. Iowa J. Bennett); and

Gordon v. Microsoft Corp., Preliminary Instruction No. IV at 12 (modified)

PLAINTIFF'S PROPOSED FINAL INSTRUCTION NO. 14

Direct and Circumstantial Evidence

In considering the evidence, make deductions and reach conclusions according to reason and common sense. Facts may be proved by direct evidence, circumstantial evidence, or both. Direct evidence is evidence from a witness who claims actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is evidence about a chain of facts from which you may draw conclusions and inferences. The law makes no distinction between direct evidence and circumstantial evidence. Give all the evidence the weight and value you think it is entitled to receive.

Authority

Iowa Criminal Jury Instructions 100.6

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 15

**Disability Discrimination
ESSENTIAL ELEMENTS**

Your verdict must be for Plaintiff Allyn Roberts and against Defendant(s) on Plaintiff's claim of Disability Discrimination if all the following elements have been proved by the preponderance of the evidence:

First, Plaintiff's Parkinson's constituted a disability;

Second, Defendant(s) terminated Plaintiff's employment;

Third, Plaintiff could have performed the essential functions of his job with or without reasonable accommodations from Defendant(s);

Fourth, Plaintiff's Parkinson's was a motivating factor in the Defendant's decision to terminate Plaintiff's employment.

If you find that Allyn has proven all of the above elements by the preponderance of the evidence, your verdict on the claim of Disability Discrimination must be for Allyn and he is entitled to damages in some amount under this claim. If you find that Allyn has not proven all of the above elements by the preponderance of the evidence with respect to Defendant, then your verdict on the claim of Disability Discrimination must be for Defendant.

Authority

Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, No. 9.40 (2013)

Goodpaster v. Schwan's Home Service, Inc., 849 N.S.2d 1, 9-13 (Iowa 2014)

Iowa Admin. Code r. 161-8.26

DeBoom v. Raining Rose, Inc., 772 N.W.2d 1, 7 (Iowa 2009)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 16

Essential Functions

The term “essential functions” means the fundamental job duties of the position. The term “essential functions” does not include the marginal duties of the position.

In determining whether a job function is essential, you should consider the following factors:

1. How the Plaintiff actually functioned in the workplace;
2. The amount of time spent on the job performing the function in question;
3. The consequences of not requiring the person to perform the function;
4. Whether there are a limited number of employees available among whom the performance of the function can be distributed;
5. Whether the reason the position exists is to perform the function;
6. Written job descriptions;
7. The work experience of persons who have held the job;
8. The current work experience of persons in similar jobs;
9. Whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function; and
10. The employer's judgment as to which functions of the job are essential.

No single factor should control your decision. You should consider all the evidence in deciding whether a job function is essential.

Authority

Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit No. 9.21

Eleventh Circuit Civil Jury Instructions No. 4.11, p. 203

29 C.F.R. § 1630.2(n)(2) at App. § 16302(n)

Iowa Admin. Code r. 161-8.27(3)

Goodpaster v. Schwan's Home Service, Inc., 849 N.W.2d 1, 15 (Iowa 2014) (“Whether an individual is qualified for a particular job, despite his or her disability, requires an individualized inquiry. . . . So too should the determination of whether a plaintiff is qualified to perform the essential functions of a position with or without accommodation generally be determined by a case-by-case analysis as opposed to resorting to a blanket exclusion of a class of workers from a given job.” (Internal citations omitted)).

Frank v. Am. Freight Sys., Inc., 398 N.W.2d 797, 801 (Iowa 1987) (“in most discrimination cases based on disability, individualized consideration must be given to the job and to the applicant’s particular circumstances. . . . The nature and extent of a disability, the needs of a particular job, and the impact of disability on a person’s ability to perform that job, are too diverse to permit generalized application.”)

Schlitzger v. Univ. of Iowa Hosp. & Clinics, 641 N.W.2d 525, 532 (Iowa 2002)

Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1152 (D. Minn. 1995)

Anderson v. Independent School Dist. No. 281, 2002 WL 31242212, at *6 (D. Minn. 2002)

Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 990 (8th Cir. 2007), cert. denied, 128 S. Ct. 98 (2007)

Kammueler v. Loomis, 383 F.3d 779, 786 (8th Cir. 2004) (stating employer’s judgment as to essential functions not conclusive)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 17

Essential Functions – Job Description

Job descriptions are only one factor for you to consider when deciding which duties are essential functions of the Arborist position. Written job descriptions are not dispositive and should not be given more weight than the other factors listed in Instruction No. 14.

Authority

Rorrer v. City of Stow, 743 F.3d 1025, 1039 (6th Cir. 2014) (“Written job descriptions are also not dispositive.”)

Davidson v. Am. Online, Inc., 337 F.3d 1179, 1191 (10th Cir. 2003) (“[A]n employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.”).

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 18

Reasonable Accommodations

The law sometimes requires “reasonable accommodations” that are needed for employees with disabilities to obtain the same workplace opportunities that employees without disabilities automatically enjoy. Many reasonable accommodations result in differences of treatment between employees that would otherwise violate employers’ disability-neutral rules.

A reasonable accommodation is a modification to the work environment or to the manner in which an employee’s position is usually performed, which would enable a qualified individual with a disability to perform the essential functions of the position. Examples of “reasonable accommodations” include:

- making existing facilities used by employees readily accessible to and usable by the plaintiff;
- job restructuring;
- assistance from other employees;
- rotating employee job duties or roles;
- part-time or modified work schedules;
- acquisition or modifications of equipment or devices;
- appropriate adjustment or modifications of examinations, training materials, or policies; and
- other similar accommodations for individuals with disabilities.

Authority

Iowa Admin. Code r. 161-8.27(6)(a)(2) (listing “job restructuring” and “part-time or modified work schedules” as examples of reasonable accommodations required by the ICRA)

Goodpaster v. Schwan’s Home Serv., Inc., 849 N.W.2d 1, 17 (Iowa 2014) (citing Iowa Admin. Code r. 161-8.27(6)(a)(2) with approval)

Ralph v. Lucent Tech., Inc., 135 F.3d 166, 167, 172 (1st Cir. 1998) (preliminary injunction upheld, ordering employer to allow employee to work part-time for 4 weeks even after employer had already provided 52 weeks of paid leave)

Hurst v. St. Mary's Hosp. v. Huntington, Inc., 867 F. Supp. 435, 439 (S.D.W.V. 1994) (allowing employee to work part-time on a temporary basis was reasonable accommodation)

Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 498 (7th Cir. 2000) (allowing worker to gradually return to working full-time was a reasonable accommodation)

Nartey-Nolan v. Siemens Med'l Solutions USA, Inc., 91 F. Supp. 3d 770, 774 (E.D.N.C. 2015) (same)

Jadwin v. County of Kern, 610 F. Supp.2d 1129, 1176 n.20 (E.D. Ca. 2009) (same)

Barrett v. U.S. Airways Inc., 535 U.S. 391, 397-98 (2002)

- By definition, “accommodations” “require the employer to treat an employee with a disability differently, *i.e.*, preferentially.” *Id.* at 397.
- Citing with approval 42 U.S.C. § 12111(9)(b) and *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000)

42 U.S.C. § 12111(9)(b) (listing “job restructuring” and “part-time or modified work schedules” as examples of reasonable accommodations required by the ADAAA)

Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000) (medical leave longer than 15 months may be reasonable accommodation)

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (eight or nine months of medical leave may be reasonable accommodation)

Cebres v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998) (leave beyond what the FMLA requires may be reasonable accommodation)

Haschmann v. Time Warner Enter. Co., 151 F.3d 591, 602 (7th Cir. 1998) (same)

Rogers v. New York Univ., 250 F. Supp. 2d 310, 316 (S.D.N.Y. 2002) (same)

Shannon v. City of Philadelphia, 1999 WL 1065210 at *6 (E.D. Pa., Nov. 23, 1999) (same)

McBride v. City of Detroit, 2008 WL 5062890 at *7 (E.D. Mich., Nov. 25, 2008) (same)

29 C.F.R. § 1630.2(o)(1)(ii) (reasonable accommodations include making modifications to the manner or circumstances under which the position is customarily performed)

8th Circuit Civil Jury Instruction 9.42 (2017)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 19

Definition of Motivating Factor

Allyn's disability was a "motivating factor" if his disability played a part in the Defendant's decision to fire him. Allyn's disability need not have been the only reason for Defendant's actions.

Authority

DeBoom v. Raining Rose, Inc., 772 N.W.2d 1, 12-14 (Iowa 2009)

Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, No. 5.96

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 20

Failure to Provide Reasonable Accommodations

ESSENTIAL ELEMENTS

Your verdict must be for Plaintiff Allyn Roberts and against Defendant on Plaintiff's claim that Defendant failed to provide reasonable accommodations if all of the following elements have been proved by the preponderance of the evidence:

First, Plaintiff could have performed the essential functions of the Arborist position at the time he was terminated if Defendant had continued to allow his co-workers to perform bucket work while Allyn performed other roles or if Defendant provided another reasonable accommodation;

Second, providing the accommodation(s) would have been reasonable; and

Third, Defendant failed to provide this or any other reasonable accommodation.

If you find that Allyn has proven all of the above elements, your verdict on the claim of Failure to Provide Reasonable Accommodations must be for Allyn and he is entitled to damages in some amount under this claim. If you find that Allyn has not proven all of the above elements with respect to one or more of the Defendant, then your verdict on the claim of Failure to Provide Reasonable Accommodations must be for Defendant.

Authority

Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit No. 9.42

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 21

Disabilities Arising During Employment

When an individual becomes disabled, from any cause, during his employment, the employer must make every reasonable effort to continue the individual in the same position or to retain and reassign the employee and to assist in his rehabilitation.

Authority

Iowa Admin. Code r. 161-8.28

John Vetter v. State of Iowa, LACL130693 (Polk County 2015) – Inst. 22 given by Judge Robert B. Hanson

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 22

Work-Related Injury Comparators

If an employer provides an accommodation for work-related injuries, they must consider the same or a similar accommodation for disabled individuals whose restrictions are unrelated to a workplace injury.

Authority

Hutchison v. UPS, 883 F. Supp. 379, 386, 397 (N.D. Iowa 1995) (finding a policy that allowed employees with work-related injuries to perform light duty work but refused light duty work for any employees injured outside of work was a *per se* violation (of the ADA) because it failed to make an individualized assessment of an employee's ability to perform the essential functions of the job with or without reasonable accommodations).

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 23

Interactive Process

When an employer becomes aware that an employee is disabled and may need an accommodation, the law requires the employer to initiate an informal, interactive process to determine appropriate reasonable accommodations. All that is required to trigger an employer's duty to engage in the interactive process is knowledge (including circumstantial) that the employee may have a condition that may qualify as a disability and result in some limitation that could require an accommodation.

The employee is expected to participate and cooperate. This process is meant to be flexible and interactive. Both the employer and the employee should communicate directly, listen to each other, and exchange essential information. The employee is likely to have greater information about his or her disability and the employer is likely to be able to identify potential accommodations that the employee would have no way of knowing about.

Neither side is allowed to delay or obstruct the process. The process should identify the limitations caused by the employee's disability, as well as potential reasonable accommodations that could overcome those limitations.

The interactive process requires the employer to: (1) communicate directly with the employee to explore various possible accommodations; (2) give good faith consideration to any accommodations suggested by the employee; and (3) offer one or more accommodations that are reasonable and effective. Preference should be given to the accommodation suggested by the employee.

If you find that Defendant(s) failed to engage in good faith in the interactive process, you may infer that it would have resulted in Plaintiff being provided with a reasonable accommodation.

Authority

29 C.F.R. § 1630.2(o)(3)

Fjellestad v. Piz~~z~~a Hut of America, Inc., 188 F.3d 944, 951-53 (8th Cir. 2002)

Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 161 (3d Cir. 1999)).

Zivkovic v. S. Calif. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002)

Barrett v. U.S. Air Inc., 225 F.3d 1105, 1112, 1114-15 (2000) (overruled on other grounds, 535 U.S. 391 (2002))

Smith v. State, 759 N.W.2d 812, *4 (Iowa App. 2008)

Taylor v. Phoenixville School Dist., 184 F. 3d 296, 314 (3d Cir. 1999)

Taylor v. Principal Financial Group, Inc., 93 F. 3d 155, 164 (5th Cir. 1996)

Colwell v. Rite Aid Corp., 602 F.3d 495, 506-07 (3d Cir. 2010)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 24

Undue Hardship

Disability discrimination includes the failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an employee, unless the employer can demonstrate that an accommodation would impose an undue hardship on the operation of the employer's business.

A defendant is not required to provide an accommodation if it proves the accommodation will impose an undue hardship on the operation of the defendant's business.

The term "undue hardship" means an action requiring significant difficulty or expense. It takes into account the financial realities of the particular defendant and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

The factors you may consider in deciding whether an accommodation would cause undue hardship on the operation of the employer's business include:

- (1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;
- (2) The type of the employer's operation, including the composition and structure of the employer's workforce; and
- (3) The nature and cost of the accommodation needed.

If you find that Defendant has proved by the preponderance of the evidence that accommodating Allyn's restrictions would have caused an undue hardship on the operation of their business, your verdict must be for Defendant with respect to Allyn's disability discrimination and failure to provide reasonable accommodation claims.

Authority

Iowa Admin. Code r. 161-8.27(6)

Goodpaster v. Schwan's Home Servs., Inc., 849 N.W.2d 1, 17 (Iowa 2014)

Schlitzger v. Univ. of Iowa Hosp. & Clinics, 641 N.W.2d 525, 530 (Iowa 2002)

Boelman v. Manson State Bank, 522 N.W.2d 73, 79 (Iowa 1994)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 25

Retaliation

Plaintiff Allyn Roberts alleges that he was retaliated against by Defendant because he requested reasonable accommodations. It is unlawful for an employer to retaliate in any manner against an employee because he has engaged in “protected activity.”

Authority

IOWA CODE § 216.11

Reed v. A.W. Lawrence & Co., 95 F.3d 1170 (2d Cir. 1996)

McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996)

Trent v. Valley Elect. Ass’n, 41 F.3d 524 (9th Cir. 1994)

Meeks v. Computer Assoc. Int’l, 15 F.3d 1013 (11th Cir. 1994).

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 26

**Retaliation
ESSENTIAL ELEMENTS**

Your verdict on the claim of Retaliation must be for Plaintiff Allyn Roberts and against Defendant(s) if you find all of the following elements have been proven:

1. Plaintiff engaged in “protected activity;”
2. Defendant terminated Plaintiff's employment; and
3. The “protected activity” was a “motivating factor” in Defendant's decision to fire him.

If you find that Plaintiff has proven each of the above elements by the preponderance of the evidence, your verdict on the claim of Retaliation must be for Plaintiff and he is entitled to damages in some amount. If you find that Plaintiff has not proven all the above elements by the preponderance of the evidence with respect to one or more of the Defendant, then your verdict on the claim of Retaliation must be for Defendant.

Authority

IOWA CODE § 216.11

8th Circuit Model Jury Instruction 10.0 (legal overview) (2017)

Farmland Foods v. Dubuque Human Rights Comm'n, 672 N.W.2d 733, 742 (Iowa 2003)

Scusa v. Nestle U.S.A. Co. Inc., 181 F.3d 958, 968 (8th Cir. 1999)

Smith v. Riceland Foods, Inc., 151 F.3d 813, 818 (8th Cir. 1998)

Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980)

Van Horn v. Specialized Support Servs., Inc., 241 F. Supp. 2d 994, 1012-13 (S.D. Iowa 2003)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 27

Adverse Action

“Adverse action” means any action which has material consequences to an employee. It includes, but is not limited to, such employment actions as a change in opportunities, change in pay, failure to make reasonable accommodation, demotion, termination, or other actions which adversely affect or undermine the position of the employee.

You should judge whether an action is sufficiently adverse from the point of view of a reasonable person in Allyn's position.

Authority

Iowa Code § 216.11

Iowa Code § 216.6(1)(a)

42 U.S.C. Section 2000e-2(a)(1)

E.E.O.C. Compliance Manual § 8-II(D)(1)

Smith v. State, 759 N.W.2d 812 (Iowa App. 2008) (“Failure to make a reasonable accommodation is considered to be an adverse employment action.” *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 521 (Iowa 2003)).

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68-73 (2006)

Casey v. Riedel, 195 F. Supp. 2d 1122, 1131-32 (S.D. Iowa 2002)

Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1171-75 (N.D. Iowa 2000)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 28

Timing

Timing alone is not enough evidence to prove Plaintiff's claim of retaliation; however, a showing that an employer takes adverse against an employee shortly after he has engaged in protected activity may be evidence of retaliation.

Authority

Boyle v. Alum-Line, Inc., 710 N.W.2d 741, 750 (Iowa 2006)

Weinzel v. Ruan Single Source Transp. Co., 587 N.W.2d 809 (Iowa Ct. App. 1998)

Beckman v. Nestle Purina Petcare Co., 635 F. Supp. 2d 893, 922 (N.D. Iowa 2009)

Brown v. Farmland Foods, Inc., 178 F. Supp. 2d 961, 982 (N.D. Iowa 2001)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 29

Pretext

The employer's stated explanation for refusing to accommodate Allyn Roberts or for firing him must be specifically articulated and non-discriminatory. The reasonableness of the employer's explanation may be considered in determining whether it is a pretext, or a cover-up for disability discrimination.

Proof that the Defendant's explanation is not true is one form of evidence that you may find proves discrimination. If you find that Defendant's justification for refusing to provide Allyn with an accommodation or for firing him is not true, discrimination may be the most likely alternative explanation. This may be especially so, since Defendant is in the best position to put forth the actual reasons for its decision.

You may find that Allyn Roberts' disability was a motivating factor in the Defendant's refusal to accommodate him or their decision to fire him if it has been proven that the Defendant's stated reason for their decision is not the real reason, but it is a pretext to hide discrimination.

You may find that disability discrimination occurred, if you find that the reasons offered by the Defendant for refusing to provide accommodations or firing Allyn Roberts are false.

Authority

Model Civil Jury Instructions for the District Courts of the Eighth Circuit, No. 5.95

DeBoom v. Raining Rose, Inc., 772 N.W.2d 1, 12-14 (Iowa)

Baker v. Silver Oak Senior Living Mgt. Co., L.C., 581 F.3d 684, 689 (8th Cir. 2009)

Briscoe v. Fred's Dollar Store, Inc., 24 F.3d 1026, 1028 ((8th Cir. 1994)

E.E.O.C. v. Ethan Allen, Inc., 144 F.3d 116, 120 (2d Cir. 1994)

Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1380-81 (10th Cir. 1994)

Stephenson v. Aluminum Co. of Am., 915 F. Supp. 39, 55 (S.D. Ind. 1995)

Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 120 S.Ct. 2097 (2000)

Idorenyi Salami v. Von Maur, et al., No. LACL 118608 Polk County - Pille

Loeb v. Textron, 600 F.2d 1012, n.6, 20 FEP Cases 29, 35 (1st Cir. 1979)

Furnco Construction Corp. v. Waters, 438 U.S. 567, 17 FEP Cases 1062 (1978)

Texas Depart. of Comm. Affairs v. Burdine, 647 F.2d 513, 25 FEP Cases 113 (5th Cir. 1981)

Beshars v. Asbill, 930 F.2d 1348 (8th Cir. 1991)

Blake v. J.C. Penney Co., 894 F.2d 274 (8th Cir. 1990)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 30

Stereotypes

Unlawful discrimination sometimes happens without the decisionmaker having planned, thought out, or even acknowledged to himself or herself that it is taking place. The law acknowledges the effects of society's stereotypes on employers in their decisionmaking, and that biased decisionmaking based upon those stereotypes can violate the law, even if the decisionmaker is unaware of bias in his or her thinking. This is because the law's purpose is to eradicate discrimination in all forms, regardless of the personal character of the individuals making discriminatory decisions.

If you find from all the surrounding circumstances that Defendant treated Allyn Roberts differently than they would have if he had not had a disability or if he had not requested a reasonable accommodation—even if the managers do not acknowledge or realize their own motives—you may find in favor of Allyn.

Authority

Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51, 255-58 (1989)

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994)

Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1064 (8th Cir. 1988) (“Age discrimination is often subtle and ‘may simply arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce.”) (quoting *Syrock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154-55 (7th Cir. 1981) (emphasis in original))

EEOC v. W & O, Inc., 213 F.3d 600 (11th Cir. 2000) (proof of “egregious misconduct,” “ill will,” or “malice” is not even required for punitive damage award and punitive damages can be awarded even when employer denies knowing its actions are illegal)

Bray v. Marriott Hotels, Inc., 110 F.3d 986, 993 (3d Cir. 1997) (Jury may find for plaintiff and reject the testimony of a defense witness even if the witness testifies in good faith that he has chosen the best candidate, if the jury is persuaded that the witness' bias prevents her from deeming that plaintiff is the best candidate)

Brown v. Mc&M/Mars, 883 F.2d 505, 513-14 (7th Cir. 1989) (the ADEA requirement that age be a determining factor “does not require a finding as to the defendant' state of mind” because the law distinguishes between motive and intent)

Idaimaco v. Runyon, 190 F.3d 131, 167 (3d Cir. 1999) (decisionmaker's sincere belief that he selected the right person for the job is not an adequate defense to a biased hiring choice)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 31

Employer's Failure to Follow Procedures

An employer's deviations from its own policies and practices may indicate it is engaging in discrimination or retaliation.

Authority

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267 (1977)

Ledbetter v. Alltel Corp. Serv., Inc., 437 F.3d 717, 722 (8th Cir. 2006)

Davis v. Wisc. Dep't of Corr., 445 F.3d 971, 976-77 (7th Cir. 2006)

Tyler v. Union Oil Co., 304 F.2d 379, 396 (5th Cir. 2002)

Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1220 (10th Cir. 2002)

Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 97 (2d Cir. 1999)

Brennan v. GTE Gov't Sys. Corp., 150 F.3d 21, 29 (1st Cir. 1998)

Stewart v. Rutgers the State Univ., 120 F.3d 426, 434 (3d Cir. 1997)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 32

Actual Damages

If you find in favor of Plaintiff Allyn Roberts on one or more of his claims, then you must determine an amount that is fair compensation for his damages. You may award compensatory damages only for injuries that Plaintiff proves were caused by the wrongful conduct of Defendant. The damages you award must be fair compensation—no more, no less.

Lost Wages: If you find that Plaintiff is entitled to damages, then in determining those damages you must award any past earnings he has lost as a result Defendant's wrongful conduct. Back pay is the amount of wages and fringe benefits Plaintiff would have earned from the date of harm to the present time, if he had not been subjected to illegal actions. Front pay is the amount of wages and fringe benefits Plaintiff would have earned from the present time into the future, if he had not been subjected to illegal actions.

Keep in mind that absolute precision in proving what an employee would have earned if not for the employer's wrongful conduct is not required. Any uncertainties in computing lost wages should be resolved against the Defendant.

Emotional Distress: You must determine the amount of damages for any emotional distress sustained by Plaintiff Allyn Roberts. Award him the amount that will fairly and justly compensate him for emotional distress damages you find he sustained as a result of the illegal actions. Damages for emotional distress include damages for emotional pain, suffering, mental anguish, humiliation, fear, apprehension, anxiety, inconvenience, loss to reputation, and loss of enjoyment of life. An employee does not need to introduce evidence of the monetary value of such damages. The amount you assess for these damages cannot be measured by any exact or mathematical standards. You must use your sound judgment based upon an impartial consideration of the evidence. When considering the amount of monetary damages to which a worker may be entitled for emotional distress, you should

consider the nature, character, and seriousness of the emotional pain he felt. You must also consider the extent or duration, as any award you make must cover the damages endured by Plaintiff since the wrongdoing to the present time.

You should also award damages for future emotional distress to an employee who has proven discrimination or retaliation, if his emotional distress and its consequences can reasonably be expected to continue in the future.

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

Authority

Iowa Civil Jury Instructions 200.6 and 200.7

8th Circuit Civil Jury Instruction 13.00 (2017)

Lynch v. City of Des Moines, 454 N.W.2d 827 (Iowa 1990)

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 532 (Iowa 1990)

Franklin v. Gwinnett County Public Sch., 503 U.S. 60, 75-76 (1992)

Mennen v. Easter Stores, 951 F. Supp. 838, 859-61 (N.D. Iowa 1997)

Neufeld v. Searle Labs., 884 F.2d 335, 341 (8th Cir. 1989)

Van Meter Indus. v. Mason City Human Rights Comm'n, 675 N.W.2d 503, 514 (Iowa 2004) (“We start with the proposition that absolute precision in proving what an employee would have earned but for the employer's discrimination is not required. Furthermore, because the difficulty in determining what an employee would have earned is often the result of the employer's discriminatory wage structure, any uncertainties in computing back pay are resolved against the employer.”)

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 530 (Iowa 1990) (same)

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 33

Mortality Table

A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Allyn Roberts is 21.8 more years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Allyn's health, habits, occupation, and lifestyle, when deciding issues of future damages.

Authority

Iowa Civil Jury Instruction 200.37

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 34

Juror's Notes

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 Civil Jury Instruction 100.21

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 35

Deliberations

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.

If you need to communicate with me during your deliberations, you may send a note to me through the Court Attendant, 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.

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.

Authority

Iowa Civil Jury Instruction 100.18

PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 36

Verdict Forms

I am giving you a 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 of you agree upon the answer to the questions. In that case, the verdict must be signed by all seven jurors who agree.

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

Authority

Iowa Civil Jury Instruction 300.1

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ALLYN WAYNE ROBERTS, Plaintiff, vs. CITY OF DES MOINES, Defendant.	Case No. LACL144995 PLAINTIFF'S PROPOSED VERDICT FORM
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Question 1: Did Plaintiff Allyn Roberts prove his claim of disability discrimination, as defined in Instruction No. 15, against Defendant? *(Please mark an "X" for each Defendant.)*

YES _____ NO _____

(Proceed to Question 2.)

Question 2: Did Plaintiff Allyn Roberts prove his claim of failure to accommodate, as defined in Instruction No. 20, against Defendant? *(Please mark an "X" for each Defendant.)*

YES _____ NO _____

(Proceed to Question 3.)

Question 3: Did Plaintiff Allyn Roberts prove his claim of retaliation, as defined in Instruction No. 26, against Defendant? *(Please mark an "X" for each Defendant.)*

YES _____

NO _____

(If your answers to Questions 1, 2, and 3 are all “no,” then do not answer any more questions. If you answered “yes” to Questions 1, 2, or 3 proceed to Question 4)

Question 4: What amount do you order Defendant to pay for Plaintiff Allyn Roberts’ in back pay and front pay?

Back Pay \$ _____

Front Pay \$ _____

(If your answer to Question 1 was “yes,” please proceed to Question 5. If your answer to Question 2 was “yes,” proceed to Question 6. If your answer to Question 3 was “yes,” proceed to Question 7.)

Question 5: What amounts do you order Defendant to pay for Plaintiff Allyn Roberts’ emotional distress damages related to his disability discrimination claim?

Emotional Distress in the past \$ _____

Emotional Distress in the future \$ _____

(If your answer to Questions 2 and 3 were both “no,” then you do not answer any more questions. If you answered “yes” to Question 2, continue to Question 6. If you answered “yes” Question 3, continue to Question 7.)

Question 6: What amounts do you order Defendant to pay for Plaintiff Allyn Roberts’ emotional distress damages related to his failure to accommodate claim?

Emotional Distress in the past \$ _____

Emotional Distress in the future \$ _____

(If your answer to 3 was “no,” then you do not answer any more questions. If you answered “yes” to Question 3, continue to Question 7.)

Question 7: What amounts do you order Defendant to pay for Plaintiff Allyn Roberts’ emotional distress damages related to his retaliation claim?

Emotional Distress in the past \$ _____

Emotional Distress in the future \$ _____

FOREPERSON _____

JUROR _____ JUROR _____

JUROR _____ JUROR _____

JUROR _____ JUROR _____

JUROR _____