

OPENING BRIEF AND SHORT APPENDIX

I. JURISDICTIONAL STATEMENT

Plaintiff invoked the jurisdiction of the district court to assert claims arising under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. and the Age Discrimination Employment Act, 29 U.S.C. §621 et seq. The defendants named in plaintiff's amended complaint (Record Item No. 14) were Cook County Hospital, the Civil Service Commission of Cook County, and "Local 1111." (Id.)

Cook County, Illinois was substituted as a defendant in place of Cook County Hospital. (Record Item No. 23.) The district court dismissed plaintiff's age discrimination claim because she had not brought that claim before the EEOC. (Short Appendix 27.) Thereafter, the district court granted summary judgment on plaintiff's ADA claim in favor of Local 1111. (Record Item No. 54.) The parties consented to proceed before a Magistrate Judge on March 11, 1998 (Record Items 72, 73), who subsequently granted summary judgment in favor of Cook County Hospital. (Short Appendix 1-24.) On plaintiff's appeal, this Court vacated the grant of summary judgment and remanded the ADA claim for trial. (Short Appendix 25-29.)

On remand, a jury found against plaintiff and judgment was entered on November 22, 1999. (Short Appendix 30.) Plaintiff filed her notice of appeal on December 14, 1999. (Record Item No. 129) and invokes the jurisdiction of this court under 28 U.S.C. §1291.

II. QUESTIONS PRESENTED

1. Did the district court err in rejecting plaintiff's four paragraph issue instruction in favor of an eight page explication of the Americans with Disability Act?
2. After the defense argued to the jury that the hospital had been "confused" about the duration of plaintiff's probationary period, did the district court err in refusing plaintiff's request to take judicial notice of the decision of the Illinois Supreme Court in *American Fed'n of State, County and Municipal Employees, Council 31, AFL-CIO v. County of Cook*, 145 Ill.2d 475, 584 N.E.2d 116 (1991) that plaintiff's probationary period was set by a collective bargaining agreement to be 90 days rather than the six month period of the civil service rules?
3. Was the question of whether plaintiff is disabled under the ADA conceded by defendant in its motion for summary judgment and on the first appeal?
4. Assuming that the question of whether plaintiff is disabled under the ADA was properly submitted to the jury, did the district court err in refusing to allow plaintiff to reopen her case and submit additional evidence of her disability?

III. STATEMENT OF THE CASE

Plaintiff, a right leg amputee, worked as a Data Entry Operator at Cook County Hospital from April 20, 1992 until she was discharged on August 7, 1992. (Short Appendix 1.) Defendant asserted in the district court that it had discharged plaintiff because of her error rate. (Short Appendix 3.)

Plaintiff based her ADA claim on evidence that Marcus Smith, a non-handicapped employee, had a comparable error rate and, instead of being discharged, received a verbal reprimand and, after another six months of poor performance, a three day suspension. (Short Appendix 26.)

In prior proceedings, the district court granted summary judgment to defendant. (Short Appendix 1-30.) This Court reversed in an unpublished order, concluding that "a reasonable jury could conclude that the differential treatment of Ms. Moore and Mr. Smith creates an inference of discrimination." (Short Appendix 29.) On remand, a jury found in favor of defendant (Short Appendix 30) and this appeal follows.

IV. STATEMENT OF FACTS

Plaintiff Barbara Moore is a below the knee amputee (Tr. 162) who, since the age of 12, has worn a prosthesis. (Tr. 162-63.) Because of her disability, plaintiff is unable to shower, has difficulty walking up and down steps, and has trouble waking in the middle of the night to use the bathroom. (Tr. 163.)

In 1992, plaintiff was hired by defendant Cook County to work at its hospital entering medical records. (Tr. 175). Plaintiff's supervisor was Dorothy Gibson (Tr. 172) Gibson provided plaintiff with an "Orientation Package," (Tr. 173), that Included a document reciting that plaintiff would be on probation for the first 90 days of her employment. (Tr. 174.)

Plaintiff's job consisted of entering information from handwritten medical charts into a computer system. (Tr. 175.) Defendant's performance goal was for plaintiff to be entering 14 charts per day within nine weeks of starting work. (Tr. 289.)

Shortly after she began to work at the hospital, plaintiff began to have problems with the part of her leg that came into contact with her prosthetic. (Tr. 179-80.) Plaintiff consulted with her physician and was off of work for two days in June of 1992. (Tr. 180.) Plaintiff informed Gibson of the reason for her absence when she returned to work. (Tr. 181.) Thereafter, Gibson wrote plaintiff up for missing work. (Tr. 182.) Defendant's progressive discipline policy called for counseling, a verbal warning, and a written warning before the employee would be summoned to a hearing. (Tr. 274.) Gibson did not counsel plaintiff (Tr. 287) and did not follow the progressive discipline hierarchy before writing up plaintiff. (Tr. 277.)

Plaintiff missed about two hours of work on July 13, 1992 when she returned to her physician. (Tr. 182.) Gibson again wrote plaintiff up for being off work. (Id.)

On July 17, 1992, Gibson wrote plaintiff up for unsatisfactory job performance. (Tr. 183.) The hearing on this complaint focused on one mistake that plaintiff had made. (Tr. 184.) Plaintiff was discharged following this hearing; at the time of her discharge, plaintiff had been employed by defendant for 110 days. (Tr. 174.)

Gibson testified that plaintiff was fired because of her inability to enter correctly 14 charts per day. (Tr. 289, 355-56.) Gibson admitted that Marcus Smith, another employee who was not disabled (Tr. 279), had also been unable to meet the 14 chart performance standard. (Tr. 299-303.) In December of 1991, when Smith had been on the job for less than six months (Tr. 298), Gibson noted that Smith was entering nine summaries per day (Tr. 301) and making numerous mistakes. (Tr. 301-02.) Smith received a verbal reprimand for his

poor job performance. (Tr. 302.)

Gibson also admitted that Smith continued to be unable to meet the performance standards in May of 1992 (Tr. 304-08) and that he was suspended for three days because of this failure. (Tr. 310.)

Gibson also disciplined Smith about attendance problems: Gibson counseled Smith about tardiness on August 9, 1991. (Tr. 281.) Smith's attendance problem continued and Gibson wrote up Smith on August 30, 1991. (Tr. 280.) One year later, Gibson evaluated Smith's job performance and noted that Smith had been absent eleven times in the previous eleven months. (Tr. 286.) Gibson did not initiate any discipline of Smith for these absences, even though defendant's written policy stated that eight or more absences in a 12 month period are unacceptable. (Tr. 272.)

Gibson also did not initiate any discipline of Cindy Pettis, another non-disabled data entry operator, after Pettis had been tardy 26 times in an eleven month period. (Tr. 287-88.) Defendant's written policy stated that eight or more instances of tardiness in a 12 month period are unacceptable. (Tr. 272.)

Gibson denied that plaintiff's disability caused Gibson to treat Smith and Pettis more leniently than plaintiff. (Tr. 370.) Gibson explained the disparate treatment on the ground that plaintiff was subject to a six month probationary period set out in the Civil Service Commission rules. (Tr. 362.) Gibson agreed that Smith and other non-handicapped data entry personnel had been given the benefit of the 90 day probationary period set out in the collective bargaining agreement. (Tr. 388.)

Over plaintiff's objections (Tr. 361, 369), Gibson testified that the collective bargaining agreement set the probationary period as 90 days (Tr. 366) but that the Civil Service Commission "contract" (Tr. 369) established a six month probationary period. (Tr. 370).

At the close of plaintiff's case in chief, defendant moved for judgment as a matter of law, arguing that plaintiff had failed to prove that she was disabled under the ADA. (Tr. 403-04.) Plaintiff opposed this motion, arguing that the case had been litigated and the jury had been selected on the assumption that plaintiff was disabled. (Tr. 405-06.) The trial judge denied the motion. (Tr. 407.)

At the instruction conference, after both parties had rested, the trial judge concluded that the jury would be permitted to determine if plaintiff was disabled under the ADA. (Supplemental Appendix 6.) Plaintiff unsuccessfully argued that defendant had waived this issue in the summary judgment motion and on the first appeal, (Supplemental Appendix 4), and pointed out that the trial judge had informed the prospective jurors during jury selection that plaintiff was disabled. (Supplemental Appendix 6.) Plaintiff alternatively argued that the ruling on this issue was a surprise and requested leave to reopen proof to present additional testimony from plaintiff about the nature and extent of her disability. (Supplemental Appendix 4.) The trial judge denied this request. (Supplemental Appendix 38.)

In closing argument, defense counsel argued that defendant had made "an honest mistake" in not affording plaintiff the benefit of the 90 day probationary period (Tr. 498):

You can look in your exhibits, and under the collective bargaining agreement, the probation period is 90 days. Whether or not the hospital was wrong in their beliefs as to the probation period really doesn't matter. It was an honest mistake. And the judge will instruct you that mistakes alone do not rise to the level of discrimination.

Following this argument, plaintiff obtained a sidebar conference (Tr. 500) and requested that the trial judge take judicial notice of the Illinois Supreme Court decision that held that the probationary period was set by the collective bargaining agreement rather than by civil service rules. (Tr. 500-03.) The trial judge refused to take judicial notice of this holding and instructed plaintiff's counsel not to argue this issue to the jury. (Tr. 503.)

Over plaintiff's objections (Supplemental Appendix 22-23, 36) the jury received an eight page instruction on the elements of plaintiff's ADA claim. (Supplemental Appendix 49-56.) The trial judge gave this instruction in the place of the four paragraph instruction that plaintiff had proposed (Supplemental Appendix 62):

The plaintiff Barbara Moore advances one claim in this lawsuit.

Plaintiff contends that, because of her disability, defendant treated her differently than it treated another employee. Such different treatment, if established by the evidence, would be a violation of a statute known as the Americans with Disability Act.

There is no dispute in this case that plaintiff is disabled under the Americans with Disability Act.

If you find from your consideration of all of the evidence that defendant treated plaintiff differently than another employee because of plaintiff's disability, then you should return a verdict in favor of plaintiff and against defendant. But if, on the other hand, you find that plaintiff has failed to establish this fact, then you should return a verdict in favor of defendant and against plaintiff.

The jury returned a general verdict in favor of defendant.

V. SUMMARY OF ARGUMENT

The core of plaintiff's ADA claim is that, because of her disability, plaintiff was treated differently than a non-disabled employee. Plaintiff proposed a simple, four paragraph instruction on this issue; the district court rejected plaintiff's proposal in favor of an eight page explication of the Americans with Disability Act. Included within this lengthy instruction was the question of whether plaintiff was disabled under the ADA.

In its motion for summary judgment, defendant had conceded that plaintiff, a below the knee amputee, is disabled. (Short Appendix 12.) On the first appeal in this case, the Court observed that the parties had "assumed" that plaintiff was disabled. (Short Appendix 27.) Plaintiff's disability was also assumed by the trial judge during jury selection.

The district court erred in permitting defendant to sandbag plaintiff by submitting to the jury the question of whether plaintiff was disabled. This error is identical to that corrected by this Court in *Brewer v. Wal-Mart Stores, Inc.*, 87 F.3d 203 (7th Cir. 1996) and requires a new trial.

The district court also erred in refusing to give plaintiff's concise issue instruction that was tailored to this case in lieu of the verbose form book instruction that covered all aspects of the ADA. The verbose instruction given by the court below was confusing, dealt with several issues that were not involved in the case, and asked the jury to decide questions of law. Plaintiff was prejudiced by the confusing instruction and a new trial is required.

A new trial is also required because of the district court's refusal to correct the improper defense closing argument that defendant had been "confused" about the duration of plaintiff's probationary period because of a conflict between the collective bargaining agreement and civil service rules. (Tr. 498.) After this argument, plaintiff asked the trial judge to take judicial notice of the decision of the Illinois Supreme Court in *American Fed'n of State, County and Municipal Employees, Council 31, AFL-CIO v. County of Cook*, 145 Ill.2d 475, 584 N.E.2d 116 (1991) that plaintiff's probationary period was set by the collective bargaining agreement to be 90 days rather than the six month period of the civil service rules. The trial judge refused to take judicial notice of this decision and instructed plaintiff's counsel not to argue this issue to the jury. (Tr. 503.)

VI. ARGUMENT

A. Standard of Review

The Court set out the standard of review of jury instructions in *Wilson v. Williams*, 83 F.3d 790, 874 (7th Cir. 1996):

We construe jury instructions in their entirety, seeking to determine if, as a whole, they were sufficient to inform the jury correctly of the applicable law. *See Maltby v. Winston*, 36 F.3d 548, 560 (7th Cir. 1994). In this review we avoid fastidiousness and inquire only whether the correct message was conveyed to the jury reasonably well. *See Wilk v. American Medical Ass'n*, 719 F.2d 207, 218 (7th Cir. 1983). We will reverse only if it appears that "the jury was misled . . . [and its] understanding of the issue was seriously affected to the prejudice of the complaining party." *Stachniak v. Hayes*, 989 F.2d 914, 920 (7th Cir. 1993) (quoting *Northbrook Excess & Surplus v. Procter & Gamble*, 924 F.2d 633, 638 (7th Cir. 1991) (citations omitted)). Our analysis, then, is in two parts. First we determine if the instruction misstates or insufficiently states the law, and, if so, we then determine whether the error has prejudiced the complaining party.

The district court's refusal to take judicial notice is reviewed under the abuse of discretion standard: "Whether a district court commits reversible error in admitting or excluding evidence is determined by the abuse of discretion standard." *Wilson v. Groaning*, 25 F.3d 581, 585 (7th Cir. 1994).

B. The Eight Page Issue Instruction Was Confusing, Inaccurate, and Asked the Jury to Decide Issues of Law and Questions of Previously Undisputed Facts

The trial judge in this case failed to heed the admonition of *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994) that jury instructions should be drafted with "a red pencil to arcane, cabalistic, inscrutable, ambiguous, and unnecessary words." *Id.* at 345.

Pursuant to the decision of this Court in the first appeal in this case, the issue that should have been submitted to the jury is whether defendant treated plaintiff differently than a non-disabled employee because of her disability. As this Court stated, "Ms. Moore claims that in firing her the hospital was treating her differently than other employees because she is disabled." (Short Appendix 27.)

Plaintiff proposed that the jury be asked to decide her claim in a four paragraph instruction, drafted in plain English. (Supplemental Appendix 62, set out *ante* at 7.) The trial judge refused plaintiff's instruction and insisted on giving an eight page instructions (Supplemental Appendix 49-56) that outlined virtually every conceivable legal principle applicable to a *prima facie* case using the *McDonnell-Douglas* formulation.

The court's instruction begins by identifying four elements of an ADA claim (Supplemental Appendix 49-50):

Under the Americans With Disabilities Act, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

First, that she has a disability, as I will define that term for you.

Second, that she is a qualified individual, as I will define that term for you.

Third, that the Defendant discriminated against her because of that disability; and

Fourth, that she suffered damages as a direct result of that discrimination.

The instruction then continues with three pages describing the legal standards for a "disability" under the ADA. (Supplemental Appendix 50-52.) This is followed by three pages of legal standards relating to whether plaintiff was a "qualified individual." (Supplemental Appendix 53-55 The jury was asked to determine "the essential functions of the employment position in question" (Supplemental Appendix 53) and provided with a laundry list of 11 factors to use in making this determination. (Supplemental Appendix 54.)

The court's instruction includes five paragraphs on whether defendant discriminated against plaintiff because of her disability (Supplemental Appendix 55-56):

The third element of a claim under the Americans with Disabilities Act is that the defendant discriminated against plaintiff because of the disability.

To satisfy this element, the plaintiff must prove by a preponderance of the evidence that the defendant took an adverse employment action against her because of her disability or that the disability was a motivating factor in the decision to take that adverse action.

As I stated, the defendant must have acted because of plaintiff's

disability or the disability was a motivating factor in the decision to take that adverse action. This means that the plaintiff's disability was a factor that made a difference in the decision to take this action. Thus, this element is not satisfied if you find that the defendant would have taken the same action in the absence of plaintiff's [56] disability

In order for the disability to have been a motivating factor in the defendant's decision, the defendant must have known that the plaintiff had a disability. This means that the person who made the decision to take the adverse action knew that plaintiff had a disability.

An employer may not terminate an employee because of a disability, but may terminate the employee because the employee is unable to do the job, even if the reason the employee cannot do his or her job is because of her disability.

This verbose jury instruction interfered with a fair resolution of the issues in this case.

1. The Question of Whether Plaintiff Is Disabled Should Not Have been Submitted to the Jury

The jury should not have been permitted to consider whether plaintiff was disabled because defendant had conceded this issue in its motion for summary judgment.

In its decision on defendant's motion, the trial judge wrote that "Both Ms. Moore and the Hospital agree that Ms. Moore is physically disabled." (Short Appendix 12.) This agreement continued through the first appeal in this case, where the Court stated that "the parties have assumed that [plaintiff's] right-leg amputation is a disability within the meaning of the ADA." (Short Appendix 27.) The assumption of disability carried over through jury selection, when the trial judge introduced the case to the prospective jurors as follows (Tr. 19):

Plaintiff, who had one of her legs amputated during her childhood, claims that other employees whose work [20] performance was similar to hers but who were not disabled were treated more favorably than she was, and her less favorable treatment and her termination was based on her disability. The defendant denies that. The defendant alleges that she was terminated because she was unable to do the work.

In conducting voir dire, the trial judge repeatedly referred to plaintiff as a person "who's disabled and who was terminated" (Tr. 22), as a person who was terminated "because of her disability" (Tr. 37, 47, 52, 58, 59, 66, 86, 87, 92, 94, 99, 103, 118), or as a person who is "handicapped." (Tr. 85.)

Defendant did not advert to any dispute about plaintiff's disability in its opening statement, asserting that plaintiff had been fired because her inability to do the job rather than because she was an amputee. "[T]he facts . . . will prove that the hospital's termination solely was because she was incompetent and not because she was an amputee." (Tr. 161.)

Defendant raised the question of whether plaintiff was disabled in its motion for judgment as a matter of law at the close of plaintiff's case. (Tr. 403-04.) The trial judge denied this motion "[i]n view of the finding of the Seventh Circuit on that issue in which it found that the parties assumed or that the parties did not argue against the proposition that [plaintiff] was disabled under the ADA." (Tr. 407.)

At the close of all the evidence, however, the trial judge reconsidered and held that the question of plaintiff's disability should be submitted to the jury. (Supplemental Appendix 6-7.) Thereafter, the trial judge denied plaintiff's request to reopen plaintiff's case to put on additional evidence about disability. (Supplemental Appendix 38.)

This Court was confronted with a similar mid-trial change in strategy in *Brewer v. Wal-Mart Stores, Inc.*, 87 F.3d 203 (7th Cir. 1996). There, the Court reversed an award of punitive damages because plaintiff's strategy of "softly" seeking punitive damages "is too long on strategy and tactics and too short on fairness." *Id.* at 209. The same is true here: defendant should not have been allowed to resurrect its waived and long abandoned challenge to plaintiff's disability.

Even if defendant had not waived its challenge to the question of plaintiff's disability, the manner in which this issue was submitted to the jury required it to decide question of law. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court "makes clear that whether a claimed affliction constitutes an impairment under the ADA and whether the identified endeavor constitutes a major life activity are determinations of law for the court to decide." *Poindexter v. Atchison, Topeka and Santa Fe Railway Co.*, 168 F.3d 1228, 1230 (10th Cir. 1999). As in *Poindexter*, the jury in this case was not provided with any guidance as to which endeavors it could properly consider as major life activities and the questions of law pertaining to "major life activity" should not have been submitted to the jury. *Id.* at 1231.

2. The Verbose Instruction Was Confusing

The trial court's issue instruction was confusing and failed to focus on the critical issue in this case, i.e., whether plaintiff's disability was the reason why she was treated differently than Marcus Smith.

There was no dispute that plaintiff and Smith exhibited performance problems that Gibson described in identical language in her contemporaneous write-ups. Smith was suspended for two days and plaintiff was fired. In this context,

the jury issue was whether plaintiff had proved that the disparate treatment was due to plaintiff's disability.

This Court has held that a jury should not be instructed about the *McDonnell-Douglas* burden shifting format for analyzing a plaintiff's discrimination claim. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995); *Anchor v. Riverside Gold Club*, 117 F.3d 339 (7th Cir. 1997). The Court has also warned district courts of the dangers in using verbose form book instructions, and made plain that "a judge need not deliver instructions describing all valid legal principles." *Gehring v. Case Corp.*, *supra*, 43 F.3d 343. See also *Hasham v. California State Board of Equalization*, 200 F.3d 1035, 1051 (7th Cir. 2000).

A particularly prejudicial flaw in the lengthy instruction is its treatment of whether plaintiff was a "qualified individual." (Supplemental Appendix 52-55.) The jury could have agreed with plaintiff that she was treated differently than Smith because of her disability but still returned a verdict for defendant by concluding that plaintiff's error rate made her unqualified for the position. The jury should not have been permitted to consider this possibility because, as this Court wrote in the first appeal, "whether Ms. Moore could perform the essential functions of the job and whether she was meeting the hospital's legitimate expectations, merge into the same inquiry in this case, and overlap as well with the question of whether Ms. Moore's non-compliance with those standards (the hospital's proffered reason for firing her) was a pretext for discrimination." (Short Appendix 28.)

The verbose issues instruction in this case permitted the jury to find against plaintiff even if she had been the victim of unlawful discrimination This

erroneous instruction requires that plaintiff be afforded a new trial.

C. Plaintiff Should Have Been Permitted to Answer the Defense Argument of “Confusion”

In closing argument, defense counsel argued that defendant had made "an honest mistake" in not affording plaintiff the benefit of the 90 day probationary period (Tr. 498):

You can look in your exhibits, and under the collective bargaining agreement, the probation period is 90 days. Whether or not the hospital was wrong in their beliefs as to the probation period really doesn't matter. It was an honest mistake. And the judge will instruct you that mistakes alone do not rise to the level of discrimination.

The trial judge erred in refusing to permit plaintiff to answer this misleading argument.

In the first appeal in this case, this Court noted that in *American Fed'n of State, County and Municipal Employees, Council 31, AFL-CIO v. County of Cook*, 145 Ill.2d 475, 584 N.E.2d 116 (1991), the Illinois Supreme Court held that plaintiff's probationary period was set by the collective bargaining agreement, rather than by civil service rules. (Short Appendix 26, 29.) After defense counsel told the jury that defendant had committed "an honest mistake," plaintiff was granted a sidebar conference (Tr. 500) and requested the trial judge to take judicial notice of the Illinois Supreme Court decision that this Court had referred to in the first appeal. (Tr. 500-03.) The trial judge refused to take judicial notice of this holding and instructed plaintiff's counsel not to argue this issue to the jury. (Tr. 503.)

The district court abused its discretion in refusing plaintiff's request to correct the defense misstatement. On the retrial required in this case, the district

court should be instructed to bar any evidence from the defense about "confusion" that the 90 day probationary period applied to plaintiff.

VII. CONCLUSION

For the reasons above stated, the case should be reversed and remanded for a new trial.

Respectfully submitted,

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