

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)	
COMMISSION,)	
)	
Plaintiff,)	
)	
and)	
)	
KEVIN ARMSTRONG,)	
)	
Intervening Plaintiff,)	
)	
v.)	No. 00-2916
)	
NORTHWEST AIRLINES, INC.,)	
)	
Defendant.)	

JURY INSTRUCTIONS

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

Now let me outline for you the parts of the charge so that you can follow it more easily. First, I will instruct you as to the burden of proof and upon which party the law places that burden in the case, and I will give you some rules to help you as you consider the evidence. Second, I will outline for you the contentions and theories of the parties. Third, I will outline for you the law to apply in determining the legal issues with respect to discrimination. Fourth, I will instruct you on the law with respect to damages. Finally, I will explain to you about the form of your verdict.

I. GENERAL INSTRUCTIONS

Corporate Defendant:
All Persons Equal Before the Law

In this case, the defendant, Northwest Airlines, Inc., is a corporation. The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

While Northwest Airlines, Inc. ("Northwest") is the defendant in this case, that does not mean that only the actions of one body can be considered by you in determining its liability in this case. A corporation acts not only through the policies and decisions that it makes, but also through its designated supervisory employees and others designated by Northwest to act on its behalf.

Pay close attention to the remainder of these instructions. As you apply subsequent portions of these instructions, you will have to determine whether or not individual Northwest employees were authorized to act on behalf of Northwest Airlines, Inc.

Burden of Proof and
Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When, as in this case, the defendant denies the material allegations of the plaintiffs' claim, the law places upon the plaintiffs the burden of supporting and making out their claim upon every essential element of their claim by the greater weight or preponderance of the evidence.

Preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

Weighing the Evidence

You, members of the jury, are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you, and to give the testimony of the witnesses the weight, faith, credit and value to which you think it is entitled.

You will note the manner and demeanor of witnesses while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. An act or omission is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

These are the rules that should guide you, along with your common judgment, your common experience and your common observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case. If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which ones of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect of a

discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the party upon whom the burden of proof has been cast in accordance with these instructions.

During this trial, I occasionally asked questions of witnesses in order to bring out facts not fully covered in their testimony. Please do not assume that I hold any opinion on the matters to which my questions relate.

Direct and Circumstantial Evidence

There are two kinds of evidence -- direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

Expert Testimony

You have heard the testimony of Dr. Lisa Meyers; Dr. Marvin E. Levin; Dr. Alan Garber; and Dr. Kevin O'Connell (by deposition and in person). Each was permitted to testify as an "expert" witness. Such a witness is allowed to express his or her opinion on those matters about which he or she asserts special knowledge and training. In weighing such witness's testimony, you may consider the witness's qualifications, his or her opinions, his or her reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept such witness's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Deposition Testimony

Certain testimony has been read into evidence from the depositions of Dr. Kevin O'Connell and Mark Williams. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

Certain summaries have been received in evidence in order to help explain the contents of records or other evidence in the case. If the summary does not correctly reflect the facts or figures shown by the evidence in the case, you should disregard the summary and determine the facts from the underlying evidence.

Totality of the Evidence

The jury may consider all evidence admitted in the case. Testimony and documents which the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. For example, matters and things which a decisionmaker is told may be considered for the purpose of explaining the basis upon which that person acted or made a decision. This, of course, is all for you, the jury, to decide.

II. THEORIES AND CONTENTIONS IN THIS CASE

Stipulated Facts

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the plaintiffs and defendant entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without either party presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

Facts stipulated to by the parties in this case include the following:

1. In June, 1997 Kevin Armstrong became employed as a ramp agent with Phoenix Airline Services a/k/a Northwest Air Link.
2. Air Link did not require Kevin Armstrong to submit to a physical examination at the time of his employment, and he was permitted to assume his duties after one week of training.
3. In January, 1998, Kevin Armstrong quit his job at Air Link and applied for a better paying ramp agent position at Air Tran in Memphis.

4. Air Tran hired him as a part-time ramp agent which later became full-time and, like Air Link, Air Tran required no physical examination and provided minimal training.
5. On January 1, 1998, Kevin Armstrong was hired by Air Tran as a ramp agent.
6. Around May, 1998, Kevin Armstrong applied for a regular part-time position as an Equipment Service Employee ("ESE") at Northwest Airlines. He was extended a conditional job offer on May 9, 1998.
7. Kevin Armstrong applied for an ESE position at Northwest Airlines in Memphis while still employed at Air Tran.
8. Dr. Kevin O'Connell is a physician who works for the Airport Medical Clinic who is an expert in occupational medicine and has substantial knowledge of the ESE position at Northwest Airlines.
9. Kevin Armstrong was diagnosed with Type 1 diabetes at the age of nine. Dr. Lisa Myers began treating Kevin Armstrong in May, 1997.
10. On Kevin Armstrong's first visit to Dr. Myers on May 2, 1997, Dr. Myers noted that Mr. Armstrong had been on insulin since he was first diagnosed with diabetes as a nine year old; that he was receiving two shots of insulin daily; and that his blood sugar readings and

hemoglobin A1c had been high for the past several months.

11. On the first visit, Dr. Myers also noted that his diabetes was poorly controlled and made major adjustments to his insulin.
12. On May 22, 1998, the reading taken closest in time to the period when he was being evaluated for employment as an ESE with Northwest Airlines showed that Kevin Armstrong had a fasting glucose level of 253.
13. Hemoglobin A1c percentages, which measure three month blood sugar averages, should be placed in the 6-7% range. Beginning in December, 1996, and continuing through the period when he applied for a position with Northwest Airlines, Kevin Armstrong's medical records show percentages ranging from 7.6% to 9.4%, with several in the 8-9% range.
14. Kevin Armstrong's two Hemoglobin A1c readings in 1998, the year he applied for an ESE position with Northwest Airlines, were 9.4% (January 21) and 8.4% (July 1).
15. ESE's at Northwest Airlines handle baggage on the tarmac (ramp) of airports, transport luggage in and out of aircraft bins and between aircraft and baggage areas of the terminal, and are also responsible for guiding

planes in and out of their parking places at airport gates and for de-icing planes when needed.

16. Essential functions of the ESE ramp position include operating heavy equipment on the ramp, working at unprotected heights, and regular heavy lifting on the ramp at airports.
17. An empty baggage cart weighs over 1,000 pounds.
18. The ESE position is a demanding job requiring a high level of visual acuity, constant alertness, and quick reaction time.
19. If Kevin Armstrong had been hired, assuming he did not receive any discipline and was not discharged, he would have been paid according to the pay scales for ESE's in Northwest Airlines Agreement Between Northwest Airlines, Inc. and International Association of Machinists & Aerospace Workers, DOS August 4, 1993 and February 25, 1999.
20. Christopher Holloway, an ESE who started his employment with Northwest Airlines in May, 1998, the time Kevin Armstrong would have started had he been hired, is still employed by Northwest Airlines.
21. The Northwest Airlines ESE job description and medical recommendations accurately describes the ESE position,

including the essential functions, for which Kevin Armstrong applied.

It is the plaintiffs' contention that the defendant refused to hire Kevin Armstrong for the position of Equipment Service Employee ("ESE" or "luggage handler") because of his disability, insulin dependent diabetes.

Specifically, the evidence will show that in May, 1998, Kevin Armstrong applied for an ESE position at Northwest Airlines and was extended a conditional job offer, with a hire date of May 18, 1998. Subsequent to a medical examination at Baptist Minor Medical Center, Kevin Armstrong was medically recommended for the position. Meanwhile, after learning that Mr. Armstrong had insulin dependent diabetes, Dr. Kevin O'Connell, defendant's medical contractor in Minnesota, requested Mr. Armstrong's diabetes records from 1996. Upon reviewing the five lab reports, Dr. O'Connell determined that job restrictions were in order. Believing that Kevin Armstrong was subject to altered states of consciousness and sudden incapacitation, Dr. O'Connell recommended that Kevin Armstrong should be restricted from driving/operating heavy equipment and working at unprotected heights above five feet. Dr. O'Connell did not conduct an individualized assessment. He formed his conclusions without talking to or examining Kevin Armstrong; requesting or reviewing Kevin Armstrong's complete

medical records; consulting with Kevin Armstrong's physician about his condition; or speaking to Kevin Armstrong's employers about his work history. Defendant Northwest Airlines ultimately withdrew the job offer based on Dr. O'Connell's recommendation.

Plaintiffs contend that Kevin Armstrong is a qualified individual with a disability. He must frequently monitor his blood sugar levels and coordinate his blood sugar with the insulin he takes and the food he eats. The evidence will show that despite Kevin Armstrong's constant dietary vigilance, his average blood sugar levels have remained elevated well above normal. Plaintiffs contend that these elevated levels cause long-term complications such as developing kidney failure, diabetic eye problems or foot problems, but do not result in immediate symptoms such as altered states of consciousness or sudden incapacitation. Plaintiffs further contend that the defendant regarded Kevin Armstrong as substantially limited in the major life activity of working. The restrictions placed on Kevin Armstrong, coupled with defendant's perception that Kevin Armstrong was subject to altered states of consciousness and sudden incapacitation, would disqualify Kevin Armstrong from a broad range of jobs or a class of jobs. Defendant's representative stated that there were no jobs that Kevin Armstrong could perform at Northwest Airlines in Memphis.

Plaintiffs contend that despite Kevin Armstrong's disability, he is qualified to perform the ESE position. Already employed as a luggage handler at Air Tran, Kevin Armstrong applied for employment at Northwest Airlines because he could earn more money. He was particularly qualified because he also had previous experience as a luggage handler for Northwest Air Link, a regional partner of Northwest Airlines. Mr. Armstrong's job responsibilities at these other air carriers were nearly identical to the ESE duties at Northwest Airlines. Of equal importance, Mr. Armstrong has never had a safety related incident on any job and he has a valid driver's license from the State of Tennessee, with no restrictions or record of accidents.

Plaintiffs contend that Kevin Armstrong would not have been a direct threat to himself or others in the performance of the ESE job duties. The evidence will show that Mr. Armstrong's diabetes does not cause him to experience altered states of consciousness, sudden incapacitation, or other symptoms that would interfere with his ability to work as an ESE.

Plaintiffs further contend that whether Kevin Armstrong engaged in the interactive process is not an issue in this case because the plaintiffs have not alleged that defendant denied Kevin Armstrong a reasonable accommodation. On the contrary,

plaintiffs assert that Kevin Armstrong does not need an accommodation. Plaintiffs contend that the employer and employee's obligation to engage in the interactive process triggered by the employee's request or the employer's recognition of the need for an accommodation. No such accommodation was needed here. Even assuming, arguendo, that reasonable accommodation is an issue in this case, defendant did not engage in the interactive process because it simply sent a blank form to Kevin Armstrong after the decision to withdraw the offer was essentially made. Although defendant was in the best position to know if any accommodations would be available, it did not offer any suggestions. When Kevin Armstrong responded to defendant's invitation and requested a reply, defendant did not respond further. Moreover, the request for Kevin Armstrong to engage in the interactive process was not a bona fide invitation because no reasonable accommodation was available.

Plaintiffs contend that Kevin Armstrong suffered mental and emotional harm as a result of defendant's illegal discrimination so as to warrant an award of compensatory damages in an amount to be determined by the jury. Plaintiffs contend that defendant acted in reckless disregard of Kevin Armstrong's federally protected rights so as to warrant an award of punitive damages in an amount to be determined by you, the jury. Plaintiffs contend

that the evidence will show that Mr. Armstrong is entitled to back pay in the amount of \$26,708.43 and other pecuniary damages in the amount of \$3,253.25.

Defendant's Contentions

As submitted by counsel for
Northwest Airlines in the Pretrial Order

The defendant, Northwest Airlines, contends that in 1998, Kevin Armstrong applied for a regular part-time ESE position at Northwest Airline's Memphis hub. ESE job duties include transporting baggage to and from planes on the ramp (or "tarmac"), loading and unloading baggage from planes, guiding planes to and from gates, and de-icing planes. Essential functions of the job include frequent heavy lifting, operating heavy equipment on the ramp, working at unprotected heights, and driving vehicles on the ramp, all in close proximity to aircraft as they are being fueled and serviced and to passengers and other workers moving rapidly in all directions. The ESE must be mentally alert at all times and perform the physical demands of the job to meet Northwest Airline's safety standards. Federal law requires that airlines such as Northwest perform their services with the highest possible degree of safety.

After Northwest Airlines received Kevin Armstrong's application, it made a conditional offer, contingent upon a pre-placement physical examination. The examination revealed that he had had open heart surgery and was an insulin-dependent diabetic. Northwest Airline's consulting physician, Dr. O'Connell, an expert in occupational medicine familiar with the ESE job requirements,

requested additional medical information regarding Kevin Armstrong's diabetes. Based on all the information provided by Kevin Armstrong, Dr. O'Connell agreed with Mr. Armstrong's doctor (Dr. Myers) that Kevin Armstrong's diabetes was poorly controlled. As a result of his medical analysis and out of concern for safety, Dr. O'Connell recommended that Mr. Armstrong not drive or operate heavy equipment on the ramp or work at unprotected heights on the ramp - two essential functions of the ESE job.

Northwest Airlines advised Mr. Armstrong of the recommended restrictions and offered to engage in an interactive accommodations process, the purposes of which are: (1) to discuss the recommended restrictions; (2) to identify precisely the applicant's limitations; (3) to allow the applicant to submit any additional data, including medical information, pertinent to his condition and limitations; and (4) to explore the possibility of any reasonable accommodations. Kevin Armstrong refused to participate in the interactive process. Northwest Airlines then withdrew its conditional job offer.

Kevin Armstrong does not seek employment with Northwest Airlines as a remedy to this lawsuit, as he is pursuing his lifelong ambition of a career in law enforcement.

Northwest Airlines contends that it is not liable in this case for the following reasons, any one of which would result in a judgment for defendant Northwest Airlines:

1. As to any claim that Northwest Airlines "regarded" Kevin Armstrong as disabled, the unrebutted proof shows that Northwest did not act on the basis of stereotypes about diabetes, but rather acted as the law requires, on the basis of medical evidence and specific physical restrictions recommended by a consulting physician.
2. Moreover, Northwest did not regard Mr. Armstrong as significantly restricted in his ability to perform either a class of jobs or a broad range of jobs in various classes. Rather, it only considered him unable to perform a single job - the ESE job.
3. Kevin Armstrong was not a qualified individual with a disability because he could not perform the essential functions of the ESE. Specifically, he was unable to work at unprotected heights or drive or operate heavy equipment on the ramp - two essential functions of the ESE position.
4. Northwest did not withdraw its conditional offer of employment to Kevin Armstrong because it regarded him as disabled, but rather due to the fact that his diabetes was poorly controlled, which made him unqualified to

perform the essential functions of the ESE job and posed a safety risk to himself, his co-workers, and the public.

5. Kevin Armstrong's refusal to engage in the ADA mandated interactive process precludes him from succeeding on an ADA claim.
6. Northwest had a legitimate business reason for not hiring Mr. Armstrong (safety risk). For this reason also, Northwest is not liable.
7. Kevin Armstrong would have posed a direct threat to himself, his co-workers, and the public in the ESE position. For this reason, Northwest was not obligated to hire him for that position and is not liable.
8. Neither Northwest nor any high management official of Northwest acted with malice or reckless indifference to Kevin Armstrong's federally protected rights. Rather, Northwest acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit discrimination in the workplace.

III. GENERAL INSTRUCTIONS ON THE APPLICABLE LAW

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If any lawyer has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty. However, it is your duty, and yours alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice or sympathy, either one way or the other.

The claim before you is based on 42 U.S.C. § 12101, which is also known as the Americans With Disabilities Act or the ADA.

This statute provides in part that:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedure, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The purpose of the Americans With Disabilities Act is to provide a clear and comprehensive national policy to eliminate discrimination in the workplace against individuals with disabilities.

The ADA defines disability as follows:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such impairment; or
- (C) being regarded as having such impairment.

In this case, Mr. Armstrong does not claim a "disability" under either (A) or (B) above; he only claims that he is entitled to relief under subsection (C). Mr. Armstrong specifically asserts that Northwest Airlines "regarded" him as having an impairment that substantially limits him in one or more major life activities.

To help you understand the legal claim, shortly I will define for you several terms and will set out the elements that must be proved by a preponderance of the evidence in order to establish plaintiffs' claim under the ADA.

The determination of whether an individual is disabled must be made with reference to measures, such as eyeglasses and contact lenses, that mitigate the individual's impairment. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be

substantially limiting if corrective measures were not taken. Stated a different way, a person whose medical condition, or impairment, is "corrected" by the use of medication or a corrective device is not a person with a "disability" under subparts (A) and (B) above; but, of course, such a person can be a person with a "disability" under subpart (C) above.

Remember, Mr. Armstrong's claim in this case is a subpart (C) claim involving allegedly being regarded as having "an impairment that substantially limits him in one or more major life activities."

Purpose of Subsection (C)

Under subsection (C), individuals who are "regarded as" having a disability are disabled within the meaning of the ADA. There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity (i.e., employer) mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity (i.e., employer) mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a employer or potential employer entertain misperceptions about the individual - it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often result from stereotypic assumptions not truly indicative of individual ability.

Congress, by amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity,

acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the impairment. The purpose of subpart (C) - the regarded as prong - is to cover individuals "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities."

Turning now to the elements (i.e., facts) that plaintiffs EEOC and Kevin Armstrong must prove to establish their claim of intentional discrimination by defendant Northwest Airlines, plaintiffs have the burden of proving the following essential elements by a preponderance of the evidence:

1. That Mr. Armstrong was regarded as having a disability as defined in these instructions;
2. That Mr. Armstrong is otherwise qualified to perform the job requirements, without accommodation; and
3. That Mr. Armstrong suffered an adverse employment decision because of the perceived disability.

In order to establish the first element, that is, that Mr. Armstrong was regarded by Northwest Airlines as having a disability, I must first define the term disability.

Disability Defined

Under the ADA a disability is a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

The terms within the definition are defined as follows:

(1) Under the ADA, a physical or mental impairment is any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sensory organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genital-urinary, hemic and lymphatic, skin, and endocrine.

This Page is Blank

(2) To be regarded as substantially limited in the major life activity of working, an individual must show that the employer regarded him as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."

A class of jobs includes the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities.

A broad range of jobs includes the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities.

Major Life Activity (P-15)

(3) For a major life activity to be substantially limiting "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. Major life activities include, but are not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, eating, speaking, breathing, learning, and working." The impairment's impact must also be permanent or long-term.

The ADA was not intended to punish an employer for following work restrictions imposed by a doctor, and an employer lawfully may rely on a doctor's assessment as to a person's qualifications for a job. Therefore, an employer who follows the medical restrictions recommended by a doctor does not regard an applicant as disabled.

You must, of course, determine whether or not the physician acting on behalf of an employer imposing restrictions on an applicant for employment complies with the ADA in imposing those restrictions. A physician who acts on behalf of an employer must, before imposing restrictions, perform an individual assessment of the applicant's condition to determine whether it poses a direct threat and/or whether the applicant is a qualified individual under the ADA. If no individual assessment was performed by the physician, then the physician's imposed restriction need not be accepted by the jury. In making that determination, you may also consider factors such as whether the physician considered whether the applicant had disability-related problems on jobs prior to his application and consideration for employment by the employer, and whether the physician considered the applicant's medical records at the time of the physician's decision.

Business Judgment

The law allows an employer, such as Northwest Airlines, broad discretion in the implementation of its legitimate business objectives, including the supervision and management of its employees and their assignments and discipline. Conversely, an employer may not take action against an applicant, in whole or in part, for a discriminatory reason.

If you find that the defendant's actions with respect to the plaintiff in this case were not motivated by discrimination, then you must render a verdict for the defendant, even though you might feel that the defendant's actions were unreasonable, arbitrary, or unfair. It is not your role, as jurors, to determine the reasonableness or fairness of the defendant's employment decisions, to second-guess the defendant's business judgment, or to substitute your judgment for the defendant's as to the appropriate course of action in dealing with the plaintiff. You are, of course, as previously discussed, to determine whether the defendant intentionally discriminated against plaintiff Armstrong because he was regarded as having a disability. Your sole responsibility is to determine the legality of the defendant's actions in accordance with these instructions.

To summarize, under the first element, plaintiffs must prove by a preponderance of the evidence that Mr. Armstrong was regarded by the defendant as having a disability, that is, a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

If plaintiff has established each of the components of the first element by a preponderance of the evidence, then you should proceed to analyze the requirements of the second element. If he has not proved the components of the first element by a preponderance of the evidence, then you must return a verdict for the defendant on Question 1 of the verdict form.

The second element of a claim under the ADA is that plaintiff Kevin Armstrong was a "qualified individual" at the time of his application.

To satisfy this element, the plaintiffs must prove two things by a preponderance of the evidence:

1. That Kevin Armstrong was qualified for the position, and
2. That he could perform the essential functions of the position without reasonable accommodation.

Additionally, in this case, Northwest Airlines asserts that Mr. Armstrong, was a "direct threat" to the health and/or safety of himself or others. Such a defense is permissible and, if established by a preponderance of the evidence, is a complete defense to a claim of discrimination under the ADA. As noted, however, the burden of proof on a "direct threat" defense is on the defendant and if the defendant fails in that burden then you cannot return a verdict for the defendant on that basis.

Qualified Individual

As I just stated, to establish that Kevin Armstrong is a qualified individual, the first thing the plaintiffs must prove is that plaintiff Kevin Armstrong was qualified for the position at the time he applied. This means that plaintiff Kevin Armstrong had the requisite skill, experience, education, and other job-related requirements of the ESE when he applied for that position.

Essential functions of Position
(88A-15)

Moreover, for you to find that plaintiff Kevin Armstrong was qualified for the position, you must determine by a preponderance of the evidence that he was able to perform the essential functions of the ESE position and that he did not need an accommodation to do so.

In order to make this determination, you will need to determine what were the essential functions of the ESE position. The "essential functions of an employment position" are the basic, fundamental duties of a job that a person must be able to perform in order to hold a particular position. Essential functions do not include marginal job duties of the position.

A job function may be considered essential for any of several reasons. These include, but are not limited to, the following:

2. The reason the position exists is to perform that function;
3. There are a limited number of employees available among whom the performance of that job function can be distributed; and

4. The job function is highly specialized and the person in that position is hired for his expertise or ability to perform that particular job function.

In determining whether or not a particular job function is essential, you may, along with all of the evidence which has been presented to you, consider the following factors:

1. The employer's judgment as to which functions of the job are essential;
2. Written job descriptions prepared by the employer for advertising or posting the position;
3. Written job descriptions prepared by the employer for use in interviewing applicants for the position;
4. The amount of time spent performing the function;
5. The consequences of not requiring the person holding the position to perform the function;
6. The terms of any collective bargaining agreement;
7. The work experience of past employees who have held the position; and
8. The work experience of current employees who hold similar positions.

The plaintiff Kevin Armstrong must have been able to perform all of the essential functions of the position without accommodation, at the time defendant withdrew the offer of employment. An employer may not base an employment decision on speculation that plaintiff Armstrong would not be a qualified individual at some time in the future. On the other hand, an employer is not required to speculate that an employee's condition will improve if that employee is not able to fulfill all of the essential functions of the position at the time in question.

An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified employee, unless it can show that the accommodation would impose an undue hardship on its business. A reasonable accommodation is any modification or adjustment to a job, and employment practice, or the work environment that makes it possible for an individual with a disability to enjoy equal employment opportunity.

A disabled employee bears the initial burden of proposing accommodation and showing that accommodation is objectively reasonable.

An applicant, if the employer claims the disabled applicant would be unqualified to perform essential functions of the job, must prove that the applicant would, in fact, be qualified for the job.

If a qualified employee is not seeking a reasonable accommodation, but instead is alleging that he can perform the essential functions of the job without reasonable accommodation, then the employee's only burden of proof is to show that he was qualified to perform the essential functions of the job. The

disputed issues involving reasonable accommodation only arise when an employee is seeking an accommodation.

In this case, Mr. Armstrong has sought no accommodation.

No Accommodation

When an applicant for employment asserts that his medical condition has been corrected and declines to seek an accommodation, the employer has no obligation to provide accommodation for that employee under the ADA. There is no assertion in this case that Northwest Airlines has or had any obligation to provide accommodation to Mr. Armstrong. His decision not to seek accommodation resolves that issue. Therefore, if you, the jury, determine based on a preponderance of the evidence, that Mr. Armstrong could have performed the essential functions of the job of ESE at Northwest Airlines with accommodation, but could not perform the job without accommodation, then he is not a qualified individual for purposes of this case under the ADA and the defendant Northwest Airlines would be entitled to a verdict in their favor, because of the failure of the plaintiff to prove by a preponderance of the evidence the facts necessary to establish the second element of his claim.

On the other hand, if you, the jury, believe that Mr. Armstrong could have performed the essential functions of the job without an accommodation then he is a qualified individual for

purposes of this case under the ADA, unless he was a "direct threat" as that term is defined below.

It is a defense to a claim of discrimination based upon disability that the plaintiff was not hired because he was a direct threat. Direct threat means a significant risk to health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that a direct threat exists must be based on a specific personal assessment of the plaintiff's present ability to safely perform the essential functions of the job. This assessment of the plaintiff's ability must be based on either a reasonable medical judgment that relies on the most current medical knowledge, or on the best available objective evidence.

Such evidence may include input from the disabled individual, the experience of the disabled individual in previous jobs, and documentation from medical doctors or other health care professionals who have expertise in the disability involved and/or direct knowledge of the individual with the disability. In determining whether an individual would pose a direct threat, the factors to be considered include:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and

4. The imminence of the potential harm.

Stated in another way, an employer may apply a qualification standard insisting that an individual not pose a direct threat to the health or safety of himself or other individuals in the work place. A "direct threat" is a significant risk to the health and safety of the applicant or others that cannot be eliminated by reasonable accommodation. A slightly increased risk is not enough to constitute a direct threat; there must be a significant (that is, real) probability of substantial harm.

As stated earlier, the burden of proof for establishing the direct threat defense rests on the employer. Northwest Airlines has asserted that defense in this case and if the defendant has established by a preponderance of the evidence that Mr. Armstrong was a "direct threat" as that term has been defined, then you must return a verdict for the defendant on Question 2 of the Verdict Form.

Do not forget, however, that as to the elements of his claim, the plaintiff has the burden of proof.

Third Element

The third element that plaintiff must prove is that the defendant's acts were a proximate cause of the harm sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such loss or injury would not have occurred without the conduct of the defendant. If you find that the defendant has proved, by a preponderance of the evidence, that the plaintiff complains about an action which would have occurred even in the absence of the

defendant's conduct, you must find that the defendant did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury or loss.

The question under the third element of plaintiff's claim under the ADA is whether Kevin Armstrong suffered an adverse employment decision because the defendant regarded Kevin Armstrong as having a disability.

To satisfy this element, the plaintiffs must prove by a preponderance of the evidence that the defendant did not hire Mr. Armstrong because defendant perceived his diabetes as a disability as defined previously in these instructions.

This means that Kevin Armstrong's perceived disability was a factor that made a difference in the decision to hire him. Thus, this element is not satisfied if you find that the defendant would have taken the same action in the absence of Kevin Armstrong's perceived disability.

An employer may not refuse to hire an individual because of a disability or a perceived disability, but may refuse to hire a person because that person is unable to do the job, or for any other non-discriminatory reason.

In summary, as to the third element, if the plaintiffs have failed to establish by a preponderance of the evidence that Mr. Armstrong suffered an adverse employment action (i.e. was not hired) because of discrimination by the defendant in violation of the ADA, then you must return a verdict for the defendant. Conversely, if you find that the plaintiff has established by a preponderance of the evidence that Mr. Armstrong suffered an adverse employment action (i.e. was not hired) because of discrimination by the defendant in violation of the ADA, then you must return a verdict for the plaintiff.

V. DAMAGES

If the plaintiffs prove by a preponderance of the evidence that the defendant is liable on the plaintiffs' claim, then you must determine the damages to which plaintiff Kevin Armstrong is entitled. You should not infer that plaintiff Armstrong is entitled to recover damages merely because I am instructing you on how to award damages. It is your function to decide on liability, and I am instructing you on damages only so that you will have guidance should you decide that plaintiff Armstrong is entitled to recovery.

If you should find that Kevin Armstrong was a qualified individual with a disability who suffered an adverse employment action by the defendant, then you must determine an amount that is fair compensation for Mr. Armstrong's damages. Compensatory damages or actual damages seek to make the party whole - that is, to compensate the plaintiff for the damage that the plaintiff has suffered as a result of the defendant's discriminatory actions. You may award compensatory damages only for injuries that the plaintiffs prove were proximately caused by defendant's unlawful conduct. Compensatory damages are not limited merely to expenses that the plaintiff has borne. Instead, compensatory damages should fairly and justly compensate plaintiff for the financial loss he has suffered as a result of that conduct. The damages, if any, that you award must be fair compensation, no more and no less.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require Mr. Armstrong to prove the amount of losses with mathematical precision, but only with as much definiteness and

accuracy as the circumstances permit. In particular, in regard to pain and suffering and mental and emotional distress, you may award damages to Mr. Armstrong for any alleged humiliation, emotional distress, mental anguish, and suffering that he experienced as a result of defendant's withdrawal of its offer of employment.

No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make must be fair in light of the evidence presented at trial.

If you find that the defendant discriminated against Kevin Armstrong on the basis of his disability, then you must determine an amount that would compensate him for the salary and other compensation that Mr. Armstrong would have earned or received if defendant had hired him. In computing money damages, you may not rely on speculation or guesswork. However, absolute precision is not required. You may make an estimate of the amount of money that will constitute just and reasonable compensation based on the facts that are before you. Any ambiguities should be resolved against the defendant.

In this case, the measure of damages for lost wages and other compensation resulting from the violation of ADA is the difference between the amount of money Mr. Armstrong would have earned had he been hired by defendant and the amount he actually earned, from May 1998 to the present.

Mr. Armstrong was under a duty to mitigate (to avoid or minimize) the back pay damages, by exercising reasonable diligence in seeking employment that could have substantially compensated him. Mr. Armstrong need not go into another line of work, accept a demotion, or take a demeaning position. Mr. Armstrong's duty to

mitigate his damages did not require him to look for or accept employment substantially equivalent to any job he had previously held; he was under a duty only to look for and accept employment substantially equivalent to the job which he was discriminatorily denied.

The employer has the burden of demonstrating that there were substantially equivalent positions available with virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status. The employer also has the burden of showing that Mr. Armstrong failed to use reasonable care and diligence in seeking such positions. The plaintiff's diligence must be evaluated in light of the individual characteristics of the claimant and the job market.

The defendant may satisfy his burden only if it establishes that there were substantially equivalent positions which were available; and the plaintiff failed to use reasonable care and diligence in seeking such positions.

The plaintiff is only required to make reasonable efforts to mitigate his damages, and is not held to the highest standard of diligence. In other words, Mr. Armstrong is not required to go to

heroic lengths in attempting to mitigate his damages, but only take reasonable steps to do so.

You may award as actual damages an amount that reasonably compensates Mr. Armstrong for any lost wages and benefits, taking into consideration any increases in salary that he would have received had he not been discriminated against.

You must reduce any award by the amount of expenses that Mr. Armstrong would have incurred in making those earnings, and also by any amount Mr. Armstrong has earned while working for other employers since Northwest's failure to hire him.

If you find that Mr. Armstrong voluntarily quit a job with another employer after Northwest failed to hire him, you must reduce any award by any amount Mr. Armstrong would have earned if he had continued to work in the job that he quit.

Furthermore, if you find that Mr. Armstrong voluntarily left the airline industry in order to learn and develop a career in a different field of work, he is not entitled to any damages after the date that he left the airline industry.

Punitive Damages (P-25/D29)

If you award the plaintiff actual damages, then you may also make him a separate and additional award of punitive damages. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for its wrongful conduct and to deter others from engaging in similar wrongful conduct.

The plaintiff may recover punitive damages if he establishes that the defendant's agent acted with malice or reckless indifference to his federally protected rights. Punitive damages may be awarded against Northwest Airlines because of an act by an agent if the principal authorized the act; the agent was unfit and the principal was reckless in employing him; or the agent was employed in a managerial capacity and was acting within the scope of the employment; or the principal or managerial agent of the principal ratified or approved the act. However, Northwest may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where those acts by such employees are contrary to the employer's own good faith efforts to comply with the law by implementing policies and programs designed to prevent such unlawful discrimination in the workplace.

To determine whether the agent was acting in a managerial capacity, you must determine the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.

An award of punitive damages would be appropriate if you find:

1. That a higher management official of Northwest personally acted with malice or reckless indifference to Mr. Armstrong's protected rights;
or
2. That Northwest itself had not acted in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace.

Punitive Damages (88A-30)

Again, if you should find that the defendant is liable for discriminating against the plaintiff in violation of the ADA, then you have the discretion to award punitive damages in addition to compensatory damages. The purpose of punitive damages is to punish a defendant for shocking conduct and to set an example to deter others from committing similar acts in the future. You may award punitive damages only if you find that the plaintiff has proved by a preponderance of the evidence that the defendant intentionally engaged in discriminatory actions with malice or with reckless indifference to the rights of the disabled.

Reckless or Malicious

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial and unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under all the circumstances.

A person acts maliciously when the person is motivated by ill will, hatred or personal spite.

If you, the jury, find that the conduct of Northwest Airlines as determined under these instructions was with malice or reckless indifference to Mr. Armstrong's federally protected rights under the ADA, then indicate so in your response to question 6 on the verdict form, but do not indicate the amount of punitive damages you would award. That question will be reserved until the parties have a final opportunity to present some additional evidence on the question.

Of course, if you find that the action of Northwest Airlines were neither malicious or with reckless indifference to the rights

of Mr. Armstrong, then you should so indicate in response to question 6, and that will be your final verdict in this case.

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form which reflects your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a foreperson after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your foreperson will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgments. Each of you must decide

the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may not have seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all eight of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
and)
)
KEVIN ARMSTRONG,)
)
Intervening Plaintiff,)
)
v.) No. 00-2916
)
NORTHWEST AIRLINES, INC.,)
)
Defendant.)

V E R D I C T

We, the jury, unanimously answer the questions submitted by the Court as follows:

1. (First element) Do you find by a preponderance of the evidence that defendant Northwest Airlines regarded Mr. Armstrong as having a disability as defined in the jury instructions?

YES _____ NO _____

If your answer to Question No. 1 is "NO," stop here, sign the verdict form and return to the Court. If your answer is "YES", proceed to Question 2.

2. (Second element) Do you find by a preponderance of the evidence that plaintiff Kevin Armstrong was a qualified individual able to perform the job requirements of the ESE position and that Mr. Armstrong did not pose a direct threat to himself or others as defined in the jury instructions?

YES _____ NO _____

If your answer to Question No. 2 is "NO," stop here, sign the verdict form and return to the Court. If your answer is "YES", proceed to Question 3.

3. (Third element) Do you find by a preponderance of the evidence that Kevin Armstrong suffered an adverse employment decision because of the perceived disability (that is, was not hired by Northwest Airlines in violation of Mr. Armstrong's federally protected rights under the Americans with Disabilities Act)?

YES _____ NO _____

If your answer to Question No. 3 is "NO," stop here, sign the verdict form and return to the Court. If your answer is "YES", proceed to Questions 4, 5, and 6.

4. Do you find that plaintiff is entitled to back pay?

YES _____ NO _____

If your answer to Question No. 4 is "YES," then under the laws as given you in these instructions, state the amount of back pay that should be awarded from the defendant.

AMOUNT: \$ _____

5. (Compensatory damages) Do you find by a preponderance of the evidence that plaintiff Kevin Armstrong suffered emotional pain and mental anguish as a result of the unlawful conduct of the defendant?

YES _____ NO _____

If you answered "YES" to Question No. 5, then under the laws as given you in these instructions, state the amount of compensatory damages that plaintiff should be awarded from the defendant.

AMOUNT: \$ _____

6. Have the plaintiffs shown by a preponderance of the evidence that defendant's adverse actions were in malicious or reckless disregard of Mr. Armstrong's federally protected rights?

YES _____ NO _____

FOREPERSON

DATE

INDEX
CIVIL CHARGE BOOK
[Jury Instructions]

00-2916
EEOC v. Northwest Airlines

1. General Instruction
 - a. Corporate Defendant/All Persons Equal Before the Law
 - b. Burden of Proof and Consideration of the Evidence
 - c. Weighing the Evidence
 - d. Direct and Circumstantial Evidence
 - e. Statements of Counsel
 - f. Totality of the Evidence
 - g. Expert Testimony
 - h. Deposition Testimony
 - i. Summaries

2. Theories and Contentions in this Case
 - a. Stipulated Facts
 - b. Theories of the Parties
 - c. Plaintiff's Contentions
 - d. Defendant's Contentions

3. General Instructions on the Applicable Law
 - a. ADA - The statute
 1. Purpose of ADA
 2. Disability Defined
 3. Purpose of Subsection (C)

 - b. First Element
 1. Substantially Limited
 2. Major Life Activity
 3. Reliance on Medical Restrictions
 4. Business Judgment

 - c. Second Element
 1. Qualified Individual
 2. Essential Function of Position
 3. Accommodation
 4. No Accommodation
 5. Qualified Individual Cannot be Direct Threat

 - e. Third Element
 1. Proximate Cause

4. Damages
 - a. Compensatory Damages
 - b. Back Pay Damages
 - c. Actual Damages
 - d. Punitive Damages
 - e. Intentionally, Recklessly, Maliciously, Fraudulently - Defined

5. Verdict Form