

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

MICHAEL J. MEINEN,)	CIV. 10-5077
)	
Plaintiff,)	
)	FINAL INSTRUCTIONS
vs.)	TO THE JURY
)	
GODFREY BRAKE SERVICE &)	
SUPPLY, INC.,)	
)	
Defendant.)	

TABLE OF CONTENTS

FINAL INSTRUCTIONS

NO. 1 - INTRODUCTION	3
NO. 2 - MATTERS TO BE DISREGARDED	5
NO. 3 - DEFINITION OF EVIDENCE	6
NO. 4 - USE OF NOTES	8
NO. 5 - OBJECTIONS	9
NO. 6 - CREDIBILITY OF WITNESSES	10
NO. 7 - IMPEACHMENT	11
NO. 8 - EXPERT WITNESSES	12
NO. 9 - EQUALS BEFORE THE LAW	13
NO. 10 - AGENCY	14
NO. 11 - STIPULATED FACTS	15
NO. 12 - BURDEN OF PROOF	16
NO. 13 - ELEMENTS OF AN AMERICANS WITH DISABILITIES ACT CLAIM	17
NO. 14 - ESSENTIAL FUNCTIONS	19
NO. 15 - REASONABLE ACCOMMODATIONS	20
NO. 16 - UNDUE HARDSHIP	22
NO. 17 - ACTUAL DAMAGES	23
NO. 18 - MITIGATION OF DAMAGES	25
NO. 19 - NOMINAL DAMAGES	26
NO. 20 - ISSUES TO BE DECIDED	27

NO. 21 - DUTY AS JURORS	29
NO. 22 - DUTY DURING DELIBERATIONS	31
VERDICT FORM	

FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I will take a few minutes to give you the instructions that are to guide and govern you in arriving at a verdict. These final instructions will be available to you in the jury room. The instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed. The order in which the instructions are given has no significance as to their relative importance.

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 3. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of both parties. Do not allow sympathy or prejudice to influence you. The law demands of you a

just verdict based solely on the evidence, your common sense, and the law as I give it to you. Your verdict must not be based on speculation, guess, or conjecture.

Finally, do not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

FINAL INSTRUCTION NO. 2 - MATTERS TO BE DISREGARDED

It is your duty as a juror to determine the facts, and you must do this from the evidence produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which I ordered stricken. Such things you must put out of your mind. You must not consider anything you may have heard or read about this case other than the evidence produced here in open court.

FINAL INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated, that is, formally agreed to by the parties. Certain things are not evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Exhibits that are identified by a party but not offered or received in evidence are not evidence.
3. Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
4. Anything you see or hear about this case outside the courtroom is not evidence.

The fact that an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms.

The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Finally, the weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of the evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 4 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict. Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 5 - OBJECTIONS

The lawyers made objections during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 6 - CREDIBILITY OF WITNESSES

You are the sole judges of all questions of fact and the credibility of witnesses. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence; the opportunity the witness had to see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the general reasonableness of the testimony; and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

FINAL INSTRUCTION NO. 7 - IMPEACHMENT

In the previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness may be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s trial testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 8 - EXPERT WITNESSES

You may have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 9 - EQUALS BEFORE THE LAW

In this case, the defendant Godfrey Brake Service & Supply, Inc., (“Godfrey Brake Service”) is a corporation. A corporation is entitled to the same fair trial as a private individual. No inference or presumption may be drawn against either party that would be improper in a case between individuals. You should consider and decide this case with the same fairness and consideration as though it were a case between individuals. The parties in this case stand equal before the law and are entitled to a fair and impartial consideration of the entire case.

FINAL INSTRUCTION NO. 10 - AGENCY

A corporation acts only through its employees. An employee of a corporation may bind the corporation by acts and statements made while acting within the scope of his duties as an employee of the corporation. Any act or omission of an employee in the performance of that person's duties is held in law to be the act or omission of the corporation.

FINAL INSTRUCTION NO. 11 - STIPULATED FACTS

The plaintiff and the defendant have stipulated -- that is, they have agreed -- that certain facts are as counsel stated. You should, therefore, treat those facts as having been proved.

FINAL INSTRUCTION NO. 12 - BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing force of the evidence. Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you something is more likely true than not true. In the event the evidence is evenly balanced so that you are unable to say the evidence on either side of an issue has the greater weight, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 13 -

ELEMENTS OF AN AMERICANS WITH DISABILITIES ACT CLAIM

To establish a claim of discrimination under the Americans with Disabilities Act (“ADA”) all of the following elements must be proved:

First, that Mr. Meinen had a disability;

The parties have agreed or stipulated Mr. Meinen suffered from multiple sclerosis and Mr. Meinen is a disabled person within the meaning of the ADA. By entering into this agreement or stipulation, Godfrey Brake Service has not admitted liability under the ADA, and you may not draw any inference of liability from the stipulation.

Second, that Godfrey Brake Service knew of Mr. Meinen’s disability;

The parties have agreed or stipulated Godfrey Brake Service knew of Mr. Meinen’s disability. By entering into this agreement or stipulation, Godfrey Brake Service has not admitted liability under the ADA, and you may not draw any inference of liability from the stipulation.

Third, that Mr. Meinen could perform the essential functions of the parts-counter job at Godfrey Brake Service with reasonable accommodations;

The phrase “essential job functions” is defined in Final Instruction No. 14.

Fourth, that providing the accommodations was reasonable;

The phrase “reasonable accommodation” is defined in Final Instruction No. 15.

and

***Fifth*, that Godfrey Brake Service failed to provide part-time hours as an accommodation and failed to provide any other reasonable accommodation by terminating Mr. Meinen.**

Mr. Meinen bears the burden of proving by greater convincing weight of the evidence each of these elements. If any of the above elements were not proven, then your verdict must be for Godfrey Brake Service.

A plaintiff's receipt of unemployment or Social Security Disability benefits have no effect on a person's right to seek money damages under the ADA.

FINAL INSTRUCTION NO. 14 - ESSENTIAL FUNCTIONS

The term “essential functions” means the fundamental job duties of the employment position at issue in the case. In determining whether a job function is essential, you should consider the following factors:

1. The employer’s judgment as to which functions of the job are essential;
2. Written job descriptions;
3. The amount of time spent on the job performing the function in question;
4. The consequences of not requiring the person to perform the function;
5. The work experience of persons who have held the job;
6. The current work experience of persons in similar jobs;
7. The reason the position exists; and
8. Whether there are a limited number of employees available among whom the performance of the function can be distributed.

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

FINAL INSTRUCTION NO. 15 - REASONABLE ACCOMMODATIONS

The ADA protects only those disabled individuals who, with or without reasonable accommodation, can perform the employment position the plaintiff holds or desires. An employer is required to make reasonable accommodations to allow a disabled person to perform the essential functions of their position of employment.

A “reasonable accommodation” is one which can be reasonably made under the circumstances and may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; acquisition or modifications of equipment or devices; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. An employer is not obligated to provide an employee with the accommodation the employee requests or prefers, but rather, the employer need only provide some reasonable accommodation.

There is no precise test for determining what constitutes a reasonable accommodation, the ADA does not require an accommodation that would cause other employees to work harder, longer, or be deprived of opportunities, or obligate an employer to hire additional employees or reassign existing workers to assist an employee seeking an accommodation.

An accommodation is unreasonable if it imposes undue financial or administrative burdens or if it otherwise imposes an undue hardship on the operation of the employer's business. "Undue hardship" is defined in Final Instruction No. 16.

Once an employee shows a reasonable accommodation was requested and is possible, the burden shifts to the employer to prove by the greater convincing weight of the evidence that it is unable to accommodate the disabled employee. The employee at all times retains the burden of persuading the jury he has been the victim of discrimination due to his disability.

FINAL INSTRUCTION NO. 16 - UNDUE HARDSHIP

The term “undue hardship” means an action requiring the employer to incur significant difficulty or expense when considered in light of the following:

1. The nature and cost of permanent part-time hours;
2. The overall financial resources of the employer;
3. The overall size of the employer’s business with respect to the number of its employees and the number, type and location of its facilities;
4. The type of the employer’s operation, including the composition, structure, and functions of the workforce; and
5. The impact of permanent part-time hours on the operation of the employer’s business, including the impact on the ability of other employees to perform their duties and the impact on the employer’s ability to conduct business.

FINAL INSTRUCTION NO. 17 - ACTUAL DAMAGES

If you find in favor of Mr. Meinen on his Americans with Disability Act claim, you must award Mr. Meinen such sum as will fairly and justly compensate him for any damages he sustained as a direct result of the action by Godfrey Brake Service. Mr. Meinen's claim includes distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages and fringe benefits, if any, Mr. Meinen would have earned in his employment with Godfrey Brake Service had he not been discharged on February 22, 2010, through the date of your verdict. From this amount you must deduct earnings and benefits he received, or could have received, from other employment during that time. You are instructed not to award any sum for future wages or benefits after the date of your verdict. Those damages, if appropriate, will be determined by the court and should not be considered by you during your deliberations.

Second, you must determine the amount of other damages, if any, sustained in the past and in the future by Mr. Meinen for emotional pain and suffering, mental anguish, and loss of enjoyment of life. There is no exact standard for fixing the amount to be awarded for these types of damages. Any award that you make should be fair considering all the evidence. In calculating damages, you should not consider any pain and

suffering, emotional distress or other damages you believe Mr. Meinen may have suffered because of his multiple sclerosis. You may only award damages caused to Mr. Meinen, if any, by the defendant's discriminatory action.

You must enter separate amounts for each type of damages on the verdict form and must not include the same items in more than one category.

You must not engage in speculation, guess or conjecture and you must not award damages as punishment or through sympathy.

FINAL INSTRUCTION NO. 18 - MITIGATION OF DAMAGES

Mr. Meinen has a duty under the law to “mitigate” his damages, that is, to exercise reasonable diligence under the circumstances to minimize his damages. If you find Mr. Meinen failed to seek out or take advantage of an employment opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have earned. Godfrey Brake Service bears the burden of proving by the greater convincing weight of the evidence that Mr. Meinen failed to mitigate his damages.

FINAL INSTRUCTION NO. 19 - NOMINAL DAMAGES

If you find in favor of Mr. Meinen, but you determine his damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 20 - ISSUES TO BE DECIDED

The issues to be determined by you in this case are these:

First, has Mr. Meinen proved by the greater convincing weight of the evidence that Godfrey Brake Service discriminated against him in violation of the Americans with Disabilities Act?

If you find Godfrey Brake Service did not discriminate against Mr. Meinen under the ADA, you will return a verdict for the defendant and your deliberations are complete. If you find Godfrey Brake Service did violate the ADA, the next issue you must decide is:

Second, has Mr. Meinen proved by the greater convincing weight of the evidence he is entitled to actual damages, that is, wages and benefits from February 22, 2010, through the date of your verdict?

If you find for Mr. Meinen on this issue, you must decide:

Third, has Godfrey Brake Service proved by the greater convincing weight of the evidence that Mr. Meinen failed to mitigate his damages?

If you find Mr. Meinen failed to mitigate his damages, you must determine the amount of money damages to be awarded to Mr. Meinen, but deduct from that sum the amount of wages and other benefits Mr. Meinen earned or could have earned from February 22, 2010, through the date of your verdict.

The next issue you must decide is:

Fourth, has Mr. Meinen proved by the greater convincing weight of the evidence he is entitled to other damages, that is, money damages for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life? If so, determine the amount of those damages.

If you find Mr. Meinen suffered no actual damages, you must award damages to Mr. Meinen in the nominal amount of One Dollar (\$1.00).

As indicated in this instruction, you should first determine the question of liability, if any, before you undertake to fix an amount that would compensate for damage found to have been suffered.

FINAL INSTRUCTION NO. 21 - DUTY AS JURORS

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of reaching a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 22 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

First, when you go to the jury room, you must select one of your members as the foreperson. He or she will preside over your discussions and speak for you here in court.

Second, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, 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.

Third, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict must be unanimous.** Nothing I said or did was intended to suggest what your verdict should be—that is entirely for you to decide.

The verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. When you have unanimously agreed on the verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a

verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated May 3rd, 2013.

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'Jeffrey L. Viken', is written over a horizontal line.

JEFFREY L. VIKEN
CHIEF JUDGE