

**IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO**

CLARENCE SICKLESMITH,)	Civil Action No.2002cv 850
)	
Plaintiff,)	JUDGE DAVID TOBIN
)	
-vs-)	
)	
)	PLAINTIFF'S PROPOSED JURY INSTRUCTIONS
CHESTER HOIST, et al.,)	
)	
Defendants.)	

Now comes Plaintiff, CLARENCE SICKLESMITH, who respectfully submits his proposed jury instructions. The proposed instructions are categorized into approximately seven sections based off of the issues in this case. Heavy emphasis is placed on OJI instructions when available although Ohio Administrative Code sections are used as well. A copy of the pertinent sections of the Ohio Administrative Code is attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew L. Margolius, do hereby certify that a copy of the foregoing Proposed Jury Instructions was hand delivered to the attorneys for the Defendants James Kurek, Roetzel and Andress, 222 South Main St., Akron, OH 44308, on this ___th day of October, 2005.

ANDREW L. MARGOLIUS

Instruction No. 1

Employment Discrimination - General

1. Employee's Claim. The employee claims that the employer discriminated against him by discharging him, retaliating against him and failing to accommodate him because of his disability or perceived disability.
2. Employer's Claim. The employer claims that the discharge here was not because of the employee's disability.

[Source: **2-266 Ohio Jury Instructions 266.01 (2003).**]

Instruction No. 2

Disability Discrimination

1. Claims. The employee claims that the Employer discriminated against him because he has a disability, or is regarded as having a disability. The Employer denies that the employee is disabled or they regarded him as having a disability and that it discriminated against the employee because of the claimed disability.

[Comment - In cases where the employee claims that the employed failed to accommodate his/her disability, see 2 OJI 266.15]

[Source: **2 Ohio Jury Instructions 266.11(1)**]

2. Elements. Before you can find for the employee, you must find by the greater weight of the evidence that:
 - (A) the employee has or was regarded as having a physical or mental impairment that substantially limits one or more major life activity; and
 - (B) the employee was qualified for the position of inspector; and
 - (C) the employee can perform the essential functions of the position of the inspection job with

reasonable accommodation; and

- (D) the employee's disability was a determining factor in the Employer's decision to discharge Mr. Sicklesmith.

[Source: 2 Ohio Jury Instructions 266.11(2)]

3. Disability. "Disability" means a physical or mental impairment that substantially limits one or more major life activity. "Major life activity" means basic life activity that an average person can perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting and reaching.

[Source: 2 Ohio Jury Instructions 266.11(4)]

4. Mental or Physical Impairment. The term "mental or physical impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs, respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine.

[Source: 2 Ohio Jury Instructions 266.11(3)]

5. Substantially limiting. A physical or mental impairment "substantially limits" one or more of a person's major life activities when it:

- (A) renders the employee unable to perform a major life activity that the average person could perform; or
- (B) Significantly restricts, as to condition, manner or duration, the individual's ability to perform a particular major life activity as compared to the condition, manner or duration under which the average person could perform the same major life activity.

The question of whether the employee's impairment substantially limits a major life activity

depends on the impairment's nature and severity, duration, and permanent or long-term impact.

[Source: 2 Ohio Jury Instructions 266.11(5)]

6. Regarded as having an impairment. An individual is “regarded as having an impairment” if the employer treats the employee as having a physical or mental impairment that limits a major life activity.

[Source: 2 Ohio Jury Instructions 266.11(9)]

7. Essential functions. “Essential functions” means the fundamental duties of a position, as opposed to marginal functions of the position. If the employee can perform the essential functions of the job, he/she cannot be denied a job because he/she cannot do things that are only marginal to the job.

To determine whether a function is essential to the job, you must consider first whether employees in the position are actually required to perform the function claimed to be essential; if you find that the employees are not actually required to perform the function, it is not an essential function.

If you find that the job function is actually required to be performed by employees in the position, then you must decide whether the job function is essential. A particular job function is essential if:

- (A) the position exists to perform the function; or,
- (B) there are a limited number of other employees available to perform the function, or among whom the function can be distributed; or
- (C) a function is highly specialized and the person in the position is hired for special expertise or ability to perform it.

You may also consider the following factors when deciding whether a particular job function is essential: 1) employer's judgment as to which functions are essential; 2) written job descriptions prepared before advertising for or interviewing applicants for the position; 3) the amount of time the employee must spend performing the function; 4) the consequences of not requiring the employee to perform the function; 5) the work experience of past employees in the job; 6) the current work experience of

employees in similar jobs; and 7) all other factors and circumstances in evidence.

[Source: 2 Ohio Jury Instructions 266.11(10)]

Instruction No. 3

Disability Discrimination; Reasonable Accommodation - Burden on Defendants

The employer shall have the burden of establishing the basis for the refusal or discrimination, whether it is based upon an inability to substantially perform the job, inability of the employer to accommodate, or Failure to engage in an interactive process to accommodate the employee.

[Source: *Taylor v. Phoenixville School Dist.*, (C.A. 3, 1999), 184 F.3d 296, at 318; Ohio Adm. Code 4112-5-08(D)(1) [Burden of proof when applicant is excluded based on disability.(1) Burden of proof. If an applicant is refused employment, or an employee is discriminated against in any term, condition or privilege of employment because of a disability, the employer shall have the burden of establishing the basis for the refusal or discrimination, whether it is based upon a BFOQ, occupational hazard, inability to substantially perform the job, or inability of the employer to accommodate.]; *Wooten v. Columbus Div. of Water* (1993), 91 Ohio App.3d 326, 334 (holding that accommodations are unreasonable if they place an undue hardship on the employer and that the burden of proving an undue hardship is on the employer)]

Instruction No. 4

Disability Discrimination; Reasonable Accommodation

1. General. An employer must make reasonable accommodation to an employee's disability, so long as the accommodation does not impose an undue hardship on the operation of the business.

2. Claims. The employee claims that he was discharged by the Employer. The employee further claims that with reasonable accommodation he could have performed the essential function of the inspection position.

The employer denies that Mr. Sicklesmith made a reasonable accommodation request and that there was no reasonable accommodation it could have made without undue hardship to the operation of the business.

3. Elements: Before you can find for the employee you must find by the greater weight of the evidence that:

- (A) the employee has or was regarded as having a physical or mental impairment that substantially limits one or more major life activity; and
- (B) he/she was qualified for the position of inspector since he satisfied the skill, experience, education and other job-related requirements for the position; and
- (C) he/she can perform the essential functions of the position of inspector with reasonable accommodation; and
- (D) the employee or his agent requested or reasonably gave notice to the employer to accommodate his disability; and
- (E) the employer failed to reasonably accommodate his/her disability.

4. Reasonable accommodation. "Reasonable accommodation" means modification to or adjustment of the work environment, or to the manner or circumstances under which a job is customarily held or performed. Reasonable accommodation is best understood as a means by which obstacles to the equal employment opportunity of an individual with a disability are removed or alleviated. Reasonable accommodation may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities.
 - (B) job restructuring.
 - (C) part-time or modified work schedules.
 - (D) appropriate modifications of examinations, training, materials or policies.
- * * * * *
- (F) reassignment to a vacant position for which the employee is qualified.
 - (G) providing an employee with a tool or equipment which allows the employee to perform the essential functions of the job.

5. Reassignment to vacant position. Although an employer is not required to create another job for an employee who is no longer able to do his/her job, an employer may be required to reassign an employee to a vacant position for which he/she is qualified in order to reasonably accommodate his/her disability.

6. Affirmative Defenses.

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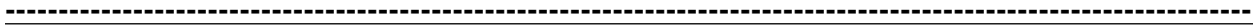
- (B) Impossibility. Employer claims that there was no accommodation he/she/it could make that would enable the employee to perform the essential functions of the job.
- (C) Undue Hardship. Employer claims that the possible accommodation(s) would impose an undue hardship on the operation of the Employer 's business. "Undue hardship" means significant difficulty and expense incurred by an employer . In determining whether accommodation would impose an undue hardship, you may consider the following factors:
 - (1) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions or outside funding;
 - (2) The financial resources of the employer 's facility or facilities involved in the provision of the accommodation, the number of persons employed at such facility, and the effect on the employer 's expenses and resources;

(3) The financial resources of the employer as a whole, the overall size of the business with respect to its total number of employees, and the number, type and location of its facilities;

(4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer;

(5) The impact of the accommodation upon the operation of the facility involved, including the impact on the ability of the other employees to perform their duties and the impact on the facility's ability to conduct business.

[Source: **2 Ohio Jury Instructions 266.15 (2003)**]



Instruction No. 5

The Accommodation Process - The Interactive Process

1. Claims. Once an employee has put the employer on notice of a disability, the employer has a good faith duty to participate in an interactive accommodation process, in order to determine a reasonable accommodation. The employee, “being a non-lawyer, did not have to come in to the discharge interview and ask for the specific accommodation or be foreclosed from ever asking any other accommodations. A meaningful dialogue is contemplated. Efforts by both parties must be made to find an accommodation.”

[Source: **Court’s Summary Judgment Opinion, Judgment Entry, page 2]**

An employer’s duty to make a reasonable accommodation also mandates that the employer interact

with an employee in a good faith effort to seek a reasonable accommodation.

[Source: *Shaver v. Wolske & Blue*, 138 Ohio App3d. 653, 742 NE2d 164 (Franklin County, 2000); Court’s Summary Judgment Opinion, Judgment Entry, page 2]



Instruction No. 6

Retaliation

- 1. General. An employer may not retaliate against an employee who asserted reasonable accommodation rights. The employee must prove by the greater weight of the evidence that the employer intended to retaliate when it discharged Plaintiff. The employee need not prove that the sole purpose of the discharge was retaliation. It is sufficient that the employee prove that retaliation was a determining factor in the discharge.
- 2. Determining factor. “Determining factor” means that the employee’s reasonable accommodation request made a difference in the discharge. There may be more than one reason for the Employer’s decision to discharge. The employee need not prove that the accommodation request was the only reason. It is not a determining factor if the employee would have been fired regardless of his accommodation request.
- 3. Reasonable Belief. The employee must have a reasonable belief that the employer engaged in a discriminatory employment practice before the employee (*insert protected conduct*), whether or not the employer did, in fact, engage in a discriminatory employment practice. The issue is not whether the employer actually engaged in a discriminatory practice. “Reasonable belief” means that belief which would be held by a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances.

[Source: 2 Ohio Jury Instructions 266.21 (2003)]

Instruction No. 7

Damages in Discrimination Cases

1. Back Pay. If you find for the Employee, he is entitled to recover lost wages and benefits, including any increases in wages or benefits lost because of the discrimination, failure to accommodate and retaliation. The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the ability to work and/or discharge to the date of the verdict. You may include all forms of compensation that the Employee proved he would have earned, but for the discharge including salary, bonuses, vacation pay, pension, health insurance and other benefits.

In determining the amount of any back pay, you must deduct the amount of wages and benefits received from replacement income during the period of back pay awarded.

2. Front Pay. If you find for the Employee, you shall consider an award of front pay. Front pay includes the amount the Employee would have earned from the date of the verdict until the date you find the Employee's loss of future pay and benefits will cease. The purpose of front pay is to temporarily compensate the employee while he/she seeks comparable employment and not to give long-term compensation from the date of the verdict to retirement. Among the factors to be considered in deciding the amount of front pay are the following: 1) the age of the Employee and his/her reasonable prospects of obtaining comparable employment elsewhere; 2) salary and other tangible benefits, such as bonuses and vacation pay; 3) expenses associated with finding new employment; and 4) the replacement value of fringe benefits until comparable fringe benefits are obtained or for a reasonable length of time. In determining the amount of front pay, you must deduct the amount of wages and benefits you believe will be received from replacement income during the period of front pay awarded.

Source: 2 Ohio Jury Instructions 266.27 (2003).

While the damages must be proven with reasonable certainty, the employee is not required to prove with unrealistic precision the amount of lost earnings, if any, due him/her. Any uncertainties in the amount employee could have earned should be resolved against the employer.

[Source: *Ohio Civil Rights Comm. v. Ingram*, 69 Ohio St.3d 89, 1994 Ohio 515 (1994)]

3. Compensatory Damages.

- (A) GENERAL. If you find for the Employee, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the Employee for the actual damage proximately caused by the conduct of the Employer .
- (B) CONSIDERATION. In deciding this amount, if any, you will consider nature, character, seriousness and duration of any emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life the Employee may have experienced.

[mitigation instruction excluded]

Source: 2 Ohio Jury Instructions 266.27(2003).

4. Punitive Damages. You will also decide whether the defendant shall be liable for punitive damages in addition to any other damages that you award to the plaintiff. The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct. You may decide that the defendant is liable for punitive damages if you find by clear and convincing evidence that:

- (A)(1) the defendant's acts or failures to act demonstrated malice, aggravated or egregious fraud, oppression, or insult;

(or)

(A)(2) the defendant as (principal) (employer) authorized, participated in, or ratified acts or failures to act of an (agent) (employee) that demonstrate malice, aggravated or egregious fraud, oppression, or insult,

(and)

(B) the plaintiff has presented proof of actual damages that resulted from those acts or failures to act of (the defendant) (an agent of the defendant) (an employee of the defendant).

MALICE. "Malice" includes

(A) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge,

(or)

(B) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

[Source: 1 Ohio Jury Instructions 23.71 (2003)]

OHIO ADMINISTRATIVE CODE

Disability/Accommodation

4112-5-08 Discrimination in the employment of the disabled.

(A) Discrimination prohibited. No qualified disabled person shall, on the basis of disability, be subjected to discrimination in employment as it relates to:

- (1) Recruitment, advertising, and the processing of applications for employment;
- (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation or any changes in compensation;
- (4) Job assignment, job classification, organizations, organizational structure, position descriptions, lines of progression, and seniority lists;
- (5) Departure and return from leaves of absence, sick leave, or any other leave;
- (6) Fringe benefits available by virtue of employment, whether or not administered by the respondent, except as provided in paragraph (f) of this rule;
- (7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- (8) Employer-sponsored activities, including social or recreational programs; and

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(9) Any other term, condition or privilege of employment.

(B) Pre-employment inquiries.

* * * * *

(D) Burden of proof when applicant is excluded based on disability.

(1) Burden of proof. If an applicant is refused employment, or an employee is discriminated against in any term, condition or privilege of employment because of a disability, the employer shall have the burden of establishing the basis for the refusal or discrimination, whether it is based upon a BFOQ, occupational hazard, inability to substantially perform the job, or inability of the employer to accommodate.

(2) Bona fide occupational qualifications.

* * * * *

(3) Occupational hazards.

(a) Division (1) of section 4112.02 of the Revised code, provides that a disabled person need not be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the disabled person, other employees, the general public, or the facilities in which the work is to be performed. If this section is relied upon to refuse to hire or train a disabled person, it is the employer's burden to establish the manner and degree to which such occupational hazards would be increased. Objective standards must be used to evaluate any such increased hazards. Only "significant" increases in hazards justify refusal to hire or train. Thus, the hazard must be reasonably foreseeable with a significant probability of happening.

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(b) Occupational hazards specifically recognized by the United States Department of Labor's Occupational Safety and Health Administration which are not correctable by reasonable accommodation meet the requirements of division (I) of section 4112.02 of the Revised Code, and will justify refusal to employ or train a disabled person.

(c) Even if under existing circumstances occupational hazards would be significantly increased, an employer may not rely on division (I) of section 4112.02 of the Revised Code to refuse to employ or to train a disabled person if through reasonable accommodation pursuant to paragraph (e) of this rule the significantly increased occupational hazards could be avoided.

(4) Ability to perform the job.

(a) Division (I) of section 4112.02 of the Revised Code further provides that a disabled person need not be employed or trained in a job that requires him or her routinely to undertake any task, the performance of which is substantially and inherently impaired by his or her disability. The determination of whether a disabled person is substantially unable to perform a job must be made on an individual basis, taking into consideration the specific job requirements and the individual disabled person's capabilities.

(b) An employer cannot rely on division (L) of section 4112.02 of the Revised Code to exclude a disabled person unless the job requires him or her to routinely undertake a task which such person cannot substantially perform. A task which is an infrequent, irregular or nonessential element of a job cannot be used to exclude a disabled person.

(c) An employer cannot rely on division (L) of section 4112.02 of the Revised Code to exclude a disabled person if, through reasonable

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accommodation pursuant to paragraph (E) of this rule, the disabled person can substantially perform the essential elements of the job.

(d) The performance of a job by a disabled person is not substantially and inherently impaired by his or her disability within the meaning of division (L) of section 4112.02 of the Revised Code, if such person is capable of performing the job, with reasonable accommodation to his or her disability, at the minimum acceptable level of productivity applicable to a non-disabled incumbent employee or applicant for employment.

(e) A physician's opinion on whether a person's disability substantially and inherently impairs his or her ability to perform a particular job will be given due weight in view of all of the circumstances including:

(i) The physician's knowledge of the individual capabilities of the applicant or employee, as opposed to generalizations as to the capabilities of all persons with the same disability, unless the disability is invariable in its disabling effect;

(ii) The physician's knowledge of the actual sensory, mental, and physical qualifications required for substantial performance of the particular job; and

(iii) The physician's relationship to the parties.

(E) Reasonable accommodation.

(1) An employer must make reasonable accommodation to the disability of an employee or applicant, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

(2) Accommodations may take the form, for example, of providing access

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to the job, job restructuring, acquisition or modification of equipment or devices, or a combination of any of these. Job restructuring may consist, among other things, of realignment of duties, revision of job descriptions or modified and part-time work schedules. Specific examples include:

(a) If a job entails primarily typing duties with some irregular messenger or delivery tasks, the messenger or delivery tasks could be assigned to an ambulatory employee so that a nonambulatory disabled person with satisfactory typing skills could be employed.

(b) If a disabled employee is required to have physical therapy during normal working hours, his or her work schedule could be modified to allow the employee to make up the time lost because of the therapy.

(3) In determining whether an accommodation would result in undue hardship to an employer, the following factors may be considered:

(a) Business necessity;

(b) Financial cost and expense where such costs are unreasonably high in view of the size of the employer's business, the value of the disabled employee's work, whether the cost can be included in planned remodeling or maintenance, and the requirements of other laws and contracts; and

(c) Other appropriate considerations which the employer can support with objective evidence.

(4) The exceptions to the prohibition against discrimination because of disability set out in division (E) of section 4112.02 and division (L) of section 4112.02 of the Revised Code, and paragraph (E) of this rule are not applicable where reasonable accommodation would remove the limitation on the disabled person's ability to safely and substantially perform the job.

(F) Application and testing procedures.

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