

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ROBBIN SIMON

Plaintiff,

V.

**UNITED STATES POSTAL SERVICE,
WILLIAM HENDERSON
POSTMASTER GENERAL**

Defendant.

No. 99 C 8297

Magistrate Judge Denlow

JURY INSTRUCTIONS

Instruction #1

Members of the jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case.

You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than given in the instructions of the court, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case. Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts; rather, it is yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law, as given in the instruction of the court.

Instruction #2

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

Instruction #3

As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence that was admitted in the case. The term 'evidence' includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, draw your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Instruction #4

When a government agency is involved, of course, it may act only through natural persons as its agents or employees. Even if an act is illegal or forbidden, it may be within the scope of the employment of the agents or employees of the government agency so as to make the government agency liable for those acts.

Instruction #5

When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received as evidence, regardless of who may have produced them; and all facts which may have been judicially noticed.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Instruction #6

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness or the admission of a document. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Instruction #7

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 has said or done something, or has failed to say or do something, which is inconsistent with the witness’s present testimony. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Instruction #8

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or ‘believability’ of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you should consider the following: the witness's relationship to the plaintiff or to the defendant; the witness's interest, if any, in the outcome of the case; the witness's manner of testifying; the witness's opportunity to observe or acquire knowledge concerning the facts about which the witness testified; the witness's candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Instruction #9

Each party has introduced into evidence certain interrogatories -- that is, questions, together with answers signed and sworn to by the other party. A party is bound by their sworn answers.

By introducing an opposing party's answers to interrogatories, however, the party introducing them does not bind itself to these answers, and may challenge them in whole or in part or may offer contrary evidence.

Instruction #10

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

NATURE OF THE CLAIMS

This is a two count cause of action brought under the Rehabilitation Act. Robin Simon alleges that Defendant, United States Postal Service, violated her rights under the Rehabilitation Act by: (1) intentionally discriminating against her because she had a disability or because Defendant perceived her as having a disability; and (2) terminating her position with the Postal Service in retaliation against her for requesting a reasonable accommodation of part-time limited duty. The Defendant denies these claims. It is your responsibility to decide whether the Plaintiff has proven her claims against the Defendant by a preponderance of the evidence as that term is defined in these instructions.

COUNT I

Plaintiff, Robbin Simon, claims that the Defendant, the United States Postal Service, William Henderson, Postmaster General, intentionally discriminated against her because she had a disability or because Defendant perceived her as having a disability.

The Defendant denies this claim.

Instruction #11

The Rehabilitation Act states that no otherwise qualified individual with a disability shall solely by reason of her disability be subject to discrimination in employment.

Instruction #12

In order for Plaintiff Robbin Simon to establish her claim of intentional discrimination by Defendant The United States Postal Service, William Henderson, Postmaster General, she has the burden of proving the following three essential elements by a preponderance of the evidence:

1. That she is a qualified person with a disability, as defined in these instructions;
2. That the Defendant intentionally discriminated against Plaintiff because of her disability; that is, the fact that Plaintiff Robbin Simon had a disability or was perceived as having a disability was a motivating factor in the Defendant's decision to terminate the Plaintiff; and
3. As a direct result of the Defendant's intentional discrimination, the Plaintiff sustained damages.

Instruction #13

PREPONDERANCE OF THE EVIDENCE - DEFINED

“A preponderance of the evidence” means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence means to prove that the claim is more likely so than not so. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof should fail to establish any essential element of the Plaintiff’s claim by a preponderance of the evidence, then the Plaintiff has failed to carry his burden of proof by a preponderance of the evidence and you must return a verdict for the Defendant.

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.

Instruction #14

DISABILITY - DEFINED

The term disability, as used in these instructions, means that the Plaintiff has a physical impairment, or is regarded as having such an impairment, that substantially limits one of the major activities of life. Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, or lifting. In this case, the Plaintiff is required to show that she is substantially limited with respect to one of these major life activities or that the Defendant regarded her as such.

Not every physical or mental impairment has a substantial enough effect on an individual's major life activity to qualify for protection under the Rehabilitation Act. It is not enough to show minor inconveniences.

An impairment is substantially limiting if it significantly restricts the duration, manner, or condition under which an individual can perform a particular major life activity as compared to the average person. Intermittent, episodic or short-lived impairments are not disabilities.

An employer cannot be liable for an adverse employment action taken against a disabled employee if the employer had no knowledge of the disability, or the extent of the disability.

Whether or not Plaintiff is disabled is determined at the time of the alleged discriminatory action.

Instruction #15

In order to meet the first element of her claim, Plaintiff Robbin Simon must prove that she is a qualified individual with a disability. You should consider the following definitions in connection with the first element of Plaintiff's claim.

Instruction #16

QUALIFIED INDIVIDUAL WITH A DISABILITY - DEFINED

The term qualified individual with a disability, as used in these instructions, means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position which the Plaintiff held.

Instruction #17

ESSENTIAL FUNCTIONS OF AN EMPLOYMENT POSITION - DEFINED

The term essential functions of an employment position, as used in these instructions, means the fundamental job duties of the employment position which the Plaintiff holds. The term essential functions does not include the marginal functions of the position. The jury may, along with all the other evidence in the case, consider the following evidence in determining the essential functions of an employment position: 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; and/or 6) the current work experience of persons in similar jobs. No one factor should be given greater weight than another.

Instruction #18

If you find that the Plaintiff has met her burden of proving that she was a qualified individual with a disability, then you should consider the second element of Plaintiff's claim.

Instruction #19

Plaintiff's mere subjective belief that she was discriminated against cannot alone prove her case.

Instruction #20

Discrimination laws are not intended to protect against unfair business decisions – only against decisions motivated by unlawful animus. An employer's decision does not have to be wise, prudent or logical; it merely has to be explained clearly and applied in a non-discriminatory manner.

Instruction #21

Plaintiff has the burden of proving by a preponderance of the evidence that she was intentionally discriminated against by the Defendant because of her disability. Discrimination is intentional if it is done voluntarily, deliberately, and willfully, and not by accident, inadvertence or other innocent reason. By use of the phrase intentionally discriminated, I mean to say that the Plaintiff has established, by a preponderance of the evidence, that her disability was a motivating factor in Defendant's decision to terminate her.

The term discrimination includes, among other things, the following acts:

- (1) limiting, segregating or classifying an employee in a way that adversely affects the opportunities or status of such employee because of the employee's disability;
- (2) not making reasonable accommodations to the known physical limitations of an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business; and
- (3) denying employment opportunities to an employee who is an otherwise qualified individual with a disability, if such denial is based on the need of the employer to make reasonable accommodation to the physical impairments of the employee.

Instruction #22

REASONABLE ACCOMMODATION - DEFINED

The term reasonable accommodation, as used in these instructions, means making modifications to the work environment which allow a person with a disability to perform the essential functions of the job. Reasonable accommodation may include job restructuring, part-time or modified work schedules, reassignment to a vacant position and other similar accommodations for individuals with disabilities. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms and conditions in order to enable a disabled individual to work; however, the employer is not required to provide the particular accommodation that the employee requests. An accommodation is some specific action required of the employer. There is no all-inclusive list of reasonable accommodations.

The term reasonable accommodation does not include efforts that would cause an undue hardship on the employer. Further, the law does not require an employer to create a new position for a plaintiff.

Instruction #23

INTERACTIVE PROCESS

In order to arrive at a reasonable accommodation, an employee and an employer should engage in an interactive process to determine what is appropriate. However, failure to engage in this “interactive process” cannot give rise to a claim for relief if the employer can show that no reasonable accommodation was possible, or if you find that the Postal Service gave Plaintiff a reasonable accommodation.

Instruction #24

UNDUE HARDSHIP -- DEFINED

If you determine that Plaintiff has requested a reasonable accommodation, the Postal Service need not provide that accommodation if providing it would cause the Postal Service undue hardship. The term undue hardship as used in these instructions, means requiring Defendant to incur significant expense or undergo significant difficulty when considered in light of the following:

One, the nature and net cost of the accommodation;

Two, the overall financial resources of the Defendant and the number of persons employed by the Defendant; and

Three, the type of the Defendant's business, including the composition, structure and functions of the Defendant's workforce.

COUNT II

This is an action brought under the Rehabilitation Act. Robbin Simon alleges that the Defendant, United States Postal Service, William Henderson, Postmaster General violated her civil rights under the Rehabilitation Act by terminating her from her position with the United States Postal Service in retaliation against her for requesting a reasonable accommodation of part-time limited duty.

The Defendant denies this claim.

Instruction #25

Plaintiff asserts that Defendant retaliated against her by suspending and then firing her after she engaged in the statutorily protected activity of requesting part-time limited duty employment. Defendant denies the claim.

In deciding whether the Defendant intentionally discriminated against the Plaintiff because of her protected activity, you should consider whether Plaintiff has established the following elements by a preponderance of the evidence:

- 1) The Plaintiff was engaged or had previously engaged in statutorily protected activity; and
- 2) That the Plaintiff was immediately suspended and then fired because she requested a reasonable accommodation, rather than for her improper conduct and prior disciplinary record.

Instruction #26

Retaliation laws are not intended to protect against unfair business decisions – only against decisions motivated by unlawful animus. An employer’s decision does not have to be wise, prudent or logical; it merely has to be explained clearly and applied in a non-discriminatory manner.

Instruction #27

Plaintiff's mere subjective belief that she was retaliated against cannot alone prove her case.

Instruction #28

PREPONDERANCE OF THE EVIDENCE - DEFINED

“A preponderance of the evidence” means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence means to prove that the claim is more likely so than not so. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof should fail to establish any essential element of the Plaintiff’s claim by a preponderance of the evidence, then the Plaintiff has failed to carry his burden of proof by a preponderance of the evidence and you must return a verdict for the Defendant.

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.

Instruction #29

PROTECTED ACTIVITY

The term protected activity as used in these instructions, means that Plaintiff engaged in activity protected under the Rehabilitation Act. Protected activities include but are not limited to the filing of a complaint with the EEOC or EEO office, or a request for a reasonable accommodation.

Instruction #30

CAUSAL CONNECTION - DEFINED

A causal connection exists when a Plaintiff shows that the employer would not have taken the adverse action but for the protected activity. The term “causal connection” as defined in these instructions means more than mere speculation to support an inference that a protected activity and an employer's act are linked.

Instruction #31

INTENTIONAL RETALIATION

In a retaliation case, the Plaintiff bears the burden of proof in showing that the Defendant intended to retaliate when it took the actions Plaintiff complains about. There can be no retaliatory intent unless Defendant knew that the Plaintiff had, in fact, engaged in statutorily protected activity. Thus, the Plaintiff must establish that the employer had actual or imputed knowledge and that motivated by such knowledge, the employer acted with the intent to retaliate against or to punish the Plaintiff.

Instruction #32

DAMAGES

If you find that Defendant intentionally discriminated against Plaintiff because of her disability or intentionally retaliated against Plaintiff for engaging in statutorily protected activity, then you must determine an amount of money that is fair compensation for Plaintiff's damages. You may award compensatory damages only for injuries that the Plaintiff proves to you were caused by Defendant's allegedly wrongful conduct.

Instruction #33

When I say Plaintiff must prove that her injuries were “caused” by Defendant’s allegedly wrongful conduct, I do not mean that the Plaintiff must prove that this was the only cause of her injuries. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a “cause.” The Plaintiff need only show that Defendant’s alleged wrongful conduct played a substantial part in bringing about or actually causing the injury or damage, even if there were other causes.

Instruction #34

The damages that you award must be fair compensation, no more and no less. In calculating damages, you should not consider any back pay that the Plaintiff lost. The award of back pay, should you find Defendant liable, will be calculated and determined by the Court.

Instruction #35

You may award compensatory damages, based on the evidence introduced at trial, for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life that the Plaintiff experienced as a consequence of the Defendant's actions. 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 should be fair in light of the evidence presented at trial.

Instruction #36

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation or guess work. On the other hand, the law does not require that Plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

Instruction #37

VERDICT - UNANIMOUS - DUTY TO DELIBERATE

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. 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 judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow juror. 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 of effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Instruction #38

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the Plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Upon retiring to the jury room, you will select one of your number to act as foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

Verdict forms have been prepared for your convenience.

Form 1

If you find in favor of Plaintiff Robbin Simon and against Defendant United States Postal Service, William Henderson, Postmaster General on Plaintiff's discrimination claim, you should use jury verdict form number 1 which reads as follows:

**WE, THE JURY, FIND IN FAVOR OF PLAINTIFF ROBBIN
SIMON AND AGAINST DEFENDANT UNITED STATES
POSTAL SERVICE, WILLIAM HENDERSON,
POSTMASTER GENERAL, FOR INTENTIONAL
DISCRIMINATION IN VIOLATION OF THE
REHABILITATION ACT.**

Form 2

If you find in favor of Defendant United States Postal Service, William Henderson, Postmaster General and against Plaintiff Robbin Simon on Plaintiff's discrimination claim, you should use jury verdict form number 2 which reads as follows:

WE, THE JURY, FIND THAT THE PLAINTIFF, ROBBIN SIMON, HAS NOT PROVEN THAT THE DEFENDANT, UNITED STATES POSTAL SERVICE, WILLIAM HENDERSON, POSTMASTER GENERAL HAS INTENTIONALLY DISCRIMINATED AGAINST PLAINTIFF IN VIOLATION OF THE REHABILITATION ACT, AND THEREFORE, WE FIND FOR THE DEFENDANT, UNITED STATES POSTAL SERVICE, WILLIAM HENDERSON, POSTMASTER GENERAL, AND AGAINST THE PLAINTIFF, ROBBIN SIMON.

Form 3

If you find in favor of Plaintiff Robbin Simon and against Defendant United States Postal Service, William Henderson, Postmaster General on Plaintiff's Retaliation claim, you should use jury verdict form Number 3, which reads as follows:

**WE THE JURY FIND IN FAVOR OF PLAINTIFF ROBBIN SIMON AND
AGAINST UNITED STATES POSTAL SERVICE, WILLIAM
HENDERSON, POSTMASTER GENERAL FOR RETALIATORY
TERMINATION IN VIOLATION OF THE REHABILITATION ACT.**

Form 4

If you find in favor of the Defendant United States Postal Service, William Henderson, Postmaster General and against Plaintiff Robbin Simon on Plaintiff's Retaliation Claim, you should use the jury verdict form Number 4 which reads as follows:

WE THE JURY FIND THAT THE PLAINTIFF ROBBIN SIMON HAS NOT PROVEN THAT THE DEFENDANT UNITED STATES POSTAL SERVICE, WILLIAM HENDERSON, POSTMASTER GENERAL ENGAGED IN RETALIATORY TERMINATION IN VIOLATION OF THE REHABILITATION ACT, AND THEREFORE, WE FIND FOR DEFENDANT UNITED STATES POSTAL SERVICE, WILLIAM HENDERSON, POSTMASTER GENERAL AND AGAINST THE PLAINTIFF ROBBIN SIMON.

Form 5

If you find in favor of Plaintiff Robbin Simon and against Defendant United States Postal Service, William Henderson, Postmaster General on Plaintiff's Discrimination and/or Retaliation claims, you should use jury verdict form Number 5, which reads as follows:

**WE THE JURY HAVING FOUND IN FAVOR OF THE PLAINTIFF
AND AGAINST DEFENDANT HEREBY ASSESS DAMAGES IN
THE AMOUNT OF \$_____.**

You will take the verdict forms to the jury room and, when you have reached unanimous agreement as to your verdict, you will all sign and date the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the courtroom.

Instruction #39

VERDICT FORMS – JURY’S RESPONSIBILITY

It is proper to add the caution that nothing in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Instruction #40

COMMUNICATION BETWEEN COURT AND JURY DURING DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

You will note from the oath about to be taken by the bailiff that [s]he too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind that you are never to reveal to any person – not even to the Court – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.