

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
CLARENCE B. BYNUM,)	
)	
Plaintiff,)	
)	
v.)	Case No: 1:04CV00259(PLF)
)	
MVM, INC.)	
)	
Defendant.)	
_____)	

**PLAINTIFF'S PROPOSED JURY INSTRUCTIONS
AND VOIR DIRE QUESTIONS**

Pursuant to the Court's Pretrial Order of December 13, 2006, Plaintiff Clarence Bynum, by and through undersigned counsel, hereby respectfully submits proposed jury instructions and *voir dire* questions for trial in the above-captioned matter.

I. PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

A. Standard Jury Instructions

Plaintiff proposes the following instructions to the jury from the Standardized Civil Jury Instructions for the District of Columbia:

I. Function of the Judge and Jury

- 1-1 Function of the Court
- 1-2 Function of the Jury
- 1-3 Significance of Party Designations
- 1-4 Jurors' Duty to Deliberate
- 1-5 Attitude and Conduct of Jurors
- 1-6 Instructions to be Considered as a Whole
- 1-7 Court's Commenting on the Evidence
- 1-8 Court's Questions to Witnesses

- 1-9 Jury Not to Take Cue from Judge
- 1-10 Rulings on Objections
- 1-11 Equality of Litigants - Corporations

II. Weighing the Evidence

- 2-1 Evidence in the Case
- 2-3 Inferences
- 2-4 Inadmissible and Stricken Evidence
- 2-5 Statements of Counsel
- 2-6 Jury's Recollection Controls
- 2-8 Burden of Proof
- 2-9 Evidence Produced by Adversary
- 2-10 Direct and Circumstantial Evidence

III. Evaluating the Witnesses

- 3-1 Jury to Determine Credibility of Witnesses
- 3-2 Number of Witnesses (and add that the same is true for number of exhibits)
- 3-4 Failure to produce stronger available evidence
- 3-5 Depositions as Evidence (if applicable)
- 3-6 Missing Witness
- 3-8 Impeachment by Prior Inconsistent Statements (if applicable)
- 3-9 Adopting prior inconsistent statements

IV. Multiple Claims and Parties

- 4-5 Consideration of the Evidence- Corporate Party's Agents and Employees

XII. Damages

- 12-1 Damages – Jury to Award
- 12-2 Extent of Damages-Proximate Cause

XIII. Personal Injury Damages

- 13-1 Damages- Elements
- 13-5 Lost Earnings- Future
- 13-9 Recovery for Emotional Distress

B. Non-Standard Jury Instructions

Please see Appendix A for Plaintiff's proposed non-standard jury instructions. Plaintiff respectfully requests that the Court give the first non-standard jury instruction "Preliminary

Statement of Legal Principles” to the jury before the parties’ opening statements.

II. PLAINTIFF’S PROPOSED *VOIR DIRE* QUESTIONS

In addition to inquiring about knowledge of the facts of this case, the parties, their lawyers and the witnesses, the Plaintiff requests that the following *voir dire* questions be asked of the jury panel:

1. Do you have a hearing problem or any other physical problem that might interfere with your ability to hear the testimony of the witnesses in this case?
2. Have you had any legal training or experience, or worked for a lawyer or a law firm?
3. Are you or is any member of your family currently an employee of either MVM, Inc. or the United States Marshal's Service?
4. Are you or is any member of your family a current or former member of a union?
5. Have you ever been employed by or applied for a position at the law firm of Martell Donnelly Grimaldi & Gallagher, Hall Booth Smith & Slover or any other private law firm?
6. Have you ever had any experience with or been exposed to any publicity about this case, MVM, Inc. or the United States Marshal's Service that might affect your ability to hear this case fairly and impartially?
7. Have you or any member of your family or household ever worked in security or law enforcement fields? If so, in what capacity?
8. Have you had any experience with judges, lawyers or the courts that might affect your ability to hear this case fairly and impartially?
9. The plaintiff claims that he was terminated from his position as a court security

officer employed by MVM, Inc. and working at the Superior Court of the District of Columbia. Plaintiff claims that part of the reason he was terminated was because of his health. Plaintiff also claims that race played a factor in his firing. Based on the nature of these claims, is there any reason why you might not be able to remain objective until both sides have presented their evidence, to evaluate the evidence fairly and impartially, or to render a verdict based solely on the evidence presented?

10. Are you familiar with laws addressing discrimination in the workplace, such as the District of Columbia Human Rights Act, the American with Disabilities Act or Title VII of the Civil Rights Act?

11. Do you believe that these laws have gone too far in some ways or do you believe that these laws have not gone far enough in some ways?

12. Have you or any member of your family experienced difficulty finding employment?

13. Have you ever been terminated or forced to resign from a job? Do you think that the experience might influence you or affect your ability to be fair if you are selected to be a juror in this case?

14. Have you or any member of your immediate family, or any of your close friends, ever been the victim of discrimination in your place of employment? Did you initiate a complaint charging discrimination? If so, do you think that the experience might influence you if you are selected to be a juror in this case?

15. There will be evidence during the trial that Mr. Bynum had several health conditions, including diabetes, heart disease and high blood pressure. Do you or any member of your immediate family, or close friends or co-workers have either of these conditions? Is there

something about that experience or your knowledge of these conditions that might affect your ability to be fair and impartial in deciding this case?

16. Do you or does anyone in your family or household have a disability? If so, did you or this individual receive an accommodation at work?

17. Have you or any member of your family or household ever raised a claim of disability discrimination, failure to reasonably accommodate, or make a claim for disability benefits?

18. Have you or any member of your family or household been denied employment for health-related reasons?

19. Do you believe that one can tell a person's abilities by their appearance?

20. Have you or has anyone in your family or household ever had any training or employment experience in personnel relations, labor relations or human resources?

21. Have you or has anyone in your family or household ever have any training or employment experience in the field of medicine?

22. Have you ever held a position where you were required to supervise employees? If yes, have you ever been accused of treating an employee unfairly?

23. Have you or has anyone in your family or household ever witness or experience violence or physical disturbance in a courthouse or similar setting?

24. Do you believe that post-9/11 domestic security measures have gone too far or not far enough?

25. Have you or any of your relatives, close friends, or co-workers ever been accused of discrimination in employment? If so, do you think that the experience might influence you if you are selected to be a juror in this case?

26. Have you or has anyone in your family or household been a victim of race discrimination?

27. Do you believe that some individuals too often claim to be victims of racism?

28. Do you believe that discrimination lawsuits are frivolous?

29. Could you put aside any sympathy that you might have or might develop toward any party or witness, and judge this case solely on the evidence presented?

30. Do you have any personal, philosophical or other reasons that would influence you in the award of compensatory and punitive damages, should the jury determine that the plaintiff was injured as a result of the defendant's actions?

31. This case is expected to take 4 to 5 days to complete. Would any of you, because of the length of this trial, find it an undue burden to serve as a juror in this case and give your full time and attention to it?

32. Have you or any member of your immediate family ever been a party to a civil lawsuit or served as a juror in a civil lawsuit? If so, do you believe that this experience might influence you if you are selected as a juror in this case?

33. Because MVM, Inc. is a corporation instead of an individual would it be difficult for you to find for or against them?

34. Is there any other reason that we have not discussed here today why you cannot sit as a juror in this case or be fair and impartial?

Respectfully submitted,

By: /S/
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Counsel for Plaintiff

Dated: March 12, 2007

PRELIMINARY STATEMENT OF LEGAL PRINCIPLES

Title VII makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual on the basis of race, with respect to his terms, conditions, or privileges of employment.

The Civil Rights Act of 1866 states that all persons, regardless of race, shall have the same right to make, perform, modify and terminate contracts, which includes employment contracts, and enjoy all benefits, privileges, terms and conditions of the contractual relationship.

The Americans With Disabilities Act (ADA) provides that employers may not discriminate against an individual with a disability, or a person perceived to be disabled, or a person who has a record of a disability, in regard to job application and testing procedures, hiring, discharge, or any other term, condition, or privilege of employment.

Authority:

Administrative Office of U.S. Courts, Manual on Complex Litigation, 4th Edition (2004); 42 U.S.C. §§ 2000e, 2000e-2(a)(1), 42 U.S.C. §§ 1981, 1981(b). 42 U.S.C. § 12112. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

MULTIPLE CLAIMS OF PARTIES WITH BURDENS

In this case, each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a “preponderance of the evidence.” This is sometimes called the “burden of proof” or the “burden of persuasion.”

A “preponderance of the evidence” simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence you should find against the party making the claim or contention.

TITLE VII/SECTION 1981 - RACE DISCRIMINATION

In this case the Plaintiff makes claims under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in terms and conditions of their employment because of the employee's race.

More specifically, the Plaintiff claims that he was discharged from employment by the Defendant because of his race.

The Defendant denies that Plaintiff was discriminated against in any way and that his race played no part in its discharge decision.

Source: Eleventh Circuit Model Jury Instruction 1.2.1 (partial)

TITLE VII/SECTION 1981 - RACE DISCRIMINATION
DISPARATE TREATMENT ESSENTIAL ELEMENTS

Your verdict must be for the plaintiff and against defendant MVM, Inc. on plaintiff's race discrimination claim, if all of the following elements have been proved by the preponderance of the evidence:

First, defendant discharged plaintiff;

Second, plaintiff's race played a part in defendant's decision.

If either of the above elements have not been proved by the preponderance of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim. If you find that Plaintiff has proved both of these elements by a preponderance of the evidence, you should turn to the issue of plaintiff's damages for this claim.

TITLE VII – RACE DISCRIMINATION - PATTERN AND PRACTICE

Plaintiff claims that Defendant had a pattern or practice of discriminating against African Americans with actual or perceived disabilities. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that race+disability discrimination was Defendant's regular practice, rather than something unusual. If you find that Plaintiff has not proved this, you must find for Defendant.

If you find that Plaintiff has proved that Defendant had a pattern or practice of discriminating, then you must answer another question: Did Defendant prove by a preponderance of the evidence that it would have fired Plaintiff even if it had not made a regular practice of race+disability discrimination? If you find that Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If you find that Defendant has not proved this, your verdict should be for Plaintiff.

Source: Seventh Circuit Model Instruction 3.03

Authority:

Adams v. Ameritech Services, Inc., 231 F.3d 414, 422 (7th Cir. 2000) (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324,336 (1977)); *King v. General Elec. Co.*, 960 F.2d 617 (7th Cir. 1992).

AMERICANS WITH DISABILITIES ACT

The Americans With Disabilities Act or "ADA" forbids employers from discriminating in terms and conditions of their employment against employees who are qualified individuals with a disability. The ADA prohibits an employer from firing one of its employees because of the person's disability.

The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities. "Major life activities" means those activities that are of central importance to daily life, that include, but are not limited to, seeing, hearing, speaking, breathing, eating, learning, sitting, standing, walking, lifting, reaching, performing manual tasks, working, and caring for oneself.

The ADA also protects individuals who: 1) have an actual disability; 2) are perceived or "regarded as" disabled; and 3) have a "record of" having a disability

An individual is perceived or "regarded as" disabled when the employer mistakenly believes that an employee has an impairment that substantially limits one or more major life activities. Specifically, an employee is "regarded as" disabled when

- a. the employee has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such limitation;
- b. the employee has a physical or mental impairment that substantially limits major life activities as a result of the attitudes of others toward such impairment; or when
- c. the employee has neither of the above impairments but is treated by the employer as having a substantially limiting impairment.

The ADA also protects an individual with a "record of" disability when that individual has a history of an actual mental or physical impairment that substantially limited a major life activity.

Authority:

42 U.S.C. § 12112(a); 29 CFR §§ 1630.2(i), 1630.2(l); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999); *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C. Cir. 2001); EEOC Technical Assistance Manual ¶ 100,120 at § 2.2(b).

“QUALIFIED INDIVIDUAL”

A plaintiff under the ADA must be “qualified” for his job in order to be protected by the Act. “Qualified” means that:

- a. the person meets the job’s education, training, work experience, and skills requirements; and
- b. he can perform the “essential functions” of the job, either with or without “reasonable accommodation” as I will describe in a few minutes.

The term “essential functions” means the fundamental duties of Plaintiff’s job. The term “essential functions” does not include marginal functions of his job. It is up to you to decide the essential functions of Plaintiff’s job. You should only consider Plaintiff’s abilities at the time of his discharge.

Authority:

42 U.S.C. § 12102(8), 29 CFR § 1630.2(m); *Swanks v. WMATA*, 116 F.3d 582, 584 (D.C. Cir. 1997); *Bugg-Barber v. Randstad US, L.P.*, 271 F.Supp.2d 120 (D.D.C. 2003).

ADA - EMPLOYMENT STANDARDS

Employers may adopt qualification standards, which include a requirement that an individual not pose a direct threat to the health or safety of persons in the workplace. I will later define direct Threat.

The ADA prohibits employers from committing discrimination by utilizing standards, criteria, or methods of administration that:

- a) have the effect of discrimination on the basis of disability; or
- b) perpetuate the discrimination of others who are subject to common administrative control.

Authority:

42 U.S.C. § 12113(b); 42 U.S.C. § 12112(b)(3).

REASONABLE ACCOMMODATION

The ADA also requires an employer to make reasonable accommodations to the known physical limitations of an otherwise qualified individual with a disability, unless the employer can show that the accommodation would impose an undue hardship on the employer's operations.

"Reasonable accommodation" can include job restructuring, a modified work schedule, a reassignment to a vacant position, or other changes or adjustments to the work environment, or the manner or circumstances under which the job is customarily performed, that would enable a qualified individual with a disability to perform the essential functions of the job. The term "essential functions" means the fundamental duties of the job plaintiff holds. It does not include marginal job functions. It is up to you to decide whether there were reasonable accommodations, which Defendant could have extended to Plaintiff that would have allowed him to perform the job's essential functions.

Authority:

42 U.S.C. § 1211; 29 CFR §§ 1630.2(n), 1630.2(o)(ii); *Swanks v. WMATA*, 116 F.3d 582, 584 (D.C. Cir. 1997); *Bugg-Barber v. Randstad US, LP*, 271 F.Supp.2d 120 (D.D.C. 2003). *Kelly v. Metallics West, Inc.*, 410 F.3d 670, 675 (10th Cir. 2005)(individuals "regarded as" disabled entitled to reasonable accommodation); *D'Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220, 1239 (11th Cir. 2005)(same); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 755 (3rd Cir. 2004)(same); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996)(same).

DISABILITY DISCRIMINATION – PLAINTIFF’S CONTENTIONS

The plaintiff’s claims involve both aspects of the ADA:

Claim 1-Plaintiff claims that he was fired because MVM, Inc. regarded him as disabled and because of his record of disability.

Claim 2-Plaintiff also claims that MVM, Inc. did not provide him a reasonable accommodation, which would have allowed him to continue working for the company.

To succeed in his first claim, plaintiff must prove four things by a preponderance of the evidence:

- 1. Defendant regarded plaintiff as having a disability or plaintiff had a record of a disability;**
- 2. Plaintiff was “qualified” to perform the job”;**
- 3. Defendant fired Plaintiff; and**
- 4. Defendant would not have fired Plaintiff if Defendant had not regarded Plaintiff as disabled or had a record of Plaintiff’s disability.**

If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for the Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the Defendant’s “Direct Threat” defense.

Source: Seventh Circuit Model Instruction 4.02 (partial)

Authority:

***Duncan v. WMATA*, 240 F.3d 1110, 114 (D.C. Cir. 2001); *Swanks v. WMATA*, 179 F.3d 929 (D.C. Cir. 1999); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).**

DEFENDANT'S CONTENTION – DIRECT THREAT

The Defendant contends that it fired plaintiff because he posed a “direct threat” to the safety of himself and others.

“Direct threat” is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Defendant must show all of the following elements to establish this defense:

1. that the defendant made an individual assessment of Plaintiff’s then-present ability to perform safely the essential functions of the job;
2. that there existed a significant risk of substantial harm that was not speculative or remote or a threat that may occur in the future;
3. that the defendant’s assessment was based on the most current medical knowledge and/or the best available objective evidence regarding the particular individual; and
4. that there was no reasonable accommodation that the Defendant could make which would have eliminated the risk or reduced it so that it was no longer a significant risk of substantial harm.

Also, when determining if Plaintiff posed a direct threat, you should consider:

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.

If you find that Defendant has proven by a preponderance of the evidence that Plaintiff posed a direct threat, you must find for Defendant under Plaintiff’s ADA Claim 1 regarding his discharge. If you find that Defendant has not proven by a preponderance of the evidence that Plaintiff posed a direct threat, you must find in favor of the Plaintiff under ADA Claim 1. You should not consider Defendant’s direct threat defense when deciding Plaintiff’s ADA Claim 2 regarding reasonable accommodation.

Authority:

29 CFR § 1630.2(r). *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 ,86 (2002). *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006). *Branham v. Snow*, 392 F.2d 896, 906-07(7th Cir. 2004); *Hutton v. Elf Atochem N. Am, Inc.* 273 F.3d 884, 893 (9th Cir, 2001). *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960-61 (10th Cir. 2002); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999); *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 603 (7th Cir. 1999). EEOC Psych. Guid., ¶ 140,178, at “Direct Threat” & n.75.

FAILURE TO ACCOMMODATE

Under Plaintiff's second ADA claim, he contends that Defendant did not meet its obligation to provide him a reasonable accommodation. In order for Plaintiff to establish this claim, he must prove by a preponderance of the evidence that:

- a. he is a qualified individual with a perceived or record of disability;
- b. he was terminated without an opportunity to request a reasonable accommodation;
- c. the Defendant did not provide him a reasonable accommodation; and
- d. with a reasonable accommodation he would have been able to perform the essential functions of his job.

If any of the above elements have not been proved by the preponderance of the evidence, your verdict must be for defendant under ADA Claim 2, and you need not proceed further in considering this claim. If you find that Plaintiff has proved all of these elements by a preponderance of the evidence, you should turn to the issue of plaintiff's damages for this claim.

Authority:

Kelly v. Metallics West, Inc., 410 F.3d 670, 675 (10th Cir. 2005)(individuals "regarded as" disabled entitled to reasonable accommodation); *D'Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220, 1239 (11th Cir. 2005)(same); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 755 (3rd Cir. 2004)(same); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996)(same). *Bugg-Barber v. Randstad US L.P.*, 271 F.Supp.2d 120 (D.D.C. 2003).

ADA - EMPLOYMENT STANDARDS

Employers may adopt qualification standards, which include a requirement that an individual not pose a direct threat to the health or safety of persons in the workplace. I will later define direct Threat.

The ADA prohibits employers from committing discrimination by utilizing standards, criteria, or methods of administration that:

- a) have the effect of discrimination on the basis of disability; or
- b) perpetuate the discrimination of others who are subject to common administrative control.

Authority:

42 U.S.C. § 12113(b); 42 U.S.C. § 12112(b)(3).

COMPENSATORY DAMAGES

You may award compensatory damages only for injuries that Plaintiff has by a preponderance of the evidence shown were caused by the Defendant's wrongful conduct.

Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

In calculating damages, you should not consider the issue of lost wages and benefits. The court will calculate and determine any damages for past and future lost wages and benefits. You should consider the following types of compensatory damages, and no others:

1. The physical, mental, and emotional pain and suffering that Plaintiff has experienced and is reasonably certain to experience in the future. No evidence of the dollar value of physical, mental or emotional pain and suffering has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Plaintiff for the injury he has sustained.
2. Any expenses, other than lost pay, Plaintiff reasonably incurred as a direct result of Defendant's discrimination.
3. Any loss, other than lost pay, caused by Defendant in Plaintiff's future earning capacity.

Source: Seventh Circuit Model Instruction 3.10

Authority:

***Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-954 (7th Cir. 1996).**

PUNITIVE DAMAGES

If you find for the plaintiff, you may, but are not required to, assess punitive damages against defendant. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against defendant. You may assess punitive damages only if you find that MVM's conduct was in reckless disregard of plaintiff's rights. An action is in reckless disregard of plaintiff's rights if taken with knowledge that it may violate the law.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of defendant's conduct;
- the impact of defendant's conduct on plaintiff;
- the relationship between plaintiff and defendant;
- the likelihood the defendant would repeat the conduct if any award of punitive damages is not made;
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

Source: Seventh Circuit Model Instruction 3.13

Authority:

42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Association*, 527 U.S. 526 (1999)