

In the District Court of the Virgin Islands

Division of St. Thomas St. John

Plaintiff, Ilease Bartlette Prose Vs Defendant Kmart Corporation

Civil Number 2002-100

This matter is before the court called Kmart's motion to dismiss. I had already responded based on what I received

1. This is a civil action for damages to redress the deprivation of rights secured to Plaintiff by Title VII of the Civil Rights Act including Title 42 USC section 2000e et seq. and section 12101 et seq., as well as those rights secured under 42 USC 621 et. seq. for age Discrimination. Further, this action is for the Contract and tort claims of the Plaintiff.

2. This has jurisdiction of this action to Title 28 US Code section 1331 for all the federal violations of the Federal Laws, including but not limited to those involving civil rights action arising under the equal employment acts of the United States codes and auxiliary jurisdiction for all the contracts tort and violations of The Virgin Islands laws.

3. Plaintiff is a black female over the age of 40 with a mental disability. She is a citizen and resident of St. Thomas United States Virgin Islands.

4. Plaintiff was employed by the Defendant Kmart Corporation, at the time of her termination she worked as a cashier.

5. Defendant upon information and belief is a corporation that was incorporated in the State of Michigan and that it operates on an interstate basis. Further it is believed that it employs over more than 500 employees and operates its business through interstate commerce on a regular basis.

On Kmart's first attempt to communicate its motion to dismiss document this is what I discovered.

1. The page numbered sequences did not follow.
2. The thought process and ideas communicated were lost.
3. Every other page is omitted.
4. The summary is incomplete.
5. The document is misleading.
6. The complete works to compliment the Kmart's Motion to Dismiss went for me, but sent via the court as was voiced by atty. Bennett Chan, on Feb. 12, 07 at the Status Conference held before Judge Barnard, is in my CV 2002-100 file.

On April 16, 07 I ordered copies and was again shocked upon review when I discovered 81 pages missing or omitted from the document. I invite a review of the document.

I will further show that a standard sized #10 with measurements $4\frac{1}{8} \times 9\frac{1}{2}$ envelope could not hold the complimentary work never sent there, at the time of entry with Renee Charles, the process server. I however responded to what I received to Atty. Chan. I again encourage your thought process to compare.

The 81 pages omitted gives a higher count of about 100 pages omitted from the court's copy of its motion to dismiss.

At a later date via my mailing adress I received another copy of its Motion to Dismiss.

I am showing 3 different sets having different Volume Weight and understanding. They are all questionable. Clarity has not been given to me. Since I had not receive any other I am responding using the last entry received.

At the Court pages 53 & 54 are omitted but the one I hold it is pregnant with information that you could have seen. Exhibits are questionable, a page is found among the entry that does not belong to the document.

The Defendant seems intent to mislead and deceive. The deceptions has multiply even the document I am about to make my response to shows that Plaintiff is protected by said document.

From here on understanding what I have read has shown quite differently the facts in that I intend to carry on and show where the motion to Dismiss does not apply to Plaintiff but to those who had not made themselves available to communication and had left no information to proceed. They are the ones to whom The dismissal applies.

Confirmation Order to any person the Debtor mailed a notice of the Bar Date or Confirmation hearing, but receive no such notice return marked undeliverable as addressed "Moved" "left no forwarding address" "forwarding order expired" or similar reasons does not apply to Plaintiff.

Plaintiff received no such mail absolutely no correspondence whatsoever she is not the one referred to therefore, plaintiff is not Barred.

3a

Based upon the Kmart's Motion to Dismiss there appear to be some unattended business involving 17 names. In the Status Conference, Called February 12, 2007 before Judge Barnard, I recall said Judge Barnard's question to the Defendant through its attorney, whether there were other names when the Attorney Bennett Chan, answered the question stating Plaintiff's was the only name on St. Thomas and the others were on St. Croix and that Atty. Lee Rhon dealt with what she had causing the Defendant to pay out thousands of dollars.

Plaintiff's Charge are among the others. Whereas, Plaintiff did file with the VI Department of Labor. Her Charge for EEOC, and ~~was~~ Wrongful discharge. EEOC sent plaintiff the right to sue letter that was filed with the Court through her then Atty. Jennings, who filed the charges with the District Court St. Thomas. Kmart went into Bankruptcy an account of itself an automatic stay was called leaving the charges involved pending. What has happened since then to all these other names I do not know since the stay got lifted. Plaintiff's Charge however that was filed with the District Court By said Attorney Archie Jennings is active and has gone and going through the process. Within the "Background Information" of the Defendant the details are written in said motion to dismiss And the names are also presented in the document yet to be address it seems.

I will say that the actions and attitudes of Defendant is the one Baring Plaintiff of her rights offered her throughout the document.

The document clearly expresses that the Plan are not shall not be construed operate to Bar the United States from pursuing and police or regulatory action against the Debtors to the extent from the automatic stay provision of 11 U.S.C. § 362 of the Bankruptcy Code Article 12.2 of the Plan & Article 12.11 discharge provision and an injunction provision.

"It is then the right of defiance for the Defendant to interfere by reducing the commitment, modify the intention or even attempting to discharge Plaintiff's charge that has already made secure by the plan."

Plan purpose in good Faith

Plan purpose in good faith (11 U.S.C. § 1129(a)(3) of the ~~Bankruptcy~~ Debtors have purpose the Plan in good faith and not by any forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the court has examined the totality of the circumstances surrounding the filing of Chapter 11 Cases and the formulate of the Plan.

"It has been the contention of the Defendant in its Motion to Dismiss that the Plaintiff cannot hold any claim against the Defendant."

This Plan Provides

Each claim filed in Chapter 11 cases of any debtor shall be deemed file against the Consolidated Debtors and shall be deemed a claim against and an obligation of the Consolidated Debtors.

10 It would then be illegal to prevent Plaintiff from collecting that settlement and the interest and any other provision in the provided Plan. Even to prevent plaintiff from applying any action or motion seeking enforcement or implementation of the provision of the Plan or the Confirmation Order.

28 USC. § 157(d) Nothing in this Confirmation Order or the Plan is intended to modify or violate 28 USC § 157(d).

Post Effective Date Committee

Effective on the Effective Date the Statutory Committee in the Chapter 11 cases shall dissolve automatically, whereupon their members, professionals, and Agents shall be released from any further duties and responsibilities in the Chapter 11 cases and under the Bankruptcy Code except with respect to obligations arising under confidentiality agreements and protective orders entered during the Chapter 11 cases which shall remain in full force and effect according to their terms applications for professional claims request for compensation and reimbursement of expenses pursuant to section 503(b) of the Bankruptcy Code for making a substantial contribution in any Chapter 11 cases and any motions or other actions seeking enforcement or implementation of the provision of the Plan or Confirmation Order.

The Court hereby approves the formation on the Effective Date of a Post Effective Date Committee (The Post Effective Date Committee) with its Court Directed To file and Docket this Confirmation Order in the Chapter 11 cases of each of the Debtors

Post Effective Committees

Post Effective Committee may employ without further order of the Court Professionals to assist it in carrying out its duty as limited above.

including any professionals retained in these reorganized cases and the Reorganized Debtors shall pay the reasonable cost and expenses of the Post Effective Date Committee including reasonable professionals fees, in the ordinary course without further order of the Court.

Separate Confirmation Order

This Confirmation is and shall be deemed a separate Confirmation Order with respect to each of the Debtors in each Debtors separate Chapter 11 cases for all purposes the Clerk of the Court is directed to file and docket this Confirmation Order in the Chapter 11 Cases of each of the Debtors.

"Plaintiff's Charge remain in full force and the Court must move on to discover other assurances".

Judicial Notice

The Court takes judicial notice of the docket of the Chapter 11 cases maintained by the Clerk of the Court and/or its duly appointed agent, including without limitation, all pleadings and other documents filed all orders entered, and all evidences and arguments made, proffered or adduce at the hearing held before the Court during the pendency of Chapter 11 cases. Personal Injury and other Litigation Claims

Notwithstanding any provision of the Plan or its Modification to the contrary the confirmation and effect of the Plan or its Modified shall not release reduce or discharge any surety obligation to satisfy any portion of any claim arising from a civil money judgement.

Retention of Jurisdiction

Pursuant to section 105 (a) and 1142 of the Bankruptcy Code and notwithstanding the entry of this Confirmation order or the occurrence of the Effective Date the Court shall retain exclusive jurisdiction as provided in the Plan over all matters arising out of and related to the Chapter 11 cases and the Plan to the fullest extent permitted by law including among other items and matters jurisdiction over those items and matters set forth in Article XIV of the Plan.

Exclusive Jurisdiction Venue Core proceedings 28 U.S.C.

Exclusive Jurisdiction Venue Core proceedings 28 U.S.C. §§ 157 (b) (2) and 1334 (a). The Court has jurisdiction over the Chapter 11 cases pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Confirmation of the Plan is a Core proceeding under 28 U.S.C.

§§ 157 (b) (2) and the Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provision of the Bankruptcy Code and should be confirmed.

12.3 Compromises and Settlements

After the Effective Date such rights shall pass to The Reorganized Debtors as contemplated in Article 12.1 of this Plan without the need for further approval of the Bankruptcy Court, except as otherwise set forth in the Plan.

12.4 Release by Debtors of Certain Parties

The Reorganized Debtors of certain parties and any newly formed entities that will be continuing the Debtors business after the Effective Date, shall be bound to the same extent the Debtors are bound by all of the releases set forth above. Notwithstanding the foregoing, Nothing in this Plan shall be deemed to release any of the Debtors or the Plan Investors or their affiliates from their obligations under the Investment Agreement or the transaction contemplated thereby.

"Kmart's motion to dismiss is illegal since the confirmation of the Plan is the core proceeding under 28 USC"

"It is then the right of defiance for the defendant to interfere by reducing the commitment modifying the intention or to even attempt to discharge Plaintiff's charge that has already made secure in the Plan".

Plan Proposed in good faith (11 USC § 1129(a)(3))
The Debtors have proposed the Plan in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the court has examined the totality of the circumstances surrounding the filing of Chapter 11 case and the formulation of the Plan.

"It would be against the Plan for the Defendant to prevent Plaintiff from collecting settlement interest and/or any other provision provided within the Plan".

Order in the Chapter 11 cases of each of the Debtors.

Exit Financing matters Page 63 ⑦

Based upon the record of these Chapter 11 cases, the security interest to be granted by the Debtors and or Reorganized Debtors pursuant to or in connection with, the Exit Financing Facility Agreement (i) appear to the Court to be legal, valid and enforceable, and (ii) do not constitute preferential transfers or fraudulent conveyances under the Bankruptcy Code or any federal or state law. Page 66 ⑧ ↓

The discharge provision set forth in Article 12.2 of the Plan and injunction provision set forth in Article 12.11 of the Plan are not intended, shall not be construed and shall not operate to Bar the United States (plaintiff) from pursuing any police or regulatory action against the Debtors to the extent expected from the automatic stay provision of 11 USC § 362 of the Bankruptcy Code.

⑧ Interest shall be paid on oversecured claims as provided for by 11 USC § 506 (b) of the Bankruptcy Code from the Petition Date and following the Effective Date on priority claims as set forth in the Plan.

Judicial Notice

The Court takes Judicial Notice of the docket of Chapter 11 cases maintained by the clerk of the Court and or its duly appointed agent, including, without limitation all pleadings and other documents filed all orders entered, and all evidences, and arguments made, proffered or adduced.

at the hearing held before the Court during the pendancy of the Chapter 11 cases.

Notwithstanding any provision of the Plan or its Modifications to the contrary, the Confirmation and effectuate of the Plan or its modification shall not release, reduce, or discharge any surety of the Debtors from such surety's obligation to satisfy any portion of any claim arising from a Civil Money judgement.

"Kmart's Motion to dismiss is not current it is way behind the times of the law made to protect plaintiff and any others whose names are mirrored on the list of names received from The Defendant Kmart".

"Plaintiff claims are at the District Court CV 2002-100 Chapter 11 gives credence as stated". A claim may be allowed in Chapter 11 without filing of a proof of claim (Section (III), Rule 3003). "This opening allows plaintiff to proceed in this forum. Therefore, Kmart's Motion to dismiss has no bearing on CV 2002-100". Hence special special circumstances, additional procedures and forms for making a claim against the estate may be establish by the Court as in the case of *In re A.H. Robins Co., Inc.*, 862 F.2d 1092 (4th Cir 1988)

"The Court will find further comments from The Bankruptcy Court indicating the desire of Confirmation Order and Plan, place there to show also that Plaintiff is not Barred from the provision extended to her in the Plan and that she applaud the Plan as she seeks recovery by said cure offered. The Court Shall retain Jurisdiction !!!".

Kmart placed liens against its creditors and was obligated to none claims, rights and interest were not allowed that rose before Confirmation Date. "All persons who have held hold or may hold claims and interest it states shall be precluded and permanently enjoined on or after date from commencing in any manner any claims action or proceeding of any kind with respect to any claim, interest or any other right or claim against [Kmart] which they process prior to the effective date... and asserting any claims that are released hereby.

"The emphasis is placed on the time of the Automatic stay to give rest to the Defendant. None was to trouble while the Defendant slept a sleep of sweet repose until after the stay gets lifted. Now that the stay is lifted to continue this stance would be against the Confirmation Order and Plan".

Notwithstanding any provision of the Plan or its modification to the contrary the Confirmation and effectuate of the Plan or its modified shall not release reduce or discharge any surety's obligation to satisfy any portion of any claim arising from a civil money judgment.

Respectfully Submitted

Thase Bartlette

5-9-07

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Plaintiff,)	CIVIL NO. 2002-100
)	
PLEASE BARTLETTE,)	ACTION FOR DAMAGES
)	BREACH OF CONTRACT
Pro Se)	DISCRIMINATION, AND
)	WRONGFUL DISCHARGE
)	
Vs)	
)	
KMART CORPORATION,)	JURY TRIAL DEMANDED
)	
Defendant)	
)	
)	

2017-11-14 14:00

INSTRUCTIONS FOR EMPLOYMENT CLAIMS UNDER THE AMERICANS
WITH DISABILITIES ACT.

Instructions:

9.0 – 9.4.5

INSTRUCTIONS FOR CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Instructions:

8.0 – 8.4,5

ADA Employment Claims – Introductory Instructions

In this case plaintiff, Ilease Bartlette, makes a claim based on federal law known as Americans with Disability Act, which will be referred to in these instructions as the ADA.

Under the ADA, an employer may not deprive a person with a disability of an employment opportunity because of that disability, if that person is able, with reasonable accommodation if necessary, to perform the essentials of the job. Terms such as "disability", "qualified individual" and reasonable accommodation" are defined by the ADA and I will instruct you on the meaning of those terms.

[Plaintiff] claim under the ADA is that [she] was [describe the employment action at issue] plaintiff was placed on probation wrongful discharge and terminated by the defendant, Kmart, because of [plaintiff's] [describe alleged disability] mental illness.

[Defendant] denies [plaintiff's] claims. Further, [defendant] asserts that [describe any affirmative] defenses.

(a) Employer practices. It shall be unlawful for an employer –

1. To fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals age; or disability.

As you listen to these instructions, please keep in mind that many of the terms I will use, and you will need to apply, have a special meaning under the ADA. So please remember to consider the specific definitions I gave you, rather than using your own opinion of what these terms mean.

Elements of an ADA Claim

Disparate Treatment – Mixed - Motive

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] it had been a wrongful discharge termination of her employment.

Plaintiff was discharged without any warning or any reprimand for any poor job performance and was discharged despite the fact that the defendant was requested to accommodate her disability. The defendant was well aware and had been specifically informed of her mental disability, but took no action to address the issues of accommodation raised by the plaintiff or attempted to resolve the matter or issues. Breaks had been a problem and a concern. Plaintiff requested through Ms. Williams her manager, to see Mr. Newton the General Store Manager. Plaintiff told Mr. Newton that her breaks have been denied. Mr. Newton became very angry with plaintiff and turned her concern into a 30-day probation to come up with 10 rings per minute and if she is not able to come up with 10 rings per minute he will terminate her from her employment. Having a disability does not mean that one is not able. Plaintiff requested training for the new system since no reading materials were given to her not even a single explanation about the new system, that cashiers were having problems with. Mr. Newton verbally denied plaintiff the accommodation and she proceeded to remind him of her struggles with mental illness and reminded him that she had a qualified disability for which she seeks the accommodation. Plaintiff was denied the accommodation. She requested Mr. Newton to transfer her to the sales floor. That too was denied. Mr. Newton said any moving will be through the door and sent plaintiff away from his presence to Tracy to write up the term of probation and for her to respond to the term and to sign and date it.

Mr. Newton reviewed what we both parties wrote and totally ignored the reminder given in written form. With open defiance against the law and plaintiff's legal rights, he chose not to change his mind to accommodate her. What he should have done was to change his ways and to accommodate her. Seeing in written form, another time, the talked about accommodation and plaintiff having a disability. The defendant had another opportunity to change his mind and to change the order but he did not. Mr. Newton was willful and he intentionally disregarded the request when Tracy took the document to him. Mr. Newton however stripped plaintiff of everything through Tracy that belong to Kmart. It caused embarrassment and a feeling of emptiness came over plaintiff experiencing her first time termination and the abuse of authority upon her.

Kmart was not careful nor mindful to return plaintiff's salary, neither the 8 hours owed to her in overtime payment since plaintiff worked on a 6th day, nor benefits owed to her. Plaintiff was sent away. She was asked to leave. Empty handed and confused by embarrassment. As a peer advocate she knew that the treatment was wrong. Plaintiff was treated differently to other cashiers whose productivity was less than hers. Cashiers were not placed on probation they were to be reviewed by management. Not one of those cashiers was terminated and they are still employed.

Plaintiff is terminated and is still unemployed since the termination of [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [her] [disability] was a motivating factor in [defendant's] decision [describe action] to terminate and wrongfully discharged her.

1. The record shows cashiers had problems with the new system call 10 rings per minute;
2. No training materials were given not even a single explanation about the system was offered;
3. Plaintiff to include other cashiers were waiting for explanation about the new system;
4. Of the 7 cashiers, she knew plaintiff was the only one that had a disability and productivity better than the other 6 cashiers as was told by Mr. Newton himself in the associates morning meeting;
5. Plaintiff was the only one placed on probation and treated differently;
6. The only one harassed on May 14, 2001;
7. The only one given an ultimatum that could end in terminating if she doesn't get the job done;
8. The only one given a direct impossibility to get the job done without training;
9. The only one to request training and was denied.
10. The only one to face punishment for the new system;
11. The only one placed on probation and was not given the opportunity to serve it. And without reason whose probation turned into termination. Defendant did not give plaintiff a chance to succeed as the law requires;
12. Plaintiff was the only one requesting an accommodation to help her succeed and was denied a reasonable request of an accommodation that would have allowed her to keep the job that she already had or to be transferred back to the sales floor.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of ADA for 31 years.

Second: [Plaintiff] is a "qualified individual" able to perform the essential functions of [specify the job or position sort] a cashier. For about 2 years, she performed her duty.

Third: [Plaintiff's] [disability] was a motivating factor in [defendant's] decision [describe action] plaintiff was harassed, given 30 days probationary term, then the terms were taken away because she requested the accommodation. The defendant then terminated [plaintiff] whereby ending her employment at Kmart. Defendant failed to give her a fair chance as is required by law to do her work with or without an accommodation, and discriminated on the basis of her disability.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights under the ADA.

In showing that [plaintiff's] [disability] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [her] [disability] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [the disability] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability" – Instruction 9.2.1

"Disability means a physical/mental impairment that "substantially limits a major life activity.

1. "Qualified" – See Instructions 9.2.2]

A "qualified individual" is one who with or without reasonable accommodation can perform the essential function of the employment position that such individual holds or desires.

[For use where defendant sets forth a "same decision" affirmative defense:

If you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must decide whether [plaintiff] is not entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiffs] [disability] had played no role in the employment decision.]

Elements of an ADA Claim - Reasonable Accommodation

In this case [plaintiff] claims that [defendant] failed to provide a reasonable accommodation for [plaintiff]. The ADA provides that an employer may not deny employment opportunities to a qualified individual with a disability if that denial is based on the need of the employer to make reasonable accommodation to that individual's disability.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of ADA.

Second: [Plaintiff] is a "qualified individual" able to perform the essential functions of [specify the job or position sought] cashier.

Third: [Defendant] was informed of the need for an accommodation of [plaintiff] due to a disability. [Note that there is no requirement that a request be made for a particular or specific accommodation; it is enough to satisfy this element that [defendant] was informed of [plaintiff's] basic need for an accommodation.]

Fourth: Providing [specify the accommodation(s) in dispute in the case] training for a new system, or relocation to the sales floor would have been reasonable, meaning that the costs of that accommodation would not have clearly exceeded its benefits.

Fifth: [Defendant] failed to provide [specify the accommodation(s) in dispute in the case] training using a new system, or relocation to the sales floor.

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability" – Instruction 9.2.1

Under the ADA the term "Disability" means a physical/mental impairment that "substantially" limits a major life activity.

2. "Qualified" – see instruction 9.2.2]

A "qualified individual" is one who with or without reasonable accommodation can perform the essential function of the employment position that such individual holds or desires.

[In deciding whether [plaintiff] was denied a reasonable accommodation, you must keep in mind that [defendant] is not obligated to provide a specific accommodation simple because it was requested by [plaintiff]. [Plaintiff] may not insist on a particular accommodation if another reasonable accommodation was offered. The question is whether [defendant] failed to provide any reasonable accommodation of [plaintiff's] disability.]

Under the ADA, a reasonable accommodation may include, but it is not limited to, the following:

[Set forth any of the following that are supported by the evidence:

1. Making existing facilities used by employees readily accessible to and usable by [plaintiff];
2. Job restructuring;
3. Reassignment to a vacant position for which [plaintiff] is qualified;
4. Provision of qualified readers or interpreters and
5. Other similar accommodations for individuals with [plaintiff's] disability.]

Note, however, that a "reasonable accommodation" does not require [defendant] to do any of the following:

[Set forth any of the following that are raised by the evidence:

1. Change or eliminate any essential function of employment;
2. Shift any essential function of employment to other employees;
3. Create a new position for [plaintiff];
4. Promote [plaintiff];
5. Reduce productivity standards.

[On the other hand, [defendant's] accommodation is not "reasonable" under the ADA if [plaintiff] was forced to change to a less favorable job and a reasonable accommodation could have been made that would have allowed [plaintiff] to perform the essential functions of the job that [she] already had. [Nor is an accommodation to a new position reasonable if [plaintiff] is not qualified to perform the essential functions of that position.]]

[For use where a jury question is raised about the interactive process:

The intent of the ADA is that there be an interactive process between the employer and the employee [applicant] to determine whether there is a reasonable accommodation that would allow the employee [applicant] to perform the essential functions of the job. Both the employer and the employee [applicant] must cooperate in this interactive process in good faith, once the employer has been informed of the employee's [applicant's] request for a reasonable accommodation.

Neither party can win this case simple because the other did not cooperate in an interactive process. But you may consider whether a party cooperated in this process in

good faith in evaluating the merit of that Party's claim that a reasonable accommodation did not exist.]

[For use where a previous accommodation has been provided:

The fact that [defendant] may have offered certain accommodations to an employee or employees in the past does not mean that the same accommodations must be forever extended to [plaintiff] or that those accommodations are necessarily reasonable under the ADA. Otherwise, an employer would be reluctant to offer benefits or concessions to disabled employees for fear that, by once providing the benefit or concession, the employer would forever be required to provide that accommodation. Thus, the fact that an accommodation that [plaintiff] argues for has been provided by [defendant] in the past to [plaintiff], or to another disabled employee, might be relevant but does not necessarily mean that the particular accommodation is a reasonable one in this case. Instead, you must determine its reasonableness under all the evidence in the case.]

[For use when there is a jury question on "undue hardship":

If you find that [plaintiff] has proved the four elements I have described to you by a preponderance of the evidence, then you must consider [defendant's] defense. [Defendant] contends that providing an accommodation would cause an undue hardship on the operation of [defendant's] business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if it would cause an "undue hardship" to its business. An "undue hardship" is something so costly or so disruptive that it would fundamentally change the way that [defendant] runs its business.

Defendant must prove to you by a preponderance of the evidence that [describe accommodation] would be an "undue hardship". In deciding this issue, you should consider the following factors:

1. The nature and cost of the accommodation.
2. [Defendant's] overall financial resources. This might include the size of its business, the number of people it employs, and the types of facilities it runs.
3. The financial resources of the facility where the accommodation would be made. This might include the number of people who work there and the impact that the accommodation would have on its operations and cost.
4. The way that [defendant] conducts its operations. This might include its workforce structure; the location of its facility where the accommodation would be made compared to [defendant's] other facilities; and the relationship between or among those facilities.
5. The impact of (specify accommodation) training using a new system, or relocation to the sales floor on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

[List any factor supported by the evidence.]

Defendant was informed of the need for an accommodation. It was enough to satisfy this element that defendant was informed.

A reasonable accommodation could have been made that would have allowed her the job that she already had. Yes. An employer may switch the marginal function of two

(or more) employees in order to restructure a job as a reasonable accommodation, issue training manuals, teachers, etc.

Barriers were set up against plaintiff. The defendant voiced in her face, "There'll be no accommodation for you". Then came the look of scorn that emerged from his eyes and actually laughed at her situation. Finally, termination and the wrongful discharge.

Reasonable accommodation removes workplace barriers for individuals with disabilities. Reasonable accommodation must be provided to qualified employees regardless of whether they work part-time or full-time or are considered "probationary". Hence, plaintiff reports she was harassed, retaliated, considered probationary, terminated, wrongfully discharged, and treated differently than white employees or non-disable persons employed by the defendant. The defendant was well informed of her mental disability, but took no action to address the issue of accommodation raised by the plaintiff or attempt to resolve the matter or issues. Plaintiff believes she was wrongfully discharged without any warning or reprimand for any poor job performance and she was discharged despite the fact that the defendant was requested to accommodate her disability. Plaintiff filed charges with the VI Dept of Labor and the VI Dept of Labor filed with EEOC who sent her the right to sue letter. Look deeply with plaintiff at other important factors:

1. The nature and cost of the accommodation.
2. [Defendant] overall financial resources.
3. The financial resources of the facility where the accommodation would be made (Tutu Park 3829 store).

4. The way that [defendant] conducts its operation. The workforce structure, compare to [defendant's] other facilities (here and America even foreign lands) the relationship between and among those facilities.
5. The impact of (specify accommodation) training using a new system, or relocation to the sales floor on the operation of the facility, the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct its business.

If you find that [defendant] has proved by a preponderance of the evidence that [specify accommodation] training for a new system, or relocation to the sales floor would be an undue hardship, then you must find for [defendant].]

Elements of an ADA Claim

Harassment – Hostile Work Environment – Tangible Employment Action

[Plaintiff] claims that [she] was subjected to harassment by [names] Sylvia Williams, Selwyn Scatliffe, George Newton and that this harassment was motivated by [plaintiff's] [disability/request for accommodation.]

[Employer] is liable for the actions of [names] Sylvia Williams, Selwyn Scatliffe, and George Newton in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA; and has a record of such a disability;

Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA; able to do the job;

Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim plaintiff requested through Ms. Williams, her checkouts manager, to see Mr. Newton, the General Manager. Plaintiff told Mr. Newton that her breaks have been denied and a concern to her. Mr. Newton became very angry with plaintiff and cuts across her when she made an attempt to speak. Her concerns addressing them appeared to have been a mistake. Mr. Newton came to the point of harassing plaintiff, and her good faith meeting seemed to have been turned into something unexpected. Mr. Newton retaliated by giving plaintiff a 30-day probationary sentence. Plaintiff was to be able to do 10 rings per minute in 30 days and if plaintiff was unable to do it, at the end of the 30 days her employment will be terminated. Prior to this probationary period plaintiff was not

given any warning or any reprimand for any poor job performance. There was absolutely no training given to explain the new system in use. Be assured plaintiff questioned and requested the knowledge. No reading materials were given, no expert professional explanation, no education from management, however the essential function was not affected it was business as usual. Meaning the system did not prevent the cash register to perform in said perfection. Plaintiff requested the training that one should receive when a new system is used and there in Mr. Newton's presence he refused to tell her, show her, or educate her even though Mr. Newton told plaintiff he knows. Plaintiff wanted still to keep her job and was ready to serve the 30 days probation so plaintiff requested from Mr. Newton an accommodation after reminding him of her struggles with mental illness and she has a disability. Plaintiff asked him to review the record kept on file. Mr. Newton still had not changed his mind but sent her to meet Tracy Neille for she preceded plaintiff to Human Resource Office to document the order. Tracy gave plaintiff the order to read and to write her comments. Plaintiff was again offering Mr. Newton another chance to do right by her and to comply with the ADA laws that protects her; concerning his willfulness to deny her an accommodation. Plaintiff named the words accommodation and disability in a manner for him to read and understand. Tracy took the document to Mr. Newton in his office. Mr. Newton returned raged with anger towards plaintiff shouted in her face there'll be no accommodation for you. Tracy is fixing your separation papers. As Mr. Newton said those words a look of hate emerged from his eyes and he actually laughed at plaintiff's situation. Plaintiff was very embarrassed

from the abuse. She was never ever been terminated before and was never treated this way by anyone. Plaintiff recoiled from the anger and winced away in great emotional pain and from the distress she was feeling from Mr. Newton's actions. Plaintiff was not allowed to serve the probationary period of 30 days and was instead terminated on May 14, 2001. So the VI Dept of Labor called it a wrongful discharge. No reason was given to plaintiff for her termination from the defendant. Plaintiff's request for an accommodation was denied.

Fourth: [Names] Sylvia Williams, Selwyn Scatliffe, George Newton, conduct was not welcomed by [plaintiff];

Fifth: [Names] Sylvia Williams, Selwyn Scatliffe, and George Newton's conduct was motivated by the fact that [plaintiff] has a "disability", as defined by the ADA [or sort an accommodation for that disability.]

Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of the reaction of a reasonable person with [plaintiff's] disability to [plaintiff's] work environment.

Seventh: [Plaintiff] believed [her] work environment to be hostile or abusive as a result of [names] Sylvia Williams, Selwyn Scatliffe, George Newton's conduct.

Eighth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment. A tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote

reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Ninth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive if 1) an employee provided management level personnel with enough information to rise a probability of harassment on grounds of disability [or request for accommodation] in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.]

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability" – Instruction 9.2.1

Under the ADA the term "Disability" means a [physical/mental] impairment that "substantially" limits a "major life activity".

2. "Qualified" – see instruction 9.2.2]

Under ADA, a "qualified individual" means that she had the skill, experience, education and other requirements for the job, and could do the job's essential functions" either with or without an accommodation.

Elements of an ADA Claim – Retaliation

[Plaintiff] claims that [defendant] discriminated again [her] because of [plaintiff's] [a third party's] [describe protected activity] request for an accommodation.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [a third party] [describe activity protected by ADA] retaliation.

Second: [Plaintiff] was subjected to an adverse tangible employment action at the time, or after, the protected conduct took place.

Third: There was a causal connection between the tangible employment action and [describe conduct by plaintiff or a third party].

Ever since plaintiff wrote to National Office regarding some concerns on the job, a campaign of retaliation has been staged against her. Then, on May 13, 2001, she was managed by Sylvia Williams who told her a few weeks ago that said Ms. Williams was promoted to checkouts manager. She is after another associate and plaintiff, and the same door plaintiff came through she will go through. On the morning portion of May 13, 2001, Ms. Williams was more so very loud mouth but it was with a customer Darryl George who told her he will complain her to management. Her fury lasted all day and she treated plaintiff to the point that her morning break was not given to her. The second portion of the day Ms. Williams she was still carrying on and even worst. Plaintiff requested a break and waited and waited yet nothing happened. The assistant manager, Selwyn Scatliffe, passed by plaintiff's workstation several times. Plaintiff thought if the manager seeing that plaintiff is due for a break or asked Ms. Williams, some form of mediation might be worked out. Scatliffe did take a long time to pass through again. But

when he did plaintiff inquired about the outcome of her question to Sylvia and his answer was, "You will have to wait until a cashier comes in, said Sylvia". Plaintiff continued to wait as Ms. Williams disturbing loud mouth controlled the entire front end all the way to Customer Service desk. After a while, plaintiff asked again for her break. Seeking it is better for Ms. Williams to send her than for plaintiff to take the break herself. Ms Williams told plaintiff to go and used plaintiff's absence to retaliate against plaintiff. Plaintiff had only gotten to the lounge when Ms. Williams paged her and asked her to call 255, plaintiff answered the page. Ms. Williams told plaintiff to listen good and hung up on her. That page was heard by seven associates whom plaintiff was sitting with at the table when plaintiff could not believe her ears and questioned if the page was for her and all answered, "Yes". Plaintiff has lost a few minutes due to the interruption of Ms. Williams' page. Plaintiff had only sat down again and had about 4 remaining minutes before her break was over when, Ms. Williams again called telling plaintiff to come to the checkout. Plaintiff decided to wait until her break was over because one supervisor who knew of the occurrence told plaintiff not to go and to wait until her break was over. Plaintiff went to Ms. Williams asked if she had call this time and Ms. Williams answered yes. Plaintiff told her she was on break and the break was not over. Ms. Williams could not tell plaintiff what she wanted. Plaintiff returned to her work. Plaintiff said to Ms. Williams when she was leaving good bye and good night. Ms. Williams promised to complain plaintiff to Mr. George, meaning George Newton. Plaintiff told Ms. Williams she is very rude to plaintiff and to the customers also. Plaintiff return to work May 14, 2001 and Igna an associate told plaintiff there is a plan to terminate you. When Ms. Williams returned plaintiff requested of her to see Mr. Newton in return Ms. Williams

told plaintiff he wants to see you too. When plaintiff got to the office Mr. Newton was in his office waiting and fuming with anger. Mr. Newton questions plaintiff and cuts across her making it impossible to give an answer. He managed to allow plaintiff to talk then placed her on probation. Even though plaintiff had done nothing wrong, to come up with 10 rings per minute, based on the order and if plaintiff is unable to come up with 10 rings per minute, her employment will be terminated. Plaintiff asked for training as an accommodation she was denied. Plaintiff asked for relocation back to the sales floor that too was denied and Mr. Newton further said any moving will be through the door. Plaintiff told and reminded Mr. Newton of her struggles with mental illness and that she has a disability. Mr. Newton is not undecided; he has made up his mind there will be no accommodations and he sent her away from his presence to Personnel/Human Resource office. There plaintiff reunited with Tracy who proceeded her to write up the document for the probation. Tracy then gave it to plaintiff for comments and to sign and date. Plaintiff wanted to keep the job she already had. Another chance was given to Mr. Newton. She extended both for herself and Mr. Newton that chance hoping he would change his mind so that she would still keep her job. Mr. Newton came where plaintiff was sent and waiting shouted in her face, there'll be no accommodation for you. Tracy is fixing your separation papers. As Mr. Newton repeated those words a look of scorn emerged from his eyes and he actually laughed at plaintiff's situation. Tracy returned and through Tracy, Mr. Newton ordered her to take back all that belonged to Kmart that was given to her. Plaintiff felt naked, abused, harassed, retaliated, discriminated and aged due to a series of retaliatory actions. Plaintiff was sent away without her salary and had to ask for it. One would think when Kmart stripped plaintiff of all that belong to

Kmart that Kmart would strip itself of all that does not belong to Kmart. From May 14, 2001, up to now, Kmart still has in its possession all that is still due to plaintiff including her salary. Plaintiff has come before the court to collect everything owed and due to her.

Concerning the first element, [plaintiff] need not prove the merits of [describe conduct] retaliation, but only that [plaintiff] [a third party] was acting under a good faith belief that [plaintiff's] [or someone else's] right to be [free from discrimination on the basis of a disability] [free to request an accommodation for a disability] training or relocation back to the sales floor was violated when defendant refused to accommodate her.

Concerning the second element, a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits.

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [describe activity] retaliatory action. Causation is, however, not necessary ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown towards [plaintiff] or a change in demeanor towards [plaintiff].

[Plaintiff] can recover for retaliation even if [plaintiff] [a third party] did not have a "disability" within the meaning of ADA. The question is not whether there was a "disability" but whether [defendant] retaliated for the [described protected activity of

plaintiff/third party] retaliatory act started when plaintiff wrote to Kmart National office. Ms. Williams told plaintiff she is after another customer and herself and that she would send her through the door, plaintiff came through. And as manager, she could hire and fire. Plaintiff's breaks were a daily weapon. Plaintiff requested a break from Ms. Williams. Ms. Williams used that on two different occasions while on her break insulted her at her first call and on the second call could not say why she had called her back to the checkout before her break was ended. Ms. Williams took the matter to Mr. Newton who in turn threatened plaintiff with the same through the door experience that appeared not to be coincidental. To cover the first acts of retaliation Mr. Newton used another retaliation to cover these proceeding and issue a 30-day probationary sentence of 30 days. Then Mr. Newton retaliated again and did not allow plaintiff to serve the probation just because plaintiff requested an accommodation that will accommodate her disability and allowed her the job she already has. Raging with anger shouted in plaintiff's face there'll be no accommodation for you and in written form the statement could be found. The final act was termination. Plaintiff had already served a 90-day probation as a new employee that fitted her for fulltime employment.

Ultimately, you must decide whether [describe activity] retaliation had a "determinative effect" means that if not for [plaintiff's] [other employee's] [protected activity], retaliatory act, the [adverse employment action] retaliation, discrimination, and termination would not have occurred.

ADA Definitions – Qualified Individual

Under the ADA, [plaintiff] must establish that [she] was a “qualified individual”. This means that [plaintiff] must show that [she] had the skill, experience, education, and other requirements for the [describe job] cashier and could do the jobs “essential functions”, either with or without [describe requested accommodation] training for a new system or to relocate to the sales floor. If [plaintiff] cannot establish that [she] is qualified to perform the essential of [describe job] cashier even with a [describe accommodation], training for a new system or relocation to the sales floor then plaintiff is not a qualified individual within the meaning of the ADA, you must return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of [her] disability. The ADA does not require an employer to hire or return an individual who cannot perform the job with or without an accommodation.

In this case, [plaintiff] claims that [she] was able to perform the essential functions of [describe job] cashier with [describe accommodation] training. [Defendant] contends that [plaintiff] was unable to perform [describe function(s)] 10 rings per minute and that this function were essential to the [describe job] cashier. It is [plaintiff's] burden to prove by a preponderance of the evidence that [she] was able to perform the essential functions of [describe job] cashier if [plaintiff] could not perform [describe function] 10 rings per minute that this was not essential to the [describe job] cashier.

In determining whether [plaintiff] could perform the essential functions of [describe job] cashier you should keep in mind that not all job functions are “essential”. The term “essential functions” does not include the marginal functions of the position. Essential functions are a job's fundamental duties. In deciding whether [describe

function] 10 rings per minute is essential to [describe job] cashier some factors you may consider include the following:

1. Whether the performance of the [describe function] 10 rings per minute is the reason that the [describe job] cashier exists;
2. [Defendant's] judgment about what functions are essential to the [describe job] cashier is a person hired to collect and keep a record of customer payment as in a store, says Webster's Dictionary. Therefore the essentials to a cashiers performance is to collect and keep record of customers payments;
3. The consequences of not requiring an employee to [describe function] 10 rings per minute in a satisfactory manner. The unsatisfactory manner has led the defendant to deny plaintiff a reasonable accommodation satisfactory to the law that would have allowed her to keep the job she already has and the consequences of defiance has brought justice to its behavior.

ADA Definition – Qualified Individual

No one factor is necessarily controlling. You should consider all of the evidence in deciding. Whether [describe function] 10 rings per minute is essential to [describe job] cashier, a person hired to collect and keep a record of customer payments.

[In addition to specific job requirements, an employer may have general requirements for all employees. For example, an employer may expect employees to refrain from abusive or threatening conduct towards others, or may require a regular level of attendance. These may be considered essential functions of the job.]

In assessing whether [plaintiff] was qualified to perform the essential functions of [plaintiff's] abilities as they existed at the time when [describe challenged employment action.] Plaintiff's abilities as they existed were perfect and even better than other cashiers as was told to her by Mr. Newton himself. The essential part of her job performance she could do to include her customer satisfaction was great. Plaintiff was dependable and flexible too. And did her job even without an accommodation for about 2 years. Upon the morning portion of the day, on May 14, 2001, plaintiff requested an accommodation due to the fact she is a qualified individual with a disability who is able to perform her work either with or without an accommodation, and was willing to proceed with just a little help of the accommodation. Plaintiff was placed on probation for requesting said accommodation. Plaintiff had done nothing wrong except try to hold the job she already had and requested the accommodation that would now become a tangible support allowing her to pass the probation. She even should not have been asked to serve another probationary period for she did so serving 90 days to become a full time employee of the defendant and passed that probationary period to become a full time

employee of the defendant, Kmart. It pained so badly that she went straight way to the VI Dept of Labor and filed a charge of discrimination and Labor declared it a wrongful discharge and filed on her behalf with EEOC who in turn sent her a letter to file with this court a suit and here we are today addressing the wrongs done to her by the defendant, Kmart even though plaintiff had the skills, experience and education.

ADA Definitions – Qualified Individual

Under the ADA [plaintiff] must establish that [she] was a “qualified individual”. This means that [plaintiff] must show that [she] had the skills, experience, education, and other requirements for the [cashier job] and could do the job’s “essential functions”, either with or without [describe requested accommodation] training for the new system. If [plaintiff] cannot establish that [she] is qualified to perform essential functions of [describe job] cashier even with a reasonable accommodation then [plaintiff] is not a qualified individual within the meaning of the ADA, you must return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of [her] disability. The ADA does not require an employer to hire or retain an individual who cannot perform the job with or without an accommodation.

In this case, [plaintiff] claims that [she] was able to perform the essential functions of [describe job] to cash or collect funds for merchandise purchased with or without a reasonable accommodation. [Defendant] contends that [plaintiff] was unable to perform [describe function] 10 rings per minute and that [this] function were essential to the [describe job] cashier’s performance. It is [plaintiff’s] burden to prove by a preponderance of the evidence that [she] was able to perform the essential functions of [describe function] cashier. If [plaintiff] could not perform [describe function] to cash collect funds for the exchange of merchandise, then it is [plaintiff’s] burden to show that [describe function] 10 rings per minute that this was not essential to the [describe job] cashier, a person hired to collect and keep a record of customer payments.

In determining whether [plaintiff] could perform the essential function of [describe job] cashier, a person hired to keep record of customer payment, should keep in

mind that not all job functions does not include the marginal functions of the position.

Essential functions are a job fundamental duties. In deciding whether [describe function]

10 rings per minute is essential to [describe job] cashier, a person hired to collect and

keep a record of customer payments. Some factors you may consider including the

following:

1. Whether the performance of the [describe function] 10 rings per minute is the reason that the [describe job] cashier, a person hired to collect and keep a record of customer payments. The answer is no;
2. [Defendant's] judgment about what functions are essential to the [describe job] cashier;
3. Written job descriptions for the [describe job] cashier;
4. The consequences of not requiring an employee to [describe function] 10 rings per minute in a satisfactory manner. Defendant chose not to follow guidelines;
5. Whether others who held the position of [describe job] cashier performed [describe function] 10 rings per minute. Again the answer is no;

No one factor is necessarily controlling. You should consider all of the evidences in deciding whether [describe function] 10 rings per minute is essential to [describe job] cashier, a person hired to collect and keep a record of customer payments.

[In addition to specific job requirements, an employer may have general requirements for all employees. For example, an employer may expect employees to refrain from abusive or threatening conduct toward others, or may require a regular level of attendance. These may be considered essential functions of the job.]

In assessing whether [plaintiff] was qualified to perform the essential functions of [describe job] cashier you should consider [plaintiff's] ability as they existed at the time when [describe challenged employment action] wrongful discharge of plaintiff and gave her a probationary period of 30 days to come up with 10 rings per minute and did not allow her to serve the probationary period. Defendant was requested to accommodate her disability with a reasonable accommodation. Hearing the request again, defendant changed the probation into termination and gave no reason for the discharge, except to say it is the denial of a reasonable accommodation. The VI Department of Labor called it a wrongful discharge and filed a claim with EEOC, who sent plaintiff the right to sue letter to file with the court.

ADA Definition – Hostile or Abusive Work Environment

In determining whether a work environment is “hostile” you must look at all of the circumstances, which may include:

1. The total physical environment of [plaintiff's] work area;
2. The degree and type of language and insult that filled the environment before and after [plaintiff] arrived;
3. The reasonable expectations of [plaintiff] upon entering the environment;
4. The frequency of the offensive conduct;
5. The severity of the conduct;
6. The effect of the working environment on [plaintiff's] mental and emotional well-being;
7. Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant;
8. Whether the conduct was pervasive;
9. Whether the conduct was directed towards [plaintiff];
10. Whether the conduct was merely a tasteless remark;
11. Whether the conduct unreasonable interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms

and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally hash, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [her] disability [or request for accommodation.] The harassing conduct may, but need not be specifically directed at [plaintiff's] disability [or request for accommodation.] The key question is whether [plaintiff], as a person with [plaintiff's disability] mental impairment was subject to hash employment conditions to which employees without a disability were not.

It is important to understand that, in determining whether a hostile work environment exist at the [employer's workplace] Kmart. You must consider the evidence from the perspective of a reasonable person with [plaintiff disability] in the same position. That is you must determine whether a reasonable person with [plaintiff's disability] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well being of a reasonable person with [plaintiff's disability]. The reasonable person with [plaintiff's disability] is simple one of normal sensitivity and emotional make up.

ADA Damages – Compensatory Damages General Instruction

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] violated [plaintiff's] rights under the ADA by [describe conduct]. Plaintiff had been experiencing some very serious stages of harassment to include the denial of her breaks and a coupon incident. That day, it was very painful, embarrassing, weary and abusive. On May 13, 2001, by my checkout's manager, Sylvia Williams, Darry George, a customer, was at another associate's counter. Both he and Sylvia had words. Sylvia was loud and disrespectful to the customer who threatened Sylvia, that he would report her to management. Plaintiff was serving a lady who in the midst's of things one could see that she seemed affected by the noise and making her payment gave me a coupon of lesser value, then changed her mind for another of greater value, after plaintiff had already processed and placed the lesser valued coupon in the slot.

Plaintiff would have to retrieve the coupon by calling on Sylvia to open the drawer because plaintiff is not allowed to open the cash register drawer under any circumstances. Plaintiff kindly called upon Sylvia to assist her but her fierce anger and wrath was turned from Darryl to plaintiff. All day, Sylvia's inhumane treatment was felt. Sylvia did not let up all day. At the end of plaintiff's shift, plaintiff told Sylvia good night, good-bye. Sylvia promised to complain her to Mr. Newton, the following day. Plaintiff told her she will also complain to him. Monday, May 14, 2001, plaintiff reported to work on the 11 am to 8 pm shift. She was told by a fellow associate there is a

plan to terminate her employment. Both Mr. Newton and plaintiff wanted to see each other. A time was set and plaintiff went in Mr. Newton's presence. Mr. Newton was very angry so that when plaintiff started to talk she could not. He will interrupt her on several occasions. Plaintiff told Mr. Newton when he did scarcely allowed her to tell of her abuse about her severe treatment and denial of her breaks. Mr. Newton said Sylvia should have given to plaintiff her break. He is still angry. Plaintiff told him about the coupon. Mr. Newton said, "A simple coupon you can't get done?" Plaintiff told Mr. Newton that is not true, and Sylvia had to retrieve it. Plaintiff is not allowed to. He had his answers but still very angry with plaintiff then told plaintiff he is putting her on a 30 days probation to see if she can come up with 10 rings per minute. He also congratulated plaintiff and reminded her that she was doing better than the other cashiers in her work performance. But, if she is unable to come up with 10 rings per minute, he will terminate Plaintiff's employment with Kmart. Mr. Newton plaintiff said, "She has been trying". How is it done and questioned what are you going to do with the others whose productivity is less than plaintiff's. Same thing I do to you. Plaintiff begged him for the knowledge. He refused to tell plaintiff. Plaintiff asked him for training as an accommodation for she has her struggles with mental illness and reminded him that she is disabled. He refused to assist her knowledge. Then may I be moved back to the sales floor as an accommodation. Mr. Newton told plaintiff any moving would be through the door and sent plaintiff away from his presence to where Tracy had gone to the Human Resource Office. Tracy, plaintiff, and Mr. Newton were all in Mr. Newton's Office. Tracy was to write up the probation order. Plaintiff was to make her comments and Tracy was to bring back the order that affirmed her need in writing. Mr. Newton came

back where plaintiff was sent and waited and again told plaintiff there'll be no accommodation for you as he shouted in her face. Then through his eyes a look of scorn emerged from his face and he actually laughed at plaintiff's situation. Plaintiff was respectful and answered not a word. She was shamed by him and yet hoped he would change his mind but he did not even though he was reminded in writing on the probation order. Plaintiff was hoping she could save the job she already had. Plaintiff was not allowed to even serve the probationary period of 30 days. Mr. Newton did not allow accommodation. The probation was now turned into termination; Tracy returned and fixed the order of termination. Plaintiff made her response and after that Mr. Newton signed the order. Plaintiff was stripped of everything Kmart had given to her for use. Plaintiff felt run over and abused. Plaintiff was told she can leave. She questioned, are you sending me away without my salary too? Tracy said sorry and offered plaintiff \$520.00. Plaintiff told Tracy that the money was incorrect and more is due to her than is offered. Tracy was to call plaintiff when they have it corrected. Plaintiff waited and asked and up to now, Kmart still has her salary, benefits, pension and vacation pay for her. Plaintiff was stripped of what was given to her but Kmart never stripped itself to return what which is rightfully hers. No reason was given to her for the discharge. But it was her seeking an accommodation that caused her to loose her job that she already had. An accommodation could have saved her job. All other cashiers are still employed, they were to be reviewed, plaintiff was to serve probation then termination. She is still unemployed through the wrongful discharge.

Then you must consider the issue of compensation damages. You must award [plaintiff] an amount that will fairly compensate [her] for injury [she] actually sustained

as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. Plaintiff must also show that [defendant] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonable probable consequence of [defendant's] act [or omission]. This test – a substantial part in bringing about the injury – is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for any injury unless [defendant's] discriminatory actions actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] acts [or omission] caused [plaintiff's] injury you need not find that [defendant] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant]. In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound

judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork. You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experience as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the 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 damage. Any award you make should be fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [she] had continued in employment with [defendant]. These elements of recovery of wages that [plaintiff] would have received from [defendant] are called "back pay" and "front pay". [Under the applicable law, the determination of "back pay" and "front pay" is for the Court.] ["Back pay" and "front pay" are to be awarded separately under instructions that I will soon give you, and any amounts for "back pay" and "front pay" are to be entered separately on the Verdict form.]

You may award damages for monetary losses that [plaintiff] may suffer in the future as a result of [defendants] [allegedly unlawful act or omission]. For example, you may award damages for loss of earnings resulting from any harm to [plaintiff's] reputation that was suffered as a result of [defendant's] [allegedly unlawful act or omission]. Where a victim of discrimination has been terminated by an employer, and has sued that employer for discrimination, [she] may find it more difficult to be employed

in the future, or may have to take a job that pays less than if the act of discrimination had not occurred. That element of damages is distinct from the amount of wages [plaintiff] would have earned in the future from [defendant] if [she] had retained the job. As I instructed you previously, [plaintiff] has the burden of proving damages by a preponderance of the evidence. But the Law does not require that [plaintiff] prove the amount of [her] losses with mathematical precision; it requires only as much definiteness and accuracy as circumstances permit.

You are instructed that [plaintiff] has a duty under the law to "mitigate" [her] damages - that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is [defendant's] burden to prove that plaintiff has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [her], then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if [she had taken advantage of such an opportunity].

In assessing damages, you must not consider attorney fees and costs, if relevant at all, are for the court and not for the jury to determine. Therefore, attorney fees and cost should play no part in your calculations of any damages.