

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
WESTERN DIVISION

FILED  
DECEMBER 13 PM 5:38  
CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA

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|---------------------------------------|---|---|
| LINDA PLEAKE,                         | * |   |
|                                       | * |   |
| Plaintiff,                            | * | 1-99-CV-90022                                     |
|                                       | * |   |
|                                       | * |   |
| v.                                    | * |   |
|                                       | * |   |
| WALNUT HILL-CUTLER CEMETERY,<br>INC., | * |   |
|                                       | * |   |
|                                       | * |   |
| Defendant.                            | * | PRELIMINARY AND FINAL<br>INSTRUCTIONS TO THE JURY |
|                                       | * |   |
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**PRELIMINARY INSTRUCTION NO. 1**  
**PRELIMINARY INSTRUCTIONS**

Ladies and gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed. In considering these instructions, the order in which they are given is not important.

**PRELIMINARY INSTRUCTION NO. 2**  
**STATEMENT OF THE CASE**

The following brief summary of the case is not to be considered evidence or proof of any facts or events in the case. It simply informs you of the factual disputes between the parties.

This is a civil case involving disability discrimination brought by Plaintiff, Linda Pleake, against her former employer, Walnut Hill-Cutler, Inc., a local cemetery. Ms. Pleake worked as a part-time secretary/receptionist with Walnut Hill-Cutler from November 1996 to April 13, 1998.

In this case, Ms. Pleake asserts that she is disabled. She claims that because of her disability, her doctor gave her certain work restrictions which her employer refused to reasonably accommodate. This will be known as Plaintiff's "failure to accommodate" claim.

In addition to her "failure to accommodate" claim, Ms. Pleake also claims that Walnut Hill-Cutler retaliated against her for asserting her rights. During trial, you will learn the way in which Ms. Pleake alleges Walnut Hill retaliated against her. This will be known as Plaintiff's "retaliation" claim. I will define and explain these two claims in further detail in instructions that I will give you later.

According to Ms. Pleake, the conditions at her work became so intolerable that she was forced to resign. During trial, you will learn how Ms. Pleake's work conditions were allegedly intolerable.

Walnut Hill-Cutler denies all of Linda Pleake's claims. Walnut Hill contends that it did accommodate her work restrictions when it was made aware of them. Walnut Hill also denies that it retaliated against Ms. Pleake. Walnut Hill claims that its conduct was based on sound business judgment.

You must not consider this summary as proof of any claim. You and you alone will decide what the facts are from the evidence presented at trial. You also will apply the law which I will give to you in these preliminary and final instructions.

**PRELIMINARY INSTRUCTION NO. 3  
DUTY OF JURORS; EQUALS IN COURT**

As I just stated, it will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are and then apply those facts to the law which I will give you in these preliminary instructions, any instructions given during the trial, and in the final instructions at the conclusion of the case. You will then deliberate and reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I will give it to you.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. An individual, such as Ms. Pleake, and a corporation, such as Walnut Hill-Cutler, Inc., stand equal before the law, and are entitled to the same fair consideration by you. The mere fact that Walnut Hill-Cutler, Inc. is a corporation, and not an individual, does not mean that it is entitled to any greater or lesser consideration by you.

However, when a corporation is involved, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of the corporation may bind the corporation by the acts and declarations made while acting within the scope of the authority delegated to the employee by the corporation, or within the scope of the employee's or agent's duties as an employee or agent of the corporation.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

**PRELIMINARY INSTRUCTION NO. 4**  
**ORDER OF TRIAL**

Before I give you further instructions, let me tell you how this trial will proceed.

First, the plaintiff's attorney will make an opening statement. Next, the defendant's attorney will make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The plaintiff will then present evidence and witnesses and the defendant may cross-examine. Following the plaintiff's case, the defendant may present evidence and witnesses and the plaintiff may cross-examine. Following the defendant's case, the plaintiff may take further opportunity to present additional evidence.

After the presentation of evidence is completed, I will give you the final instructions on the law that you are to apply in reaching your verdict. The attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will then give you some final instructions on deliberations. After that you will retire to deliberate on your verdict.

**PRELIMINARY INSTRUCTION NO. 5  
DEFINITION OF EVIDENCE**

You shall base your verdict only upon the evidence, these instructions, and other instructions that I may give you during trial.

“Evidence” is:

1. Testimony in person or testimony previously given, which includes depositions or videotaped depositions.
2. Exhibits admitted into evidence by the court.
3. Stipulations, which are agreements between the parties.
4. Any other matter admitted into evidence.

Evidence may be direct or circumstantial. You should not be concerned with these terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

The following are not evidence:

1. Statements, arguments, questions and comments by lawyers are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I shall tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

**PRELIMINARY INSTRUCTION NO. 6**  
**CREDIBILITY OF WITNESSES**

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

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

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

You may hear testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinions on matters in that field and the reasons for their opinions. Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Also, an expert witness may be asked to assume certain facts are true and to give an opinion based on that assumption. This is called a hypothetical question. If any facts assumed in the question are not proved by the evidence, you should decide if that omission affects the value of the expert's opinion.

**PRELIMINARY INSTRUCTION NO. 7**  
**STIPULATED FACTS**

The plaintiff and defendant have agreed or “stipulated” to certain facts and have reduced these facts to a written agreement or stipulation. Any counsel may, throughout the trial, read to you all or a portion of the stipulated facts. You should treat these stipulated facts as having been proved.

**PRELIMINARY INSTRUCTION NO. 8**  
**DEPOSITIONS**

Certain testimony from a deposition may be read into evidence or played from an audiotape. A deposition is testimony taken under oath before the trial and preserved in writing or on autiotape. Consider that testimony as if it had been given in court.

**PRELIMINARY INSTRUCTION NO. 9  
INTERROGATORIES**

During this trial, you may hear the word “interrogatory.” An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

**PRELIMINARY INSTRUCTION NO. 10**  
**OBJECTIONS**

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. It is the duty of the lawyer for each party to object when another party offers testimony or other evidence that the lawyer believes is not properly admissible. You should not show prejudice against a lawyer or the party the lawyer represents because the lawyer has made objections. You should not infer or conclude from any ruling or other comment I may make that I have any opinions on the merits of the case favoring one side or the other. Also, if I sustain an objection to a question that goes unanswered by the witness, you should not draw any inferences or conclusions from the question itself.

**PRELIMINARY INSTRUCTION NO. 11**  
**BENCH CONFERENCES**

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

**PRELIMINARY INSTRUCTION NO. 12**  
**NOTE-TAKING**

If you want to take notes during the trial, you may. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying. If you do take notes, be sure that your note-taking does not interfere with listening to and considering all the evidence. Also, if you take notes, do not discuss them with anyone before you begin your deliberations. Do not take your notes with you at the end of the day. Be sure to leave them on your chair in the courtroom. The court attendant will safeguard the notes. No one will read them. The notes will remain confidential throughout the trial and will be destroyed at the conclusion of the trial.

If you choose not to take notes, remember it is your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone who is taking notes. We depend on the judgment of all members of the jury; you must all remember and consider the evidence in this case.

Whether or not you take notes, you should rely on your own memory regarding what was said. Your notes are not evidence. A juror's notes are not more reliable than the memory of another juror who chooses to consider the evidence carefully without taking notes.

You will notice that we do have an official court reporter making a record of the trial. However, we will have not typewritten transcripts of this record available for your use in reaching your verdict.

**PRELIMINARY INSTRUCTION NO. 13**  
**BURDEN OF PROOF**

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. Plaintiff Linda Pleake has the burden of proving by the greater weight of the evidence her claims of (1) failure to accommodate and (2) retaliation. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, then you must conclude that issue has not been proved.

The "greater weight of the evidence" is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

**PRELIMINARY INSTRUCTION NO. 14**  
**ADMONITION**

To ensure fairness, you as jurors must obey the following rules:

*First*, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

*Second*, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

*Third*, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

*Fourth*, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case - you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side - even if it is simply to pass the time of day - an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, remember it is because they are not supposed to talk or visit with you either.

*Fifth*, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. In fact, until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know more about the matter than anyone will learn through the news media.

*Sixth*, do not do any research or make any investigation about the case on your own.

*Seventh*, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

FINAL INSTRUCTION NO. 1 – CLAIM #1: FAILURE TO ACCOMMODATE –  
ESSENTIAL ELEMENTS

Plaintiff Linda Pleake alleges that Walnut Hill-Cutler failed to accommodate her disability. In order for Ms. Pleake to win on this claim, she must prove all of the following essential elements by the greater weight of the evidence:

- (1) **Plaintiff had an impairment to her back, neck, and shoulder;**
- (2) **This impairment substantially limited her ability to walk, bend, lift, sit and stand for extended periods of time;**  
(The phrase “substantially limited” is defined for you in Final Instruction No. 2.)
- (3) **Walnut Hill-Cutler knew of this impairment;**
- (4) **Plaintiff could have performed the essential functions of her job had Walnut Hill-Cutler given her the opportunity to get up and move around periodically;**  
(The phrase “essential functions” is defined for you in Final Instruction No. 3).
- (5) **Providing these or other accommodations would have been reasonable;**  
(“Reasonable accommodation” is defined for you in Final Instruction No. 4).
- (6) **Walnut Hill-Cutler failed to provide these or other reasonable accommodations.**

If any of the above elements have not been proved by the greater weight of the evidence, then your verdict must be for the Defendant Walnut Hill-Cutler. If, however, Plaintiff has proved all of these essential elements, then you must consider Defendant’s defense of good faith as explained in Final Instruction No. 5.

Note: You may not return a verdict for Plaintiff just because you might disagree with the Defendant’s decision or actions, or believe those decisions to be harsh or unreasonable. An employer is entitled to make its own subjective personnel decisions as long as the employer does not violate an employee’s rights or the law.

## FINAL INSTRUCTION NO. 2 — “SUBSTANTIALLY LIMITED” DEFINED

The phrase “substantially limited” as used in these instructions means that an individual is unable to, or significantly restricted in, the ability to perform a major life activity. Major life activities include caring for oneself, performing manual tasks, walking, or working.

In determining whether the Plaintiff’s impairment substantially limits a major life activity of Plaintiff, you should compare the Plaintiff’s abilities with those of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. Impairments with little or no long-term impact are not sufficient.

It is not the name of the impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

A person is substantially limited in the major life activity of working if the person is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills and abilities. Working does not mean working at a particular job of the person’s choice.

### FINAL INSTRUCTION NO. 3 — “ESSENTIAL FUNCTIONS” DEFINED

The term “essential functions” means the basic, fundamental job duties of the employment position the Plaintiff holds or for which the Plaintiff has applied. The term “essential functions” does not include the marginal functions of the position.

In determining whether a job function is essential, you should consider the following factors: (1) the employer’s judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement if one exists; (6) the work experience of persons who have held the job; (7) the current work experience of persons in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; and (10) whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function.

#### FINAL INSTRUCTION NO. 4 — “REASONABLE ACCOMMODATION” DEFINED

The law requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their job. Making “reasonable accommodations” means making modifications to the work place which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability.

A reasonable accommodation is one that could reasonably be made under the circumstances and may include but is not limited to modifications to the work environment or the manner under which the position is customarily performed. A reasonable accommodation may also include part-time or modified work schedules or reassignment to a vacant position.

An employer does not have a duty to provide all accommodations requested by an employee with a disability. The duty is to provide a “reasonable accommodation” which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability.

## FINAL INSTRUCTION NO. 5 — “GOOD FAITH” DEFENSE

The Defendant Walnut Hill-Cutler has asserted a “good faith” defense to Ms. Pleake’s claims of disability discrimination. If you find that Ms. Pleake has proven all of the essential elements of her Failure to Accommodate claim, as explained in Final Instruction No. 1, then before you can award her any damages, you must first answer the following question in the verdict form:

“Has the Defendant proved by the greater weight of the evidence that the Defendant made a good faith effort and consulted with the Plaintiff to identify and make a reasonable accommodation?”

If you answer “Yes” to this question, then you may not award the Plaintiff any “compensatory damages” as described in Final Instruction No. 8, but you must award “nominal damages” of One Dollar (\$1) as described in Final Instruction No. 9.

If you answer “No” to this question, then you are to determine the amount of compensatory damages, and if necessary, “punitive damages” as explained in Final Instruction No. 10 to award Plaintiff.

FINAL INSTRUCTION NO. 6 – CLAIM #2: RETALIATION –  
ESSENTIAL ELEMENTS

Linda Pleake’s second claim is that Walnut Hill-Cutler retaliated, that is, took revenge against her when she asserted her rights under the disability laws. You are instructed that those laws which prohibit discrimination in the work place also prohibit any retaliatory action being taken against an employee by an employer because the employee has asserted rights or made complaints under those laws. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be her lawful rights. To show “good faith,” however, it is insufficient for the Plaintiff to merely allege that her belief in this regard was honest and bona fide; the allegations and the evidence must also establish that her belief, even if mistaken, was objectively reasonable.

To win her claim of retaliation, Ms. Pleake must prove all of the following essential elements by the greater weight of the evidence:

- (1) **The Plaintiff was engaged in a statutorily protected activity, that is, she in good faith asserted claims or complaints of discrimination related to her disability;**
- (2) **That adverse action was taken against her;**  
(“Adverse action” means a tangible change in Ms. Pleake’s duties or working conditions that result in a material employment disadvantage).
- (3) **The adverse action took place because of, or was causally connected to, the Plaintiff engaging in statutorily protected activity;**  
(For adverse employment action to be “causally connected” to statutorily protected activities it must be shown that, but for the protected activity, the adverse employment action would not have occurred. Or, stated differently, it must be shown that the protected activity by the Plaintiff was a substantial or motivating factor that made a difference in the Defendant’s conduct toward Plaintiff.)
- (4) **That the Plaintiff suffered damages as a proximate cause of such adverse employment action.**

If Linda Pleake has failed to prove each of the above elements by the greater weight of the evidence, your verdict must be for Walnut Hill-Cutler on Linda Pleake’s claim of retaliation. If Linda Pleake has proved each of these essential elements, then your verdict must be for her on this claim.

## FINAL INSTRUCTION NO.7— CONSTRUCTIVE DISCHARGE

Linda Pleake asserts that the conditions at her job were so intolerable that she was forced to quit. In other words, she asserts that she was “constructively discharged” from her employment.

A constructive discharge is not a separate claim under the anti-discrimination laws; however, if Ms. Pleake proves constructive discharge, she may be entitled to additional damages under the law.

For you to find that Plaintiff was constructively discharged, Ms. Pleake must prove the following two elements by the greater weight of the evidence:

- (1) Walnut Hill-Cutler made Ms. Pleake’s working conditions intolerable;  
(Note: The working conditions created by the employer must be such that a reasonable person would find them intolerable, not simply that the plaintiff found them intolerable).
- (2) Ms. Pleake’s physical impairments to her back, neck, and shoulder was a motivating factor in Walnut Hill-Cutler’s actions;
- (3) Ms. Pleake’s quitting her job was a reasonably foreseeable result of Walnut Hill-Cutler’s actions; and
- (4) Ms. Pleake gave her employer a reasonable opportunity to remedy the situation before quitting her job.

## FINAL INSTRUCTION NO. 8 — COMPENSATORY DAMAGES

Compensatory damages represent the amount of money you award the Plaintiff which will fairly and justly compensates her for any damages you find she has sustained as a direct result of the Defendant's conduct. Because Plaintiff asserts two claims against the Defendant — namely a failure to accommodate claim and a retaliation claim — she can recover compensatory damages for violations of one or both claims. Remember, the Plaintiff must prove her damages by the greater weight of the evidence. I will now explain the type of compensatory damages available to the Plaintiff for each claim:

- (1) **Claim #1: Failure to Accommodate** — If you find that Ms. Pleake has proven all the essential elements of her failure to accommodate claim (see Final Instruction No. 1) and if you answered “No” to the “Good Faith defense” question in Final Instruction No. 5, then you may award the following types of compensatory damages:
  - present emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life (calculated from the time of her injury to the date of your verdict);
  - future emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life (calculated from the date of your verdict to a date in the future you believe she will no longer suffer such damages);
  - medical care and supplies reasonably needed by and actually provided to the Plaintiff (and reasonably certain to be needed and provided in the future);
  - back pay from the date Plaintiff quit to the date of your verdict, *minus* earnings and benefits from other employment received by Plaintiff during that time;  
(Note: you can only award back pay if Plaintiff has proven “constructive discharge” as explained in Final Instruction No. 7);
  
- (2) **Claim #2: Retaliation** — If you find that Ms. Pleake has proven all the essential of her retaliation claim (see Final Instruction No. 6, then you may award the following types of compensatory damages:
  - present emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life (calculated from the time of her injury to the date of your verdict);
  - future emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life (calculated from the date of your verdict to a date in the future you believe she will no longer suffer such damages);
  - medical care and supplies reasonably needed by and actually provided to the Plaintiff (and reasonably certain to be needed and provided in the

- future);
- back pay from the date Plaintiff quit to the date of your verdict, *minus* earnings and benefits from other employment received by Plaintiff during that time;  
(Note: you can only award back pay if Plaintiff has proven “constructive discharge” as explained in Final Instruction No. 7);

I will now tell you some final rules to remember when determining compensatory damages in this case. Throughout your deliberations, you must not engage in any speculation, guess, or conjecture. The amount you assess for any item of compensatory damage must not exceed the amount caused by the defendants as proved by the evidence.

You are also instructed that a plaintiff has a duty under the law to “mitigate” his or her damages--that is, to exercise reasonable diligence under the circumstances to minimize his or her damages. Therefore, if you find that the defendant has proven by the greater weight of the evidence that Ms. Pleake failed to seek out or take advantage of an opportunity that was reasonably available to her, you must reduce her damages by the amount she reasonably could have avoided if she had sought out or taken advantage of such an opportunity.

**FINAL INSTRUCTION NO. 9 — “NOMINAL” DAMAGES**

If you find in favor of Plaintiff on her Failure to Accommodate claim, as explained in Final Instruction No. 1, but you find that Plaintiff has not proved compensatory damages, (which is to say monetary value), then you must return a verdict for Plaintiff in the nominal amount of One Dollar (\$1.00).

## FINAL INSTRUCTION NO. 10 — PUNITIVE DAMAGES

In addition to compensatory damages, the law permits the jury under certain circumstances to award the injured Plaintiff punitive damages in order to punish the Defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

In order to award Plaintiff punitive damages, you must make two findings:

- (1) find in favor of Ms. Pleake on either her failure to accommodate claim or her claim of retaliation; and
- (2) find that Defendant Walnut Hill-Cutler, engaged in discriminatory conduct with “malice or with reckless indifference” to Ms. Pleake’s right to be free of disability-based discrimination. (The term “malice or reckless indifference” is defined for you in Final Instruction No. 11).

If you make both of these findings, then in addition to compensatory damages, you may, but are not required to, award Plaintiff an additional amount as punitive damages if you find it is appropriate to punish the Defendant or to deter the Defendant from like conduct in the future. Remember, whether to award Linda Pleake punitive damages and the amount of those punitive damages are within your sound discretion.

FINAL INSTRUCTION NO. 11 — “MALICE OR WITH RECKLESS INDIFFERENCE”  
DEFINED

For the purpose of imposing punitive damages, “malice” means the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury. “Reckless indifference” means acting with knowledge of a substantial risk of harm to another. The terms “malice” or “reckless indifference” pertain to the Defendant’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.

To be liable in punitive damages, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.

Factors you may consider in awarding punitive damages include, but are not limited to, the following: the nature of the defendant's conduct; the impact of the defendant's conduct on the plaintiff; the relationship between the plaintiff and the defendant; the likelihood that the defendant would repeat the conduct if a punitive award is not made; the defendant's financial condition; Ms. Pleake’s actual damages; and any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

FINAL INSTRUCTION NO. 12 — DUTIES OF DELIBERATION

In conducting your deliberations and returning our verdict, there are certain rules you must follow.

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

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous;

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

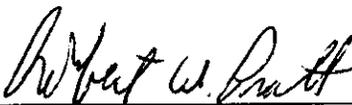
Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges — judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone — including me — how your votes stand numerically.

*Fourth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be — that is entirely for you to decide.

*Finally*, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

Entered this 13<sup>th</sup> day of December, 2000.

  
ROBERT W. PRATT  
U.S. DISTRICT JUDGE