

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

WILLIAM BLAKE,

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Plaintiff

\*

v.

\*

Civil Action  
L07-CV-50

BALTIMORE COUNTY, MARYLAND, et al.,

\*

Defendants

\*

\* \* \* \* \*

PLAINTIFF BLAKE'S PROPOSED JURY INSTRUCTIONS

Plaintiff Blake, through his undersigned counsel, hereby requests the following jury instructions.

/S/  
Kathleen Cahill  
The Law Offices of  
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Bar No. 02006

PLAINTIFF'S SPECIAL INSTRUCTION NO. 1

The Americans with Disabilities Act – Purpose

Plaintiff Detective William Blake brings this lawsuit under the Americans with Disabilities Act (often referred to as “the ADA”).

The purpose of the ADA is to ensure that an employee is not judged on the basis of unfounded myths, fears, generalizations or stereotypes about any health status or disability, but rather on the basis of actual performance on the job.

School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

29 C.F.R Part 1630 App., sec, 1630.2(l).

136 Cong. Rec. 7422-03, 7347.

S.Rep.No. 101-116 at 39 (1989); H.R.Rep.No. 101-485, pt.2, at 75 (1990).

Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act, Equal Employment Opportunity Commission.

PLAINTIFF'S SPECIAL INSTRUCTION NO. 2

Introduction to Claims

In this case, Detective Blake says that Baltimore County violated the ADA in two different ways. First, Det. Blake alleges that Baltimore County compelled him to submit to unlawful medical inquiries and examination. Second, Det. Blake claims that Baltimore County retaliated against him because he participated in certain conduct that is protected by the ADA.

Det. Blake does not need to prove a disability in order to prove either of these two kinds of ADA claims, so you do not need to consider whether or not he has, or had, a disability.

Conroy v. New York State Dept. of Correctional Services, 333 F.3d 88, 94-95 (2<sup>nd</sup> Cir. 2003); Cossette v. Minnesota Power & Light, 188 F.3d 964,969-970 (8<sup>th</sup> Cir. 1999); Fredenburg v. Contra Costa Dept. of Health Servs., 172 F.3d 1176, 1182 (9<sup>th</sup> Cir. 1999); Roe v. Cheyenne Mountain Resort, 124 F.3d 1221, 1229 (10<sup>th</sup> Cir. 1997); Karraker v. Rent-a-Center, Inc., 239 F.Supp.2d 828, 834-836 (C.D.Ill. 2003); Jackson v. Lake County, 2003 WL 22127743, \*7-9 (N.D.Ill. 9/15/03); EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, General Principles, (7/26/00), Section B, nn. 13-15, <http://eeoc.gov/policy/docs/guidance-inquiries.html>.; EEOC Compliance Manual, §2-II(B)(8)(5/20/98).

PLAINTIFF'S SPECIAL INSTRUCTION NO. 3

First Claim –

The Americans with Disabilities Act - Medical Inquiries and Examinations, General  
Job Related and Consistent with Business Necessity  
Burden of Proof

Under the ADA an employer can only require an employee to submit to a medical examination or respond to medical inquiries if the employer proves that the examination or inquiry is “job-related,” and “consistent with business necessity.”

In this case there is no dispute that defendant Baltimore County required Det. Blake to respond to medical inquiries and submit to a medical exam. Therefore, you must find for Det. Blake on his first claim unless Baltimore County can prove that the medical inquiries and medical examination it required of Det. Blake were (1) job-related; and (2) consistent with business necessity.

*3C Fed. Jury Prac. & Instr. Sec. 172.24 (5<sup>th</sup> ed.)(O'Malley).*

42 U.S.C. 12112(d)(4)(A)(1994).

29 C.F.R. 1630.14(c)(1998).

Equal Employment Opportunity Commission Technical Assistance, Employment Tests and Selection Procedures, December 2007.

PLAINTIFF'S SPECIAL INSTRUCTION NO. 4

The Americans with Disabilities Act - Medical Inquiries and Examinations  
Job-Related and Consistent with Business Necessity, Defined

Medical inquiries and examinations are “job-related and consistent with business necessity” if the employer “has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.”

EEOC Enforcement Guidance, Job-Related and Consistent with Business Necessity, supra, Section A.

PLAINTIFF'S SPECIAL INSTRUCTION NO. 5

The Americans with Disabilities Act - Direct Threat Defense

A “direct threat” means a significant risk of substantial harm to the employee or others. The determination that an employee poses a “direct threat” must be based on an individualized assessment of the employee’s present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. In other words, the harm must be serious and likely to occur, not remote and speculative.

In determining whether Det. Blake posed a direct threat, you should consider:

- The duration of any risk,
- The nature and severity of any potential harm,
- The likelihood that any potential harm will occur, and
- The likely time before any potential harm occurs, that is, the potential harm must be imminent or near at hand.

Again, Baltimore County must prove that its position that Det. Blake posed a direct threat was based on objective evidence. A subjective belief, even if held in good faith, will not shield the County from liability.

You must find for Det. Blake on his first claim if Baltimore County does *not* prove, by a preponderance of the evidence, that at the time it ordered Det. Blake to respond to medical inquiries and submit to a medical examination, it had a reasonable belief, based on objective evidence, that (a) Det. Blake’s ability to perform the essential functions of his job was impaired, or (b) Det. Blake posed a “direct threat.”

If the County *does* prove one of those things, then you still must consider whether the inquiries and examination the County required were narrowly tailored. Even in circumstances where it is determined that a medical inquiry or examination is permitted under the ADA, the medical inquiry or examination must not be overly broad. The employer must prove that the medical inquiry or examination was restricted in scope to determining whether the employee can perform the essential job functions.

29 C.F.R. §1630(r)(1998).

Echazabel v. Chevron UAS, Inc., 336 F.3d 1023, 1028 (9<sup>th</sup> Cir. 2003).

Black’s Law Dictionary.

PLAINTIFF'S SPECIAL INSTRUCTION NO. 6

The Americans with Disabilities Act - Direct Threat Defense  
Objective Reasonableness and Best Available Medical Evidence

Defendant Baltimore County must prove the objective reasonableness of its determination that Det. Blake posed a direct threat, that is, that a reasonable person could believe, in light of the best available medical evidence, that Det. Blake posed a direct threat.

An employer cannot escape its obligations under the ADA by contracting out certain hiring and personnel functions to third parties. That is, here, Baltimore County cannot escape its obligations under the ADA by blindly relying on the assessment of a doctor it hires. Because it is Baltimore County's responsibility to act based on the particularized facts using the best available objective evidence, Baltimore County does not escape liability if it acts based on the erroneous or inadequate assessment of a doctor it hires, or if its reliance on the assessment of its doctor is unreasonable or in bad faith.

Bragdon v. Abbott, 524 U.S. 627 (1998); Rodriquez v. ConAgra Grocery Products, 436 F.3d 468, 484 (5<sup>th</sup> Cir. 2006); Echazabel v. Chevron UAS, Inc., 336 F.3d 1023, 1028 (9<sup>th</sup> Cir. 2003); Lowe v. Alabama Power Company, 244 F.3d 1305, 1308-1309 (11<sup>th</sup> Cir. 2001); Holiday v. City of Chattanooga, 206 F.3d 637, 645 (6<sup>th</sup> Cir. 2000); Taylor v. Pathmark Stores, Inc. 177 F.3d 180, 192 (3<sup>rd</sup> Cir. 1999); Riemer v. Illinois Dept. of Transportation, 148 F.3d 800(7<sup>th</sup> Cir. 1998); EEOC v. Browning-Ferris, Inc., 262 F.Supp.2d 577, 590-591 (D.Md. 2002); Ragan v. Jeffboat, 149 F.Supp.2d 1053, 1070 (S.D.Ind. 2001); EEOC v. Texas Bus Lines, 923 F.Supp. 965 (S.D.Tex.1996).

PLAINTIFF'S SPECIAL INSTRUCTION NO. 7

The Americans with Disabilities Act - Medical Inquiries and Examinations,  
Current Ability vs. Future Risk.

The determination whether a direct threat exists must be based upon the capabilities of the employee at the time of the determination, and must not be based upon speculation that the employee may become unable in the future or cause increased costs in the future.

The results of a medical inquiry or examination may not be used to disqualify employees who are currently able to perform the essential functions of a job, because of fear or speculation that a condition may indicate a greater risk of future injury or costs.

29 C.F.R. Part 1630 App., sec. 1630.2(m).  
ADA Title I Technical Assistance Manual sec. 6.4.

PLAINTIFF'S SPECIAL INSTRUCTION NO. 8

The Americans with Disabilities Act –  
Preliminary Injunction, EEG

One of the medical examinations at issue in this case is an electroencephalogram or EEG, a study of the electrical activity of the brain.

On December 14, 2006, Baltimore County ordered Det. Blake to undergo an EEG. In response, Det. Blake filed a request for emergency court intervention to bar defendant Baltimore County from making him undergo the EEG, alleging it violated the ADA. This Court granted that request for emergency relief, and on July 1, 2008, I entered a preliminary injunction barring Baltimore County from making Det. Blake undergo the EEG. One year later, on July 1, 2009, defendant Baltimore County withdrew its directive that Det. Blake submit to the EEG.

Among his claims, Det. Blake asserts a claim for compensatory damages for the alleged wrongful conduct of defendant Baltimore County in ordering him to submit to the EEG.

PLAINTIFF'S SPECIAL INSTRUCTION NO. 9

Second Claim –  
The Americans with Disabilities Act - Retaliation

In this case Det. Blake also claims that Baltimore County retaliated against him because he testified on behalf of a fellow police officer during a hearing relating to the fellow police officer's medical condition or disability.

The ADA prohibits an employer from retaliating against an employee because the employee opposed any act or practice made unlawful by the ADA, or because he made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.

In order to prevail on this claim, Det. Blake must prove that:

- (1) He engaged in conduct protected by the ADA;
- (2) Baltimore County subjected him to an adverse employment action at or after the time the protected conduct took place; and
- (3) Baltimore County took an adverse employment action against him because of his protected conduct.

In this case, Det. Blake testified on behalf of a fellow police officer who had filed an ADA claim, and that is "protected conduct" under the ADA. So the first element of this claim is satisfied. You must therefore determine if requiring Det. Blake to submit to a medical examination and respond to medical inquiries was an "adverse employment action," and whether Baltimore County took that action because of his engaging in the protected conduct.

An "adverse employment action" is one that would discourage or dissuade a reasonable employee from opposing, testifying, assisting or participating in any manner in an investigation, proceeding or hearing related to the ADA.

Title VII, Sec 704 sec. 2000e-3(a).  
*3C Fed. Jury Prac. & Instr. Sec. 172.24 (5<sup>th</sup> ed.)(O'Malley).*  
Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2409 (2006).

PLAINTIFF'S SPECIAL INSTRUCTION NO. 10

Preponderance of the Evidence

To “establish by the preponderance of the evidence” means to prove something that is more likely so than it is not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared to that opposed to it, has more convincing force, and produces in your mind a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proven by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits, regardless of who may have produced them.

*3C Fed. Jury Prac. & Instr. Sec. 172.52 (5<sup>th</sup> ed.)(O'Malley).*

PLAINTIFF'S SPECIAL INSTRUCTION NO. 11

Compensatory Damages.

If you find for Det. Blake on either of his claims, then you must determine an amount that is fair compensation for Det. Blake's damages. You may award compensatory damages only for injuries that Det. Blake proves were caused by Baltimore County's wrongful conduct.

The damages you award must be fair compensation – no more and no less. You may award damages for any pain, suffering or mental anguish that Det. Blake experienced as a consequence of Baltimore County's unlawful medical inquiry and examination, or Baltimore County's unlawful retaliation. 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 trial.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate 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 guess work. On the other hand, the law does not require that Det. Blake prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

*3C Fed. Jury Prac. & Instr. Sec. 172.70 (5<sup>th</sup> ed.)(O'Malley).*