

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WILLIAM R. DOWNING, JR.

PLAINTIFF

v.

No. 4:15-cv-570-DPM

DEPARTMENT OF FINANCE AND
ADMINISTRATION, an Agency of the
State of Arkansas; BOB HAUGEN and
DAVID JUSTICE, Both in their
Individual and Official Capacities

DEFENDANTS

ORDER

The Court much appreciates the parties' endorsement of the definitions/questions procedure, as well as their comments, objections, and suggestions on the particulars. Attachment one is a responding redline showing the changes the Court is inclined to make. Attachment two is a clean version. We'll talk further on these points this afternoon at the pretrial.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

28 March 2018

Attachment One

- *Essential job functions* are the fundamental duties of Downing's job. Marginal functions are not essential functions of the job.
- *Equivalent* means virtually identical in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. It must involve the same or substantially similar duties, skill, effort, responsibility, and authority.
- An *actual disability* is a physical or mental impairment that substantially limits one or more major life activities.
 - *Substantially limits* is a broad term. An impairment can be substantially limiting even though it doesn't prevent Downing from performing a major life activity. Impairments or effects of impairments that last (or are expected to last) less than six months may be substantially limiting. In deciding whether an impairment substantially limits a major life activity, you

should compare Downing's ability to perform the major life activity with an average person's ability.

- *Major life activities* include (but aren't limited to) performing manual tasks, walking, standing, lifting, bending, and working.
- Downing was *regarded as having a disability* if he had an actual or perceived physical impairment, regardless of whether the impairment limits or is perceived to limit a major life activity.
 - Downing cannot be regarded as having a disability if his impairment was transitory and minor.
 - A transitory impairment is one with an actual or expected duration of six months or less. (This is unlike an actual disability, which doesn't have a time limit.)

- Downing's disability (whether actual or perceived) was a *motivating factor* if that disability played a part in the Department's decision to fire Downing.
- An *accommodation* is a modification to the work place that allows a person with a disability to perform the essential functions of the job or allows the person 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): job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; and other similar accommodations. Reasonable accommodation does not include creating a new position or bumping another employee in order to reassign a disabled employee.

Reasonable accommodation also does not necessarily mean the accommodation requested or preferred by Downing.

- *Undue hardship* means significant difficulty or expense to the Department. Some things to consider are:

- The nature and cost of the accommodation;
- The number, type, and location of the Department's various facilities;
- The financial resources of the Department's facility that would be involved in providing the accommodation; the number of employees at that facility; and the overall impact of the accommodation on that facility;
- The financial resources and size of the Department itself;
- The type of work the Department performs, including the structure and functions of the Department's workforce.

LIABILITY QUESTIONS

1. ~~What were the essential functions of Downing's job at the Department before he took leave?~~ _____

_____.

2. ~~Was it essential pre-leave that Downing lift fifty pounds or more?~~

Yes _____ No _____

3. ~~What were the essential functions of Downing's job at the Department after he returned from leave?~~ _____

_____.

4. ~~Was it essential post-leave that Downing lift fifty pounds or more?~~

Yes _____ No _____

5. ~~Based on your answers to Questions 1 through 4, compare the essential functions of Downing's job before and after he took leave. Consider whether the pre-leave and post-leave jobs were substantially similar in skill, effort, responsibility, and authority. Are there any material differences, or were the jobs substantially the same?~~

1. Were Downing's pre-leave and post-leave jobs equivalent?

Yes _____ No _____.

If you answered "no," would the Department have made the same changes to Downing's pre-leave job even if Downing had not taken FMLA leave?

Yes ____ No ____.

6. 2. When Downing returned from leave, was he able to perform the essential functions of his pre-leave job?

Yes ____ No ____

7. 3. Did Downing have an actual disability?

Yes ____ No ____

If you answered "yes," did the Department know about Downing's disability?

Yes ____ No ____

8. 4. Whether Downing was actually disabled or not, did Bob Haugen or David Justice regard Downing as having a disability?

Yes ____ No ____

9. 5. At the time Downing was fired, did his hip-related restrictions prevent him from being able to perform any essential job functions?

Yes ____ No ____

10. 6. Was Downing fired solely because of an actual or perceived disability?

Yes ____ No ____

If you answered "yes" to Question 10 6, skip Question 11 7.

~~11.~~ 7. Was Downing's actual or perceived disability a motivating factor in the Department's decision to fire Downing?

Yes ____ No ____

If you answered "yes," would the Department have fired Downing even if it had not considered his disability?

Yes ____ No ____

Answer the remaining Questions ~~12, 13, 14, 15, & 16~~ only if you found (see Question 7 3) that Downing was actually disabled and that the Department knew it.

~~12.~~ 8. After returning from leave, did Downing seek an accommodation for any disability?

Yes ____ No ____

~~13.~~ 9. At the time Downing was fired, could he have performed the essential functions of his job with a reasonable accommodation?

Yes ____ No ____

If you answered "yes," would providing the accommodation have created an undue hardship on the Department?

Yes ____ No ____

~~14.~~ Did the Department make a good faith effort to accommodate Downing after he returned from leave?

Yes _____ No _____

~~15. After Downing returned from leave, was a work schedule other than the new schedule possible without creating an undue hardship on the Department?~~

~~Yes _____ No _____~~

16. 10. If you conclude that Downing requested an accommodation (see Question 12 8), was he fired solely because he sought that accommodation?

Yes _____ No _____ Inapplicable _____

Attachment Two

- *Essential job functions* are the fundamental duties of Downing's job. Marginal functions are not essential functions of the job.
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- An *actual disability* is a physical or mental impairment that substantially limits one or more major life activities.
 - *Substantially limits* is a broad term. An impairment can be substantially limiting even though it doesn't prevent Downing from performing a major life activity. Impairments or effects of impairments that last (or are expected to last) less than six months may be substantially limiting. In deciding whether an impairment substantially limits a major life activity, you

should compare Downing's ability to perform the major life activity with an average person's ability.

- *Major life activities* include (but aren't limited to) performing manual tasks, walking, standing, lifting, bending, and working.
- Downing was *regarded as having a disability* if he had an actual or perceived physical impairment, regardless of whether the impairment limits or is perceived to limit a major life activity.
 - Downing cannot be regarded as having a disability if his impairment was transitory and minor.
 - A transitory impairment is one with an actual or expected duration of six months or less. (This is unlike an actual disability, which doesn't have a time limit.)

- Downing's disability (whether actual or perceived) was a *motivating factor* if that disability played a part in the Department's decision to fire Downing.
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Reasonable accommodation also does not necessarily mean the accommodation requested or preferred by Downing.

- *Undue hardship* means significant difficulty or expense to the Department. Some things to consider are:
 - The nature and cost of the accommodation;
 - The number, type, and location of the Department's various facilities;
 - The financial resources of the Department's facility that would be involved in providing the accommodation; the number of employees at that facility; and the overall impact of the accommodation on that facility;
 - The financial resources and size of the Department itself;
 - The type of work the Department performs, including the structure and functions of the Department's workforce.

LIABILITY QUESTIONS

1. Were Downing's pre-leave and post-leave jobs equivalent?
Yes ____ No ____.

If you answered "no," would the Department have made the same changes to Downing's pre-leave job even if Downing had not taken FMLA leave?

Yes ____ No ____.

2. When Downing returned from leave, was he able to perform the essential functions of his pre-leave job?
Yes ____ No ____

3. Did Downing have an actual disability?
Yes ____ No ____

If you answered "yes," did the Department know about Downing's disability?

Yes ____ No ____

4. Whether Downing was actually disabled or not, did Bob Haugen or David Justice regard Downing as having a disability?
Yes ____ No ____

5. At the time Downing was fired, did his hip-related restrictions prevent him from being able to perform any essential job functions?
Yes ____ No ____

6. Was Downing fired solely because of an actual or perceived disability?

Yes ____ No ____

If you answered "yes" to Question 6, skip Question 7.

7. Was Downing's actual or perceived disability a motivating factor in the Department's decision to fire Downing?

Yes ____ No ____

If you answered "yes," would the Department have fired Downing even if it had not considered his disability?

Yes ____ No ____

Answer the remaining Questions only if you found (see Question 3) that Downing was actually disabled and that the Department knew it.

8. After returning from leave, did Downing seek an accommodation for any disability?

Yes ____ No ____

9. At the time Downing was fired, could he have performed the essential functions of his job with a reasonable accommodation?

Yes ____ No ____

If you answered "yes," would providing the accommodation have created an undue hardship on the Department?

Yes ____ No ____

10. If you conclude that Downing requested an accommodation (see Question 8), was he fired solely because he sought that accommodation?

Yes ____ No ____ Inapplicable ____