UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NICK PHILKO,

Plaintiff,

Case No: 13-11485
Honorable Arthur J. Tarnow

v.

SET SEG INSURANCE SERVICES AGENCY, INC.,

Defendant.
_____/

JURY INSTRUCTIONS

1. PRELIMINARY INSTRUCTIONS

1.1. Preliminary Instructions — Description of Case; Summary of Applicable Law

In this case, Nick Philko claims that SET SEG Insurance Company terminated his employment because of his seizure disorder and the liability it assumed came with it; SET SEG denies this claim and contends that Nick Philko was terminated because of his performance at client meetings. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements that Nick Philko must prove to make his case:

The Americans with Disabilities Act of 1990 provides that an employer may not "discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." Nick Philko must prove that (1) he was protected under the ADAAA, (2) SET SEG knew he was protected, (3) SET SEG took an adverse action against him and (4) there was a causal connection between the adverse action and Nick Philko's protected status. Finally, Nick Philko must prove that SET SEG's articulated reason for the adverse employment action is a pretext for discrimination.

1.2. Preliminary Instructions – Jury Deliberation; Jurors as Triers of Fact

The responsibility of the jury is to determine the facts. You are the judges of the facts. You determine the weight, effect, and value of the evidence, as well as the credibility of the witnesses. You must consider and weigh the testimony of all witnesses who appear before you, and you determine whether to believe any witnesses and the extent to which any witness should be believed. It is your responsibility to consider any conflicts in testimony which may arise during the course of the trial. Your decision as to any fact in the case is final. On the other hand, it is your duty to accept the law as I instruct you.

1.3. Preliminary Instructions – Jury Must Only Consider Evidence; What Evidence Is / Prohibited Actions by Jurors

(1) Your determination of the facts in this case must be based only upon the evidence admitted during the trial. Evidence consists of the sworn testimony of the witnesses. It also includes exhibits, which are documents or other things introduced into evidence.

(2) There are some things presented in the trial that are not evidence, and I will now explain what is not evidence:

(a) The lawyers' statements, commentaries, and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. However, an admission of a fact by a lawyer is binding on his client.

(b) Questions by the lawyers, you or me to the witnesses are not evidence. You should consider these questions only as they give meaning to the witnesses' answers.

(c) My comments, rulings, and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal

opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

(3) You are not to consider anything about the case from outside of the courtroom as it is not evidence admitted during the trial. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because information obtained outside of the courtroom does not have to meet these standards, it could give you incorrect or misleading information that might unfairly favor one side, or you may begin to improperly form an opinion on information that has not been admitted. This would compromise the parties' right to have a verdict rendered only by the jurors and based only on the evidence you hear and see in the courtroom. To be fair to both sides, you must follow these instructions. I will now describe some of the things you may not consider from outside of the courtroom:

(a) Newspaper, television, radio and other news reports, emails, blogs and social media posts and commentary about this case are not evidence.

(b) Opinions of people outside of the trial are not evidence. You are not to discuss or share information, or answer questions, about this case at all in any manner with anyone until you have been discharged as a juror. Don't allow anyone to say anything to you or say anything about this case in your

presence. If anyone does, advise them that you are on the jury hearing the case, ask them to stop, and let me know immediately.

(c) Research, investigations and experiments not admitted in the courtroom are not evidence. You must not do any investigations on your own or conduct any research or experiments of any kind. You may not research or investigate through the Internet or otherwise any evidence, testimony, or information related to this case, including about a party, a witness, an attorney, a court officer, or any topics raised in the case.

(4) To avoid even the appearance of unfairness or improper conduct on your part, you must follow the following rules of conduct:

(a) While you are in the courtroom and while you are deliberating, you are prohibited altogether from using a computer, cellular telephone or any other electronic device capable of making communications. You may use these devices during recesses so long as your use does not otherwise violate my instructions.

(b) Until I have discharged you as a juror, you must not talk to any party, lawyer, or witness even if your conversation has nothing to do with this case. This is to avoid even the appearance of impropriety.

(5) If you discover that any juror has violated any of my instructions about prohibited conduct, you must report it to me.

(6) After you are discharged as a juror, you may talk to anyone you wish about the case.

1.4. Preliminary Instructions – Direct and Circumstantial Evidence

There are two types of evidence that you may use in reaching your verdict. One type of evidence is called “direct evidence.” An example of "direct evidence" is when a witness testifies about something that the witness knows through his own senses — something the witness has seen, felt, touched or heard or did. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining. Another form of direct evidence is an exhibit where the fact to be proved is its existence or current condition.

The other type of evidence is circumstantial evidence. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

You should consider both kinds of evidence that are presented to you. The law makes no distinction in the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

1.5. Preliminary Instructions — 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 are the sole judges of the credibility of the witnesses. "Credibility" means whether a witness is worthy of belief. You may believe everything a witness says or only part of it or none of it. In deciding what to believe, you may consider a number of factors, including the following:

(1) the opportunity and ability of the witness to see or hear or know the things the witness testifies to;

(2) the quality of the witness's understanding and memory;

(3) the witness's manner while testifying;

(4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice;

(5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence;

(6) how reasonable the witness's testimony is when considered in the light of other evidence that you believe; and

(7) any other factors that bear on believability.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

1.6. Preliminary Instructions — Preponderance of the Evidence

This is a civil case. Nick Philko is the party who brought this lawsuit. SET SEG is the party against which the lawsuit was filed. Nick Philko has the burden of proving his case by what is called the preponderance of the evidence. That means Nick Philko has to prove to you, in light of all the evidence, that what he claims is more likely so than not so. To say it differently: if you were to put the evidence favorable to Nick Philko and the evidence favorable to SET SEG on opposite sides of the scales, Nick Philko would have to make the scales tip somewhat on his side. If Nick Philko fails to meet this burden, the verdict must be for SET SEG. If you find after considering all the evidence that a claim or fact is more likely so than not so, then the claim or fact has been proved by a preponderance of the evidence.

In determining whether any fact has been proved by a preponderance of 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 received in evidence, regardless of who may have produced them.

On certain issues, called affirmative defenses, SET SEG has the burden of proving the elements of the defense by a preponderance of the evidence. I will instruct you on the facts that will be necessary for you to find on this affirmative defense. An affirmative defense is proven if you find, after considering all evidence in the case, that SET SEG has succeeded in proving that the required facts are more

likely so than not so.

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard of proof and it applies only to criminal cases. It does not apply in civil cases such as this. So you should put it out of your mind.

2. CAUTIONARY INSTRUCTIONS

2.1. Cautionary Instructions - Faithful Performance of Duties; Jury to Follow Instructions

Members of the jury, the evidence and argument in this case have been completed and I will now explain the law that applies to this case.

Faithful performance by you of your duties is vital to the administration of justice.

The law you are to apply is contained in these instructions, and it is your duty to follow them. In other words, you must take the law as I give it to you. You must consider them as a whole and not pick out one or some instructions and disregard others.

Following my instructions, you will go to the jury room and deliberate and decide on your verdict.

2.2. Cautionary Instructions - Facts to Be Determined from Evidence

It is your duty to determine the facts from evidence received in open court. You are to apply the law to the facts and in this way decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

2.3. Cautionary Instructions - Duties of the Jury

Counsel may have referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you are of course to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinions about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

2.4. Cautionary Instructions - Admission of Evidence

The evidence you are to consider consists of testimony of witnesses and exhibits offered and received. The admission of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit to which an objection was sustained or any testimony or exhibit which was ordered stricken.

2.5. Cautionary Instructions - Corporations Entitled to Unprejudiced Treatment

The corporation, defendant, in this case, is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and it is your duty to decide the case with the same impartiality you would use in deciding a case between individuals.

2.6. Cautionary Instructions - Whether Party Is Insured Is Irrelevant

Whether a party is insured has no bearing whatever on any issue that you must decide. Don't even discuss or speculate about insurance.

2.7. Cautionary Instructions - Evidence Introduced for a Limited Purpose

Whenever evidence was received for a limited purpose, you must not consider it for any other purpose.

2.8. Cautionary Instructions - Jury to Consider All the Evidence

In determining whether any fact has been proved, you shall consider all of the evidence bearing on that fact without regard to which party produced the evidence.

2.9. Cautionary Instructions - Circumstantial Evidence

Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove or disprove a proposition. You must consider all the evidence, both direct and circumstantial.

2.10. Cautionary Instructions - Jurors May Take into Account Ordinary Experience and Observations

You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of any particular fact in this case, that knowledge may not be used as evidence.

2.11. Cautionary Instructions - Prior Inconsistent Statement of Witness

If you decide that a witness said something earlier that is inconsistent with what the witness said at this trial, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case.

However, there are exceptions. You may consider an earlier statement as proof of the facts in this case if:

(a) the statement was made by the plaintiff, the defendant, or an agent or employee of either party; or

(b) the statement was given under oath subject to the penalty of perjury at a trial, hearing, or in a deposition; or

(c) the witness testified during the trial that the earlier statement was true.

2.12. Cautionary Instructions – Inferences Defined

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case.

2.13. Cautionary Instructions – "If You Find" or If You Decide"

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

2.14. Cautionary Instructions - Stipulations

Statements and arguments of the lawyers are not evidence in the case, unless made as an admission or stipulation of fact. A "stipulation" is an agreement between both sides that certain facts are true. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

3. CREDIBILITY AND WEIGHT

3.1. Credibility and Weight - Credibility of Witnesses

You are the judges of the facts in this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so you may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in the light of all the evidence.

3.2. Credibility and Weight - Witness Who Has Been Interviewed by an Attorney

It has been brought out that a lawyer or a representative of a lawyer has talked with a witness. There is nothing wrong with a lawyer talking with a witness for the purpose of learning what the witness knows about the case and what testimony the witness will give.

3.3. Credibility and Weight - Weighing Conflicting Evidence—Number of Witnesses

Although you may consider the number of witnesses testifying on one side or the other when you weigh the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing.

3.4. Credibility and Weight - Consideration of Deposition Evidence

During the trial, you heard testimony from a deposition. A deposition is the sworn testimony of a party or witness taken before trial. All parties and their lawyers had the right to be present and to ask questions.

You are to give this evidence the same consideration as you would have given it had the witness testified in open court.

4. AMERICANS WITH DISABILITIES ACT

4.1. Americans With Disabilities Act — Introduction

In this case Plaintiff Nick Philko makes a claim based on a federal law known as the Americans with Disabilities 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 essential functions of the job. Terms such as "disability", "qualified individual" and "reasonable accommodations" are defined by the ADA and I will instruct you on the meaning of those terms.

Mr. Philko's claim under the ADA is that he was terminated by the defendant, SET SEG Insurance Company, on the basis that it perceived Mr. Philko as being disabled.

SET SEG denies Mr. Philko's claims. Further, SET SEG asserts that it had a sufficient basis to terminate Mr. Philko's employment.

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 give you, rather than using your own opinion of what these terms mean.

4.2. Americans With Disabilities Act — General Standard

In this case Mr. Philko is alleging that his employment was terminated on the basis of a disability or perceived disability.

The Americans with Disabilities Act provides that SET SEG shall not discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring advancement, or discharge of employees, employee compensation, job training, and other terms conditions, and privileges of employment.

In order for Mr. Philko to prove discrimination, he must demonstrate that but for his disability or perceived disability, he would not have been terminated. Mr. Philko does not have to prove that his disability or perceived disability was the sole reason for the company to terminate his employment. But Mr. Philko cannot prove discrimination "merely by showing that [his] disability was *a motivating factor"* in his termination. Rather, but for consideration of his disability or perceived disability, he would not have been terminated.

Plaintiff requests the additional instruction

Although Nick must prove that SET SEG acted with the intent to discriminate on the basis of a disability, Nick is not required to prove that SET SEG acted with the particular intent to violate Nick's federal rights under the ADA. Moreover, Nick is not required to produce direct evidence of intent, such as statements admitting

discrimination. Intentional discrimination may be inferred from the existence of other facts.

SET SEG has given a nondiscriminatory reason for terminating Nick. If you disbelieve SET SEG's explanations for its conduct, then you may, but need not, find that Nick has proved intentional discrimination. In determining whether SET SEG's stated reason for its actions was a pretext, or excuse, for discrimination, you may not question SET SEG's business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of SET SEG or believe it is harsh or unreasonable. You are not to consider SET SEG's wisdom. However, you may consider whether SET SEG's reason is merely a cover-up for discrimination.

Ultimately, you must decide whether SET SEG would not have terminated Mr. Philko but for his disability or perceived disability. It is not necessary that Mr. Philko's disability or perceived disability be the only reason for SET SEG's decision to terminate him. But you must find that SET SEG would not have made the decision but for Mr. Philko's disability or perceived disability.

4.3. Americans With Disabilities Act —ADA Case Framework

In order to prove what is called a prima facie case, Mr. Philko must show that (1) he had a disability or SET SEG regarded him as disabled, (2) he was otherwise qualified for the job, with or without reasonable accommodation, and (3) he suffered an adverse action on the basis of his disability or perceived disability.

Once Mr. Philko presents a prima facie case of discrimination, the burden shifts to SET SEG to articulate a legitimate, non-discriminatory reason for its actions.

If you find that SET SEG offers a legitimate, non-discriminatory reason for the termination, then the burden shifts back to Mr. Philko to show that the stated reason is a pretext for unlawful discrimination.

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

1. "Disability" — Read Instruction 4.4.1
2. "Perceived Disability" — Read Instruction 4.4.2
3. "Qualified" — Read Instruction 4.4.3
4. "Essential Job Functions" — Read Instruction 4.4.4
5. "But For" Causation – Read Instruction 4.4.5

4.4. Americans With Disabilities Act — Definitions

4.4.1. Element One - Disability

Under the ADA, the term "disability" means a physical or mental impairment that "substantially limits" a "major life activity." I will now define some of these terms in more detail. Again, I remind you to consider the specific definitions I give you, and not to use your own opinions as to what these terms mean.

"Physical/Mental Impairment"

The term "physical impairment" means any condition that prevents the body from functioning normally. The term "mental impairment" means any condition that prevents the mind from functioning normally.

"Major Life Activities"

Under the ADA, the term "disability" includes a physical impairment that substantially limits a major life activity. Major life activities are activities that are of central importance to everyday life. Major life activities include the operation of major bodily functions. I instruct you that seeing, hearing, walking, speaking, learning, reading, concentrating, thinking, and communicating and the operation of a major bodily function, including but not limited, the nervous system, and the brain are major life activities within the meaning of the ADA.

"Substantially Limiting"

Under the ADA, an impairment "substantially limits" a person's ability to see, hear, walk, speak, learn, read, concentrate, think, and communicate and the

operation of a major bodily function, including but not limited, the nervous system, and the brain if it prevents or restricts him from seeing, hearing, walking, speaking, learning, reading, concentrating, thinking, and/or communicating and the operation of a major bodily function, including but not limited, the nervous system, and the brain compared to the average person in the general population.

To decide if Mr. Philko's alleged impairment substantially limits his ability to see, hear, walk, speak, learn, read, concentrate, think, and/or communicate and the operation of a major bodily function, including but not limited, the nervous system, and the brain, you should consider the nature of the impairment and how severe it is, how long it is expected to last, and its expected long-term impact.

If you find that Mr. Philko's alleged impairment is a substantial limitation, it does not matter that it can be corrected by the use of such devices as a hearing aid, medication, or prosthetics.

Only impairments with a permanent or long-term impact are disabilities under the ADA. Temporary injuries and short-term impairments are not disabilities. Even so, some disabilities are permanent, but only appear from time to time. For example, if a person has a mental or physical disease that usually is not a problem, but flares up from time to time, that can be a disability if it would substantially limit a major life activity when active.

If you find that Mr. Philko's alleged impairment substantially limits one major

life activity, you must find that it is a disability even if it does not limit any other major life activity.

The name of the impairment or condition is not determinative. What matters is the specific effect of an impairment or condition on Mr. Philko's life. The primary question for you to decide is whether SET SEG has complied with its obligations under the ADA.

4.4.2. Element Two - Perceived Disability

A person is perceived or regarded as disabled within the meaning of the ADA if the employer mistakenly believes that the person's actual, non-limiting impairment substantially limits one or more major life activities.

4.4.3. Element Three - Qualified Individual

Under the ADA, Mr. Philko must establish that he was a "qualified individual." This means that Mr. Philko must show that he had the skill, experience, education, and other requirements for the Account Executive position and could do the job's "essential functions."

4.4.4. Element Four - Essential Job Functions

The term "essential job functions" means the fundamental job duties of the employment position plaintiff holds or for which plaintiff has applied. The term "essential functions" does not include the marginal functions of the position.

Along with all the other evidence in the case, you may consider the following in determining the essential functions of an employment position:

1. SET SEG's judgment as to which functions of the job are essential;

2. Written job descriptions prepared for advertising or used when interviewing applicants for the job;

3. The amount of time spent on the job performing the function in question;

4. The 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; and

7. The current work experience of persons in similar jobs.

4.4.5. Element Five - "But For" Causation

In order for Mr. Philko to prove discrimination, he must demonstrate that "but for" his disability or perceived disability, he would not have been terminated.

Mr. Philko does not have to prove that his disability or perceived disability was the sole reason for the company to terminate his employment. But Mr. Philko cannot prove discrimination merely by showing that his alleged disability was a motivating factor in his termination. Rather, Mr. Philko must prove that SET SEG terminated him "because of" his perceived disability.

In other words, Mr. Philko's alleged disability, or the alleged perception that he was disabled, must have been the "but-for" cause of Mr. Philko's termination.

4.5. Americans With Disabilities Act — Business Judgment

You must determine whether defendant discriminated against the plaintiff. You are not to substitute your judgment for the defendant's business judgment, or decide this case based upon what you would have done.

However, you may consider the reasonableness or lack of reasonableness of defendant's stated business judgment along with all the other evidence in determining whether defendant discriminated or did not discriminate against the plaintiff.

If Mr. Philko establishes the above, the burden then shifts to SET SEG to state a legitimate non-discriminatory reason for the termination. SET SEG only has to identify a non-discriminatory reason; it does not have to prove the absence of discrimination.

Your task is to determine whether defendant discriminated against the plaintiff. You may not substitute your judgment for the defendant's business judgment, or decide this case based upon what you would have done. An employer may discharge an employee for any other reason, good or bad, fair or unfair, and you must not second-guess that decision or permit any sympathy for Mr. Philko to lead you to substitute your own judgment for that of SET SEG. This is true, even if you personally may not approve of the action taken and would have acted differently under the circumstances. The law does not require employers to make perfect decisions, nor does it forbid them from making decisions that others may disagree

with; it only for bids them for making decisions for impermissible or discriminatory reasons.

However, you may consider the reasonableness or lack of reasonableness of defendant's stated business judgment along with all the other evidence in determining whether defendant discriminated or did not discriminate against the plaintiff.

4.6. Americans With Disabilities Act — Pretext

Pretext is defined as a reason that you give to hide the real reason for doing something. Pretext may be shown by identifying "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the purported reasons that [you] could find them unworthy of credence and hence infer that the [SET SEG] did not act for the asserted non-discriminatory reasons."

Once SET SEG states its legitimate non-discriminatory reason, then Mr. Philko has the burden to show that the stated reason is a pretext for unlawful discrimination.

Pretext is defined a reason that you give to hide the real reason for doing something. Pretext may be shown by identifying "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the purported reasons that [you] could find them unworthy of credence and hence infer that the [SET SEG] did not act for the asserted non-discriminatory reasons.

4.7. Americans With Disabilities Act — Direct Threat

It is a defense to the plaintiff's ADA claim if the plaintiff posed a direct threat to the health and safety of others. The defendant may require, as a qualification for the position, that an individual not pose a "direct threat" to the health or safety of others or himself. A health or safety risk can only be considered if it is a significant risk of substantial harm. Assessment of the existence of a direct threat must be based on valid and objective evidence and not speculation.

The defendant claiming the direct threat defense must prove by a preponderance of the evidence that the plaintiff posed a direct threat to the health or safety of others or himself that could not be eliminated by a reasonable accommodation.

Factors that may be considered in determining whether an individual poses a direct threat to the health and safety of others or himself are:

1. The nature and severity of the potential harm;
2. The duration of the potential harm;
3. The imminence of the potential harm; and
4. The probability of the harm occurring.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find

that the defendant has proved this affirmative defense, in which event your verdict should be for the defendant.

This defense does apply when the direct threat is to the disabled individual.

4.8. At Will Instruction

An employment relationship is terminable at will unless an employer has agreed otherwise or the employer's policies provide otherwise. Terminable at will means that the employment relationship may be terminated by either party at any time, with or without cause, for any reason or for no reason at all. However, the employment relationship is not terminable at will if the Plaintiff has convinced you that he was terminated on the basis of his disability.

5. DEFINITION OF BURDEN OF PROOF

5.1. Burden of Proof - Definition

(a) I have just listed for you the propositions on which Nick has the burden of proof. For Nick to satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true.

You must consider all the evidence regardless of which party produced it.

(b) On the of mitigation of damages, SET SEG has the burden of proof. For SET SEG to satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true.

You must consider all the evidence regardless of which party produced it.

5.2. Burden of Proof - Preponderance of the Evidence

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighted. Quality may, or may not, be identical with quantity.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all the evidence, regardless of who produced it.

If the weight of the evidence is equally balanced, or if you are unable to determine which side of an issue has the preponderance, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

6. DAMAGES

6.1. Damages - Compensatory Damages

If you decide that the plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates him for each of the elements of damage which you decide has resulted from the defendant's action, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by the plaintiff to the present time:

(a) physical pain and suffering;

(b) mental anguish;

(c) denial of social pleasure and enjoyments;

(d) embarrassment, humiliation or mortification;

(e) the loss of earning capacity.

You should also include each of the following elements of damage which you decide plaintiff is reasonably certain to sustain in the future:

(a) physical pain and suffering;

(b) mental anguish;

(c) denial of social pleasure and enjoyments;

(d) embarrassment, humiliation or mortification;

(e) the loss of earning capacity.

If any element of damage is of a continuing nature, you shall decide how long it may continue.

Which, if any, of these elements of damage has been proved is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate plaintiff for his damages, and not to punish the defendant.

6.2. Damages – Punitive Damages

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

The plaintiff has the burden of proving by clear and convincing evidence that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that the defendant's conduct that harmed the plaintiff was malicious, oppressive or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff.

If you find that punitive damages are appropriate, you must use reason in

setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

6.3. Damages – Back Pay

If you determine by the greater weight of the evidence that SET SEG discriminated against Mr. Philko because of Mr. Philko's disability, then you must determine an amount of damages that SET SEG's actions have caused Mr. Philko. Damages must be reasonable. If you should find that Mr. Philko is entitled to a verdict, you may award Mr. Philko only such damages as you find by the greater weight of the evidence will reasonably compensate Mr. Philko for such injury and damage as you find, from the greater weight of the evidence, that Mr. Philko has sustained as a result of the claims you find that she has proven. Mr. Philko must prove the amount of her damages, if any, by the greater weight of the evidence. You may not award damages based on sympathy, speculation or guesswork.

You may award as actual damages an amount that reasonably compensates Plaintiff for any lost wages and benefits that he would have received from Defendant from the date of his termination, February 1, 2012 through the date of the verdict. You must deduct from this sum whatever wages Plaintiff earned from other employment during this period and whatever wages and benefits you find that Defendant has proven Plaintiff failed to earn from substantially comparable employment.

6.4. Damages - Front Pay

You may determine separately a monetary amount equal to the present value of any future wages and benefits that Nick would reasonably have earned from SET SEG had Nick not been terminated for the period from the date of your verdict through a reasonable period of time in the future. In determining the amount of the front pay award, the following factors are considered: (1) the age of the plaintiff; (2) the reasonable amount of time for the plaintiff to obtain comparable position; (3) the amount of time the plaintiff had worked at the employer or the previous employers; and (4) the amount of time the employees in the similar positions had worked at employer. From this figure you must subtract the amount of earnings and benefits Nick will receive from other employment during that time. Nick has the burden of proving these damages by a preponderance of the evidence.

6.5. Damages - Personal Injury Action: Definition of Economic Loss and Noneconomic Loss Damages; Separation of Future Damages by Year

In this case, you must determine a separate amount for each year in the future for which plaintiff will sustain damages.

You will also be required to separate the two types of damages available in this case. The first type, "economic loss" damages, consists of such things as medical expenses, loss of wages or lost earning potential, and miscellaneous expenses. The second type, "noneconomic loss" damages, means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, and other noneconomic loss.

6.6. Damages - Future Damages (Personal Injury Action)—Reduction to Present Cash Value

If you decide that plaintiff is entitled to an award of future damages, you should award the full value of future damages as you determine them. You should reduce any award of future damages to present cash value.

6.7. Damages - Interest—As Part of Damages

If you decide plaintiff has suffered damages, you should determine when those damages began, and add interest from then to April 2, 2013 at a rate of 2.1 percent per year or at a rate per year that you decide is appropriate.

6.8. Damages - Mitigation of Damages—Failure to Exercise Ordinary Care

A person has a duty to use ordinary care to minimize his or her damages after he has been injured. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of his damages which resulted from his failure to use such care.

6.9. Damages - Effect of Inflation on Future Damages

If you decide that the plaintiff will sustain damages in the future, you may consider the effect of inflation in determining the damages to be awarded for future losses.

7. GENERAL INSTRUCTIONS FOR USE AT END OF TRIAL

7.1. General Instructions For Use At End of Trial — Deliberations

When you retire to the jury room to deliberate, you may take with you these instructions, your notes, and the exhibits that the Court has admitted into evidence. You should select one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

You have two main duties as jurors. The first is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if, under the appropriate burden of proof, the parties have established their claims. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

As jurors, you have a duty to consult with each other and to deliberate with the

intention of reaching a verdict. Each of you must decide the case for yourself, but only after a full and impartial consideration of all of the evidence with your fellow jurors. Listen to each other carefully. In the course of your deliberations, you should feel free to re-examine your own views and to change your opinion based upon the evidence. But you should not give up your honest convictions about the evidence just because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

When you start deliberating, do not talk to the jury officer, to me or to anyone but each other about the case. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a cell phone, smart phone, or computer of any kind; the internet, any internet service, or any text or instant messaging service, like Twitter; or any internet chat room, blog, website, or social networking service, such as Facebook, MySpace, LinkedIn, or YouTube, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. Information that you might see on

the internet or on social media has not been admitted into evidence and the parties have not had a chance to discuss it with you. You should not seek or obtain such information and it must not influence your decision in this case.

If you have any questions or messages for me, you must write them down on a piece of paper, have the foreperson sign them, and give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take some time to get back to you.

One more thing about messages. Never write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that a certain number is voting one way or another. Your votes should stay secret until you are finished.

Your verdict must represent the considered judgment of each juror. In order for you as a jury to return a verdict, each juror must agree to the verdict. Your verdict must be a majority of 6 of the 8 jurors.

A form of verdict has been prepared for you. It has a series of questions for you to answer. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will fill it in, and have your foreperson date and sign the form. You will then return to the courtroom and your foreperson will give your verdict. Unless I direct you otherwise, do not reveal your answers until

you are discharged. After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so.

The written form of the instructions on the law I have just given you will be available to you in the jury room. These instructions, which are contained in a three-ring binder, are placed in the charge of the foreperson you elect. You are invited to use these instructions in any way that will assist you in your deliberations and in arriving at a verdict. You may pass these instructions from juror to juror for individual reading and consideration, but you may not remove any one of the individual sheets from the binder. These written instructions, which are in exactly the same language as I have given them to you orally, represent the law that is applicable to the facts, as you find the facts to be. There is a table of contents on the first page of these instructions. You may readily locate any particular instruction by referring to this list.

Once again, I want to remind you that nothing about my instructions and nothing about the form of verdict is intended to suggest or convey in any way or manner what I think your verdict should be. It is your sole and exclusive duty and responsibility to determine the verdict.

7.2. General Instructions For Use At End of Trial — Number of Witnesses

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

7.3. General Instructions For Use At End of Trial — Read-Backs of Trial Testimony

At your request, I have decided to have a transcript of [describe the testimony] read [provided] to you in order to assist you in your deliberations. I remind you that you must focus on all of the testimony and evidence presented at the trial. You may not give undue weight to the testimony that is read back to you [provided to you].

7.4. General Instructions For Use At End of Trial — Deadlock

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so consistent with your individual judgments. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you must be open to their opinions. You should not be influenced to vote a certain way, however, by the single fact that a majority of the jurors, or any of them, will vote in a certain way. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinions of the other jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that those views are wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to reexamine your own views.

Remember that you are not partisans; you are judges — judges of the facts. Your only interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

If you should fail to agree on a verdict, the case is left open and must be resolved at a later time. There is no reason to think that another trial would be

conducted in a better way or that a different jury would decide it any better. Any future jury must be selected in the same manner and from the same source as you.

We try cases to dispose of them and to reach a common conclusion if it is consistent with the conscience of each member of the jury. I suggest that, in deliberating, you each recognize that you are not infallible, that you listen to the opinions of the other jurors and that you do so carefully with a view to reaching a common conclusion, if you can. You may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberation.