IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, §
§
Plaintiff, § ORIGINAL
§
v. § CIVIL ACTION NO. 3:04-CV-1729-P
§
§
SERVICE ELECTRONICS, INC., §
§
Defendant. §

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of rule stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. A corporation and all other persons are equal before the law and must be treated as

equals in a court of justice. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court in these instructions, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A governmental entity and a corporation are both entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including governmental entities and corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporate entity is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee acting in a supervising or managerial capacity of a corporate entity may bind that entity by his or her acts and declarations made while acting within the scope of his or her duties as an employee of that corporate entity. An "employee" is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work and not merely the result sought to be accomplished. A party is an "agent" of another party if the party acts with the other party's authority. Authority for another to act for a party must arise from the party's agreement that the other act on behalf and for the benefit of the party. If a party so authorizes another to perform an act, that other party is also authorized to do whatever else is proper, usual, and necessary to perform the act expressly authorized.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses, the exhibits admitted in the record, and stipulated facts. Stipulated facts must be accepted as proven facts. Any evidence as to which an objection was sustained by the Court and any evidence ordered stricken by the Court, must be entirely disregarded.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in this case. One is "direct" evidence — such as testimony of an eyewitness. The other is "indirect" or "circumstantial" evidence — the proof of a chain of circumstances which points to the existence or nonexistence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you should consider his or her relationship to Plaintiff or to Defendant; his or her interest, if any, in the outcome of the case; his or her manner of testifying; his or her opportunity to observe or acquire knowledge concerning the facts about which he or she testified; his or her candor, fairness and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

During the trial of this case, certain testimony has been read to you by way of depositions, consisting of sworn answers to questions asked of the witnesses in advance of trial. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way, insofar as possible, as if the witness had been present and had given from the witness stand the same testimony as given in the deposition.

I will instruct you as to which party has the burden of proof on each essential element of its claim in the case. The party having the burden of proof on each issue of fact must prove that fact by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force

and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have introduced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for Defendant as to that claim.

A witness may be "impeached" or discredited by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time he or she said or did something, or failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, it is in your exclusive province to give the testimony of that witness such credibility or weight, if any, as you think it deserves.

In answering the questions which I will submit to you, answer "yes" or "no" unless otherwise instructed. A "yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no."

After I have completed reading these instructions and reviewing the verdict form and jury questions with you, counsel will have the opportunity to make their closing arguments.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that all members of the jury agree to it. You therefore may not enter into an agreement to be bound by a majority or any vote other than a unanimous one.

Remember at all times that you are not partisans. Rather, you are judges — judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one juror to act as your presiding officer who will preside over your deliberations and will be your spokesperson here in Court. A verdict form has been prepared for your convenience. Your presiding officer will sign in the space provided below after you have reached your verdict.

If, during your deliberations, you wish to communicate with the Court, you should do so only in writing by a note handed to the Deputy Marshal and signed by the presiding officer. During your deliberations, you will set your own work schedule, deciding for yourselves when and how frequently you wish to recess and for how long.

After you have reached your verdict, you will return these instructions together with your written answers to the questions that I will submit to you. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Date: February 7th, 2006.

Jorge A. Solis

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

STIPULATIONS OF FACT

The parties have stipulated, or agreed, that the following are facts:

1. Defendant is an employer, as that term is defined by the ADA.
2. Defendant has more than 200 employees.
3. Sharon Mejia has a hearing impairment: without her hearing aids, she has 96 percent hearing loss in her left ear; and 86 percent loss in her right ear.
4. Even with her hearing aids, Sharon Mejia's hearing loss is characterized as "moderately severe" to "severe."
5. Sharon Mejia is disabled, as defined by the ADA based on her hearing impairment.
6. Sharon Mejia applied for a position as a material handler/data entry on or about September 13, 2002.
7. Sharon Mejia came to Service Electronics to interview for the material handler/data entry position through a temporary services company, Sterling Personnel Services, Inc.
8. Kristi Phillips is an employee of Sterling Personnel Services (not Service Electronics) who helped coordinate Sharon Mejia's interview with Service Electronics.
9. Service Electronics made the final hiring decisions regarding temporary applicants – not Sterling Personnel Services.
10. The position for which Sharon Mejia applied was a temporary position with no set term of employment.

11. The position for which Sharon Mejia applied paid $9.50 per hour.

12. Sharon Mejia was not selected for the material handler/data entry position.

13. Angelita Anguiano and Guadalupe Santoya were selected for the material handler/data entry position.

14. Sharon Mejia obtained a full-time data entry position with Antech Diagnostics on or about January 29, 2003.

15. Sharon Mejia initially earned approximately $9.36 per hour with Antech Diagnostics; she currently earns approximately $9.73 per hour.

You must now treat these as facts as having been proved for the purpose of this case.

AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990, often called "the ADA," makes it unlawful for any employer to discriminate against a qualified individual with a disability because of his or her disability with respect to job application procedures, hiring, employee compensation or any other term, condition and privilege of employment. The law is intended to eliminate discrimination in the workplace. The ADA was designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to individuals without disabilities.

The Equal Employment Opportunity Commission, or EEOC, is an agency of the United States charged with processing and investigating complaints regarding violations of the Americans with Disabilities Act.

It is unlawful to fail or to refuse to hire a qualified applicant for a position because of that applicant's disability. To succeed in this case, the EEOC must prove the following three items by a preponderance of the evidence:

(1) Sharon Mejia has a disability;

(2) Sharon Mejia was qualified for the position of Material Handler/Data Entry at the Defendant's worksite;

(3) Defendant failed or refused to hire Sharon Mejia for the position of Material Handler/Data Entry because of her disability.

Defendant has conceded that elements (1) and (2) are met, in that Sharon Mejia has a disability and was qualified for the position of Material Handler/Data Entry.

Plaintiff must prove that Sharon's Mejia's disability was a motivating factor that prompted Service Electronics not to hire her. It is not necessary for the Plaintiff to prove that disability was the sole or exclusive reason for Service Electronics' decision. It is sufficient if the Plaintiff proves that the alleged disability was a determining factor that made a difference in the employer's decision.

You should be mindful, however, that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's disability. So far as you are concerned in this case, an employer may refuse to hire or otherwise adversely affect 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 the employee to lead you to substitute your own judgment for that of Service Electronics even though you personally may not approve of the action taken and would have acted differently under the circumstances.

PROOF OF DISABILITY DISCRIMINATION

In proving that Sharon Mejia was discriminated against based on her disability, the EEOC does not have to prove that Ms. Mejia's disability was the only reason Defendant failed or refused to hire Ms. Mejia. The EEOC need only prove that Ms. Mejia's disability was a "motivating factor" in the Defendant's decision. The term "motivating factor" means a consideration that moved the Defendant toward its decision. In showing that Ms. Mejia's disability was a motivating factor, you need not determine that Ms. Mejia's disability was the sole motivation or even the primary motivation for the Defendant's decisions. The EEOC need only prove that Ms. Mejia's disability was a motivating factor in the Defendant's decision even though other factors may also have motivated the Defendant.

In determining whether discrimination on the basis of Ms. Mejia's disability was the true reason for the Defendant's decision not to hire her, you should consider whether the reasons offered by the Defendant for this decision are credible. If you find that the reason presented by the Defendant is not worthy of belief, then you may, but are not required to, conclude that the stated reason is a "pretext" or a cover-up for disability discrimination. Pretext means that the reason offered by the company is actually a cover-up or subterfuge for discrimination. Pretext can be shown by introducing evidence that contradicts or disproves the Defendant's stated reason. In making such a finding, you may consider to what extent, if any, the Defendant's reason has remained consistent or has changed during the course of the EEOC investigation and judicial process.

You may conclude that Ms. Mejia's disability was the true reason for Defendant's failure to hire her. This conclusion may be based solely upon your determination that the Defendant's explanations are not believable, or upon other factors that convince you that, more likely than not, discrimination based on Ms. Mejia's disability was the true reason for the failure to hire. If you find that Ms. Mejia's disability was the true reason for the Defendant's failure to hire her, then you must find in favor of the EEOC.

As with all findings and conclusions you reach, your ultimate findings of whether the Defendant discriminated against Ms. Mejia because of her disability must be based upon the evidence you have heard and seen in this trial. You may not speculate as to other reasons the Defendant may have had for its decision which are not supported by evidence.

QUESTION NO. 1

Do you find that the EEOC has proven, by a preponderance of the evidence, that Sharon Mejia's disability was a motivating factor in Service Electronics' decision to not hire her for a temporary position?

Answer "Yes" or "No."

ANSWER: NO

If you answer "Yes," then proceed to Question No. 2.

If you answer "No," do not proceed to any additional questions.

QUESTION NO. 2

If you have found that Sharon Mejia's disability was a motivating factor in its decision to not hire her for a temporary position, do you nevertheless find that Service Electronics has proven, by a preponderance of the evidence, that it would not have hired her anyway for reasons unrelated to her disability?

Answer "Yes" or "No."

ANSWER: _____

If you answer "No," then proceed to Question No. 3.

If you answer "Yes," do not proceed to any additional questions.

BACKPAY DAMAGES

If you find by a preponderance of the evidence that Defendant refused to hire Sharon Mejia because of her disability, in violation of the Americans with Disabilities Act, then you must determine what sum of money she is entitled to receive as backpay.

You should not interpret the fact that I have given instructions about the Plaintiff's damages as an indication in any way that I believe that the Plaintiff should, or should not, win this case. It is your task first to decide whether the Defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendant is liable and that the Plaintiff is entitled to recover money from the Defendant.

Backpay damages are calculated as the difference between what Sharon Mejia would have earned had she been hired by Defendant and what she has earned at other jobs in the interim. Interest, overtime, salary increases and fringe benefits such as vacation and sick pay are

among the items which should be included in backpay. Basically, you have the ability to make Sharon Mejia whole for any wages or other benefits that she has lost as a result of the denied hire.

You are not required to calculate backpay with mathematic certainty. You may make an estimate of the amount of money that will constitute just and reasonable compensation based on the facts that are before you.

MITIGATION OF DAMAGES

A claimant who has suffered discrimination is required to use reasonable efforts to mitigate her damages. The Defendant has the burden of proof in showing that Sharon Mejia did not use reasonable efforts in seeking alternative employment to mitigate her backpay damages.

The reasonableness of Ms. Mejia's diligence should be evaluated in light of her individual characteristics and the specific job market. The question of mitigation is one of fact and relies on such factors as reasonableness, similarity and diligence. Whether an aggrieved individual has mitigated her damages requires a factual assessment of the reasonableness of her conduct. A diligent individual attempting to mitigate damages would at least check the want ads, register with employment agencies, and discuss job opportunities with friends and acquaintances.

If you find Defendant is liable and that Sharon Mejia has suffered damages, she may not recover for backpay damages which she could have avoided through reasonable effort. If you find by a preponderance of the evidence that Sharon Mejia unreasonably failed to take advantage

of an opportunity to lessen her backpay damages, you should deny her recovery for those damages which she would have avoided had she taken advantage of the opportunity.

You are the sole judge of whether Sharon Mejia acted reasonably in avoiding or minimizing her damages. An injured party may not sit idly by when presented with an opportunity to reduce her backpay damages. However, she is not required to exercise unreasonable efforts or to incur unreasonable expenses in mitigating the damages.

The Defendant has the burden of proving the damages which Sharon Mejia could have mitigated. In deciding whether to reduce Sharon Mejia's backpay damages because of her failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the Defendant has satisfied its burden of proving that Sharon Mejia's conduct was not reasonable.

The Defendant must prove that substantially equivalent employment was available in the specific line of work in which Sharon Mejia was engaged and that Sharon Mejia refused to accept this employment. Substantially equivalent employment is employment that affords virtually identical promotion opportunities, compensation, job responsibility, working conditions and status as the position that Sharon Mejia applied for with Defendant. Defendant must prove that Sharon Mejia's conduct was so inadequate as to constitute an unreasonable failure to seek employment. The range of reasonable conduct in a job search is broad and Sharon Mejia must be given the benefit of every doubt.

The law does not require that Sharon Mejia be held to the highest standard of diligence in seeking employment. The law does not require that Sharon Mejia actually be successful at finding another job. Furthermore, the law does not require that Sharon Mejia take lesser or

dissimilar work. Sharon Mejia was not required to take a demotion or demeaning position. She was also not required to accept employment that was located an unreasonable distance from her home.

QUESTION NO. 3

What amount of back pay damages, if any, is Sharon Mejia entitled to receive? Answer in dollars and cents, if any.

$ _____

COMPENSATORY DAMAGES

If you find that the Defendant did not hire Sharon Mejia because of her disability then you must determine an amount that is fair compensation for her damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Sharon Mejia whole - that is, to compensate her for the damages which she has suffered and/or will, in all reasonable probability, suffer in the future, as a consequence of Defendant's illegal conduct.

The EEOC has claimed that as a result of Defendant's unlawful treatment of Sharon Mejia, she has suffered from emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other mental and emotional pain. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, humiliation, emotional distress, or loss of self esteem. The EEOC is not seeking damages for psychic injury or psychiatric disorder. Thus,

the use of corroborating medical evidence testimony at trial is not necessary in order for the Plaintiff to prove this claim for non-pecuniary compensatory damages.

If you find that the EEOC has proven by a preponderance of the evidence that Sharon Mejia has suffered from mental or emotional distress as a result of the discrimination, then you must determine an amount that is fair compensation for her damages. No evidence of monetary value of such intangible things, such as emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other mental and emotional pain must be introduced into evidence. No exact standard exists for fixing the compensation to be awarded for these elements of damages. The damages that you award must be fair compensation -- no more and no less. The award you make should be fair in light of the evidence.

Computing this award may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require Sharon Mejia to prove the amount of her losses with mathematical precision, but only with as much accuracy as the circumstances permit.

QUESTION NO. 4

What amount of compensatory damages, if any, is Sharon Mejia entitled to receive? Answer in dollars and cents, if any.

(1) Past Emotional Harm.

ANSWER: $_____

(2) Future Emotional Harm.

ANSWER: $_____

(3) Past Mental Anguish.

ANSWER: $_____

(4) Future Mental Anguish.

ANSWER: $_____

PUNITIVE DAMAGES

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Service Electronics. The purposes of punitive damages are to punish a defendant for its conduct and to serve as an example or warning to the defendant and others not to engage in similar conduct in the future.

You may award these damages if you determine by a preponderance of the evidence that one or more of the Defendant's acts was done with malice or with reckless indifference to the federally protected rights of Sharon Mejia. The terms "malice" or "reckless indifference" pertain to the Defendant's knowledge that it may be acting in violation of federal law. Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful. Reckless indifference is when an act is done with a lack of concern for the consequences of the action. In determining whether the Defendant acted with malice or reckless indifference toward Sharon Mejia by subjecting her to discrimination, you need only conclude that Defendant had knowledge that it may be acting in violation of federal law, or that the Defendant was aware of the risk that its actions violated federal law. Further, you do not need to conclude that Defendant's conduct was egregious or outrageous discrimination.

Plaintiff must prove by a preponderance of the evidence that Service Electronics' managerial employees acted within the scope of their employment and in reckless disregard of Sharon Mejia's right not to be discriminated against. In determining whether Dwayne Gragg was a managerial employee of Service Electronics, you should consider the kind of authority Service Electronics gave him, the amount of discretion he had in carrying out his job duties and the manner in which he carried them out. You should not, however, award Plaintiff punitive damages if Service Electronics proves that it made a good faith effort to prevent discrimination in the workplace, including but not limited to implementing an anti-discrimination policy and educating its employees on the ADA's prohibitions.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either party. In determining the amount of any punitive damages, you should consider the following factors:

– the reprehensibility of Service Electronics' conduct;
– the impact of Service Electronics' conduct on Plaintiff;
– the relationship between Plaintiff and Service Electronics;
– the likelihood that Service Electronics would repeat the conduct if an award of punitive damages is not made;
– Service Electronics' financial condition;
– the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

QUESTION NO. 5

Do you find that the EEOC has proven, by a preponderance of the evidence, that Defendant acted with malice or with reckless indifference to the federally protected rights of Sharon Mejia?

Answer "Yes" or "No."

ANSWER: _____

QUESTION NO. 6

If your answer to Question No. 5 is "Yes," then what amount of punitive damages, if any, should be assessed against the Defendant for its conduct?

Answer in dollars and cents, if any.

$ _____

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

DATE: 2-7-06

BY: Laura Hodges
PRESIDING OFFICER OF THE JURY