IN THE COURT OF APPEALS OF IOWA

No. 0-468 / 10-0004
Filed October 6, 2010

MICHAEL K. CLANCY,
Plaintiff-Appellant,

vs.

CITY OF DUBUQUE, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Michael Clancy appeals from an adverse judgment in his disability discrimination action against the City of Dubuque. **AFFIRMED.**

Jason D. Lehman and Danita L. Grant of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellee.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Michael Clancy appeals from an adverse judgment in his disability discrimination action against the City of Dubuque. Finding no error in the court's supplemental jury instruction or its denial of the motion for new trial, we affirm.

I. Background Facts and Proceedings.

Michael Clancy began working for the City of Dubuque (City) in 1979 as a sanitation worker. He remained in that position until 2003 when he sustained work-related injuries to his back. Clancy was placed on permanent work restrictions preventing him from performing that job. Clancy later bid on several jobs with the City that he could perform within his restrictions.

In August 2004, he began working for the City as a part-time parking ramp cashier, working sixteen to twenty hours. The position entailed both regularly scheduled shifts, as well as special event shifts. Clancy generally worked Mondays and Tuesdays from 2:15-6:45 p.m. and Thursdays from 8:15 a.m.-2:15 p.m. Special event shifts were assigned on a rotating basis among the several parking ramp cashiers. The City provided the parking ramp cashiers a monthly, written schedule.

In October 2004, Clancy received a written disciplinary notice for "tardiness."[1] No disciplinary lay-off was imposed. An accompanying memorandum from his supervisor, Tim Horsfield, noted "areas needing

[1] The disciplinary notice form indicates various types of notice and the directive "check one" of the following: "Verbal"; "Written __ No disciplinary lay-off or discharge"; "Written __ Disciplinary lay-off"; and "Written __ Discharge." A note at the bottom of the form states, "Copies of this notice (except verbal) are to be distributed to employee, union steward (if any), personnel department and department file." A later form varied slightly in its phrasing.

improvement," which included "consistent tardiness," a "frequent practice" of having someone else work his shifts, and "a serious problem in getting in touch with you for call-in situations." Clancy was directed from that date on to notify the employer upon arrival at work to verify his timely attendance, and to have any schedule changes preapproved by Horsfield.

On March 29, 2006, Clancy failed to show for a special event shift. The head cashier attempted to telephone Clancy at his home telephone number, but the line was busy. She then left a message on Clancy's cell phone. Clancy spoke with the head cashier the next day saying he forgot that he was to work and that he did not get the message until the following morning. On April 4, 2006, Clancy received a written disciplinary notice for "failing to show up for work on March 29, 2006 for a scheduled work shift for Grand Opera Event," and was given a one-day disciplinary lay-off. The notice referenced an attached memorandum outlining the event as noted above, and the previous disciplinary action.

On June 29, 2006, Clancy was involved in a non-work related motor vehicle accident. He was in his car, stopped in the left lane of Highway 20 to turn left, when another motorist struck him from the rear. He suffered a concussion and a severed nerve in his left eye. He had bruising and swelling. He was off work for about twelve days and then released to return to work without restrictions on July 10, 2006.

In an October 2, 2006 memorandum from Horsfield to the personnel director, Randy Peck, Horsfield indicated Clancy failed to attend a mandatory training session on September 20. Horsfield wrote:

> The following morning, I questioned Mike regarding his failure to attend. Mike indicated that he had simply . . . forgotten and did not remember until late in the day that he was to be there. He subsequently went on with a list of excuses that ranged from vehicle trouble to doctor's appointments and other family illnesses, the same excuses given when he is late for work or has missed other scheduled work times. This has been an ongoing problem with Mike since he began working in the Parking Division.

Horsfield then outlined the history of Clancy's disciplinary notices, and stated he wished to place in Clancy's file a three-day suspension. On October 17, 2006, Clancy received a written disciplinary notice for "failing to show for a scheduled training session on Sept. 20, 2006" and was given a three-day suspension from work without pay. Also on the notice was written: "Two prior discipline notices given for being late for work and not showing up for another scheduled work shift."

On December 10, 2006, Clancy failed to show for a special event shift.

On December 15, 2006, Clancy, his wife, his attorney, and a union representative, met with Horsfield and Peck to discuss his failing to appear for scheduled work. At this meeting Clancy informed the City that he was having difficulty with memory as a result of his June accident. He informed them his wife was attempting to help by making a separate written schedule of his shifts (that did not also show the other cashiers' shifts), which they posted on the door at home. He testified he was having difficulty remembering the "odd-scheduled days" and asked the City to provide him a phone call before his scheduled special event shifts. According to Peck, however, he specifically asked what accommodation Clancy needed and Clancy responded that he needed one more

chance. Peck requested medical documentation, which would take about two weeks. Clancy continued to appear on the parking ramp work schedule.

Peck received a letter dated December 26, 2006, from Jeanne Ulrichs, a speech pathologist, who wrote:

> Michael Clancy has been working with speech pathology at Mercy Medical since 12/20/06, working on strategies to improve memory and attention. He was referred by Patrick Sterrett, M.D. (Dubuque Neurology) on 12/18/06 with the diagnosis of Head Injury–Memory problems/attention problems.
>
> Thus far in therapy, it has been noted through formal and informal testing that Michael has difficulty recalling especially within tasks that involve large amounts of information within an environment with several distractions. Several compensatory strategies have been suggested and are currently being put into place in order to compensate for these issues.

In another letter dated December 28, 2006, Dr. Patrick Sterrett wrote that Clancy "had a postconcussion syndrome from hitting his head. One of the most common symptoms is memory loss, which he did manifest and continues to do so but is improving."

On January 26, 2007, Peck wrote to the Dubuque City Manager outlining Clancy's employment history, disciplinary notices, and the meeting following the December 10 failure to report to work. Peck wrote:

> At our meeting his attorney stated that he would provide me with a statement from Mike's treating physician supporting Mike's claim of memory loss and forgetfulness by December 29, 2006. He also stated that he did not think it was appropriate to terminate Mike as a result of his failure for reporting to work on December 10, 2006 due to the injury and subsequent memory loss and forgetfulness. Mike's attorney said that Mike would sign a Last Chance Agreement.
>
> Assistant City Attorney, . . . Horsfield and I have discussed Mike's performance and recommend the following:
>
> - Five workday suspension without pay
> - Prepare a Last Chance Agreement for Mike's signature

> I will schedule a meeting with [assistant city attorney, Horsfield . . .] and you to discuss this recommendation.

On February 2, 2007, Clancy received a written disciplinary notice assigning a five-day suspension for "failure to show up to work a scheduled shift on 12-10-06 at the Iowa Ramp."

On February 4, 2007, Clancy failed to show for a scheduled special event shift. On February 9, 2007, Clancy was discharged for repeated failure to report for work.

Clancy filed suit against the City alleging the City unlawfully discriminated against him in failing to accommodate his mental disability.[2] Clancy, his wife, and his former attorney all testified that at the December meeting a request was made that Clancy get another chance and that he be telephoned before the irregularly scheduled special event shifts. Clancy's attorney testified, "What I remember asking for was another chance because that's what we—we needed another chance for Mike to be able to work through his situation and asking the City to try to accommodate that." While the City's witnesses did not deny that the request for a telephone call was made, they testified that the accommodation requested was a last chance. It appears to have been understood by all that the December meeting was held because Clancy's employment was in jeopardy. Other testimony indicated that Clancy and his wife had his schedule prominently posted in the house, Clancy's wife would sometimes telephone Clancy from her

[2] Clancy alleged violations of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the Iowa Civil Rights Act (ICRA), Iowa Code ch. 216 (2007); and City of Dubuque Code of Ordinances.

work to remind him he was to work, and Clancy's wife was in the house when Clancy missed his shift on February 4, 2007.

Clancy posed no objections to the jury instructions given. The jury was instructed in part:

> Instruction No. 10
>
> Plaintiff brings this action on two claims. One of the claims is failure to provide reasonable accommodation as explained in Instruction No. 11. The other claim is that of adverse employment as explained in Instruction No. 12. If Plaintiff proves either of these claims, Plaintiff is entitled to recover damages in some amount. If Plaintiff fails to prove both these claims, the Plaintiff is not entitled to damages.
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> Instruction No. 11
>
> Your verdict must be for Mr. Clancy and against the City of Dubuque if all of the following elements have been proved by the preponderance of the evidence:
>
> *First*, Mr. Clancy had a mental impairment; and
>
> *Second*, such mental impairment substantially limited Mr. Clancy's ability to concentrate, think or remember; and
>
> *Third*, the City of Dubuque knew of Mr. Clancy's mental impairment; and
>
> *Fourth*, Mr. Clancy could have performed the essential functions of the part-time parking ramp cashier job with or without reasonable accommodation at the time the City of Dubuque terminated Mr. Clancy's employment if Mr. Clancy had been provided with a telephone call reminder or a modified work schedule; and
>
> *Fifth*, providing a telephone call reminder or a modified work schedule would have been reasonable; and
>
> *Sixth*, the City of Dubuque failed to provide a telephone call reminder or a modified work schedule and failed to provide any other reasonable accommodation.
>
> If any of the above elements has not been proved by the preponderance of the evidence then your verdict must be for the City of Dubuque.[3]

[3] The language of the instruction was based upon the federal model jury instruction for reasonable accommodation cases under the Americans with Disabilities Act. *See* 8th Cir. Civil Jury Instr. § 5.51C (2008).

Instruction No. 12

> Your verdict must be for Mr. Clancy and against the City of Dubuque if all of the following elements have been proved by the preponderance of the evidence:
>
> *First*, Mr. Clancy had a mental impairment; and
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> *Second*, such mental impairment substantially limited Mr. Clancy's ability to concentrate, think or remember; and
>
> *Third*, the City of Dubuque terminated Mr. Clancy's employment; and
>
> *Fourth*, Mr. Clancy could have performed the essential functions of the part-time parking ramp cashier job with or without reasonable accommodation at the time the City of Dubuque terminated Mr. Clancy's employment; and
>
> *Fifth*, the City of Dubuque knew of Mr. Clancy's mental impairment and Mr. Clancy's mental impairment was a motivating factor in the City of Dubuque's decision to terminate his employment
>
> If any of the above elements has not been proved by the preponderance of the evidence then your verdict must be for the City of Dubuque. You may find that Mr. Clancy's mental impairment was a motivating factor in the City of Dubuque's decision to terminate his employment if it has been proved by the preponderance of the evidence that the City of Dubuque's stated reasons for its decision to terminate Mr. Clancy's employment are a pretext to hide discrimination.[4]

The terms "disability," "impairment," "substantially limits," "major life activity," "essential functions," and "motivating factor" were defined in the instructions as those terms are defined in the ADA, 42 U.S.C. §12101 et seq., or its regulations. *See* 29 C.F.R. § 1630.2 (definitions).

Instruction No. 17 provided:

> A "reasonable accommodation" is a modification or adjustment to the work environment, or to the manner or circumstances under which the job is customarily performed, that allows an employee with a disability to perform the essential functions of the job. A "reasonable accommodation" may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, appropriate adjustments or modifications of policies, and other similar accommodations.

[4] This instruction was based upon a federal model jury instruction for disparate treatment. 8th Cir. Civil Jury Instr. § 5.51A (2008) (disparate treatment/actual disability).

> To request a reasonable accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."

This instruction uses terms and phrases taken from ADA regulations. *See* 29 C.F.R. § 1630(2)(o)(1)(ii) ("The term reasonable accommodation means . . . [m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position[.]"), (2)(ii) ("Reasonable accommodation may include but is not limited to . . . [j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; . . . appropriate adjustment or modification of . . . policies . . . ; and other similar accommodations for individuals with disabilities.").

During jury deliberations, the jury submitted this question to the court:

> Is it possible to see the ADA law in regard to accommodations that must be made by the employer[?]
> Concern if the law states if accommodations must be made prior to scheduled work (outside workplace) or only at the workplace.

After a hearing and extensive argument by counsel, the court gave this supplemental instruction: "This is in response to your written question. The language of the ADA is set out accurately in the jury instructions. It is for you to render a verdict based on the jury instructions and the evidence presented."

The jury found in favor of City on both Clancy's claims and the court entered judgment on the verdicts.

Clancy filed a motion for new trial, contending the verdicts were not sustained by sufficient evidence and were contrary to law, and that the court

erred in refusing to submit the supplemental jury instruction Clancy proposed. The court denied the motion for new trial. Clancy now appeals.

II. Supplemental Jury Instruction.

We begin by noting Clancy did not object to the jury instructions as originally given nor does he claim they contained erroneous statements of the law. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) ("Failure to timely object to an instruction not only waives the right to assert error on appeal, but also 'the instruction, right or wrong, becomes the law of the case.'") (quoting *Froman v. Perrin*, 213 N.W.2d 684, 689 (Iowa 1973)). Nor does Clancy argue that the supplemental instruction provided by the court was erroneous. Instead, Clancy argues the trial court erred in refusing to give further instruction and explanation to the jury question posed. The City responds that Instruction No. 17 defined "reasonable accommodation" and adequately informed the jury.

> The decision to answer a jury question or whether to give additional information requested by a jury during deliberations, generally rests within the discretion of the trial court, and in the absence of abuse of that discretion, the court's action will not be disturbed on appeal. In addition, the view has sometimes been followed that in a civil case, it is within the sound discretion of trial court to allow or refuse the jury's request for clarification of jury instructions.

89 C.J.S. *Trial*, § 810 at 448-49 (2001). Our supreme court has stated, "[s]upplemental instructions are 'as a general rule proper, and sometimes are necessary and desirable.' However, in such an instruction the court must correctly state the law and confine it to the factual situation appearing in the record." *Brown v. Lyon*, 248 Iowa 1216, 1222, 142 N.W.2d 536, 539 (1966) (citation omitted).

Clancy's counsel argued to the trial court that *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515 (2d Cir. 1995), supported his position and would justify a supplemental instruction that "a phone call does fall within the purview of the ADA or that a reasonable accommodation may precede the start time of a work shift." Clancy's counsel also proposed a response stating

> the ADA does not provide a closed-end definition of reasonable accommodation. The ADA sets out a nonexclusive list of different methods of accommodation encompassed by that term that may include an accommodation prior to the start of a work shift.

We believe neither proposed instruction was necessary to respond to the jury's question. It is true that the ADA does not provide a closed-end definition of "reasonable accommodation." *See* 42 U.S.C. § 12111(9) ("The term 'reasonable accommodation' may include . . . ."); 29 C.F.R. § 1630(2)(o) (quoted in part above); *Lyons*, 68 F.3d at 1515 ("Neither the ADA nor the Rehabilitation Act provides a closed-end definition of 'reasonable accommodation.'"). Rather, "the ADA sets out a nonexclusive list of different methods of accommodation encompassed by that term." *Lyons*, 68 F.3d at 1515. The Eighth Circuit's Manual of Model Civil Jury Instructions states "there is no precise test for determining what constitutes a reasonable accommodation." A lengthy discussion of the term follows. *See* 8th Cir. Civil Jury Instr., at 166–67; § 5.51C and Committee Comments, at 179–183.

In *Lyons*, a staff attorney sued her employer claiming the failure to provide her a parking space near work violated her rights under the ADA. 68 F.3d at 1513. The district court dismissed her suit for failure to state a claim, holding the ADA imposed no such duty. *Id.* On appeal, the Second Circuit Court of Appeals

reversed the dismissal stating, "whether it is reasonable to require an employer to provide parking spaces may well be susceptible to differing answers." *Id*. at 1516.

Clancy argues the *Lyons* case stands for the proposition that a reasonable accommodation may precede the start of the work shift. Even if we assume the *Lyons* case may be read in that light, we do not conclude that the trial court's failure to instruct the jury to that effect was an abuse of discretion. The determination as to what is reasonable within the meaning of the ADA generally requires a flexible, fact-specific inquiry to be conducted on an individualized, case-by-case basis. *See id*. "[Q]uestions of reasonableness are best resolved by the fact finder." *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 415, 420 (Iowa 2005).

Here, in Instruction No. 11, the jury was instructed:

> Your verdict must be for Mr. Clancy and against the City of Dubuque if all of the following elements have been proved by the preponderance of the evidence:
>
> *First*, Mr. Clancy had a mental impairment; and
>
> *Second*, such mental impairment substantially limited Mr. Clancy's ability to concentrate, think or remember; and
>
> *Third*, the City of Dubuque knew of Mr. Clancy's mental impairment; and
>
> *Fourth*, Mr. Clancy could have performed the essential functions of the part-time parking ramp cashier job with or without reasonable accommodation at the time the City of Dubuque terminated Mr. Clancy's employment if Mr. Clancy had been provided with a telephone call reminder or a modified work schedule; and
>
> *Fifth*, providing a telephone call reminder or a modified work schedule would have been reasonable; and
>
> *Sixth*, the City of Dubuque failed to provide a telephone call reminder or a modified work schedule and failed to provide any other reasonable accommodation.

> If any of the above elements has not been proved by the preponderance of the evidence then your verdict must be for the City of Dubuque.

Thus, the jury was instructed to find for Clancy if the City failed to provide a telephone call reminder or a modified work schedule and *any other* reasonable accommodation.

"Reasonable accommodation" was defined in the jury instructions in an open-ended manner in Instruction No. 17, which reads in part:

> A "reasonable accommodation is a modification or adjustment to the work environment, or to the manner or circumstances under which the job is customarily performed, that allows an employee with a disability to perform the essential functions of the job. A "reasonable accommodation" may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, appropriate adjustments or modifications of policies, *and other similar accommodations*.

(Emphasis added.) Consequently, while we believe Clancy could argue (as he did) that a telephone call prior to his work shift fell within the purview of the ADA, or that a reasonable accommodation may precede the start time of a work shift, those concepts were embodied in the instructions already given. *See Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 166 (Iowa Ct. App. 1996) ("A trial court does not err in refusing to submit a party's proposed instructions when its concepts are embodied in other instructions submitted to the jury."). Clancy has cited no authority that the law requires the specific accommodations he requested. *See Koenig v. Koenig*, 766 N.W.2d 635, 637 (Iowa 2009) ("We must determine whether the jury instructions presented 'are a correct statement of the applicable law based on the evidence presented.'" (citation omitted)); *Graber v. City of*

Ankeny, 616 N.W.2d 633, 644–45 (Iowa 2000) (finding court did not err in refusing to instruct on concept unsupported by statute or case law).

On appeal Clancy asserts, "It seems clear that the heart of the jury's question concerns whether an employer is legally required to provide accommodations which take place, at least in part, outside the workplace." He argues that the trial court should have instructed the jury that providing him with a telephone call reminder is substantially similar to installing a handicapped-accessible ramp. We note that Clancy did not request such an instruction at trial. And again, the statement might well be a legitimate argument, but we do not believe a jury instruction to that effect was required. We, therefore, conclude the district court did not abuse its discretion in its supplemental instruction to the jury.

III. Was the Jury's Verdict Sustained by Sufficient Evidence and Did it Effect Substantial Justice?

Clancy next argues the district court erred in failing to grant him a new trial because the jury's verdict was not supported by sufficient evidence, was contrary to law, and failed to effectuate substantial justice between the parties. Clancy challenges the jury's verdicts on several grounds, but his argument for all grounds is identical, so we will discuss them together. *See Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

> In addition to the grounds for granting a new trial set out in rule 1.1004(6), the trial court has inherent power to set aside a verdict when the court concludes "the verdict fails to administer substantial justice." We review the court's ruling on a motion for new trial based on this ground for an abuse of discretion. To show an abuse of discretion, the complaining party must show "the court exercised its discretion 'on grounds clearly untenable or to an extent clearly

> unreasonable.'" *Id.* (citation omitted). "As used in this context, '[u]nreasonable' means not based on substantial evidence."

Id. at 87–88 (citations omitted).

In *Casey's General Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519–20 (Iowa 2003), our supreme court stated:

> The Iowa Civil Rights Act prohibits an employer from discriminating against a qualified person with a disability because of the person's disability. The statute, however, only pronounces a general proscription against discrimination and we have looked to the corresponding federal statutes to help establish the framework to analyze claims and otherwise apply our statute. Like the ADA, to recover under the Iowa statute, a claimant must establish: (1) he or she is a disabled person; (2) he or she is qualified to perform the job, with or without an accommodation; and (3) he or she suffered an adverse employment decision because of the disability.
>
> Generally, if a claimant establishes these three elements, the burden shifts to the employer to show a legitimate nondiscriminatory reason for the adverse employment decision. Once an employer proffers a legitimate nondiscriminatory reason, the burden shifts back to the claimant to show the reason proffered by the employer is pretextual.

(Citations omitted.)

Clancy recites evidence he contends supports findings that he has a mental impairment as a result of the motor vehicle accident; the impairment substantially limited his ability to concentrate and remember; the City knew of his impairment; he could have performed the essential functions of his job had he been provided a telephone call or modified schedule; a telephone call or modified work schedule would be reasonable; and the City failed to provide a reasonable accommodation. Nevertheless, "[w]e view the evidence in the light most favorable to the verdict, taking into consideration all reasonable inferences that could be fairly made by the jury." *Kiesau v. Bantz*, 686 N.W.2d 164, 171 (Iowa

2004). We will uphold the verdict if there is substantial evidence in the record to support the jury's findings. *Id.*

The jury was not asked to make individual findings as to each element of Clancy's claims so we do not know what element or elements the jury found Clancy had not proved. But there was evidence presented that Clancy had forgotten a scheduled special event shift before the accident, as well as after. On March 29, 2006, Clancy failed to show for a special event shift. That day the head cashier attempted to telephone Clancy at his home telephone number, but the line was busy. She then left a message on Clancy's cell phone, which he did not check until the next morning. Additionally, there was evidence that the City provided a written schedule to all cashiers, and despite Clancy posting his schedule in a prominent place, he missed scheduled shifts. A reasonable jury could find Clancy had not proved he could perform the essential functions of his job even had he been provided a telephone call or modified schedule. *See Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998) and cases cited therein (finding regular and reliable attendance is a necessary element of most jobs). The district court did not abuse its discretion in denying Clancy's motion for a new trial.

IV. Conclusion.

The district court did not abuse its discretion in failing to give the supplemental instructions requested by plaintiff or in denying the motion for new trial. Viewing the evidence in the light most favorable to the verdicts and taking into consideration all reasonable inferences that fairly could be made by the jury,

there is substantial evidence supporting the jury's verdicts for the City on Clancy's reasonable accommodation and adverse employment claims. We therefore affirm.

AFFIRMED.