ORAL ARGUMENT IS REQUESTED

Nos. 97-1381, 97-1406, 97-1403

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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JACK L. DAVOLL; DEBORAH A. CLAIR; PAUL L. ESCOBEDO,

Plaintiffs-
Appellants/Cross-Appellees

v.

CITY AND COUNTY OF DENVER, et al.,

Defendants-
Appellees/Cross-Appellants

_____

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CITY AND COUNTY OF DENVER, et al.,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

_____

BRIEF FOR THE UNITED STATES AS APPELLEE IN 97-1403

_____

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STATEMENT OF PRIOR OR RELATED APPEALS

The only related appeal is United States v. City & County of Denver, No. 97-1431, which is consolidated for purposes of panel assignment and oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

No. 97-1381, 97-1406

JACK L. DAVOLL; DEBORAH A. CLAIR; PAUL L. ESCOBEDO,

Plaintiffs-
Appellants/Cross-Appellees

v.

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CITY AND COUNTY OF DENVER, et al.,

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_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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_____

BRIEF FOR THE UNITED STATES AS APPELLEE IN 97-1403

_____

STATEMENT OF JURISDICTION

The United States, plaintiff-appellee, filed a complaint in the United States District Court for the District of Colorado, alleging that the City and County of Denver and related agencies violated the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. The district court had jurisdiction over the case pursuant to 28 U.S.C. 1331 and 1345.

This appeal is from a final judgment entered on October 9,

1997, pursuant to Fed. R. Civ. P. 54(b). Denver filed a timely notice of appeal on October 24, 1997. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES[1]

Jury Instructions

Whether the district court erred:

1. in its charge to the jury about when reassignment is required as a reasonable accommodation (1.E);

2. in its charge to the jury about what jobs should be considered in deciding whether a person is "qualified" (1.A & 1.B);

3. in its charge to the jury about the definition of "substantially limited with respect to a major life activity" (5);

4. in its charge to the jury that plaintiffs need not request an accommodation if such a request would have been futile (1.C); and

5. in refusing to charge the jury that the ADA required only equal treatment of people with disabilities (1.G).

Sufficiency of the Evidence

6. Whether Denver waived its sufficiency claims by not seeking a Judgment as a Matter of Law at the close of all the evidence.

7. Whether there was sufficient evidence to support the jury's verdict that plaintiffs were qualified for a position

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[1] Denver lists six issues with nine sub-issues. For greater clarity, we elect the following organization (noting after the issue the equivalent issue raised by Denver when available).

other than that of police officer (1.A).

8. Whether there was sufficient evidence to support the jury's verdict that plaintiffs Clair and Escobedo were qualified for vacant positions (1.D).

9. Whether there was sufficient evidence to support the jury's verdict that reassignment of Davoll would not constitute an undue hardship (1.F).

Discovery and Evidentiary Rulings

10. Whether the district court abused its discretion in prohibiting Denver from using the term "affirmative action" before the jury (1.G).

11. Whether the district court abused its discretion by refusing to exclude Denver's response to a request for an admission (3).

12. Whether the district court abused its discretion in permitting Dr. Kleen to testify (4.A).

13. Whether the district court erred in denying Denver's motion to extend discovery for expert witnesses (4.B).

Remedy

14. Whether the district court committed plain error in charging the jury that it could award compensatory damages for Denver's failure to comply with the ADA's reasonable accommodation requirement (2).

15. Whether the district court clearly erred when it found that Denver had agreed that equitable issues would be resolved on the basis of written submissions (6).

STATEMENT OF THE CASE

The United States does not dispute Denver's statement of the case, but adds the following for the sake of completeness.

In March 1992, the United States received a written complaint from Jack Davoll alleging that Denver was not complying with its duty under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 et seq., to reasonably accommodate persons with disabilities (App. 2990). Pursuant to 28 C.F.R. 35.172, the Department of Justice engaged in an extensive investigation and lengthy, but ultimately unsuccessful, attempts to achieve voluntary compliance (U.S. App. 5).

On February 15, 1996, the United States filed a two-part complaint (App. 123-130), alleging a violation of Title II of the ADA on behalf of Davoll (App. 124-126, 127-128), as well as a Title I "pattern or practice" of discrimination (App. 127). We challenged Denver's practice of refusing to reassign current employees who became unable to perform their duties due to a disability to vacant positions for which they were qualified (App. 126-127). The United States sought an injunction and monetary and equitable relief for all identified victims (App. 128-129).

The suit was consolidated for trial with Davoll's private action (App. 923 n.1). After a jury verdict in favor of Davoll and an award of equitable relief by the district court (App. 1383), Denver appealed.

STATEMENT OF THE FACTS

1. City and County of Denver: Of Denver's 12,000 employees, most are enrolled in one of two different personnel systems: police officers (approximately 1,426) and firefighters in the Classified Service; and almost everyone else (approximately 8,000 full-time and 1,500 temporary employees) in the Career Service (App. 1453).[2] Denver "is the employer of all Career Service and Classified Service employees and pays their salaries, insurance and other benefits" (App. 1453, 3449, 3601). Whatever purpose this division served in the past, it continues primarily because of "territorialism" and "turf wars" (App. 3455-3456). Denver does not consider persons employed in one system eligible for transfer or reemployment rights in the other (App. 1457, 3465-3466).

2. Career Service: Each year, the Career Service seeks to fill about 2,200 vacancies (App. 1460), including 1,500 full-time positions (App. 3594). When a city agency wishes to hire for a vacant position from outside the pool of current employees, it must ask the Career Service Authority to advertise the open position (App. 3576). All applicants must first submit an application and meet the minimum qualifications for the vacant position (App. 1460, 3404, 3480). Applicants who meet the

[2] These facts are drawn from the parties' stipulated facts (App. 1453-1461), the trial testimony, and the trial exhibits. With regard to exhibits, Denver stipulated to the admission (App. 3233-3234, 3691) of Exhibit 13A, which contains portions of the City Charter (App. 1482-1492) and Career Service Rules (App. 1493-1511), and Exhibit 13C, which contains Denver's answer to interrogatories (U.S. App. 11-16).

minimum qualifications are tested and interviewed, depending on the necessary skills (App. 1460-1461, 3578-3584). Based on the results of this screening, an eligibility list is compiled, which can be used for up to two years (App. 3419, 3429). A short list of the highest ranked candidates is provided to the agency head for interviews (App. 1460-1461, 3420, 3429, 3587-3588), although the actual scores and rankings are not revealed to the agency (App. 3598). The agency head may select anyone on the list (App. 3421-3422, 3434-3435).

Agency heads are not limited to choosing from the people on the list provided by the Career Service Authority. Current Career Service employees may request an interview from the agency directly, completely bypassing the Career Service Authority (App. 3428, 3471). Agency heads may select a current employee from another agency who is willing to transfer to the vacant position without that employee ever being tested for the particular position (App. 3422-3423, 3438, 3596), so long as the employee "meets the minimum qualifications" (App. 1504, 3423, 3596). Indeed, an agency head can recruit an existing employee for a vacant position without having to "recruit externally" (App. 3752) and "without ever going through any of the lists" (App. 3472, 3473, 3598). However, the Career Service Authority has decided that persons employed in the Classified Service system are not eligible for such a transfer to a vacant position in the

Career Service system (App. 1457).[3]

3. Classified Service: The Classified Service system shares much in common with the Career Service. Like the Career Service, the Classified Service purports to be a "merit system" (App. 3457). It is administered by the Civil Service Commission, which establishes the application procedures for entry-level police officers (App. 1461, 1487, 3644). Like the Career Service Authority, the Civil Service Commission administers written and oral examinations for all Classified Service positions, and ranks applicants based on their scores (App. 1461, 1487-1488, 3644; U.S. App. 12-14). If an applicant with a passing score is a veteran, or a widow or widower of a veteran, the score is adjusted upwards based on "veteran preference points;" veterans may get more "preference points" if they have a service-connected disability (App. 3466; U.S. App. 14).

Those applicants who get passing marks are then administered a physical abilities test, a medical test, a polygraph test, a psychological test, and a background check (App. 1461, 3644-3645; U.S. App. 14-15). When the agency head (here the Manager of Safety) wishes to hire a new police officer, she so informs the Commission, which certifies the names of the three highest ranked

[3] In 1993, the Personnel Director for the Career Service Authority was asked to examine whether such transfers would be possible (App. 3441, 3445-3446). After reviewing the City Charter, the Career Service rules, and a state court opinion, and consulting with his staff and a law school graduate, he determined in a matter of hours that they were not permissible under local law and that the ADA did not preempt the implicit prohibition on such transfers (App. 3446-3447, 3449, 3541).

applicants (App. 1488; U.S. App. 16). Similar procedures are followed for promotions (App. 1490).

Like the Career Service, there are circumstances in which the examination and ranking system may be bypassed. Former Classified Service employees who were separated under honorable circumstances may be reemployed without competing against the general applicant pool (App. 1488). Similarly, "[t]ransfers within the classified service may be made from one department to a similar position in another, without examination" (App. 1492, 3279).

4. The Denver Police Department: Police Department employees are in both personnel systems -- about 1,426 from the Classified Service and 200 from the Career Service (App. 1453, 3456). Every year, between 24 and 36 Career Service vacancies occur in the Police Department (App. 1460).

Evidence demonstrated that persons determined to be qualified by Classified Service examinations were presumptively qualified to perform certain jobs in the Career Service. In the past, police officers had performed many duties within the Police Department that were not directly related to police work, such as working as police dispatchers or as evidence clerks in the property bureau (App. 3477-3478, 3619). The Department did not have any "formal test" for deciding which police officers were qualified to do those specialized jobs within the Department (App. 3621), but instead apparently assumed that people qualified as police officers were usually qualified for most of these jobs.

If there were special skills necessary for a specific job, the Department relied on informal screening methods (App. 3620, 3623).

Many positions that were previously performed by police officers have been converted in recent years to "civilian" positions (App. 3475-3476, 3619). Thus, for example, the jobs of police dispatcher or evidence clerk, which used to be performed by a police officer, are now performed by Career Service personnel (App. 3477-3479, 3619). The qualifications for the jobs were not changed, save for the fact that the job-holders no longer have to be able to make an arrest or fire a gun (App. 3476, 3480, 3619-3620).

5. Jack Davoll: Davoll was an experienced law enforcement officer when he was hired by the Denver Police Department in 1984 (App. 1457-1458, 2947-2950). He served for nine years and received high performance ratings and numerous commendations until his disability-related retirement (App. 1458, 2964-2967, 2977). Davoll was injured on the job (App. 1458). Thereafter, he was "medically precluded" from making a forcible arrest (App. 1458). It is uncontested that the ability to make a forcible arrest is an essential function of the job of police officer (App. 916), and as such, Davoll was disqualified by his injury from that job (App. 3033). This happens to about four Denver police officers each year (App. 1460).

At the time Davoll was separated from the Police Department, there were a number of vacant positions in the Police Department,

as well as other Denver agencies, for which he was qualified based on his experience as a Denver law enforcement official. (App. 1454-1456, 3481, 3619). These included jobs such as a Senior Criminal/Civil Investigator and Staff Probation Officer (App. 1461). Davoll applied for the latter two positions (App. 1461), and Denver found him to be qualified (App. 3010, 3405-3406, 3696-3697; see also 3006-3008, 3011). While Davoll was allowed to apply for these jobs just like a member of the general public (App. 3597), he was informed that a "transfer" or "reassignment" directly to a vacant position for which he was qualified was not permitted (App. 2992, 3495-3497). He was not appointed to any of those positions (App. 3010).

SUMMARY OF ARGUMENT

Jack Davoll had worked for the City and County of Denver as a police officer for nine years when he suffered an injury that left him unable to perform an essential function of his job, i.e. make a forcible arrest. Although he could no longer be a police officer, he wanted to continue working for Denver by transfering to another position for which he was qualified. But Denver refused to reassign him to a vacant position, arguing that he would have to compete with all other applicants, including those with no experience in city government.

When Congress passed the Americans with Disabilities Act (ADA), it recognized that some employees who were qualified when hired would be become disabled and unable to perform their jobs. Congress sought to protect those workers by requiring employers

to provide the "reasonable accommodation" of "reassignment to a vacant position." A jury found that Davoll was an individual with a disability, that he was qualified for vacant positions in existence at the time of his separation, and that reassigning him to a vacant position would not be an "undue hardship" to Denver. As we read Denver's brief, it raises 14 separate claims of error in an effort to overturn the jury's verdict. In essence, Denver argues that it has no obligation to reassign Davoll, and, despite the jury's findings, that to do so would be an undue hardship.

ARGUMENT

I

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON QUESTIONS OF LIABILITY

A. The District Court Did Not Err in Charging the Jury that Denver's Failure to Reassign Davoll to a Vacant Position for Which He Was Qualified Could be a Violation of its Duty to Reasonably Accommodate

The ADA defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. 12112(b)(5)(A); 29 C.F.R. 1630.9.[4] The ADA

[4] As noted above, the United States' case on behalf of Davoll was brought under Title II of the ADA. However, to ensure that public entities governed by both Title I and Title II are subject to a uniform definition of discrimination, the Attorney General has provided that "the requirements of title I of the Act, as established by the regulations of the [EEOC] in 29 CFR

(continued...)

provides that the "term 'reasonable accommodation' may include * * * job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. 12111(9) (emphasis added); 29 C.F.R. 1630.2(o)(2)(ii). One of the most common situations in which the reassignment provision comes into play is when a long-time employee without a disability receives an injury (often times on-the-job) that disables him, making him unable, even with other reasonable accommodations, to perform the essential functions of his current job. Cf. Nancy Mudrick, Employment Discrimination Laws for Disability: Utilization and Outcome, 549 Annals Am. Acad. Pol. & Soc. Sci. 53, 67, 69 (1997). Nevertheless, the employee is willing and qualified to perform other jobs for the same employer.

Denver argues (Br. 17-18) that Instructions 19 and 20 (App. 1447-1449) erroneously charged the jury that reassignment could ever be required as a "reasonable accommodation." It argues that by providing that reasonable accommodation "may include"

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[4](...continued)
part 1630, apply to employment * * * by a public entity if that public entity is also subject to the jurisdiction of title I." 28 C.F.R. 35.140(b)(1). We will therefore rely on the language of Title I and the EEOC's regulations in discussing Denver's obligations, as has Denver (Br. 12, 17). See generally Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998).

reassignment, reassignment is always optional and thus failure to reassign can never be a violation of the ADA. We disagree. For if reassignment is optional, then the whole list is optional, and a judicially enforceable duty to provide reasonable accommodation is simply illusory. That would be contrary to Congress' intent "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2) (emphasis added). Instead, the ADA requires reasonable accommodations for qualified individuals, 42 U.S.C. 12112(b)(5)(A), and provides a list of actions that courts may require of employers as reasonable accommodations under appropriate circumstances, 42 U.S.C. 12111(9).

Congress' use of the phrase "may include" does not require a contrary result. For example, 42 U.S.C. 2000e-5(g), the remedial provision of Title VII, provides that "the court may * * * order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * , or any other equitable relief as the court deems appropriate." In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court explained that the phrase "may include" did not give the district court unlimited discretion in determining when to award back pay. While the Court acknowledged that "like all other remedies under the Act, [back pay] is one which the courts 'may' invoke," it explained that that "hardly means that it is unfettered by meaningful standards or shielded from thorough [judicial] review." Id. at 415-416.

We are not suggesting that reassignment is always required. See Terrell v. USAir, 132 F.3d 621, 625 (11th Cir. 1998). By listing various potential accommodations, the statute "implicitly recognizes that there may be cases calling for one remedy but not another." Moody, 422 U.S. at 416. In Moody, the Court looked to the structure and purpose of Title VII to conclude that back pay was the presumptive remedy under most circumstances. Id. at 416-418. Similarly there are circumstances when the failure to reassign is a violation of the ADA's duty to accommodate, save for the employer's affirmative defense of "undue hardship." See McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1165 (7th Cir. 1997); Terrell, 132 F.2d at 625; Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114-1115 (8th Cir. 1995). Drawing from the language of the statute and the EEOC's regulations and Interpretative Guidance,[5] if the following five conditions exist then an employee with a disability is entitled to a reassignment under the ADA absent proof by the employer of "undue hardship."

First, by definition the accommodation of "reassignment to a vacant position" only applies to employees who have a current

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[5] Congress delegated to the EEOC the authority to promulgate regulations to enforce Title I. 42 U.S.C. 12116. As such, its regulations are entitled to "great deference," since they have the "force of law" unless "arbitrary, capricious, or manifestly contrary to the statute." Sutton v. United Air Lines, Inc., 130 F.3d 893, 899 n.3 (10th Cir. 1997) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). While the EEOC's Interpretive Guidance to its regulations is not entitled to Chevron deference, see ibid., as evidence of the "agency's fair and considered judgment" on the meaning of its regulations, it is "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 117 S. Ct. 905, 911-912 (1997) (internal quotations omitted).

assignment. "Reassignment is not available to applicants." EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o). Second, the employee must be a person with a disability who can no longer perform the essential functions of his current position, even with reasonable accommodation. See McCreary, 132 F.3d at 1165; Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996). Reassignment should generally be viewed as a last resort; to ensure that reassignment does not lead to workplace segregation, employees should be accommodated in their current positions if such accommodations do not constitute an undue hardship. EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o).

Third, the employee must request (or otherwise make known) his or her desire to be reassigned, unless he or she knows that such a request would be futile. We discuss this requirement in more detail in Part I.D.

Fourth, again obvious from the text of the statute, reassignment is only required to a "vacant position." Thus, there is no obligation to reassign the employee to an already occupied position, or create a new position to accommodate the worker. See White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995) (citing EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o)). Nor does the ADA require an employer to promote a disabled employee as an accommodation. See ibid. Instead, employers should attempt to "reassign the individual to an equivalent position, in terms of pay, status, etc.," if the

employee is qualified for such a vacant position, otherwise the employer "may reassign an individual to a lower graded position." EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o).

Fifth, an employer does not have to reassign an employee to a job for which he is not qualified. See White, 45 F.3d at 362; Gile, 95 F.3d at 499. Denver argues (Br. 18, 21-22) that this requirement should be understood to require only that it appoint an employee to a position for which he would have been selected through the regular selection process. But such a rule would completely negate the "reassignment" requirement. For "'allowing the plaintiff to compete for jobs open to the public is no accommodation at all.'" Ransom v. Arizona Bd. of Regents, 983 F. Supp. 895, 902 (D. Ariz. 1997).

As a matter of equity, Congress could reasonably require that employers show some loyalty to current employees, especially those who have served to the employer's satisfaction. Employers should not be free to discard loyal employees who become disabled, so long as those employees are qualified to fill open positions in the employer's workforce.

The ADA was intended to overcome overgeneralizations and stereotypes that led to employers underestimating the productive value of people with disabilities and the benefits that would accrue to the employer if they were given accommodations. See Coolbaugh v. Louisiana, No. 96-30664, 1998 WL 84123, at *7 (5th Cir. Feb. 27, 1998); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995). These benefits could be

especially great with regard to current employees. Requiring reassignment in certain cases recognizes "the benefits that [employers] derive from accommodating the special needs of existing employees, which they do not gain from serving those of applicants." Barth v. Gelb, 2 F.3d 1180, 1189 (D.C. Cir. 1993), cert. denied, 511 U.S. 1030 (1994); see S. Rep. No. 116, 101st Cong., 1st Sess. 31-32 (1989). Recruiting and selecting new employees impose high search costs on an employer.[6] By reassigning someone the employer has already found suitable for employment and who is familiar with the organizational rules, the employer is able to avoid the bulk of these costs.[7] Moreover, such a policy encourages employees to make long-term investments in the organization and gain firm-specific skills, both of which benefit the employer.[8] This is presumably why most employers

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[6] See, e.g., Matthew T. Golden, On Replacing the Replacement Worker Doctrine, 25 Colum. J.L. & Soc. Probs. 51, 84 (1991) (noting that "substantial costs may be involved in recruiting" workers).

[7] See, e.g., Oliver E. Williamson, The Economics of Organization: The Transaction Cost Approach, 87 Am. J. Sociology 548 (1981); see also Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 209-210 (Monroe Berkowitz & M. Anne Hill eds., 1986) (noting other potential savings for employer by reassigning current employees with disabilities). This common sense observation was confirmed by the Personnel Director for Denver's Career Service Authority at trial (App. 3463).

[8] See, e.g., Michael L. Wachter & George M. Cohen, The Law and Economics of Collective Bargaining, 136 U. Pa. L. Rev. 1349, 1358-1361 (1988); Leonard Bierman & Rafael Gely, The Need for Real Striker Replacement Reform, 74 N.C. L. Rev. 813, 818 (1996); Collignon, supra, at 228. Indeed there is some evidence that employees who are injured and wish to continue working, but are

(continued...)

(including Denver) have policies that permit transfers of existing employees without the rigorous screening required of new hires. "Thus there is economic logic as well as moral truth behind the intuition that distinguishes between 'family' and 'stranger' and the level of obligation owed to each." Barth, 2 F.3d at 1189.

The jury was expressly instructed on all five of these elements (App. 1447-1448). And, of course, the jury was charged as to Denver's "undue hardship" defense (App. 1450), an instruction to which Denver raises no challenge.

B. The District Court Did Not Err in Charging the Jury that Employees with Disabilities Need Only Be Qualified for a Vacant Position To Which They Can be Reassigned, Rather Than the Position They Currently Hold

Denver argues (Br. 13) that Instruction 16 (App. 1444) erroneously charged the jury on the proper definition of "qualified individual with a disability." According to Denver (Br. 12), the jury should have been charged that plaintiffs had to show that they were qualified for their current police officer positions in order to be entitled to any reasonable accommodation, including reassignment.[9]

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[8](...continued)
forced to take work with a new employer, receive lower wages "because of the loss of firm-specific matches." Morley Gunderson & Douglas Hyatt, Do Injured Workers Pay for Reasonable Accommodation?, 50 Indus. & Lab. Rel. Rev. 92, 95 (1996).

[9] It is not clear that Denver preserved this claim for appeal. The district court stated that Denver had preserved any objections to jury instructions which it made in its first set of proffered instructions with objections (App. 2741). In the first set of proffered instructions, the United States' propose

(continued...)

That argument is contrary to the plain text of the statute, which defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8) (emphasis added); 29 C.F.R. 1630.2(m). Thus, in cases involving reassignment as a potential accommodation, this Court has considered not only whether "a reasonable accommodation would enable the employee to do [his current] particular job," but also "whether the employee could be transferred to other work which could be done with or without accommodation." Gonzagowski

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[9](...continued)
"qualified individual with a disability" instruction charged that a plaintiff need be qualified for the position to which he seeks reassignment and that an "individual seeking reassignment to a vacant position as a 'reasonable accommodation' need not be the best qualified person available for that position" (App. 1408i). Denver objected to this instruction "on the basis that this definition would result in providing not just reassignment but also preference in hiring to individual[s] with disabilities that is not required under the ADA" (App. 1408i). We read that objection as applying only to the "best qualified person" portion of the charge, which the court declined to use (App. 2774). At no point did Denver challenge this instruction on the grounds that an employee had to be qualified for his current job. Because Denver is raising a new objection to a different part of this instruction, its claim is subject to plain error review. See Fed. R. Civ. P. 51 (must object to jury instructions, "stating distinctly the matter objected to and the grounds of the objection"); Cartier v. Jackson, 59 F.3d 1046, 1050 (10th Cir. 1995). Nevertheless, for the reasons discussed in the text, this instruction was not error at all, much less plain error.

Denver also suggests (Br. 11-12) that it is challenging the district court's decision to deny it summary judgment on this issue. However, it is well-settled that a denial of summary judgment merges with the verdict and is not appealable after trial. See Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 507 U.S. 973 (1993).

v. Widnall, 115 F.3d 744, 747 (10th Cir. 1997) (citing White, 45 F.3d at 360). This is also consistent with the approach of other courts of appeals that have held in reasonable accommodation/ reassignment cases that the employee need only show that he or she is qualified for the vacant position.[10]

Indeed, this Court recently recognized in Woodman v. Runyon, 132 F.3d 1330, 1340 (10th Cir. 1997), that "[r]equiring that plaintiffs demonstrate they are capable of performing their original job would disqualify the very individuals the [reassignment provision] is intended to benefit." It specifically relied on Gonzagowski and White, an ADA case, in holding that deciding whether a person is "qualified" requires an examination of "the availability of other jobs the plaintiff might do." Ibid. The jury was thus properly instructed on this matter.

C. The District Court Did Not Err In Charging the Jury As to The Definition of Disability

The ADA defines a "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. 12102(2)(A). A "major life activity" includes "functions such as caring for oneself, performing manual tasks, walking, seeing

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[10] See, e.g., McCreary, 132 F.3d at 1165; Stone v. City of Mount Vernon, 118 F.3d 92, 99 (2d Cir. 1997), cert. denied, 1998 WL 69645 (Feb. 23, 1998); Gile, 95 F.3d at 498-499; Shiring v. Runyon, 90 F.3d 827, 831-832 (3d Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695, 699 (5th Cir. 1995) ("Contrary to the city's position, we do not read the statutory reference to employment an individual 'desires' as applicable only to job applicants."), cert. denied, 116 S. Ct. 1263 (1996).

hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i). Denver concedes (Br. 34-35) that Instructions 13 and 14 "correctly" charged the jury on what constitutes a "major life activity" (App. 1440), and "substantially limited in a major life activity" (App. 1441).

Instead of challenging its content, Denver argues (Br. 33-34) that the court erred in giving Instruction 13 because plaintiffs did not allege that they were substantially limited in a major life activity other than working. Yet as Denver implicitly concedes by limiting this claim of error to "private plaintiffs" (Br. 33, 34), the United States' complaint filed on behalf of Davoll clearly alleged that Davoll "has a physical impairment that substantially limits one or more of his major life activities, including walking, standing and working" (App. 125).[11]

Denver also claims (Br. 34-35) that the second paragraph of Instruction 15 (App. 1442-1443), concerning what it means to be "substantially limited in the major life activity of working," misled the jury. As this Court explained in Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995), "'[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life

[11] In addition, the court correctly held that private plaintiffs' allegation (App. 4) that they had "sustained injuries" and that "[d]ue to those injuries, plaintiffs are qualified individuals with disabilities as defined in the ADA," met their obligations to put Denver on notice of their theory of the case (App. 2744, 2771-2772).

activity of working.'" Id. at 942 (quoting 29 C.F.R. 1630.2(j)(3)(i)). Instead, "[t]o demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show 'significant[] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" Ibid.

Individuals can be limited in several major life activities at once. But when "work" is the major life activity at issue, the factfinder must make use of a special multi-pronged test. Id. at 943. The EEOC has thus urged that only "[i]f an individual is not substantially limited with respect to any other major life activity, [then] the individual's ability to perform the major life activity of working should be considered." EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(j). This guidance has been adopted by a number of courts, see, e.g., Katz v. City Metal Co., 87 F.3d 26, 31 n.3 (1st Cir. 1996); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 & n.10 (5th Cir. 1995), and was the basis of the second paragraph of Instruction 15.

Denver claims (Br. 34-35) that Instruction 15 led the jury to disregard Instructions 13 and 14. The jury was charged that "[i]n following my instructions, you must follow all of them, and not single out some and ignore others" (App. 1462), and in reviewing the instructions, this Court must likewise view them as a whole, see Mason v. Oklahoma Turnpike Auth., 115 F.3d 1442,

1454 (10th Cir. 1997). Instruction 15 specifically charges the jury to "first consider whether an impairment limits some other major life activity" than working (App. 1442). In doing so, the jury would naturally refer to the previous instruction, Instruction 14, which Denver concedes (Br. 34) articulated the proper analysis. By instructing the jury to "first consider" an impairment on a major life activity other than working before addressing working, the instruction did nothing other than provide a sequence for consideration of the issues.

D. The District Court Did Not Err In Charging the Jury that Employees Need Not Request Reassignment If They Know Any Such Request Would Be Futile

Denver challenges (Br. 13-14) Instructions 17 and 20. In Instruction 17 the court charged the jury that although an employee is generally "responsible for informing the employer of the need for a 'reasonable accommodation,'" an employee "is not required to request reassignment or transfer if he or she is aware that an employer has a policy of not providing that form of reasonable accommodation" (App. 1445). Instruction 20 restated this charge in slightly different language, requiring the jury to find that each plaintiff "asked to be reassigned, or, but for his or her knowledge of the employer's 'no-reassignment' policy, would have asked to be reassigned" (App. 1448).

We have no disagreement with the general proposition expounded by Denver -- that the "appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified

individual with a disability." EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.9; see Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1285-1286 (7th Cir. 1996). But here it was undisputed that (1) there was no accommodation that would permit plaintiffs to perform their current jobs as police officers (App. 1517); and (2) "Denver's stated policy prohibits the reassignment or transfer or police officers * * * to Career Service positions within or outside the Denver Police Department" (App. 1457). Requiring plaintiffs to ask for a reassignment, even though they knew that Denver would not do so, would be an exercise in futility.

As such, Instructions 17 and 20 are a proper exposition of the "futile gesture" doctrine, which holds that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." International Bhd. of Teamsters v. United States, 431 U.S. 324, 365-366 (1977). While this doctrine is well-established in the Title VII context, its roots arise from general equity principles. See id. at 366. That the basis of the "futile gesture" doctrine is not limited to Title VII is further evidenced by its use in a variety of legal areas, including questions of exhaustion, see McCarthy v. Madigan, 503 U.S. 140, 148 (1992); Chemical Weapons Working Group v. Department of the Army, 101 F.3d 1360, 1362 (10th Cir. 1996); Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 724 (10th

Cir. 1996), and standing, see Sporhase v. Nebraska, 458 U.S. 941, 944 n.2 (1982). And Congress expressly stated in the legislative history that it expected the doctrine to apply to ADA actions. See H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess. 82-83 (1990) (describing the "futile gesture" doctrine of Teamsters and stating "[t]he Committee intends for this doctrine to apply to this title"); S. Rep. No. 116, supra, at 43 (similar). Thus, the charge contained in Instruction 17 was correct. Cf. Bultemeyer, 100 F.3d at 1285.

In any event, even if error, the instruction was harmless. The evidence was uncontested that Davoll requested that Denver reassign him to a vacant position, but that Denver refused to do so on the basis that there was a policy prohibiting such reassignments (App. 1458, 1480, 2992, 3027-3028, 3152-3153, 3495-3497, 3683). Thus Davoll met his obligation, if any, to initiate the (in this case futile) interactive process.

E. The District Court Did Not Err in Refusing to Charge the Jury That Denver Meets its Obligation under the ADA by Treating Employees with Disabilities the Same as Other Employees

Denver argues (Br. 19-22) that the district court erred in not instructing the jury in Instruction 1 (App. 1425-1426) that Denver did not "discriminate[] against" the plaintiffs because they "were treated the same as all other employees of the City" (App. 1414 (proposed jury instruction); App. 2768-2769 (district court refusal)). To the contrary, it would have been error to so charge the jury in this case.

The ADA is a detailed and comprehensive statute intended to integrate people with disabilities into the economic and social mainstream. See 42 U.S.C. 12101(a)(8); S. Rep. No. 116, supra, at 2; H.R. Rep. No. 485, Pt. II, supra, at 22. And it clearly prohibits treating people with disabilities worse than similarly situated people without disabilities based on prejudices, stereotypes, or invalid overgeneralizations. See 42 U.S.C. 12112(b)(1); EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.5. But that is not the extent of the ADA's reach. For Congress concluded that discrimination against persons with disabilities consisted of not only "outright intentional exclusion," but also the "failure to make modifications to existing facilities and practices." 42 U.S.C. 12101(a)(5). The ADA thus defines discrimination to also include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. 12112(b)(5)(A).

This Court has held that a person with a disability states a claim against her employer under the ADA by alleging a failure to provide reasonable accommodations so that she could perform the essential functions of her job. See, e.g., Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996). The Court did not suggest that the employer could escape liability

simply by showing that it does not provide such accommodations to all its employees. Indeed, "the thrust of a reasonable accommodation claim is that a defendant must make an affirmative change in an otherwise valid law or policy." Bangerter v. Orem City Corp., 46 F.3d 1491, 1501-1502 (10th Cir. 1995); see also Riel v. Electronic Data Sys. Corp., 99 F.3d 678, 681 (5th Cir. 1996).

While, as we discussed above, the precise scope of an employer's reasonable accommodation duty is contingent on a number of factors, Denver's proposed instructions were not a correct statement of the law when the claim is discrimination through a failure to reasonably accommodate a disability.

II

DENVER'S CLAIMS REGARDING THE SUFFICIENCY OF THE EVIDENCE WERE NOT PRESERVED FOR APPEAL AND, IN ANY EVENT, ARE INCORRECT

As to Davoll, Denver argues that the jury's verdict was not supported by sufficient evidence in two areas: (1) that Davoll was a qualified individual with a disability (Br. 11-12); and (2) that reassignment of qualified individuals to vacant positions was an "undue hardship" (Br. 18).[12] It did not properly preserve its sufficiency claims for appeal because it failed to make a motion for judgment as a matter of law (JMOL) at the close of all the evidence pursuant to Fed. R. Civ. P. 50(b). As such, it is barred from raising those claims on appeal.

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[12] Denver also argues (Br. 14-16) that the evidence was insufficient as to plaintiffs Clair and Escobedo because they did not show there were vacant jobs available for reassignment for which they were qualified. We do not address that claim.

1. In this case, Denver never moved for JMOL on its "undue hardship" claim. Factual sufficiency "issues not raised in a motion for directed verdict may not be * * * considered on appeal." Hinds v. General Motors Corp., 988 F.2d 1039, 1045 (10th Cir. 1993); see FDIC v. United Pac. Ins. Co., 20 F.3d 1070, 1076 (10th Cir. 1994) ("Defendant's failure to raise the bond coverage issue in its directed verdict motion precludes us from reviewing the sufficiency of the evidence to support the jury's bond coverage finding."); Green Constr. Co. v. Kansas Power & Light Co., 1 F.3d 1005, 1012-1013 (10th Cir. 1993) ("It has long been the rule that failure to move for a directed verdict precludes later appellate review of the sufficiency of the evidence.").[13]

Denver did move for JMOL at the end of the plaintiffs' case on the grounds that "they have not established that any of the plaintiffs are individuals who are disabled," and its motion was denied (App. 3664-3665). However, because Denver elected to put on a defense after its motion was denied, the motion was ineffective in preserving its claim of insufficient evidence. It is well-settled that "a defendant's motion for [JMOL] made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence." Karns v. Emerson Elec. Co.,

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[13] Denver opposed summary judgment on this issue in the United States' Title I pattern-or-practice case (App. 841-842), but did not move for summary judgment on this ground in either case. In any event, such a pre-trial motion could not preserve Denver's claim that the evidence at trial was insufficient to support the verdict. See Whalen, 974 F.2d at 1251.

817 F.2d 1452, 1455 (10th Cir. 1987) (collecting cases); Wright & Miller, Federal Practice & Procedure: Civil § 2534, at 322 (2d ed. 1994).

Denver's failure to make a new JMOL motion at the close of all the evidence bars its sufficiency claims. "Failure to renew the motion [at the close of all the evidence] prevents a defendant from challenging the sufficiency of the evidence on appeal." Karns, 817 F.2d at 1455; accord Trujillo v. Goodman, 825 F.2d 1453, 1455 (10th Cir. 1987); Wright & Miller, supra, at 323.[14] For these reasons, Denver failed properly to preserve its arguments regarding the sufficiency of the evidence.

2. This Court has never held that sufficiency claims not

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[14] Prior to the 1991 Amendments to Rule 50, this Court recognized a "limited" exception to this rule. Karns, 817 F.2d at 1456. It explained "a defendant's failure to move for [JMOL] at the close of all the evidence did not bar consideration of [the sufficiency of the evidence] when (1) the defendant moved for [JMOL] at the close of the plaintiff's evidence; (2) the trial court, in ruling on the motion, somehow indicated that renewal of the motion would not be necessary in order to preserve the issues raised; and (3) the evidence introduced after the motion was brief." Ibid. (citing Armstrong v. Federal Nat'l Mortgage Ass'n, 796 F.2d 366, 370 (10th Cir. 1986)). We believe that the Armstrong exception did not survive the 1991 Amendments to Rule 50. The Seventh Circuit, which had previously embraced a similar exception, subsequently reversed itself on the issue, explaining that "Rule 50 was reevaluated and amended in 1991. At that time the Advisory Committee made clear that Rule 50 deliberately 'retain[ed] the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered.' The Committee had the opportunity to change the requirements of Rule 50 in the 1991 amendments, and declined to do so. Therefore, we follow the plain language of the Rule * * *." Downes v. Volkswagen of Am., 41 F.3d 1132, 1139-1140 (7th Cir. 1994) (citations omitted). In any event, the circumstances of this case do not fall within the Armstrong exception, since the district court flatly denied the motion (App. 3665). The absence of a reservation by the district court is fatal to an appellant. See Karns, 817 F.2d at 1456.

properly preserved can be reviewed for "plain error," nor does Denver claim "plain error." In any event, there is no question that Denver cannot prevail under the "plain error" standard. Denver would have to show "'plain error apparent on the face of the record that, if not noticed, would result in a manifest miscarriage of justice.' This exception, however, permits only 'extraordinarily deferential' review that is 'limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency.'" Patel v. Penman, 103 F.3d 868, 878 (9th Cir. 1996), cert. denied, 117 S. Ct. 1845 (1997) (citations and some internal quotation marks omitted).[15]

On the question of whether Davoll was a "qualified individual with a disability," Denver's only argument (Br. 11-12)

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[15] This is the definition of "plain error" used in the Fourth, Fifth and Eleventh Circuits as well. See, e.g., MacArthur v. University of Tex. Health Ctr., 45 F.3d 890, 896 n.8 (5th Cir. 1995); Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182, 187 (4th Cir. 1994); Georgetown Manor v. Ethan Allen, Inc., 991 F.2d 1533, 1539-1540 (11th Cir. 1993). The First, Second and Eighth Circuits have also stated they will consider waived sufficiency claims where not granting such claims "would constitute plain error resulting in a manifest miscarriage of justice." See, e.g., BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners, 90 F.3d 1318, 1325 (8th Cir. 1996); Hammond v. T.J. Litle & Co., 82 F.3d 1166, 1172 (1st Cir. 1996); Russo v. State of N.Y., 672 F.2d 1014, 1022 (2d Cir. 1982). The Third Circuit has expressly rejected any "plain error" exception, see Yohannon v. Keene Corp., 924 F.2d 1255, 1262 (3d Cir. 1991), and the Seventh Circuit has "several times mentioned this exception, generally with faint disapproval, but [has] never adopted it." EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1286 n.15 (7th Cir. 1995). Like this Court, the Sixth and D.C. Circuits have not mentioned plain error as an exception when refusing to consider the sufficiency of the evidence for failure to comply with Rule 50. See, e.g., Jackson v. City of Cookeville, 31 F.3d 1354, 1357 (6th Cir. 1994); U.S. Indus., Inc. v. Blake Constr. Co., 671 F.2d 539, 548 (D.C. Cir. 1982).

is that he was not qualified for a job as a police officer. But as we explained in Part I.B, supra, that is not the proper inquiry. Instead, the inquiry is whether he was qualified, with or without reasonable accommodation, for any vacant position, and Denver does not challenge the sufficiency of that evidence as to Davoll. See pp. 9-10, supra. Compare Br. 14-16 (challenging it as to other two plaintiffs).

On the question of "undue hardship," Denver argues (Br. 18) that allowing reassignments would violate local law and practice. But not every change constitutes an "undue hardship." Denver must show "significant difficulty or expense." 42 U.S.C. 12111(10)(A); 29 C.F.R. 1630.2(p)(1). And there was no such evidence at trial. Indeed, the testimony by Denver's own witnesses was that they had done no studies to attempt to determine the effect of such a change, monetarily or otherwise (App. 3454, 3573-3574, 3601-3602, 3762). Moreover, Denver's Chief of Police admitted it would not be an undue hardship to the police department (App. 3618), and the Personnel Director for Denver's Career Service Authority admitted that it would not be an undue hardship in terms of expense (App. 3461). While we are not suggesting that requiring assignments across personnel systems could never rise to the level of an undue hardship, it remained Denver's obligation to show (rather than simply assert) that it would be significantly difficult or expensive, and this

it did not do.[16]

Denver also seems to suggest (Br. 18, 21-22) that permitting reassignments of police officers with disabilities will interfere with its "meritocracy," or with current employees' expectations in a merit-based system. But the evidence at trial, discussed on pp. 5-7, made clear that the current system already permits city employees (other than those who work in the Classified Service) to transfer to a vacant position, without regard to the formal application process and without the need to take an exam for that position. Moreover, there was testimony that Denver provides preferences for veterans. The system Denver currently has in place already makes "exceptions" to its "meritocracy" for certain categories of applicants and employees. Complying with the ADA's requirement that current employees with disabilities (even though working in a different personnel system) who can no longer perform the essential functions of their current job (which the parties stipulated occurred approximately four times a year (App. 1460)), but who possess the qualifications to fill a vacant position (of which there are approximately 1,500 full-time

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[16] To the extent that Denver is suggesting (Br. 6, 18) that any accommodation that would require a change in municipal law is always an undue hardship, such an argument would be contrary to this Court's statement that "the thrust of a reasonable accommodation claim is that a defendant must make an affirmative change in an otherwise valid law or policy." Bangerter, 46 F.3d at 1501-1502 (emphasis added). It would also be a complete inversion of the Supremacy Clause, permitting the existence of a local law to control the exercise of federal rights, when in fact it is clear that the ADA preempts any local law that "stands as an obstacle to the accomplishment" of its objectives. United States v. City & County of Denver, 100 F.3d 1509, 1512 (10th Cir. 1996) (discussing doctrine of "conflict preemption").

positions a year (App. 3594)), must be reassigned to that vacant position, simply does not rise to the level of an "undue hardship." Indeed, we would submit that a three-tenths of one percent (0.3%) reduction in job openings in a workforce the size of Denver's is not an undue hardship on other employees as a matter of law. Denver did submit conclusory opinion testimony at trial that employee morale would be affected by such a scheme, but the jury (properly instructed on the definition of undue hardship), apparently chose to not credit it, or found that it was not sufficiently undue. Under the circumstances, we believe the evidence at trial was sufficient to sustain the jury's verdict under the normal standards of review, and is most certainly sufficient to withstand "plain error" review.[17]

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[17] If this Court reaches the sufficiency arguments and agrees with Denver that the district court erred in failing to grant its motion for JMOL, this Court does not have the authority to enter a judgment against the plaintiffs as Denver requests (Br. 36). Apart from failing to move for JMOL at the close of all the evidence, Denver also did not renew its motion for JMOL after the verdict. This Court has made clear that the consequence of failing to file a post-verdict JMOL is that the court of appeals is barred from entering a judgment for the appellant. See Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1334 (10th Cir. 1984); Brown v. Alkire, 295 F.2d 411, 414 (10th Cir. 1961); Hansen v. Vidal, 237 F.2d 453, 454 (10th Cir. 1956). Instead, the only remedy available if this Court finds the district court erred in denying JMOL is to grant a new trial on the issue. See ibid.

III

THE DISTRICT COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS

A. The District Court Did Not Abuse Its Discretion in Prohibiting Denver From Using the Terms "Affirmative Action" and "Special Rights" or "Preferences" Before the Jury

Denver argues (Br. 18-22) that the district court abused its discretion by granting plaintiffs' motion in limine to prohibit the use of the phrases "seeking preferences or affirmative action or special rights" (App. 2767). But Denver was not in any way hindered in making its legal arguments. It was able to argue that plaintiffs were only entitled to equal treatment by invoking other familiar analogies, such as the "level playing field" (App. 2940, 2942, 3846, 3848), hiring on the basis of "status" (App. 2849, 3436), and "wanting an advantage" (App. 3834, 3839). See also App. 3429, 3466, 3600, 3747 (Denver employees and lawyers using "preference" language). And Denver does not identify any facts that the ruling barred it from submitting for the jury's consideration.

The district court justified its decision in part on the grounds that using such language "would simply muddy the waters and obfuscate the issues, and its prejudicial effect might outweigh its probative value" (App. 2767). It is common knowledge that terms such as "affirmative action" and "special rights" have come to carry significant political baggage. As was brought to the court's attention (App. 966), Denver had only recently been the venue for a highly contested statewide referendum concerning the rights of gays and lesbians in which

the terms "special rights" and "preferences" had become a rallying cry for one side of the debate. See Jane S. Schacter, The Gay Civil Rights Debate in the States, 29 Harv. C.R.-C.L. L. Rev. 283, 293-294, 300-306 (1994). It was surely permissible for the court to exclude those words which might (unintentionally) invoke strong feelings regarding contentious societal issues not involved in this case.

B. The District Court Did Not Abuse Its Discretion By Refusing to Exclude Denver's Response to a Request for an Admission

Denver argues (Br. 25-27) that the district court abused its discretion in permitting one of its responses to plaintiffs' request for admissions to be admitted into evidence (App. 3636-3640). Denver's response stated that it contended "that police officers who cannot make a forcible arrest and/or shoot a firearm are qualified individuals with a disability as defined under the ADA" (App. 506, 1513). Denver frames its argument as whether the court erred in holding it to its representation in the Second Amended Pretrial order (App. 937, 956) that the response (contained in the Defendants' First Response to Interrogatories, Requests for Production of Documents and Requests for Admission to Defendants) was authentic and admissible.

But its real dispute is not with the document's authenticity or admissibility per se (for it does not dispute that the document is authentic and that if it does contain an admission, that it would be admissible as the admission or statement-against-interest of a party). Instead, Denver is really arguing

that the court abused its discretion in not permitting it to withdraw its admission because it contained a "typographical" or "clerical" error. Such a request is governed by Fed. R. Civ. P. 36(b), and is reviewed for an abuse of discretion. See Bergemann v. United States, 820 F.2d 1117, 1121 (10th Cir. 1987).

Despite the fact that the admission was consistent with previous statements by Denver's agents (see, for example, the testimony of Lt. Steven Cooper at App. 3493), the court apparently accepted Denver's contention that there was a dispute about whether the response contained a typographical error. Under the circumstances, the district court did not abuse its discretion in permitting the admission of this response as mere evidence, not giving any special instructions about the weight to give an admission. See Rolscreen Co. v. Pella Prods. of St. Louis, 64 F.3d 1202, 1210 (8th Cir. 1995) (district court in best position to "assess the significance" of responses that had "aspects of ambiguity" and did not err "in allowing the jury to consider them along with the other evidence"); see also In re Corland Corp., 967 F.2d 1069, 1074 (5th Cir. 1992) (district court did not abuse its discretion in admitting defendant's admissions but not giving conclusive weight to equivocal statement).

We think the situation here is similar in some respects to Keen v. Detroit Diesel Allison, 569 F.2d 547, 553-554 (10th Cir. 1978). In Keen, one party failed to respond to a request for admission, but the plaintiff did not indicate in the pre-trial

order that it was planning to use the default admission at trial. The district court permitted the admission to be admitted as evidence, but also permitted counsel to present conflicting evidence and argue the merits. The district court did not give a special charge about the conclusive weight of an admission, thus leaving it to the jury to weigh along with all the other evidence. In that situation, this Court found that any error was harmless. Id. at 554.

Here, similarly, the court permitted Denver to put on evidence regarding whether plaintiffs were qualified individuals with disabilities. It also allowed Denver to impugn its admission through its questions (App. 3641), and to argue at closing that the statement was a mistake (App. 3839-3840). The district court gave no specific instruction about the admission (nor was one requested), thus leaving the jury with its general instruction that it was "for [it] to decide how much weight to give to any evidence" (App. 1432). As Denver concedes (Br. 26), "the district court * * * in instructing the jury, made it clear that it remained plaintiffs' burden to prove that the three plaintiffs * * * were qualified individuals with disabilities." Under the circumstances, refusing to exclude the admission from evidence was not an abuse of discretion.

C. The District Court Did Not Abuse Its Discretion in Permitting Dr. Kleen to Testify

Denver referred Davoll to Dr. Yechiel Kleen for an independent medical examination and for treatment (App. 3052, 3061), and Dr. Kleen was called by the United States to testify

at trial as a treating physician (App. 3046-3121). Denver argues (Br. 27-29) that the district court abused its discretion in permitting Dr. Kleen to testify because he gave expert testimony without being previously disclosed as an expert pursuant to Fed. R. Civ. P. 26(a)(2)(A). But Dr. Kleen was not giving expert testimony, and thus did not fall within the scope of the disclosure requirement.

Dr. Kleen's testimony consisted of fact and opinion. Because the appendix page Denver refers to in its brief to support its argument (App. 2756) does not contain any testimony, it is difficult to respond specifically to its general claim (Br. 28) that Dr. Kleen testified "far beyond the facts made known to him during the course of the care and treatment of" Davoll. To the contrary, a review of Dr. Kleen's direct examination (App. 3046-3090) shows that unlike an expert, who normally relies on the reports of third-parties as the factual basis for her opinions, Dr. Kleen was testifying as to Davoll's condition based on his personal knowledge.

Second, Denver suggests that Dr. Kleen provided "expert" opinion on Davoll's physical and mental state, which would have required the United States to disclose his identity prior to trial as a person who will "present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Fed. R. Civ. P. 26(a)(2)(A). (The United States would not have been required to submit to Denver the written report generally required of experts under Rule 26(a)(2)(B) because that rule only applies to persons

"retained or specially employed to provide expert testimony in the case." See Fed. R. Civ. P. 26(a)(2) 1993 Advisory Comm. Notes ("A treating physician, for example, can be * * * called to testify at trial without any requirement for a written report.")). But Dr. Kleen's testimony was admissible under Federal Rule of Evidence 701, which provides that a witness may testify as to any opinion "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

Denver objected (App. 3046-3047) when Dr. Kleen was asked about his background. But just as a postal inspector may explain his experience in investigating child pornography in order to support his lay opinion about certain photographs, see United States v. Stanley, 896 F.2d 450, 452 (10th Cir. 1990), and a police officer may testify as to his experience to give context to his lay opinion that he did not engage in a search, see Specht v. Jensen, 832 F.2d 1516, 1526 (10th Cir. 1987), cert. denied, 488 U.S. 1008 (1989), so here, Dr. Kleen could explain to the jury the basis for the opinions he was about to give. See also Malloy v. Monahan, 73 F.3d 1012, 1016 (10th Cir. 1996) (experience and background of witness important in determining foundation for lay opinion testimony).

Denver objected (App. 3090) when Dr. Kleen gave his opinion as to the cause of the psychological difficulties that he had previously evaluated, arguing that Dr. Kleen was not an expert in "psychological evaluation." But "opinion testimony is not limited

to experts." United States v. Garcia, 994 F.2d 1499, 1506 (10th Cir. 1993). Indeed, this Court has consistently recognized that lay witnesses may opine about the psychological state of a person, so long as the opinion is based on sufficient personal knowledge. See United States v. Anthony, 944 F.2d 780, 782-783 (10th Cir. 1991) (collecting cases).

Denver also complains (Br. 29) that Dr. Kleen's testimony "clearly was based upon his scientific and specialized knowledge as a physician who specializes in rehabilitative medicine," and provided the jury "very specific medical information * * * in order to enable them to understand the full nature of Mr. Davoll's injury." It is true that Dr. Kleen did explain the medical terms he used, such as "modality" (App. 3048), "EMG" (App. 3055) and "soft tissue injury" (App. 3062). But the fact that a treating physician talks about medicine in explaining his treatment, diagnosis and care of a patient does not convert his testimony into expert testimony. As this Court recently explained, even when not designated as an expert witness, "opinions offered by [a doctor are admissible if they were] based on his experience as a physician and were clearly helpful to an understanding of his decision making process in the situation." Weese v. Schukman, 98 F.3d 542, 550 (10th Cir. 1996); see also Weinstein's Federal Evidence § 701.08 at 701-22 (2d ed. 1997) ("As a lay witness, the [treating] doctor may not go the length of answering a hypothetical question, but a court should give the doctor a loose rein to state what are truly facts, even if they

are 'expert' facts."); Richardson v. Consolidated Rail Corp., 17 F.3d 213, 218 (7th Cir. 1994); Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Colo. 1995).

D. Denver Did Not Suffer Prejudice When the District Court Initially Declined to Permit Additional Discovery, When It Later Permitted Such Discovery and Denver Did Not Take Advantage of It

Denver claims (Br. 29-31) that the district court abused its discretion in December 1995 when it refused to permit Denver to obtain physical examinations of the plaintiffs and designate expert witnesses after the date set by the scheduling order. As Denver notes (Br. 30), we were not a party to this action at that time, so we do not address whether that initial ruling was an abuse of discretion.

However, we believe that subsequent events overcame any possible prejudice. After the court consolidated the private plaintiffs' and United States' actions for trial, Denver sought to obtain physical examinations of the plaintiffs and designate expert witnesses for the consolidated trial (App. 2714). At a hearing before the Magistrate Judge, plaintiffs made no objection to a physical examination that complied with Fed. R. Civ. P. 35 (App. 2694-2698). But before the Magistrate Judge could rule, Denver withdrew its request for medical examinations (App. 2703, 2710-2711). The Magistrate Judge then granted Denver's remaining requests, giving it leave to redepose the plaintiffs on issues relating to vocational rehabilitation and to designate a vocational rehabilitation expert (App. 2714-2715). Given this opportunity, however, Denver declined to designate any experts

(App. 2761-2762). Given Denver's choice not to designate an expert or take physical examinations when it had the opportunity to do so, it should not now be heard to complain that it was prejudiced by its inability to do so earlier in the case.

IV

THE DISTRICT COURT DID NOT ERR WITH REGARD TO THE REMEDY

Denver did not file any post-verdict motions challenging the amount of the jury's award of compensatory damages. Nor did it file a motion seeking to have the district court reconsider the amount of back pay and front pay that was awarded. Nor does Denver challenge the amount of the awards here. Instead, Denver makes belated objections to the manner in which the legal and equitable relief was awarded.

A. The District Court Did Not Commit Plain Error in Charging the Jury That It Could Award Compensatory Damages for a Failure to Reasonably Accommodate the Plaintiffs

Denver claims (Br. 23-25) that the district court erred in Instruction 23 (App. 1452) in charging the jury that it could award compensatory damages if it found violations of the ADA. Denver argues that a plaintiff cannot recover compensatory damages for a violation of the ADA without a finding of intentional discrimination. But Denver did not raise this claim below.[18] Thus, as Denver concedes in its section heading (Br.

[18] Denver objected in the first set of proffered instructions with objections (App. 1408j) "to the omission of the work [sic] 'intentional' as all plaintiffs must in the end prove intentional discrimination," citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), a Title VII case involving

(continued...)

23), this claim is reviewed for "plain error."

As we explained above, the United States' claim on behalf of Davoll was brought pursuant to Title II of the ADA. While Denver's substantive duties under Title II are drawn from the EEOC's Title I regulations, see 28 C.F.R. 35.140(b)(1), the statute provides that "remedies * * * set forth in section 794a of title 29 shall be the remedies * * * this subchapter provides," 42 U.S.C. 12133. Courts have consistently understood this provision to incorporate the remedies available under Section 504 of the Rehabilitation Act, 29 U.S.C. 794. See Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996); Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 930 (8th Cir. 1994).

This Court has not yet decided the proper scope of remedies available in Section 504, and thus Title II, actions. In Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir. 1997), a majority of this Court specifically declined to decide whether a plaintiff may "seek compensatory damages for violations of Title II of the ADA without alleging intentional discrimination," because the plaintiff did "not contest the district court's ruling that intentional [discrimination] must be pleaded and proved in order

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[18](...continued)
plaintiff's burden of proof to establish liability. We agree with Denver's implicit concession that this was clearly not sufficient to put the court on notice that Denver was challenging the remedies available to plaintiffs who prevailed on a reasonable accommodation claim. See Fed. R. Civ. P. 51 (must object to jury instructions, "stating distinctly the matter objected to and the grounds of the objection").

to recover compensatory damages." Id. at 1403. It thus did not reach the issue. Id. at 1402, 1403-1404.

Judge Jenkins, dissenting, found that the issue was properly presented. Id. at 1404. He then proceeded with a scholarly review of the issue, id. at 1407-1416, and concluded (correctly in our view) that compensatory damages are available when government entities violate any of their duties under the ADA, including the duty to reasonably accommodate persons with disabilities. Id. at 1407-1408. And as he noted, this is the majority view in the courts. See id. at 1414 n.20; see also W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995); Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1107, 1111 (9th Cir. 1987).[19]

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[19] As Judge Jenkins noted, 118 F.3d at 1408, Section 794a contains two provisions, one which incorporates the remedies of Title VII, and one which uses the remedies of Section 504. The legislative history suggests that Congress intended the latter set of remedies to be available for Title II claims, see S. Rep. No. 116, supra, at 57-58; H.R. Rep. No. 485, Pt. II, supra, at 98, and Denver does not argue to the contrary.

In any event, we note that Denver misdescribes the compensatory damages available for violations of Title VII (and Title I). 42 U.S.C. 1981a(a)(2) provides that damages are available against a defendant "who engaged in unlawful intentional discrimination * * * or who violated the requirements of * * * section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act," which requires the provision of reasonable accommodations. Thus the EEOC and Merit System Protection Board have determined that the federal government is liable for damages under Section 1981a(a)(2) when it fails to reasonably accommodate an employee, even without evidence of intentional discrimination. See Hocker v. Department of Transp., 63 M.S.P.R. 497, 505, 507 (M.S.P.B. 1994), aff'd mem., 64 F.3d 676 (Fed. Cir. 1995), cert. denied, 516 U.S. 1116 (1996). Moreover, Section 1981a(a)(3) provides that "[i]n cases where a discriminatory practice

(continued...)

We urge this Court to adopt Judge Jenkins' reasoning as the rule for this Circuit and affirm the district court's instruction on that ground. In the alternative, this Court may simply find that given the existence of case law in other circuits supporting the instruction and the absence of any controlling Tenth Circuit precedent, the district court did not commit "plain" error in giving the instruction. "To constitute plain error, the district court's mistake must have been both obvious and substantial." Cartier v. Jackson, 59 F.3d 1046, 1050 (10th Cir. 1995) (emphasis added). This case is similar to Cartier, which involved plain error review of a jury instruction that had followed the legal rule adopted by other courts of appeals on an issue that had not been addressed by the Tenth Circuit. This Court reasoned that "[b]ecause this test is accepted law in other circuits, it was not a substantial and obvious error for the district court to include it in the jury instructions." Ibid.; see also Heath v. Suzuki Motor Corp., 126 F.3d 1391, 1394 (11th Cir. 1997) (no plain error when law was unsettled).

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[19](...continued)
involves the provision of a reasonable accommodation * * * damages may not be awarded under this section where the covered entity demonstrates good faith efforts * * * to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." The existence of a good faith defense for damages to a reasonable accommodation claim (a defense not raised by Denver) demonstrates that Congress intended such damages to be otherwise available. See Schmidt v. Safeway, Inc., 864 F. Supp. 991, 1001 (D. Or. 1994); cf. Moody, 422 U.S. at 423 n.17 ("It is not for the courts to upset this legislative choice to recognize only a narrowly defined 'good faith' defense.").

B. The District Court Did Not Clearly Err in Finding that Denver Had Waived Its Right to an Evidentiary Hearing

Finally, Denver argues (Br. 35-36) that the district court erred in failing to hold a hearing on issues of equitable relief (i.e. back pay, front pay and injunctive relief). In doing so, it ignores the district court's explicit finding that Denver "agreed on the record that the equitable issues would be resolved on the basis of written submissions" (App. 1362). This finding is not clearly erroneous.

At a post-verdict status conference, the court asked the parties "what do you want to do on the equitable relief issues? Do you want to argue those? Do you want to have a hearing?" (App. 3904). Counsel for the United States replied "as far as Mr. Davoll goes, the United States believes we can file a written submission on the back pay calculation." The court then said "[i]t really shouldn't require a hearing to figure [this] out." Counsel for Denver responded (App. 3905):

> That is correct, Your Honor. Your Honor, what I will propose on that issue is that if they will make a submission to you in writing, we will make one in response.

The court accepted this proposal, and set a briefing schedule (App. 3905). Pursuant to the schedule, plaintiffs filed legal memoranda and attached exhibits and affidavits documenting the claims (App. 1126-1219, 1228-1273). In response, Denver filed a legal memorandum with no exhibits or attachments and requested an evidentiary hearing, arguing that cross-examination was needed to address questions relating to the salary from which back pay should be measured and the plaintiffs' mitigation of damages

(App. 1291-1292). Relying on Denver's statements at the status conference and its failure to submit even "an offer of proof" as to what it would hope to show at such a hearing, the district court resolved the issues on the written submissions (App. 1362).

Denver seems to argue (Br. 35) that when it agreed to resolve these issues on the papers, it had anticipated that it would have an opportunity to address questions respecting plaintiffs' mitigation efforts at trial. But Denver's agreement to resolve the equitable issues "in writing" came after the trial and jury's verdict. At that point, Denver knew exactly what evidence it had produced at trial. Indeed, it had been on specific notice since before trial that the issue of back pay would be for the court to decide (App. 2742, 2746), a ruling that it does not challenge on appeal. Compare Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees that oral argument may assist the Court in addressing the multiple claims raised by Denver.

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 1998, two copies of the foregoing Brief for the United States as Appellee in No. 97-1403 were served by first-class mail, postage prepaid, on the following counsel:

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