APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-3141

[Filed April 1, 2019]

TAMRA N. ROBINSON	)
	)
v.	)
	)
FIRST STATE COMMUNITY ACTION AGENCY,	)
	)
Appellant	)
	)
	)

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-14-cv-01205)
District Judge: Hon. Richard G. Andrews

Submitted Under Third Circuit L.A.R. 34.1(a)
October 23, 2018

Before: KRAUSE, COWEN, FUENTES,
Circuit Judges.

(Filed April 1, 2019)

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OPINION OF THE COURT

FUENTES, *Circuit Judge.*

Tamra Robinson was told by her manager Karen Garrett that her work performance was so poor that "you either don't know what you're doing, or you have a disability, or [you're] dyslexic." Taking Garrett's words seriously, Robinson, who had never before considered the possibility she might have a disability, decided to undergo testing for dyslexia. She sent Garrett an evaluation that concluded that Robinson had symptoms consistent with dyslexia, and requested certain accommodations from the manager of human resources. She was told that any diagnosis she received would not prevent her from performing her work in a satisfactory matter, and she was advised to focus on improving her performance. Weeks later, she was fired.

During the litigation in the District Court between Robinson and her former employer, First State Community Action Agency, Robinson acknowledged that she could not prove she was dyslexic. She proceeded on a different theory, that she was perceived or regarded as dyslexic by her employer and was therefore entitled to a reasonable accommodation the same way someone who was dyslexic would have been. While we have previously recognized the validity of a "regarded as" disability case theory in cases arising under the Americans with Disabilities Act,[1] the ADA Amendments Act of 2008[2] made clear that a "regarded as" plaintiff is not statutorily entitled to accommodation.[3] Despite this, both parties proceeded under the "regarded as" case theory throughout litigation, trial, and post-trial briefing. Only now does First State seek to unring the bell and overturn the jury's verdict because the jury was instructed that the "regarded as" case theory was valid. We hold that First State has waived this argument because of its continued acquiescence to Robinson's case theory, its encouragement of the adoption of the very jury instruction to which it now objects, and its failure to include this error in its post-trial briefing. We therefore affirm the judgment of the District Court.

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[1] *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 775 (3d Cir. 2004).

[2] Pub. L. No. 110-325, § 6, 122 Stat. 3553, 3558 (2008).

[3] 42 U.S.C. § 12201(h).

I. Background

A. Robinson's Employment at First State

In October 2009, Tamra Robinson was hired by First State Community Action Agency ("First State") as an individual development account counselor.[4] Almost two years later, First State hired Karen Garrett, and Garrett became Robinson's supervisor. Garett was dissatisfied with Robinson's work, and in November 2011, Garrett told Robinson "you either don't know what you're doing, or you have a disability, or [you're] dyslexic."[5]

Robinson had never before considered whether she had any kind of disability. She attempted to find a physician to conduct an evaluation for dyslexia, and ultimately reached out to a family friend, Dr. Phyllis Parker, who was a psychologist. After undergoing testing in January 2012, Robinson received an evaluation from Dr. Parker noting that she demonstrated "signs of dyslexia," but this evaluation did not diagnose her with the disorder.[6] She immediately forwarded it to Garrett.

While Robinson was undergoing this process, Garrett completed a performance appraisal for Robinson. On January 12, 2012, she placed Robinson on an individual development plan addressing six areas of concern. The plan provided for biweekly reviews of

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[4] About a year later, she was transitioned into the position of housing default counselor.

[5] J.A. 65.

[6] J.A. 75.

Robinson's progress followed by a final evaluation in March of that year. Garrett received Dr. Parker's evaluation just six days after completing the development plan. She forwarded it to First State's Human Resources Director, David Bull. Bull emailed Robinson, informing her that he received a copy of her "Informal Dyslexia Screening."[7] Nevertheless, he told Robinson that he did not believe the diagnostic information contained in the evaluation would "impact[] [Robinson's] ability to perform the essential elements of [her] job responsibilities" and instructed her to follow the individual development plan.[8] The next day, Robinson wrote back and asked for "reasonable accommodations"—specifically, she asked for "hands-on organized training for the types of clients" she would be responsible for counseling.[9] Bull replied by saying, "I fully understand and know ADA. What you need to do *is your job*."[10] A few weeks later, Robinson was fired.

B. Proceedings Below

In 2014, Robinson filed the instant suit against First State alleging violations of the Americans with Disabilities Act. Since at least the summary judgment stage, she argued that First State wrongfully terminated her and wrongfully denied her reasonable accommodations, both because she actually possessed a disability (dyslexia) and because First State regarded

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[7] J.A. 253.

[8] *Id.*

[9] J.A. 250.

[10] J.A. 252.

her as dyslexic.[11] The dispute between Robinson and First State proceeded to trial, and Robinson prevailed on her reasonable accommodation claim but not her termination claim. First State then moved for a new trial, and cited two alleged errors during the course of the trial.

First, during Robinson's direct examination, she testified that after being terminated, she filed a complaint with the Equal Employment Opportunity Commission, which, she further testified, ruled in her favor. At sidebar, counsel for First State objected and requested a mistrial. The District Court instead struck the response, informing the jury:

> Members of the jury, [you] may recall at the beginning of the trial, that I might have to strike some testimony, and tell you to disregard what you heard.
>
> That last question and answer, I am striking that testimony, and you have to disregard what you heard. You cannot rely on it for anything. You need to put it out of your mind.[12]

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[11] *See* Opening Brief in Support of Robinson's Motion for Summary Judgment ("Robinson SJ Br.") (Doc. 48) at 8, *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

[12] J.A. 132. Later, the District Court further explained the ruling outside the presence of the jury, noting that it did not find an intentional violation of the rule against the improper introduction of evidence. The District Court also referenced a Seventh Circuit case, *Wilson v. Groaning*, 25 F.3d 581 (7th Cir. 1994), which concluded that the improper admission of testimony was sufficiently cured by the trial court's prompt decision to strike the testimony and instruct the jury to disregard it.

In its post-trial decision, the District Court maintained that striking the testimony was a sufficient response to the inadmissible evidence because juries are presumed to follow a court's instructions, and the split verdict showed that they were not unduly swayed by the testimony.

Second, the District Court mentioned the statutory damage cap for Robinson's claims in its jury instructions.[13] After trial, the District Court agreed that the instruction was error, but determined that because First State did not object at trial and the error was harmless, it did not merit a new trial.

First State now appeals that decision, arguing that it merits a new trial both because of the stricken testimony about the Commission's finding and because of the erroneous damages cap instruction. First State also argues, for the first time, that the judgment below should be vacated because Robinson's "regarded as" disabled case theory was precluded by the ADA Amendments Act of 2008.[14]

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[13] The Court informed the jury that "[t]he total amount of compensatory and punitive damages combined you can award in this case is $50,000." J.A. 389.

[14] First State styles this objection as one regarding the District Court's jury instructions. The District Court instructed the jury on Robinson's reasonable accommodation claim as follows: "You can find that First State breached its duty to provide reasonable accommodations because it failed to engage in an interactive process if Ms. Robinson proves four things: First, First State regarded Ms. Robinson as dyslexic. Second, Ms. Robinson requested accommodation or assistance. Third, First State did not make a good faith effort to assist Ms. Robinson in seeking accommodations; and fourth, Ms. Robinson could have reasonably

II. Discussion

A. The 2008 Amendments

In 2008, the Americans with Disabilities Act was amended. The Act now provides that employers "need not provide a reasonable accommodation . . . to an individual who meets the definition of disability in [Section 12102(1)(C)]."[15] That Section, in turn, includes the definition of individuals who are "regarded as having" a physical or mental impairment.[16] In other words, after the 2008 Amendments went into effect, an individual who demonstrates that she is "regarded as" disabled, but who fails to demonstrate that she is actually disabled, is not entitled to a reasonable accommodation.[17] Therefore, the reasonable accommodation jury instruction, which informed the members of the jury that they needed to find only that First State "regarded Ms. Robinson as dyslexic,"[18] was error.

The question before us is whether to review this error under the strict plain error standard or whether

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been accommodated but for First State's lack of good faith." J.A. 384.

[15] 42 U.S.C. § 12201(h).

[16] 42 U.S.C. § 12102(1)(C).

[17] *See Powers v. USF Holland, Inc.*, 667 F.3d 815, 823 n.7 (7th Cir. 2011) ("[T]he ADAAA clarified that an individual 'regarded as' disabled (as opposed to actually disabled) is not entitled to a 'reasonable accommodation.'"). We have also made this point in prior decisions. *See, e.g.*, *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 188 n.17 (3d Cir. 2009).

[18] J.A. 384.

to treat the objection as waived. Despite the fact that Robinson discussed her position that she need only prove she was regarded as dyslexic as early as 2016, when she filed her motion for summary judgment, First State never addressed the effect of the 2008 Amendments until its briefing before this Court. It contends that its failure to raise this argument is best understood as a failure to object to an erroneous jury instruction and should therefore be reviewed under our plain error standard. We disagree because, although First State focuses narrowly on how this error manifested in the jury instructions, it was more broadly a flaw in Robinson's theory of the case that dated back to summary judgment briefing, and First State at no time objected to that theory despite numerous opportunities to do so. Thus, we view the argument as waived, and we decline to consider it for the first time on appeal.

1. Forfeiture and Waiver

"The effect of failing to preserve an argument will depend upon whether the argument has been forfeited or waived."[19] Forfeiture is the "failure to make the timely assertion of a right."[20] Waiver is the "intentional relinquishment or abandonment of a known right."[21] Waived arguments about jury instructions may not be

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[19]*Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146 (3d Cir. 2017).

[20]*Id.* at 147 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

[21]*Id.* (citation omitted).

resurrected on appeal.[22] When the argument was merely forfeited, however, plain error analysis applies,[23] and we will reverse only where the error is "fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance and our refusal to consider the issue would result in a miscarriage of justice."[24]

We find that First State's actions below are more appropriately classified as waiver. Throughout the history of this litigation, including in its early stages, First State was routinely confronted with Robinson's "regarded as" case theory. Not only did First State fail to object, it specifically assented to the jury instruction it now points to as erroneous.

In 2016, First State moved for summary judgment, arguing, among other things, that Robinson could not establish that she was disabled under the terms of the Americans with Disabilities Act.[25] In response, and in her motion for summary judgment, Robinson argued that she only needed to establish that First State

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[22] *Id.* at 146 n.7.

[23] *See Harvey v. Plains Twp. Police Dep't*, 635 F.3d 606, 609 (3d Cir. 2011); *see also* Fed. R. Civ. P. 51(d).

[24] *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 424 F.3d 336, 339 (3d Cir. 2005) (quoting *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 136 (3d Cir. 1997)).

[25] *See* Opening Brief in Support of First State's Motion for Summary Judgment (Doc. 45), *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

"regarded her" as disabled.[26] Instead of correcting Robinson's error of law, First State argued that there was no evidence First State treated Robinson as though she had a "substantially limiting impairment."[27] The Magistrate Judge disagreed, and found that summary judgment was inappropriate because there was a question of material fact regarding whether First State considered Robinson disabled.[28] First State filed no objections to the Report and Recommendation, failing again to argue that a plaintiff could no longer proceed under a "regarded as" disability theory for reasonable accommodation claims.[29]

Those failures, alone, would not be enough to waive the issue on appeal, but the viability of the "regarded as" case theory was squarely before First State again at trial. At a conference outside the jury's presence in December 2017, plaintiff's counsel suggested that the relevant jury instruction include the four-part test from *Williams v. Philadelphia Housing Authority Police Department* on a failure to reasonably accommodate a

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[26] Robinson SJ Br. at 8; Brief in Opposition to First State's Motion for Summary Judgment (Doc. 50) at 9–11, *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

[27] *See* Brief in Opposition to Robinson's Motion for Summary Judgment (Doc. 51) at 8, *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

[28] *See* Report and Recommendation dated October 24, 2016 (Doc. 56) at 8–10, *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

[29] *See* Order dated November 17, 2016 (Doc. 57), *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

plaintiff who was "regarded as" disabled.[30] Defense counsel initially provided no views about the jury charge. That evening, plaintiff's counsel sent an email clearly stating that "as we represented today, we are not arguing that Ms. Robinson *has* a disability."[31] The email also provided more concrete suggestions to include the *Williams* test in the instructions. At the charge conference the next day, defense counsel voiced her support for Robinson's proposed jury instruction, specifically saying that while she had not seen the new proposed language, she agreed that "it would be simpler if the accommodation claim is included" and that "the language about the failure to engage in the four-part test"—the language derived from *Williams*, which held that a "regarded as" plaintiff could pursue

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[30] In *Williams*, we concluded that the Americans with Disabilities Act as then codified entitled a plaintiff who was regarded as disabled to reasonable accommodations. 380 F.3d 751, 775 (3d. Cir. 2004). We set forth the following four elements for establishing that an employer breached its duty to provide reasonable accommodations: "1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith." *Id.* at 772 (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319–20 (3d Cir. 1999)). The instructions given to the jury below modified those in *Williams* to reflect the entitlement of a "regarded as" plaintiff to a reasonable accommodation. Those instructions correctly explained the law under our precedent in *Williams*, but the 2008 Amendments abrogated *Williams* on that point.

[31] Email to the Court dated December 7, 2016 (Doc. 69), *Robinson v. First State Cmty. Action Agency*, 14 Civ. 1205 (RGA) (D. Del. 2014).

a reasonable accommodation claim—should be included.[32] After First State was found liable on Robinson's reasonable accommodation claim, it moved for a new trial. But it did not raise the error in that post-trial briefing, nor did it move for judgment as a matter of law on those grounds.

This course of conduct evinces an intent to proceed under Robinson's "regarded as" case theory and waive any objection based on the 2008 Amendments. Our recent cases on waiver illustrate this point. In *Government of the Virgin Islands v. Rosa*, we found that a defendant's "repeated acquiescence" to erroneous instructions did not rise to the level of a knowing and intentional waiver.[33] But in *United States v. Wasserson*, we concluded that an alleged error was waived when the defendant failed to raise the objection at trial and failed to include it in his post-trial briefing.[34] And, we have long held that when a party jointly recommends a jury instruction, it cannot later complain about that

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[32] J.A. 211–12. Specifically, Stevens said, "Your Honor, I'm not exactly sure of how [Robinson] want[s] to change the instruction as proposed, but I think it would be simpler if the accommodation claim is included. The language about the failure to engage in the four-part test that is used instead of setting out two separate tests. I do think it could be set out with the four-prong test that is identified, I believe. I think we're talking about the same one. I can consult with counsel to make sure we're talking about the same one."

[33] 399 F.3d 283, 292–93 (3d Cir. 2005).

[34] 418 F.3d 225, 239 (3d Cir. 2005). The defendant in that case also failed to raise the issue in his opening brief, which constituted a second ground to find waiver. *Id.* at 240.

very instruction.[35] Here, First State did not merely fail to object to an instructional error at a charging conference; it played along with a flawed theory of liability throughout the litigation and ultimately endorsed the specific instruction embodying that theory. First State was initially made aware in mid-2016 of the erroneous case theory and did nothing. It did nothing again at the beginning of trial. And finally, it invited the District Court to use the four-part test from *Williams* it now argues is incorrect. Unfortunately for First State, it is simply too little, too late. We therefore find that First State has waived its argument about the effect of the 2008 Amendments and will not review the instruction for plain error.

2. The Effect of the Model Jury Instructions

Although, for the reasons stated above, we conclude that First State's argument regarding the reasonable accommodation jury instruction was waived, and thus need not review the instruction for plain error, the parties have devoted considerable attention in their briefing to the significance of the "Model Civil Jury Instructions for the District Courts of the Third Circuit,"[36] which erroneously includes a "regarded as"

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[35] *See United States v. Ozcelik*, 527 F.3d 88, 97 n.6 (3d Cir. 2008); *see also United States v. Teague*, 443 F.3d 1310, 1317 (10th Cir. 2006) ("[W]hen a party 'invites' an error by suggesting that the court take particular action, we can presume that the party has acted voluntarily and with full knowledge of the material consequences.").

[36] Model Instructions 9.1.3 and 9.2.1 have not been updated to reflect the 2008 Amendments to the ADA. Instead, Instruction

instruction, for a plain-error analysis. In so doing, they expose a fundamental misunderstanding of the import of those instructions and the standard under which they are reviewed. Specifically, Robinson argues that because the flawed instruction appears in what are colloquially known as the "Third Circuit Model Jury Instructions," the District Court could not have "plainly" erred in providing it to the jury. As Robinson's misunderstanding may be shared by others, we take this opportunity to correct it.

Although entitled "Model Civil Jury Instructions for the District Courts of the Third Circuit," these instructions are drafted not by members of this Court but by the Committee on Model Civil Jury Instructions, consisting of eight district court judges from districts within the Third Circuit, who also collaborate with the Committee's reporters, two law professors. Although the Committee's work is partially funded by the Third Circuit Court of Appeals, and made available on the Court's website, the website clarifies that "neither the

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9.1.3, which provides the elements for a reasonable-accommodation claim, states that a plaintiff must prove she "has a 'disability' within the meaning of the ADA," and cross-references Instruction 9.2.1 for the definition of "disability." Third Circuit Model Jury Instructions for Employment Claims Under the Americans with Disabilities Act at 17, *available at* https://www.ca3.uscourts.gov/sites/ca3/files/9_Chap_9_2018 _Oct.pdf. Instruction 9.2.1, in turn, defines "disability" to include "not only those persons who actually have a disability, but also those who are 'regarded as' having a disability by their employer." *Id.* at 48. The Comment to Model Instruction 9.1.3 refers to *Williams*, and states that "an employee 'regarded as' having a disability is entitled to the same accommodation that he would receive were he actually disabled." *Id.* at 28. The Comment to Model Instruction 9.2.1 uses the same language. *Id.* at 56.

[Third Circuit] Court of Appeals nor any Judge of that Court participate[s] in the drafting of the Model Instructions."[37] Given the care put into that drafting, we have observed it is unlikely "that the use of [a] model jury instruction can constitute error."[38] True enough, as far as probabilities go, but we have never held that use of such an instruction cannot constitute error, and a model jury instruction itself is neither law nor precedential. Judges and parties are not free to incorporate incorrect legal principles simply because there is a similar error in these or any model jury instructions. Model instructions are designed to help litigants and trial courts, not to replace their shared obligation to distill the law correctly when drafting proposed jury instructions. Thus, the existence of the antiquated model jury instruction here, which regrettably does not yet reflect the 2008 Amendments, fails to provide a second justification for our decision to not review the relevant jury instruction.

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[37] Introduction to the Model Civil Jury Instructions, *available at* http://www.ca3.uscourts.gov/sites/ca3/files/INTRODUCTION_2018_for_website.pdf.

[38] *United States v. Petersen*, 622 F.3d 196, 208 (3d Cir. 2010). Admittedly, our language has not always been as precise as it could be, perhaps contributing to the confusion. For example, we have referred to the model instructions on occasion as "our own." *Id.* As indicated, however, the model jury instructions do not bear the imprimatur of this Court, and when parties use those instructions, they are reviewed like any other instructions for their correctness, both on plenary review and plain-error review.

B. The Statutory Damages Cap

First State also argues that the inclusion of the $50,000 statutory damages cap was error. Because First State did not object during trial, we review for plain error.[39] We agree with the District Court that the instruction was given in error but that such error was harmless.

The pertinent statute, 42 U.S.C. § 1981a(c)(2), provides that a court "shall not inform" the jury of statutory damages limitations. The District Court's instruction did just that, and the instruction was error. The question for us, then, is whether that error was so fundamental and prejudicial that a failure to review it would constitute a miscarriage of justice.[40]

First State points to a single Fourth Circuit opinion that lends some credence to its argument that an erroneous instruction on statutory damages *might* constitute error, but falls far short of convincing us that there was plain error in this case. In *Sasaki v. Class*, an attorney mentioned the damages cap during closing

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[39] First State's attorney did raise questions about whether or not the damages cap should be included in the jury instructions. But while First State points this out, it neglects to mention that its attorney did not actually object to the charge, and instead said "I don't know. I just read it as a rule. I didn't know if it was the rule to be followed. . . . I'm comfortable with [the instruction]." J.A. 184. When an attorney admits to uncertainty about the propriety of the charge and fails to actually object, the requirements of Rule 51(c) of the Federal Rules of Civil Procedure have not been met, and the instruction is reviewed under the plain error standard. *See Collins v. Alco Parking Corp.*, 448 F.3d 652, 655–56 (3d Cir. 2006).

[40] *Collins*, 448 F.3d at 656.

argument.[41] On review, the Fourth Circuit concluded that "when a jury's damages award itself indicates . . . strongly that the error substantially influenced the jury's verdict, the error cannot be dismissed as harmless."[42] But there are two key distinctions between *Sasaki* and the instant matter. First, because the defendant's attorney objected at trial, the error was preserved.[43] Second, the court found evidence that the jury had responded to the erroneous disclosure by adjusting its award—namely, the jury awarded $50,000 (the highest amount within the damages cap) on the plaintiff's federal claims and $150,000 on her state law claims, despite the fact that "[a]ll of the conduct that formed the basis for [the] state claims also provided the basis for [the] federal claims."[44] Here, however, First State presents no evidence that learning of the damages cap affected the jury's decisionmaking. Indeed, the jury awarded Robinson $22,501, which was well below the statutory cap in any event.

While the inclusion of the statutory cap language was error, we cannot see how there was any prejudice to First State as a result, much less prejudice that, if left uncorrected, would work a manifest injustice. We therefore conclude that there was no plain error.

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[41] 92 F.3d 232, 235 (4th Cir. 1996).

[42] *Id.* at 237.

[43] *Id.* at 235.

[44] *Id.* at 237.

C. Robinson's Testimony about the Commission

Finally, we review First State's objection to Robinson's testimony about the outcome of her complaint before the Equal Employment Opportunity Commission. We review the District Court's denial of a new trial on these grounds for abuse of discretion. An abuse of discretion occurs when a lower court's decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact."[45]

First State argues that it was improperly prejudiced by Robinson's disclosure that the Commission ruled in her favor. The District Court agreed that Robinson's testimony was inadmissible and promptly struck it from the record. She instructed the jury that they were not to consider it in their liability determination. First State does not explain why this course of conduct was insufficient, except that it speculates that Robinson's statement "likely played a part" in the jury's verdict.[46] For two reasons, we disagree.

First, as the District Court noted, the jury returned a split verdict. Had the jurors been under the impression that they should find First State liable because the Commission found in Robinson's favor, it does not follow that this prejudice would manifest itself

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[45] *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006) (quoting *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 127 (3d Cir. 1993)).

[46] Appellant's Br. at 22.

only in the reasonable accommodation verdict and not the termination verdict.

Second, we presume that jurors follow the instructions given to them by the trial court.[47] That presumption is only overcome where there is an "overwhelming probability" that the jury was unable to follow the instructions and a likelihood that the evidence wrongfully admitted was "devastating" to the other party.[48] There is simply no evidence here that the jury considered Robinson's testimony after receiving the curative instruction, nor is there a likelihood that the consideration of Robinson's testimony would have been "devastating" to First State. We therefore conclude that the District Court did not abuse its discretion in determining that a new trial was not warranted on these grounds.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the District Court.

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[47] *Glenn v. Wynder*, 743 F.3d 402, 407 (3d Cir. 2014).

[48] *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (quoting *Richardson v. Marsh*, 481 U.S. 200, 208 (1987); *Bruton v. United States*, 391 U.S. 123, 136 (1968)).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 14-1205-RGA

[Filed August 29, 2017]

TAMRA N. ROBINSON,	)
	)
Plaintiff,	)
	)
v.	)
	)
FIRST STATE COMMUNITY ACTION AGENCY,	)
	)
Defendant.	)
	)

MEMORANDUM

Tamra Robinson, Plaintiff, filed this action against First State Community Action Agency, Defendant, alleging violations of the Americans with Disabilities Act ("ADA"). Plaintiff asserted that: (1) Defendant regarded her as dyslexic yet failed to engage in an interactive process to provide her with reasonable accommodations; and (2) Defendant terminated her because she was regarded as dyslexic. On December 8, 2016, "judgment [was] entered in favor of [Defendant] on the ADA 'termination' claim; and . . . judgment in

the amount of twenty-two thousand five hundred one dollars ($22,501) [was] entered in favor of [Plaintiff] on the ADA 'interactive process' claim." (D.I. 73).

Before the Court is Defendant's motion for a new trial. (D.I. 82). Defendant moves under two theories: 1) the jury was prejudiced by hearing inadmissible testimony about the Equal Employment Opportunity Commission ("EEC") findings in favor of Plaintiff, and 2) the jury was instructed on the statutory cap on punitive damages in contravention of federal law. For the reasons stated below, Defendant's motion is **DENIED.**

Also before the Court is Plaintiff's motion for attorneys' fees, legal expenses, and costs. (D.I. 81). As the prevailing party, Plaintiff seeks recovery of attorneys' fees under 42 U.S.C. § 12205. (*Id*.). Plaintiff requests an award of a lodestar in the amount of $150,412, and for litigation costs and expenses in the amount of $2,637.28, representing the amounts incurred through January 3, 2017. (*Id*. if 15). In Plaintiff's reply, Plaintiff requests that $17,876.72 be added to the lodestar for attorneys' fees incurred between January 3, 2017 and January 24, 2017. (D.I. 85 at 8). Thus, Plaintiff's total request is attorneys' fees of $168,288.72 and costs of $2,637.28. (*Id*.). For the reasons set forth below, Plaintiff's motion is **GRANTED** in part and **DENIED** in part.

DEFENDANT'S MOTION FOR NEW TRIAL

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(a)(1)(A) provides, in pertinent part: "The court may, on motion, grant a

new trial on all or some of the issues—and to any party— . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court. . . .” Among the most common reasons for granting a new trial are: (1) the jury’s verdict is against the clear weight of the evidence, and a new trial must be granted to prevent a miscarriage of justice; (2) newly discovered evidence exists that would likely alter the outcome of the trial; (3) improper conduct by an attorney or the court unfairly influenced the verdict; or (4) the jury’s verdict was facially inconsistent. *Arow-Smith v. N.J. Transit Rail Operations, Inc.*, 953 F. Supp. 581, 584–85 (D.N.J. 1997).

The decision to grant or deny a new trial is committed to the sound discretion of the district court. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Olefins Trading, Inc. v. Han Yang Chem. Corp.*, 9 F.3d 282, 289 (3d Cir. 1993). Although the standard for granting a new trial is less rigorous than the standard for granting judgment as a matter of law—in that the Court need not view the evidence in the light most favorable to the verdict winner—a new trial should only be granted where “a miscarriage of justice would result if the verdict were to stand,” the verdict “cries out to be overturned,” or where the verdict “shocks [the] conscience.” *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1352–53 (3d Cir. 1991).

II. THE EEC TESTIMONY

In Defendant’s motion for a new trial, Defendant contends that Defendant was prejudiced by Plaintiff’s testimony that the EEC found in her favor. (D.I. 82).

Defendant also argues that Plaintiff's counsel intentionally elicited the statement from Plaintiff. (D.I. 86 ¶ 1).

On the first day of the trial, Plaintiff testified that she filed a complaint with the EEC and that the EEC ruled in her favor. (D.I. 87 at 3).

> Q. After you were terminated, what did you do next?
> A. I filed a Complaint with the EEC, the Equal Employment Opportunity Commission and filed for unemployment.
> Q. The EEC, to your understanding, what is that they do?
> A. They, I guess, help support those who feel like they were discriminated against with regard to a disability.
> Q. Why did you go to them?
> A. To get backing in regards to the evaluation and me doing -- show them the evaluation was sufficient enough for a defense.
> Q. What happened next?
> A. The EEC ruled in my favor.

(*Id*.) Defendant objected, and I called counsel to sidebar. (*Id*.). Defendant requested a mistrial, which I denied. (*Id*. at 4). I told the parties trial was going to move forward, but I asked Defendant's counsel if there was something else she would like me to do. (*Id*. at 6). Defense counsel made no suggestions in response. I struck the question and answer and instructed the jurors to disregard what they had heard and to not rely on it for anything. (*Id*. at 8).

> Members of the jury, you may recall at the beginning of the trial I said I might have to strike some testimony and tell you to disregard what you heard. The last question and answer, I am striking that testimony, and you have to disregard what you heard. You cannot rely on it for anything. You need to put it out of your mind.

(*Id.*). After my instruction, there was no further discussion of the EEC throughout the trial.

I am not granting Defendant's request for a new trial for two reasons. First, the instruction I gave was sufficient to alleviate any prejudice to Defendant. The Supreme Court held that a district court should "presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987). I promptly struck the testimony. My instruction was not objected to. The testimony itself was not detailed and not even all that clear what Plaintiff was saying the EEC ruled on in her favor. The jury's verdict was split, showing individual analysis of the two asserted claims. There is no reason to believe that the EEC testimony prejudiced the jury, and I do not believe that it had any effect on the verdict.

Second, I do not find that Plaintiff's counsel intentionally elicited the testimony from Plaintiff. When I asked Plaintiff's counsel whether he had

expected Plaintiff's testimony, his responses were not altogether clear. I would summarize my understanding of his explanation to be that he was not shocked by the response but he was trying to demonstrate that the EEC did not work out and that is why Plaintiff had to file a lawsuit. (D.I. 87 at 5-6). After reviewing Plaintiff's counsel's line of questioning leading to the EEC findings statement, and his responses to my inquiry during the sidebar, I find that the EEC testimony was inadvertently presented to the jury. Since the jury was not prejudiced, and the EEC testimony was inadvertent, a new trial is not warranted.

III. THE STATUTORY DAMAGES CAP

Defendant argues that I should grant a new trial because the jury was instructed on the statutory limitations of $50,000 for punitive damages. That was an error. Under 42 U.S.C. § 1981a(c)(2), "If a complaining party seeks compensatory or punitive damages under this section . . . the court shall not inform the jury of the limitations." Defendant, however, did not make any objection to the instruction on the record, despite multiple opportunities to do so.

"A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51(c)(1). Further, a "party may assign as error: an error in an instruction actually given, [only] if that party properly objected." Fed. R. Civ. P. 51(d)(1).

During a conference, I drew the parties' attentions to the inclusion of the damages cap in the proposed verdict form and asked for their input on adding an instruction about the cap. (D.I. 88 at 3). Neither Plaintiff nor Defendant objected. (*Id.*). Instead, both parties agreed that the instruction should be included. (*Id.*). During the charging conference, I again asked the parties if they objected to any of the proposed jury instructions, which included an instruction on the damages cap. (D.I. 89 at 3-21). Defendant raised six objections, but none pertained to the damages cap. (*Id.*). After Defendant's counsel raised the objections, she stated, "And I believe that is all I had for the final version of the jury instructions." (*Id.* at 18). I read the jury instruction to the jury as revised and consented to by both parties. The jury then retired and went to the jury room for deliberation.

Defendant did not object to the instruction on the damages cap nor its inclusion in the verdict form. Thus, the instruction was not reversible error. *See McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750 (3d Cir. 1990) (erroneous punitive damages instruction not plain error); *Trent v. Atlantic City Elec. Co.*, 334 F.2d 847, 859 (3d Cir. 1964) (noting that reviewing errors in jury instructions which were not objected to at trial should be exercised "to prevent only what is deemed a miscarriage of justice").

Further, any error was harmless. It is certainly open to debate whether telling the jury that the maximum amount of punitive damages is $50,000 is worse for Defendant than leaving the maximum amount unstated. I do not think it all likely that had I

not instructed on the cap, the jury would have awarded less. Having not raised the objection during trial, Defendant is barred from raising this objection now.

Since the erroneous testimony was stricken with a curative instruction, the erroneous jury instruction was not objected to, and it did not harm Defendant, there is no reason to grant a new trial. Thus, Defendant's motion for new trial is **DENIED.**

PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

IV. STANDARD OF REVIEW

Under the fee-shifting provision of the ADA, a district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. Since Plaintiff prevailed on her interactive process claim, she is a prevailing party entitled to reasonable attorney's fees. A reasonable fee "is one that is adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 897 (1984). In calculating the amount of reasonable attorney's fees, "[t]he most useful starting point . . . is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The result of this calculation is called the lodestar. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

A court determines a reasonable hourly rate by reference to the prevailing market rates in the community and the evidence submitted "supporting the

hours worked and rates claimed" to a court. *Hensley*, 461 U.S. at 433. "The prevailing party bears the burden of establishing by way of satisfactory evidence" and the "[attorneys'] own affidavits, that the hourly rates meet this [community rate]." *Washington v. Phila. Cty. Ct. of C.P.,* 89 F.3d 1031, 1035 (3d Cir. 1996). With respect to the number of hours expended, the prevailing party must establish that those hours were "reasonably expended." *Hensley,* 461 U.S. at 434. "The district court . . . should exclude from [the lodestar] calculation hours that were not reasonably expended." *Id.* The court also may exclude from the lodestar calculation hours "spent litigating on claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed." *Rode*, 892 F.2d at 1183.

"After determining the [reasonable rate and] number of hours reasonably expended," the court "multiplies that rate by the reasonable hours expended to obtain the lodestar." *Id.* "The lodestar is presumed to be the reasonable fee." *Id.* "The court can adjust the lodestar downward if the lodestar is not reasonable in light of the results obtained." *Id.* This downward adjustment "accounts for time spent litigating wholly or partially unsuccessful claims that are related to the litigation of successful claims." *Id.* "The district court cannot decrease a fee award based on factors not raised at all by the adverse party." *Id.* With these standards in mind, I turn to Plaintiff's request.

V. LODESTAR

To support the fees request, Plaintiff submitted three affidavits from local attorneys, practicing in the

field of plaintiff-side employment law. (D.I. 81 at Ex. A-C). Plaintiff also submitted a twenty-two page itemized record detailing the date work was performed, the individual who performed it, a description of the work, the number of hours spent, and the amount charged. (*Id.* at Ex. F). Defendant contests the reasonableness of the hourly rates, contests the reasonableness of the time spent on litigation, contests the adequacy of the documentation, and requests various adjustments to the lodestar. (D.1. 85). I will address each of Defendant's challenges in turn.

A. HOURLY RATES

Defendant argues Plaintiff's attorneys' hourly rates of $410 should be reduced. Defendant points to the $350 hourly rate awarded in *Burris v. Richards Paving.* 472 F. Supp. 2d 615 (D. Del. 2007). While that may have been reasonable for that case, which was a decade ago, the standard is, "The prevailing party bears the burden of establishing by way of satisfactory evidence . . . that the hourly rates meet this [community rate]." *Washington* 89 F.3d at 1035. Plaintiff provided the Court with three affidavits from local attorneys in support of the reasonableness of the hourly rates. (D.I. 81 at Ex. A-C). Plaintiff has established that the requested rates here are reasonable. Thus, no adjustment will be made to the hourly rates.

B. TIME SPENT ON LITIGATION

Defendant argues that "the case was overstaffed with two attorneys expending 352.3 hours," and that "the issues in this case were not unusually complex,

and the trial was not unduly long or burdensome." (D.I. 83 ¶¶ 18-19). Defendant requests that I "find that the time expended throughout the litigation was [excessive] and not award the requested prevailing rate for both attorneys." (*Id*. ¶ 18). Defendant "assert[s] that the [trial preparation and presentation] fees should be reduced by half." (*Id*. ¶ 19).

The use of two attorneys during trial is not excessive, and no adjustment will be made to the lodestar on the basis of the purported overstaffing. *Contrast Taylor v. USF-Red Star Express, Inc.*, 2005 WL 555371 at *3 (E.D. Pa. Mar. 8, 2005) (reducing the trial billing hours in an ADA case because the plaintiff used three senior attorneys at trial "when one or two would have sufficed."). Trials require a greater commitment of resources. I also note that most of the pretrial work was done with one attorney.

C. DOCUMENTATION

Defendant contests certain entries as being "insufficient to support a fee award." Although a motion for attorney's fees should have "some fairly definite information as to the hours," it is only required to be "specific enough to allow the district court to determine if the hours claimed are unreasonable for the work performed." *Rode*, 892 F.2d at 1190. Although some of Plaintiff's entries are not extremely detailed, all of Plaintiff's entries are specific enough for the Court to understand the reasonableness of the work performed. Thus, no adjustment will be made to the entries.

Plaintiff's Exhibit F, the twenty-two page itemized record detailing the attorneys' fees, is accepted as adequate documentation for a fee award.

The starting point—the lodestar—is $168,288.72. Next, I will address Defendant's request for adjustments to the lodestar.

VI. ADJUSTMENTS TO THE LODESTAR

In Defendant's answer (D.I. 83), Defendant requests several adjustments to the lodestar. Defendant argues I should reduce the lodestar for any post-trial charges, for secretarial work performed at paralegal hourly rates, for travel billed at full hourly rates, for issues caused and prolonged by Plaintiff, for costs incurred by the change of Plaintiff's theory of the case, for costs relating to Dr. Parker's deposition, and for Plaintiff's unsuccessful termination claim. (*Id.*). I will examine each argument Defendant raises.

A. POST-TRIAL CHARGES

Defendant "contests [post-trial] charges relating to the preparation of the Motion for [Attorneys'] Fees." (D.I. 83 ¶ 16).

The Third Circuit has held "the time expended by attorneys in obtaining a reasonable fee is justifiably included in the attorneys' fee application, and in the court's fee award." *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978). Plaintiff's post-trial charges spent in preparing the motion for attorneys' fees and replying to Defendant's answer are compensable. No adjustment will be made to the lodestar just because it includes Plaintiff's post-trial fees.

B. SECRETARIAL WORK

Defendant argues that the "hours of secretarial work" performed by paralegals required no "specialized legal training" and requests a reduction in the lodestar equivalent to the difference had the hours been performed by a secretary. (D.I. 83 ¶ 17). While paralegal work can be included in a fees award, "purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *Missouri*, 491 U.S. 274, 288 n. 10 (1989). The tasks described by Defendant as "hours of secretarial work" are not "purely clerical or secretarial tasks" because e-filing, retrieving pleadings from the docket, and calling a court reporter or clients are not purely secretarial. No adjustment will be made to Plaintiff's hours based on the theory that a secretary should have performed the work.

C. TRAVEL

Defendant argues that I should reduce Plaintiff's fees for travel time because Plaintiff charged "the full hourly fee for travel to and from depositions located within two hours of the court of jurisdiction." (D.I. 83 ¶ 21). "[M]atters of this sort are within the discretion" of the Court. *Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991) (upholding the district court's decision to award compensation for travel time at the regular hourly rate). Defendant, not Plaintiff, chose Georgetown, Delaware as the location of the depositions. Since Plaintiff's travel time could have been avoided by Defendant, no adjustment will be made to Plaintiff's travel time billing.

D. ISSUES CAUSED AND PROLONGED BY PLAINTIFF

Defendant requested residential, employment, and educational records. Plaintiff refused to provide that information. (D.I. 83 ¶ 22). Defendant filed a motion to compel (D.I. 25) which Plaintiff answered (D.I. 28), but, "[o]n the same day, Plaintiff provided the information, and Defendant subsequently withdrew the motion." (*Id.*). Had Plaintiff turned over the residential, employment, and educational records instead of billing for an answer and only then turning over the information, the costs associated with this motion to compel could have been avoided. Since the costs could and should have been avoided by Plaintiff, the lodestar will be reduced with regards to the costs expended on the motion to compel. The lodestar is reduced by $2,270.00 to $166,018.72.

E. CHANGE OF PLAINTIFF'S THEORY OF THE CASE

Defendant argues for a reduction for the "belated change in Plaintiff's theory of the case." (D.I. 83 ¶ 23). Defendant argues that early in the case, "Plaintiff asserted that she was dyslexic," but "[l]ater in the litigation, Plaintiff asserted that she was 'regarded as' disabled." (*Id.*). Defendant filed a motion for summary judgment in anticipation that Plaintiff's only theory was that she was dyslexic but did not anticipate the "regarded as disabled" theory.

Defendant did not indicate, in any document, when Plaintiff supposedly changed her theory of the case. There is no evidence in the record (at least that has

been called to my attention), *cf.* Fed. R. Civ. P. 56(c)(3) & (e)(2) (putting the burden on the parties to point to the record that supports a party's position), that Plaintiff misled Defendant on her theory of the case.

Plaintiff merely alleged "discrimination against [her] because of [her] disability in violation with the [ADA]." (D.I. 2 at 7). The term "disability" as used in 42 U.S.C. § 12101 has three meanings: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. Thus, simply because Plaintiff states she has a disability does not mean that she is not arguing that she is regarded as having a disability.

Plaintiff's *pro se* complaint alleged facts that supported a "regarded as" theory. She checked the disability box, and also wrote that she had "informed [her supervisor] that I had a disability." (*Id.* at 7 & 9). Defendant might have anticipated all three meanings of "disability" under § 12101 as theories of the case. Defendant might have pinned Plaintiff down as to which theories she was pursuing, and which not. I do not see that Defendant did so. Therefore, the costs associated with replying to Defendant's summary judgment motion were reasonably expended. No adjustment will be made to the lodestar for hours and costs arising from the motion for summary judgment.

F. DR. PARKER'S DEPOSITION

Defendant argues I should downwardly adjust the lodestar by $2,050 for costs incurred with Dr. Parker's

deposition. (D.I. 83 ¶¶ 23-24). Dr. Parker produced a report that was a central exhibit at trial for the "regarded as" theory. (*Id.* ¶ 23). Defendant noticed and took the deposition of Dr. Parker (D.I. 38, 46-1); however, Dr. Parker ultimately did not testify at trial, and her deposition was not offered in support of the "regarded as" theory. Since Defendant took Dr. Parker's deposition, and Plaintiff necessarily had to take part in it, no adjustment will be made to the lodestar for time spent on Dr. Parker's deposition.

G. PLAINTIFF'S UNSUCCESSFUL CLAIM

Defendant argues that I should award an amount that is "commensurate with the limited success attained by [Plaintiff] and the type of claim pursued." (D.I. 83 ¶ 26). Plaintiff brought an ADA interactive process claim and an ADA termination claim against Defendant, but only prevailed on the ADA interactive process claim. "If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436. "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Id.* at 436-37. In *Hensley*, the Supreme Court rejected the use of "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. [Because such] a ratio provides little

aid in determining what is a reasonable fee in light of all the relevant factors." *Id.* at 435 n. 11.

Plaintiff had two claims. She only prevailed on one of them – the ADA interactive process claim. The jury awarded $1 in nominal damages and $22,500 in punitive damages. This is a limited success "in comparison to the scope of the litigation as a whole." *Id.* at 440. Plaintiff got nothing for being terminated. That was her lead claim. She sought $34,000 for it. (D.I. 60 at 14). She did not prevail on it. Recognizing Plaintiff's success at trial was only partial, but also recognizing the intertwined nature of the successful and unsuccessful claims, I think it is appropriate to adjust the lodestar of $166,018.72 by reducing it by 20%. The awarded adjusted lodestar amount is $132,814.98.

VII. LITIGATION COSTS

Plaintiff submitted an itemized record detailing the date the litigation expense was incurred, a description of each expense, and the amount for each expense. (D.I. 81 Ex. F). Plaintiff requests reimbursement of litigation costs in the amount of $2,637.28. (*Id.* ¶ 9).

With regards to litigation costs, Defendant only contests the costs of Dr. Parker's deposition transcript, which is $400.20, for the same reasons that the hours expended on Dr. Parker's deposition were unreasonably expended. (D.I. 83 ¶ 27). Since Plaintiff established that the hours spent on Dr. Parker's deposition were necessary, Dr. Parker's deposition transcript was also necessary. No expense regarding Dr. Parker's deposition transcript shall be deducted from the

litigation costs. The awarded litigation costs are $2,637.28.

VIII. CONCLUSION

For the aforementioned reasons, Defendant's motion for new trial (D.I. 82) is **DENIED,** and Plaintiff's motion for attorneys' fees (D.I. 81) is **GRANTED** in part and **DENIED** in part. The total amount awarded is $135,452.26.

A separate order will be entered.

s/_____
United States District Judge 8/29/17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 14-1205-RGA

[Filed August 29, 2017]

TAMRA N. ROBINSON,	)
	)
Plaintiff,	)
	)
v.	)
	)
FIRST STATE COMMUNITY ACTION AGENCY,	)
	)
Defendant.	)
	)

ORDER

For the reasons stated in the accompanying Memorandum, Defendant's motion for new trial (D.I. 82) is **DENIED,** and Plaintiff's motion for attorneys' fees (D.I. 81) is **GRANTED** in part and **DENIED** in part. The total amount awarded in attorneys' fees is $135,452.26.

IT IS SO ORDERED this 29 day of August, 2017.

s/_____
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 14-1205-RGA

[Filed December 8, 2016]

TAMRA N. ROBINSON,	)
	)
Plaintiff,	)
	)
v.	)
	)
FIRST STATE COMMUNITY ACTION AGENCY,	)
	)
Defendant.	)
	)

JUDGMENT

This matter having been tried to a jury on December 5-7, 2016, and the jury having rendered a verdict in favor Plaintiff on her ADA "interactive process" claim and in favor of Defendant on the ADA "termination" claim;

NOW THEREFORE, pursuant to Fed. R. Civ. P. 58(b),

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED that judgment is entered in favor of

Defendant First State Community Action Agency on the ADA "termination" claim; and

IT IS FURTHER ORDERED, DECREED, AND ADJUDGED that judgment in the amount of twenty-two thousand five hundred one dollars ($22,501) is entered in favor of Plaintiff Tamra Robinson on the ADA "interactive process" claim.

December 8, 2016 s/_____
Date United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-3141

[Filed April 30, 2019]

TAMRA N. ROBINSON	)
	)
v.	)
	)
FIRST STATE COMMUNITY ACTION AGENCY,	)
	)
Appellant	)
	)
	)

(D. Del. No. 1-14-cv-01205)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, COWEN*, and FUENTES,* Circuit Judges

The petition for rehearing filed by appellant, in the above-entitled case having been submitted to the

* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Cowen's and Fuentes' votes are limited to panel rehearing.

judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Julio M. Fuentes
Circuit Judge

Dated: April 30, 2019
Lmr/cc: Kevin G. Fasic
Katherine R. Witherspoon
Tasha M. Stevens