

# REPLY BRIEF

## I. ARGUMENT IN REPLY

### A. The Eight Page Issue Instruction Was Confusing, Inaccurate, and Asked the Jury to Decide Issues of Law and Questions of Previously Undisputed Facts

Defendant characterizes the eight page issue instruction as a statement "in simplified terms, of all the elements needed to prove an ADA claim." (Def.Br. 20.) Something is simplified when it is reduced to basic essentials. Defendant is in error in its assertion that the eight page instruction simplified the disputed issues in the case.

### B. The Question of Whether Plaintiff Is Disabled Should Not Have Been Submitted to the Jury

In our opening brief, we pointed out that during jury selection, the trial judge repeatedly referred to plaintiff as a person who is "disabled" or "handicapped." (Pl.Br. 12.) Defendant does not dispute that defense counsel stood by while the judge told the prospective jurors that plaintiff was a disabled person. Nonetheless, defendant argues that it preserved its objections to plaintiff's status as a disabled person by including this issue in the pre-trial order (Def.Br. 17) and in its trial brief. (Id.)

In analogous circumstances, this Court has required counsel to do more than sit silently while the district court commits error. "Counsel has a duty to register proper objections, even at the risk of incurring the wrath of the judge." *Siddiqi v. Leak*, 880 F.2d 904, 912 (7th Cir. 1989) (failure to object to non-compliance with Rule 51 of the Federal Rules of Civil Procedure). In this case, to preserve its assertion that plaintiff is not disabled, defendant was required to come forward and make its position plain to the trial judge when he first stated

to the prospective jurors that plaintiff is "disabled." As in *Sanders v. Village of Dixmoor*, 178 F.3d 869 (7th Cir. 1999), where plaintiff's counsel "did not notify the trial court of the theory he now advances," *id.* at 870, defense counsel was required to speak out about its intent to dispute plaintiff's status as a disabled person as soon as the trial judge expressed his belief (which was shared by plaintiff's counsel) that the disability issue had long ago been conceded by defendant.

## II. CONCLUSION

For the reasons above stated and those previously advanced, the case should be reversed and remanded for a new trial.

Respectfully submitted,

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