IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

DONALD PERKL, by his
Guardian Ad Litem, Monica Murphy,

Plaintiff-Intervenor,

v.

CEC ENTERTAINMENT, INC.,
d/b/a CHUCK E. CHEESE'S,

Defendant.

OPINION AND ORDER

98-C-698-X

This civil action for monetary damages and equitable relief is before the court following a trial in which a jury found that defendant CEC Entertainment, Inc. intentionally discriminated against plaintiff-intervenor Donald Perkl by terminating his employment because he was disabled, in violation of Title I of the Americans With Disabilities Act, 42 U.S.C. §§ 12111-12117. The jury awarded Perkl $70,000 in compensatory damages and $13 million in punitive damages, although the total award is statutorily capped at $300,000. Before the court is defendant's motion for judgment as a matter of law, plaintiff EEOC's motion for equitable relief and costs and Perkl's motion for entry of judgment, attorneys fees, costs and equitable relief.

Notwithstanding the huge damages verdict and the plaintiffs' claim of complete and total victory, the jury just as easily could have found for CEC on all issues. The outcome on both liability and damages hinged on the credibility of one or two key witnesses for each side. The jury chose to believe plaintiffs' witnesses, which was its prerogative. As discussed below, the evidence was sufficient to support the jury's determination that Perkl was a qualified individual and that CEC discriminated against him because of his disability when it fired him. Accordingly, I am denying CEC's motion for judgment as a matter of law.

The damages verdict is a closer call. Although I have some reservations which I discuss below, I am upholding the jury's verdict on both compensatory and punitive damages.

As for equitable relief, I am not providing much more than the parties have agreed to in their post-verdict negotiations. Because CEC has made Perkl an unconditional offer of re-employment, I am ordering CEC to reinstate Perkl to his former position at the Madison Chuck E. Cheese's restaurant, and I am denying Perkl's request for front pay. Perkl shall be awarded prejudgment interest on his back pay award.

As for costs, I am awarding the EEOC its costs in the amount of $7,615.84. I am staying final action on Perkl's request for attorneys fees and costs pending the provision of some additional information material to my decision. I am declining to establish the supplemental needs trust requested by Perkl as unnecessary.

Evidence Adduced at Trial

For the purpose of deciding CEC's motion for judgment as a matter of law, I am synopsizing the evidence adduced at trial:

CEC is a nationwide restaurant chain that operates under the name of Chuck E. Cheese's. In 1998, CEC had revenues of $379.4 million and net income of $33.7 million. CEC's restaurants are run by managers, who oversee the day-to-day operations of the store, who are in turn supervised by general managers, who are in turn supervised by area or district managers. District managers supervise the operations of several Chuck E. Cheese restaurants in a particular region. In January 1997, Donald Creasy became the district manager of the Chuck E. Cheese's restaurant in Madison.

On Creasy's first visit to the Madison restaurant, he observed that it was dirty and disorganized and that there was a lack of leadership by the management staff. That day, Creasy had a conversation with Sharon Fitch, the restaurant's general manager, regarding the need for her to give checklists to her employees to ensure they were all doing their jobs.

At a later visit to the Madison restaurant, Creasy found the situation essentially unchanged from his first visit. He again spoke with Fitch about the need for checklists. He also spoke to both Fitch and Brea Wittwer, another manager, about their need to implement a "close-to-open" policy, a practice whereby tasks such as vacuuming, cleaning bathrooms, sweeping and mopping the kitchen were completed by the evening crew while the restaurant was closing so that the restaurant would be ready to open without additional work the next

morning. Creasy also told Fitch and Wittwer that they should reassign one of the employees, Jason Martin, to perform more cleaning duties in lieu of the kitchen prep tasks he was doing. At the time, Martin's responsibilities were taking out trash, washing windows, picking up the parking lot and doing some kitchen preparation work, including breaking up chunks of pizza cheese.

On March 17, 1997, Wittwer hired plaintiff Donald Perkl to perform janitorial duties at the restaurant. Perkl is a mentally retarded, autistic and nonverbal man who communicates through the use of picture cards. He was referred to Chuck E. Cheese's by Madison Packaging & Assembly, a community vocational rehabilitation program that provides a variety of services to people with and without disabilities, including work assessments, supported employment in the form of job coaches and community placements. Wittwer hired Perkl to replace Janice Oliver, another developmentally disabled individual whose employment at Chuck E. Cheese's had been supported by Madison Packaging & Assembly.

Perkl had over six years' experience working at a sheltered workshop at Madison Packaging & Assembly, where he performed light assembly and packaging tasks. He also had worked in the community in a supported employment position as a janitor at Northwest Fabrics in 1996. Perkl's case workers told Wittwer that Northwest Fabrics had been happy with Perkl's performance but his job had been terminated in December 1996 because the

company hired an outside janitorial service. Wittwer hired Perkl with the understanding that he would be working with a job coach funded by Dane County.

The role of a job coach is to assist in teaching the disabled individual the tasks that he is expected to perform, provide on-site supervision during the early phases of the individual's employment, monitor the employee's progress and serve as a liaison between the employee and the employer. In theory, the job coach is supposed to "fade" over time; in other words, to provide less and less support as the individual becomes more independent on the job. The job coach also keeps case notes that record the individual's progress on the job.

Perkl worked at Chuck E. Cheese's from 8 a.m. to noon, Monday through Friday. His job duties consisted of various cleaning tasks, including mopping the floors, vacuuming carpets and cleaning the bathrooms. Perkl was accompanied on the job every day by a job coach.

Creasy happened to be visiting the restaurant on March 18, 1997, Perkl's first day of work and he saw Perkl working. Creasy asked Wittwer who he was and Wittwer explained that Perkl was mentally retarded and nonverbal and that she had just hired him; Creasy then told Wittwer to fire him. At trial, Wittwer testified that Creasy told her about an incident that had occurred in a Chuck E. Cheese's restaurant in California that had involved a developmentally disabled employee and said that it was now defendant's policy

not to hire "those kind of people." Fitch testified that Creasy had made a similar statement about Oliver, the mentally retarded woman whom Perkl had replaced.

In his testimony at trial, Creasy agreed that he questioned why Wittwer hired Perkl, but stated that it was not because Perkl was disabled. He testified that he questioned Wittwer's decision to hire Perkl because there was not a position available for him; namely, the restaurant already had Jason Martin whom Creasy believed should perform custodial duties in the store. Creasy also testified that he told Wittwer that the tasks that Perkl was performing should have been done at closing time instead of in the mornings and that an additional employee was not needed at that time of the year because sales were starting to decline.

Wittwer asked Creasy if she could have a couple of weeks to see what she could do with Perkl; Creasy agreed. After Creasy left the restaurant that day, Wittwer wrote and sent a letter via facsimile to Leslie Crim in the human resources department at defendant's headquarters in Dallas, Texas. The letter stated, in part:

> I hired a 50-year-old man yesterday who happens to be autistic and has a diagnosis of mental retardation. He works with job coaches who are fully trained and cost us nothing. He started today and will be doing all of our cleaning and maintenance. Our district manager wants me to fire him because, we don't need "those kind of people" working for us. Can someone please help me with this situation, so we can at least give this guy a chance? We are an equal opportunity employer, are we not?

Crim received Wittwer's letter and faxed a copy of it to Creasy and Creasy's boss, Regional Vice President Gary Spring. Crim did not call Wittwer. Hearing no response from

Crim, Wittwer telephoned Spring a few days later. Wittwer testified that she told Spring about Creasy's discriminatory remark and that Creasy wanted her to fire Perkl. According to Wittwer, Spring told her that the decision whether or not to fire Perkl was hers to make. Spring acknowledged that he never asked Wittwer any questions about the incident or conducted any investigation into Wittwer's complaint.

Between March 18, 1997 to April 7, 1997, Creasy visited the Madison restaurant on various occasions and observed Perkl working. According to Creasy, on each of these occasions, Perkl was vacuuming after the restaurant had opened for business. Creasy testified that he addressed this concern with Wittwer. However, Wittwer testified that she did not recall a time when Perkl vacuumed the carpets after the restaurant had opened and she did not recall having any conversation with Creasy regarding Perkl's work performance.

On April 7, 1997, after Perkl's shift had ended, Creasy contacted Madison Packaging & Assembly and informed the receptionist that Perkl's services would not be needed for the rest of the summer. Wittwer testified that Dave Lemanski, Perkl's case manager at Madison Packaging & Assembly, telephoned the restaurant about five minutes later. According to Wittwer, Creasy refused to take the call; instead, he directed Wittwer to take the call and to tell Lemanski that she had decided to terminate Perkl. Although Creasy testified that he did at some point speak with Lemanski and explain the reasons for terminating Perkl, Lemanski testified that he never spoke with Creasy about Perkl.

On April 9, 1997, two days after Perkl's termination, Lemanski faxed a letter to Creasy requesting his presence at a meeting on April 25, 1997, at the Madison Chuck E. Cheese's restaurant to discuss Perkl's termination. Although Creasy testified that he did not see the fax until April 12 or 13, 1997, a copy of the fax somehow made its way to Crim in Dallas by April 10, because on that day, Crim wrote a letter to Lemanski in which she indicated that she had received a copy of it. In her letter, Crim stated that she did not understand what Lemanski's connection was to Perkl, and that, in order to protect the privacy of its employees, the company would not discuss any employee matters with someone "who has not identified themselves as a legitimate representative of the employee." Pltffs.'s Ex. #114. Crim also stated in the letter that she had instructed Creasy and Wittwer not to discuss the matter with anyone and that there would be no meeting on April 25.

Lemanski did not receive Crim's letter until April 14, 1997. Meanwhile, on April 10, 1997, he attempted to reach Crim by telephone to discuss Perkl's termination. Lemanski left two messages for Crim; she did not return his calls that day. The next day, April 11, 1997, Lemanski obtained the number for Dick Frank, defendant's chief executive officer. Lemanski called Frank and left a message; Frank returned the call within half an hour. Lemanski explained that he was calling about Perkl's termination and that he had not gotten any response from Creasy or the human resources department. Frank assured Lemanski that the company would investigate the matter.

Frank then spoke with Crim, who told him about Lemanski's letter of April 9, 1997, and her response of April 10, 1997, regarding the company's need to understand Lemanski's role in the situation before it discussed Perkl's employment with him. Frank viewed Crim's response as appropriate because he shared her concerns about Lemanski's connection to Perkl.

On April 14, 1997, Lemanski sent a letter to Frank in which he enclosed a copy of Wittwer's March 18, 1997, fax to Crim. Lemanski also provided information that clarified his relationship to Perkl. Pltffs.'s Ex. #115. Crim attempted to contact Lemanski on April 17, 1997, but Lemanski did not return her calls. Lemanski testified that, by that time, attorney Monica Murphy was involved in the case on Perkl's behalf and he thought it was more appropriate for her to deal with the situation.

At trial, Creasy gave three reasons for firing Perkl: no position was available; the restaurant's sales were starting to decline and labor costs were high; and that, in failing to get the carpets cleaned before the restaurant opened, Perkl was not meeting Creasy's performance standards. Creasy denied that he fired Perkl because he was disabled.

Plaintiffs presented only one witness, Perkl's foster mother Linnel Thomas, in support of Perkl's claim for compensatory damages. Perkl has lived with Thomas, her husband and her two children for four years. Thomas testified that Perkl communicates with her by nodding yes or no in response to her questions or by pointing at pictures in his communication book. Thomas testified that Perkl was very excited and happy when he got

the job at Chuck E. Cheese's. He showed Thomas and her family his uniform and jumped up and down so high that his head hit the ceiling. Thomas testified that she knew that Perkl was very happy working at Chuck E. Cheese's because he expressed that to her and because he would get up and ready for work in the morning on his own.

Thomas testified that Perkl came home early on the day he was terminated and went immediately to his room without communicating with anyone. She testified that, from his demeanor and body language, she could tell that something bad had happened to him; in her words, Perkl was "devastated." Thomas spoke with Wittwer and Lemanski that same day and learned about Perkl's termination. She testified that she then went in to talk to Perkl who indicated that someone at Chuck E. Cheese's had told him that he was being let go from his job. Thomas testified that from that day to the present, Perkl has been less attentive to his personal hygiene, fails to get up on his own in the morning, has less interest in participating in social activities or family activities and lost 11 pounds. She testified that Perkl's doctor has not diagnosed Perkl with depression and Perkl does not take any medication for depression. Thomas testified that, although Perkl subsequently obtained another job in the community, he did not express the same joy as when he got the job at Chuck E. Cheese's. According to Thomas, Perkl is still puzzled about why he got fired and worries that it will happen again.

CEC presented Dr. Hugh Johnston, a psychiatrist at the University of Wisconsin Medical School who testified as an expert on the issue of Perkl's emotional distress. Dr.

Johnston had conducted an independent medical examination of Perkl prior to trial and had videotaped his interview with Perkl (although CEC did not play the video at trial). Dr. Johnston opined that although Perkl was able to experience emotional distress to the same degree as anyone else, Perkl was not currently suffering from any emotional distress whatsoever and it was unlikely that he had ever suffered any emotional distress as a result of having been fired from Chuck E. Cheese.

ANALYSIS

I. Defendant's Rule 50 Motion for Judgment as a Matter of Law

As the Court of Appeals for the Seventh Circuit has noted, attacking a jury verdict is a hard row to hoe. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999). The court's inquiry on a motion for judgment as a matter of law "is limited to whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Id*. (quoting *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996) (internal citations omitted)). The jury verdict must stand unless defendant can show that no rational jury could have brought in a verdict against it. *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 745 (7th Cir. 1994). CEC has not made that showing here.

A. Qualified Individual with a Disability

Before an employer can be held liable for discrimination in violation of the Americans with Disabilities Act, the employee must demonstrate that he was a "qualified individual with a disability." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined in relevant part 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(9).

To make this showing, a plaintiff must meet two criteria. First, he must show that he satisfied the prerequisites of his position by possessing "the requisite skill, experience, education and other job-related requirements." *Ross v. Indiana State Teacher's Ass'n Insurance Trust*, 159 F.3d 1001, 1013 (7th Cir. 1998); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 524 (7th Cir. 1996); 29 C.F.R. app. § 1630.2(m). Second, he must establish that he can perform the "essential functions" of such a position with or without accommodation. *Id*.

The ADA defines an "essential function" as a "fundamental" job duty of the employment position the individual with a disability holds; it excludes functions that are "marginal." 29 C.F.R. § 1630.2(n). The essential functions inquiry includes an assessment of whether the employee was capable of performing his work in accordance with the employer's performance standards. *See Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928, 934 (7th Cir. 1995) (an "employer may fire the employee because he cannot perform his job adequately, i.e., he is not a 'qualified individual' within the meaning of the ADA"); 29

C.F.R. app. § 1630 (ADA is intended to enable disabled persons to compete in workforce according to same performance standards and requirements that employers expect of persons who are not disabled).

Pointing out that the court may not "second-guess" the employer's judgment in describing the essential requirements for the job, *see DePaoli v. Abbot Laboratories*, 140 F.3d 668, 674 (7th Cir. 1998), CEC contends that it is entitled to judgment as a matter of law because plaintiffs failed to prove that Perkl was meeting Creasy's bona fide performance expectations. CEC argues that Creasy presented unrebutted testimony that one of the essential functions of Perkl's job was to finish vacuuming before the restaurant opened and that he observed Perkl vacuuming after opening on three occasions.

However, the jury also heard Wittwer, a manager at the restaurant and Perkl's immediate supervisor, testify that Perkl performed his job well and that she could not recall any time when he was vacuuming after the restaurant had opened, nor did she recall a time that Creasy had spoken to her about Perkl's work. In addition, Kristin Thielig, one of Perkl's job coaches, testified that he performed his work satisfactorily on each of the six occasions that she accompanied him on the job. Thielig also testified that vacuuming was the first task Perkl would do when he arrived at work in the morning and that, when she was there, he never took two hours to finish vacuuming. Granted, Thielig's testimony is of limited weight because she did not accompany Perkl every day that he worked, but it bolsters Wittwer's testimony that Perkl was performing his job satisfactorily.

Plaintiffs also presented the deposition testimony of Stephanie Henry, a general manager for defendant, who testified that, before firing an employee for performance problems, a manager will typically give the employee a warning or some sort of notice that his performance is deficient before considering termination. It is undisputed that Perkl never received any warnings before his termination. In light of this testimony, the jury was entitled to conclude that Perkl could perform the essential functions of the job.

Moreover, even though Creasy's testimony that Perkl was vacuuming after opening on three occasions was not refuted directly, the jury was not required to believe it. *See Kasper v. Saint Mary of Nazareth Hospital*, 135 F.3d 1170, 1173 (7th Cir. 1998). It is clear from the jury's verdict that it did not find Creasy to be a credible witness. The outcome of this case depended largely on who won the swearing contest between Creasy and Wittwer. The jury's verdict demonstrates that it generally disbelieved Creasy's story; therefore, it could also have disbelieved him when he said that he observed Perkl vacuuming after the restaurant had opened.

Or perhaps the jury concluded that Creasy's asserted expectation that Perkl would have the vacuuming done before the restaurant opened was not bona fide, a conclusion that would have been easy to draw once the jury concluded that Creasy had in fact made a discriminatory remark about mentally retarded people. We can only speculate as to what the jury was thinking, but the point remains that under either scenario the evidence is

sufficient to support the jury's conclusion that Perkl was a qualified individual with a disability.

B. Discrimination

CEC also contends that the evidence is insufficient to support the jury's finding that defendant terminated Perkl because of his disability. CEC argues that the unrefuted evidence shows that the reason Creasy fired Perkl was because another maintenance worker did not fit within the plan that Creasy had for the Madison restaurant, which was to implement a close-to-open policy and reassign Martin to solely custodial duties. Defendant points out that both Creasy and Fitch testified that Creasy had these goals for the restaurant before Perkl was hired.

Plaintiffs contend that they presented evidence from which the jury could conclude that Creasy's asserted reasons for terminating Perkl were a pretext for discrimination. As evidence that the close-to-open rationale was phony, plaintiffs point to memoranda that Creasy had written to Fitch in the weeks prior to Perkl's employment regarding items that needed to be cleaned or improved at the Madison restaurant and which contain no mention of implementing the "close-to-open" system. They also note that, even if the close-to-open system had been implemented, Perkl was not given the option of working in the evening. Plaintiffs also cite the testimony of defense witness Michael O'Leary, who replaced Fitch as general manager of the Madison restaurant. O'Leary testified that he allowed one of his

employees to vacuum in the morning. Plaintiffs offer this as proof that the close-to-open system was never implemented. As for CEC's claim that Martin was performing Perkl's job duties, plaintiffs point out that Perkl was hired to replace Oliver, who had previously been doing maintenance chores; that Martin was a kitchen worker whose duties did not overlap with Perkl's; and that Martin did not begin to do any of Perkl's duties until after Perkl was fired.

It would be difficult to sustain the jury's verdict if plaintiffs' case rested solely on a pretext theory. Fitch, who was plaintiffs' witness, acknowledged that Creasy had spoken to her about implementing the close-to-open policy and about reassigning Martin's job duties before Perkl was hired. The fact that Martin was not performing Perkl's job duties at the time Perkl was hired does not refute Creasy's testimony regarding Martin, for Creasy did not testify that Martin was performing the same tasks as Perkl; he testified that he told the managers at the Madison restaurant that they *should* have Martin do more custodial duties instead of the kitchen prep tasks that he was doing. Creasy testified that the cooks could do their own preparation work. The reason Martin was not doing Perkl's duties at the time of Perkl's employment was because the managers at the restaurant did not follow Creasy's wishes; it does not refute Creasy's testimony that he believed Martin could have and should have been performing Perkl's job.

Plaintiffs are also on soft ground in the pretext department with respect to their attack on Creasy's close-to-open justification for firing Perkl. Contrary to plaintiffs'

assertion, O'Leary testified that at the time he took over for Fitch as the general manager of the Madison restaurant, Creasy had begun to implement the close-to-open system. O'Leary testified that the close-to-open system is defendant's policy for all its restaurants and that he had no problem making the system work in the Madison restaurant. O'Leary testified that under the close-to-open system, the bathrooms and other areas of the restaurant were cleaned in the evening. The only exception was vacuuming, which O'Leary allowed to be done for an hour each morning by a disabled employee. O'Leary's testimony, which was unrebutted, supports the legitimacy of Creasy's expressed desire to implement the close-to-open system in the Madison restaurant.

On the other hand, Creasy may have undercut his own credibility on this point by providing too many questionable reasons for firing Perkl. At trial, Creasy testified that another reason he fired Perkl was because sales were starting to decline at the restaurant and the restaurant's labor costs were high. However, Wittwer, Fitch, and Henry, all former assistant managers for CEC, testified that they were not aware of a case in which CEC terminated an employee because of a decline in sales; rather, the usual practice was to cut back hours. CEC's regional vice president Spring also testified that he was not aware of any employee other than Perkl who was terminated for sales reasons. This evidence was sufficient to cast a doubt upon Creasy's "sales decline" justification; if the jury suspected Creasy was lying about one reason, it could reasonably conclude that he was lying about them all.

The heart of plaintiffs' case, however, was the direct evidence of discrimination, namely Creasy's alleged statement to Wittwer that she should fire Perkl because CEC did not hire "those kind of people." If the jury believed that Creasy made the statement, then it could reasonably infer that Creasy's decision to fire Perkl was motivated by discriminatory animus and not by his asserted management goals for the restaurant. Wittwer's testimony and the letter she faxed to Crim the next day provided evidence sufficient to allow the jury to conclude that Creasy made the statement. Moreover, Fitch testified that Creasy had made a similar statement about Oliver. The jury obviously believed Wittwer and may well have believed Fitch. Because there was a reasonable basis for the jury's verdict, it shall stand. *Knox v. State of Indiana*, 93 F.3d 1327, 1332 (7th Cir. 1996).

CEC argues that Wittwer's recollection of Creasy's discriminatory statement is implausible because Creasy and Wittwer both testified that Perkl's disability is not obvious from his appearance, and it was undisputed that Creasy had not spoken to Perkl before he told Wittwer to fire him. However, Creasy's testimony at trial counters this assertion. Creasy testified that upon seeing Perkl, he asked Wittwer who he was and Wittwer explained that Perkl was autistic, mentally retarded and nonverbal and that she had just hired him to do maintenance. Also, Wittwer testified that Perkl was working with his job coach the first time Creasy saw him.

CEC also argues that Creasy's alleged statement cannot be viewed as evincing a discriminatory intent when both Wittwer and Fitch admitted on cross-examination that they

could not be certain what Creasy meant by the statement and when neither asked Creasy to explain it. CEC made this same argument to the jury during closing argument, but the jury didn't buy it. Creasy denied making the statement, so the jury never heard him explain what he meant by it. CEC's decision to deny that Creasy ever made the statement while also arguing that Wittwer and Fitch didn't know what Creasy meant when he said it might have seemed like a necessary tactic at the time, but it also might have helped galvanize the jury for Perkl and against CEC. Once the jury concluded that Creasy had made the statement, it was up to the jury to infer from the circumstances in which the statement was made whether it was discriminatory and the extent to which the statement bore on Creasy's decision to fire Perkl.

Wittwer testified that when Creasy started talking about "those kind of people" he related an incident that had occurred in a California Chuck E. Cheese's restaurant that had involved a developmentally disabled person. From this, the jury could reasonably infer that by "those kind of people," Creasy was referring to the developmentally disabled. "[A] remark need not explicitly refer to the plaintiff's protected status . . . for a reasonable jury to conclude that it is direct evidence of illegal motivation based on that status." *Sheehan*, 173 F.3d at 1044-45 (observing that reasonable jury could conclude that supervisor's statement to employee known to be pregnant that she was being fired so that she could "spend more time at home with her children" reflected unlawful motivations because "it invoked widely understood stereotypes the meaning of which is hard to mistake.").

Moreover, even if the jury *might* have concluded rationally that Creasy's statement could be construed innocently, it was not *required* to do so. *See, e.g., Sheehan*, 173 F.3d at 1045 (rational jury need not have accepted defendant's explanation that plaintiff's supervisor was joking when she told plaintiff: "If you have another baby, I'll invite you to stay home"; "Oh, my God, she's pregnant again"; and, "Gina, you're not coming back after this baby."); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1457 (7th Cir. 1992) (supervisor's statements that radio station wanted "new young sound" would support conclusion of age discrimination, even though remarks might reasonably be subject to "innocent" interpretation).

CEC also argues that the three weeks that elapsed between the alleged remark and Perkl's termination removes any inference of discrimination. *See Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d 716, 723 (7th Cir.), *cert. denied*, 119 S. Ct. 167 (1998) (to rise to level of direct evidence of discrimination, "isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process.") (quoting *Geier v. Medtronic, Inc.*, 99 F.3d 238, 242 (7th Cir. 1996)). I disagree. Three weeks is a relatively short time period between the remark and Perkl's termination. Moreover, Creasy's statement was causally related to Perkl's discharge: it was made at the restaurant, while Perkl was working, in the context of Creasy's disappointment with Wittwer that she had hired Perkl. The evidence was sufficient to support a nexus between the remark and Perkl's discharge. *Compare Kennedy,* 140 F.3d at 724 (supervisor's alleged comment to plaintiff that,

"if you were my wife, I would not want you working after having children," did not support inference of discriminatory intent where comment was made at least five months before plaintiff's termination and occurred in casual setting unrelated to discussions regarding issues that led to plaintiff's dismissal); *Geier,* 99 F.3d at 242 (supervisor's isolated comments did not constitute direct evidence of pregnancy discrimination because they were made one year prior to plaintiff's termination and in setting unrelated to discussions of plaintiff's work performance); *McCarthy v. Kemper Life Ins. Companies*, 924 F.2d 683, 686-87 (7th Cir. 1991) (racial remarks made two years before plaintiff's discharge not probative of discrimination).

Because there was more than one conclusion that could be drawn from the evidence, CEC's motion for judgment as a matter of law shall be denied. *See Emmel*, 95 F.3d at 636 (motion for judgment as matter of law should be granted only when there can be but one conclusion from evidence); *Kasper*, 135 F.3d at 1173 ("When a case turns on credibility, neither side is entitled to judgment as a matter of law unless objective evidence shows that it would be unreasonable to believe a critical witness for one side.").

C. Compensatory damages

CEC contends that Thomas's testimony is insufficient to support the jury's determination that Perkl was entitled to compensatory damages. Pointing to Thomas's testimony regarding Perkl's ability to communicate, CEC suggests that Perkl's failure to testify on his own behalf or to call a medical expert to corroborate Thomas's testimony

regarding the emotional distress he suffered precludes any award of compensatory damages as a matter of law. CEC asserts that it is not aware of any case in the Seventh Circuit or elsewhere in which the court upheld an award of damages for emotional distress in a discrimination case when neither the plaintiff nor a doctor testified about the alleged damages. In fact, argues CEC, the Court of Appeals for the Seventh Circuit reviews critically even those cases in which the plaintiff testifies regarding his emotional distress when no corroborating evidence is offered. From this, CEC suggests that the least that a discrimination victim must do to prove emotional distress, at least in the Seventh Circuit, is to testify on his own behalf regarding any emotional distress that he allegedly suffered as a result of the discrimination.

It is true that, unlike cases involving physical injuries (such as those cited by the EEOC in its brief at pages 16 and 17), a victim of discrimination is not presumed to have suffered emotional distress merely from the fact that discrimination occurred: a plaintiff must actually prove that he suffers from emotional distress and that the discrimination caused that distress. *United States v. Balistreri*, 981 F.2d 916, 931 (7th Cir. 1992). It is also true that, in certain instances, an injured party's testimony about emotional distress may of itself support an award for nonpecuniary loss. *See Merriweather v. Family Dollar Stores of Ind., Inc.,* 103 F.3d 576, 580 (7th Cir. 1996); *Avitia v. Metropolitan Club of Chicago*, 49 F.3d 1219, 1227-29 (7th Cir. 1995). However, I disagree with CEC's claim that these cases impose

some sort of bright-line, minimum quantum of proof requiring a plaintiff to testify on his own behalf in order to recover nonpecuniary damages.

Like CEC, I have not uncovered a case in which damages for emotional distress in a discrimination case were awarded in the absence of testimony from the injured plaintiff. However, in *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court expressed the general rule governing damages for emotional distress:

> Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury.

Id. at 264 n.20. Having carefully reviewed *Merriweather*, *Avitia*, and other similar cases from the Seventh Circuit involving emotional distress claims, I conclude that Perkl's failure to testify does not bar him from recovering nonpecuniary damages. Although no case is directly on point—because in each case the plaintiff testified about emotional distress—I find nothing in these cases to suggest that a plaintiff *must* take the stand in order to recover such damages, so long as the evidence that is presented meets the competency standard of *Carey v. Piphus*.

Generally speaking, the most competent evidence of the emotional distress suffered by a plaintiff will come from the plaintiff himself, who is in the best position to describe the emotional pain he suffered and to link it to the discrimination. That may not always be the case, however, such as in a case like this where the plaintiff is mentally retarded and has a

limited ability to communicate even simple concepts, much less an abstract, subjective concept like emotional distress.

As noted in *Carey*, evidence that a plaintiff suffered emotional distress may include the testimony of others who observed the plaintiff. Here, Perkl's foster mother of four years testified regarding negative changes in Perkl's demeanor and behavior after his termination. Defendant's expert, Dr. Johnston, agreed that evidence of changes in Perkl's behavior would be relevant to determining whether he suffered emotional distress. This testimony was sufficient to support the jury's conclusion that Perkl had suffered emotional distress as a result of losing his job at Chuck E. Cheese's.

Although some of Thomas's testimony regarding her understanding of the events surrounding Perkl's testimony was inconsistent with the evidence presented during the liability phase of the trial, that is not a reason to set aside the jury's award. CEC was free to expose this inconsistency during cross-examination, which it did, and in closing arguments, which it did not.

Clearly, the jury concluded that any inconsistencies between Thomas's testimony and the other evidence—including Dr. Johnston's opinion—were insignificant to the emotional distress question. Viewing the evidence in the light most favorable to the plaintiff, I cannot say that the jury's conclusion that Perkl suffered emotional distress was unreasonable.

This is as good a point as any to observe that CEC made a tactical decision during the damages phase not to call Perkl to the stand as an adverse witness, or to seek admission of

his videotaped interview with Dr. Johnston. Clearly it was Perkl's burden to prove that he had suffered emotional distress, and CEC had no burden to disprove this contention. And perhaps CEC's tactical decision will ultimately prove correct if the court of appeals decides that Thomas's testimony just didn't get Perkl over the hump on compensatory damages.

But CEC had these options available to it in order to bolster Dr. Johnston's testimony and to let the jury get a closer look at Perkl and his demeanor so that the jury could assess the degree of emotional distress Perkl was experiencing now and had experienced in the past. If Dr. Johnston was correct, then Perkl's testimony, either live or taped, would not have supported his claim of emotional distress. Having foregone these evidentiary options, CEC is not in quite so strong a position to quibble over the persuasiveness of Thomas's unequivocal testimony. *Cf. Avitia* 49 F.3d at 1228 (even where defendant had no ability to refute a claim of emotional distress because it was so minimally supported as to defy rebuttal, it was proper for the jury to consider the claim).

A more difficult question is whether the evidence supports the amount of $70,000 that the jury awarded to Perkl for emotional distress. CEC contends that a remittitur of the amount of compensatory damages is warranted because the jury's award of $70,000 was not connected rationally to the evidence and is not comparable to awards made in similar cases. *See Riemer*, 148 F.3d 800, 808 (7th Cir. 1998) (quoting *EEOC v. AIC Security Investigations, Inc.*, 55 F.3d 1276, 1285 (7th Cir. 1995)) (when reviewing a compensatory damages award, court must consider whether the award is "monstrously excessive," whether there is no

rational connection between the award and the evidence and whether the award is roughly comparable to awards made in similar cases).

Before considering the merits of defendant's arguments, I must first address the EEOC's claim that CEC has waived its right to remittitur by failing to bring a motion for a new trial under Fed. R. Civ. P. 59(a). It is clear that CEC has not waived its right to request a new trial, for such a motion need not be filed until 10 days after judgment has been entered and judgment has not yet been entered in this case. Fed. R. Civ. P. 59(e). However, I agree with the EEOC that it is more appropriate to consider defendant's excessive damages claim in the context of a Rule 59 motion for a new trial, even though it may not be improper to consider it at this stage. *See Central Office Telephone, Inc. v. American Telegram & Telegraph Co.*, 108 F.3d 981, 993 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998) (court's reduction of damages on motion for judgment as matter of law did not appear to conflict with Seventh Amendment). That said, because I conclude that the damages awarded in this case were not excessive, I will address CEC's request for a reduced damages award at this juncture even though it may be premature.

CEC argues that the award is not connected rationally to the evidence because the evidence regarding Perkl's emotional distress consisted solely of Thomas's uncorroborated and conclusory testimony. CEC compares this case to *Avitia*, 49 F. 3d 1219, a case in which the sole evidence of the plaintiff's emotional distress consisted of his answer to a single question in which his lawyer asked him how he felt when he was fired. Plaintiff responded

that he felt like the Sears Tower was falling on top of him, that he was speechless, that he had cried and that he felt like he had been tossed like a "piece of garbage." He testified that "until now I can feel that." *Id*. at 1227. Finding it plausible that, after working for the same employer for 13 years plaintiff would have been deeply distressed by what he regarded as an unjust and unjustified discharge, the court ruled that some amount of damages was appropriate. *Id*. at 1229.

Noting that plaintiff found a replacement job within three months of his discharge, the court concluded that his brief testimony did not sufficiently prove such deep upset that would justify an award of $21,000. Accordingly, the court found that a remittitur of half the award ($10,500) was necessary. *Id*. at 1229-30. *See also Biggs v. Village of Dupo*, 892 F.2d 1298, 1304-05 (7th Cir. 1990) (finding claimant's "conclusory" testimony "that he was affected emotionally by being fired, and that he was concerned over 'the idea of my family going through it'" insufficient to sustain award for emotional distress); *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir. 1981) (evidence of emotional distress offered by three different claimants was insufficient where one stated merely he was "very depressed," another that she was "a little despondent," and third that he was "completely humiliated").

In the instant case, Thomas provided specific testimony regarding objective, observable changes in Perkl's behavior before and after his termination from Chuck E. Cheese's. From Thomas's detailed descriptions of Perkl's behavior, the jury could rationally conclude that Perkl was severely hurt by losing his job. It was not necessary for plaintiffs to

prove that Perkl understood that his firing was discriminatory in order to recover damages for emotional distress, so long as the evidence linked Perkl's mental anguish to defendant's wrongful termination. *See Riemer*, 148 F.3d at 808 (upholding award of $45,582 to ADA plaintiff for emotional distress and mental anguish where plaintiff testified that, due to employer's discriminatory reassignment, he was at home only on weekends, that his long absences led to frequent arguments with his wife, and that these problems caused him to feel "stressed out" because he felt there was nothing he could do to improve his home life other than quit his job).

Moreover, the jury was entitled to consider how much the job meant to Perkl when determining the appropriate amount of damages. *See EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1286-87 (7th Cir. 1995) (finding evidence sufficient to support jury's award of $50,000 to ADA plaintiff, noting that plaintiff almost never took vacations, often put his job before his family and plaintiff's job was one of the "major defining aspects of his life"). Thomas testified that Perkl literally jumped for joy and hit his head on the ceiling when he first told her family about his job at Chuck E. Cheese's, that he showed off his uniform proudly and that he was eager and ready to go to work every morning. She also testified that Perkl did not express the same joy when he obtained different jobs in the community after he was fired from Chuck E. Cheese's. The jury reasonably could have concluded—and, I infer, *did* conclude—that Perkl's distress over losing his job at Chuck E. Cheese's was greater than that suffered by the ordinary victim of a wrongful discharge. *Cf. AIC Security*, 55 F.3d at 1286 (noting that emotional burden on plaintiff, who was dying of

cancer and who perceived himself as unable to provide adequately for his family, was "considerably greater" than that suffered by ordinary victim of wrongful discharge).

Of course, not all of the evidence supports the jury's award. Perkl worked at Chuck E. Cheese's for only three weeks, he has no dependents and, contrary to his assertions, he was not terminated in a humiliating or demeaning manner or subjected to such treatment when he worked at Chuck E. Cheese's. *See Balistreri*, 981 F.2d at 932 ("The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action"). Dr. Johnston testified that it was unlikely that Perkl had ever experienced any severe distress from his termination, although I infer that the jury gave no credence to Dr. Johnston's opinions.[1]

I must take all of the relevant circumstances into account to ensure that the emotional distress award is commensurate to the damage actually caused. *See Avitia*, 49 F.3d at 1229. Having done so, I decline to order a remittitur on the basis of lack of evidence. To most people, losing a minimum pay job cleaning toilets at a pizza franchise would be viewed as a minor inconvenience and nothing more. But for Perkl, it was much, much more. Through no fault of his own, Perkl's disabilities have rendered him unable to savor many of the joys and pleasures the world has to offer. There was uncontradicted evidence that the job at

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[1] While Dr. Johnston could have anticipated the possibility that the jury would reject his opinion as to the quantity and quality of Perkl's emotional distress, I doubt that any scientific professional could have anticipated the lambasting Dr. Johnson took in the local press, which distilled his opinion down to a soundbyte and then pilloried him for his insensitivity.

Madison is a tough town in which to advocate unpopular positions; former Mayor Paul Soglin has likened it to sticking your tongue in a toaster.

Chuck E. Cheese's was the be-all and end-all for Perkl. The jury was within its discretion to take this into account in awarding an amount significantly higher than it would have awarded the average Chuck E. Cheese "cast member" who lost such a job after three weeks of part time work.

Even so, CEC contends that $70,000 is out of line with other awards in the Seventh Circuit for emotional distress, noting that the highest awards in the circuit have been around $50,000. *See Riemer*, 148 F. 3d at 809 (upholding award of $45,582 under ADA for emotional distress and inconvenience resulting from wrongful reassignment); *AIC Security*, 55 F.3d at 1286 (upholding award of $50,000); *Fleming v. County of Kane*, 898 F.2d 553, 561-62 (7th Cir. 1990) (upholding award of $40,000 under 42 U.S.C. § 1983 for emotional distress resulting from wrongful termination); *Webb v. City of Chester*, 813 F.2d 824, 836-37 (7th Cir. 1987) (reviewing cases and concluding that damages for claims under 42 U.S.C. § 1983 resulting from illegitimate firings "ranged from a low of $500 to a high of over $50,000"); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir. 1985) (holding that $35,000 was an appropriate award for emotional harm suffered as a result of discriminatory treatment and termination).

Admittedly, the $70,000 awarded in this case is on the high side, and I appreciate that this court must not be casual with other people's money. *See Avitia*, 49 F.3d at 1229. However, in affirming the award in *AIC Security*, the court observed that some of the awards in earlier cases had occurred several years ago; if adjusted to their current value, they would

be "considerably greater" as a result of the changing value of money over time. *Id.*, 55 F.3d at 1286. Taking such a consideration into account, I conclude that the jury's award of $70,000 to Perkl is "roughly comparable" to awards made in similar cases.

D. Punitive Damages

Under the ADA and the Civil Rights Act of 1991, plaintiffs who prevail on a claim of intentional discrimination may recover punitive damages against an employer if the plaintiff demonstrates that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). This standard requires the plaintiff to show more than merely intentional discrimination under the ADA. *Kolstad v. American Dental Association*, 527 U.S. 526, 119 S. Ct. 2118, 2124 (1999). However, the Supreme Court has rejected the conclusion that an additional showing of "egregious conduct" is required. Rather, the Court stated that "[t]he terms 'malice' and 'reckless' ultimately focus on the actor's state of mind. " *Id.* at 2124. This state of mind requirement "pertain[s] to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* Although not required, "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.' " *Id.* at 2126.

CEC contends that the evidence adduced at trial was insufficient to support the jury's conclusion that CEC acted with malice or reckless indifference to Perkl's federal rights. I

disagree. As discussed previously, the jury acted within its prerogatives by concluding that Creasy intentionally discriminated against Perkl when he fired him. Because Creasy's conduct occurred during the scope of his employment as a district manager for CEC, the jury properly imputed Creasy's acts to CEC. Indeed, CEC ultimately stood by Creasy and declined to have the court instruct the jury on *Kolstad*'s "good faith" defense to the imposition of punitive damages; such an instruction would have allowed CEC to argue that Creasy had acted inconsistently with CEC's good faith efforts to prevent discrimination in the workplace. *See Kolstad*, 119 S. Ct. at 2129.

As noted previously, under *Kolstad*, plaintiffs did not need to show that the circumstances surrounding Perkl's termination were egregious; all that had to be shown was that Creasy terminated Perkl "in the face of a perceived risk that [his] actions [would] violate federal law." *Kolstad*, 119 S. Ct. at 2125. There was ample evidence adduced at trial to support a conclusion that Creasy was well aware of the ADA's prohibitions at the time he fired Perkl, including Creasy's testimony that defendant has a policy against discrimination and promotes the hiring of disabled individuals. Moreover, CEC did not contend that Creasy was unaware of the ADA or that he discriminated with the belief that such discrimination was lawful. *See id*. at 2125. Under these circumstances, the jury's determination that CEC was liable for punitive damages was proper.

Citing cases from the Seventh Circuit, CEC argues that plaintiffs needed to show something more, such as the involvement of upper management or that CEC had a pattern

of flouting the law, in order to recover punitive damages. *See, e.g.*, *Lindale v Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998) (punitive damages may not be awarded in "garden-variety" disparate treatment case involving middle-level supervisor unless there are aggravating circumstances); *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1134 (7th Cir. 1997) (employee's failure to show that employer acted egregiously in terminating her because of her religious beliefs precluded award of punitive damages). To the extent these cases suggest that there must be aggravating circumstances before punitive damages may be awarded, they appear to be invalidated by *Kolstad*. In any event, even if these authorities remain good law in light of *Kolstad*, I conclude that there was evidence of such factors in this case to support the jury's punitive damages award. Foremost was the lack of any response to Wittwer's fax from CEC's human resources department or from Spring, a fact from which the jury could choose to infer that CEC's human resources department and Creasy's boss cared little about Perkl's rights, or more generally, about preventing discrimination in the workplace. Even though Perkl had not actually been terminated at that time, the jury was entitled to view CEC's failure to investigate Wittwer's allegations as evidence that it did not care about what happened to Perkl, or about whether one of its managers was discriminating against disabled employees.

Moreover, there was evidence from which the jury could have concluded that CEC's post-termination investigation was equally sub-par. Wittwer testified that she spoke with Crim after Perkl's termination and reminded Crim about her March 18, 1997, fax regarding

Creasy's "those kind of people" remark about Perkl; however, Crim indicated that she had never received Wittwer's fax. At trial, the evidence showed that Crim had in fact received Wittwer's fax. Nonetheless, Crim did not at that time or at any time ask Wittwer to explain in more detail the circumstances surrounding Creasy's alleged remarks. According to Wittwer, Crim told her not to speak with Lemanski and that there would be no meeting at the restaurant as Lemanski had requested. Wittwer also testified that Crim asked her questions about who Dave Lemanski was. From this, the jury could have inferred that Crim's purported reluctance to talk to Lemanski until after he had clarified in writing his relationship to Perkl was not worthy of credence, when she presumably had obtained or could have obtained this information from Wittwer. Granted, the jury could have concluded that CEC's response was slow and cautious but not obstructionist; but the jury obviously did *not* conclude this, and the jury was not *required* to conclude this.

Finally, at the time of trial, Creasy was still employed by CEC as a district manager and had not been disciplined. CEC had a reason for this: its CEO, Dick Frank, testified that he had trouble believing that Creasy had ever made the alleged remark about "those kind of people." But once the jury concluded that Creasy *had* made the remark, it would most likely conclude that CEC's failure to discipline Creasy flouted CEC's obligations to Perkl under the ADA. Given the size of the jury's award, I surmise that's exactly the conclusion that the jury drew. Viewing all of this evidence and the inferences therefrom in the light most favorable

to plaintiff, I conclude that the evidence reasonably supports the jury's award of punitive damages.

A more difficult question is whether the amount of punitive damages awarded is excessive. When answering this question, the court looks to the amount of punitive damages remaining after reducing the jury's award to the statutory cap and subtracting any amount awarded for compensatory damages. *See, e.g.*, *AIC Security*, 55 F.3d at 1287; *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1356 (7th Cir. 1995). Applying that procedure in this case, the punitive damages award under scrutiny is $230,000.

This is less than 2% of what the jury deemed appropriate: the jury, acting without knowledge of the cap, awarded $13 million in punitive damages, which would be about 39% of one year's net income for CEC. With this as context, the following discussion has an air of artificiality to it. How can we realistically discuss where this award should fit on the 0 to $300,000 spectrum when $12,770,000 of the award has already been excised? The breathtaking magnitude of an eight-figure punitive damages award demonstrates that the jury wanted to send CEC a loud, clear message. Having worked with the jurors through the entire trial, I found them all to be attentive, intelligent, thoughtful, and rational. No evidence was introduced at trial that was inflammatory or unfairly prejudicial.[2] I see no basis

[2] There was one instance where the EEOC defied my specific order and attempted to demonstrate that CEC's employee manual violated the ADA, but I struck the question and admonished the jury.

to conclude the jury ignored the evidence, disobeyed the court's instructions, acted with passion rather than reason, or otherwise abandoned its duty to provide a just verdict.

This is not to say that the $13,000,000 verdict would necessarily stand if it were before the court, but it's not before the court: we've already had a de facto remittitur of 98.23% of the award. To argue over the fraction that remains could be viewed as denigrating the jury's very function in this trial. That being said, to end the analysis on this note would be to court reversal on appeal, so I will apply the case law to determine whether the remaining $230,000 in punitive damages should be reduced further still. I conclude that it should not.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the court identified three guideposts for evaluating the excessiveness of a punitive damages award: (1) the degree of reprehensibility of the defendant's conduct, (2) the proportion of punitive damages to compensatory damages, and (3) the relation of the damage award to other statutory remedies available to redress similar wrongful acts. *Id*. at 575-83. Although the court in *BMW* was concerned about "constitutional" reasonableness in light of due process considerations of fair notice, other courts, including the Seventh Circuit, appear to have relied upon *BMW* to analyze damage awards that do not necessarily implicate due process. *See, e.g., Deters v. Equifax*, ___ F.3d ___, 2000 WL 121273, *7 (10th Cir. Feb. 1, 2000) (analyzing punitive damages awarded in sexual harassment claim in light of *BMW* factors); *Pavon v. Swift Transportation Co., Inc.*, 192 F.3d 902, 909-910 (9th Cir. 1999) (utilizing *BMW* guideposts

in race discrimination case); *Jonasson v. Lutheran Child and Family Servs.*, 115 F.3d 436, 441 (7th Cir. 1997) (observing that district court committed no error in reviewing damage award in sexual harassment case pursuant to *BMW* guideposts); *Lawyer v. 84 Lumber Co.*, 991 F. Supp. 973, 976-77 (N.D. Ill. 1997) (utilizing *BMW* guideposts to evaluate reasonableness of punitive damages award in race discrimination case).

The punitive damages award in this case is within the second and third guideposts of *BMW,* which overlap somewhat. By virtue of the statutory cap, the ratio of punitive damages to compensatory damages is a little more than three to one; if back pay is counted as part of the compensatory damages, the ratio is less than three to one. The Seventh Circuit has held this ratio is appropriate, or at least permissible, in most cases. *See, e.g., AIC Security*, 55 F.3d at 1287. As the court observed in *AIC Security*, "statutes routinely provide for double and treble damages awards to deter and punish". *Id*. For instance, the ADEA provides for double damages in cases of willful violations. 29 U.S.C. § 626(b).

The most difficult factor is the third guidepost, the degree of reprehensibility of defendant's conduct. CEC contends that an award at the statutory limit should be reserved only for the most egregious cases, and that this is not that type of case. In support of its claim, CEC relies on *Hennessy*, 69 F.3d 1344, a sex and pregnancy discrimination case in which the Court of Appeals for the Seventh Circuit stated that punitive damages awards in the amount of the statutory cap should be "reserved for egregious cases." *Id*. at 1355. The evidence showed that plaintiff's supervisor had propositioned plaintiff about a year before

he became her boss; when he became her boss, he gave her a more negative evaluation than had plaintiff's previous supervisor; upon learning that plaintiff was pregnant, he expressed surprise, stating that he believed her to be a "career woman"; he sent critical memoranda about her to others at the company while at the same time reassured plaintiff "not to worry" about her probationary status; and the company's president did not want to hire women in the sales field because they get pregnant. *Id*. at 1354. The jury did not award any compensatory damages but awarded punitive damages of $300,000, which the trial court reduced to the statutory cap of $100,000. On review of the punitive damages award, the court found that the evidence was sufficient to support the jury's award of punitive damages but the case was not "so egregious that an award at 100 percent of what can legally be awarded against a company of [defendant's] size is appropriate." *Id*. at 1356. The court remanded the case to the trial court to determine what "smaller figure" of damages was appropriate.

It is questionable whether *Hennessy* is controlling authority in light of *Kolstad*, for it seems to conflict with *Kolstad's* holding that a showing of egregiousness is not required in order for a plaintiff to recover punitive damages. On the other hand, the opinion in *Kolstad* addresses only the circumstances under which punitive damages may be awarded; it does not foreclose CEC's contention that the amount of punitive damages awarded should approach the statutory cap only in the most egregious cases.

This case, which involved an isolated instance of discrimination by a single supervisor, is not at the "most egregious" end of the spectrum. I am nonetheless declining to reduce Perkl's damages recovery to an amount lower than the statutory cap, notwithstanding *Hennessy*. First, *Hennessy* is distinguishable in that the jury in that case did not award the plaintiff any compensatory damages and the punitive damages were therefore "100 percent" of the allowable statutory damages. In contrast, the jury awarded Perkl $70,000 in compensatory damages and therefore the entire award in this case does not consist solely of punitive damages. Here, the punitive damages award is only 77 percent of the total allowable award for a defendant of CEC's size.

Second, the degree of reprehensibility of CEC's conduct is only one of the factors to be considered in evaluating a punitive damages award. *See BMW*, *supra*. As noted previously, an award of punitive damages that is less than three times the amount of Perkl's compensatory damages is reasonable in light of the second and third guideposts of *BMW*. Moreover, the Seventh Circuit has stated that "[w]e will set aside a jury's award of punitive damages only if we are certain that it exceeds what is necessary to serve the objectives of deterrence and punishment." *AIC Security*, 55 F.3d at 1287 (citing *Bogan v. Stroud*, 958 F.2d 180, 185 (7th Cir. 1992)). A relevant consideration in determining whether a punitive damages award serves these objectives is the wealth of the corporation. *Id*.; *see also* H.R. No. 102-40(I), P.L. 102-166, *reprinted in* 1991 U.S.C.C.A.N. 2, 549, 611 (recognizing that juries may properly take defendant's financial standing into account when awarding damages

under Civil Rights Act of 1991 in order to ensure effective deterrence). Assuming that a wealthy corporation and a corporation of lesser worth engage in the same type of misconduct, common sense dictates that it will take a larger punitive damages award to deter the wealthy corporation from future misconduct.

CEC had gross revenues of over $379 million and net profits of over $33 million. *Cf. AIC Security*, 55 F.3d at 1287(sustaining punitive damages award of $150,000 where defendant employed over 300 employees and had gross yearly revenues of "several million" dollars). Although the size and to some extent the wealth of a defendant is taken into account by the statutory caps, it is not improper to consider the wealth of the defendant when evaluating whether a punitive damages award within the relevant provision is excessive. Given the size and wealth of the defendant in this case, I conclude that an award at the statutory limit does not exceed the bounds of reasonableness.

Finally, as noted at the outset of this discussion, the primary responsibility for deciding the appropriate amount of punitive damages rests with the jury. *AIC Security*, 55 F.3d at 1287. As two courts of appeals have concluded, "[n]othing in the language of [42 U.S.C. § 1981a] suggests that the cap on damages is intended to diminish the jury's role in assessing punitive damages or to alter the standard for judicial review of such awards." *Luciano v. Olsten Corp.*, 110 F.3d 210 , 220-21 (2d Cir. 1997)*; see also Deters,* 2000 WL 121273 at *7. With due respect to the Seventh Circuit's opinion in *Hennessy*, if a trial court

must recalibrate the jury's award in every case by using the statutory cap as an endpoint, there would appear to be little point in allowing the jury to assess punitive damages.

Therefore, given the jury's view that CEC's conduct was egregious and that a significant amount of damages was required to punish it and to deter it and others from engaging in such discriminatory conduct in the future, in addition to the other factors just discussed, I decline to order a remittitur of the jury's award below the statutory cap.

E. Constitutionality of the Statutory Cap on Damages

Perkl devotes the last 1½ pages of his brief to his contention that imposing a damages cap violates his right to equal protection. Perkl argues generally that the caps are unfair because they impose limits on the amount that a disabled individual can recover that do not apply to others. For example, Perkl argues, a successful race discrimination plaintiff may pursue remedies under 42 U.S.C. § 1981 that are not subject to any cap. Perkl also refers obliquely to the Seventh Amendment right to trial by jury, arguing that the caps limit the jury's ability to assess damages.

Perkl's argument is woefully underdeveloped. Engaging in an equal protection analysis of legislation is hardly a rote exercise. For starters, it requires identification of the standard of scrutiny to which the legislation is subject, an analysis that Perkl has not undertaken. Nor has he cited to a single case that might illuminate the legal underpinnings of his claim. Perkl's Seventh Amendment argument is no more than a passing reference.

The law of this circuit is unequivocal:

> We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues). A party urging us to reverse a district court's judgment has an obligation to argue why we should reverse that judgment, and to cite appropriate authority to support that argument. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). It is not this court's responsibility to research and construct the parties' arguments.

United States v. Lanzotti, ___ F.3d ___, 2000 WL 157484, *5 (7th Cir. 2000) (citations omitted). This reasoning applies with equal force to undeveloped arguments made at the district court level. Accordingly, Perkl has waived his constitutional challenge to the statutory caps.

That said, even if this court were to consider his arguments, they have little merit. Although there is limited authority on the constitutionality of Title VII's damages caps, the authority that exists favors constitutionality of the caps. *Means v. Shyam Corp.*, 44 F. Supp. 2d 129, 131-33 (D. N.H. 1999); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 982 F. Supp. 786, 788 (W.D. Wash. 1997). In *Means*, the court reviewed the legislative history of the Civil Rights Act of 1991 and concluded that Congress' decision to treat employment discrimination victims differently than other tort victims was rationally related to Congress' interests in deterring frivolous suits and avoiding ruinous awards in certain employment discrimination actions. *Means*, 44 F. Supp. 2d at 132-33. Although *Means* is not on all fours with the instant case because the plaintiff was the victim of sexual harassment, the court's

review of the legislative history and its conclusion that the statutory caps are rationally related to a valid legislative purpose appear sound.

If this court were to consider Perkl's claim on its merits, his chance of success would be slim. This goes for his Seventh Amendment claim as well. *See Davis v. Omitowoju*, 883 F.2d 1155, 1161-1165 (3rd Cir. 1989) (Reexamination Clause of Seventh Amendment does not impede federal court's post-verdict application of state statutory cap in diversity case); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (post-verdict application of state statutory cap in diversity case does not violate Seventh Amendment right of trial by jury); *Pierre v. Eastern Air Lines*, 152 F. Supp. 486 (D. N.J. 1957) (provisions of Warsaw Convention limiting recovery for negligence injuring passenger in international flight to sum of approximately $8,300 are not violative of constitutional guarantee of trial by jury).

In sum, there is no need to pursue this claim further. The cap stands.

II. Plaintiffs' Motions for Injunctive and Other Equitable Relief

The "powers, remedies, and procedures" of Title VII apply to the Americans with Disabilities Act according to 42 U.S.C. § 12117(a). Under Title VII, injunctive relief is authorized when the court finds that the defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice. . . ." 42 U.S.C. § 2000e-5(g). The court may enjoin further discrimination, and may order appropriate affirmative action, including equitable relief. 42 U.S.C. § 2000e-5(g)(1). Courts are given wide discretion to

fashion a complete remedy, which may include injunctive relief, in order to make victims of employment discrimination whole. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Plaintiffs have asked this court to provide equitable relief by ordering that CEC:

> 1) Pay prejudgment interest on Perkl's back pay award;
>
> 2) Pay the sum of $9,523 to Perkl as front pay;
>
> 3) Provide ADA training to all of its managers, supervisors, trainers, recruiters and human resources personnel, with various attendant conditions;
>
> 4) Convene a formal meeting of its directors within 60 days and adopt a corporate resolution indicating that defendant is an equal opportunity employer and shall conduct its employment practices in accord with the ADA;
>
> 5) Create a written policy prohibiting disability discrimination, distribute a copy of it to all its employees within 60 days and post such policy in all of its restaurants;
>
> 6) Post a notice in all of its restaurants for three years informing its employees of this lawsuit and its outcome and further informing its employees that it may bring complaints of disability discrimination to the EEOC or to defendant's human resources department; and
>
> 7) Provide the EEOC and the Wisconsin Coalition for Advocacy with a report every six months for the next three years describing all complaints of disability discrimination made to its human resources department during the reporting period.

Plaintiffs also request the court to enter an injunction permanently enjoining defendant for three years from:

> a) engaging in any employment practice that discriminates on the basis of disability or violating the ADA in any respect;

b) failing to promptly investigate and respond to any and all complaints of disability discrimination; and

c) asking applicants for employment about potential disabilities or handicaps; and

d) following its "Six Traits of a Winner" or "Six Traits of a Star" hiring policy.

I consider these requests in turn.

A. Interest on Back Pay

The parties have stipulated that Perkl should be awarded $9,657 in back pay and that he should be awarded prejudgment interest on that amount. However, the parties disagree as to the proper rate at which the interest should be calculated. CEC and the EEOC agree that the prejudgment interest should be calculated using a prime interest rate of 8.5 percent, but Perkl argues that I should apply an annual rate of 12 percent interest as is required by Wisconsin law. In federal cases, the court is to use the prime rate, compounded monthly, to calculate prejudgment interest. *See Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269, 274 (7th Cir. 1993). The amount should be calculated up to the date of the entry of judgment and should not stop at the date of the verdict, as defendant has proposed. I leave it to the parties to compute the proper interest in accordance with this order.

B. Reinstatement vs. Front Pay

Reinstatement is among the remedies that a court may order under Title VII. 42 U.S.C. § 2000e-5(g)(1). In cases where reinstatement is unavailable, front pay may be

awarded as a substitute remedy. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951-952 (7th Cir. 1998) (citing cases from other circuits with approval). Front pay has been described as "a monetary award equal to the gain [the plaintiff] would have obtained if reinstated." *Id.* (citing *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993)).

Generally, front pay is awarded as a substitute remedy only when reinstatement is inappropriate, such as when "there [is] no position available or the employer-employee relationship [is] pervaded by hostility." *Id.* (citation omitted). The friction between employer and employee arising from the litigation process itself is an insufficient reason to deny reinstatement. *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1046 (7th Cir. 1994). Whether reinstatement is an appropriate remedy is a fact-intensive inquiry that varies depending on the circumstances of each case.

An employee's refusal to accept a reasonable offer of reinstatement tolls the employer's liability for back pay and front pay. *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1203 (7th Cir. 1989). In determining whether the employee's refusal was reasonable, "the trial court must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal." *Id.* (quoting *Claiborne v. Illinois Central Railroad*, 583 F.2d 143, 153 (5th Cir. 1978)). "An offer of reinstatement tolls the accrual of damages only if it 'afford[s] the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status.'" *Id.* (quoting *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983)).

CEC has offered to reinstate Perkl. When the instant motion went under advisement, the terms of CEC's offer were inked in an affidavit from William Gilow, the current general manager of the Chuck E. Cheese's restaurant in Madison, who averred that Perkl is welcome to work at the Madison restaurant at a rate comparable to other employees, and that Gilow "will work to accommodate his schedule and arrange for him to have four hours a day if that is what he desires." Dkt. #215, Ex. B. Perkl and the EEOC responded that CEC's offer of reinstatement was inadequate because CEC had merely offered Perkl re-employment and did not offer to reinstate him to his former janitorial position and did not even identify any jobs that it was contemplating assigning to Perkl.

In a letter dated February 2, 2000, CEC clarified its offer, stating that if Perkl wants to return to Chuck E. Cheese in a maintenance capacity, CEC will make a maintenance position available at the Madison restaurant, and that Perkl may begin immediately or whenever he is ready to return. Dkt. #234. CEC also stated that it will work with Perkl to accommodate him if he wants to try other duties at the restaurant.

Perhaps Perkl has already accepted CEC's offer. The offer is reasonable and there are no other factors militating against reinstatement. The offer is unconditional and provides Perkl the opportunity to return to what was described at trial as his "dream job" at a higher rate of pay. I disagree with Perkl's claim that he would be returning to a hostile environment if he returned to the Madison Chuck E. Cheese's restaurant. The key figure in the controversy, district manager Donald Creasy, is no longer assigned to the Madison restaurant

and there is little if any evidence of any animosity by CEC towards Perkl or his job coaches. Perkl got along fine with most of the employees the last time he worked at CEC and there is no reason to think that this will change. As noted previously, the fact that Perkl was Chuck E. Cheese's opponent in this litigation is an insufficient reason to deny reinstatement. Because reinstatement is appropriate, Perkl's request for front pay will be denied.

C. Corporate Resolution & Certification of Court's Judgment

CEC has agreed that, within 60 days of this order, it will convene a formal meeting of its board of directors to adopt a corporate resolution reconfirming that is an equal opportunity employer and that its employment practices will be conducted in accord with the requirements of the ADA. CEC has agreed that it will communicate the resolution orally and in writing to all company managers, trainers and human resources personnel. Additionally, CEC has agreed to file an authenticated copy of the resolution with the Clerk of Court and to provide the EEOC with a copy. CEC further agrees that, upon compliance with each provision of this court's judgment, it will certify such compliance to the EEOC.

However, CEC objects to providing the Wisconsin Coalition for Advocacy ("WCA") with a copy of its corporate resolution or certification of compliance, on the ground that WCA is not a party to this lawsuit. WCA is a federally-funded advocacy and protection agency for persons with developmental disabilities; WCA also employs Monica Murphy, Perkl's attorney and guardian ad litem. As such, argue plaintiffs, WCA is well-suited to

oversee CEC's compliance with the ADA. The EEOC argues that CEC's resistance to providing WCA with a copy of its corporate resolution makes little sense in light of the fact that CEC's shares are publicly traded and a copy of the resolution will be on file with the court. Rather, argues the EEOC, CEC's stance with respect to WCA evinces CEC's hostility towards the principles and purposes of WCA and suggests a lack of remorse.

The EEOC is overreacting. The WCA is not a party to this lawsuit. Although WCA is a public advocacy and protection agency and it no doubt had a public agenda when it first got involved in this case, WCA's ultimate role in *this* lawsuit was to represent Perkl's private interests. Even if it were proper for WCA to assume an oversight role, there is no need for double agency oversight of CEC in this case. WCA is not entitled to CEC's resolution or certification of CEC's compliance.

D. Proposed Training

Plaintiffs have asked that the court require CEC to provide training on the ADA under the following conditions: 1) all managers, supervisors, trainers, recruiters and human resource personnel receive the training; 2) the training be conducted by one or more outside trainers chosen by CEC; 3) the training be conducted on an annual basis for the next three years; 4) the training last a minimum of two hours each training session; 5) the EEOC and the WCA approve the selection of the outside consultant, be informed at least thirty days in advance of each training session and be provided with an outline of the training to be

given and copies of all of the handouts; and (6) all costs associated with the training be paid by CEC.

CEC has agreed to perform this training, but requests certain modifications. First, CEC agrees to present the training to all its district managers, regional managers, trainers, recruiters and human resource personnel every year, and to present it to its store managers during the annual manager conferences. CEC notes that the annual conferences are mandatory for store managers except for those managers excused from attending for good cause. CEC asserts that it will provide these excused managers with the handouts from the ADA training.

The EEOC responds that, under CEC's proposal, a newly-hired or promoted store manager could be employed for several months without receiving ADA training, or, if excused for good cause, might never receive anything except the handouts. A better alternative, suggests the EEOC, would be to require CEC to provide videotaped training on the ADA to new store managers when they are hired in addition to providing it at the annual managers' meeting.

The EEOC's suggestion is a reasonable compromise between the plaintiffs' interest in ensuring that all of CEC's managers receive ADA training in a timely fashion and CEC's apparent concern about its ability to comply with an annual training requirement for its store managers. CEC already provides videotaped training to its new employees during orientation that covers sexual harassment. Requiring CEC also to provide ADA training to

new managers at this time would not be unduly burdensome. Accordingly, I will order that individuals who are hired into positions as store managers who are not able to attend an annual manager conference within 45 days from the date of hire, and those managers who are excused from attending the annual manager conference, be required to receive specific training on the ADA within 45 days of the date on which they are hired or excused from the annual manager conference, whichever the case may be. CEC may choose the format for this training.

CEC agrees that a two-hour presentation on discrimination is appropriate, but contends that it should be a split session providing one hour of training about the ADA and another hour about race, gender, age and religious discrimination. CEC asserts that a two-hour presentation on the ADA alone is simply too long to present to hundreds of store managers. Plaintiffs respond that one hours' worth is insufficient to provide any meaningful training on the ADA, particularly "[g]iven the ignorance regarding the ADA and its requirements displayed during trial by all levels of Chuck E' Cheese's management . . .". EEOC's Reply Brief, Dkt. #232 at 10.

I agree with CEC. Because the ADA's provisions governing discrimination in employment share many features with Title VII, one hour of training focusing on the special requirements of the ADA would be sufficient when combined with another hour of training covering other types of discrimination. In fact, I'll take it a step further: although this particular case was about the ADA, I hesitate to order CEC to give particular prominence to

the ADA relative to other antidiscrimination laws that are equally important and with which CEC employees should be equally well versed. I will order that CEC provide two hours of annual training on antidiscrimination law which shall educate CEC employees as to the essential elements of the federal laws prohibiting discrimination on the basis of age, disability, gender, national origin, race, and religion.

Finally, for the reasons discussed previously, I am not requiring CEC to obtain the approval of its trainer from the WCA.

E. Written Policy Prohibiting Disability Discrimination

In accordance with plaintiffs' request, CEC has agreed to adopt within 60 days of this order a written policy prohibiting disability discrimination, which it will distribute to all its employees and managers. CEC will post a copy of the policy immediately after its adoption at all of its restaurants in a place where employee notices are customarily posted for six months, and will take reasonable steps to ensure that the policy is not obstructed by any other document, posting or paper. CEC avers that it will publish the policy in the next edition of its employee handbook, "Chuck E. Today," which it will distribute on an unspecified date during the calendar year 2000.

Unsatisfied, the EEOC responds that CEC has had ample time since the jury verdict to update its handbook and there is no reason for any further delay. It would have been helpful if CEC would have explained why it needs more than 60 days to update its

handbook; on the other hand, CEC's agreement to distribute a copy of the policy to all of its employees and managers and to post notice of the new policy as soon as it is adopted indicates that CEC is not trying to avoid informing its employees of the policy. Accordingly, I will grant CEC's request in part and order that the updated handbook containing the new policy must be distributed by the time the six-month posting period expires, which would be no more than eight months from the date of this order.

F. Posting of Notice

Plaintiffs request that CEC be ordered to post a notice informing its employees of the outcome of this lawsuit, the relief ordered and the employee's right to bring any complaints of disability discrimination to CEC's human resources department or the EEOC. CEC objects to the notice as unnecessary in light of its agreement to adopt and disseminate a written policy against disability discrimination. CEC also points out that there is no evidence that Perkl or any other employee was hampered in his or her ability to bring a discrimination complaint.

I agree. Such a notice is overkill. As the EEOC itself points out, federal law already requires CEC to display a poster informing its employees of their rights under the federal anti-discrimination laws. 42 U.S.C. § 2000e-10; 29 C.F.R. § 1601.30. Moreover, CEC has agreed to adopt a policy against disability discrimination and to distribute it to all of its

employees and to provide ADA training to its managers, supervisors, trainers, recruiters and human resources personnel.

In this respect, this case differs from *EEOC v. AIC Security Investigations, Ltd.*, 823 F. Supp. 571 (N.D. Ill. 1993), *aff'd in part, rev'd in part on other grounds*, 55 F.3d 1276 (7th Cir. 1995), a case in which the district court ordered the defendant to post a notice much like the one at issue here but did not order the company to provide ADA training or adopt any policy against discrimination. Moreover, the discriminatory termination decision in that case was made by the company's sole owner, whose testimony demonstrated lack of remorse and "a cynical attitude towards the judicial process as well as the purposes and intent of the [ADA]." *Id.*, 823 F. Supp. at 578. Where the owner, the discriminator, and the highest-ranking decision-maker at the company were one in the same and accountable to no one, it made sense to require the posting of the notice proposed by the EEOC. Here, however, where a publicly-held company, through its chief executive officer, has expressed remorse for its actions and has agreed to other injunctive measures designed to prevent future incidents of disability discrimination, the posting of such a notice is unnecessary.

G. Report of Complaints

The EEOC's proposed judgment contains a requirement that, every six months for the next three years, CEC shall provide the EEOC with all complaints of disability discrimination reported to CEC's human resources department. I am not inclined to require

this because the substantial burden outweighs the marginal benefit. True, CEC screwed up its handling of Wittwer's faxed complaint in this case, but CEC is now painfully aware of the costs resulting from such mistakes and has committed to correcting its procedures to prevent similar problems in the future.

This is not a situation where there was an absence of institutional procedures for handling complaints, or a widespread pattern of neglect in implementing those procedures. Frank, the CEO, personally involved himself in Perkl's case when Lemanski telephoned him, although his subordinates ultimately appear to have dropped the ball.[3] In any event, Frank took the stand at trial and promised to fix whatever was broken. I had no reason to doubt these averments at the time, and the jury's subsequent $13 million verdict undoubtedly has focused Frank's attention even more keenly on the task at hand. EEOC oversight of CEC's procedures is not necessary in this case.

H. Permanent Injunction

Plaintiffs request a permanent injunction restraining CEC from:

1) Engaging in any employment practice that discriminates on the basis of disability;

2) Violating the Americans with Disabilities Act in any and all respects;

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[3] There are several ways to interpret CEC's response to Perkl's firing; for purposes of ordering equitable relief I will accept the jury's decision that CEC did not respond properly. Even so, I see no evidence that CEC intentionally stonewalled Lemanski or Perkl that would require me to order EEOC oversight of CEC's practices.

3) Failing to promptly investigate and respond to any and all complaints of disability discrimination;

4) Asking applicants for employment about potential disabilities or handicaps; and

5) Following its "Six Traits of a Winner" or "Six Traits of a Star" hiring policy.

Defendant objects to all but the last request, averring that it has already abandoned the "six traits" policy.

Under Title VII, injunctive relief is not limited to those cases in which a pattern or practice of discrimination was shown but is authorized once the court finds that the defendant intentionally engaged in an unlawful employment practice. 42 U.S.C. § 2000e-5(g)(1); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1578 (7th Cir. 1997). Moreover, injunctive relief is appropriate even where there is no evidence of discrimination going beyond the particular claimant's case if circumstances suggest that discriminatory conduct could persist in the future. *Id*. at 1578-79.

As noted in the previous section, I conclude that the circumstances of this case indicate that CEC's discriminatory conduct is not likely to persist in the future. CEC has agreed to provide training to its employees, adopt a corporate policy against disability discrimination and to notify its employees of the policy. Moreover, CEC has suffered immeasurable damage to its reputation as a result of the publicity generated by this case and the jury's enormous award of punitive damages. Although CEC's investigation into Creasy's remarks and his termination of Perkl was lackluster, there was no evidence adduced at trial

to suggest that CEC is a corporation that flouts its obligations or is unconcerned about complying with laws prohibiting discrimination. To the contrary, the evidence at trial demonstrated that CEC has a positive record for hiring disabled employees, including employees with developmental disabilities. Perkl's case appears to have been the exception, not the rule. The EEOC essentially conceded as much in a post trial interview, contending simply that CEC's record of hiring other disabled workers did not provide a sufficient defense to the charge that CEC discriminated against a particular employee. *Jury Awards $13 Million to Mentally Retarded Man . . .*, 35 Fair Employment Practices Reporter (BNA), No. 886 at 144 (Nov. 25, 1999).

In light of these factors, I find that Creasy's continued employment with the company is not by itself a sufficient reason to grant the injunction. Plaintiffs' request for an injunction will be denied.

As for plaintiffs' request that CEC be enjoined from asking applicants for employment about potential disabilities or handicaps, it is beyond the scope of this lawsuit. This was an unlawful termination case, not an unlawful hiring case. Plaintiffs' victory in this lawsuit does not grant the EEOC an unfettered license to correct any and all perceived evils on its list of CEC's alleged shortcomings. The equitable relief to which CEC has voluntary agreed more than covers its bill in Perkl's case. Accordingly, this portion of plaintiff's requested injunction is also denied.

III. Establishment of a Trust

Perkl, through his guardian ad litem and attorney, asks this court to establish a supplemental or special needs trust for him and to order that the proceeds from this litigation be deposited in the trust. Perkl asserts that he receives Supplemental Security Income and Medical Assistance through the federal Medicaid program and benefits under the Community Integration Program, a state medical assistance waiver program. Perkl asserts that he uses these benefits to cover the cost of his supported employment and vocational programming, his transportation and his adult family home, and that he could lose his eligibility for these benefits as a result of the substantial sum of damages he will receive. CEC opposes this request for a variety of reasons.

In 1993, as part of the Omnibus Budget Reconciliation Act, Congress exempted the assets in what are known as "supplemental needs trusts" from those assets and resources that are counted for the purposes of determining an individual's eligibility for Medicaid assistance. Pub. L. 103-66, § 13611(b), *codified at* 42 U.S.C. § 1396p(d)(4)(A). "Supplemental needs trust" is the term commonly used to describe a trust that is established for the benefit of a disabled person and that is intended to supplement public benefits without increasing countable assets and resources so as to disqualify the individual from public benefits. *See* Jill S. Gilbert, *Using Trusts in Planning for Disabled Beneficiaries*, Wisconsin Lawyer (Feb. 1997); *Sullivan v. County of Suffolk*, 174 F.3d 282, 284 (2nd Cir. 1999).

Under the relevant federal statutory provision, disabled persons under the age of 65 remain eligible for ongoing Medicaid assistance in spite of funds held in a supplemental needs trust, so long as the trust contains a provision that provides that any funds remaining in the trust upon the death of the individual shall be used to pay back any Medicaid assistance paid on behalf of the individual.[4] 42 U.S.C. § 1396p(d)(4)(A); *Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328, 330 (8th Cir. 1998). In Wisconsin, the creation of such trusts is authorized by Wis. Stat. § 701.06(5m), which provides that a trust "that is established for the benefit of an individual who has a disability which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual" is exempt from claims for public support if the trust does not result in ineligibility for public assistance. Wis. Stat. § 701.06(5m); *see also* Wis. Stat. § 49.454(4).

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[4] Section 1396p(d) provides:

> 1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan . . . subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.
>
> * * *
>
> (4) This subsection shall not apply to any of the following trusts:
>
> (A) A trust containing the assets of an individual under age 65 who is disabled . . . and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

Plaintiffs argue that this court has the inherent authority to order that Perkl's monetary award be deposited into a supplemental needs trust if it finds that it is in Perkl's best interests to do so. However, plaintiffs do not ask this court simply to order that the funds be deposited into a trust that already exists, but are asking the court to establish the trust. Recognizing that I may indeed have the authority to establish such a trust and that such a trust appears to be in Perkl's best interests, I am nonetheless declining to enter plaintiff-intervenor's proposed order. Under 42 U.S.C. § 1396p(d)(4)(A), Perkl's parent or guardian can establish such a trust.

To ensure that Perkl's eligibility for benefits is not unfairly compromised by the award in this case, I will order CEC to make a lump sum payment to Monica Murphy, as guardian ad litem for Donald Perkl. Murphy can retain the funds in her IOLTA account until such a trust has been established.

IV. Plaintiff-Intervenor's Attorney Fees and Costs

Perkl seeks an award of $97,714.50 in attorney fees and $24,275.19 in costs. The Americans with Disabilities Act provides for an award of reasonable attorneys fees, litigation expenses and costs to "the prevailing party, other than the United States." CEC has crafted some novel arguments challenging the fee request filed by plaintiff-intervenor's counsel, Monica Murphy. First, CEC argues that Murphy cannot recover for any time she expended on this lawsuit prior to the time that Murphy became Perkl's guardian ad litem in August

1999. I granted Murphy's request to become Perkl's guardian ad litem after the parties discovered that Alice Perkl, Perkl's mother and the initial intervening plaintiff, was mistaken in her belief that she was Perkl's guardian. CEC argues that Donald Perkl, not Alice Perkl, was the "prevailing party" and therefore Donald Perkl cannot recover fees for any work performed by Murphy in her capacity as Alice Perkl's attorney.

Second, CEC argues that Murphy cannot recover any fees that occurred *after* she became Perkl's guardian ad litem because she was acting as an attorney at the same time. According to CEC, Murphy "began to represent herself in the litigation," and, as such, was like a pro se litigant who may not recover fees in a civil rights action. *See Kay v. Ehrler*, 499 U.S. 432 (1991) (attorney who represents himself in successful civil rights action may not be awarded "a reasonable attorney's fee as part of the costs" under 42 U.S.C. § 1988).

CEC's arguments are nimble but unpersuasive. First, as Perkl argues, his interests and no one else's were at stake throughout this entire litigation. Alice Perkl never had a separate claim and was merely intervening on behalf of her son, whom she mistakenly believed was her ward. The fact that Alice Perkl was mistaken about her legal status was a technicality that had no material bearing on the manner in which Murphy litigated this case, which was always with an eye on Donald Perkl's interests.

CEC's second argument is also a nonstarter, for it relies on the faulty premise that, as guardian ad litem, Murphy was representing herself. To the contrary, Murphy was appointed to represent Perkl's best interests, not her own. *See* Fed. R. Civ. P. 17(c) (infant

or incompetent person who does not have duly appointed representative may sue by a next friend or guardian ad litem). Donald Perkl was in the beginning, is now and ever shall be the real party in interest in this lawsuit. Moreover, it is not inappropriate for an individual to serve the dual roles of attorney and guardian ad litem for an incompetent client. *See, e.g., Kollsman v. Cohen*, 966 F.2d 702, 706 (4th Cir. 1993). A guardian ad litem's fees may be taxed as costs under Fed. R. Civ. P. 54(d), so long as those costs do not include services the guardian ad litem performed in her role as an attorney to the incompetent. *Id*. Time spent by the guardian ad litem in her role as an attorney are treated like any other attorney fees, and may be shifted in accordance with any applicable fee-shifting statute. *Id*.

Thus, although Murphy cannot obtain a double recovery, CEC is liable one way or another for the time she spent on this case, either as costs for her services as guardian ad litem under Fed. R. Civ. P. 54(d), or as attorney fees under 42 U.S.C. § 2000e-5.

This segues into Perkl's actual request. He seeks an award of attorney fees for 501.90 hours of work performed by Murphy at a rate of $175, and 73.20 hours of work performed by attorney Jodi Hanna at a rate of $135.[5] Like Murphy, Hanna is a staff attorney for the Wisconsin Coalition for Advocacy. CEC objects to the fee request as unreasonable.

The court's determination of reasonableness is guided by the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, (1983). Under *Hensley*, "[t]he most useful

[5] Murphy has submitted a second affidavit setting forth her fees and expenses incurred for work relating to the post-judgment motions. *See* Dkt. #230. Before considering these costs, I will give CEC a chance to object to any fees or expenses it deems unreasonable.

starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate", 461 U.S. at 433, to arrive at what is commonly referred to as the "lodestar." The party seeking the fee award bears the burden of proving the reasonableness of the hours worked and the hourly rates claimed. *See Hensley*, 461 U.S. at 433, 103 S.Ct. 1933. Furthermore, the district court has an obligation to "exclude from this initial fee calculation hours that were not 'reasonably expended' " on the litigation. *Id.* at 434. The district court may then increase or reduce the modified lodestar amount by considering a variety of factors, *see id*. at 434-35, the most important of which is the "degree of success obtained." *Id*. at 436.

CEC raises specific objections to only a few line items on Murphy and Hanna's billing statements. First, it objects to time spent by Hanna accompanying Murphy to expert depositions at which the EEOC's attorneys were also present. This is a reasonable objection. It was unnecessary for both Murphy *and* Hanna to attend the depositions of Dr. Peter Blanck and Dr. Johnston, when the EEOC also sent its attorneys. Deducting the time spent on these activities results in a reduction of 15.2 hours. Similarly, given the fact that there were already three attorneys on board, it was unnecessary for Hanna to work on plaintiffs' *Daubert* motion to exclude Dr. Johnston's testimony. Deducting the time spent by Hanna on the motion results in an additional reduction of 4 hours.

Defendant next objects to time spent by Murphy and Hanna meeting with affiants who were intended to rebut Dr. Johnston's report. I agree that these fees must be disallowed

because they were not reasonably expended on the litigation. As I explained when I disallowed the witnesses, the time to name such experts had long since passed. From Hanna's and Murphy's billing statements, I have computed the time spent relating to the preparation of these affidavits to be 4.5 hours by Hanna and 14.8 hours by Murphy.[6] Perkl's fee request will be reduced accordingly. In addition, I am disallowing another 8 hours claimed by Hanna for "witness prep" on October 30 and 31, on the assumption that these unnamed witnesses were the putative rebuttal experts. If I have erred in my assumption, Perkl may provide documentation on this point when he submits the other supplementary materials I am requesting, as will be explained below.

I am rejecting CEC's objection to Murphy's time spent "correcting errors" she made regarding Perkl's guardianship status. The mistake was not Murphy's fault; she, like everyone else who was acquainted with Perkl, including Alice Perkl herself, believed that Alice Perkl was Donald's legal guardian. Indeed, much of the time spent by Murphy to rectify the situation was prompted by CEC, which smelled blood and moved in for the kill. The time Murphy spent on this issue is compensable.

Next, CEC argues generally that the fee request is unreasonable because most of the work on Perkl's behalf was performed by the two attorneys from the EEOC, Laurie Vasichek and Barbara Henderson, who each played a larger role than Murphy in preparing and trying

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[6] In reaching this number, I cut in half the four hour "omnibus" time entry shown on Murphy's time sheet for October 25, 1999.

this case. *See AIC Security*, 55 F.3d at 1288 (trial court acted within its discretion by reducing a fee request by 50% after finding that EEOC attorneys handled the bulk of the trial and the preparation of such). Perkl responds that CEC should count its blessings: but for the EEOC's assistance, Perkl's attorneys would have spent substantially more time and money on this case, greatly increasing the final cost to CEC.

Perkl has the better argument here, but CEC is entitled to some small measure of relief. From my constant interaction with the lawyers in this case during pretrial hearings and motions practice, and during the trial itself, I have no trouble concluding that Murphy pulled her own weight. The plaintiffs had clearly apportioned the work between the EEOC and Murphy, so that each had specific responsibilities both before and during trial.

That being said, although Murphy was by no means a fifth wheel on the truck, many of her briefs and arguments on behalf of Perkl essentially duplicated the EEOC's work. While I appreciate that lawyers don't like to leave any stone unturned and that no one likes to miss a motion hearing, in this case the EEOC's and Perkl's interests were essentially identical. It should have been clear to both sides by our third or fourth hearing that one lawyer could adequately brief and argue most of plaintiffs' joint positions on the disputes brought to the court's attention.

Additionally, I did not realize until the post trial motions that Perkl had a *fourth* lawyer, Ms. Hanna, working with Murphy at the WCA in addition to the EEOC's two attorneys, Ms. Henderson and Ms. Vasichek. This was overkill. Three attorneys were more

than enough for this case, particularly where two of them had available the relatively vast resources of the EEOC.

Taking all of this into account, I conclude that a 5% discount, in the fashion of *AIC Security*, is appropriate here. I will cut %5 from the otherwise allowable fees claimed by Murphy and Hanna.

CEC's only remaining objection to Perkl's attorney fee request is that a number of the entries on Murphy's time log are vague, but CEC does not specifically identify any such entry. Counsel who oppose fees have a "responsibility to state objections with particularity and clarity." *Hutchison*, 42 F.3d at 1048 (quoting *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 664 (7th Cir. 1985)). I have independently reviewed the fee statements of Hanna and Murphy and find that the entries are sufficiently detailed to permit review.

Having completed that review, I conclude that with the exceptions noted above, the hours spent and the hourly rates requested are reasonable. Therefore, accounting for the deductions previously discussed, Perkl shall be awarded attorney fees for 487.1 hours of work performed by Monica Murphy at a rate of $175 and 41.5 hours of work performed by Jodi Hanna at a rate of $135, less five percent, for a total of $86,302.87.

As for costs, CEC objects to Perkl's claim for $2,000 for a "trust drafting fee" and to the $406.51 claim for two "trial team dinners." These objections are well-founded. Although, as noted previously, it is probably in Perkl's best interests to have the proceeds from this lawsuit deposited into a supplemental needs trust, Perkl can obtain this same relief

without this court's intervention and without shifting this cost to CEC. Moreover, Murphy has not provided any documentation to show that a $2,000 flat fee for the drafting of the trust (which was drafted by a private attorney named Roy Froemming) is reasonable.

Not much needs to be said about the dinners, one of which cost nearly $350. They are not allowed. Murphy's decision to treat the team to a fancy meal gets put on her tab, not CEC's.

Beyond CEC's objections to Perkl's requested costs, I have my own concerns. Perkl seeks reimbursement for $15,333.38 in "expenses," which he supports with a ledger sheet from WCA. According to the ledger sheet, the $15,333.38 sum includes approximately $7,500 paid as salaries and wages to various WCA staff, including one staff attorney. It also includes approximately $400 in payroll taxes and benefits. Perkl has not explained why these items, which appear to be part of WCA's overhead costs, are reimbursable as part of the costs of this litigation. To the extent that some of these costs represent attorney fees, there is no indication that the unnamed staff attorneys actually worked on this case; moreover, there is no itemized account of the hours spent by these attorneys. Accordingly, unless Perkl can provide clarification, all of these "costs" will be denied.

The ledger raises other concerns. It shows $1,389.75 under the category of "Travel-Staff"; however, on a separate itemized list, Attachment B, Perkl requests reimbursement for travel expenses totaling $1,054. Additionally, the ledger reports $2,878 in expenses for legal computer and online research; however, Attachment B requests reimbursement for

WESTLAW in the amount of $2,022.79. Finally, the ledger includes $3,167 for "litigation expenses," but Perkl fails to itemize or describe with any particularity the nature of such expenses.

I will give Perkl until March 28, 2000 to respond to my concerns about his requested costs. Perkl should explain the discrepancies between the WCA ledger sheet and Attachment B, provide a detailed itemization of the $3,167 requested for "litigation expenses" and, to the extent I am correct that some of the requested costs constitute WCA's overhead, provide authority in support of his claim that such expenses are allowable as costs. CEC shall have until that same date, March 28, 2000 to object to the reasonableness of the itemized fees and expenses requested by Perkl for work relating to post-judgment motions. I will reserve entering judgment on Perkl's request for attorney fees and costs until I have had the opportunity to consider the additional submissions from the parties.

ORDER

For the reasons discussed above, it is ORDERED that the motion of defendant CEC Entertainment, Inc., for judgment as a matter of law is DENIED.

It is FURTHER ORDERED that the motions of plaintiff Equal Employment Opportunity Commission and plaintiff-intervenor Donald Perkl for entry of judgment, equitable and injunctive relief and attorney fees and costs are GRANTED IN PART and DENIED IN PART as specifically detailed in the judgment of the court issued herewith.

JUDGMENT

The Court hereby enters judgment upon the verdict of the jury, rendered November 4, 1999, in favor of plaintiff Equal Employment Opportunity Commission ("EEOC") and intervening plaintiff Donald Perkl, by his guardian ad litem, Monica Murphy, and against defendant CEC Entertainment, Inc. It is ORDERED that judgment be entered in favor of EEOC and Perkl and against the defendant as follows:

1. Defendant shall pay Monica Murphy, as guardian ad litem for plaintiff-intervenor Donald Perkl, the sum of $9,657 as back pay, plus interest at the prime rate, compounded monthly, from April 7, 1997, to the date of judgment, in accordance with 42 U.S.C. § 2000e-5, incorporated by reference into the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12117.

2. Defendant shall reinstate Donald Perkl to his position as a janitor at Chuck E. Cheese's restaurant in Madison, Wisconsin, if Perkl so desires, in accordance with the terms of defendant's offer of reinstatement dated February 2, 2000, in accordance with 42 U.S.C. § 2000e-5, incorporated by reference into the ADA, 42 U.S.C. § 12117.

3. Defendant shall pay Monica Murphy, as guardian ad litem for Donald Perkl, the sum of $70,000.00 as compensatory damages in accordance with 42 U.S.C. § 1981a(b).

4. Defendant shall pay Monica Murphy, as guardian ad litem for Donald Perkl, the sum of $230,000.00 as punitive damages in accordance with 42 U.S.C. § 1981a(b).

5. Defendant shall pay the United States Treasury the sum of $7,615.84 for the EEOC's costs in this action in accordance with Fed. R. Civ. P. 54(d) and 29 U.S.C. § 2412(a).

6. Judgment on intervening plaintiff Donald Perkl's motion for attorneys' fees and costs is stayed pending the submission of additional information by the parties.

It is FURTHER ORDERED, pursuant to 42 U.S.C. § 2000e-5, incorporated by reference into the ADA, 42 U.S.C. § 12117, that equitable relief in favor of the Equal Employment Opportunity Commission and Perkl and against defendant shall be provided as follows:

7. Defendant shall provide annual training to all of its district managers, regional managers, trainers, recruiters and human resources personnel on the ADA. The training shall also be provided to store managers at the annual manager conferences. Such training shall be conducted by one or more outside trainers chosen by defendant. The training shall be conducted on an annual basis for the next three years, and shall last a minimum of two hours each training session, and may include training on other federal antidiscrimination laws.

The EEOC shall approve the selection of the outside consultant, and shall be informed at least 30 days in advance of each training session, and at that time shall be provided with an outline of the training to be given and copies of all handouts to be used at training. Individuals who are hired or promoted into positions as store managers and who

are not able to attend an annual manager conference within 45 days from the date of hire, and those managers who are excused from attending the annual manager conference, shall be required to receive two hours of training on the ADA and other federal antidiscrimination laws within 45 days of the date on which they are hired or excused from the annual manager conference, whichever the case may be.

8. Not later than May 13, 2000, the defendant's board of directors shall convene a formal meeting and adopt a corporate resolution indicating that CEC Entertainment, Inc. is an equal opportunity employer and shall conduct its employment practices in accord with the requirements of the Americans with Disabilities Act. The defendant shall provide a written copy of its resolution to all company managers, trainers and human resources personnel. An authenticated copy of the corporate resolution shall be filed with the Clerk of Court and provided to the EEOC within five days of its adoption.

9. Not later than May 13, 2000, defendant shall create a written policy prohibiting disability discrimination and distribute a copy of it to all of its employees and managers. A copy of this policy shall be published in defendant's employee handbook, "Chuck E. Today," no later than November 13, 2000. Defendant shall post a copy of its policy prohibiting discrimination at all of its restaurants in a place where employee notices are customarily posted for six months. Defendant shall take reasonable steps to ensure that this policy is not obstructed by any other documents, postings or papers.

10. Upon achieving compliance with each provision of this judgment, defendant shall promptly certify to the EEOC that it has complied with the appropriate provision of the judgment.

11. This judgment shall remain in effect for a period of three years from the date of entry.

Entered this 14th day of March, 2000.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge