CHAPTER 6

THREE PERSPECTIVES: THE JURY, THE JUDGE, THE ARBITRATOR

In the Matter of a Controversy Between:	)	
	)	
Roger Baker and the	)	
Clerical Workers International Union	)	
	)	**Discharge of**
and	)	**Roger Baker**
	)	
Seattle County, State of Washington	)	

MOCK PROBLEM

WRITTEN BY

THE HONORABLE HARRY T. EDWARDS
AND
ALEX REINERT, ESQ.

[The idea for this problem was proposed by Professor James Oldham and Barry Winograd. The Mock Problem, related research, jury instructions, and all of the procedural details of the problem were completed by Chief Judge Harry T. Edwards and his law clerk, Alex Reinert, Esq. The "stipulated facts," grievance claim, and lawsuit are entirely fictitious. Chief Judge Edwards made every effort to confirm the accuracy of the legal analyses underlying the problem design. However, because the assignment to write the problem did not come until the last minute, the Judge was forced to work under very difficult time constraints. He is therefore unwilling to certify that the underlying legal analyses are entirely free of error. Only a small portion of the written legal analysis that was given to the audience and the participants appears here in publication. This, along with the "jury instructions," should be enough to give the reader a clear sense of what is at stake. The jury instructions given by Judge Edwards, and his discussion of the relevant law during the proceedings, are not offered as dispositive statements of federal or state law, and they should not be viewed or used in this way.]

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The Participants

The Honorable Harry T. Edwards Chief Judge, United States Court of Appeals for the D.C. Circuit	Presiding Judge
Andrée McKissick Member, National Academy of Arbitrators Chevy Chase, MD	Arbitrator
Rolf Valtin Member, National Academy of Arbitrators Lovettsville, VA	Arbitrator
Barry Winograd Member, National Academy of Arbitrators Oakland, CA	Arbitrator
W. Daniel Boone, Esq. Van Bourg, Weinberg, Roger & Rosenfeld Oakland, CA	Grievant's Attorney
Lynne C. Hermle, Esq. Orrick, Herrington & Sutcliffe Menlo Park, CA	County's Attorney
Dr. John M. Oldham Director, Psychiatric Institute Columbia University	Grievant's Expert Witness
Dr. M. Gregg Bloche Professor of Law Georgetown University Law Center & Adjunct Professor of Public Health Johns Hopkins University	County's Expert Witness

The Cast of Characters in the Mock Problem

Roger Baker	Plaintiff and Grievant
Joann Glickman	Coworker
Betty Martinez	Senior Manager, Witness Coordination Unit
Lucy Munoz	Coworker
Carla Smith	Coworker
W. Daniel Boone	Union's & Baker's Attorney
Lynne C. Hermle	County's Attorney
Dr. Samuel Slater	Psychologist
Dr. John M. Oldham	Baker's Expert
Dr. M. Gregg Bloche	County's Expert
Paul Riley	Person hired to replace Baker

The Stipulated Facts

The parties stipulate to the following facts:

1. Roger Baker began work for the Seattle County District Attorney's office in the witness coordination unit on January 1, 1997. The witness coordination unit includes about ten employees who schedule witness interviews and arrange subpoenas for attorneys and investigators handling criminal prosecutions. Most of the employees are female.
2. At the time of his employment by the Seattle County District Attorney's office, Baker was in his mid-thirties. Baker is a physically large man with a deep voice. As an adult, Baker has suffered significant periods of depression.
3. Baker worked in various jobs on the East Coast before his 1996 return to Seattle, where he lived as a child. On his return to Seattle, he sought psychological treatment from the County's mental health services, which he continued after he started to work at the District Attorney's office. When he was hired, Baker did not advise the District Attorney's office of his previous or ongoing treatment.
4. Between January 1997 and January 1999, Baker worked without significant incident in the witness coordination unit. He incurred occasional unexplained absences, which he invariably attributed to a "family emergency." These absences continued episodically until he was terminated in December 1999. In addition, Baker's first two years of employment were marked by rare displays of anger, which were seen as "temper tantrums" by some of his coworkers.
5. On or about January 12, 1999, Baker and coworker Joann Glickman had a disagreement over who would stay after normal hours to complete some work. During their discussion, Baker became enraged and started screaming, standing up at his desk and advancing toward Glickman's desk, 15 to 20 feet away. Baker stopped a few feet from Glickman's desk, but continued screaming at her. A deputy district attorney who was in the room intervened and told Baker to return to his desk. Baker did so. Soon afterward, Joann Glickman transferred out of the unit.
6. On or about January 15, 1999, Baker was verbally counseled by Betty Martinez, the senior manager who oversaw the witness

coordination unit. Martinez suggested that Baker consider attending a special class or consult the Employee Assistance Program to deal with his temper. She memorialized these suggestions in writing. Martinez verbally warned Baker that another outburst would result in discipline and possibly dismissal. She did not put these warnings in writing. Baker apologized, telling Martinez that he did not know what got into him, that he loved his work, that he thought Martinez was a wonderful boss, that he had had trouble in the past holding onto his jobs, and that if he lost this one, he would probably just kill himself. Martinez told her immediate supervisor about her meeting with Baker; when Martinez said she was "troubled" by Baker's remarks, her superior told her to keep an eye on the situation.

7. In March 1999, another coworker, Lucy Munoz, complained about Baker's behavior. According to Munoz, Baker periodically said offensive things to her, sometimes verbally and sometimes in handwritten notes. Baker's statements were varied. Once he remarked on Munoz's ethnic accent; another time, he said something like "you are only paid to think from the waist down." Baker began making these comments sometime in late 1998, but Munoz did not complain about Baker's behavior until March 1999.
8. On or about March 8, 1999, Munoz's computer made a beeping noise. Baker, whose workstation was nearby, shouted at Munoz, "People can get killed for less than that!" This comment upset Munoz and, on or about March 11, 1999, she complained to Betty Martinez. Martinez, however, did not say anything to Baker because Munoz had insisted on confidentiality. Martinez reassured Munoz, telling her that Baker represented no real threat of physical danger. Martinez relocated Munoz's workstation, and a month or so later, Munoz transferred out of the department. Subsequently, Munoz turned down a promotion because it would have meant a return to the witness coordination unit where Baker still worked. Martinez never spoke with Baker about the Munoz incidents.
9. A third incident occurred in September 1999. Another coworker in the unit, Carla Smith, made some mistakes when processing subpoenas. On or about September 17, Smith, sitting at her desk, mumbled—"Like I care if these witnesses show up for trial." Baker, whose desk was nearby, overheard

Smith's comment. He became visibly angry, rising from his desk and yelling at Smith. Smith, who previously had enjoyed what she thought was a pleasant relationship with Baker, was surprised by Baker's outburst. She reported the incident to Martinez, then later sought counseling with the County Employee Assistance Program.

10. After Martinez learned about the Smith incident, she summoned Baker for a conference. At first, Baker denied it, but he then admitted that he had said something to Smith about not taking her job seriously enough. After meeting with Martinez, Baker sent a note to Smith apologizing for his outburst; he also enclosed in the envelope what he called his "favorite" pen, writing that "crazy Betty Martinez is at it again, exaggerating things." He signed the note, "Roger 'Mad Dog' Baker."
11. On September 30, 1999, after the Carla Smith incident, Betty Martinez and her superiors gave Baker a letter tentatively proposing his termination, effective December 31, 1999. Baker immediately consulted with his Union representative, who put Baker in touch with Union attorney Daniel Boone. After conferring with Baker, Boone concluded that his client had psychiatric difficulties of which the employer was unaware. On or about October 11, 1999, Boone, on Baker's behalf, notified Martinez (and soon thereafter the County's attorney, Lynne Hermle) that Baker suffered from a disability, and that discharging him, under all the circumstances, would amount to impermissible discrimination against Baker.
12. During his consultations with Baker, Boone determined that, between March 1997 and October 1998, Baker was treated by Dr. Samuel Slater, a local psychologist. Baker never reported this to anyone in his place of employment. Baker was not under any physician's care and he took no prescribed medication after October 1998.
13. On October 15, 1999, at Baker's request and with his permission, Dr. Slater wrote a letter to Daniel Boone and Lynne Hermle explaining his treatment of Baker. Dr. Slater's letter stated that Baker has had a "history" of group and individual counseling and that he had been treated with various stabilizing and antidepressant medications. Dr. Slater characterized Baker's condition as a "complex case biologically," presenting difficulty achieving the correct medical balance. Dr. Slater did not indicate what medicine or other

treatment had been prescribed for Baker, stating that "it would be inappropriate to reveal a patient's full regime of treatment."

14. After reviewing Dr. Slater's letter, Boone contacted Dr. John M. Oldham, Director of the Psychiatric Institute at Columbia University and an expert on personality disorders. On October 25, 1999, at Boone's request, Dr. Oldham flew to Seattle and conferred with Baker. On November 10, 1999, Dr. Oldham provided a report stating that Roger Baker suffered from Borderline Personality Disorder and that this was a condition that could be managed with proper medication and workplace accommodations. Boone sent a copy of Dr. Oldham's report to Lynne Hermle.
15. After learning of Dr. Oldham's opinion, Lynne Hermle arranged for psychiatrist Dr. M. Gregg Bloche, Professor of Law at Georgetown University Law Center and Adjunct Professor of Public Health at Johns Hopkins University, to evaluate Baker. On November 30, 1999, Dr. Bloche filed a report concluding that Baker was not clearly within the Borderline Personality Disorder profile and that no treatment would prevent the disruptive behavior that led to his notice of termination.
16. On December 6, 1999, Boone contacted Hermle and asked the District Attorney's office to further delay any action on Baker's case to allow Baker to receive necessary counseling and medication. Boone expressed the view that, with correct medical treatment, along with other appropriate accommodations, Baker would be able to meet all of his work requirements, and would pose no threat to his coworkers. After consultation with her client, Hermle notified Boone that Baker would be discharged on December 31, 1999. On January 3, 2000, Paul Riley was hired to replace Baker. Mr. Riley has no disabilities.

The Present Legal Proceedings

Following his termination, Baker commenced two actions:

A. *He filed a grievance under the collective bargaining agreement between the Clerical Workers International Union (CWIU) and Seattle County*, claiming that his termination was without just cause. When the grievance was denied, Baker filed a timely request for arbitration solely on the contractual "just cause" issue. His written grievance and appeal for arbitration both explicitly state that "the grievant does not want any of his statutory or other legal remedies decided in arbitration."
B. *He filed a complaint in Washington State Superior Court*, seeking a jury trial on two counts:
   1. A claim that his dismissal violated the federal Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*
   2. A claim that his discharge violated his state law right to be free from wrongful terminations.

Baker's Contractual Claim in Arbitration

Baker's grievance claim has been properly appealed to arbitration. His claim will be decided by three arbitrators. The relevant provisions of the collective bargaining agreement are as follows:

Article II. Direction of Working Forces

Except as may be limited by provisions of this Agreement or by applicable law, the direction of the employees covered by this Agreement, including the right to hire, lay off, suspend, dismiss, and discharge any employee for proper and just cause, are vested exclusively with the County.

Article XI. Legal Rights

This Agreement shall be binding on both the County and the Union and shall be faithfully performed by each and shall apply alike to male and female employees. Nothing herein shall be considered as depriving either party or any employee of any rights or protection granted under any applicable federal or state law.

Article XXIV. Civil Rights

There shall be no discrimination at the time of employment against any prospective employee, nor after employment, by supervisors, or any other person in the employ of the County against any employee because of membership or nonmembership in the Union.

It is the continuing policy of the County and Union that the provisions of the Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, disability, Vietnam era service, sex, or age, except where sex or age is a bona fide occupational qualification. Wherever in this Agreement a masculine pronoun is used, such use is intended to apply equally to males and females.

Baker's ADA Claim (Jury Trial)

The ADA applies to County employees, and it embodies public policy prescriptions that are part of both federal and state law. The ADA prohibits discrimination against a "qualified individual with a disability." A "qualified individual with a disability" is "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m) (1999). A "reasonable accommodation" includes "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." *Id* § 1630.2(o)(1)(ii). "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.* § 1630.2(o)(3).

Given this framework, three questions are before the jury:

1. Whether Baker has a disability.
2. Whether he is a qualified individual with a disability.
3. Whether he requires accommodation and, if so, whether any such accommodation is reasonable.

Baker's State Law Claim (Jury Trial)

Washington's Law Against Discrimination prohibits discharge because of mental disability, *see* WASH. REV. CODE § 49.60.180(2), and imposes a duty on the employer to reasonably accommodate an employee's disability. *See Dedman v. Washington Personnel Appeals Bd.*, 989 P.2d 1214, 1217, 10 A.D. Cases 1215 (Wash. Ct. App. 1999). To establish a claim of wrongful discharge on the basis of a handicap, an employee must prove (1) a handicap; (2) satisfactory performance on the job; (3) replacement by a person outside the protected group; and (4) the handicap was the reason for the discharge. *See Ware v. Mutual Materials Co.*, 970 P.2d 332, 335, 16 LRRM 2381 (Wash. Ct. App. 1999). Once a *prima facie* case of wrongful discharge for handicap has been established, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge; the employee may then counter with evidence that the reason is pretext for the discrimination. *See id.* at 335–36. The jury must determine whether Baker has a disability and what is a reasonable accommodation, if any, for his disability. *See Phillips v. City of Seattle*, 766 P.2d 1099, 1103, 50 Fair Empl. Prac. Cas. 404, 1 A.D. Cases 1411 (Wash. 1989) (*en banc*).

There is no bar to Baker pursuing his claim through both the collective bargaining agreement and the state court system. In *Smith v. Bates Technical College*, 991 P.2d 1135, 163 LRRM 2358 (Wash. 2000) (*en banc*), the Washington Supreme Court held that an employee could file a tort action in state court, seeking damages for emotional distress and punitive damages, for wrongful termination. The court held that this cause of action was open to state employees even if they are protected by a collective bargaining agreement and Public Employee Relations Commission (PERC) remedies.

The *Smith* case also establishes Baker's right to sue the County under the common law tort of wrongful discharge. In *Smith*, the court extended this common law right to employees, like Baker, who are terminable only for cause under collective bargaining agreements. *See id.* at 1139, 1140–41. Therefore, Baker could also bring an action for "wrongful discharge in violation of public policy." *Id.* at 1139. When deciding whether a "clear mandate of public policy is violated," Washington state courts appear to consider "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Id.* at 1142 (internal quotation marks omitted). Therefore, Baker's claim may simply reduce to a question of whether his termination violates the Washington Law Against Discrimination.

The Rules of the Problem

1. Save for the expert testimony, the facts are as stipulated. Counsel may make arguments based only on the stipulated facts and the evidence presented via the expert witnesses.
2. The experts may not testify as to legal conclusions or ultimate issues of fact. In other words, the experts may not testify as to whether Baker is a "qualified individual with a disability" or whether the accommodation sought by Baker is "reasonable." The experts may, however, testify to the characteristics of Baker's conditions, its severity, and possible ways to accommodate his condition.
3. Each attorney will have 5 minutes to make an opening statement addressed to both the arbitrators and the jury. The grievant/plaintiff will present first, followed by the employer.
4. After the opening statements, the grievant/plaintiff will proceed, presenting direct testimony of his expert, followed by cross examination by the employer. Then the employer will present its expert, followed by cross examination by the grievant/plaintiff. Each side will have up to 25 minutes for direct examination, 10 minutes for cross examination, and 5 minutes for re-direct.
5. After the experts have testified, there will be a 20-minute break, during which each party will prepare its closing argument. The employer will close first, followed by the grievant/plaintiff. Each counsel will have 5 minutes to close.
6. The arbitrators will leave the room to deliberate over the contract claim. While they deliberate, the judge will instruct the jury on the ADA and state claims.
7. The jury will retire to deliberate.
8. The jury and the arbitrators will return by 11:15 A.M. to render a decision.

Schedule

8:30 A.M.	Introduction to the Session, Professor James Oldham and Chief Judge Harry T. Edwards
8:50 A.M.	Opening Statement by W. Daniel Boone, Counsel to Grievant/Plaintiff
8:55 A.M.	Opening Statement by Lynne C. Hermle, Counsel to County
9:00 A.M.	Presentation of Dr. John M. Oldham's Direct Testimony by Mr. Boone
9:25 A.M.	Cross Examination of Dr. Oldham by Ms. Hermle
9:35 A.M.	Re-Direct Examination of Dr. Oldham
9:40 A.M.	Presentation of Dr. M. Gregg Bloche's Direct Testimony by Ms. Hermle
10:05 A.M.	Cross Examination of Dr. Bloche by Mr. Boone
10:15 A.M.	Re-Direct Examination of Dr. Bloche
10:20 A.M.	Break
10:40 A.M.	Closing Argument by Ms. Hermle
10:45 A.M.	Closing Argument by Mr. Boone
10:50 A.M.	Arbitrators retire to deliberate; Chief Judge Harry T. Edwards instructs the jury
10:55 A.M.	Jury retires to deliberate
11:15 A.M.	Arbitrators and jury return with verdict
11:30 A.M.–Noon	Discussion

The Mock Trial

Introduction

James Oldham: To your right are the three arbitrators who will represent the shadow proceeding. They will be listening to the testimony of the expert witnesses and assessing how they would incorporate that testimony into the question of whether the grievant was dismissed for just cause or not. They will give us their thoughts about this at a later point in the morning.

The active part of the proceeding will present expert testimony from genuine psychiatric experts on behalf of the union and the employer in the context of a state wrongful discharge jury trial under the common law of the State of Washington. Washington was picked because its state supreme court recently decided that this kind of an action can properly proceed notwithstanding the availability of a grievance and arbitration procedure. Presiding is his honor Chief Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia.

Chief Judge Harry T. Edwards: You have the fact pattern before you in your materials. It is a case involving Roger Baker and the Clerical Workers International Union in Seattle County. It is a difficult problem in a difficult area, so let us get started. The main thing to understand is that the facts are stipulated, except for the testimony of the experts. The experts' testimony is limited. They cannot testify as to a legal conclusion and they may not alter the stipulated facts. They cannot testify as to whether the plaintiff, Roger Baker, is a qualified individual with a disability or whether the accommodation sought by Baker is reasonable, but they can testify to the characteristics of Baker's condition, its severity, and possible ways to accommodate his condition.

We are assuming that the experts have been qualified, so we are not going to have any objections on those grounds, although their qualifications can be offered by counsel. At the same time, the attorneys representing the county and the grievant will be presenting, not only the Americans With Disability Act claims under both state and federal law, but a just cause arbitration claim.

We have three arbitrators who have read the stipulated facts, who will be listening to the expert testimony, and who, at the conclusion of the trial presentation, will leave the room before jury instructions have been given so that they can consider the just cause question.

The grievant specifically says, in a clear submission, that the arbitrators are not to decide the statutory claims—the state or federal statutory claims. After the testimony is in, we will have a break, then we will come back and hear closing arguments. The arbitrators will leave and I will then instruct the jury. The jury will go out and while the arbitrators and jurors are deliberating, you and I will talk about what we have heard. We will bring them back in after about 20 minutes and hear what they have decided. We will now proceed with counsel opening statements.

Presentation of Evidence in Mock Trial

Counsel Daniel Boone: Good morning, members of the jury, panel of arbitrators. My name is Dan Boone. I am here as the attorney for Mr. Baker individually. I am also here in my capacity as the union lawyer. As you can tell from the fact pattern, I have been involved in this case from very early on, prior to the discharge of Mr. Baker.

We are here today in two very different kinds of proceedings, the state court civil proceeding and the labor arbitration. This case would be presented two different ways in the different proceedings. I will attempt to do both. And I will try to do this by speaking to you as the jury through the expert witness.

Let me preface with a statement that, as the union lawyer, I recognize that Mr. Baker's conduct was unacceptable and that it impacted on other union members. I am not here to condone or to justify his conduct. I am here through this witness to explain it to a degree. Although neither the employer nor Mr. Baker nor his union recognized the cause of his conduct at the time the conduct occurred, it was recognized before his discharge.

I attempted to communicate with the employer to say, "Yes, Mr. Baker does have a disability. I do request that there be accommodations made. Please work with us to figure out those accommodations." Unfortunately that was not done, and I will argue to you, as to the jury with the proper instructions, that not engaging in that interactive process was a violation of the law.

In the arbitration context at the closing argument, I will argue that there was not cause for the discharge of Mr. Baker. I will not recite those arguments now, but I will ask that as an appropriate remedy that you direct that Mr. Baker be reinstated, and that you exercise your remedial powers to order that as a condition of reinstatement that Mr. Baker participate in the course of treatment

that Dr. Oldham has found appropriate and will testify about. I will ask that you exercise your remedial powers to require the employer to accommodate the limitations and disabilities caused by Mr. Baker's borderline personality disorder. At that stage, through your remedial orders and your finding of the violation of the law for the failure of the employer to properly accommodate, hopefully these two roads will come together.

We are very fortunate here this morning to have Dr. John Oldham present. Dr. Oldham is one of the top few experts on borderline personality disorder in the United States. He is the chair of the committee that has drafted and is ready to publish the definitive paper about the diagnosis and treatment of borderline personality disorder. We are fortunate today to have him present to participate on behalf of both the union and Mr. Baker. I will not recite his specific qualifications or the course of his testimony, because of the limitations of time, but I hope to set out for both of the panels the basic theories of the case.

Much of the case centers on the failure of the employer to respond to our efforts to have an interactive process to recognize Mr. Baker's particular limitations, to engage in a process to seek accommodations for Mr. Baker so that he can continue to be a productive employee. If this interactive process had taken place, a reasonable accommodation was available, as will be explained this morning by Dr. Oldham.

We ask that Mr. Baker be able to participate in a course of treatment involving individual and group therapy. We ask that his schedule be adjusted in order that he can participate in the appropriate therapy for this particular condition.

We are in Seattle, Washington, and, as Dr. Oldham will tell you, Dr. Marcia Linehan here in Seattle is the preeminent specialist in the United States for this course of treatment for this particular condition. Mr. Baker can participate in group and individual therapy to maximize his ability to understand and recover from this disorder. Thank you very much.

Counsel Lynne Hermle: Good morning. Roger Baker's attempts to blame disability discrimination for his termination are misplaced. They are badly misplaced. The evidence in this case will show you that his termination, following explosions of rage and hostility at female coworkers, was not unlawful. First, it was not unlawful because our personalities, however nasty, mean, or vicious, are not mental disabilities. They are not mental disorders substantially limiting us. They are deeply ingrained patterns of

behavior, patterns that we may find difficult to change after years of allowing ourselves to explode with anger at those who annoy us.

Mr. Baker's termination was not unlawful for two additional very important reasons. First, it was not unlawful because Roger Baker's pattern of screaming at others, of yelling at people who annoy or anger him, means that he is not qualified for his job. Second, even if he could prove to you that he had a disability, that he was qualified for his job, the evidence will show you that Roger Baker's claimed disability could not reasonably be accommodated by the county, because, ladies and gentlemen, Roger Baker had a very important job, a job that was people-sensitive. He worked with witnesses to crimes, witnesses and victims, scheduling them so that they would come in and cooperate with the district attorney. These are rape victims, women who have been abused by their husbands, people who have been assaulted and robbed, reluctant people, frightened people, people who have difficulty taking time off work to come in and testify. As you can well imagine, temper tantrums, tantrums of rage and anger at people who are less than cooperative, reluctant people, would be virtually certain to ensure that these witnesses would not come in and testify and cooperate with the prosecuting attorneys.

The evidence in this case will show you that Roger Baker, his lawyer, and his hired psychiatrist cannot guarantee to you that even with the therapy you have just heard requested, Roger Baker is not going to continue to explode with anger at those who annoy him. In fact, it is very, very likely that this is a pattern that will continue.

Ladies and gentlemen, the evidence in this case will prove to you that Roger Baker's personality, however mean, is not a disability, that because of his conduct, his lack of people skills, and his inability to work with people, people who may be difficult or not cooperative, he is not qualified for his job, and importantly, that his alleged disability, in fact, his personality, cannot be accommodated for the job that he has. Finally, the evidence will show you that there was just, in fact, ample, cause for his termination under the undisputed facts. Thank you.

Chief Judge Harry T. Edwards: Counsel will proceed with direct evidence, direct testimony from the plaintiff's expert.

Counsel Daniel Boone: Call Dr. John Oldham, please. We are considering the witness as sworn. State your name, please, sir.

Dr. John Oldham: I am John Oldham.

Counsel Daniel Boone: What is your present job?

Dr. John Oldham: I am presently Director of the New York State Psychiatric Institute, Chief Medical Officer of the New York State Office of Mental Health and Acting Chairman of the Department of Psychiatry at Columbia University.

Counsel Daniel Boone: For how long have you been a psychiatrist?

Dr. John Oldham: Since 1971.

Counsel Daniel Boone: Have you been, as part of your work, involved in the diagnosis and treatment of patients with personality disorders?

Dr. John Oldham: Yes. That has been an area I have done a fair amount of research and writing in, and it is an area in which I have some expertise.

Counsel Daniel Boone: Do you have a particular expertise relating to the diagnosis and treatment of borderline personality disorders?

Dr. John Oldham: Yes, I do.

Counsel Daniel Boone: Could you describe that, please, briefly?

Dr. John Oldham: I have been a member of a number of research groups that have studied this particular disorder. It is a mental disorder that is quite disabling and one that needs a lot of research. I have been a participant in that research. I am currently involved in a National Institute of Mental Health–funded study of this disorder and I was asked to chair the work group of the American Psychiatric Association to develop a practice guideline on the borderline personality disorder. This is the first personality disorder for which there will have been a practice guideline, and the first draft of that guideline was just distributed at the annual meeting of that organization two weeks ago in Chicago.

Counsel Daniel Boone: And that is a practice guideline that will be used by whom?

Dr. John Oldham: That will be used, widely used, by the profession of psychiatry as well as by other clinicians working with these types of patients.

Counsel Daniel Boone: Doctor, we are going to give testimony today about the diagnosis and criteria for borderline personality disorder. Everyone has a copy of the diagnostic criteria. Doctor, is this a page from the *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition?

Dr. John Oldham: Yes, it is.

Counsel Daniel Boone: Could you describe briefly what this document is?

Dr. John Oldham: The diagnostic manual, we call it the DSM IV, is the official diagnostic terminology for mental disorders that is the standard created by the American Psychiatric Association and that is used for standard diagnostic terminology in this country and also fairly broad utilization in other countries.

Counsel Daniel Boone: So within the profession, in order to be able to describe, understand, communicate, and treat mental disorders, this is the Bible, if you will?

Dr. John Oldham: That is right.

Counsel Daniel Boone: Is there a particular section in DSM IV that addresses personality disorders?

Dr. John Oldham: Yes, it is divided into several sections and there is a section devoted to mostly the personality disorders themselves.

Counsel Daniel Boone: First, how many separate personality disorders are found in DSM IV?

Dr. John Oldham: There are currently ten personality disorders that are identified as mental disorders. There are two being researched that are in the appendix in this edition.

Counsel Daniel Boone: Could you provide for the jury a general definition of the characteristics of a personality disorder as a generic category?

Dr. John Oldham: Yes. The personality disorders are separated in a special section because they are thought to have several features in common. They are generally understood to be early onset in life, meaning late adolescence, early adulthood. They are pervasive across almost all situations, therefore not limited to a specific set of circumstances. They are enduring over a very long period of time, and they have to produce in order to qualify as a disorder what is described as significant emotional distress or subjective distress or significant social or occupational impairment.

Counsel Daniel Boone: Responding or reflecting on the comments in the opening statement, if I have a little bit of a short temper, does that mean I have a personality disorder?

Dr. John Oldham: No, indeed. It might mean you have a particular trait or personality feature, but it does not mean you have a disorder.

Counsel Daniel Boone: Now as I understand it, sir, you were requested by Mr. Baker's union to come out and interview Roger Baker?

Dr. John Oldham: That's correct.

Counsel Daniel Boone: You did so?

Dr. John Oldham: I did so.

Counsel Daniel Boone: You prepared a report?

Dr. John Oldham: Yes, I did.

Counsel Daniel Boone: Was the report given to me and then, in turn, to the employer?

Dr. John Oldham: That's correct.

Chief Judge Harry T. Edwards: The jury should understand that the communications between the psychiatrist and the plaintiff are not privileged; any privilege has been waived, so the testimony is permissible.

Counsel Daniel Boone: You interviewed Roger Baker on a one-on-one basis? You had a face-to-face interview with Roger Baker?

Dr. John Oldham: That is correct.

Counsel Daniel Boone: Could you describe for the jury, please, what you found out about Mr. Baker that you believe was relevant in your diagnosis and recommendation of treatment for him?

Dr. John Oldham: Yes, there were several things in my interview with him that emerged that I thought were very important for his diagnosis. Many of the things he told me were confirmatory of the information already available from the work record described in the stipulated facts. He provided information in addition to that. He did indicate that he had a period of despondency. He had periods of moodiness and depression. He was fairly irritable for long periods of time, and he is not someone who easily gets along with other people.

He indicated that he is better able to do his job if people leave him alone and he is allowed some distance and able to do his work. He indicated that he has lost many jobs in the past almost always because of his explosive temper, and he has tried to keep it under control but has not been successful. He also indicated that at times he has had periods when he is upset that he drank alcohol in excess, often in a binge manner, and on occasion would impulsively drive while intoxicated, drive quite recklessly, sometimes going so far as to be in a different city and wake up the next day and not recognize how he got there. These would be the occasions—as mentioned in the stipulated facts—when he would call the employer and indicate that this was a family emergency and he missed work. But he did not feel comfortable telling the employer about the underlying problem.

He also indicated that he had in the past a number of times told people he felt like killing himself. On one occasion, he did make

a somewhat halfhearted attempt. Once when he had had too much to drink, he took some pills, although he did not seriously jeopardize his health medically. He did not make any other attempts other than that one time; however, he did threaten to kill himself and felt periodically that that was something he might in the future still erupt and say at a time of stormy mood. Those were some of the additional facts that he indicated when we spoke.

Counsel Daniel Boone: Did you ask him questions and glean information from him about his childhood and family life?

Dr. John Oldham: Yes. He was a pretty isolated young man. He had no siblings. His father was a very abusive man, who was actually abusive to him verbally and physically on occasion, a very dominant man who was very harsh. The mother was a somewhat defeated woman, who seemed mostly to be trying to placate the patient's father for most of her life.

The patient tried to do better than his father, who was not a college graduate. He worked his own way through school. He said he didn't have time to socialize, because he had no support from his family for college. He had hoped to finish school and go on to a professional degree, and, in fact, he thought about going to law school. In talking to him, a pattern repeatedly recurred. He said that he could not afford to continue his education, so he decided the best he could do was to work in a law setting, and so he has done that repeatedly. He said it has been frustrating because, and this is more or less a quote, he said, "I know a whole lot more than a lot of those lawyers, and some of them really think they are hot stuff." And it is kind of frustrating to work with some of those lawyers. He said similar things, I might add, about doctors.

He said he had been in treatment at times, but that doctors don't know very much. They tell him he has some kind of mood disorder, but he has never found that it has helped very much. They have given him medications, but he does not take them very religiously because he is not sure that they help. He was once wanting to become engaged to be married. He was involved romantically only that one time, and that was with a woman he knew and was involved with for about four months. She was not interested in him. They broke up. He said it was a relief that they broke up, because she turned out to be "a real bitch" after he realized what she was really like. And this was a pattern that frequently recurred in his descriptions of other people.

Counsel Daniel Boone: Do you want to look at your report, doctor, and see whether there are other points to mention?

Dr. John Oldham: Yes, I have a report, and let me see if there is anything else that I want to add. Well, just one other point. He had most recently been in treatment with a Dr. Slater, and I did speak to Dr. Slater on the phone. Dr. Slater confirmed his view that the diagnosis was borderline personality disorder. Dr. Slater is not a physician, and the medications Mr. Baker was taking were prescribed by another doctor, a Dr. Franklin. I was unable to reach Dr. Franklin. I would add, finally, that Dr. Slater did agree with the potentially severely incapacitating nature of the borderline personality disorder.

If I may, for a moment, I would just point out that the word "borderline" is a little bit misleading. It comes from the original theory of this disorder, which was the notion that it was somewhere on the border between neurotic conditions and psychotic conditions. So the border means on the border of being actually so disabled that you would lose touch with reality, but not quite. And it is a disorder that is characterized by very big difficulties in terms of both capacity to get along with other people and capacity to control your mood and your impulses.

Counsel Daniel Boone: Moving from your interview, you had an opportunity not only to interview him but also to review the fact pattern of the events that all the other folks in the room have read, the 16 stipulated paragraphs?

Dr. John Oldham: That is correct.

Counsel Daniel Boone: Was it based on your interview, your conversations with Dr. Slater, the review of those documents, as well as the stipulated information, that you formed the basis for your diagnosis?

Dr. John Oldham: That is right.

Counsel Daniel Boone: Was it your diagnosis that Mr. Baker is an individual with a borderline personality disorder?

Dr. John Oldham: Unquestionably.

Counsel Daniel Boone: Now, we have here the diagnostic criteria, but before addressing them specifically, could you provide a general description for the jury and the arbitrators as to what the characteristics of borderline personality disorder are?

Dr. John Oldham: Yes. This is a pattern that fits the overall general diagnostic characteristics that I mentioned a moment ago by being pervasive and long-standing and fairly enduring. It is a disorder that is characterized principally by difficulties interpersonally, with intensive and stormy interpersonal relationships, particularly when those relationships endure over time. It becomes

hard to sustain a reasonable, comfortable interpersonal relationship over time. It is also characterized by mood swings and by impulsive behavior. And it is also characterized frequently by great difficulty controlling anger.

This is not a condition that has a single homogeneous definition, which is true of most of the mental disorders in the DSM IV. This particular disorder is defined in what is called a polythetic format, which means that there are *x* out of *y* criteria that are necessary to meet the diagnosis, but there are many different ways that could be met. In the case of borderline personality disorder, it is five out of nine criteria that must be present.

Counsel Daniel Boone: Specifically referring to these diagnostic criteria, in order to establish this diagnosis, must Mr. Baker's characteristics meet five of the nine?

Dr. John Oldham: That is correct.

Counsel Daniel Boone: Is it your expert opinion that he does?

Dr. John Oldham: That is correct.

Counsel Daniel Boone: If you could, please, referring to the diagnostic criteria, explain to the jury and to the arbitrators which of the criteria in your judgment fit Mr. Baker and why?

Dr. John Oldham: Fine. The ones that I feel are certain are the following. I believe he clearly meets criterion number 2, a pattern of unstable and intense interpersonal relationships, etc., and there are a number of things in the stipulated facts that support that. For example, Mr. Baker referred to his boss Martinez as a wonderful boss and later he referred to her as "crazy Betty Martinez." He also reported having a very pleasant relationship with his coworker Smith, but then he erupted in a rage at this person. More importantly, in the interview, the pattern of interpersonal relationships that I mentioned before was quite clear, where he would idealize people and then when things did not work out, would flip around and be absolutely disparagingly critical of the same people.

Criterion number 4 is clearly met as well, which is impulsivity in at least two areas that are potentially self-damaging. This was not evident in the stipulated facts but became clear in the interview when he described his mood-driven binge drinking and impulsive reckless driving. He even interpreted that as almost a passive suicidal streak in himself that he wondered about.

I believe criteria 5 and 6 are also met. Five is recurrent suicidal behavior gestures or threats, and number 6, affective instability due to reactivity of mood. He did indicate he had made a number of threats to commit suicide and, in fact, did make one of those at

this particular job, and he has also had one suicide attempt. His affective instability is clear. He has episodic dysphoria and irritability. But it is transient, never lasting more than a few days.

I believe criterion number 8, inappropriate intense anger or difficulty controlling anger, is met as well, and that would be the fifth. And there are many demonstrations of that within the stipulated facts, and he also indicated that when I spoke to him directly. There are other criteria that he has elements of, but those I believe are definite.

Counsel Daniel Boone: Thank you, doctor. Based on the information you gathered from your interview with Mr. Baker, how does this impact on his ability to function in the world?

Counsel Lynne Hermle: Excuse me, objection on the basis of vagueness. Also irrelevant to the extent it doesn't deal with the workplace, your honor.

Chief Judge Harry T. Edwards: You make a double objection on irrelevance and vagueness. Sustain on vagueness. Overrule on relevance.

Counsel Daniel Boone: Dr. John Oldham, I will ask it in the form of a leading question to move it along.

Counsel Lynne Hermle: Objection, leading.

Counsel Daniel Boone: I will attempt to wend my way past leading legal conclusions and vagueness. Let me ask you this: What are the general categories of symptomology that result from this condition?

Dr. John Oldham: One of the symptoms is the one you see described in the stipulated facts, which is an irritability, an anger, an explosive temper that makes it very difficult to get along with others. This often, by the way, emerges over time, as I think I mentioned before, so in a workplace situation where one works with the same coworkers day after day after day, it becomes difficult for a person with this disorder to sustain an even temper, because it is characteristic of the disorder that there are frequent eruptions in an ongoing relationship with other people. There are also mood interferences, because there will be despondency and irritable days when it is difficult for him to relate pleasantly to coworkers or collaborate effectively with coworkers.

Counsel Daniel Boone: Did you draw any conclusions based on his overall history as well as the stipulated facts about Roger Baker's ability or difficulties in maintaining a stable and continuing working relationship?

Dr. John Oldham: I believe that he needs treatment and help to be able to work in an ongoing way and in an environment that will be successful, but I believe that is achievable with the appropriate treatment and help. I do not think he has had the advantage of the best treatment, and that best treatment is available for him, and I think that is something that he needs.

Counsel Daniel Boone: Let us talk about treatment for a minute. We are located in Seattle, Washington. Is there a doctor in Seattle, Washington, by the name of Marcia Linehan?

Dr. John Oldham: Yes.

Counsel Daniel Boone: Does Dr. Linehan have some expertise and practice experience in the diagnosis and treatment of those suffering from borderline personality disorder?

Dr. John Oldham: She does indeed. It is just coincidental and fortunate that Mr. Baker is located in Seattle. Dr. Linehan's work is done at the University of Washington in Seattle. It is probably the most well-recognized form of treatment for borderline personality disorder that has been prescribed, with good data that consist of randomized controlled trials that have been published in the Archives of General Psychiatry. She is someone whose work has led to an encouragement in the field about the capacity to treat this very difficult disorder with some success.

Counsel Daniel Boone: Do you know Dr. Linehan?

Dr. John Oldham: Yes, I do. We have worked closely together. We have published together.

Counsel Daniel Boone: Would Roger Baker be able to participate in her clinical setting?

Dr. John Oldham: Yes, indeed, because he is right there where her work is.

Counsel Daniel Boone: If you could, describe briefly what the characteristics are of the treatment and what function they play?

Dr. John Oldham: Yes. Backing up for a moment, the treatment of this disorder is one that usually is best done with a combination of psychotherapy and pharmacotherapy. Pharmacotherapy is not definitively a treatment for this disorder alone. Pharmacotherapy is symptom-targeted and adjunctive but is useful and helpful in the context of the primary treatment, which is psychotherapy.

The treatment that Marcia Linehan's group has developed is called dialectical behavior therapy. It is a form of cognitive behavior therapy that is specifically targeted for a group of people who meet the criteria for borderline personality disorder. This

particular treatment involves once- or twice-weekly individual therapy in addition to once-a-week group therapy for about 2¼ hours, so it is a fairly substantial investment in treatment. It is not a quick treatment. Generally, the length of time it takes to be fairly certain of a pretty good outcome is about a year of this consistent, intensive treatment, with combined adjunctive mood and impulse stabilizing pharmacotherapy at the same time.

Counsel Daniel Boone: May I ask you a couple of specific questions, doctor? There is a legitimate concern here by everyone in the room that Roger Baker, if ordered back to the workplace, will go off again next week or next month. You recognize that as a legitimate concern?

Dr. John Oldham: Yes, indeed.

Counsel Daniel Boone: It seems from reading these papers that Roger Baker does not have much understanding or appreciation of the severity of his condition. Would that be correct?

Dr. John Oldham: That is correct. And, in fact, that is fairly characteristic of not only this but the other personality disorders. We sometimes refer to them as the externalizing disorders, because these are the people who say "nothing is my fault—it is your fault," and because he is blaming other people, it is difficult for him to acknowledge and recognize the problem as his own. However, he is able to do that to some degree. Often in the storm of a mood it is not so easy to see clearly, and then he feels justified in reacting the way he reacts. But in retrospect he can see that he reacted inappropriately. In this treatment, there is a front-loaded prioritization of intensive attention to the kinds of behaviors that jeopardize a person's capacity to maintain his job and his capacity to stay in treatment and capacity to get along with other people. That is what is immediately attacked in the treatment at the very beginning.

Counsel Daniel Boone: As a clinician, would you recommend that Roger Baker participate in this individual therapy combined with the group therapy?

Dr. John Oldham: He would need to participate in both. That is a requirement of this form of treatment.

Counsel Daniel Boone: Would that require some adjustment of his work schedule?

Dr. John Oldham: I think it is likely that it would.

Counsel Daniel Boone: In addition to the therapies you have described, based on your understanding of Roger Baker, individually, and this condition generally, if he were to return to work now, what adjustments might be made in order for him to function

successfully, to be able to do his job of making contact with these witnesses, preparing the paperwork for the subpoenas to support this office?

Dr. John Oldham: One very simple maneuver would be to allow him to have a separate space, even perhaps be in a separate office, which would minimize the interpersonal distractions and contact with others. I might make one other point. Earlier, counsel for the County indicated that he worked with a number of people in his job in the witness protection category. We have no record that there has been any difficulty in his work with the other individuals that he has had to deal with, and I do not find that terribly surprising, because in this kind of disorder the difficulties emerge over time, in sustained relationships. These difficulties might not have been seen in the brief interpersonal interactions in his former work.

Counsel Daniel Boone: One question, the proverbial last question. Doctor, if Roger Baker were given the opportunity to participate in Dr. Linehan's program, and he were set up in a separate space at work possibly focusing more on the paperwork rather than on the interpersonal interactions, can you state to the jury and to the arbitrators that he is fit to return to work and to carry out his job for the District Attorney's office?

Counsel Lynne Hermle: Objection.

Chief Judge Harry T. Edwards: Sustained.

Counsel Daniel Boone: One more. Speaking as a doctor, not as a lawyer, if Mr. Baker participated in this treatment, together with the modifications at work, what do you assess the danger to that workplace in terms of his going off, engaging in angry behavior in the future?

Dr. John Oldham: There is no way to guarantee anything. I believe this is an effective treatment. I believe it is a treatment that does not work immediately; however, with some mood stabilizing medication and a motivated involvement in this treatment, I believe he would quickly be able to reasonably carry out his job with the accommodations described, even if he still had periods of difficult mood and irritability. I think that any such periods of difficulty would be minimal and he would be able to do his job effectively.

Counsel Daniel Boone: Thank you.

Chief Judge Harry T. Edwards: Thank you, counsel. Cross-examination.

Counsel Lynne Hermle: Good morning, doctor. You testified that Roger Baker has borderline personality disorder, and let me focus you on the timing of your diagnosis. You first diagnosed

borderline personality disorder in Mr. Baker in November 1999, is that correct?

Dr. John Oldham: I believe that is correct.

Counsel Lynne Hermle: That was after you were hired by his lawyer?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And that was after he had been informed that he was going to be discharged, after he received a letter from the County?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And you did not notify the County before they gave him that discharge letter that he had a borderline personality disorder?

Dr. John Oldham: I did not know him at that time.

Counsel Lynne Hermle: Right. So you did not tell the County then?

Dr. John Oldham: Right.

Counsel Lynne Hermle: Now, let me focus on borderline personality disorder. In fact, in some of your writings on borderline personality disorder you state that you believe a personality disorder is an extreme of a normal personality style. Is that correct?

Dr. John Oldham: There is a fair amount of evidence that that is the case.

Counsel Lynne Hermle: Yes. And you believe it?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And you have written to that effect?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: Now a personality style is an arrangement of someone's thoughts, feelings, attitudes, and behaviors?

Dr. John Oldham: Okay.

Counsel Lynne Hermle: Have you not written that this is the case?

Dr. John Oldham: I believe I have.

Counsel Lynne Hermle: Yes, you have. And?

Chief Judge Harry T. Edwards: If she is asking you, count on it.

Dr. John Oldham: Thank you, your honor.

Counsel Lynne Hermle: And, in fact, doctor, under your theory there are 14 different personality styles that we all have?

Dr. John Oldham: Yes, that is the system that I have developed and written about. That is correct.

Counsel Lynne Hermle: The personality disorders are an exaggeration of the personality styles present in all of us?

Dr. John Oldham: That is correct.

Counsel Lynne Hermle: And you have so written?

Dr. John Oldham: That is correct.

Counsel Lynne Hermle: In this case, let me ask you a couple of questions about Mr. Baker. One of the things Mr. Baker told you is that he has always had a bad temper. Is that correct?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And another thing he told you is when he gets really angry it is really hard for him to calm down.

Dr. John Oldham: He said that. That is right.

Counsel Lynne Hermle: And he also told you that people irritate him?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And he also told you he does not get along with people very well?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And he told you he has had trouble holding jobs because of his temper?

Dr. John Oldham: That is right.

Counsel Lynne Hermle: Now let me go to your diagnosis. You talked about the DSM IV, and you told the jury that that is a diagnostic and statistical manual that is used for clinical purposes, is that right, doctor?

Dr. John Oldham: That is right.

Counsel Lynne Hermle: And it is an important treatise in your work?

Dr. John Oldham: I'm sorry, I do not understand the question.

Counsel Lynne Hermle: It is an important book in what you do.

Dr. John Oldham: Oh, sure.

Counsel Lynne Hermle: Now one of the things that the DSM IV tells us, doctor, is that there is a distinction between the fact that something is in the DSM for clinical purposes and a disability for legal purposes on the other hand. Is that right?

Dr. John Oldham: I believe so, yes.

Counsel Lynne Hermle: Well, let us make sure of it. I am putting before you, doctor, and before the jury, a page from the DSM IV. And referring to page xxvii, the DSM IV tells us specifically that it is to be understood that inclusion here for clinical and research purposes of a diagnostic category does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. That is correct, doctor?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And in other places in the DSM IV there are similar warnings, are there not?

Dr. John Oldham: I believe so.

Counsel Lynne Hermle: So, for example, here on page xxiii it tells us the clinical diagnosis of a DSM IV mental disorder is not sufficient to establish the existence for legal purposes of a mental disorder, mental disability, or mental disease. Am I reading that correctly?

Dr. John Oldham: I believe you are.

Counsel Lynne Hermle: Okay. Now, doctor, the DSM IV distinguishes between personality disorders on the one hand, and on the other hand acute symptomatic conditions such as depression, schizophrenia, panic disorders, right? Those are Axis I disorders?

Dr. John Oldham: The DSM is organized as a multi-axial document, and those are what are called Axis I disorders. Axis II disorders include the personality disorders.

Counsel Lynne Hermle: So the Axis I disorders that you have just referred to, those are disorders that tend to have a very powerful biological component. Is that correct?

Dr. John Oldham: That is correct of most disorders, including the personality disorders.

Counsel Lynne Hermle: I am asking you about the Axis I disorders.

Dr. John Oldham: That is correct for most of them, not necessarily all of them.

Counsel Lynne Hermle: Okay. For most of the Axis I disorders, there is a powerful biological component. Correct?

Dr. John Oldham: I think that is a fair statement.

Counsel Lynne Hermle: And generally a powerful biological component can be treated with medication, is that correct?

Dr. John Oldham: Generally.

Counsel Lynne Hermle: Now, personality disorders, as you have written, are among other things, long-term patterns of behavior. Is that correct?

Dr. John Oldham: Among other things.

Counsel Lynne Hermle: And is it true, doctor, that you believe personality disorders affect more than 15 percent of the total population?

Dr. John Oldham: There is evidence to support that.

Counsel Lynne Hermle: In fact, you have written that there is evidence to support the fact that they affect even more than that. Is that right?

Dr. John Oldham: Yes, I think that is probably a conservative estimate.

Counsel Lynne Hermle: In fact, some studies have said that personality disorders affect 50 percent of the American population.

Dr. John Oldham: I do not believe that is correct. There are studies that have shown that the disorder is prevalent in 50 percent of treated population but not in the community sample.

Counsel Lynne Hermle: So is it true that there are studies that show that mental disorders affect more than 40 percent of the treated population?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: Now statistically, if it is true that personality disorders affect more than 15 percent of the population, statistically more than one person on our jury has a personality disorder, is that not true? Statistically?

Dr. John Oldham: Statistically that is correct; also, one person would have major depressive disorder, which is 20 percent of the population, and these are often co-morbid; therefore, many people have more than one.

Counsel Lynne Hermle: So, doctor, let me focus you on borderline personality disorder. One of the things that the DSM IV tells us about borderline personality disorder is that individuals who have it are very sensitive to environmental circumstances. Is that true?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And they may explode in inappropriate anger whenever there are unavoidable changes in plans?

Dr. John Oldham: That may be characteristic of some types of borderline patients, not necessarily all of them.

Counsel Lynne Hermle: But that is one of the factors that the DSM IV tells us about?

Dr. John Oldham: Well, there are many things that are descriptive in the DSM IV that do not necessarily apply to every single individual patient.

Counsel Lynne Hermle: I understand that. But what I'm asking you, doctor, is does the DSM IV tell us that inappropriate anger may well occur in borderline individuals when there are unavoidable changes in plan?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: Another thing you mentioned to us is that there may be switches in how a borderline individual views people with whom he has ongoing contact?

Dr. John Oldham: That is correct.

Counsel Lynne Hermle: And what that means to us is that a borderline individual may have a good relationship with someone with whom he has contact and then it may switch to a very unpleasant, difficult relationship.

Dr. John Oldham: Yes, that is one of the important components of the disorder for which there is a need for treatment.

Counsel Lynne Hermle: Now, do you ever testify in criminal proceedings, doctor?

Dr. John Oldham: Yes.

Counsel Lynne Hermle: And you recognize, do you not, that criminal trials may be postponed over and over again?

Dr. John Oldham: Certainly.

Counsel Lynne Hermle: And certainly for some serious crime, crimes of rape, homicide, there may be prosecutions lasting several years?

Dr. John Oldham: Right.

Counsel Lynne Hermle: And you know yourself that trials may be postponed repeatedly by the courts or the parties, and you as a witness as well as other witnesses and victims may have to be rescheduled over and over again?

Dr. John Oldham: Right.

Counsel Lynne Hermle: Requiring repeated contacts with you from the court or the parties who have retained you?

Dr. John Oldham: Right. It can be very frustrating.

Counsel Lynne Hermle: No doubt. Thank you, doctor.

Chief Judge Harry T. Edwards: You've got one minute, counselor.

Counsel Lynne Hermle: With respect to Dr. Linehan, both you and Dr. Linehan believe that a minimum of four years of therapy is necessary to effect any lasting change. Is that true, doctor?

Dr. John Oldham: No, I do not believe that is correct.

Counsel Lynne Hermle: Have you written that, doctor?

Dr. John Oldham: It is possible I have said something along those lines. If you point me to what you are referring to, I would be glad to comment on it.

Counsel Lynne Hermle: With permission, your honor. You wrote the book *The New Personality Self-Portrait*, doctor?

Dr. John Oldham: Right.

Counsel Lynne Hermle: I'm going to read a line and then have you tell me whether I have read this correctly. You are talking about therapy and what you said was "crisis is the goal of the shorter

programs, while extended psychotherapy usually lasting at least four years can effect lasting change if the person can persevere that long." Is that true, doctor? Did I read that correctly?

Dr. John Oldham: I believe you read it correctly, but it is a little different as you read it than as you stated it. As you stated it you said it is a minimum of four years as an absolute. The statement in my book says that usually there is a need for longer treatment. What I am describing in the Linehan form of treatment is a one-year program that does not do everything. The whole job is not done, but it allows, at the end of that year, a pretty successful outcome, with stabilization of the person's condition while preferably ongoing treatment continues beyond that time.

Chief Judge Harry T. Edwards: This is the last question, counsel.

Counsel Lynne Hermle: If the patient continues, correct?

Dr. John Oldham: Certainly.

Counsel Lynne Hermle: And borderline patients often do not continue?

Dr. John Oldham: Not if they have been successfully treated at the end of the first year.

Counsel Lynne Hermle: Thank you, doctor.

Chief Judge Harry T. Edwards: Re-direct.

Counsel Daniel Boone: Doctor, is the study that is about to be published concerning the treatment of borderline personality disorders one that was prepared by a number of psychiatrists from around the United States?

Dr. John Oldham: Yes, this is actually a work group put together by the American Psychiatric Association to develop these practice guidelines based on evidence from the literature and from clinical consensus.

Counsel Daniel Boone: That is the group you chair?

Dr. John Oldham: That is correct.

Counsel Daniel Boone: Have you reviewed all of the professional literature in this area?

Dr. John Oldham: I have done the best I can to review the entire literature.

Counsel Daniel Boone: Based on your review of that literature, what is the estimate of the number of people in our society who suffer from the general category of personality disorder?

Dr. John Oldham: Well, again, we do not have very good data there. The epidemiological studies that have been done have not included the personality disorders across the board, which includes borderlines, so we do not have good data. The best estimates

are that between 10 and 15 percent of the general population is thought to have personality disorders.

Counsel Daniel Boone: Of the percentage within the general category of personality disorders, where does borderline personality disorder fit?

Dr. John Oldham: Borderline is actually viewed in clinical groups as one of the most severely disabling types of disorders, and as a disorder that is frequently seen in treatment settings. These people need treatment because they have difficulties functioning, so in treatment settings you will see as many as 20 percent of outpatients with this disorder, and as I said, there may be other comorbid conditions like depression or anxiety. And you will often have as much as 50 percent of inpatient psychiatric populations with this disorder.

Counsel Daniel Boone: I have no further questions.

Chief Judge Harry T. Edwards: Defendant, call your witness please.

Counsel Lynne Hermle: We call Dr. Gregg Bloche. Good morning, Dr. Gregg Bloche. Are you a trained psychiatrist?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: And you have a medical degree sir?

Dr. Gregg Bloche: That is correct.

Counsel Lynne Hermle: From where did you get your medical degree?

Dr. Gregg Bloche: From Yale University.

Counsel Lynne Hermle: Did you do a residency?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: Where did you do that?

Dr. Gregg Bloche: At the Columbia Presbyterian Medical Center in New York.

Counsel Lynne Hermle: What did you do your residency in?

Dr. Gregg Bloche: In psychiatry.

Counsel Lynne Hermle: In the course of your residency, did you work with persons who had been diagnosed as borderline individuals?

Dr. Gregg Bloche: Yes, extensively.

Counsel Lynne Hermle: Over what period of time did you focus on that treatment?

Dr. Gregg Bloche: Over a period of three years on an outpatient basis and six months on an inpatient, that is in the hospital, basis.

Counsel Lynne Hermle: In addition to your psychiatric expertise, doctor, do you have expertise in the law?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: Would you tell the jury, please, about your legal training.

Dr. Gregg Bloche: I have a law degree, also from Yale University, and I am Professor of Law at Georgetown University and Adjunct Professor at Johns Hopkins University in the Department of Health Policy and Management and Co-Director of the Georgetown–Johns Hopkins Joint Program in Law and Public Health.

Counsel Lynne Hermle: Do you specialize in particular areas of the law?

Dr. Gregg Bloche: My focus is health care policy and the interaction between clinical and diagnostic judgments and larger public issues.

Counsel Lynne Hermle: Are you familiar with the psychiatric literature?

Dr. Gregg Bloche: With parts of it, yes.

Counsel Lynne Hermle: Are you familiar with psychiatric literature that applies to borderline personality disorder?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: Are you familiar with the DSM IV?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: Have you, doctor, been a member of the American Psychiatric Association Council? Please tell me about that.

Dr. Gregg Bloche: Yes. I served as a member of the American Psychiatric Association's Council on Law and Psychiatry during the drafting of the DSM IV and during the drafting and discussion of the cautionary statement.

Counsel Lynne Hermle: And the cautionary statement would be the document that the jury just saw on the overhead, is that correct?

Dr. Gregg Bloche: That is correct. The cautionary statement was intended to make it clear that a diagnosis for the purpose of helping people clinically is very different from a legal conclusion about whether a person has a disability.

Counsel Lynne Hermle: Now, doctor, have you done work connected with Mr. Baker's claim that he has a borderline personality disorder, which is a disability?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: What have you done?

Dr. Gregg Bloche: At the request of the County, I came here to Seattle to evaluate Mr. Baker.

Counsel Lynne Hermle: And did you meet with Mr. Baker?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: Did you speak with him?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: Did you review Dr. Oldham's report?

Dr. Gregg Bloche: I reviewed Dr. Oldham's report, but I was not able to speak with Dr. Slater. Dr. Slater declined to speak with me.

Counsel Lynne Hermle: Dr. Slater would be Mr. Baker's treating psychologist, is that correct?

Dr. Gregg Bloche: That is right.

Counsel Lynne Hermle: Did you attempt to contact him?

Dr. Gregg Bloche: Yes.

Counsel Lynne Hermle: And what did you learn?

Dr. Gregg Bloche: Dr. Slater told me only that his patient would not authorize my speaking with him and therefore as a matter of the ethics of confidentiality he was unable to speak with me as he had with Dr. Oldham.

Counsel Lynne Hermle: All right. So in other words he spoke to Dr. Oldham, but he would not speak to you.

Dr. Gregg Bloche: That is correct.

Counsel Lynne Hermle: Now let me focus you on the DSM IV, Dr. Bloche. Who drafted the DSM IV?

Dr. Gregg Bloche: The DSM IV was prepared by a series of committees under the umbrella of the American Psychiatric Association.

Counsel Lynne Hermle: And is the DSM IV used in any way to determine whether insurers will pay for psychiatric treatment?

Dr. Gregg Bloche: That is correct. To establish medical necessity for purposes of getting mental health coverage you generally have to show that there is a DSM IV diagnosis that applies, so the DSM IV frames how large the area of insurance coverage is going to be. The broader the diagnostic terms and concepts in the DSM IV, the more treatment is covered by insurance.

Counsel Lynne Hermle: So does the DSM IV define disorders narrowly, broadly, or in some other way?

Dr. Gregg Bloche: The goal is to capture disorders, to define disorders as broadly as possible in order to help as many people as possible clinically.

Counsel Lynne Hermle: Now let me provide you with a copy of the DSM IV, Dr. Gregg Bloche. Dr. Oldham has testified to us that

to meet the definition of borderline personality disorder under the DSM IV—there is a word he used about poly-something—but what I understand that to mean is there are nine possible elements and if you meet five of these, you are borderline.

Dr. Gregg Bloche: Basically the committee decided that folks ought to qualify for borderline personality disorder if five of these nine categories are deemed to be met.

Counsel Lynne Hermle: All right. Let us focus on those borderline personality disorders, doctor. Let me actually take you through the ones that Dr. Oldham found present here. Did you, based on your investigation and review, find that Roger Baker clearly met five of the criteria of borderline personality disorder?

Dr. Gregg Bloche: No, I did not.

Counsel Lynne Hermle: And if I understand it, doctor, if I meet three of the criteria, and I guarantee you on certain days I do. . . .

Dr. Gregg Bloche: We all do.

Counsel Lynne Hermle: If I meet three of the criteria, I do not fall within the definition of the DSM IV?

Dr. Gregg Bloche: That is right.

Counsel Lynne Hermle: If I meet four of the criteria, I do not fall within the definition?

Dr. Gregg Bloche: That is right.

Counsel Lynne Hermle: I need to meet five?

Dr. Gregg Bloche: That is right; that is what the committee determined. This is not a biological construct; this is an administrative construct.

Counsel Lynne Hermle: Can tell me what page that is on, doctor?

Dr. Gregg Bloche: Page 654 lists a summary of the criteria.

Counsel Lynne Hermle: Number 2 was one of the criteria that Dr. John Oldham found—a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation. What does that mean? Does that mean bad relationships?

Dr. Gregg Bloche: That means not getting along with people, blowing up with anger and having intense contradictory feelings about people. And that makes people mad at you when you do that.

Counsel Lynne Hermle: Let's go down to number 4, which I believe was Dr. Oldham's next choice. Impulsivity in two areas that are potentially self-damaging, such as spending, sex, substance abuse, reckless driving, binge eating. Doctor, if I meet any two of those, I meet that criterion, is that correct?

Dr. Gregg Bloche: That is right.

Counsel Lynne Hermle: All right. Then we had number 5, which Dr. Oldham also found present here. This criterion requires recurrent suicidal behavior. Is that correct?

Dr. Gregg Bloche: That is right. One suicidal gesture would not do it. One suicidal threat would not meet criterion number 5.

Counsel Lynne Hermle: Now according to Dr. Oldham's report, one of the things Mr. Baker states is that only once did he sort of really try to kill himself, when he was upset when a woman refused to go out with him. Do you find that Mr. Baker met this criterion?

Dr. Gregg Bloche: Mr. Baker, in my judgment, does not meet this criterion, because of the reason you point to—that there is only one suicidal gesture in this record, and it was not Dr. Oldham's view that this was a serious suicide attempt, according to his own report. There was only one suicidal threat in all the record available to us in the fact pattern. There was not the repeated suicidal planning and thinking that is essential for this criterion.

Counsel Lynne Hermle: Now, let me focus you on treatment, Dr. Bloche. Are you familiar with the psychiatric literature with respect to possible treatment for borderline personality disorder?

Dr. Gregg Bloche: Yes, and I am familiar with some of Dr. Linehan's work.

Counsel Lynne Hermle: And you have also reviewed some of Dr. Oldham's work?

Dr. Gregg Bloche: That is correct. I was trained under Dr. John Oldham.

Counsel Lynne Hermle: Then you must be very familiar with his expertise. Is there any medication that is specifically designed for borderline personality disorder?

Dr. Gregg Bloche: No.

Counsel Lynne Hermle: With respect to therapy, does the psychiatric literature specify whether therapy is likely to quickly enact change in these patterns of explosive anger and other problems?

Dr. Gregg Bloche: It makes it clear that, based on both empirical studies and clinical experience, it will not.

Counsel Lynne Hermle: And what is your understanding of why that is, doctor?

Dr. Gregg Bloche: Because these are traits of personality, traits of character, whether they are inherited or whether they are developed environmentally in our early childhood experience. These are traits of personality that once we become young adults

we cannot change. We can at best learn to adapt to who we are as persons; we cannot fundamentally change who we are as persons. And even that adaptation, in the case of the kind of emotional and cognitive instability that marks borderline personality disorder, takes years.

The humane and I think wonderful course of treatment that Dr. Oldham is talking about is enormously hard to do, and it is made even more difficult by the fact that the very instability that is the object of treatment leads people with borderline personality disorder to idealize and then devalue their therapists, to terminate therapy repeatedly. It becomes unlikely that someone will stay in treatment for the four years necessary to do the real humane work that Dr. Oldham spoke of.

Counsel Lynne Hermle: Focus on that for a moment, Dr. Bloche. Why is it unlikely that a person with borderline personality disorder will remain in treatment over a long period of time?

Dr. Gregg Bloche: Because just as people with borderline personality disorder idealize and then devalue and then become enraged at the people they work with, the people in their intimate lives, they develop those kinds of feelings with special intensity toward therapists. There is something the psychoanalysts call "transference"—it is having feelings about your therapists that are tied to feelings you had about early childhood figures in your life. And these patients have the most intense of feelings toward their therapists. They become enraged, furious, and they very often suddenly, abruptly, depart from therapy.

Counsel Lynne Hermle: And your understanding in this case is that it would be Mr. Baker who would be responsible for continuing therapeutic treatment?

Dr. Gregg Bloche: That is right. We cannot handcuff him and make him do this, physically, on an outpatient basis. Ultimately the ball is in his court, he has to act responsibly or fail to do so.

Counsel Lynne Hermle: Does therapy provide any guarantees of lasting change in a person like Mr. Baker?

Dr. Gregg Bloche: It provides absolutely no guarantees. Dr. Oldham was absolutely right about that.

Counsel Lynne Hermle: And are you familiar with the information in Dr. Oldham's report with respect to Mr. Baker telling him doctors do not know anything?

Dr. Gregg Bloche: Yes. Here is another very poor prognostic sign from Mr. Baker, bad news in terms of predicting Mr. Baker's future. Unfortunately, tragically, he seems to be utterly without

insight into his condition, into what he brings to the instability in his life. He is always blaming others; he is blaming the people he falls in love with; he is blaming his coworkers; he is blaming his bosses; he is blaming the doctors. He does not point a finger toward himself and say, "What could I have done differently to avoid that situation?"

Counsel Lynne Hermle: You are familiar with the fact that Mr. Baker told Dr. Oldham that doctors he had seen gave him some pills to take, but they did not help much, so he did not take them religiously?

Dr. Gregg Bloche: That is right. His past history of noncompliance with treatment is another bad prognostic sign.

Counsel Lynne Hermle: Now, are you aware of any specific facts that show that if Mr. Baker begins attending treatment with Dr. Linehan he is guaranteed to stop exploding in these fits of rage?

Dr. Gregg Bloche: No.

Counsel Lynne Hermle: Thank you.

Chief Judge Harry T. Edwards: Thank you, counsel. Cross-examination.

Counsel Daniel Boone: Doctor, as I understand it, you trained under Dr. Oldham at Columbia Presbyterian?

Dr. Gregg Bloche: That is correct.

Counsel Daniel Boone: For three years for your residency?

Dr. Gregg Bloche: Four years, including an internal medicine internship.

Counsel Daniel Boone: After that time in residency and training, did you engage in the practice of psychiatry in the diagnosis and treatment of patients?

Dr. Gregg Bloche: No.

Counsel Daniel Boone: You are a law professor?

Dr. Gregg Bloche: That is correct.

Counsel Daniel Boone: You would agree with me that Dr. Oldham is an outstanding and recognized clinician in this field?

Dr. Gregg Bloche: Absolutely.

Counsel Daniel Boone: Would you agree that Dr. Oldham has a great deal more experience diagnosing and treating people with borderline personality disorders than you ever will have or have had?

Dr. Gregg Bloche: Yes.

Counsel Daniel Boone: You would agree that this is a serious disorder, would you not? If a person meets the criteria, this is a serious mental disorder?

Dr. Gregg Bloche: It seriously impairs a person's ability to live, love, and work.

Counsel Daniel Boone: Does it seriously impair the person's ability to interact with others?

Dr. Gregg Bloche: Yes.

Counsel Daniel Boone: And to hold and keep a job? Correct?

Dr. Gregg Bloche: It can.

Counsel Daniel Boone: Now, if you had been contacted by the District Attorney's office and it had been suggested to you that you work with Dr. Oldham to try to understand as much as possible about Roger Baker, would you have welcomed the opportunity to do that?

Dr. Gregg Bloche: I am not sure. Possibly. It would have depended upon the exact conditions and circumstances of the arrangement.

Counsel Daniel Boone: Well, assuming that privileges and legalities were put aside, putting your clinician hat on, your psychiatrist hat on, as opposed to your lawyer hat, would you welcome the opportunity to work with Dr. Oldham to try to figure out a way of understanding Mr. Baker and seeing whether there was a way that he could be treated and continue to work at the District Attorney's office?

Dr. Gregg Bloche: I would always welcome the opportunity to work with Dr. Oldham, but I am not sure as to what extent those goals would be relevant to the issues in this case.

Counsel Daniel Boone: You agree, do you not, putting your lawyer hat on, that there is an interactive process that should be carried out if a disability is identified and there is a request for accommodation?

Dr. Gregg Bloche: Well, I should explain what my expertise is, which is not the lawyer hat, but familiarity with the literature and its relevance to the legal and policy questions that are at stake, whether in this case, or in other policy and legal environments.

Counsel Daniel Boone: Specifically, Dr. Oldham was told by Roger Baker that he thought about suicide at times, he told others he felt like killing himself, there was one time when he took some pills, that he goes on drinking binges, and quite a few times when he is upset he engages in reckless driving while intoxicated. Would you say that this is a combination of either suicidal behavior or gestures or threats of suicide?

Dr. Gregg Bloche: You skipped over some language in the report that goes in the opposite direction.

Counsel Daniel Boone: Could you answer my question, please?

Dr. Gregg Bloche: No, because Dr. Oldham also says that Mr. Baker did not really endanger himself. This was not a suicide attempt; this was a mere suicide gesture.

Counsel Daniel Boone: Right. And would you say that getting drunk and recklessly driving around on the highway is suicidal behavior?

Dr. Gregg Bloche: No, not necessarily. We would need to know a lot more. It is reckless behavior. It is stupid behavior. It is not, by itself, suicidal behavior.

Counsel Daniel Boone: Some further investigation would be appropriate, would it not?

Dr. Gregg Bloche: Yes. Further investigation, further interviews, and information from many others involved would be necessary before contemplating giving Mr. Baker the clear diagnosis of borderline personality disorder.

Counsel Daniel Boone: Doctor, would you say it is impossible that if Roger Baker were to participate with Marcia Linehan in her program that Roger Baker could recover over the course of a year or two?

Dr. Gregg Bloche: Nothing is absolutely impossible. It is exceedingly unlikely that he could fully recover over the course of a year or two. I agree with Dr. Oldham, who has written and said that eloquently and powerfully based on the extensive research he has done throughout his career.

Counsel Daniel Boone: Would you describe Dr. Linehan's treatment as humane treatment?

Dr. Gregg Bloche: Yes.

Counsel Daniel Boone: It may have the function of saving a person's life?

Dr. Gregg Bloche: It may save lives. That is right.

Counsel Daniel Boone: But it is your view that, while this humane treatment is going on, it is not appropriate for a person to continue working?

Counsel Lynne Hermle: Objection. Irrelevant and outside the scope of direct, lacks foundation.

Chief Judge Harry T. Edwards: Overruled.

Counsel Daniel Boone: You would agree as a clinician that it is important for Roger Baker to continue with his employment? It is important for his self-image to have a job, would you agree with that?

Dr. Gregg Bloche: Yes. It is important to his self-image. I am not drawing a conclusion about the impact on the workplace.

Counsel Daniel Boone: Now, these characteristics that are listed here, these do not apply to somebody who loses his temper one day and then loses his temper three months from now—the characteristics are to be enduring and pervasive, correct? Those are the criteria?

Dr. Gregg Bloche: Yes, and typically more frequent losses of temper than you have just described.

Counsel Daniel Boone: And do you disagree with Dr. Oldham's opinion that Roger Baker fits the criterion number 2?

Dr. Gregg Bloche: I would be prepared to say that Mr. Baker provisionally meets criterion number 2, which involves unstable and intense interpersonal relationships. We do not have enough information to say for sure. DSM IV allows us to say that somebody provisionally meets a criterion if we think that the person probably will, but we still have some reservations because we have not done the data collection we think is necessary.

Counsel Daniel Boone: As a psychiatrist, sir, what would you do to investigate, to determine, either to confirm or deny, this diagnosis and course of treatment that Dr. Oldham is proposing?

Dr. Gregg Bloche: I would want very much to be able to speak with Dr. Slater, and I would want very much to speak with coworkers and others involved in Mr. Baker's life.

Counsel Daniel Boone: And maybe do more in-depth interview with Mr. Baker?

Dr. Gregg Bloche: Yes.

Counsel Daniel Boone: Do you concede that with that additional investigation you would come to agreement with Dr. Oldham that, in fact, Roger Baker does suffer from a borderline personality disorder?

Dr. Gregg Bloche: It is possible.

Counsel Daniel Boone: With that additional investigation, is it possible you could come to the conclusion that Roger Baker would, in fact, benefit from and resolve this disorder if he were given the opportunity to treat with Dr. Linehan?

Dr. Gregg Bloche: No, I could not come to that conclusion.

Counsel Daniel Boone: No matter what?

Dr. Gregg Bloche: I could not come to the conclusion that Mr. Baker could with certainty or even with high likelihood resolve, this disorder based on even Dr. Linehan's course of treatment.

Counsel Daniel Boone: So it may not be entirely resolved, but you would agree there is a very good possibility of mitigating the extremes of his behavior through either medication or this clinical therapy?

Dr. Gregg Bloche: Yes.

Counsel Daniel Boone: The condition may never be cured, but it can certainly be mitigated, correct?

Dr. Gregg Bloche: To a small to moderate degree.

Counsel Daniel Boone: But you cannot really tell on these conditions as to how successful or not they are going to be with what we know right now. Is that correct?

Dr. Gregg Bloche: That is correct.

Counsel Daniel Boone: If Roger Baker returned to work and it was a condition of his continued employment that he actively participate in this course of therapeutic treatment, would you agree that this condition would motivate him to participate actively and cooperatively in this treatment?

Dr. Gregg Bloche: Possibly. The problem of unstable and intense feelings of anger, resentment, etc., might have a high possibility of destroying that hopeful dynamic. And if the treatment were to have the humane and wonderful effects that we would hope for, it is going to have those effects over a period of years, during which time he is going to be exposed to the great stresses of the witness scheduling process in his place of work, and even the most flexible and mentally healthy amongst us have great difficulty handling that kind of stress.

Counsel Daniel Boone: You would agree, would you not, doctor, that over the course of the three years that he worked there, that there is not a single incident of his having any bad interaction with any witness at the job? Is that correct?

Dr. Gregg Bloche: We do not know that, and we would be unlikely to hear about it since witnesses go back into their separate worlds after their brief encounter with Mr. Baker.

Counsel Daniel Boone: Witnesses do not complain if they are treated badly?

Dr. Gregg Bloche: We do not know whether or not witnesses have complained.

Counsel Daniel Boone: Let me ask you again, sir, we have no evidence of any improper relations between Roger Baker and any witness? Is that correct?

Dr. Gregg Bloche: None that I am aware of.

Counsel Daniel Boone: Thank you. No further questions.

Chief Judge Harry T. Edwards: Re-direct.

Counsel Lynne Hermle: Evidence that we have largely consists of evidence that we got from Mr. Baker himself, right?

Dr. Gregg Bloche: That is correct.

Counsel Lynne Hermle: With respect to the information that came from psychologist Slater to Dr. Oldham, what is your understanding of where that came from?

Dr. Gregg Bloche: That came from Mr. Baker.

Counsel Lynne Hermle: And why did you testify, doctor, that Mr. Baker's conduct is likely to be mitigated only to a small extent.

Dr. Gregg Bloche: Because these are traits of character, traits that do not change, and the goal of the cognitive and behavioral therapy that Dr. Linehan and others have recommended is to try to help patients adapt to who they are as people, not to try to change who they are as people. And the instability that is the hallmark of this disorder tends to destroy the therapeutic relationships necessary even to achieve these changes.

Counsel Lynne Hermle: I want to go back to what you just said in more lay terms. What does that last thing mean? The instability element?

Dr. Gregg Bloche: It means that these poor people are so prone to exploding with anger that they are likely to destroy their therapeutic relationships and the relationships in the workplace. They can learn to manage their anger only to a small extent and with great difficulty, and it takes a long, long time. It takes years.

Counsel Lynne Hermle: You have read Dr. Oldham's writings about whether borderline patients are likely to continue in a course of therapy over time, and what does Dr. Oldham conclude about that?

Dr. Gregg Bloche: Dr. Oldham concludes, and I agree with him, that it is extremely difficult to keep folks with borderline personality disorder in therapeutic relationships. They typically start therapy and quit, moving through multiple therapists. Some folks with borderline personality can see dozens of therapists over the course of their lives.

Counsel Lynne Hermle: Nothing further. Thank you, doctor.

Chief Judge Harry T. Edwards: The testimony by the parties has been received and pursuant to the procedures that we have agreed upon, counsel will now have an opportunity to prepare their closing arguments. We will take a 20-minute break. We will then come back and hear closing arguments. The arbitrators will then convene to deliberate, after which I will instruct the jury.

[Twenty-minute break.]

Chief Judge Harry T. Edwards: The Marshals will please remove anyone who is talking. The court is now in session, and we will hear closing arguments. We will hear from defendant's counsel first.

Counsel Lynne Hermle: Thank you, your honor.

Misplaced blame. We see it so much. Some of them are extreme examples: "Hostess Twinkies made me kill somebody." Here we see, "My father was mean to me and so I get to engage in screaming fits of anger and hostility at my coworkers in the workplace. I get to cause not one but two people to transfer from jobs that they probably liked and valued, because I came at them angry and yelling for nothing. I get to cause another person to go into counseling and to leave because of my inappropriate screaming anger. Even though my supervisor has warned me about my behavior and even though I have been told to get help." Those facts, ladies and gentlemen, are all in the stipulated facts that you have before you.

But here, Roger Baker's efforts to blame others for what happened cannot win. It cannot win because he cannot prove the three essential things that he has the burden of proving to you in this proceeding. First, as I have told you before, he cannot win because he cannot prove he has a protected disability. The law is designed to protect people with proven disabilities, people disabled by cancer, by multiple sclerosis, by mental retardation, real disabilities that substantially impair us. The law is not designed to protect people who engage in temper tantrums. It is not designed to protect because of our patterns of ingrained behavior. This is not a mental impairment that limits us. You heard Dr. Oldham. Dr. Oldham told us that he is an expert in personality disorders, and that a personality disorder is just an extension of a personality style, a style that we all have, a style that becomes ingrained in us over time.

Second, Roger Baker cannot win with his disability claim, he cannot prove his claim of disability discrimination, because he cannot show that he was qualified for this job. Can you imagine a person who would be less qualified for a job dealing with sensitive, reluctant, and frightened people? The heart of this job is to deal with witnesses. Not just coworkers, which is important, too. He has nine of them, or he had nine of them in the witness unit, nine other people with whom he worked to schedule witnesses. That is in your fact pattern. But his primary duty was to deal with people who did not necessarily want to deal with him. People who had been themselves victims of crime, people who were asked to take time off work, which they could not necessarily afford, people who did not want to go in front of a jury, people who did not want to face their abusers or their assailants. And to qualify for a job like that, what

is the one thing you have to have? You have to have people skills. You have to be able to persuade people with reason, with humor, with tact, with patience, and, yes, with subpoenas, to come in and to testify against wrongdoers.

And if there is one thing the evidence showed you, including Dr. Oldham's testimony, this is not a man qualified for that job. He is not qualified, because, as Dr. Oldham told us, Roger Baker doesn't like to work with people. People irritate him. He is sensitive to environmental changes. He likes to work alone. Roger Baker is not qualified for the job of witness coordinator with the D.A.'s unit.

Now back for just one moment to how we know this is not a disability. The DSM IV—you heard a lot about it. But the DSM IV tells us itself it does not decide a person is disabled just because the borderline personality disorder is in there. We saw the cautionary statement, and what it tells us, that this is for clinical use. Just because it could help a psychiatrist does not mean it answers the question for you. You have to decide that on your own.

Further, Roger Baker cannot meet his third obligation here of proving to you, proving by a preponderance of the evidence, that this problem could reasonably be accommodated, that his pattern of temper tantrums, even if he was protected under the disability laws, even if he was qualified, that this could reasonably be accommodated by the County. The reason is that his rages are so unpredictable. They are ingrained and are unpredictable, yet the accommodation requested here is simply that he be allowed to go to therapy.

Even Dr. Oldham has conceded that he cannot guarantee that the rages would not continue to happen. That makes sense, does it not? This is a person who over years has continued to engage in these bouts of screaming rage, and there is no way of showing that this can be accommodated, even if, as Dr. Oldham suggested, he works a little bit more by himself. He still must go to work with the other people in the unit. He still must work with reluctant and unpredictable witnesses. This is not something that can reasonably or even unreasonably be accommodated in Roger Baker's job.

Even if Roger Baker was put off in a secluded area, he would still have contact with witnesses. He would still have to deal with unpredictable changes. And as Dr. Oldham admitted, it is frustrating to witnesses when things get postponed over and over again.

Now focusing on just cause for a moment for the arbitrators: We know that Mr. Baker was counseled by his supervisor, Ms. Martinez,

after screaming at his coworker Joann Glickman. We know she told him to get help from the EAP or otherwise, and we know that she told him if it happens again you can be fired. This is obviously a very severe situation. And, ladies and gentlemen, it did happen again. There is no evidence that Roger Baker sought help until he was told he was going to be terminated, and, in fact, it was another screaming fit causing a coworker to seek counseling that led to his termination. One more outburst and you could be dismissed, Ms. Martinez told him, and that is exactly what happened.

In closing, the ADA and the state laws in Washington are designed to protect those of us who are truly disabled. They are not designed to help someone who does not even help himself, a person whose temper tantrums cannot be accommodated because he has not sought therapy, he has not continued with therapy, and he does not believe in doctors. Roger Baker cannot meet the first, second, or third key elements of his claim, and for all of those reasons, ladies and gentlemen, his attempts to engage in misplaced blame must fail, and you must find for the County. Thank you, your honor.

Chief Judge Harry T. Edwards: Thank you, counsel. We will now hear from the plaintiff's counsel.

Counsel Daniel Boone: Good morning, members of the jury. There is a certain analytical framework that the judge will instruct that you have to follow in order to evaluate the case. Under the Americans With Disabilities Act, an individual is protected by the law if the individual is a qualified individual with a disability. The first part of that is: Is Roger Baker a qualified individual? Is he qualified to hold this position in the District Attorney's office?

Despite what counsel says, look at the facts. The facts are that for two years, between 1997 and 1999, under paragraph four of the stipulated facts, Roger Baker worked in the District Attorney's office performing a job every day without problems. He worked for two years without complaints from witnesses, without difficulties with coworkers. There was some attendance problem, but he knows how to do the job. The definition of a qualified individual is somebody who possesses the requisite skills, experience, education, and job-related requirements for the position. Mr. Baker has demonstrated that he has those.

The next question: Does he have a disability? A disability includes a mental impairment that substantially limits one or more major life activities. Each of those words has meaning in the law, as you will be instructed by the court. "Mental impairment," that is the first phrase. The guidelines and regulations implemented as part

of this law specifically state that personality disorders are mental impairments. A borderline personality disorder is one of several personality disorders recognized by the law as constituting a disability. Thus, the next step is met. We then get to the question of the particular diagnosis. I do not have time to argue Dr. Oldham's testimony at length. We all know here that this man is an expert. He is *the* expert. He trained the County's expert. He has been doing this for 30 years.

Dr. Bloche, as a trainee, had some experience with borderline personality during a training period of three or four years under the direction of Dr. Oldham. I will not argue the details, but I ask that you conclude that Roger Baker meets the criteria for borderline personality disorder as reflected in the document that defines those terms. Whatever has been said to try to denigrate, minimize, or make light of the pervasiveness and the impact of this mental disorder, I ask that you recognize and accept that diagnosis.

Under the ADA, a mental impairment must substantially limit one or more life activities. The doctor testified and the evidence establishes that there are two major life activities that are impacted here that are recognized by the law. Number one, "interacting with others." The stipulated facts prove it. To the degree that the employer argues that Roger Baker cannot get along with other people, that he is completely without control, that is a demonstration of impairment of that major life activity. Second, "working" (not the specific job, but in a general category or class of jobs) is a major life activity. This man has had difficulty keeping jobs over the course of his life, and obviously he has demonstrated difficulties in this particular job. The evidence establishes that this criteria has been met.

The next question is, having met those criteria, what are the legal obligations that are imposed upon this employer? This gets to the key of the case. Once the employee or his representative communicates to the employer a belief that the employee has a disability, the employer is obligated to engage in an interactive process to identify the disability, how it impacts on this man's life, what treatment is appropriate, and what accommodations must be made in order to determine whether, with a course of treatment, with accommodations, he can continue to perform what are known in the law as the essential functions of the job. The law requires that if Roger Baker can do the job, with accommodation, he is entitled to continuing employment. Refusal to engage in this process is a violation of the Americans with Disabilities Act.

In this case, there was notice by this man's conduct. He was referred to EAP. There was not any follow-up, though he did engage in behavior that should have been recognized as a manifestation of a disability.

Certainly after September 1999, there was clear notice. Mr. Baker was given a notice of intent to discharge. That is not the discharge. As a public employee he is entitled to due process rights. The notice of intent is not the actual discharge. I notified the employer and its attorney on October 11 that Baker suffered from a disability, and that the discharge would be unlawful. On October 15, Dr. Slater explained the course of mental treatment with medications. He described it as a complex case biologically. This was still before the discharge. The union took the initiative to have Roger Baker examined by Dr. Oldham on October 25. His November 11, 1999, report with a DSM IV diagnosis of borderline personality disorder is reflected in paragraph 16 of the facts. There was a request for delay to allow Baker to receive necessary therapy and medication, and there was a specific request for accommodation. Specific accommodations were not identified at that particular time. The law does not require that they be specified.

The inescapable conclusion is that the employer did not make a good-faith effort to assist the employee in seeking accommodation. That is a specific requirement of the law. It is an interactive process. The purpose is to identify the precise limitations resulting from the disability. A second purpose is to explore potential alternative accommodations that will overcome those limitations. At the outset this is not known. The law does not require Mr. Baker or me or even Dr. John Oldham to state a particular plan that absolutely will work.

The law requires notice and it requires this dialogue. The employer's failure and refusal to do that, the employer's decision to discharge Roger Baker rather than engaging in that interactive process, is a violation of the Americans with Disabilities Act. Based on that ground alone, you must find for the plaintiff, because the County could have exchanged the additional clinical information.

Dr. Bloche acknowledges that through the process of dialogue with Dr. Oldham they could have explored alternatives. They could have better understood Roger Baker's situation. They could have worked toward a more refined diagnosis. Together, they could have better understood what course of treatment could be successful.

The accommodation described by Dr. Oldham as appropriate is to allow Roger Baker to participate in this very fine treatment in the Seattle area. This course of action addresses the immediate behavioral problems at the outset. The therapy should be considered with a course of mood-stabilizing medication to allow him the opportunity to keep working. The law, I would argue to you and as you will be instructed by the court, requires that. The failure of the employer to engage in that interactive process was a violation.

Switching gears to the arbitration setting—how much time do I have?

Chief Judge Harry T. Edwards: A minute.

Counsel Daniel Boone: In a just cause context, Roger Baker was discharged for a pattern of disruptive behavior. By looking at the documents, you will see that although he was warned the year before, the employer did not follow up. The employer did not even bring certain matters to his attention. The employer engaged in a pattern of inaction that yields a combination of interrelated arguments. There is a notice issue, there is a double jeopardy issue, and there is, essentially, estoppel. I do not have time to develop each of these arguments.

As I mentioned in the opening, if I were arguing this case to you strictly in arbitration, I would not *argue* an ADA analysis. I would argue that there was not just cause for discharge.

I rely upon Dr. Oldham to persuade you about an appropriate remedy. It is his determination that this man is fit to return to work and to participate in a course of treatment that he has described. My remedy request is for reinstatement without loss of seniority. I will not strenuously argue for back pay. However, the union does request that you order as a condition of reinstatement that Roger Baker participate in Dr. Linehan's program, that it be monitored by an employer expert or an EAP person as appropriate, that he engage in individual and group therapy, and that this be monitored with reports.

This could be characterized as a last chance or as a reinstatement with certain conditions. You are familiar with reinstatement with anger management therapy as a condition of continuing employment. This is more complex, more refined anger management, if you will, to best ensure that if you reinstate this man, serious events will not occur in the future. Thank you.

Chief Judge Harry T. Edwards: The case is submitted. The arbitrators will now convene privately. You can come back either

with a group award or individual awards as you see fit. The grievance is before you, the applicable terms of the collective bargaining are before you and I will ask you to leave now; you will not be here for the instructions. You know what your job is. We will summon you when it's time to come back. We're aiming for about 20 minutes. [Arbitrators exit.]

Instructions to the Jury

Chief Judge Harry T. Edwards: This is a civil case and as such the plaintiff has the burden of proving the material allegations of his complaint by a preponderance of the evidence. To prove something by a preponderance of the evidence is to prove that it is more likely true than not true. While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony as you feel are justified in light of common experience.

You have heard testimony of two experts who have been called to give their opinion about the plaintiff's mental state and potential accommodation for the plaintiff. It is up to you to decide whether to rely upon any of the expert testimony. You may accept it or reject it and give it as much weight as you think it deserves considering the witnesses' education and experience, the reasons given for the opinion, and all of the other evidence in the case. You should not permit an expert's testimony to be a substitute for your own reason, judgment and common sense. You may reject the testimony of any expert in whole or in part if you conclude the reasons given in support of an opinion are unsound or if you, for other reasons, do not believe the expert witness. The determination of the facts in this case rests solely with you.

The plaintiff claims that by discharging him the defendant violated the Americans With Disabilities Act and Washington state law prohibiting discrimination against individuals with a disability. The state and federal laws are different in very subtle respects. I will instruct you solely as to the requirements of the ADA.

In order to prevail on his ADA claim the plaintiff must prove each of the following facts by a preponderance of the evidence. First, that the plaintiff had a disability as I will define that term for you; second, that the plaintiff was a qualified individual as I will define that term for you; and third, that the plaintiff's disability was a substantial motivating factor that prompted the defendant to discharge him from employment.

The first fact that the plaintiff must prove by a preponderance of the evidence is that he had a disability. An individual with a disability is a person who has a physical or mental impairment that substantially limits one or more life activities.

An impairment includes, *inter alia*, any mental or physiological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

In determining whether the plaintiff has an impairment you should consider the effect of any medicine or assistive devices which might correct or lessen the effect of the impairment. For example, a person with substantial vision loss does not have an impairment if he wears glasses or contact lenses that correct the problem. In other words, if with treatment, a person is no longer substantially limited in a major life activity, he is not considered to be disabled under the ADA.

If you find that the plaintiff has an impairment then you must determine whether that impairment substantially limits a major life activity. A "major life activity" is an activity that an average person can perform with little or no difficulty. Caring for one's self, performing manual tasks, walking, talking, seeing, hearing, breathing, learning, getting along with others, and working may be major life activities.

An impairment substantially limits one or more major life activities if an individual is unable to perform an activity, or if he is significantly restricted as to the condition, manner, or duration under which he can perform the major life activity as compared to an average individual.

Three factors you should consider in determining whether the plaintiff has proved by a preponderance of the evidence that his alleged impairment substantially limits a major life activity are: its nature and severity; how long it will last or is expected to last; and the permanent or long-term impact or expected impact.

An impairment need not be permanent in order to substantially limit a major life activity, as long as it is a long-term impairment. Long-term is defined as indefinite or unknowable in duration, and expected to last at least several months. A temporary, non-chronic impairment of short duration with little or no long-term impact does not qualify as an impairment that substantially limits a major life activity. For example, a broken leg or the need to recuperate for several weeks after surgery are not substantial limitations on a major life activity.

The second factor the plaintiff must prove by a preponderance of the evidence is that he was qualified for the job in question at the time of the challenged employment decision notwithstanding his alleged disability. The ADA does not require an employer to retain an individual who cannot perform the job.

In order to prove that he was qualified, the plaintiff must establish, first, that he possessed the requisite skill, experience, education, and other job-related requirements of the job in question; and, second, that he was capable of performing all of the essentials functions of the job in question, despite any disability, either with or without reasonable accommodation by the defendant. The parties have stipulated that Mr. Baker meets the first requirement. You must decide, however, whether Mr. Baker has met his burden of proving that he was capable of performing all of the essential functions of the witness coordination unit position, despite any alleged disability, either with or without reasonable accommodation by the defendant.

The essential functions of a position are the fundamental duties of the job that a person must be able to perform in order to hold a particular position. Essential functions do not include marginal job duties of the position. A job duty or function may be considered essential because, among other things, one of the reasons the job exists is to perform that function.

Further, in addition to the particular requirements of a specific job, an employer may have general requirements for an employee in any position. For example, the employer may expect employees to refrain from abusive or threatening conduct toward coworkers or the public, or may require a regular and reliable level of attendance by the employee.

The plaintiff must have been able to perform all of the essential functions of the position with or without reasonable accommodation at the time of his termination.

An employer may not base an employment decision on speculation that the plaintiff's condition might worsen to the extent that the plaintiff would not be able to be a qualified individual at some time in the future. On the other hand, an employer is not required to speculate that an employee's condition will improve if that employee is not able to fulfill all the essential functions of the position at the time in question.

If you find that the plaintiff was able to fulfill all of the essential functions of the job without any accommodation at the time of the adverse job action, then he is a qualified individual. However, if you

find that the plaintiff is not able to fulfill all of the essential functions without any accommodation, then you must consider whether there were reasonable accommodations that the defendant could have made that would have enabled the plaintiff to fulfill the essential functions he could not otherwise fulfill.

Under the ADA, an employer must be willing to consider making changes or accommodations in its ordinary work rules, facilities, or the terms and conditions of employment to enable a disabled individual to work. A reasonable accommodation is a change that presently or in the near future will enable a disabled employee to perform the essential functions of the job.

In order to prove that he would have been qualified for the job if he had received a reasonable accommodation, the plaintiff must prove, first, that he informed the defendant of the substantial limitation arising from his disability; second, that he identified and requested an accommodation; third, that the requested accommodation was reasonable, was available, and would have allowed the plaintiff to perform the essential functions of the job; and, last, that the defendant unreasonably refused to provide that accommodation.

A reasonable accommodation must be reasonable both in terms of cost and efficiency. Thus, you may consider the financial and administrative burdens that would be placed on the employer if required to make a particular accommodation. You may also consider the impact of an accommodation on other employees in determining whether a particular accommodation was reasonable.

An employer is not required to eliminate or alter essential functions of a position as a reasonable accommodation. Thus, the employer is not required to reallocate essential job duties to other employees, or to reduce productivity standards to accommodate the plaintiff.

A disabled employee has the obligation to suggest reasonable accommodations to the employer. The employer is not required to grant every request by an employee. It is required only to make those reasonable accommodations that allow the employee to function in the position. An employee may not require an employer to accept a particular accommodation if another will accomplish the necessary result.

The plaintiff's final burden is to prove that his disability was a substantial or motivating factor that prompted the defendant to take the challenged employment action. For purposes of this problem, you may assume that the plaintiff's disability played

enough of a role to be considered a motivating factor. Given the complexities of proving this element and the limitations of this forum, I will not instruct you to decide this question on these limited facts.

When you retire to the jury room to deliberate on your verdict, select your foreperson and conduct your deliberations. The foreperson will preside over the deliberations and speak for you here in court. Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors. Answer each question on the verdict sheet that I am going to give you from the facts as you find them. Your answers and your verdict must be unanimous. You may now retire to the jury room to conduct your deliberations. We hope to see you back in about 20 to 30 minutes.

[Jury retires.]

Commentary by Chief Judge Harry T. Edwards

Chief Judge Harry T. Edwards: One of the issues that was alluded to by plaintiff's counsel, that is, whether working is a major life activity, raises an interesting issue. This is a highly disputed question. If "working" is covered, then questions arise as to what the person can and cannot do, how do you prove it, and what kind of expert testimony and statistics are necessary. This mock problem, however, was not written to focus on the question of "work" as a major life activity.

The difficulty with a problem of this sort is that we are forced to operate in artificially tight time frames. The attorneys and the expert witnesses were terrific in trying to condense what they had to offer. The attorneys did not get a chance to see my instructions in advance. Indeed, my instructions to the jury were very abbreviated. We would have been here all afternoon if I had offered complete instructions. I winnowed the instructions down to the bare essence, because we are asking the jury to decide the case in 20 to 30 minutes. This would be a ridiculous time constraint in real life, but I think we have enough here for them to work with, and it will be interesting to hear what the jury and arbitrators decide.

Let me tell you some things that I might worry about if I were trying this case without a jury. We did not get into the substantial or motivating factor question. This is a difficult area. I simply removed it from the case because we used stipulated facts to stay within a prescribed time frame. "Substantial motivating factor" is a fact-intensive determination that would benefit from the testimony of live witnesses.

On the issue of "major life activity," I want you to understand that there is a lot yet to be done by the courts. We have assumed that the ability to get along with others is a major life activity. That is yet to be finally determined by the courts, however. I accepted the assumption in my instructions to the jury, because the Washington state courts often look to the Ninth Circuit for guidance on federal law questions; and the Ninth Circuit has adopted an expansive view of the ADA.

As I noted earlier, it remains to be seen whether "work" itself is a major life activity. This is a highly contested area of disability law. The courts appear to be split over several issues, including: First, whether determining limitations of the major life activity of working is made with reference to the number of jobs that a plaintiff remains qualified for or the number of jobs that the plaintiff is no

longer qualified for. Second, whether quantitative vocational evidence must be presented to establish disqualification from a class of jobs or a broad range of jobs in various classes. And, finally, what role, if any, a plaintiff's class-based career expectations should play in determining whether he or she is substantially limited in the ability to work. Given the difficulty courts have had in defining the contours of substantial limitations of the ability to work, it is understandable that there is still disagreement over whether to include "getting along with others" as a major life activity. In any event, in order for the plaintiff to have a fair shot of prevailing in this case, the jury instructions had to include interacting with others as a major life activity.

The "essential functions" of the job pose another interesting question. Neither side presented much evidence on this issue. In a real trial, I would expect to hear much more testimony on this. Nonetheless, I think that both sides assumed, from the stipulated facts, that Mr. Baker's behavior, without any treatment, is so disruptive of the office environment that he probably is not able to perform the essential functions of the job without some accommodation. It is possible that the jury could get hung up on this issue, depending upon how they digest the testimony on accommodation. Remember, however, that, given the Supreme Court's decision in *Sutton v. United Airlines, Inc.*, the more the plaintiff shows that he can function normally with treatment, the harder it is for him to show that he has a disability that is covered by the ADA.

The timing of the discharge, as suggested by plaintiff's counsel, was significant. I purposely tried to fiddle with that in the stipulated facts, and he picked up on it. Defense counsel tried to avoid it. I wrote the stipulated facts to make it clear that the employer gave notice on September 30, 1999, that Baker was only "tentatively" to be terminated on December 31, 1999. The delay in the termination raises a question as to why the employer would be willing to keep Baker on the job for three more months if his behavior was unacceptable. I would have argued that this suggested that an accommodation was possible or that Baker could perform the essential functions of the job without accommodation.

In any event, the three-month delay gave the parties ample time to analyze the plaintiff's medical situation. Following the psychiatric examinations, the employer was put on notice that Baker might have a handicap that was covered by the ADA. The plaintiff's counsel argued that the employer violated the ADA by failing adequately to discuss possible accommodations with Baker once it

was discovered that he had a mental disability. This is something akin to a procedural due process argument; and there is some language in some of the cases suggesting that an employer has an obligation to meet and confer with an employee over possible accommodations. I do not think that you can take this argument too far, however. The employer may well be obliged to discuss possible accommodations, and a court might even require such discussions in a case in which none has occurred. It seems doubtful, however, that an employee can satisfy his burden of proof under the ADA and secure damages for unlawful discrimination simply by showing a "procedural" infirmity.

On the other hand, the so-called procedural argument offers real possibilities in arbitration. This is so because, in many situations, an arbitrator has more room to "problem solve" under a collective bargaining agreement than a judge does under the strictures of the statute.

Accommodation is the real issue in this case, the hard issue. I was not sure what the experts were going to tell us on this. I was not sure whether they were going to say that Baker's disability could be ameliorated with prescription drugs. Interestingly, both experts rejected that as a possibility, so that puts the case in a different posture than the one I want to discuss with you.

The experts might have said, look, all you have to do is get this employee to take some pills, and his depression or his disorder is under control, he's going to be able to work, to be perfectly fine. If that had been the testimony, then, as I have already suggested, Baker might have had a problem under *Sutton*. The court's decision in *Sutton* suggests that if the treatment makes the person relatively whole so that he no longer is substantially limited in major life activity then he's no longer disabled under the ADA. For example, the Court suggests that if someone has bad vision, but he can see 20/20 with glasses, he is not disabled, even though he walks into walls without the glasses. A court of appeals, following *Sutton* has held that if a person suffers from depression, but his medicine and counseling will allow him to operate without a problem, that person is not disabled under the ADA. Similarly, if a person has poor hearing, but can hear with a hearing aid, *Sutton* suggests that the person is not disabled under the ADA. These hypotheticals should be distinguished from situations involving people who use what I call work-around aids for their disabilities. For example, someone may need a wheelchair because he or she can't walk. That person may be able to perform the essential functions of the job

with the aid of a wheelchair, but the disability is not gone. The major life activity is still impacted. The person still cannot walk. A person who needs a seeing eye dog cannot see. If someone needs signing, the person still cannot hear. This is the line that the Court appears to draw in *Sutton*.

The mock problem raises difficult issues for the plaintiff. If the medicine and counseling work, then the plaintiff arguably is not disabled. If the medicine does not work then there is a very serious question whether Baker can perform the essential functions of the job. In any event, there is a question as to whether there is any reasonable way to accommodate this employee. Does the employer have to put him in a private room? Does the employer have to give him time off to go to extensive counseling sessions? The defendant argues that it does not matter, because, even with counseling, Baker's problems will remain the same.

So the jury must decide whether Baker will be able to perform the essential functions of the job with or without an accommodation. I cannot imagine the jury finding that Baker can work without an accommodation. If I am right on this, then the question is whether there is some reasonable accommodation that Baker can be given that the employer has refused to offer. And the further question is whether the plaintiff offered enough to the jury for them to find that the employer failed to provide some reasonable accommodation.

It will be very interesting to see whether the arbitrators and the jury come out differently. Richard Bloch's thesis on the continuing importance of arbitration, even with respect to claims that implicate statutory issues, will be tested. This is a case in which an arbitrator, under a contractual "just cause" standard, might look at the grievant's claim very differently than would a judge and jury viewing a plaintiff's claim under the ADA. The plaintiff's burden of proof under the ADA is not always easy to meet. And in a case of this sort, involving mental disability, the issues are impossibly complex. We listened to two brilliant psychiatrists today, but they gave us no certainty in their opinions. In arbitration, the burden normally is on the employer to prove just cause for termination; and "just cause" is a malleable standard, certainly more expansive than "discrimination" under the ADA.

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[Arbitrators return.]

Let us now see whether or not we get a different look depending on whether it is arbitration or the jury. If the arbitrators are ready we can let them come in first and tell us, and then the jury will come in when they are ready.

Arbitrators' Decisions

Chief Judge Harry T. Edwards: We are going to let you folks share with us your thinking first while the jury is out.

Rolf Valtin: Our caucus discussion indicates that we have three different outcomes, although Barry Winograd is not entirely sure yet. Andrée, you go first, I will go second, and Barry will follow.

Andrée McKissick: Since arbitrators are the interpreters of contract, we look within the four walls of the contract. Let me say first that I find that Article 14, the civil rights provision, to be essentially a nondiscrimination clause. It functions as that. It specifically notes disability along with other protections, requiring all employees to be treated equally. This is coupled with the analysis of Article 11, the legal rights clause, which says that the protection of the grievant should, in fact, be applicable through federal law. I certainly read that to mean that the ADA is what the drafters intended. Article 2 is basically the management rights clause with the proviso that if indeed they discharge someone, it should be done for just and proper cause, and of course legitimately, i.e., with the absence of discrimination or malicious motive.

Having said that, it is my view that incorporation by reference of the ADA was intended by the drafters, this is so notwithstanding the fact that the grievant specifically notes and specifies that he would not like any statutory protection. I find in turn that the ADA requires a Title VII analysis using *McDonnell-Douglas*,[1] but I don't find that the grievant's prima facie case was made. I find there is lack of notice, or insufficient notice, and I say that on three accounts based upon the analysis here.

Grievant here has been diagnosed under the DSM IV as having a borderline personality with depression and I find that, of course, he does have a mental impairment that is substantially life threatening. However, there is a lack of disclosure on the grievant's part and this is true also with Dr. Slater, who, although he used the reasoning of protecting grievant's rights, does not tell us in detail that there is a disability creating a nexus with the grievant and asking what is the concurrent remedy for some sort of accommodation. Even Mr. Boone, who seemingly was protecting him, seemed to fail to fully identify that.

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[1] *McDonnell-Douglas v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).

Now, looking at this from a just cause perspective, I would also view this as a disruptive pattern of behavior. Again, because of lack of notice as well as the other things I mentioned, I would deny this grievance. The grievant is a short-term employee who is explosive, and I would find him a direct threat to the safety of the workplace. No one knows what he may do, or when he may do it. Even though a lot was said about the suicide attempt, I think it is significant to note that there were three separate outbursts and it was clear not only that this would go on, but that it constitutes a permanent impairment. Now, I will let Rolf go on into the details as to his rationale for the just cause reasons.

Rolf Valtin: Well, I would take the grievant and the union at their word that they do not want me to touch the law and that they did it deliberately because they are concerned that an amateur will foul up his rights under the law, and therefore whatever may be impliedly said about incorporating the law, I am deciding this strictly under the just cause standard. My opinion would make clear that nothing I hold or conclude should be construed as touching on the law.

My starting point is the fact that in my life as an arbitrator I have time and again given substantial weight to long and satisfactory service and have put grievants back to work even though they may have committed some pretty awful offenses. Here the contrary is true. The grievant is a short-term employee. He has withheld information about his condition. That condition has led to a pattern of disruptive behavior to the point that two apparently very good employees have had to transfer out, maybe even lose promotion. He is now supposed to get, maybe, a separate office while the rest of his colleagues sit out there in the hall. It is too much for me. I would uphold the discharge on the just cause grounds I have just given you.

Barry Winograd: Well, it was an interesting deliberation. Rolf and I are on the same page with the contract reading and the submitted issue and the exclusion of the statutory question as being whether it's expressly before us or not. And if we can, without destroying the boundaries of arbitrator immunity from testimony, note that in the deliberation there was a bit of Alphonse and Gaston, because I, too, was suggesting that the employer more or less dropped the ball on the notice question, particularly in keeping the middle incident to themselves. That happened just two months after the first incident, and then they sat around for

another five or six months until a third incident occurred. These kinds of questions are always troubling for arbitrators.

I understand fully the just cause analysis for the short-term employee for the problems that occurred, even though there was no evidence, it appears, of actual or imminent threatened violent action. These were serious problems. The union acknowledges that.

I do think, however, that a very careful analysis of these facts and a fuller study of the record might warrant a conditional reinstatement. I think Rolf at one point in the discussion said, "Well, you know, maybe so, it is a very difficult case." These are the kinds of cases that do cause problems for arbitrators, realizing that here is an individual who certainly needs help.

Chief Judge Harry T. Edwards: Play it out for us, Barry, if you are writing the award calling for conditional reinstatement. What is your award? What are you saying?

Barry Winograd: I would require a certification of fitness. I would give an opportunity for a further or fuller testing or analysis, with a dispute resolution mechanism if psychiatrists disagreed. I would require further analysis of whether this individual goes back in this particular department or perhaps to some other department at the County's election.

I think there are other approaches, including dismissal if the employee does not go through the therapeutic process. I do not see any back pay in this case, given the individual's own misconduct and his withholding of information, causing a lot of the difficulties to unfold in the way they did. So if it goes in that direction, I think it is highly regulated conditional reinstatement.

Chief Judge Harry T. Edwards: Any further comments from any of the three of you before I ask the jury to return?

Rolf Valtin: Only to say that I would gladly side with Barry if this were a long-term employee. That, to me, is the big distinction.

Chief Judge Harry T. Edwards: What about comments from the folks in the audience? How do you react on the arbitration piece of it now, leaving aside the law? Incidentally, I tried to write this in a way that the grievant's wishes would be respected; that is, the grievance says the grievant does not want any of his statutory or other legal remedies decided in arbitration. I realize that all of you debate that constantly, but one wonders if an employee should not have a right to be able to say he does not want you to decide statutory issues, especially if the union is presenting on behalf of the employee and the union agrees. That is not to say that you

should not think about how the law might come into play, just that you should not decide the statutory issues.

Andrée McKissick: May I respond?

Chief Judge Harry T. Edwards: Sure.

Andrée McKissick: I think the intent of the parties, the drafters, should be supreme, I think the collective bargaining agreement is the controlling feature.

Chief Judge Harry T. Edwards: Here is the question I am asking: Why can't the parties limit their submission to arbitration? Nothing in the contract bars that?

Andrée McKissick: I guess that is probably right; however, in real life that is not what goes on. I actually have a case, two of them, on the same issue, one with bipolar disorder and the other with chronic depression, and with federal-sector employees in the D.C. area, this happens all the time in ADA cases. As a matter of fact, I used the Title VII analysis of *McDonnell-Douglas* because that is the way it is analyzed, and that is what the parties require. They actually submit cases along with their post-hearing briefs (i.e., the *Sutton*[2] case and the *Murphy*[3] case). It is the way I analyze this, because that is generally the way the union and the employer want me to analyze it.

James Oldham: Because we may not have another opportunity to bring this out, Barry Winograd and I have a confession to make. That is that this problem was built upon an actual case that Barry decided. Judge Edwards, however, wrote the problem with no knowledge of this, so Barry's case and this problem are not the same. Nonetheless, Barry may want to elaborate a bit upon the differences between the case that has been presented here and the one that he decided. Then others in the audience might step to the microphone and put in their oars.

Barry Winograd: Let me share with you a couple of things. First, in the actual case there was a conditional reinstatement remedy, highly regulated along the lines that I was talking about, giving the County an election to place the employee in another department, which they did and he had a fair amount of success in doing so.

There were certain key differences that were made in this case, to try and make it a bit more balanced. First, there was very powerful evidence of superior work, including strong support by

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[2]*Sutton v. United Airlines*, 527 U.S. 471, 9 AD Cases 673 (1999).
[3]*Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 9 AD Cases 691 (1999).

supervisors really wanting to keep him because he was such a great worker, and that may be something of an explanation of why they did not jump on this sooner than they did.

Second, there was some evidence of workplace gossip or grapevine that had made this fellow out to be worse than the events that actually occurred. I think we have all encountered those kinds of situations. Third, there was a very powerful inference from evidence involving a pharmacist that the employer had actual knowledge that the grievant had a medical or psychiatric problem. Last, and very significant, there was no psychiatric testimony in the case. As arbitrators we rarely get that kind of medical expert testimony and it would have been quite interesting to have had it, particularly of the caliber of the expert testimony that we had today.

There is an unfortunate postscript to the case. After the reinstatement, the grievant did undertake some therapy but could not come to grips with it, continued to blame others, indeed, blamed the arbitrator because the arbitrator did not award him any back pay. So he was discharged a second time.

Chief Judge Harry T. Edwards: Comments from the floor?

Richard Bloch: First of all, I want to say that I do not think I have ever been at a session where I have learned more or had more inspiration to other thoughts, and we really thank all of you for doing this. My comment relates to your exchange with Andrée McKissick a moment ago. I have a tremendous problem with one side coming to me and saying here is how we are submitting and we wish you not to consider it in light of a contractual mandate that stands to the contrary. I think I would be concerned by that.

Chief Judge Harry T. Edwards: No, make sure we are on the same page, because it says "do not decide my statutory remedies," not "do not consider the law."

Richard Bloch: Oh, then I misunderstood. I thought you were saying the submission could ask you not to consider the law.

Chief Judge Harry T. Edwards: No, in fact I was trying very hard to write it in a way that the arbitrators would be able to import legal notions, but the grievant would be able to avoid having the arbitrators render any judgment on his statutory rights. In other words, the grievant wants to avoid any possibility of a court deferring to arbitral judgments under *Gilmer* and such other cases. Baker wants his day in court, and he wants a judge, not an arbitrator, to decide statutory issues.

Mark L. Kahn: I wonder whether the employer might not have raised an additional argument, namely, that reinstatement could

be psychologically harmful to Mr. Baker because he has to learn that there are, indeed, consequences to misconduct on the job.

Counsel Lynne Hermle: I actually thought about that and decided it was not the strongest argument that I had. I will say in preparing this case, and I am sure Dan had the same problem, there were many arguments we could have made that our time limitation did not permit.

The judge mentioned the *Sutton* issue, which is if this employee is fixable, can he go back to work? Initially when I read this, I thought, great, that is another argument. I have my whole structure. Then I went on the Web and looked up Dr. Oldham. I realized from his writings that he is very distinguished and prolific, and that he was never going to agree that this employee is fixable. The fact of the matter is, he did not believe it.

One of the things I think about when I try these disability cases, unlike a lot of race, gender, or harassment cases, is that I generally do not get a cynical jury. I get a jury that is really sympathetic to a disabled plaintiff. And the statistics that my firm has put together about disability trials in California are that something like 70 or 80 percent of them, this is pre-*Sutton*, are won by the plaintiffs in California and the average jury award is something like $1.5 million. So I fear these cases more than most. This one is a little bit easier because the employee is obnoxious.

Chief Judge Harry T. Edwards: Dan, tell the audience how you would have argued the so-called procedural theory that you wanted to try and push to the jury.

Counsel Daniel Boone: I was persuaded that the strongest argument that I had is found in *Taylor v. Phoenixville School District*.[4] This Third Circuit case really focuses on this interactive process built into the ADA—the notion that once the employer has notice, it must set about and explore whether there is an accommodation, whether it is reasonable, whether it would be undue burden.

Given the brevity of the grievant's employment and given the characterization of his conduct, I recognize that with a group of very experienced arbitrators, I can anticipate a reaction of "this guy is a pain in the neck, and the discharge should be upheld." So I have to overcome that predilection. That is why my theory of the case is to give him a chance—that the County should have really looked into this before discharge. It is easier for you as arbitrators

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[4]184 F.3d 296, 9 AD Cases 1056, 9 AD Cases 1187 (3d Cir. 1999).

than it is for courts to decide whether or not there was really an interactive process, as opposed to second-guessing or arguing about whether these DSM IV criteria are or are not met.

My final comment about the case is I was faced with a fundamental contradiction in attempting to argue this case to both the jury and the arbitrators. My ADA argument has to be that Roger Baker has a disability that will not go away. It cannot be fixed. My arbitration argument is that I want Roger Baker regarded as the alcoholic who has been going to six meetings a week between the time of his discharge to the time of his arbitration, that he is successfully participating in a process of remediation. In arbitration I present Baker as an individual who is substantially rehabilitated so the arbitrator would not be afraid about putting him back to work. That argument is exactly the opposite of the one that I must make under the ADA in order to avoid Roger Baker being thrown out of court because he does not suffer from a "disability."

Chief Judge Harry T. Edwards: Your point highlights what Rich Bloch was talking about yesterday. In a case of this sort, an advocate must think carefully about whether the client is better off in arbitration or in court. As I have already said, because of some of the stringent requirements in the statute, a claimant is sometimes better off in arbitration. However, if a plaintiff can get a case before a jury, Ms. Hermle says the odds on prevailing go up.

Jury Verdict

Chief Judge Harry T. Edwards: We will hear from the jury now. We are back in session please.

Chief Judge Harry T. Edwards: Mr. Andrews, do you have a verdict from the jury?

Jury Foreperson Andrews: We are requesting special dispensation in this case because we are deadlocked.

Chief Judge Harry T. Edwards: We anticipated that possibility. Will you first tell the audience, given the circumstance, what the vote would be for the plaintiff and for the defendant and then explain how you came to the verdict.

Jury Foreperson Andrews: The final vote was six to six.

Chief Judge Harry T. Edwards: If you know, was it split employer-union?

Jury Foreperson Andrews: I don't think so. They did say it would probably take us not only 20 minutes but it could be 20 hours to come up with a unanimous decision. On Question Number 1 . . .

Chief Judge Harry T. Edwards: You will have to read it to the audience because they do not have a verdict sheet.

Jury Foreperson Andrews: Thank you. Whether the plaintiff had a disability, i.e., a psychological or mental disorder, that substantially limited one or more major life activities. The answer was yes on a vote of nine to three.

Chief Judge Harry T. Edwards: Okay.

Jury Foreperson Andrews: In other words, there was a disability that substantially limited a major life activity.

Question Number 2a: Whether the plaintiff was capable of performing all of the essential functions of the job in question despite any disability without the need of any reasonable accommodation by the defendant. The verdict was twelve to zero. So we did have unanimity on that.

Question No. 2b: Whether the plaintiff was able to fulfill all of the essential functions of the job in question, with reasonable accommodations by the defendant. We split six to six.

And finally, whether there were reasonable accommodations that the defendant could have made that would have enabled the plaintiff to fulfill the essential functions of the job that he could not otherwise fulfill. We split again six to six.

Chief Judge Harry T. Edwards: You want to explain these votes to us as best you can and then any of your fellow jurors can add

comments if they feel you fall short. What was the reason you were tending to split?

Jury Foreperson Andrews: I would let the jury speak for themselves, because they are very capable of doing that; however, the issue seems to be was there any reasonable accommodation in the first place, and we were split on that.

Chief Judge Harry T. Edwards: Was there an accommodation that was even possible, is what you mean?

Jury Foreperson Andrews: Yes.

Chief Judge Harry T. Edwards: No matter what you think about the case, some jurors thought you could not conceive of a reasonable accommodation.

Jury Foreperson Andrews: Correct. And I would invite any of the jurors to expand on that.

Chief Judge Harry T. Edwards: What about those who felt, as best you can recall, that there was an accommodation that was available, what was their thinking?

Jury Foreperson Andrews: I think there was a feeling that sufficient accommodation had not been made, that the management needed to do more to determine just how serious this disability was.

James Oldham: If any juror wants to add a comment, we would welcome it.

Juror: One of the things we were frustrated by related to the argument about whether or not the employer had failed to engage in the interactive process—that was not on our instructions.

Chief Judge Harry T. Edwards: You are right. Mr. Boone and I disagree over what the law requires so there is no instruction suggesting that a failure to engage in the interactive process, without more, violates the ADA.

Let me explain. I think the bottom line for me is the plaintiff still has to be able to show there is some accommodation that is available. You can interact all you want, but the burden is still on the plaintiff to show some viable accommodation that was denied. The failure to interact alone is not, as I understand the law, a violation of the ADA. It is a nice argument to raise in court, but I think the plaintiff has to show more than that. Go ahead, any of you can make a comment.

Juror: We were confused by the third question. It is hard to describe, but there were two questions that were very similar. The second question, Number 2b, said: "Were there any potential accommodations that could have been made?" We weren't sure

what that meant. My own view was that, and I'm not sure if anybody else on the jury shared this, if the plaintiff had asked for a year's leave of absence it would have dovetailed with the expert testimony that it would take a year to have the plaintiff showing signs of benefit from the therapy.

Personally, I felt the employer was at a risk during that intervening year and that there would be disruptions. It would have influenced my vote if the plaintiff had asked for a year leave of absence instead of continuing to work while taking therapy.

Chief Judge Harry T. Edwards: I am not sure whether you can claim that under the ADA, at least as the law stands now. The law seems to look at an ability to work at the moment of termination, with or without an accommodation. In any event, the plaintiff did not ask for a leave of absence, so I can understand your hesitation.

Juror: I would have been influenced had the request for the year's leave of absence been a paid year leave of absence.

Chief Judge Harry T. Edwards: If it had been for a paid year?

Juror: If it were clear that the employer would pay for the leave.

Chief Judge Harry T. Edwards: Mr. Boone would love that.

Juror: I thought the EEOC takes the position that a leave of absence is a reasonable accommodation. I think the duration might be open to question and maybe their premise is wrong (they often are), but their view clearly is that a leave of absence is a reasonable accommodation.

Chief Judge Harry T. Edwards: The EEOC tends to take positions that are much more generous than the courts have, up to now.

Juror: We did have an interesting discussion that follows the *Sutton* problem. There were people who thought he was not disabled. The majority obviously thought he was disabled, but then the question was if medication alone would have made him okay, then he would not be disabled. I mean he could be in good shape even if the medication was not going to solve his problem totally. But then at least half the jurors felt that he was not fit to be in the workplace because these episodes of violence were likely to repeat. This is sort of the catch-22 that the Supreme Court has created out of the ADA.

Chief Judge Harry T. Edwards: If we talk about the *Sutton* problem here, neither psychiatrist was prepared to say that there was a fix, that is, take a pill and you are okay. It becomes a very interesting question if the psychiatrists had been in agreement that there is a pill that would do it, because then they do not have a good

case on disability under the Supreme Court's reasoning in *Sutton*. But that was not the way the case developed.

Theodore St. Antoine: Judge Edwards, this is such an unparalleled and much-appreciated opportunity for a little continuing legal education that I cannot resist following up on what you said at the recess and what Juror Jim Adler has just followed up on. Suppose the condition is fixed by medication or otherwise, what room does that leave for this concept that a disability can still exist if it is *perceived* as a disability?

Chief Judge Harry T. Edwards: Good question, Ted. Under *Sutton*, if your disability can be fixed, say with eye glasses or a hearing aid, then you are not disabled under the ADA. However, if an employer regards you as disabled, even though you would otherwise lose under *Sutton* because your disability has been fixed, you can still win by arguing that the employer discriminated against you because of your perceived disability. But I would not count on that one a lot. I think employers are going to be well advised to avoid that pitfall. So *Sutton* appears to take a lot of people out of the protected category.

Counsel Daniel Boone: Just one reference for those who are interested in this area: The Spring 2000 issue of the Boalt Hall *Journal of Employment and Labor Law* is an entire book on the ADA.[5] There are many articles by those who were drafters and formulators of the law reflecting upon its application or misapplication by the courts and reflecting upon all of the issues we have discussed here today. It is 550 pages of very meaty stuff.

James Jones: There was nothing in the fact pattern to tell us about the Employee Assistance Program. A lot of employers have them. What are they for, if you do not take a case like this and try to divert it into the EAP without parsing and deciding all these issues—is he perceived to be disabled, is he really disabled? What are those diversion programs: Do they not provide for leaves of absence? And in trying a case like this, if they use EAP for people who have a physical problem or family problem, and they do not use them for people who have a mental problem or who are perceived to have a mental problem, do you have another discriminatory issue that fits under the ADA? What do you do with those sort of pieces in a case?

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[5]21Berkeley J. Emp. & Lab. L. 1 (2000).

Chief Judge Harry T. Edwards: In the facts, Baker was advised to use the Employee Assistance Program. There is nothing more on this. I was trying to create a problem that would be manageable in the limited time frame; obviously there is so much more you can do with this. I think the counter to your point in this case, if there was one, would be that the employee never came forward with anything. I think the counter to the counter is that his inaction was part of his illness. I think that is the way it would play out. But we did not have time in this setting.

But this brings me back to what we have been alluding to during the past two days. To the extent that we are talking about human problems and our ability to be problem-solvers, as opposed to legal issue-resolvers, arbitration has more opportunities available to you than does litigation in this context. There is much more you can do in arbitration and mediation with this kind of an issue than you can do in litigation. There is no doubt. In litigation you are in a tight technical box. Good defense attorneys will do everything they can to keep the case from getting to a jury to avoid huge damage awards. Every legal technicality will be raised.

Even in arbitration there will be lawyers who will draw on legal technicalities. That is why I wanted to carefully distinguish between contractual and statutory rights in this case. A lot of you seem too quick to say, "I have got to throw it all in." I am suggesting to you that, in arbitration, you are not always well advised to throw in a statutory claim, either because the court might defer to an arbitral judgment that you view to be wrong, or because the arbitrator is going to be less likely to use common sense to resolve the problem if the arbitrator has a demand that he or she must decide the statutory issue. The statutory issue admits of fewer remedial possibilities than are available in arbitration. In this problem, it is absolutely clear that the statute is a much harder way to go. If you win it, you win big, but the options for winning are much smaller than in the arbitration forum.

Conclusion

James Oldham: It is time to bring this wonderful session to a close. We should let the jury know that the arbitrators divided two to one. The two-person majority denied the grievance for different reasons. The third arbitrator was inclined to think that accommodation was feasible and that the employer had inappropriately ignored the signals about the need for accommodation, and that some curative steps could have been taken.

In closing, I want to say that perhaps the most important thing that guarantees success is careful preparation and we certainly had that today. The lawyers, the psychiatrists, Judge Edwards, and the arbitrators: Thank you very much.

Chief Judge Harry T. Edwards: Can I just echo that briefly? There was a lot of artificiality in this problem, but the attorneys, the experts, and the arbitrators had a great sense of what we were trying to do. As attorneys in D.C. will tell you, I am not quick to throw bouquets. Today, however, high praise is in order. The attorneys and experts were truly sterling in their efforts. I thank them for performing so well under such tight constraints. I also thank the arbitrators and jurors for undertaking their assignments under difficult conditions. We learned much from their deliberations.

Appendix A

Expert Consultant Summary

COLUMBIA UNIVERSITY
COLLEGE OF PHYSICIANS & SURGEONS
DEPARTMENT OF PSYCHIATRY

EXPERT CONSULTANT SUMMARY

Name of Consultant: John M. Oldham, M.D.
Name of Patient: Roger Baker
Date of Evaluation: October 25, 1999
Date of Report: November 10, 1999
Brief Personal History:

The patient is a 38-year-old single male with no siblings who grew up with his parents in a small town on the West Coast. He was a reasonably good student who was, reportedly, somewhat moody and isolated in school but never involved in any delinquent activity. His father was a construction worker and a harsh and punitive disciplinarian. He was at times abusive to his son both physically and verbally. His mother was a passive, somewhat defeated woman who spent her life trying to placate the patient's father.

The patient was determined to be more successful than his father, who did not attend college, and he succeeded in graduating from college. He received no support from his parents, worked to support his college education, and he reported that he had no time to socialize. He was unsure of his career goals and unclear about what his major should be, but he eventually majored in philosophy with a tentative, vague plan to go to law school, which he never did. Instead, he chose to seek jobs in legal areas, which he reported was only intermittently satisfying. "It was often frustrating, since I'm a lot smarter than most of the lawyers, and they usually really think they're hot stuff," he said.

Mr. Baker reported that he was only once seriously involved in a romantic relationship, which was when he was about 30 years old. He was infatuated with a woman he had met at a previous job, and they developed a social and romantic relationship that lasted for about four months. He wanted to get married and have children, but she did not want either, and the relationship broke up abruptly. The patient reports relief that things did not work out, because "it turned out that she was really a selfish bitch."

Mr. Baker stated that he has always had a bad temper. Sometimes, he reported, he would become enraged almost out of the blue, and once he really got angry it was very hard for him to calm down or be reasoned with—often he would just have to leave the room for a while. However, he insisted that he never hit or hurt anybody. He reported that he has had bad moods and times when he has been despondent. He has thought about suicide at times, and on occasion when he has been really upset, he has told others that he felt like killing himself, but these moods usually did not last too long. Only once did he "sort of" really try to kill himself, when he was upset because a woman refused to go out with him and he got drunk and then took some pills. However, he didn't really endanger himself. After revealing this episode, Mr. Baker admitted that he has gone on "drinking binges" quite a few times when he has been upset. Sometimes he would then get in his car and drive recklessly, while intoxicated, and sometimes wake up the next day and not remember how he got where he was. He reported that these were the times when he called in to work and said he had a "family emergency," since he was ashamed to admit the real circumstances. Although he has told this information to various therapists, he does not believe that he has a problem with alcohol. Rather, he says, "Sometimes I think I'm sort of trying to get myself killed—I'm too chicken to do it straight out."

The patient has had trouble holding on to jobs, usually, he reported, because of his temper. "I don't get along with people very well," he said; "They irritate me—they do stupid things. I'd do my work just fine if people would just leave me alone." He feels that he generally has bad luck. He reported that once he had a really terrific boss, but she was transferred and replaced by "a guy who was a real jerk." Another boss seemed great at first, but she "had me fooled since she turned out to be a real pain in the ass."

Mr. Baker reported that he had been in psychiatric treatment sporadically in the past, most recently in 1998 with Dr. Slater. "Doctors don't know anything. They have said I have some sort of mood disorder. They gave me some pills to take, but they didn't help much, so I didn't take them very religiously." Mr. Baker has not been seriously or persistently depressed for many years. He reported that when he was 30 years old, after the breakup of his one romantic relationship, he thinks he was pretty "out of it" for several weeks. He was between jobs at the time, however, so he does not recall how well he was or was not able to function.

On October 28, 1999, I spoke with Dr. Slater, to whom Baker had given permission to discuss his case with me. Dr. Slater concurred with the diagnosis of Borderline Personality Disorder. Dr. Slater is not a physician, and his patients obtain their medications from a Dr. Richard Franklin; I was unable to reach Dr. Franklin.

Diagnostic Impression:
Axis I: History of Major Depressive Disorder, Single Episode (DSM IV 296.2)
Axis II: Borderline Personality Disorder (DSM IV 301.84)*
with features of Narcissistic Personality Disorder (DSM IV 301.81)**
and features of Paranoid Personality Disorder (DSM IV 301.0)***

*Meets criteria 2, 4, 5, 6, and 8; possibly meets criteria 3 and 9.
**Meets criteria, 1, 7, and 8.
***Meets criteria 2, 5, and 6.

Appendix B

Diagnostic Criteria for 391.83 Borderline Personality Disorder*

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

(1) frantic efforts to avoid real or imagined abandonment. Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.
(2) a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation
(3) identity disturbance: markedly and persistently unstable self-image or sense of self
(4) impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating). Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.
(5) recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior
(6) affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days)
(7) chronic feelings of emptiness
(8) inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights)
(9) transient, stress-related paranoid ideation or severe dissociative symptoms

*American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (1994), 654.