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Distinguished by [Barnett v. PA Consulting Group, Inc.](#), D.D.C., February 28, 2014

677 F.3d 454

United States Court of Appeals,  
District of Columbia Circuit.

Jeffrey KAPCHE, Appellant/Cross-Appellee

v.

Eric H. HOLDER, Jr., Attorney General of  
the United States, Appellee/Cross-Appellant.

Nos. 11-5018, 11-5017

|

Argued Jan. 20, 2012.

|

Decided April 13, 2012.

**Synopsis**

**Background:** Unsuccessful applicant for special agent position with the FBI brought action against Attorney General under the Rehabilitation Act, alleging that the FBI's refusal to hire applicant was because of his Type 1 diabetes. After jury awarded applicant \$100,000 in compensatory damages, Attorney General moved for judgment as a matter of law and for a new trial. The United States District Court for the District of Columbia, [James Robertson, J.](#), 652 F.Supp.2d 24, denied motion. Applicant moved for equitable relief in the form of back pay and either reinstatement or front pay. The District Court, [Robertson, J.](#), 714 F.Supp.2d 109, denied motion. Parties appealed.

**Holdings:** The Court of Appeals, [Karen LeCraft Henderson](#), Circuit Judge, held that:

[1] evidence that applicant's diabetes substantially limited his major life activity of eating was sufficient to support verdict;

[2] Attorney General adequately alleged after-acquired evidence defense in amended answer;

[3] district court acted within its discretion in determining that Attorney General established after-acquired evidence defense to applicant's request for equitable relief; and

[4] district court acted within its discretion in denying back pay.

Affirmed.

West Headnotes (23)

[1] **Federal Courts** 🔑 Failure to mention or inadequacy of treatment of error in appellate briefs

Plaintiff forfeited his challenge on appeal to district court's denial of motion to alter or amend judgment, where plaintiff failed to pursue challenge in his opening brief on appeal. [Fed.Rules Civ.Proc.Rule 59\(e\)](#), 28 U.S.C.A.

[2] **Federal Courts** 🔑 Taking case or question from jury; judgment as a matter of law

Court of Appeals reviews de novo the denial of a motion for judgment as a matter of a law but does not lightly disturb a jury verdict. [Fed.Rules Civ.Proc.Rule 50\(a\)\(1\)](#), 28 U.S.C.A.

[3] **Federal Civil Procedure** 🔑 Weight and Sufficiency of Evidence

Judgment as a matter of law in a jury trial is proper if the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the nonmoving party. [Fed.Rules Civ.Proc.Rule 50\(a\)\(1\)](#), 28 U.S.C.A.

1 Case that cites this headnote

[4] **Civil Rights** 🔑 Practices prohibited or required in general; elements

In assessing a claim against a federal agency alleging employment discrimination on the basis of disability in violation of the Rehabilitation Act, the court employs the same standards used to determine liability under the ADA. Rehabilitation Act of 1973, § 501(g), 29 U.S.C.A. § 791(g); Americans with Disabilities

Act of 1990, § 101 et seq., 42 U.S.C.A. § 12111 et seq.

1973, § 501(g), 29 U.S.C.A. § 791(g); 29 U.S.C. (2006 Ed.) § 705(20)(B)(i).

4 Cases that cite this headnote

[5] **Civil Rights** 🔑 Particular conditions, limitations, and impairments

Evidence that unsuccessful applicant's Type 1 diabetes substantially limited his major life activity of eating was sufficient to support verdict that FBI's failure to hire applicant for special agent position was disability discrimination in violation of Rehabilitation Act; applicant was required to check his blood sugar level three to five times daily using finger prick, to calculate the amount of carbohydrates in any food before ingesting it, and to take insulin not only with every meal he ate, but also in response to physical activity or illness, in order to keep his blood sugar within safe range. Rehabilitation Act of 1973, § 501(g), 29 U.S.C.A. § 791(g); 29 U.S.C.(2006 Ed.) § 705(20)(B)(i).

1 Case that cites this headnote

[6] **Civil Rights** 🔑 Impairments in general; major life activities

Determining whether an individual is substantially limited in a major life activity, as required to support a disability-based employment discrimination claim under the Rehabilitation Act, is an individualized inquiry. Rehabilitation Act of 1973, § 501(g), 29 U.S.C.A. § 791(g); 29 U.S.C.(2006 Ed.) § 705(20)(B)(i).

1 Case that cites this headnote

[7] **Civil Rights** 🔑 Impairments in general; major life activities

The effects, both positive and negative, of any measures a person is taking to correct for, or mitigate, a physical or mental impairment must be taken into account when judging whether that person is substantially limited in a major life activity, as required to support a disability-based employment discrimination claim under the Rehabilitation Act. Rehabilitation Act of

[8] **Civil Rights** 🔑 Impairments in general; major life activities

A disability exists within the meaning of the Rehabilitation Act only where an impairment substantially limits a major life activity, not where it might, could, or would be substantially limiting if mitigating measures were not taken. Rehabilitation Act of 1973, § 501(g), 29 U.S.C.A. § 791(g); 29 U.S.C.(2006 Ed.) § 705(20)(B)(i).

2 Cases that cite this headnote

[9] **Civil Rights** 🔑 Impairments in general; major life activities

Plaintiff alleging disability-based employment discrimination in violation of the Rehabilitation Act must show that his limitation in a major life activity is substantial as compared to the average person in the general population. Rehabilitation Act of 1973, § 501(g), 29 U.S.C.A. § 791(g); 29 U.S.C.(2006 Ed.) § 705(20)(B)(i).

[10] **Civil Rights** 🔑 Impairments in general; major life activities

A physical or mental impairment need not cause an utter inability to perform a major life activity in order for it to constitute a substantial limitation of a major life activity, as required to support a disability-based employment discrimination claim under the Rehabilitation Act. Rehabilitation Act of 1973, § 501(g), 29 U.S.C.A. § 791(g); 29 U.S.C.(2006 Ed.) § 705(20)(B)(i).

3 Cases that cite this headnote

[11] **Federal Courts** 🔑 Equity and equitable relief in general

Court of Appeals reviews equitable relief, the standard for calculating back pay and front pay in an action alleging disability-based employment discrimination under the

Rehabilitation Act, under an abuse of discretion standard. Rehabilitation Act of 1973, §§ 501, 505(a)(1), 29 U.S.C.A. §§ 791, 794a(a)(1); Civil Rights Act of 1964, § 706(g), 42 U.S.C.A. § 2000e-5(g).

1 Case that cites this headnote

**[12] Civil Rights** ➡ Relief

District court has wide discretion to award equitable relief for disability-based employment discrimination in violation of the Rehabilitation Act, and it should fashion this relief so as to provide a victim of employment discrimination the most complete make-whole relief possible. Rehabilitation Act of 1973, §§ 501, 505(a)(1), 29 U.S.C.A. §§ 791, 794a(a)(1); Civil Rights Act of 1964, § 706(g), 42 U.S.C.A. § 2000e-5(g).

3 Cases that cite this headnote

**[13] Civil Rights** ➡ Affirmative action; recruitment and hiring

Although evidence of the plaintiff's wrongdoing acquired subsequent to an employer's discriminatory hiring decision does not negate liability for disability-based discrimination under the Rehabilitation Act, it is relevant in determining whether equitable relief is available to the plaintiff. Rehabilitation Act of 1973, §§ 501, 505(a)(1), 29 U.S.C.A. §§ 791, 794a(a)(1); Civil Rights Act of 1964, § 706(g), 42 U.S.C.A. § 2000e-5(g).

5 Cases that cite this headnote

**[14] Federal Civil Procedure** ➡ Affirmative Defense or Avoidance

A party's failure to plead an affirmative defense generally results in the waiver of that defense and its exclusion from the case. Fed.Rules Civ.Proc.Rule 8(c)(1), 28 U.S.C.A.

7 Cases that cite this headnote

**[15] Federal Civil Procedure** ➡ Affirmative Defense or Avoidance

Even if after-acquired evidence defense was an affirmative defense to claim for equitable relief under Rehabilitation Act, Attorney General adequately alleged defense in amended answer to disability discrimination complaint by unsuccessful applicant for FBI special agent position who sought front pay or reinstatement as remedy for FBI's failure to hire because of applicant's Type 1 diabetes; one week before applicant filed complaint, FBI informed him it was withdrawing conditional offer of employment because of applicant's "failure to provide pertinent and accurate information," and thus applicant was already on notice of basis of after-acquired evidence defense when Attorney General alleged in answer that FBI had "legitimate non-discriminatory reasons" for not hiring applicant, and applicant conducted discovery on defense and moved successfully to have all testimony of defense excluded from trial. Rehabilitation Act of 1973, §§ 501, 505(a)(1), 29 U.S.C.A. §§ 791, 794a(a)(1); Civil Rights Act of 1964, § 706(g), 42 U.S.C.A. § 2000e-5(g); Fed.Rules Civ.Proc.Rule 8(c)(1), 28 U.S.C.A.

2 Cases that cite this headnote

**[16] Civil Rights** ➡ Affirmative action; recruitment and hiring

**Civil Rights** ➡ Back pay or lost earnings

District court acted within its discretion in determining that unsuccessful applicant for FBI special agent position demonstrated lack of candor during his background investigation regarding his suspension by sheriff's office that was his then-current employer, as required for Attorney General to establish after-acquired evidence defense to applicant's request for equitable relief in form of front pay or reinstatement as remedy for FBI's failure to hire because of applicant's Type 1 diabetes; sheriff's office personnel file indicated applicant initially denied taking gasoline from sheriff's office gas tank without permission when confronted by supervisor but later admitted it and explained that he did so in case he and his family lost electricity during hurricane, whereas in his second FBI interview, applicant said he had not recalled the incident at prior FBI interview in which he failed

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