

Original

FILED
DES MOINES, IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

TRACEY BAILEY,)	
)	
Plaintiff,)	Civil No. 4-99-cv-30610
)	
v.)	
)	INSTRUCTIONS TO THE JURY
CITY OF BLOOMFIELD, IOWA and)	
CHIEF OF POLICE BERNIE GUTZ,)	
)	
Defendants.)	

MEMBERS OF THE JURY, THE COURT NOW GIVES YOU THE
FOLLOWING INSTRUCTIONS:

This is a civil case brought by the plaintiff Tracey Bailey against the defendants City of Bloomfield, Iowa, and Chief of Police Bernie Gutz. Tracey Bailey worked for defendants as a police officer from April 5, 1995 until November 18, 1999. She alleges that during her employment, she was sexually harassed and discriminated against, and that the defendants retaliated against her after she complained about the offensive conduct. The defendants deny those allegations and submit they responded appropriately to her complaints.

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Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

INSTRUCTION NO. 1

Members of the jury, the instructions I gave at the beginning of the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of the trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed. In considering the instructions, you will attach no importance or significance whatever to the order in which they are given.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

You must follow the instructions now given you regardless of your opinion of what the law ought to be. You need not be concerned with the wisdom of any rule of law.

PAGE TWO OF INSTRUCTION NO. 1

Finally, as judges of the facts your duty is to decide all fact questions. In doing so, do not be influenced by any personal likes or dislikes, sympathy, bias, prejudice or emotions.

INSTRUCTION NO. 2

You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony in person or by deposition;
2. Exhibits received by the Court.
3. Stipulations which are agreements between the parties. If the parties stipulate to a fact, you should treat that fact as having been proved.

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

The following are not evidence.

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

INSTRUCTION NO. 3

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence, but if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part, or none of any witness' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witness' appearance, conduct, age, intelligence, memory, and knowledge of the facts;
3. The witness' interest in the trial, their motive, candor, bias, and prejudice; and
4. Whether the witness said something different at an earlier time.

INSTRUCTION NO. 4

In these instructions you are told that your verdict depends on whether you find certain facts have been proved.

The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight or preponderance of the evidence. To prove something by the greater weight or preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

The greater weight or preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

INSTRUCTION NO. 5

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of law.

INSTRUCTION NO. 6

A municipality acts only through its agents or employees and any agent or employee of a municipality may bind the municipality by acts and statements made while acting within the scope of the authority delegated to the agent by the municipality, or within the scope of his or her duties as an employee of the municipality.

INSTRUCTION NO. 7

Title VII of the Civil Rights Act of 1964 and the Iowa Civil Rights Act provide that it is unlawful for an employer to discriminate against any person because of that person's gender. It is also unlawful for an employer to retaliate against an employee because the employee engages in protected activity such as complaining about discrimination or sexual harassment.

Plaintiff Tracey Bailey asserts the following claims against the defendants: (1) hostile work environment sexual harassment, (2) sex discrimination, and (3) retaliation. You will consider each claim separately.

INSTRUCTION NO. 8

In these instructions you should interpret the word "sex" to include not only gender, but also alleged pregnancy and related conditions.

INSTRUCTION NO. 9

Your verdict must be for plaintiff and against defendants on plaintiff's claim of hostile work environment sexual harassment if each of the following elements have been proved by the preponderance of the evidence:

1. Plaintiff was subjected to hostile, abusive or offensive conduct by other law enforcement officers during her employment as a police officer for the City of Bloomfield;

2. Such conduct was unwelcome;

3. Such conduct was based on plaintiff's sex;

4. Such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile;

5. At the time such conduct occurred and as a result of such conduct, plaintiff believed her work environment to be hostile;

6. Defendants knew or should have known of the offensive conduct; and

7. Defendants failed to take prompt and appropriate corrective action to end the harassment.

PAGE TWO OF INSTRUCTION NO. 9

Except as provided in Instruction No. 12, if any of these elements has not been proven by a preponderance of the evidence, your verdict must be for defendants. If plaintiff has proven these elements, then proceed to consider the question of damages. Consider this instruction separately with respect to each defendant as explained further in the verdict form.

INSTRUCTION NO. 10

The second element of Instruction No. 9 requires you to determine whether the behavior was unwelcome to plaintiff, and would be unwelcome to a reasonable person under similar circumstances. You must determine whether the conduct was uninvited and offensive. The conduct must be "unwelcome" in the sense that plaintiff did not solicit or invite it and she regarded the conduct as undesirable or offensive.

INSTRUCTION NO. 11

Conduct which can create a sexually hostile work environment may be, but need not be, explicitly sexual in nature. Intimidation and hostility toward women because they are women can be sexual harassment if severe or pervasive.

To determine whether conduct is severe or pervasive enough to create a hostile environment, you must look to the totality of the circumstances. The types of factors you may take into account are the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the plaintiff's job performance and the effect on plaintiff's psychological well being. This list is not exhaustive, and there is no mathematically precise test. A plaintiff must generally show that the harassment is sustained and non-trivial. You should consider all the incidents in combination to determine if there was a hostile working environment. You must weigh and sift through the facts to determine whether, taking everything into consideration, a reasonable person would have found the workplace environment abusive.

INSTRUCTION NO. 12

If you find defendant Gutz committed sexually harassing conduct as explained in elements 1, 2 and 3 of Instruction No. 9, it is not necessary for plaintiff to prove elements 6 and 7 with respect to that conduct. However, defendant City of Bloomfield is not responsible for any sexually harassing conduct committed by a supervisor if the City of Bloomfield has proved by the preponderance of the evidence that (a) defendant City of Bloomfield exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the City of Bloomfield. You may still consider the conduct of defendant Gutz as it may relate to other issues submitted to you in these instructions.

INSTRUCTION NO. 13

An employer may be responsible for the acts of sexual harassment by non-employees where the employer's supervisory personnel know or should have known of the conduct and fail to take appropriate corrective action. The fact the person committing the acts is not an employee may be considered in determining what corrective action, if any, is appropriate.

INSTRUCTION NO. 14

On plaintiff's claim of sex discrimination, your verdict must be for plaintiff and against defendants if all the following elements have been proved by the preponderance of the evidence:

1. Defendants took one or more of the following actions against plaintiff:

- a. Failed to promote her to sergeant; or
- b. Constructively discharged her; and

2. Plaintiff's sex was a motivating factor in defendants' actions.

If either of the above elements has not been proved by the preponderance of the evidence, your verdict must be for defendants on this claim. If plaintiff has proved all of these elements, then you will consider the issue stated in Instruction No. 15 with respect to this claim. Consider this instruction separately with respect to each defendant as explained further in the verdict form.

INSTRUCTION NO. 15

If you find in favor of plaintiff under Instruction No. 14, then you must answer the following question in the verdict forms: Has it been proved by the preponderance of the evidence that defendants would have taken the same employment action concerning plaintiff regardless of her sex? Defendants have the burden to prove this proposition. The answer to this question affects plaintiff's right to recover damages under federal law, but not under state law.

INSTRUCTION NO. 16

In order to prevail on her claim of retaliation, plaintiff must prove all of the following elements by a preponderance of the evidence:

1. That plaintiff engaged in a statutorily protected activity;
2. Defendants took one or more of the following adverse employment actions against plaintiff:
 - a. Failed to promote her to sergeant; or
 - b. Constructively discharged her; and
3. That plaintiff's activity was a motivating factor in defendants' actions.

If any of these elements has not been proven by a preponderance of the evidence, your verdict must be for defendants. If plaintiff has proven these elements, then proceed to consider the question of damages. Consider this instruction separately with respect to each defendant as explained further in the verdict form.

INSTRUCTION NO. 17

A "statutorily protected activity" means a person has opposed any practice made unlawful by federal or state employment laws. Making a complaint about alleged sexual discrimination, sexual harassment or retaliation is a statutorily protected activity.

INSTRUCTION NO. 18

You may not return a verdict for plaintiff just because you might disagree with defendants' decisions or policies, or believe them to be harsh or unreasonable. An employer is entitled to make its own subjective personnel decisions and can make employment decisions for any reason that does not violate the law concerning employment discrimination.

INSTRUCTION NO. 19

As used in these instructions, plaintiff's sex or statutorily protected activity were a "motivating factor" if plaintiff's sex or protected activity played a part in defendants' employment actions towards plaintiff. However, plaintiff's sex or protected activity need not have been the only reason for defendants' employment actions.

INSTRUCTION NO. 20

If you find in favor of plaintiff under any of her claims, then you must award plaintiff such sum as you find by the preponderance of the evidence will fairly and justly compensate her for any damages you find she sustained as a direct result of the defendants' actions referenced in the claim or claims in which you find in her favor. Plaintiff's claim for damages includes two types of damages and you must consider them separately:

1. You must determine the amount of any wages and benefits plaintiff would have earned in her employment with defendant if her employment had not ceased on November 18, 1999, and/or if she had been promoted to sergeant, not to exceed the amounts claimed in Exhibit 47. This is called "back pay."

2. You must determine the amount of mental or emotional pain and suffering sustained by plaintiff in the past. Mental or emotional pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life. You will be required to make separate findings for this item of damage for plaintiff's claim of sexual harassment and her other claims.

The amount, if any, you award for mental or emotional pain and suffering cannot be measured by an exact or mathematical standard; the determination of the amount must rest in the sound

discretion of the jury. Such discretion must not be exercised arbitrarily or out of passion or sympathy or prejudice for or against the parties or to punish, but must be based on a fair, intelligent, dispassionate and impartial consideration of the evidence. The amount you assess for any item of damage must not exceed the amount caused by the defendants as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this instruction by way of punishment or through sympathy.

INSTRUCTION NO. 21

The parties dispute the circumstances under which plaintiff left her employment on November 18, 1999. Defendants contend that plaintiff resigned voluntarily. If she resigned voluntarily, she would not be entitled to an award of damages because of the termination of her employment. Plaintiff contends that she was "constructively discharged." If she was constructively discharged, an award of damages because of the discharge is permissible.

A constructive discharge arises when an employer causes an employee's work conditions to be so difficult or unpleasant that a reasonable employee in a similar position would feel compelled to resign. An employee must, however, give her employer a reasonable opportunity to work out a problem.

In order for plaintiff to recover damages against the defendants resulting from a constructive discharge, she must prove by a preponderance of the evidence the following:

1. Defendants made plaintiff's working conditions intolerable, and;
2. That the intolerable working conditions were deliberately created by defendants with the intention of forcing plaintiff to quit; or plaintiff's decision to quit was a reasonably foreseeable consequence of the defendants' actions.

If either of these elements has not been proven by a preponderance of the evidence, plaintiff is not entitled to recover damages for the termination of her employment.

INSTRUCTION NO. 22

In arriving at an item of damage you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage and agreeing in advance that the average of those estimates shall be your item of damage.

INSTRUCTION NO. 23

Your first duty upon retiring to the jury room for your deliberations is to elect one of your members foreperson of the jury. The person so elected is responsible for the orderly, proper and free discussion of the issues by any juror who wishes to express his or her views. The foreperson will supervise the balloting and sign the interrogatories that are in accord with your decision and will also sign any written inquiries addressed to the Court.

Requests regarding instructions are not encouraged. Experience teaches that questions regarding the law are normally covered in the instructions, and the jury is encouraged to examine them very carefully before making any further requests of the Court.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion in a case or determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when it is incorrect. You are not partisans or advocates. You are judges--judges of the facts. Your sole interest is to ascertain the truth.

INSTRUCTION NO. 24

The verdict must represent the considered judgment of each juror.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. An inconclusive trial is always undesirable. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 25

Submitted to you with these instructions is the special verdict form. After you have agreed and appropriately signed the interrogatories in accordance with the directions contained therein, inform the jury officer outside the room. If you return a unanimous verdict, that is, a verdict to which you all agree, you will have the verdict form signed only by one of your number whom you will have selected as your foreperson.

After deliberating for six hours from the time this case is submitted to you, excluding meals or recesses outside the jury room, then it is necessary that only seven of you agree upon a verdict. In that case the verdict must be signed by the seven jurors who agree on the verdict. If your foreperson is a dissenting juror, he or she should not sign the verdict.

When you have agreed upon and appropriately signed your verdicts, you will return with them into court.

This case is submitted to you at 4:45 p .m. at which time your deliberations are deemed to commence.

Dated this 7th day of June, 2001.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE