

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

ELIZABETH THOMPSON,)
)
 Plaintiff,) Civil No. 4-98-cv-30584

v.)

NATIONAL CHIROPRACTIC MUTUAL) INSTRUCTIONS TO THE JURY
INSURANCE COMPANY, GARRY BAKER,)
and PAT McNERNEY,)
)
 Defendants.)

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

This is a civil case brought by the plaintiff, Elizabeth Thompson, against the defendants, National Chiropractic Mutual Insurance Company (which will be referred to in these instructions as National Chiropractic), Garry Baker and Pat McNerney. Plaintiff alleges that the defendants harassed her and discriminated against her because of her sex and her pregnancy, and that they retaliated against her after she complained of the conduct.

Defendants deny that they harassed plaintiff or retaliated against her, or that sex or pregnancy were a motivating factor in any employment decision. Defendants deny that any conduct on their part caused plaintiff damages.

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. _____

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.

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. _____

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. _____

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. _____

Certain testimony has been received into evidence from depositions. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

INSTRUCTION NO. _____

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. _____

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. _____

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

INSTRUCTION NO. _____

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 Elizabeth Thompson asserts the following claims against the defendants: (1) sexual harassment against defendant Baker, (2) sexual harassment against defendant National Chiropractic; (3) sex discrimination based on pregnancy against defendants National Chiropractic and McNerney, and (4) retaliation against defendants National Chiropractic and McNerney. You will consider each claim separately.

INSTRUCTION NO. _____

Your verdict must be for plaintiff and against defendant Garry Baker on plaintiff's claim of sexual harassment against him if all of the following elements have been proved by the preponderance of the evidence:

1. Plaintiff was subjected to sexually degrading or suggestive acts, comments or touching by defendant Baker;

2. Such conduct was unwelcome;

3. Defendant Baker knew or should have known that his conduct was unwelcome;

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

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

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

If any of the above elements has not been proved by the preponderance of the evidence, your verdict must be for defendant Baker on this claim. If plaintiff has proven all of these elements, then you will consider the question of damages with respect to this claim.

INSTRUCTION NO. _____

Your verdict must be for plaintiff and against defendant National Chiropractic on plaintiff's claim of sexual harassment against National Chiropractic if each of the following elements have been proved by the preponderance of the evidence:

1. Plaintiff was subjected to sexually degrading or suggestive acts, comments, or touching by Garry Baker, Pat McNerney and/or Stephen Smith;

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

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

If any of the above elements has not been proved by the preponderance of the evidence, your verdict must be for defendant National Chiropractic on this claim. If plaintiff has proven all of these elements, then you will consider the question of damages with respect to this claim.

INSTRUCTION NO. _____

To determine whether the conduct was 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. _____

The second element of Instruction No. ____ 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. _____

If plaintiff establishes elements 1, 2 and 3 in Instruction No. _____ concerning the conduct of her supervisor Pat McNerney, she does not have to establish elements 6 and 7 with respect to his conduct because National Chiropractic is charged with responsibility for Pat McNerney's conduct as supervisor without proof of these elements. However, defendant National Chiropractic is not responsible for any sexually harassing conduct by Pat McNerney if National Chiropractic has proved by the preponderance of the evidence that (a) defendant National Chiropractic 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 National Chiropractic.

INSTRUCTION NO. _____

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

1. Defendants eliminated significant job duties from her position; 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 and you need not proceed further in considering 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 and the evidence separately with respect to defendant National Chiropractic and defendant Pat McNerney.

INSTRUCTION NO. _____

In these instructions you should interpret the word "sex" to include not only plaintiff's gender, but also her pregnancy, the fact that she gave birth to a child, and conditions related to her pregnancy.

INSTRUCTION NO. _____

As used in these instructions, plaintiff's sex or complaints about sexual harassment were a "motivating factor" if plaintiff's sex or complaints about sexual harassment played a part in defendant's employment actions towards plaintiff. However, plaintiff's sex or complaints about sexual harassment need not have been the only reason for defendant's employment actions.

INSTRUCTION NO. _____

If you find in favor of plaintiff under Instruction No. ____, then you must answer the following question in the verdict forms:
Has it been proved by the preponderance of the evidence that defendant National Chiropractic Mutual Insurance Company would have taken the same employment action concerning plaintiff regardless of her sex? Defendants have the burden to prove this proposition. If you answer "yes," plaintiff cannot recover damages on her sex discrimination claim.

INSTRUCTION NO. _____

In order to prevail on her claim that defendants National Chiropractic and Patrick McNerney retaliated against her for having made complaints about sexual harassment, plaintiff must prove all of the following elements by a preponderance of the evidence:

1. That plaintiff engaged in a statutorily protected activity;
2. That plaintiff received adverse employment action(s);
3. That plaintiff's activity was a motivating factor in the adverse action(s); and
4. Plaintiff was damaged as a result.

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 defendant National Chiropractic and defendant Pat McNerney.

INSTRUCTION NO. _____

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.

"Adverse employment action" means an action which has serious employment consequences. It includes, but is not limited to, such employment actions as constructive discharge or termination, demotion, suspension, reduction of salary and/or benefits, unfavorable personnel reports, significant reduction in job duties or other actions which adversely affect or undermine an employee's position.

INSTRUCTION NO. _____

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. _____

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. The reasonable value of charges for counseling in the past and future for mental or emotional pain and suffering.

2. Mental or emotional pain and suffering sustained by plaintiff in the past and future. Mental or emotional pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.

The amount, if any, you award for past and future 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.

INSTRUCTION NO. _____

The parties dispute the circumstances under which plaintiff left her employment on January 5, 1998. 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. _____

If you find in favor of plaintiff but you find that plaintiff's claimed damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar (\$1.00).

INSTRUCTION NO. _____

In addition to the damages mentioned in the other instructions, the law permits the jury, under certain circumstances, to award an injured person punitive damages in order to punish a defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. Under the law, only the employer, National Chiropractic, is subject to an award of punitive damages

If you find in favor of plaintiff under any of Instruction Nos. _____, (and in the case of plaintiff's sex discrimination claim you answer "no" as explained in Instruction No. ____) and if you find defendant National Chiropractic acted with malice or with reckless indifference to plaintiff's rights, then in addition to any damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant National Chiropractic or to deter said defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages, is within your discretion.

INSTRUCTION NO. _____

For the purpose of imposing punitive damages, "malice" means the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury. "Reckless indifference" means acting with knowledge of a substantial risk of harm to another. The terms "malice" and "reckless indifference" pertain to National Chiropractic's knowledge that it may be acting in violation of federal law.

INSTRUCTION NO. _____

An employer may be liable for punitive damages resulting from the discriminatory or unlawful employment decisions of its managerial agents. However, you may not award punitive damages against defendant National Chiropractic Mutual Insurance Company if you find that National Chiropractic made good faith efforts to comply with the laws against employment discrimination and to prevent and promptly correct any sexually harassing behavior, and that the managers who made the employment decisions affecting plaintiff acted contrary to those efforts.

INSTRUCTION NO. _____

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. _____

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. _____

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

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.

Submitted to you with these instructions is the special verdict form. After you have agreed and appropriately signed the verdict form in accordance with the directions contained therein, inform the jury officer outside the room. You will have the verdict signed only by one of your number whom you will have selected as your foreperson and return with it into court.

Dated this _____ day of April, 2000.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE