

JURY INSTRUCTIONS

FOR

DISCRIMINATION & RETALIATION UNDER TITLE VII

SEPARATE VERDICTS ON EACH CLAIM

The plaintiff in this case is * * *. The defendant in this case is * * *. There are two positions at issue in this case and plaintiff makes claims of discrimination and retaliation as to both. The two positions are: (1) * * * and (2) * * *. Defendant denies both claims of discrimination and retaliation. Defendant also claims that [i.e. plaintiff would not have been selected for either position under any circumstances because there were better qualified candidates who would have been selected before plaintiff.] By your verdict, you will decide all disputed issues of fact. I have decided all questions of law that arose during the trial and will now instruct you on the law you must follow and apply in deciding your verdict. Because you are being called upon to decide the facts of this case, you should give careful attention to the testimony and exhibits presented for your consideration, bearing in mind how I have instructed you concerning the manner in which you should determine the credibility or "believability" of each witness and the weight to be given his or her testimony. As to [i.e. each job, plaintiff claims that he/she did not receive the position] because he/she was discriminated against because of [i.e. his/her race] and because he/she was retaliated against because he/she engaged in activities, called "protected activities." I will explain that term, "protected activities" in a moment, but for now the important thing to bear in mind is that plaintiff makes distinct and separate claims as to [i.e. each job]. Therefore, you must consider each claim as to [i.e. each job] separately and individually and not let your determination as to one claim affect or influence your decision as to the other claim.

LAW PROHIBITING DISCRIMINATION

Under Title VII of the Civil Rights Act, 42 U.S.C.A. §2000e-2(a), "It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." The Civil Rights Act is not intended as a vehicle for judicial review of employment decisions that are not the result of discrimination. Although the Civil Rights Act requires that an employer reach employment decisions without discriminating, it does not place an affirmative duty upon an employer to accord special treatment to an employee. An employer has the right to make business decisions, including selection decisions such as those at issue in this case, for good, bad, or no reason at all, as long as they don't constitute discrimination. The law does not expose an employer to liability merely because the employer may have misjudged an employee's job performance or made a personnel decision that was unwise or ill-advised. It is not your function in this case to second-guess the wisdom of any employment action which affected [plaintiff]. Thus, even if you personally disagree with the actions that were taken or believe that they were harsh or unreasonable, if you find that discrimination was not a motivating factor for the actions, then you must return a verdict in the defendant's favor.

DISCRIMINATORY INTENT

Proof of discriminatory intent is critical in this case. Discrimination is intentional if it is done voluntarily, deliberately, and willfully. Discriminatory intent may be proved either by direct evidence such as

statements made by a person whose intent is at issue, or by circumstantial evidence from which you can infer a person's intent. Thus, in making a determination as to whether there was intentional discrimination in this case, you may consider any statement made or act done or omitted by a person whose intent is in issue as well as all other facts and circumstances that indicate his or her state of mind. You may also infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. In order to prevail on his claim, plaintiff must show that he/she was [i.e. qualified for the position that he/she sought, that he/she was not selected for the position], and that his/her [race, color, religion, sex, or national origin] and the [race, color, religion, sex, or national origin] of the person who [i.e. got the job] was a motivating factor in the decision [i.e. not to select] plaintiff. Remember that the plaintiff must show only that [race, color, religion, sex, or national origin] was a motivating factor in the defendant's decision [i.e. not to select him/her for the position he/she applied.] He/She does not have to show that it was the only or even a major factor in the defendant's decision. If [defendant] has offered a non-discriminatory reason or reasons for its [i.e. selection of * * * and its not selecting plaintiff and you believe that reason or reasons, then your verdict should be for the defendant. If, however, you do not believe that this reason or reasons were the real reason or reasons for [i.e. the failure to select plaintiff], you may find that plaintiff has proven his/her claim of intentional employment discrimination, particularly if you believe that the [defendant's representatives] involved did not put forth honestly the reason or reasons for their decision.

LAW PROHIBITING RETALIATION

Plaintiff has brought his/her claim under Title VII of the Civil Rights Act of 1964, which prohibits employers, like [defendant], from taking retaliatory personnel actions against employees who have previously engaged in activity protected by Title VII, such as pursuing a complaint of employment

discrimination. It is, therefore, unlawful for a [defendant] to refuse to hire a person because that person is [i.e. pursuing a complaint of discrimination]. It is undisputed in this case that plaintiff engaged in protected activity when he/she [i.e. filed an EEO complaint], so the only issue for you to decide is whether plaintiff was denied employment as a result of that protected activity.

PROOF OF RETALIATION

It is up to you to decide whether plaintiff has proved his/her claim of retaliation by a preponderance of the evidence. It is plaintiff's burden to show that it is more likely so than not so that his/her engaging in protected activity was a substantial factor in the decision of the defendant to [i.e. withdraw a job offer]. If you find that he/she has met that burden and that it is more likely so than not so that his/her [i.e. pursuing a complaint of discrimination] was a substantial factor in the decision of the defendant to [i.e. withdraw a job offer], then your verdict should be for the plaintiff. If, on the other hand, you find that it is more likely so than not so that the explanation given by the defendant for [i.e. withdrawing the job offer] was not a substantial factor in the decision it made, then your verdict should be for the defendant. Alternatively, if you do not believe the given explanation was the real or full reason for the defendant's decision to [i.e. withdraw the job offer], you may find that plaintiff has proven his/her claim of retaliation, particularly if you believe that the [defendants] who testified did not put forth honestly the reason for their decision to [i.e. withdraw the job offer]. If you have determined that plaintiff has proven by a preponderance of the evidence that retaliation was a substantial factor in the defendant's decision, then you must also determine whether the defendant has proven by a preponderance of the evidence that it would have [i.e. withdrawn the job offer] even in the absence of retaliation. You must determine whether the defendant has shown that it is more likely so than not so that the [defendant] would have made the same decision even if you find it more likely so than not so that retaliation was a

substantial factor in the decision it made to [i.e. withdraw the job offer].

PROOF OF INTENT

Proof of retaliatory intent is critical in this case. Retaliation is intentional if it is done voluntarily, deliberately, and willfully. Retaliatory intent may be proven either by direct evidence such as statements made by a person whose intent is at issue, or by circumstantial evidence from which you can infer a person's intent. Thus, in making a determination as to whether there was intentional retaliation in this case, you may consider any statement made or act done or omitted by a person whose intent is in issue as well as all other facts and circumstances that indicate his or her state of mind. You may also infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

RIGHT TO MAKE BUSINESS DECISIONS

In this context, please bear in mind that an employer has the right to make business decisions for any reason, whether good or bad, so long as those decisions are not motivated by a factor that the law makes illegal, such as retaliation. It is not your function to second guess the decision the [defendant] made in this case, but solely to determine whether in making that decision the [defendant] broke the law by permitting retaliation to be a substantial factor in its decision to [i.e. withdraw the job offer]. Thus, even if you personally disagree with that decision or think it harsh or unreasonable, you may not permit that feeling to influence in any way your determination of whether or not the [defendant] retaliated against [plaintiff] when it decided to [i.e. withdraw the job offer].

DAMAGES - DISCRIMINATION

I will now give you instructions about how to calculate damages. You should not consider the fact that

I am giving you this instruction as suggesting any view of mine as to which party is entitled to your verdict in this case, or that I think that you should award any damages. Those decisions are entirely for you to make. I am giving you these instructions solely for your guidance, in the event that you find in favor of [plaintiff] on his claim against the [defendant]. The fact that I do does not in any way mean that I think you should award any damages; that is entirely for you to decide. If you find for [plaintiff] on [his/her] claim that the defendant discriminated against him because of his/her [race, color, religion, sex, or national origin], then you must determine whether he/she is entitled to damages in an amount that is fair compensation. You may award compensatory damages only for injuries that the [plaintiff] proved were caused by the [defendant's] allegedly wrongful conduct. The damages that you award must be fair compensation, no more and no less. You may award compensatory damages for emotional pain and suffering, inconvenience, and mental anguish if you find that there were caused by [defendant's] discrimination. No evidence of the monetary value of such intangible things as pain and suffering has been or need be introduced into evidence. There is no exact standard for fixing the compensation to be determined for these elements of damage. Any award you make should be fair in light of the evidence produced at trial. In determining the amount of damages, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit. You may not consider the amount of lost wages or other benefits, if any, claimed by the plaintiff in this case. Likewise, you may not consider the cost to plaintiff of hiring an attorney. Those attorneys fees and lost wages are determined by the Court, if necessary, and may not be included in your

damages award.

DAMAGES - RETALIATION

I will now give you instructions about how to calculate damages. You should not consider the fact that I am giving you this instruction as suggesting any view of mine as to which party is entitled to your verdict in this case, or that I think that you should award any damages to plaintiff if you feel she is entitled to your verdict. Those decisions are entirely for you to make. I am giving you these instructions solely for your guidance, in the event that you find in favor of [plaintiff] on her claim against the [defendant]. The fact that I do does not in any way mean that I think you should award any damages; that is entirely for you to decide. If you find for [plaintiff] on her claim that the [defendant] retaliated because he/she was [i.e. pursuing a complaint of discrimination], then you must determine whether he/she is entitled to damages in an amount that is fair compensation. You may award compensatory damages only for injuries that the plaintiff proved were caused by the defendant's allegedly wrongful conduct in [i.e. withdrawing the job offer]. The damages that you award must be fair compensation, no more and no less. You may award compensatory damages for emotional pain and suffering, inconvenience, and mental anguish if you find that there were caused by defendant's retaliation.