

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
DEC 07 2007
[Signature]
CLFRK

PATRICIA JOHNSON
Plaintiff,

CIV. 04-4186-KES

vs.

GATEWAY, INC., a corporation and,
DAVID REZNICEK, an individual,

**FINAL
INSTRUCTIONS
TO THE JURY**

Defendants.

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FINAL INSTRUCTION NO. 1 – INTRODUCTION & DEFINITIONS

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I will 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 trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier 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 oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

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.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater weight of the evidence.

Greater weight of the evidence means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater weight, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 - IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be "impeached" and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness's present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – AGENCY

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts or 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.

FINAL INSTRUCTION NO. 5 – CORPORATION AS A PARTY

The fact that one of the parties to this action is a corporation is immaterial. In the eyes of the law, a corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 6 – RETALIATION

Your verdict must be for Johnson and against Gateway, Inc. and/or Reznicek on Johnson's retaliation claim if all of the following elements have been proved by Johnson by the greater weight of the evidence:

First, Johnson complained to Gateway and/or Reznicek that she was being discriminated against on the basis of gender;

Second, Johnson reasonably believed that she was being discriminated against on the basis of gender;

Third, Gateway and/or Reznicek discharged Johnson;
and

Fourth, Johnson's complaint of gender discrimination was a determinative factor in Gateway's and/or Reznicek's decision to discharge Johnson.

If any of the above elements have not been proved by the greater weight of the evidence against a defendant, your verdict must be for that defendant and you need not proceed further in considering this claim against that defendant. In addition, your verdict must be for a defendant if it has been proved by the greater weight of the evidence that defendant would have discharged Johnson even if Johnson had not complained about gender discrimination. You may find that Johnson's complaint of discrimination was a determinative factor in a defendant's decision if it has been proved by the greater weight of the evidence that a defendant's stated reasons for the decision are a pretext to hide discrimination.

The fact that you find against one defendant should not control your verdict as to the other defendant. You must give separate and individual consideration to the allegation against each defendant.

FINAL INSTRUCTION NO. 7 – BUSINESS JUDGEMENT

You may not return a verdict for Johnson just because you might disagree with a defendant's employment decision with regard to Johnson or believe it to be harsh or unreasonable. Under South Dakota law, an employment relationship can be terminated at-will by either the employer or the employee. A defendant has the right to make a business decision and/or discharge an employee for good reason, bad reason, or no reason at all, so long as its decisions are not in retaliation for making a complaint of gender discrimination.

FINAL INSTRUCTION NO. 8 – ACTUAL DAMAGES

If you find in favor of Johnson and against Gateway Inc., or Reznicek, or both, under Final Instruction Number 6 then you must award Johnson such sum as you find by the greater weight of the evidence will fairly and justly compensate Johnson for any damages you find Johnson sustained as a direct result of a defendant's decision to terminate Johnson's employment.

To determine damages, you must determine the amount of any wages and fringe benefits Johnson would have earned in her employment with Gateway if she had not been discharged on March 17, 2003, through the date of your verdict, *minus* the amount of earnings and benefits Johnson received from other employment during that time.

You are also instructed that Johnson has a duty under the law to mitigate her damages—that is, to exercise reasonable diligence under the circumstances to minimize her damages. Therefore, if you find by the greater weight of the evidence that Johnson failed to seek out or take advantage of an opportunity that was reasonably available to her, you must reduce her damage by the amount she reasonably could have avoided if she had taken advantage of such an opportunity.

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.

FINAL INSTRUCTION NO. 9 – PUNITIVE DAMAGES

In addition to actual damages mentioned in the previous instruction, the law permits the jury under limited circumstances to award an injured person punitive damages in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of Johnson and against either or both defendants, and if you find by the greater weight of the evidence that Johnson's termination was motivated by evil motive or intent, or that an individual defendant was callously indifferent to Johnson's rights, then in addition to any damages to which you find Johnson 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 or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages, are within your discretion.

You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed such defendants may be the same or they may be different.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. The intent of the defendant

In considering the defendant's intent, you should examine the degree of reprehensibility of the defendant's misconduct, including but not limited to, the following factors:

- a. Whether the harm caused was physical as opposed to economic;

- b. Whether the tortuous conduct evinced an indifference to, or reckless disregard of, the health or safety of others;
 - c. Whether the target of the conduct was vulnerable financially;
 - d. Whether the conduct involved repeated actions or was an isolated incident; and
 - e. Whether the harm was the result of intentional malice, trickery or deceit, or mere accident.
2. The amount awarded in actual damages.

In considering this factor, you should consider:

- a. Whether the plaintiff has been completely compensated for the economic harm caused by the defendant;
- b. The relationship between the harm (or potential harm) suffered by the plaintiff and the punitive damages award;
- c. The magnitude of the potential harm, if any, that the defendant's conduct would have caused to its intended victim if the wrongful plan succeeded; and
- d. The possible harm to other victims that might have resulted if similar future behavior were not deterred.

The amount of punitive damages must bear a reasonable relationship to the actual damages.

3. The nature and enormity of the wrong.
4. The defendant's financial condition.
5. All of the circumstances concerning the defendant's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating punitive damages.

INSTRUCTION NO. 10 – PREJUDGMENT INTEREST

Any person who is entitled to recover damages is entitled to recover interest thereon from the day that the loss or damage occurred except:

1. During a period of time, the person liable for the damages was prevented by law, or an act of the person entitled to recover the damages from paying the damages, or

2. Interest is not recoverable on damages which will occur in the future, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship.

You must decide:

1. the amount of damages (if any), and
2. the amount of damages which are subject to prejudgment interest (if any), and
3. the date or dates on which the damages occurred.

If you return a verdict for Johnson, you must indicate on the verdict form whether you find Johnson is entitled to prejudgment interest, and if so, the amount of damages upon which interest is granted and the beginning date of such interest. Based upon your findings, the Court will calculate the amount of interest Johnson is entitled to recover.

FINAL INSTRUCTION NO. 11 – DUTIES DURING DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated December 7, 2007



KAREN E. SCHREIER
CHIEF JUDGE