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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CIV 04-4215

EQUAL EMPLOYMENT OPPORTUNITY *
COMMISSION, *

Plaintiff, *

RICHELLE DOOLEY and *
ANGIE GACKIE, *

Plaintiffs - Intervenors, *

JURY INSTRUCTIONS

-vs- *

SIOUXLAND ORAL MAXILLOFACIAL *
SURGERY ASSOCIATES, L.L.P., *

Defendant. *

INSTRUCTION NO. 1

Members of the jury, the instructions I gave at the beginning of the trial and during 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 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.

INSTRUCTION NO. 2

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.

INSTRUCTION NO. 3

As I stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in this case. "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, any facts that are stipulated – that is, formally agreed to by the parties, and any facts that are judicially noticed – that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I have stricken from the record, or have told you to disregard, is not evidence and must not be considered.
4. Anything you have seen or heard about this case outside the courtroom is not evidence, unless I specifically told you otherwise during the trial.

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you for only one particular purpose, and not for any other purpose. When this occurred during the trial, I instructed you on the purposes for which the item can and cannot be used.

INSTRUCTION NO. 3, continued

Finally, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 4

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

INSTRUCTION NO. 5

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

INSTRUCTION NO. 6

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 7

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

INSTRUCTION NO. 8

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education in a particular science, profession, or occupation. In deciding the weight to give to the opinion, you should consider the expert's qualifications and credibility and the reasons for the opinion. You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. You are not bound by the opinion; therefore, if you should decide that the opinion of an expert witness is not based on sufficient education and experience, or if you should conclude that the reasons for the opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

INSTRUCTION NO. 9

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 or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight 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. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

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

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 10

42 U.S.C.A. § 2000e(k), the Pregnancy Discrimination Act, provides that it is unlawful to discriminate on the basis of sex including “because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work”

42 U.S.C.A. § 2000e(k).

INSTRUCTION NO. 11

Plaintiff, Equal Employment Opportunity Commission (EEOC) is a federal agency that has brought this action on behalf of Richelle Dooley and Angie Gacke. Richelle Dooley and Angie Gacke were allowed to intervene as plaintiffs in this action.

Although there are two individual plaintiffs in this lawsuit, the case of each is separate from the other, and the plaintiffs' claims are being tried together in one lawsuit only for purposes of convenience, expediency and economy of the court's and the parties' resources. The mere fact that the plaintiffs' claims against the defendant are being tried together should not be considered by you and you should not lend additional credence to the claims simply because the two cases are being tried in one lawsuit. Accordingly, you must determine each plaintiff's case separately, the same as if you were trying different lawsuits. Therefore, you may not consider evidence admitted on behalf of one plaintiff in determining the merits of the other plaintiff's claims.

Unless otherwise stated, these instructions apply to each case.

INSTRUCTION NO. 12

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences. This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 13

Defendant Siouxland is an employer under Title VII of the Civil Rights Act of 1964, as amended. An employer may be responsible for the actions of its agents if the employer authorizes the doing and manner of the act; or the agent was employed as a manager and was acting within the scope of employment; or the employer or its managerial agent ratifies or approves the actions of an agent. To act in a managerial capacity, an employee must be important but does not need to be top management, officers, or directors.

Plaintiffs' supplemental instruction

INSTRUCTION NO. 14

Your verdict must be for the Plaintiffs EEOC and Richelle Dooley and against Defendant Siouxland on ~~the~~ Plaintiffs' pregnancy discrimination claim if all the following elements have been proved by the greater weight of the evidence:

First, the Defendant discharged the Plaintiff Richelle Dooley; and

Second, Plaintiff Richelle Dooley's pregnancy was a motivating factor in Defendant's decision to discharge her.

If either of the above elements has not been proved by the greater weight of the evidence, your verdict must be for the Defendant and you need not proceed further in considering this claim.

You may find that the Plaintiff Richelle Dooley's pregnancy was a motivating factor in the Defendant's discharge of Plaintiff Richelle Dooley ~~if~~ if it has been proved by the greater weight of the evidence that the Defendant's stated reasons for its discharge of Plaintiff Richelle Dooley ~~are~~ are a pretext to hide pregnancy discrimination.

INSTRUCTION NO. 15

As used in these instructions, Plaintiff Richelle Dooley's pregnancy was a "motivating factor," if the Plaintiff Richelle Dooley's pregnancy played a part in the Defendant's decision to discharge Plaintiff Richelle Dooley. However, the Plaintiff Richelle Dooley's pregnancy need not have been the only reason for the Defendant's decision to discharge Plaintiff Richelle Dooley.

INSTRUCTION NO. 16

You may find that the Plaintiff Richelle Dooley's pregnancy was a motivating factor in the Defendant's decision to discharge Plaintiff Richelle Dooley if it has been proved by the greater weight of the evidence that the Defendant's stated reasons for its decision to discharge Plaintiff Richelle Dooley are not the real reasons, but are a pretext to hide pregnancy discrimination.

INSTRUCTION NO. 17

If you find in favor of the Plaintiff Richelle Dooley under Instruction 14 then you must answer the following question in the verdict forms: Has it been proved by the greater weight of the evidence that the Defendant would have discharged Plaintiff Richelle Dooley regardless of her pregnancy?

INSTRUCTION NO. 18

Your verdict must be for the Plaintiffs EEOC and Angie Gacke and against Defendant Siouxland on the ~~is~~ Plaintiffs' pregnancy discrimination claim if all the following elements have been proved by the preponderance of the evidence:

First, the Defendant did not hire the Plaintiff Angie Gacke; and

Second, Plaintiff Angie Gacke's pregnancy was a motivating factor in Defendant's decision to not hire her.

If either of the above elements has not been proved by the greater weight of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.

You may find that the Plaintiff Angie Gacke's pregnancy was a motivating factor in the Defendant's decision to not hire Angie Gacke if it has been proved by the greater weight of the evidence that the Defendant's stated reasons for its decision to not hire Plaintiff Angie Gacke are a pretext to hide pregnancy discrimination.

INSTRUCTION NO. 19

As used in these instructions, Plaintiff Angie Gacke's pregnancy was a "motivating factor," if the Plaintiff Angie Gacke's pregnancy played a part in the Defendant's decision to not hire Angie Gacke. However, the Plaintiff Angie Gacke's pregnancy need not have been the only reason for the Defendant's decision to not hire Plaintiff Angie Gacke.

INSTRUCTION NO. 2D

You may find that the Plaintiff Angie Gacke's pregnancy was a motivating factor in the Defendant's decision to not hire Angie Gacke if it has been proved by the greater weight of the evidence that the Defendant's stated reasons for its decision ^{To} not hire Angie Gacke are not the real reasons, but are a pretext to hide pregnancy discrimination.

INSTRUCTION NO. 21

If you find in favor of the Plaintiff Angie Gacke under Instruction 18, then you must answer the following question in the verdict forms: Has it been proved by the greater weight of the evidence that the Defendant would have not hired Plaintiff Angie Gacke regardless of her pregnancy?

INSTRUCTION NO. 22

You may not return a verdict for either plaintiff just because you might disagree with the defendant's employment decision with regard to that plaintiff or believe it to be harsh or unreasonable. The question for you to decide is whether pregnancy was a motivating factor in the employment decision.

Eighth Circuit Manual of Model Civil Jury Instructions, No. 5.01 (modified)(2007); Defendant's Proposed Instruction 19 (modified).

INSTRUCTION NO. 23

If you find in favor of Plaintiff Richelle Dooley under Instruction 14 and if you answer "no" in response to Instruction 17, then you must award her such sum as you find by the greater weight of the evidence will fairly and justly compensate her for any damages you find Plaintiff Richelle Dooley sustained as a direct result of the defendant's decision to discharge Plaintiff Richelle Dooley. Plaintiff Richelle Dooley's claim for actual damages includes distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages and fringe benefits Plaintiff Richelle Dooley would have earned in her employment with the defendant if she had not been discharged on January 3, 2002 through the date she decided to work in the home, *minus* the amount of earnings and benefits that Plaintiff Richelle Dooley received from other employment during that time.

Second, you must determine the amount of any other damages sustained by the plaintiff, such as emotional pain or mental anguish. You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

You are also instructed that a plaintiff has a duty under the law to "mitigate" his/her damages - that is, to exercise reasonable diligence under the circumstances to minimize his/her damages. Therefore, if you find by the preponderance of the evidence that Plaintiff Richelle Dooley failed to seek out or take advantage of an opportunity that was reasonably available to her, you must reduce her damages by the amount she reasonably could have avoided if she had sought out or 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.

INSTRUCTION NO. 24

If you find in favor of Plaintiff Angie Gacke under Instruction 18 and if you answer “no” in response to Instruction 21, then you must award her such sum as you find by the greater weight of the evidence will fairly and justly compensate her for any damages you find Plaintiff Angie Gacke sustained as a direct result of the defendant's decision to not hire Plaintiff Angie Gacke. Plaintiff Angie Gacke’s claim for actual damages includes distinct types of damages and you must consider them separately: *First*, you must determine the amount of any wages and fringe benefits Plaintiff Angie Gacke would have earned in her employment with the defendant if she had been hired in March of 2002 through the date in 2002 when Plaintiff Angie Gacke earned wages equal to or greater than the wage offered in the central sterilization/ recovery position, *minus* the amount of earnings and benefits that she received from other employment during that time.

Second, you must determine the amount of any other damages sustained by the plaintiff, such as emotional pain or mental anguish. You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

You are also instructed that a plaintiff has a duty under the law to "mitigate" his/her damages - that is, to exercise reasonable diligence under the circumstances to minimize his/her damages. Therefore, if you find by the preponderance of the evidence that Plaintiff Angie Gacke failed to seek out or take advantage of an opportunity that was reasonably available to her, you must reduce her damages by the amount she reasonably could have avoided if she had sought out or 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.

INSTRUCTION NO. 25

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 bailiff, 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

INSTRUCTION NO. 25, continued

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 forms ^{are} simply the written notice of the decision that you reach in this case. You will take ~~this~~ ^{these} forms to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the forms, ^{sign} and date ~~it~~ ^{them}, and advise the marshal or bailiff that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* CIV 04-4215

EQUAL EMPLOYMENT OPPORTUNITY *

COMMISSION, *

Plaintiff, *

*

RICHELLE DOOLEY and *

ANGIE GACKIE, *

VERDICT FORM

(RICHELLE DOOLEY)

Plaintiffs - Intervenors, *

*

-vs- *

*

SIOUXLAND ORAL MAXILLOFACIAL *

SURGERY ASSOCIATES, L.L.P., *

*

Defendant. *

Complete this form by answering the following questions.

Was Plaintiff Richelle Dooley's pregnancy a motivating factor in Defendant's decision to discharge Plaintiff Richelle Dooley?

Yes _____ or No _____ (Check one or the other.)

If you have answered yes to the above question, answer the next question. If you have answered no to the above question, sign and date the verdict form and disregard the following sections.

Has it been proved by the greater weight of the evidence that the Defendant would have discharged Plaintiff Richelle Dooley regardless of her pregnancy?

Yes _____ or No _____ (Check one or the other.)

If you have answered yes to the above question sign and date the verdict form. If you have answered no to the above question, proceed to the damages portion of this form.

We find plaintiff Richelle Dooley's damages as defined in these Instructions to be:

Wage loss in the amount of \$ _____ (state the amount).

Other damage in the amount of \$ _____ (state the amount).

For total damages in the amount of \$ _____ (state the amount).

Foreperson

Dated: _____

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* CIV 04-4215

EQUAL EMPLOYMENT OPPORTUNITY *
COMMISSION, *

Plaintiff, *

RICHELLE DOOLEY and *
ANGIE GACKIE, *

VERDICT FORM
(ANGIE GACKE)

Plaintiffs - Intervenors, *

-vs- *

SIOUXLAND ORAL MAXILLOFACIAL *
SURGERY ASSOCIATES, L.L.P., *

Defendant. *

Complete this form by answering the following questions.

Was Plaintiff Angie Gacke's pregnancy a motivating factor in Defendant's decision to not hire Plaintiff Angie Gacke ?

Yes _____ or No _____ (Check one or the other.)

If you have answered yes to the above question, answer the next question. If you have answered no to the above question, sign and date the verdict form and disregard the following sections.

Has it been proved by the greater weight of the evidence that the Defendant would have not hired Plaintiff Angie Gacke regardless of her pregnancy?

Yes _____ or No _____ (Check one or the other.)

If you have answered yes to the above question sign and date the verdict form. If you have answered no to the above question, proceed to the damages portion of this form.

We find plaintiff Angie Gacke's damages as defined in these Instructions to be:

Wage loss in the amount of \$_____ (state the amount).

Other damage in the amount of \$_____ (state the amount).

For total damages in the amount of \$_____ (state the amount).

Foreperson

Dated: _____

Eighth Circuit Manual of Model Civil Jury Instructions, No. 5.28 (modified)(2007).