

FILED

OCT 03 2013


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ERIK JORGENSEN,)	CIV. 10-5021-JLV
)	
Plaintiff,)	
)	
vs.)	FINAL
)	INSTRUCTIONS
)	TO THE JURY
DAVE SCHNEIDER, individually and)	
as Mayor, and the CITY OF BELLE)	
FOURCHE, SOUTH DAKOTA,)	
)	
Defendants.)	

TABLE OF CONTENTS

FINAL INSTRUCTIONS

NO. 1 - INTRODUCTION	2
NO. 2 - MATTERS TO BE DISREGARDED	4
NO. 3 - DEFINITION OF EVIDENCE	5
NO. 4 - USE OF NOTES	7
NO. 5 - OBJECTIONS	8
NO. 6 - CREDIBILITY OF WITNESSES	9
NO. 7 - IMPEACHMENT	10
NO. 8 - EXPERT WITNESSES	11
NO. 9 - EQUALS BEFORE THE LAW	12
NO. 10 - BURDEN OF PROOF	13
NO. 11 - PLAINTIFF'S CLAIMS	14
NO. 12 - FIRST AMENDMENT RETALIATION CLAIM	15
NO. 13 - WRONGFUL DISCHARGE CLAIM	17
NO. 14 - MOTIVATING FACTOR DEFINED	19
NO. 15 - AUTHORITY OF THE MAYOR	20
NO. 16 - ELEMENTS OF DAMAGES	21
NO. 17 - FUTURE DAMAGES	22
NO. 18 - MITIGATION OF DAMAGES	23
NO. 19 - DUTY AS JURORS	24
NO. 20 - DUTY DURING DELIBERATIONS	26

VERDICT FORM

FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I will take a few minutes to give you the instructions that are to guide and govern you in arriving at a verdict. These final instructions will be available to you in the jury room. The instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed. The order in which the instructions are given has no significance as to their relative importance.

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 3. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of both parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict

based solely on the evidence, your common sense, and the law as I give it to you. Your verdict must not be based on speculation, guess, or conjecture.

Finally, do not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

FINAL INSTRUCTION NO. 2 - MATTERS TO BE DISREGARDED

It is your duty as jurors to determine the facts, and you must do this from the evidence produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which I ordered stricken. Such things you must put out of your mind. You must not consider anything you may have heard or read about this case other than the evidence produced here in open court.

FINAL INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated, that is, formally agreed to by the parties. Certain things are not evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Exhibits that are identified by a party but not offered or received in evidence are not evidence.
3. Objections and rulings on 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.
4. Testimony I struck from the record or told you to disregard is not evidence and must not be considered.
5. Anything you see or hear about this case outside the courtroom is not evidence.

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in

court, and you should consider this testimony together with all other evidence received.

The fact that an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” 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.

Finally, the weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of the evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 4 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict. Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 5 - OBJECTIONS

The lawyers made objections during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 6 - CREDIBILITY OF WITNESSES

You are the sole judges of all questions of fact and the credibility of witnesses. 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 says, 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 see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the 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 people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

FINAL INSTRUCTION NO. 7 - IMPEACHMENT

In the previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness may 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 trial 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 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. 8 - EXPERT WITNESSES

You may have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 9 - EQUALS BEFORE THE LAW

In this case, the defendant City of Belle Fourche is a municipal corporation. A municipal corporation is entitled to the same fair trial as a private individual. No inference or presumption may be drawn against any party that would be improper in a case between individuals. You should consider and decide this case with the same fairness and consideration as though it were a case between individuals. The parties in this case stand equal before the law and are entitled to a fair and impartial consideration of the entire case.

FINAL INSTRUCTION NO. 10 - BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing force of the evidence. Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you something is more likely true than not true. In the event the evidence is evenly balanced so that you are unable to say 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 convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 11 - PLAINTIFF'S CLAIMS

In this action Mr. Jorgensen claims Mr. Schneider, as mayor of the City of Belle Fourche, and the City of Belle Fourche are liable on two separate claims:

1. First Amendment retaliation; and
2. Wrongful discharge.

The defendants have stipulated and agreed that if Mr. Schneider is liable to Mr. Jorgensen under either or both of these claims, then the City of Belle Fourche is also liable.

Mr. Jorgensen has the burden of proving each of these two claims by the greater convincing weight of the evidence.

Plaintiff's claims of intentional infliction of emotional distress and punitive damages are no longer a part of this case, so you will not decide those claims. Why those claims are not part of the case cannot concern you. You should decide the case based solely on the evidence on the remaining claims before you.

FINAL INSTRUCTION NO. 12 -

FIRST AMENDMENT RETALIATION CLAIM

Mr. Jorgensen's testimony at the September 21, 2009, Nicole Shiffrar grievance hearing was a protected activity under the First Amendment of the United States Constitution.

To establish a First Amendment retaliation claim against Mr. Schneider, as the mayor of the City of Belle Fourche, and the City of Belle Fourche, Mr. Jorgensen must prove by the greater weight of the evidence each of the following elements:

First, whether Mr. Schneider discharged Mr. Jorgensen;

The defendants have stipulated and agreed Mr. Schneider discharged Mr. Jorgensen.

and

Second, whether Mr. Jorgensen's testimony at the September 21, 2009, Nicole Shiffrar grievance hearing was a motivating factor in Mr. Schneider's decision to discharge Mr. Jorgensen;

The term "motivating factor" is defined in Final Instruction No. 14.

You must find in favor of the defendants on Mr. Jorgensen's First Amendment retaliation claim if you find by the greater convincing weight of the evidence Mr. Schneider would have taken the same action absent the testimony. In other words, your verdict must be for the defendants if they have

proved Mr. Schneider would have discharged Mr. Jorgensen even if he had not testified at the Shiffrar grievance hearing.

You may not return a verdict for Mr. Jorgensen just because you may disagree with Mr. Schneider's decision or believe the decision to be harsh or unreasonable.

The defendants have stipulated and agreed if Mr. Schneider is liable under Mr. Jorgensen's First Amendment retaliation claim, the City of Belle Fourche is also liable.

**FINAL INSTRUCTION NO. 13 -
WRONGFUL DISCHARGE CLAIM**

Mr. Jorgensen participated in the City of Belle Fourche's grievance process when he testified at Ms. Shiffrar's grievance hearing on September 21, 2009, and at his own grievance hearing on November 21, 2009. State law prohibits an employer from discharging an employee because of the employee's participation in the grievance process.

To establish a wrongful discharge claim against Mr. Schneider, as mayor of the City of Belle Fourche, and the City of Belle Fourche, Mr. Jorgensen must prove by the greater weight of the evidence each of the following elements:

First, that Mr. Schneider discharged Mr. Jorgensen;

The defendants have stipulated and agreed Mr. Schneider discharged Mr. Jorgensen.

and

Second, Mr. Jorgensen's participation in the grievance process was a motivating factor for his discharge.

The term "motivating factor" is defined in Final Instruction No. 14.

You must find in favor of the defendants on Mr. Jorgensen's wrongful discharge claim if you find by the greater convincing weight of the evidence Mr. Schneider would have taken the same action absent the testimony. In other words, your verdict must be for the defendants if they have proved Mr.

Schneider would have discharged Mr. Jorgensen even if he had not testified at the Shiffrar grievance hearing or his own grievance hearing.

You may not return a verdict for Mr. Jorgensen just because you may disagree with Mr. Schneider's decision or believe the decision to be harsh or unreasonable.

The defendants have stipulated and agreed if Mr. Schneider is liable under Mr. Jorgensen's wrongful discharge claim, the City of Belle Fourche is also liable.

FINAL INSTRUCTION NO. 14 - MOTIVATING FACTOR DEFINED

The term “motivating factor” means a reason, alone or with other reasons, on which Mr. Schneider relied or which moved Mr. Schneider to a decision to discharge Mr. Jorgensen. However, Mr. Jorgensen’s testimony at a grievance hearing need not have been the only reason for Mr. Schneider’s decision to discharge Mr. Jorgensen.

In determining Mr. Schneider’s state of mind when making his decision to discharge Mr. Jorgensen, you may consider evidence, including indirect or second-hand information which Mr. Schneider obtained to establish his understanding of the circumstances existing at the time of Mr. Jorgensen’s discharge. It is not necessary that the information be true, but only that Mr. Schneider honestly or reasonably believed the information to be true.

You may find Mr. Jorgensen’s testimony at a grievance hearing played a part in Mr. Schneider’s decision if you believe Mr. Schneider’s reasons for his decision were not the real reasons, but were a pretext to hide retaliation. To establish pretext, Mr. Jorgensen must prove by the greater convincing weight of the evidence that a retaliatory reason more likely motivated Mr. Schneider, or that his explanations for his decision were unworthy of belief. Mr. Jorgensen may establish this pretext by demonstrating weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Mr. Schneider’s explanation of reasons for his discharge of Mr. Jorgensen.

FINAL INSTRUCTION NO. 15 - AUTHORITY OF THE MAYOR

A South Dakota statute declares a mayor of a municipality has the power to discharge a police officer appointed by him whenever the mayor is of the opinion that the interests of the city demand removal of the officer. The mayor must report the reasons for the removal to the city council at its next regular meeting.

Under this statute a mayor may not discharge a police officer in retaliation for the police officer exercising his First Amendment rights or his right to participate in a grievance hearing.

You are instructed that Mr. Jorgensen was appointed by Mayor Schneider as a police officer with the Belle Fourche Police Department.

FINAL INSTRUCTION NO. 16 - ELEMENTS OF DAMAGES

If you find in favor of Mr. Jorgensen on the question of liability, you must award Mr. Jorgensen such sum as you find will fairly and justly compensate him for any actual damages you find he sustained as a direct result of defendants' conduct.

Damages include:

1. Wages and benefits you find Mr. Jorgensen would have earned in his employment with the City of Belle Fourche had he not been discharged on December 7, 2009, through the date of your verdict, minus the amount of earnings and benefits from other employment received by Mr. Jorgensen during that time.
2. The loss of wages and benefits reasonably certain to occur in the future;
3. Embarrassment, humiliation, emotional distress and mental anguish suffered by Mr. Jorgensen.

Whether any of these elements of damage were proven by the evidence is for you to decide. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture and you must not award any damages based on sympathy.

FINAL INSTRUCTION NO. 17 - FUTURE DAMAGES

The law allows damages for loss reasonably certain to occur in the future. By their nature, all future damages are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future loss is established, the law does not require certainty as to the amount of damages. Once the existence of damages is established, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that future damages cannot be measured with exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

FINAL INSTRUCTION NO. 18 - MITIGATION OF DAMAGES

Mr. Jorgensen had a duty under the law to “mitigate” his damages, that is, to exercise reasonable diligence under the circumstances to minimize his damages. If you find Mr. Jorgensen failed to seek out or take advantage of an employment opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have earned. The defendants bear the burden of proving by the greater convincing weight of the evidence that Mr. Jorgensen failed to mitigate his damages.

FINAL INSTRUCTION NO. 19 - DUTY AS JURORS

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of reaching a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

**FINAL INSTRUCTION NO. 20 -
DUTY DURING DELIBERATIONS**

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

Second, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, 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.

Third, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict must be unanimous.** Nothing I said or did was intended to suggest what your verdict should be—that is entirely for you to decide.

The verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. When you have unanimously agreed on the verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict.

You will then return to the courtroom where your verdict will be received and announced.

Dated October 8, 2013.

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'Jeffrey L. Viken', is written over a horizontal line.

JEFFREY L. VIKEN
CHIEF JUDGE