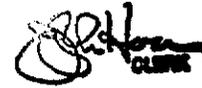


FILED

FEB 27 2009



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BRENDON S. ALBERS and
CHRISTOPHER ESTES,

Plaintiffs,

vs.

TRI-STATE IMPLEMENT, INC.;;
STEVE MELLEGARD, individually;
and STAN MELLEGARD,
individually,

Defendants.

CIV. 06-4242-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

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 and during the 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 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.

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 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 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 – CORPORATION ACTS THROUGH ITS
EMPLOYEES**

Tri-State Implement, Inc. is a corporation. A corporation only acts 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 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 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 – ALBERS’ RACE DISCRIMINATION CLAIM

Albers brings a claim under the Federal Civil Rights statute that prohibits discrimination against an employee because of the person’s race. Specifically, Albers claims that he was denied health insurance benefits because of his race before he was promoted to head painter.

Your verdict must be for Albers and against Tri-State on Albers’ race discrimination claim if all of the following elements have been proved by the greater weight of the evidence:

- First, Tri-State denied Albers health insurance benefits; and**
- Second, Albers’ race was a motivating factor in Tri-State’s decision.**

Albers’ race was a “motivating factor” if it played a part in Tri-State’s decision to deny him health insurance benefits. However, Albers’ race need not have been the only reason for Tri-State’s decision to deny health insurance benefits.

If any of the above elements have not been proved by the greater weight of the evidence, your verdict must be for Tri-State and you need not proceed further in considering this claim. In addition, your verdict must be for Tri-State if it has been proved by the greater weight of the evidence that Tri-State would have decided to deny Albers health insurance benefits regardless of his race. You may find that Albers’ race was a motivating factor in Tri-State’s decision if it has been proved by the greater weight of the evidence that Tri-State’s stated reasons for its decision were not the true reasons but are a pretext to hide race discrimination.

FINAL INSTRUCTION NO. 7 – ESTES’ RACE DISCRIMINATION CLAIM

Estes also brings a claim under the Federal Civil Rights statute that prohibits discrimination against an employee because of the person’s race. Specifically, Estes claims that he was denied health insurance benefits because of his race during the entire period of his employment at Tri-State.

Your verdict must be for Estes and against Tri-State on Estes’ race discrimination claim if all of the following elements have been proved by the greater weight of the evidence:

- First, Tri-State denied Estes health insurance benefits; and***
- Second, Estes’ race was a motivating factor in Tri-State’s decision.***

Estes’ race was a “motivating factor” if it played a part in Tri-State’s decision to deny him health insurance benefits. However, Estes’ race need not have been the only reason for Tri-State’s decision to deny health insurance benefits.

If any of the above elements have not been proved by the greater weight of the evidence, your verdict must be for Tri-State and you need not proceed further in considering this claim. In addition, your verdict must be for Tri-State if it has been proved by the greater weight of the evidence that Tri-State would have decided to deny Estes health insurance benefits regardless of his race. You may find that Estes’ race was a motivating factor in Tri-State’s decision if it has been proved by the greater weight of the evidence that Tri-State’s stated reasons for its decision were not the true reasons but are a pretext to hide race discrimination.

FINAL INSTRUCTION NO. 8 – BUSINESS JUDGMENT

You may not return a verdict for either Albers or Estes on their race discrimination claims just because you might disagree with Tri-State's decision or believe it to be harsh or unreasonable.

FINAL INSTRUCTION NO. 9 – RACIAL COMMENTS

The racial comments alleged to have been made by Steve Mellegard and Stan Mellegard, standing alone, do not necessarily prove that race was a motivating factor in Tri-State's decision to deny health insurance benefits. Rather, you may consider them only to the extent you believe the alleged racial comments constitute circumstantial evidence that Tri-State discriminated against Estes and Albers on the basis of race in denying them health insurance benefits.

FINAL INSTRUCTION NO. 10 – RACE DISCRIMINATION DAMAGES

I will now instruct you on how to determine the damages, if any, each plaintiff is entitled to on his race discrimination claim. You may only award damages to Albers if you find in his favor under Final Instruction Number 6. Likewise, you may only award damages to Estes if you find in his favor under Final Instruction Number 7.

If you find in favor of either plaintiff on his race discrimination claim, then you must award him such sum as you find by the greater weight of the evidence will fairly and justly compensate him for damages you find he sustained as a direct result of Tri-State's decision to deny him health insurance benefits. Damages may include the amount of health insurance premiums Tri-State would have paid had the plaintiff been provided with health insurance benefits, as well as mental anguish, damage to reputation, loss of enjoyment of life, and emotional pain and suffering.

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

Whether any of these damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 11 – NOMINAL DAMAGES

If you find in favor of either plaintiff on his race discrimination claim, but you do not find that his damages have monetary value, then you must return a verdict for him in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 12 – PUNITIVE DAMAGES

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of either plaintiff on his race discrimination claim, and if it has been proved that Tri-State's decision to deny him health insurance benefits was motivated by evil motive or intent, or that Tri-State was recklessly indifferent to the plaintiff's rights, then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing Tri-State for engaging in such misconduct and deterring Tri-State and others from engaging in such misconduct in the future.

In determining whether to award punitive damages to either plaintiff, you should consider whether Tri-State's conduct was reprehensible. In this regard, you may consider whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether Tri-State's conduct that harmed the plaintiff also caused harm or posed a risk of harm to others; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff.

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

1. how much harm Tri-State's wrongful conduct caused the plaintiff;
and
2. what amount of punitive damages, in addition to the other damages already awarded, is needed, considering Tri-State's financial condition, to punish Tri-State for its wrongful conduct toward the plaintiff and to deter Tri-State and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.

FINAL INSTRUCTION NO. 13 – ALBERS’ FAIR LABOR STANDARDS ACT CLAIM

Albers brings a claim under the Fair Labor Standards Act, a federal law that provides for the payment of time-and-a-half overtime pay. Albers claims that Tri-State did not pay him legally required overtime pay. You are instructed that Albers was not an exempt employee. Your verdict must be for Albers, and against Tri-State, on Albers’ Fair Labor Standards Act claim if all of the following elements have been proved by the greater weight of the evidence:

First and Second, Albers was employed by Tri-State during the time period involved, and Albers was an employee employed by an enterprise engaged in commerce

The parties have stipulated, or agreed, to the first and second elements — that Albers was employed by Tri-State and that Albers was an employee employed by an enterprise engaged in commerce — and you should consider these elements as established.

Third, Tri-State failed to pay Albers overtime pay as required by the Fair Labor Standards Act.

The Fair Labor Standards Act requires an employer to pay its employees at a rate of at least one and one-half (1 ½) times their regular rate for time worked in any one work week over forty (40) hours. This is commonly known as time-and-a-half pay for “overtime” work.

If you find that the third element has not been proved by the greater weight of the evidence, then you must find in favor of Tri-State and against Albers and you need not further consider this claim. If you find that the third element has been proved by the greater weight of the evidence, you must find in favor of Albers and determine whether Tri-State’s violation was willful, as explained in Final Instruction Number 14, and determine the damages Albers suffered, as explained in Final Instruction Number 16.

FINAL INSTRUCTION NO. 14 – WILLFUL VIOLATION

If you find in favor of Albers under Final Instruction Number 13, then you must decide whether the conduct of Tri-State was “willful.” You must find Tri-State’s conduct was willful if you find by the greater weight of the evidence that, when Tri-State failed to pay Albers overtime wages, Tri-State knew the failure to pay overtime wages was in violation of the Fair Labor Standards Act, or acted with reckless disregard of that law.

FINAL INSTRUCTION NO. 15 – ESTES’ FAIR LABOR STANDARDS ACT CLAIM

Estes also brings a claim under the Fair Labor Standards Act, a federal law that provides for the payment of time-and-a-half overtime pay. Estes claims that Tri-State did not pay him legally required overtime pay. You are instructed that Estes was not an exempt employee. Your verdict must be for Estes, and against Tri-State, on Estes’ Fair Labor Standards Act claim if all of the following elements have been proved by the greater weight of the evidence:

First and Second, Estes was employed by Tri-State during the time period involved, and Estes was an employee employed by an enterprise engaged in commerce

The parties have stipulated, or agreed, to the first and second elements — that Estes was employed by Tri-State and that Estes was an employee employed by an enterprise engaged in commerce — and you should consider these elements as established.

Third, Tri-State failed to pay Estes overtime pay as required by the Fair Labor Standards Act.

The Fair Labor Standards Act requires an employer to pay its employees at a rate of at least one and one-half (1 ½) times their regular rate for time worked in any one work week over forty (40) hours. This is commonly known as time-and-a-half pay for “overtime” work.

If you find that the third element has not been proved by the greater weight of the evidence, then you must find in favor of Tri-State and against Estes and you need not further consider this claim. If you find that the third element has been proved by the greater weight of the evidence, you must find in favor of Estes and determine the damages Estes suffered, as explained in Final Instruction Number 16. It is not relevant whether Tri-State’s violation was willful for the purposes of Estes’ Fair Labor Standards Act claim.

FINAL INSTRUCTION NO. 16 – FAIR LABOR STANDARDS ACT DAMAGES

I will now instruct you on how to determine the damages, if any, each plaintiff is entitled to on his Fair Labor Standards Act claim. You may only award damages to Albers if you find in his favor under Final Instruction Number 13. Likewise, you may only award damages to Estes if you find in his favor under Final Instruction Number 15.

The measure of damages for each plaintiff under the Fair Labor Standards Act is the difference between what he should have been paid under the Fair Labor Standards Act, as set forth in this instruction, and the amount that he was actually paid.

The Fair Labor Standards Act requires an employer to pay its employees at a rate of at least one and one-half ($1 \frac{1}{2}$) times their regular rate for time worked in one work week over forty (40) hours. The regular rate for a week is determined by dividing the first forty (40) hours worked into the total wages paid for those forty (40) hours. The overtime rate, then, is one and one-half ($1 \frac{1}{2}$) times that rate.

The plaintiff has the burden to show the amount and extent of the work for which he was improperly compensated. Tri-State then has the burden to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the plaintiff's evidence. If Tri-State fails to produce such evidence, you may then award damages to the plaintiff, even though the result may be only approximate.

FINAL INSTRUCTION NO. 17 – WAIVER

An employer's obligation to pay overtime compensation is statutory and cannot be waived or substituted by an agreement by an employee to work for less.

FINAL INSTRUCTION NO. 18 – CONVERSION OF MONEY

Tri-State alleges that Estes converted money by purchasing gasoline on Tri-State's credit account without authorization. Conversion is the unwarranted interference with or control over the property of another, which deprives its owner of the property. A conversion occurs whenever there is a serious interference with a person's rights in that person's property. The act constituting conversion must be an intentional act, but it does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.

Your verdict must be for Tri-State and against Estes, on Tri-State's claim of conversion of money, if Tri-State has proved all of the following elements by the greater weight of the evidence:

First, Tri-State owned or had a possessory interest in the money used to purchase the gasoline;

Second, Tri-State's ownership or possessory interest in the money was greater than that of Estes;

Third, Estes exercised control over or seriously interfered with Tri-State's interest in the money; and

Fourth, such conduct deprived Tri-State of its interest in the money.

Your verdict must be for Estes and against Tri-State, on Tri-State's claim of conversion of money, if Tri-State did not prove any of the elements of conversion by the greater weight of the evidence.

FINAL INSTRUCTION NO. 19 – CONVERSION DAMAGES

If you find in favor of Tri-State under Final Instruction Number 18, you must determine the amount of money that will reasonably and fairly compensate Tri-State for the fair market value of the property immediately before Estes took possession of it and for the time and money properly expended by Tri-State in pursuit of the property converted, if such loss was caused by Estes' conduct, whether such loss or harm could have been anticipated or not.

Whether any of these damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 20 – CONVERSION OF TOOLS AND SUPPLIES

Tri-State alleges that Albers and Estes converted tools and supplies from Tri-State Implement. Conversion is the unwarranted interference with or control over the property of another, which deprives its owner of the property. A conversion occurs whenever there is a serious interference with a person's rights in that person's property. The act constituting conversion must be an intentional act, but it does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.

Your verdict must be for Tri-State and against Albers and Estes, on Tri-State's claim of conversion of tools and supplies, if Tri-State has proved all of the following elements by the greater weight of the evidence:

First, Tri-State owned or had a possessory interest in the tools and supplies;

Second, Tri-State's ownership or possessory interest in the tools and supplies was greater than that of Albers and Estes;

Third, Albers and Estes exercised control over or seriously interfered with Tri-State's interest in the tools and supplies; and

Fourth, such conduct deprived Tri-State of its interest in the tools and supplies.

Your verdict must be for Albers and Estes and against Tri-State, on Tri-State's claim of conversion of tools and supplies, if Tri-State did not prove any of the elements of conversion by the greater weight of the evidence.

FINAL INSTRUCTION NO. 21 – CONVERSION DAMAGES

If you find in favor of Tri-State under Final Instruction Number 20, you must determine the amount of money that will reasonably and fairly compensate Tri-State for the fair market value of the property immediately before Albers and Estes took possession of it and for the time and money properly expended by Tri-State in pursuit of the property converted, if such loss was caused by Albers and Estes' conduct, whether such loss or harm could have been anticipated or not.

Whether any of these damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 22 – DUTIES DURING DELIBERATIONS

In conducting 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 an 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 February 27, 2009.



KAREN E. SCHREIER
CHIEF JUDGE