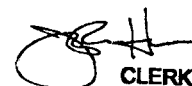


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CLERK

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

LINDA L. BISHOP,

Plaintiff,

CIV. 06-5066-KES

vs.

**FINAL
INSTRUCTIONS
TO THE JURY**

PENNINGTON COUNTY, a political
subdivision of the State of South
Dakota,

Defendant.

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FINAL INSTRUCTION

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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 – LIABILITY OF EMPLOYER FOR ACTIONS OF
SUPERVISORY EMPLOYEE**

For the purposes of this case, you are instructed that the actions of a Pennington County employee who has the power to hire, fire, demote, transfer, suspend, or investigate are deemed to be the actions of Pennington County, when that employee has used that authority to retaliate against another employee who has complained of sexual harassment.

FINAL INSTRUCTION NO. 5 – RETALIATION

Your verdict must be for Bishop and against Pennington County on Bishop's retaliation claim if all the following elements have been proved by the greater weight of the evidence:

First, Bishop complained to Pennington County that she was being harassed on the basis of gender;

The parties have stipulated that Bishop complained to Pennington County that she was being harassed on the basis of gender.

Second, Pennington County discharged Bishop; and

The parties have stipulated that Pennington County did discharge Bishop.

Third, Bishop's complaint of gender harassment was a determinative factor in Pennington County's decision to discharge Bishop.

Bishop's complaint of gender harassment was a determinative factor only if Pennington County would not have discharged Bishop but for Bishop's complaint. It does not require that Bishop's complaint of gender harassment was the only reason for the decision made by Pennington County.

If the third element has not been proved by the greater weight of the evidence, your verdict must be for Pennington County and you need not proceed further in considering this claim. In addition, your verdict must be for Pennington County if it has been proved by the greater weight of the evidence that Pennington County would have discharged Bishop even if Bishop had not

complained about gender harassment. You may find that Bishop's complaint of gender harassment was a determinative factor in Pennington County's decision if it has been proved by the greater weight of the evidence that Pennington County's stated reasons for its decision were not the true reasons but are a pretext to hide retaliation.

FINAL INSTRUCTION NO. 6 – DAMAGES

If you find in favor of Bishop on her claim of retaliation, then you must award Bishop such sum as you find by the greater weight of the evidence will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of Pennington County’s decision to discharge Bishop. Bishop’s claim for damages includes two distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages and fringe benefits Bishop would have earned in her employment with Pennington County if she had not been discharged on November 1, 2004 through the date of your verdict, *minus* the amount of earnings and benefits the plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by the plaintiff, such as mental anguish, humiliation, and emotional pain and suffering. 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 Bishop 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 Bishop 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.

FINAL INSTRUCTION NO. 7 – NOMINAL DAMAGES

If you find in favor of Bishop on her claim of retaliation, but you find that Bishop's damages have no monetary value, then you must return a verdict for Bishop in the amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 8 – 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 Bishop, you must indicate on the verdict form whether you find Bishop 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 Bishop is entitled to recover.

FINAL INSTRUCTION NO. 9 – 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.

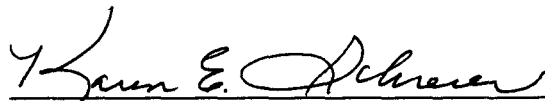
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in

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 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 bailiff that you are ready to return to the courtroom.

Dated November 8, 2008.



KAREN E. SCHREIER
CHIEF JUDGE