

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

KRISTINE BALTZER,

Plaintiff,

-vs-

CHRIS CAM CORP,
d/b/a HEARTLAND PAPER COMPANY,

Defendant.

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CIV. 07-4194

JURY INSTRUCTIONS

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INSTRUCTION NO. 1

EXPLANATORY

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 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. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

JUDGE'S OPINION

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
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 said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a 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. 4

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 preponderance of the evidence. To prove something by the preponderance 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 preponderance 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. 5

PREPONDERANCE OF THE EVIDENCE

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

A preponderance 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 convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In this action, the plaintiff claims that defendant Heartland Paper Company is liable on two separate theories: (1) race discrimination, and (2) retaliation. Plaintiff has the burden of proving one or both of these claims by a preponderance of the evidence.

In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing on that issue, regardless of who produced it. The preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

INSTRUCTION NO. 6

IMPARTIAL TREATMENT

The fact that the Defendant Heartland Paper Company is a corporation is immaterial. In the eyes of the law, it is an individual party to the lawsuit and all parties are entitled to the same impartial treatment.

INSTRUCTION NO. 7

COMMON EXPERIENCES

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

INSTRUCTION NO. 8

TITLE VII - DISPARATE TREATMENT - ESSENTIAL ELEMENTS

Your verdict must be for Plaintiff Kristine Baltzer and against Defendant Heartland Paper Company on plaintiff's race discrimination claim if all of the following elements have been proved by the preponderance of the evidence:

First, Defendant Heartland Paper Company disciplined or terminated Plaintiff; and

Second, Plaintiff's race was a motivating factor in Defendant's decision.

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

INSTRUCTION NO. 9

**DISPARATE TREATMENT -
"SAME DECISION" INSTRUCTION**

If you find in favor of plaintiff under Instruction 8, then you must answer the following question in the verdict form: Has it been proved by the preponderance of the evidence that defendant would have disciplined and/or discharged plaintiff regardless of her race?

INSTRUCTION NO. 10

PRETEXT INSTRUCTION

You may find that plaintiff's race was a motivating factor in defendant's conduct if it has been proved by the preponderance of the evidence that defendant's stated reason for its decision is not the true reason but is a pretext to hide race discrimination.

INSTRUCTION NO. 11

DEFINITION OF MOTIVATING FACTOR

As used in these instructions, plaintiff's race was a "motivating factor" if plaintiff's race played a role in the defendant's decision to discipline and/or discharge plaintiff. However, plaintiff's race need not have been the only reason for defendant's decision to discipline and/or discharge plaintiff.

INSTRUCTION NO. 12

RETALIATION CLAIM

The Plaintiff alleges that the Defendant Heartland Paper Company retaliated, that is took revenge, against the Plaintiff because the Plaintiff had previously taken steps seeking to enforce the Plaintiff's lawful rights under Title VII of the Civil Rights Act.

You are instructed that those laws prohibiting discrimination in the workplace also prohibit any retaliatory action being taken against an employee by an employer because the employee has asserted rights or made complaints under those laws. So, even if a complaint of discrimination against an employer is later found to be invalid or without merit, the employee cannot be penalized in retaliation for having made such a complaint if you find that the employee made the complaint as a means of seeking to enforce what the employee believed in good faith to be her lawful rights. To establish "good faith," however, it is insufficient for the plaintiff to merely allege that her belief in this regard was honest and bona fide; the allegations and the record must also establish that the belief, though perhaps mistaken, was objectively reasonable.

In order to establish the claim of unlawful retaliation, therefore, the plaintiff must prove by a preponderance of the evidence:

First: that she engaged in statutorily protected activity, that is, that she in good faith asserted claims or complaints of discrimination prohibited by federal law;

Second: that a reasonable employee would have found the employer's retaliatory action materially adverse;

Third: the materially adverse action was causally linked to the protected conduct;

Fourth: that the plaintiff suffered damages as a proximate or legal result of such adverse employment action.

INSTRUCTION NO. 12 continued

For an adverse employment action to be “causally related” to statutorily protected activities it must be shown that, but for the protected activity, the adverse employment action would not have occurred. Or, stated another way, it must be shown that the protected activity by the plaintiff was a substantial, motivating cause that made a difference in the defendant’s decision.

You should be mindful, however, that the law applicable to this case requires only that an employer not retaliate against an employee because the employee has engaged in statutorily protected activity. So far as you are concerned in this case, an employer may discipline, discharge, or otherwise adversely affect an employee for any other reason, good, bad, or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

INSTRUCTION NO. 13

CAUSAL CONNECTION

The close proximity in timing between Plaintiff's complaint of racial discrimination and Defendant's adverse employment action may be considered along with other circumstantial evidence in support of her claim of retaliation.

INSTRUCTION NO. 14

SAME OR SIMILARLY SITUATED

Certain circumstances may exist which might give rise to an inference of discrimination through different factors. Plaintiff has alleged that other employees who were not Native American or who did not complain to management of alleged discriminatory treatment, and who engaged in the same work performance were treated better. Plaintiff must prove that those other employees were “similarly situated.” The burden for establishing that other employees were “similarly situated” is rigorous. Employees will be “similarly situated” only when they dealt with the same supervisor, were subject to the same standards, and engaged in the same conduct, without any mitigating or distinguishing circumstances.

INSTRUCTION NO. 15

TITLE VII - - ACTUAL DAMAGES

If you find in favor of plaintiff on her race discrimination claim under Instruction 8 and if you answer "no" in response to Instruction 9, and/or if you find in favor of the plaintiff on her retaliation claim under Instruction 12, then you must award plaintiff such sum as you find by the preponderance of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of defendant's decision to discipline and/or discharge plaintiff. Plaintiff's claim for 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 would have earned in her employment with defendant if she had not been discharged in May 2007, through the date of your verdict, *minus* the amount of earnings and benefits that plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by plaintiff, such as future emotional pain, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

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 plaintiff 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 preponderance of the evidence that plaintiff 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. 16

TITLE VII 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 the plaintiff under Instruction 12, then you must decide whether the defendant acted with malice or reckless indifference to the plaintiff's right not to be retaliated against based on her complaint of race discrimination. The defendant acted with malice or reckless indifference if it has been proved by the greater weight of the evidence that the management personnel at Heartland Paper Company who terminated Kristine Baltzer knew that the termination was in violation of the law prohibiting retaliation and acted with reckless disregard of that law. However, you may not award punitive damages if it has been proved by the greater weight of the evidence that the defendant made a good-faith effort to comply with the law prohibiting retaliation.

If you find that the defendant acted with malice or reckless indifference to Kristine Baltzer's rights and did not make a good-faith effort to comply with the law, 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. The purposes of punitive damages are only to punish the defendant for engaging in such misconduct and to deter the defendant and others from engaging in such misconduct in the future.

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

1. How reprehensible the defendant's conduct was. 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 others were harmed

INSTRUCTION NO. 16, continued

by the same conduct of the defendant that harmed the plaintiff; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff;

2. How much harm actually resulted to the plaintiff from the defendant's wrongful conduct;

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for its wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future;

4. In order to achieve the purposes of punitive damages set forth above, the amount of any punitive damages award should bear a reasonable relationship to the amount of compensatory damages you awarded, if any;

5. The amount of possible harm the defendant's conduct could cause the plaintiff in the future;

6. In order to achieve the purposes of punitive damages set forth above, the amount of any punitive damages award should bear a reasonable relationship to the harm likely to be caused in a similar situation by conduct similar to the defendant's wrongful conduct.

You may assess punitive damages against the Defendant or you may refuse to impose punitive damages.

INSTRUCTION NO. 17

NOMINAL DAMAGES

If you find in favor of the plaintiff under Instruction No. 8 (Elements) and if you answer “no” in response to Instruction No. 9, (Same Decision) and/or if you find in favor of the Plaintiff under Instruction No. 12, (Retaliation) but you find Plaintiff’s damages have no monetary value, then you must return a verdict for Plaintiff in a nominal amount such as One Dollar (\$1.00).

INSTRUCTION NO. 18

DAMAGES

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from the preponderance of the evidence in accordance with the other instructions.

INSTRUCTION NO. 19

ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM

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.

INSTRUCTION NO. 19 continued

Fourth, your verdict must be based solely on the evidence and the law which I have given 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. If more than one form was furnished, you will bring the unused forms with you.