

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 have been stipulated – that is, formally agreed to by the parties, and any facts that have been judicially noticed – that is, facts which I say you must accept as true..

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

1. Statements, arguments, questions and comments 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 are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the information might have been.
4. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and must not be considered.
5. Anything you see or hear about this case outside the courtroom is not evidence.

Furthermore, 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

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, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

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.

United States v. Rhodes, 631 F.2d 43, 46 n.3 (5th Cir. 1980).

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 a witness's intelligence, the opportunity a witness had to see or hear things testified about, the witness's memory, any motives a 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

Your verdict depends on whether you find certain facts have been proved by the greater weight of the evidence. In order to find that a fact has been proved by the greater weight of the evidence you must find 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.

You have probably heard of the phrase "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.

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

INSTRUCTION NO. 10

In this case, the Plaintiff, Margaret Benson, M.D., brings a gender discrimination claim of constructive discharge against Defendant Sanford Health under Title VII of the Civil Rights Act of 1964, and a state law cause of action for negligent infliction of emotional distress against this Defendant. The Defendant denies those allegations and asserts that Plaintiff failed to mitigate her alleged damages.

It will be your duty to decide from the evidence whether the Plaintiff is entitled to a verdict against the Defendant.

INSTRUCTION NO. 11

Plaintiff has brought a constructive discharge claim alleging gender discrimination by the Defendant under Title VII of the Civil Rights Act of 1964, as amended, commonly referred to as "Title VII." Title VII provides, in pertinent part:

It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

INSTRUCTION NO. 12

Defendant 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.

Kolstad v. American Dental Ass'n, 527 U.S. 526, 541-544 (1999).

INSTRUCTION NO. 13

Your verdict must be for the Plaintiff Dr. Benson and against Defendant Sanford Health on the Plaintiff's constructive discharge claim if all the following elements have been proved by the greater weight of the evidence :

First, the Defendant made the Plaintiff's working conditions intolerable, and

Second, the Plaintiff's gender was a motivating factor in the Defendant's actions, and

Third, the Defendant acted with the intent of forcing the Plaintiff to quit or the Plaintiff's resignation was a reasonably foreseeable result of the Defendant's actions.

If any of the above elements has not been proved, your verdict must be for the Defendant.

INSTRUCTION NO. 14

As used in these instructions, the Plaintiff's gender was a "motivating factor," if the Plaintiff's gender played a part or a role in the Defendant's conduct which Plaintiff claims led to her constructive discharge. However, the Plaintiff's gender need not have been the only reason for the Defendant's conduct leading to the Plaintiff's constructive discharge.

INSTRUCTION NO. 15

Working conditions are intolerable if a reasonable person in the Plaintiff's situation would have deemed resignation the only reasonable alternative.

INSTRUCTION NO. 16

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

INSTRUCTION NO. 17

To establish that Defendant's stated reasons for its conduct are a pretext for discrimination, Plaintiff may show that a discriminatory reason more likely motivated Defendant or that the Defendant's explanations are unworthy of credence. The Plaintiff may establish this pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Defendant's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of belief.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

INSTRUCTION NO. 18

You may not return a verdict for the Plaintiff just because you might disagree with the Defendant's conduct or believe it to be harsh or unreasonable.

INSTRUCTION NO. 19

If you find in favor of the Plaintiff on her constructive discharge claim, then you must award the Plaintiff such sum as you find will fairly and justly compensate the Plaintiff for any damages you find the Plaintiff sustained as a direct result of the constructive discharge. The Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages and fringe benefits the Plaintiff would have earned in her employment with the Defendant if she had not been constructively discharged on January 18, 2007, through the date of your verdict, minus the amount of earnings and benefits that 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 emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. 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.

Third, you are separately instructed on considering punitive damages.

You are also instructed that the 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 that the 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.

Eighth Circuit Manual of Model Civil Jury Instructions, No. 5.02A (2011)(modified).

INSTRUCTION NO. 20

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

INSTRUCTION NO. 21

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

If you find in favor of the Plaintiff on her constructive discharge claim, then you must decide whether the Defendant acted with malice or reckless indifference to the Plaintiff's right not to be discriminated against on the basis of her sex. The Defendant acted with malice or reckless indifference if:

it has been proved that Tony Tiefenthaler and /or other Sanford management that may have acted with him knew that the conduct which caused the constructive discharge was in violation of the law prohibiting sex discrimination, or acted with reckless disregard of that law. However, you may not award punitive damages if it has been proved that the Defendant made a good-faith effort to comply with the law prohibiting gender discrimination.

If you find that the Defendant acted with malice or reckless indifference to the Plaintiff'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 for the purposes of punishing the Defendant for engaging in such misconduct and deterring the Defendant and others from engaging in such misconduct in the future. You should presume that a Plaintiff has been made whole for her injuries any damages awarded under Instruction 19.

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,

INSTRUCTION NO. 21, continued.

deceit, intentional malice, reckless disregard for human health or safety; whether the Defendant's conduct that harmed the Plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the Plaintiff.

2. How much harm the Defendant's wrongful conduct caused the Plaintiff and could cause the Plaintiff in the future. You may not consider harm to others in deciding the amount of punitive damages to award.

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.

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

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

INSTRUCTION NO. 22

Your verdict must be for the Plaintiff Dr. Benson and against Defendant Sanford Health on the Plaintiff's negligent infliction of emotional distress claim if all the following elements have been proved by the greater weight of the evidence :

First, the Defendant engaged in negligent conduct;

Second, the Plaintiff suffered emotional distress;

Third, the Defendant's conduct was a legal cause of Plaintiff's emotional distress;

Fourth, the Plaintiff suffered a physical manifestation of the distress.

If any of the above elements has not been proved, your verdict must be for the Defendant.

INSTRUCTION NO. 23

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by evidence. That is for you to decide.

INSTRUCTION NO. 24

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. The Defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the Plaintiff's injury.

INSTRUCTION NO. 25

Tony Tiefenthaler and/or other Sanford management that may have acted with him were agents of the Defendant at the time Plaintiff contends that the conduct which she alleges constitutes negligent infliction of emotional distress took place. Therefore, any act or omission of Tony Tiefenthaler and/or other Sanford management that may have acted with him at that time is considered the act or omission of Defendant.

INSTRUCTION NO. 26

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 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.

INSTRUCTION NO. 26, continued

Finally, the verdict form is simply the written notice of the decision that you reach in this case.

I will read the form to you. 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.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

MARGARET A. BENSON, M.D., * CIV. 08-4072

Plaintiff, *

vs. *

VERDICT FORM

SANFORD HEALTH, *

Defendant. *

FIRST CAUSE OF ACTION

On Plaintiff's constructive discharge claim alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, we the jury find in favor of:

(Mark an X in the appropriate space.)

Plaintiff Margaret Benson _____

or

Defendant Sanford Health _____

Note: Complete the following paragraphs only if you found in favor of the Plaintiff. Otherwise, proceed to the Second Cause of Action.

We the jury find Plaintiff's lost wages and benefits through the date of this verdict to be:

\$ _____ (stating the amount or, if none, write the word "none").

We the jury find Plaintiff's other damages, excluding lost wages and benefits, to be (stating the amount or, if you find that Plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar (\$1.00)):

\$ _____ emotional pain

\$ _____ suffering

\$ _____ mental anguish

\$ _____ loss of enjoyment of life

\$ _____ nominal (in the amount of \$1.00)

Nutshell or

We assess punitive damages against Defendant, as submitted in Instruction 21, as follows:

\$ _____ (stating the amount or, if none, write the word "none").

SECOND CAUSE OF ACTION

On Plaintiff's cause of action for negligent infliction of emotional distress, we the jury find in favor of:

(Mark an X in the appropriate space.)

Plaintiff Margaret Benson _____

or

Defendant Sanford Health _____

Only if you found in favor of Plaintiff Margaret Benson on her cause of action for negligent infliction of emotional distress, state the amount of damages (if any) for this cause of action. If you found in favor of the Defendant on this cause of action, have your foreperson sign and date this form because you have completed your deliberation on this claim.

\$ _____

Past Emotional Distress

Foreperson

Dated: _____