

FILED

MAR 17 2011



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RYAN BODDICKER,
Plaintiff,

vs.

ESURANCE, INC.,
Defendant.

CIV. 09-4027-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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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 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can 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 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 the 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.

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

FINAL INSTRUCTION NO. 3 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of 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 that something is more than 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 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. 4 – FMLA INTERFERENCE

In order to prove a claim for Family and Medical Leave Act (FMLA) interference, Ryan Boddicker must prove the following elements:

(1) Boddicker was eligible for leave under the FMLA in that Boddicker was employed by Esurance for at least 12 months and had worked at least 1,250 hours during the previous 12 month period;

The parties have agreed that this element is proven.

(2) Boddicker had a serious health condition defined by the FMLA in that he had a health condition that involved continuing treatment by a health care provider;

The parties have agreed that this element is proven.

(3) Boddicker was absent from work because of that serious health condition;

The parties have agreed that this element is proven.

(4) at the outset of his need for intermittent FMLA leave, Boddicker gave Esurance timely notice of his need to be intermittently absent from work;

The parties have agreed that this element is proven.

(5) as soon as practicable, Boddicker gave Esurance sufficient information so that Esurance knew or should have known the absence was for a serious health condition; *True*

(6) Esurance interfered with Boddicker's right to take FMLA leave; *True*

Under the FMLA, interference occurs when an employer interferes with, restrains, or denies the exercise of an employee's FMLA rights or when an employer discourages an employee from using FMLA leave or "chills" his use of FMLA leave. When an employer attaches negative consequences to the exercise of protected rights, it has "chilled" the employee's willingness to exercise those rights. Interference also includes manipulation by an employer to avoid responsibility under the FMLA. An employer's intent or motive is irrelevant in determining whether the employer

interfered with an employee's FMLA rights.

An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. Enforcement of an employer's reasonable notice requirements does not constitute interference.

(7) Esurance interfered with Boddicker's right to take FMLA leave for a reason connected with Boddicker's use of his FMLA leave; and *True*

(8) Boddicker suffered damages as a direct result of Esurance's interference with Boddicker's right to take FMLA leave. *True*

Your verdict must be for Boddicker if all of these elements have been proven. But if you find that any of the above elements has not been proven, then your verdict must be for Esurance.

FINAL INSTRUCTION NO. 5 – ACTUAL DAMAGES

If you find in favor of Ryan Boddicker, then you must award him the amount of any wages that Ryan Boddicker lost as a direct result of Esurance's interference with his right to take FMLA leave. The damages award should end as of November 5, 2007, the day Ryan Boddicker's employment with Esurance ended. You should subtract the amount of earnings and benefits received by Ryan Boddicker from other employment during that time. Additionally, you may not award Ryan Boddicker damages to compensate him for emotional distress or as a punishment to Esurance.

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

FINAL INSTRUCTION NO. 6 – EMPLOYEE MEDICAL HISTORIES

When an employer has records of an employee's medical histories or medical certifications, for purposes of the FMLA, the employer must maintain them as confidential medical records in separate files, apart from the employee's usual personnel files. Supervisors and managers may be informed regarding necessary restrictions on the employee's work or duties and necessary accommodations.

FINAL INSTRUCTION NO. 7 – 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.

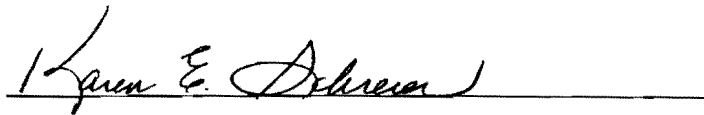
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. **Remember that you should not tell**

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 March 17, 2011.

A handwritten signature in cursive script, reading "Karen E. Schreier", is written over a solid horizontal line.

KAREN E. SCHREIER
CHIEF JUDGE