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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

JACQUE HUINER,
Plaintiff,

vs.

ARLINGTON SCHOOL DISTRICT,
Defendant.

CIV. 11-4172-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

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 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, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. This does not mean they are more important than my oral instructions. **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 civil actions, the party who has the burden of proving 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 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, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the testimony of witnesses. I now give you this further instruction on how the testimony of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by:

1. Contradictory evidence
2. A showing that the witness testified falsely concerning a material matter
3. 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
 - a. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true.
 - b. 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.

FINAL INSTRUCTION NO. 4 – ADA REASONABLE ACCOMMODATION

An employer's failure to make a reasonable accommodation to a disabled employee is a form of prohibited discrimination under the Americans with Disabilities Act.

FINAL INSTRUCTION NO. 5 – ELEMENTS OF CLAIM

To establish Arlington School District is liable to Huiner, Huiner must prove each of the following five elements by the greater convincing force of the evidence:

One, Huiner’s anxiety substantially limited her ability to perform one or more major life activities;

“Major life activities” include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

In determining whether Huiner’s impairment substantially limited her ability to perform a major life activity, you should compare Huiner’s ability to perform major life activities with that of the average person. In doing so, you may consider the conditions under which Huiner performed major life activities, the manner in which she performed major life activities, and the length of time it took her to perform major life activities.

It is not the name of an impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

Two, Arlington School District knew of Huiner’s anxiety;

Three, Huiner could have performed the essential functions of her job if Arlington School District had provided Huiner with accommodations;

The term “essential functions” means the fundamental job duties of the employment position the plaintiff held. “Essential functions” do not include the marginal functions of the position.

In determining whether a job function is essential, you should consider the following factors:

- (1) Arlington School District's judgment as to which functions of the job are essential;
- (2) Written job descriptions;
- (3) The amount of time spent on the job performing the function in question;
- (4) Consequences of not requiring the person to perform the function;
- (5) The terms of a collective bargaining agreement;
- (6) The work experience of persons who have held the job;
- (7) The current work experience of persons in similar jobs;
- (8) Whether the reason the position exists is to perform the function;
- (9) Whether there are a limited number of employees available among whom the performance of the function can be distributed; and
- (10) Whether the function is highly specialized and the individual in the position was hired for her expertise or ability to perform the function.

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

Four, providing accommodations to Huiner would have been reasonable;

A "reasonable" accommodation is one that could reasonably be made under the circumstances and may include but is not limited to: job restructuring; part-time or modified work schedules; reassignment to a

vacant position; appropriate adjustment or modifications of examinations, training materials, or policies; and other similar accommodations for individuals with disabilities.

An accommodation that would cause other employees to work harder, longer, or be deprived of opportunities is not required.

An employer is not obligated to provide an employee the accommodation she requests or prefers. The employer need only provide some reasonable accommodation. If more than one accommodation would allow the individual to perform the essential functions of the position, the employer has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

And five, Arlington School District failed to provide reasonable accommodations.

In determining whether Huiner can prove elements three, four, and five, you should consider whether the parties engaged in an interactive process, which is defined for you in Final Instruction No. 6.

If any of the above elements have not been proved, then your verdict must be for Arlington School District.

FINAL INSTRUCTION NO. 6 – INTERACTIVE PROCESS

Before an employer must make an accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. Thus, it is generally the responsibility of the plaintiff to request the provision of a reasonable accommodation. Once the plaintiff has made such a request, the parties must engage in an “interactive process” to determine what precise accommodations are necessary. This means that the employer should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations. The interactive process does not allow an employer, in the face of a request for accommodation, to be passive. In essence, the employer and the employee must work together in good faith to help each other determine what accommodation is necessary.

Although an employer will not be held liable for failing to engage in an interactive process if no reasonable accommodation was possible, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is evidence that the employer may be acting in bad faith.

To establish that an employer failed to participate in an interactive process, a disabled employee must show:

1. The employer knew about the disability;
2. The employee requested accommodations or assistance;
3. The employer did not make a good faith effort to assist the employee; and
4. The employee could have been reasonably accommodated but for the employer’s lack of good faith.

FINAL INSTRUCTION NO. 7 – GOOD FAITH DEFENSE

If you find for Huiner on Final Instruction No. 5, then you must answer the following question in the verdict form: Has it been proved that Arlington School District made a good faith effort and consulted with Huiner to identify and make a reasonable accommodation?

FINAL INSTRUCTION NO. 8 – RIGHT TO NOT RENEW

Under South Dakota law, a school district has the right to not renew a tenured teacher's contract. Before doing so, the school district's superintendent is required by law to give written notice of nonrenewal to the teacher and school board by April 15.

Arlington School District did not renew Huiner's contract for the 2011-2012 school year. If you find that Arlington School District failed to make reasonable accommodations for Huiner, you may consider whether Arlington School District's decision to not renew Huiner's contract was a result of its failure to make reasonable accommodations when determining what damages, if any, Huiner is entitled to.

FINAL INSTRUCTION NO. 9 – DAMAGES

If you find in favor of Huiner, then you must award Huiner such sum as you find by the greater convincing force of the evidence will fairly and justly compensate her for any damages you find she sustained as a direct result of Arlington School District's failure to provide reasonable accommodations. Huiner's claim for damages includes two distinct types of damages and you must consider them separately.

First, Huiner seeks damages for lost wages and fringe benefits she would have earned if her contract had been renewed through the date of your verdict. If you find by the greater convincing force of the evidence that Huiner's contract was not renewed as a direct result of Arlington School District's failure to provide reasonable accommodations, then you must determine the amount of any wages and fringe benefits Huiner would have earned in her employment with Arlington School District through the date of your verdict, minus the amount of earnings and benefits that Huiner received from other employment during that time.

You are instructed not to award any damages for future wages and benefits, or damages awarded for wages and benefits after the date of your verdict. Those damages, if appropriate, will be determined by the Court and should not be considered by you in your deliberations.

Second, you must determine the amount of any other damages sustained by Huiner, such as emotional pain and suffering, inconvenience, loss of enjoyment of life, and mental anguish. 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 Huiner has a duty under the law to "mitigate" her damages—that is, to exercise reasonable diligence under the circumstances to minimize her damages. The burden of proof is on Arlington School District to prove that Huiner failed to mitigate her damages. Therefore, if

you find by the greater convincing force of the evidence that Huiner 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 opportunity. In mitigating her damages, Huiner was not required to go into another line of work, accept a demotion, or take a demeaning position. Rather, she was required to use reasonable diligence to seek out or not refuse a job that is substantially equivalent to the one she had.

If you should find Huiner is entitled to a verdict, you may award her only such damages as will fairly and justly compensate her for such injury and damage as you find, from a greater convincing force of the evidence, that she has sustained as a proximate result of Arlington School District's actions. 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.

FINAL INSTRUCTION NO. 10 – ADVERSE INFERENCE

If a party has evidence under its control and does not present that evidence, an inference may be drawn that the evidence would not support that party's claim.

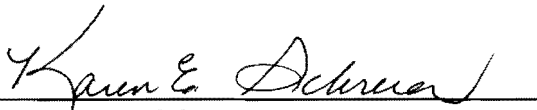
FINAL INSTRUCTION NO. 11 – DUTIES DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

1. Select a foreperson to preside over your discussions and to speak for you here in court.
2. 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.
3. 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.
4. 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.
5. 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.**
6. 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.
7. 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 April 4, 2014.


KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE