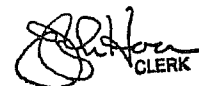


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

**FILED**

DEC 15 2017

  
CLERK

LAURA ZYLSTRA KAISER,

Plaintiff,

vs.

BRYAN GORTMAKER, IN HIS OFFICIAL  
CAPACITY AS SOUTH DAKOTA  
DIRECTOR OF THE DIVISION OF  
CRIMINAL INVESTIGATION;

Defendant.

1:15-CV-01030-CBK

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case.

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. It would be a violation of your sworn duty to base your verdicts upon any rules of law other than the ones given to you in these instructions, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented in this case. You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach a just verdict, regardless of the consequences to any party.

INSTRUCTION NO. 3

This is a civil action. The plaintiff seeks to recover monetary damages against the defendant.

Plaintiff claims that the defendant (1) retaliated against her and (2) discriminated against her, resulting in financial losses and emotional distress to the plaintiff. Defendant denies that it is liable for retaliation or discrimination and denies that any of defendant's actions were a proximate cause of any damages to the plaintiff. These claims by the parties form the issues of fact to be determined by you from the evidence received during the trial under the law applicable to this case as stated in these instructions.

The defendant is a State actor. This fact is immaterial. In the eyes of the law, all persons, including government entities and employees, are entitled to the same impartial treatment.

When a government entity is involved, it may act only through its employees, agents, and officers. In general, government entities are responsible under the law for any of the acts, omissions, and statements of their employees made or done within the scope of their duties as employees of the government.

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The evidence in this case consists of the testimony of witnesses and the documents and other things received as exhibits.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

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

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained any objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the answer or information may have been.
3. Testimony and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.
5. Certain charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in this case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries shown to you do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

INSTRUCTION NO. 5

There are two types of evidence from which you may find the truth as to the facts of a case--direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the liability or non-liability of a party. The law makes no distinction between the weight to be given to either direct evidence or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

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, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that 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, 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 trial 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.



INSTRUCTION NO. 8

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in court, and you should consider this testimony together with all other evidence received.

INSTRUCTION NO. 9

You have heard testimony from persons described as experts. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 10

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 depends upon that fact.

The party who has the burden of proving a claim for sexual discrimination or retaliation or an affirmative defense thereto must prove all the facts necessary to support the claim or defense by the “greater weight” of the evidence.

Evidence is of “greater weight” if, when considered and compared with that opposed to it, it is more persuasive and convinces you that what a party seeks to prove is more likely true than not true.

The burden of proof is solely upon the plaintiff as to her claims against the defendant. The defendant does not have the burden to prove anything as to the plaintiff’s claims. The burden of proof is solely upon the defendant as to its affirmative defenses. The plaintiff does not have the burden to prove anything as to the defendant’s affirmative defenses.

The “greater weight of the evidence” is not necessarily determined by the greater number of witnesses or number of exhibits a party has presented. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

You have heard in criminal cases 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.

The issues to be determined by you in this case are set forth in the verdict form.

INSTRUCTION NO. 11

Your verdict must be for plaintiff and against defendant on plaintiff's retaliation claim under Title VII of the Civil Rights Act of 1964 if all the following elements have been proved by the greater weight of the evidence:

*First*, plaintiff opposed Deputy Erickson's sexual harassment by resisting his advances, telling him to stop, by complaining to defendant, or otherwise opposing harassment;

*Second*, plaintiff reasonably believed that she was being harassed on the basis of gender;

*Third*, defendant gave plaintiff discipline, a demotion, a job transfer or a constructive discharge;

*Fourth*, discipline, a demotion, a job transfer or a constructive discharge might well dissuade a reasonable worker, in the same or similar circumstances as plaintiff from making a charge of discrimination,

*Fifth*, plaintiff's opposition to gender harassment, as set forth in essential element *First* above, was a "determining factor" in defendant's decision. Plaintiff's opposition to gender harassment was a "determining factor" only if defendant would not have given her the discipline, demotion, job transfer or constructive discharge but for her opposition to gender harassment; it does not require that her opposition be the only reason for defendant's decision. You may find that plaintiff's opposition was a determining factor in defendant's decisions if it has been proved that defendant's stated reason for its decision is a pretext - that is, an excuse - to hide retaliation.

If any of the above elements has not been proved, your verdict must be for defendant and you need not proceed further in considering this claim.

INSTRUCTION NO. 12

Your verdict must be for plaintiff and against defendant on plaintiff's claim of discrimination based upon her gender if all of the following elements have been proved by the greater weight of the evidence:

*First*, defendant gave plaintiff discipline, a demotion, a job transfer or a constructive discharge, and

*Second*, plaintiff's gender was a determining factor in defendant's decision.

Plaintiff's gender was a "determining factor" only if defendant would not have given her the discipline, demotion, job transfer or constructive discharge but for her gender; it does not require that her gender be the only reason for defendant's decision. You may find that plaintiff's gender was a determining factor in defendant's decisions if it has been proved that defendant's stated reason for its decision is a pretext - that is, an excuse - to hide discrimination.

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

INSTRUCTION NO. 13

The phrase “constructive discharge” as used in Instruction Nos. 11 and 12 requires the following elements to be proved by the greater weight of the evidence:

- I. Defendant made plaintiff’s working conditions intolerable.
- II. Plaintiff’s gender was a determining factor in the defendant’s decisions, and
- III. Plaintiff’s resignation was a reasonably foreseeable result of defendant’s decisions.

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

INSTRUCTION NO. 14

You may not return a verdict for the plaintiff just because you might disagree with the defendant's decisions or believe them to be harsh or unreasonable.

INSTRUCTION NO. 15

The defendant as an employer may take adverse actions against an employee such as plaintiff for any reason, good or bad, as long as it is not in retaliation for a protected act – in this case, opposing sexual harassment – or is not discriminatory – in this case, based upon gender.

Defendant has offered evidence that it took the adverse employment action against plaintiff entirely for non-retaliatory and non-discriminatory reasons. It is the plaintiff's burden to prove that, by the greater weight of the evidence, the decisions to place the plaintiff on a work improvement plan, to demote, transfer, or constructively discharge her were motivated by plaintiff's opposition to sexual harassment or by gender discrimination.

You should scrutinize the reasons proffered by the defendant, just as you would any other evidence. If you find by the greater weight of the evidence that the reasons were "pretextual," that is, they were not the real reasons for the decisions, then you may infer or not infer, as you choose, that the pretext was designed to conceal the retaliation or discrimination.

Retaliatory or discriminatory intent may be proven either by direct evidence, such as statements made by a person whose intent is at issue, or by circumstantial evidence from which you can infer a person's intent. Thus, in making a determination as to whether there was intentional retaliation or discrimination in this case, you may consider any statement made or act done or omitted by a person whose intent is at issue, as well as all other facts and circumstances that indicate his or her state of mind.



INSTRUCTION NO. 16

If you find in favor of the plaintiff under Instruction No. 11 or No. 12, then you must award the plaintiff such sum as you find will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of defendant's discrimination or retaliation. Plaintiff's claim for damages includes two distinct types of damages and you must consider them separately:

1. The amount of any wages and fringe benefits plaintiff would have earned in her employment with defendant if she had not been demoted or constructively discharged through the date of your verdict, minus the amount of earnings and benefits that plaintiff received from other employment during that time.
2. The amount of any other damages sustained by the plaintiff, such as mental anguish, emotional distress, humiliation, embarrassment, loss of reputation, and other damages.

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.

If you find that plaintiff failed to mitigate her damages as defined in Instruction No. 17, 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, 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. 17

A plaintiff seeking lost wages (back pay) has a duty to mitigate those losses by exercising reasonable diligence to locate other suitable employment, which can include self-employment, and maintain a suitable job once it is located. The burden of proving that the plaintiff did not make reasonable efforts is on the defendant. In carrying such a burden, the defendant must show more than that there were steps available the plaintiff could take toward finding comparable employment other than those the plaintiff took; it must show that the course of conduct the plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment.

INSTRUCTION NO. 18

If you find in favor of the plaintiff under Instruction No. 11 or No. 12, 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. 19

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A special verdict form has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form to state the verdict upon which you unanimously agree, and then return with your verdict form to the courtroom.

Do not give the verdict form to the Marshal. The foreperson should retain the form until the Clerk gives it to me in open court.

You will be required to provide written answers to certain questions on the verdict form. The questions are to be answered with a "Yes" or a "No" or other brief answer. When all the jurors have agreed to all of the answers to the questions (other than the ones that are immaterial), that will be the verdict of the jury. The foreperson will write the answers of the jury in the space provided under the question. You will refrain from answering any question that has become no longer relevant because of your answer to a previous question.

INSTRUCTION NO. 20

The verdict must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times, 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.

INSTRUCTION NO. 21

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on any question on the verdict form until after you have reached unanimous verdicts.

INSTRUCTION NO. 22

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdict should be.

What the verdict shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

LAURA ZYLSTRA KAISER,  
  
Plaintiff,

vs.

BRYAN GORTMAKER, IN HIS OFFICIAL  
CAPACITY AS SOUTH DAKOTA  
DIRECTOR OF THE DIVISION OF  
CRIMINAL INVESTIGATION,

Defendant.

1:15-CV-01030-CBK

VERDICT

We the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find the following:

1. On the plaintiff's retaliation claim against defendant, we find in favor of:

\_\_\_\_\_ Plaintiff

\_\_\_\_\_ Defendant

2. On the plaintiff's gender discrimination claim against defendant, we find in favor of:

\_\_\_\_\_ Plaintiff

\_\_\_\_\_ Defendant

If, and only if, you found for the plaintiff on either claim in No. 1 or No. 2, proceed to question 3.



3. On the issue of damages, we award the plaintiff the following:

\$ \_\_\_\_\_ for mental anguish, emotional distress,  
humiliation, embarrassment, loss of reputation,  
and other damages.

\$ \_\_\_\_\_ for lost wages.

\$ \_\_\_\_\_ for lost benefits.

Dated this \_\_\_\_\_ day of December, 2017.

\_\_\_\_\_  
FOREPERSON