



## **JURY 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 and during the trial are not repeated here.

## **JURY INSTRUCTION NO. 2**

Members of the jury, now that you have heard all of the evidence, it is my duty to instruct you in the law.

1. 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.

2. It is my duty to tell you what the law is. It is your duty to decide what the facts are and to apply the law to those facts.

In determining what the facts are you must rely solely upon the evidence in this trial and the general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact.

3. You must apply the law in these instructions, even if you believe that the law is or should be different.

No one of these instructions contains all of the law applicable to this case. You must consider each instruction in light of all of the others.

The law demands of you a just verdict. You must not indulge in any speculation, guess, or conjecture. You must not allow sympathy or prejudice to influence your verdict.

### **JURY INSTRUCTION NO. 3**

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;
2. Documents and other things received as exhibits;
3. Any facts that have been stipulated--that is, formally agreed to by the parties;

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;
2. Objections to questions;
3. Any testimony I told you to disregard; and
4. Anything you may have seen or heard about this case outside the courtroom or have overheard from one of the bench conferences between the lawyers and myself.

## **JURY INSTRUCTION NO. 4**

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 the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' 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.

## **JURY INSTRUCTION NO. 5**

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 fact must prove it by the greater weight, that is, a preponderance, of the evidence. To prove something by the greater weight 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 must resolve that issue against the party who has the burden of proving it. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

## **JURY INSTRUCTION NO. 6**

This case should be considered and decided by you as an action between parties of equal standing in the community, of equal worth, and holding the same or similar stations in life. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

A governmental entity such as the defendant, Douglas County, acts only through natural persons as its agents or employees, and the county is responsible for the acts, knowledge, and the conduct of those agents it places in positions of responsibility when such acts and conduct occur within the scope of the duties of such employee or agent.

## **JURY INSTRUCTION NO. 7**

During the trial, testimony was presented to you by deposition. Such testimony is under oath and is entitled to the same fair and impartial consideration you give other testimony.

## JURY INSTRUCTION NO. 8 (Page 1 of 2)

The parties have agreed that the following may be accepted as established facts for purposes of this case only:

1. The Plaintiff, is a resident of Omaha, Douglas County, Nebraska and has been employed by the Douglas County Sheriff's Department in Douglas County, Nebraska since 1992.

2. The Defendant, Douglas County, Nebraska, was and is a political subdivision within the State of Nebraska.

3. The Defendant, Timothy Dunning, is a resident of Omaha, Douglas County, Nebraska and is currently the Sheriff of Douglas County, Nebraska, and is sued in his official capacity only.

4. The Plaintiff, while still employed as a sworn Sheriff's Deputy for Douglas County, Nebraska, became pregnant. Because of pregnancy related complications, she was on medical leave from July 1999 through September 1999. That while the Plaintiff was on medical leave, the Defendants held a firearms qualification shoot, which is a yearly requirement for sheriff deputies.

5. Pursuant to Nebraska law § 81-1412, deputy sheriffs must qualify once a year on a firearm shooting course approved by the director of the Nebraska Law Enforcement Training Center.

6. The Nebraska Law Enforcement Training Center is under the supervision and control of the Nebraska Commission on Law Enforcement and Criminal Justice, a state agency.

7. The Director of the Law Enforcement Training Center, Steve Lamken, denied the request for waivers for four individuals, including the Plaintiff in December 1999.

8. While the Plaintiff was on FMLA leave in early 2000, the Nebraska Police Standards Advisory Council also denied the Defendants' request for waivers of the handgun certification requirement for Theresa Ogorzaly, Marlene Novotny, and Russ Racine.

9. That no written light duty policy existed prior to September of 2000.

10. That the Plaintiff filed an EEOC complaint against the Defendant in approximately February of 2000.

**JURY INSTRUCTION NO. 8 (Page 2 of 2)**

11. That the Plaintiff worked as a narcotics officer from April of 1996 until she was transferred in September of 2000.

12. In June 8, 2000, the Plaintiff informally complained to Sgt. Russ Torres about alleged harassment from fellow officers.

13. On July 13, 2000, the Plaintiff was given a direct order to submit her complaints of harassment in writing so that an investigation could be conducted.

14. The Plaintiff submitted her complaints in writing on July 14, 2000.

15. The Sheriff notified the Plaintiff of the findings of the investigation.

16. On June 1, 2000, the Plaintiff participated in a consent search conducted for a narcotics investigation. The Plaintiff was the property officer during this search.

17. In 2000, the Sheriff's Department consisted of three Bureaus: Operations Bureau (7 divisions), Court Services Bureau (12 divisions), and Administrative Services Bureau (5 divisions.)

18. On September 17, 2000, the Plaintiff was transferred from the Operations Bureau, Narcotics Division, to the Court Services Bureau. The Plaintiff was in Court Services Bureau until Fall 2002. The Plaintiff is currently assigned to Road Patrol.

19. Seven other deputies were also transferred to various bureaus pursuant to the same Personnel Order effective September 17, 2000.

## **JURY INSTRUCTION NO. 9**

This case involves allegations of discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964, often referred to as "Title VII."

Title VII prohibits an employer from discriminating against an individual in the terms or conditions of employment because of the individual's sex. Also, Title VII prohibits an employer from retaliating against an employee for complaining of employment discrimination.

The plaintiff has two claims:

First, the plaintiff claims that she was subjected to discrimination by the defendants because of her sex and pregnancy. I refer to this claim throughout these instructions as the "discrimination claim."

Second, the plaintiff claims that she was subjected to retaliation by the defendants because of her complaints of sex and pregnancy discrimination. I refer to this claim throughout these instructions as the "retaliation claim."

The defendants deny each of the plaintiff's claims.

You must consider each claim separately.

## **JURY INSTRUCTION NO. 10**

It is unlawful for an employer to intentionally discriminate against an individual because of that person's sex. The terms "because of sex" or "on the basis of sex" include, but are not limited to, "because of" or "on the basis of pregnancy, childbirth, or related medical conditions." Women affected by pregnancy, childbirth, or related medical conditions are to be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.

## **JURY INSTRUCTION NO. 11**

For the purposes of these instructions, an “adverse employment action” means a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Minor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard of an adverse employment action.

## **JURY INSTRUCTION NO. 12**

Your verdict must be for the plaintiff on the plaintiff's sex and pregnancy discrimination claim if all the following elements have been proved by the greater weight of the evidence:

First, the defendants took adverse employment actions against the plaintiff; and

Second, the plaintiff's sex and pregnancy were a motivating factor in the defendants' adverse employment actions.

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

If all of the above elements have been proved by the greater weight of the evidence, then you must answer the following question on the verdict form as to this claim:

"Has it been proved by the greater weight of the evidence that the defendants would have made the same employment decisions as to the plaintiff regardless of the plaintiff's sex and pregnancy?"

### **JURY INSTRUCTION NO. 13**

Your verdict must be for the plaintiff and against the defendants on the plaintiff's retaliation claim if all the following elements have been proved by the greater weight of the evidence:

First, the plaintiff complained about sex and pregnancy discrimination; and

Second, the defendants subsequently took adverse employment actions against the plaintiff; and

Third, the plaintiff's complaints were a motivating factor in the defendants' decision to take adverse employment actions against the plaintiff.

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

If all of the above elements have been proved by the greater weight of the evidence, then you must answer the following question on the verdict form as to this claim:

"Has it been proved by the greater weight of the evidence that the defendants would have made the same employment decisions as to the plaintiff regardless of the plaintiff's complaints of discrimination?"

## **JURY INSTRUCTION NO. 14**

As used in these instructions, the plaintiff's sex and pregnancy, or her complaints of discrimination were a "motivating factor," if the plaintiff's sex and pregnancy or her complaints about discrimination played a role in the defendants' employment actions regarding the plaintiff. However, the plaintiff's sex and pregnancy or her complaints of discrimination need not have been the only reasons for the defendants' employment actions with respect to the plaintiff.

You may find that the plaintiff's sex and pregnancy, or her complaints of discrimination were a motivating factor in the defendants' employment actions if it has been proved by the greater weight of the evidence that the defendants' stated reasons for its employment actions are not the true reasons, but are a "pretext" to hide sex discrimination and retaliation.

You may not return a verdict for the plaintiff just because you might disagree with the defendants' employment actions regarding the plaintiff or believe the employment actions to be harsh or unreasonable.

## JURY INSTRUCTION NO. 15 (Page 1 of 2)

If you find in favor of the plaintiff on either the sex discrimination claim or the retaliation claim, then you must award the plaintiff such sum as you find by the greater weight of the evidence will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as direct result of the defendants' employment actions regarding the plaintiff. The plaintiff's claim for damages includes two 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 defendants if she had not been discriminated or retaliated against, from the date the discrimination or retaliation first occurred through the date of your verdict, *minus* the amount of earnings and benefits that the plaintiff received from her employment during that time.

Second, you must determine that amount of any other damages sustained by the plaintiff, such as future pecuniary losses, physical and emotional pain and suffering the plaintiff has experienced and is reasonably certain to experience in the future, inconvenience, mental anguish, loss of enjoyment of life and any other damages, past and future, the plaintiff sustained as a result of the defendants' discrimination and retaliation that would justly compensate the plaintiff. You must enter separate amounts for each of the two types of damages on the verdict form and must not include the same items in more than one category.

**JURY INSTRUCTION NO. 15 (Page 2 of 2)**

If you find in favor of the plaintiff, 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).

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.

**JURY INSTRUCTION NO. 16**

Your verdict must be agreed to by all eleven of you, that is, it must be unanimous.

## **JURY INSTRUCTION NO. 17**

The law forbids you to return a verdict determined by chance. You may not, for instance, agree in advance that each juror will state an amount to be awarded in damages, that all of those amounts will be added together, that the total will be divided by the number of jurors, and that the result will be returned as the jury's verdict. A verdict determined by chance is invalid.

## **JURY INSTRUCTION NO. 18 (Page 1 of 2)**

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.

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 courtroom deputy signed by one or more jurors. Or, you may reach my chambers directly by lifting the receiver of the telephone in the jury room. The caller should clearly identify himself or herself as a member of the jury so that my staff will react accordingly. I will respond to your question 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.

**JURY INSTRUCTION NO. 18 (Page 2 of 2)**

If you do not agree on a verdict by 5:00 o'clock p.m., you may separate and return for deliberation at 9:00 o'clock a.m. on the next business day, i.e. Friday, February 7, 2003. You may deliberate after 5:00 o'clock p.m., but if so, please advise the courtroom deputy of your intention to do so. You may also separate for meals during the course of your deliberations, but if you do separate for meals please contact the courtroom deputy to advise her of your intention to separate and when you expect to return to the jury room to reconvene your deliberations. If you do separate, then during that time, you are not allowed to discuss this case with anyone, even another juror.

Fourth, your verdict must be based solely on the evidence and law which I have given to you in my instructions. 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, complete it pursuant to the instructions on the form, and advise the courtroom deputy when you are ready to deliver your verdict.

Submitted at 12:10 pm o'clock a.m. / p.m.

DATED this 6th day of February, 2003.

BY THE COURT:

  
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THOMAS D. THALKEN  
United States Magistrate Judge