IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KRISTEN STIFFLER, an individual; Plaintiff, vs. FIDELITY NATIONAL MANAGEMENT SERVICES, LLC, Defendant.	**8:14CV231** **INITIAL JURY INSTRUCTIONS**

INSTRUCTION NO. 1

DUTY

It will be your duty to decide from the evidence whether the plaintiff is entitled to a verdict against the defendant. From the evidence, you will decide what the facts are. You are entitled to consider the evidence in the light of your own observations and experiences in life. You may use reason and common sense to draw deductions from facts established by the evidence. You will then apply those facts to the law which I give you in these and the other instructions. In that way, you will reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree or disagree with the law stated in the instructions.

Do not allow sympathy or prejudice to influence you. The law requires that your verdict be unaffected by anything except the evidence, your common sense, and the law stated in these and other instructions.

Anything that I may say or do during the trial must not be taken by you as an indication of what I think of the evidence or what I think your verdict should be.

INSTRUCTION NO. 2

EVIDENCE

The word "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 that the evidence being offered 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 this courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for

which the item can and cannot be used. You should also pay particularly close attention to such an instruction, because it may not be available to you in writing later in the jury room.

Finally, some of you may have heard the phrases or terms “direct evidence” and “circumstantial evidence.” Direct evidence is direct proof of a fact, such as testimony by an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. 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. 3

BENCH CONFERENCES AND RECESSES

During the trial it may become necessary for me to talk with the lawyers outside your hearing, either by having a bench conference while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, the court and counsel are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence which govern the trial, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

INSTRUCTION NO. 4

JURY QUESTIONS

While evidence is being presented, you are not allowed to raise your hands to ask questions about that evidence. However, if you do have questions about something you hear during the examination of a witness, you may write your questions down on a piece of paper. When the attorneys have finished examining that witness, you may submit your written question or questions. I will review each question with the attorneys. You may not receive an answer to your question because I may decide that the question is not proper under the rules of evidence. The attorneys may choose to answer your questions by asking more questions of the witness. But even if the question is proper, you may not get an immediate answer to your question. For instance, a witness or an exhibit that you will see later in the trial may answer your question.

INSTRUCTION NO. 5

NOTE-TAKING

If you wish, you may take notes to help you remember what witnesses said. Notes may be helpful to you because at the end of the trial, you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and it may not be practical for the court reporter to read back lengthy testimony. Therefore, you should pay close attention to the testimony as it is given.

If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide this case. Do not let note-taking distract you to the point that you miss hearing other testimony from the witness.

During the trial, documents or other physical items may be received into evidence. At the present, however, you will not be supplied with a list of exhibits which are received in evidence. Therefore, you may wish to make notes about the exhibits, especially their description and number, so that you can refer to those exhibits while you are deliberating.

When we take our recess each day for the lunchtime break and when we take our recess each night, please take your notes to the jury room and leave your notes there. The courtroom deputy will take custody of your notes and secure them.

No one will read your notes but you. Your notes will be destroyed after the trial is over.

INSTRUCTION NO. 6

PREPONDERANCE OF EVIDENCE

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

INSTRUCTION NO. 7

WITNESSES

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, a 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. 8

CONDUCT OF THE JURY

To insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with this case, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside this courtroom, do not let anyone tell you anything about this case or anyone involved in it until the trial has ended and I have accepted your verdict. If someone should try to talk to you about this case during the trial, please report it to me or to the deputy clerk.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers, or witnesses involved in this case—you should not even pass the time of day with any of them. If a person from one side of the lawsuit sees you talking to a person from the other side—even if it is simply to pass the time of day—it might arouse an unwarranted suspicion about your fairness. If a lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or encounter each other elsewhere while this trial is taking place, do not think he or she is being rude. Those persons are not supposed to talk or visit with you, either.

Fifth, you must decide this case on the basis of evidence presented in the courtroom. Therefore, do not read any news stories or articles about the case, or about

anyone involved with this case, or listen to any radio or television reports about the case or about anyone involved with it. In fact, until the trial is over you should probably avoid reading any newspapers or news journals, and avoid listening to any TV or radio newscasts. There might not be any news reports of this case, but, if there are, you might find yourself inadvertently reading or listening to something before you realize what you are doing.

Sixth, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation about this case on your own. Do not use or refer to a dictionary or any law books concerning any aspect of this case, including any evidence introduced. Do not visit the scene of any incident mentioned in this case and do not use Internet programs or other devices to electronically search for or view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge.

Seventh, do not form an opinion about any fact or issue in the case until you have received all of the evidence, have heard arguments of counsel, have been instructed as to the law of the case, and have retired to the jury room. Consequently, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and have discussed the evidence with the other jurors.

INSTRUCTION NO. 9

OUTSIDE COMMUNICATIONS AND RESEARCH

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom because the parties must have an opportunity to respond to any information you consider in deciding this case. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or entities involved in the case. In other words, you should not consult dictionaries or reference materials, search the Internet, websites, blogs, chat rooms, social networking websites including Facebook, MySpace, LinkedIn, Instagram, or YouTube, or use your cell phones, iPhones, text messaging, Twitter, Snapchat, or any other electronic tools or devices to obtain information about this case or to help you decide the case.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. However, until you have returned a verdict and the case is at an end, you must not talk to anyone or communicate with anyone about the case by any means, electronic or otherwise. This includes communications with your family and friends. Such communication would compromise your fairness as jurors and may require your removal from the case and a retrial of this matter at considerable expense to the parties.

INSTRUCTION NO. 10

OUTLINE OF TRIAL

The trial will proceed in the following manner:

First, the attorney for the plaintiff may make an opening statement. Next, the attorney for the defendant may make an opening statement. An opening statement is not evidence but is an outline of what the party intends to prove, a summary of what the attorney expects the evidence to be.

The plaintiff's attorney will then present evidence through a direct examination of a witness. The defendant's attorney may then cross-examine that witness. After the cross-examination, the plaintiff's attorney may ask additional questions on re-direct. The defendant's attorney may also ask questions on re-cross. After all of the plaintiff's witnesses have been presented, the plaintiff will rest. The defendant's attorney will then present the defendant's case. The defendant may present evidence through direct examination of witnesses and plaintiff's attorney may cross-examine those witnesses. Re-direct and re-cross examinations may also take place.

After the presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. Just as with opening statements, these closing arguments are not evidence. I will then instruct you further on the law. After that, you will retire to deliberate on your verdict.

INSTRUCTION NO. 11

STATEMENT OF THE CASE

This is an action involving alleged employment discrimination on the basis of gender and pregnancy under Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act. Under that statute, it is unlawful for an employer to refuse to hire, to discharge, or to otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's sex. The term "because of sex" includes, but is not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. The law requires women affected by pregnancy, childbirth, or related medical conditions to be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

The plaintiff, Kristen Stiffler, alleges that the defendant, Fidelity National Management Services, LLC, her former employer, discriminated against her on the basis of sex and/or pregnancy by terminating her employment. She also alleges that Fidelity discriminated against her by assigning her to a claims team for which she had no experience, limiting her ability to ask questions, demoting her to a different team, treating her more harshly and/or holding her to a higher performance standard than any other attorney.

The defendant denies all of the plaintiff's allegations and contends that all of its alleged actions were taken for legitimate and nondiscriminatory reasons.

INSTRUCTION NO. 12

UNCONTROVERTED FACTS

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

1. The Court has jurisdiction over the claims asserted by Plaintiff.

2. Venue is proper in the District of Nebraska.

3. Plaintiff's maiden name is Prybella and her married name is Stiffler.

4. Plaintiff is a member of a protected class pursuant to Title VII of the Civil Rights Act of 1964.

5. Plaintiff was an at-will employee of Defendant from October 26, 2009 to May 1, 2013.

6. Plaintiff worked as an associate claims counsel on the Great Lakes West team from October 1, 2012, to May 1, 2013.

7. Plaintiff's only maternity leave while employed by Defendant began October 26, 2012.

8. Plaintiff requested permission to work from home between two and four hours per day, five days per week, while on maternity leave starting December 17, 2012.

9. Defendant approved Plaintiff's request to work part time from home.

10. Plaintiff never requested the ability to work from home full time while on maternity leave.

11. Plaintiff returned to the workplace part time on January 21, 2013.

12. Plaintiff returned to the workplace full time on January 28, 2013.

13. Plaintiff's employment was terminated by the Managing Counsel of the Great Lakes team, Kayla VanCannon, on May 1, 2013.

14. Ms. VanCannon was on maternity leave herself at the time she terminated Plaintiff's employment.

15. Plaintiff did not inform Ms. VanCannon of being pregnant a second time before her employment was terminated on May 1, 2013.

16. Plaintiff filed a charge of discrimination with the Nebraska Equal Opportunity Commission and the U.S. Equal Employment Opportunity Commission on July 16, 2013.

17. On May 13, 2014, the Nebraska Equal Opportunity Commission issued a Commission Determination, finding in Defendant's favor that there was no reasonable cause to support a finding of discrimination.

18. On July 7, 2014, the U.S. Equal Employment Opportunity Commission issued a Notice of Right to Sue. This lawsuit was filed within 90 days of said Notice.

19. Defendant maintained the following policies in its Employee Handbook during Plaintiff's employment: Employment At-Will Policy, Policy Against Harassment and Discrimination, and General Policy and Standards of Conduct.

20. Plaintiff acknowledged receipt of Defendant's Employee Handbook.

21. Plaintiff and Defendant stipulate that there is no element of damages related to lost vacation pay.

22. Plaintiff and Defendant stipulate that Fidelity's emails of regularly conducted activity are an exception to rule against hearsay.

INSTRUCTION NO. 13

PREGNANCY DISCRIMINATION

You have heard the terms sex discrimination and gender discrimination. Legally, these terms are the same. It is unlawful for an employer to intentionally discriminate against an individual because of or on the basis of that person's gender.

The terms "because of gender," or "on the basis of gender" 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.

INSTRUCTION NO. 14

CLAIM I - ELEMENTS

In order to prevail on her claim of sex/gender or pregnancy discrimination, the plaintiff must prove the following elements by a preponderance of the evidence:

1. The defendant terminated the plaintiff's employment; and

2. The plaintiff's sex/gender or pregnancy was a motivating factor in the defendant's decision.

If you find the plaintiff has not proved these elements by a preponderance of the evidence, your verdict will be in favor of the defendant on this claim. If you find the plaintiff has proved these elements by a preponderance of the evidence, proceed to consider Instruction No. 18.

INSTRUCTION NO. 15

DEFINITION: PRETEXT

You may find that the plaintiff's sex/gender or pregnancy was a motivating factor in the defendant's decision if it has been proved by a preponderance of the evidence that the defendant's stated reasons for their decision are a pretext to hide gender and/or pregnancy discrimination.

INSTRUCTION NO. 16

DEFINITION: SIMILARLY SITUATED

One way for the plaintiff to establish pretext is to show she was treated differently than "similarly situated" employees.

It is for you to decide if the other individuals identified for comparison were "similarly situated" to the plaintiff. To be "similarly situated," employees must be similarly situated in all relevant aspects. Specifically, the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standard, and engaged in the same conduct without any mitigating or distinguishing circumstances.

INSTRUCTION NO. 17

DEFINITION: MOTIVATING FACTOR

As used in these instructions, the plaintiff's sex/gender or pregnancy was a "motivating factor," if the plaintiff's sex/gender or pregnancy played a part in the defendant's decision to terminate the plaintiff. However, the plaintiff's sex/gender or pregnancy need not have been the only reason for the defendant's decision to terminate the plaintiff.

INSTRUCTION NO. 18

EXPLANATORY: "SAME DECISION"

If you find in favor of the plaintiff under Instruction No. 14, then you must answer the following question in the verdict form: Has it been proved that the defendant would have terminated the plaintiff regardless of her sex/gender or pregnancy?

INSTRUCTION NO. 19

EXPLANATORY: BUSINESS JUDGMENT

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

INSTRUCTION NO. 20

EQUAL BEFORE THE LAW

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. Fidelity National Management Services, LLC, is entitled to the same fair trial at your hands as a private individual. All persons or entities, including Fidelity National Management Services, LLC, stand equal before the law, and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 21

DEFINITION: AGENCY

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of his or her duties as an employee of the corporation.

INSTRUCTION NO. 22

DEPOSITION TESTIMONY

During the trial, certain testimony might be presented to you by way of deposition. A deposition consists of sworn recorded answers to questions asked of a witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

INSTRUCTION NO. 23

DAMAGES: ACTUAL

If you find in favor of the plaintiff under Instruction No. 14 and if you answer “no” in response to Instruction No. 18, then you must award the plaintiff such sum as you find will fairly and justly compensate her for any damages you find she sustained as a direct result of the defendant’s decision to terminate the plaintiff.

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 terminated on May 1, 2013, 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 for emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life. You must enter separate amounts for each of these two types of damages in the verdict form and must not include the same items in more than one category.

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.

INSTRUCTION NO. 24

DAMAGES: NOMINAL

If you find in favor of the plaintiff under Instruction No. 14 and if you answer "no" on the verdict form under Instruction No. 18, 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).