

Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. The parties to this case and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law that I give you, and reach a just verdict regardless of the consequences.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. It is not my function to determine the facts in this case. That function belongs to you.

You should consider and decide this case as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair consideration. A corporation is entitled to the same fair consideration as a private individual. All persons and corporations, big or small, stand equal before the law and are to be dealt with as equals in a court of justice.

As I stated, it is your duty to determine the facts. In determining the facts, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and any facts to which the parties have stipulated or agreed.

Certain things are not evidence. I will list them for you.

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements and arguments to you are not evidence. The purpose of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what they lawyers said, your memory is what counts.

Some of you may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, in other words it is proof of one or more facts that point to the existence or non-existence of another fact that is at issue. You are to consider both direct and circumstantial evidence. The law allows you to give equal weight to both types of evidence, but it is up to you to decide how much weight to give to any evidence in the case.

You are to consider all of the evidence in determining your verdict. However, that does not mean that you must accept all of the evidence as true or accurate.

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life.

In our lives, we sometimes look at one fact and conclude from that fact that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences, but any inferences that you make must be reasonable and must be based on the evidence in the case.

In determining the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. You will also have to decide what weight, if any, to give to the testimony of each witness.

In considering the testimony of any witness, you may take into account:

- the opportunity and ability of the witness to see or hear or know the things that the witness testified about;
- the witness's memory;
- the witness's intelligence;
- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;
- the witness's manner while testifying;
- the reasonableness of the witness's testimony in light of all the evidence in the case; and
- any other factors that bear on believability.

The weight of the evidence as to a particular fact does not necessarily depend on the number of witnesses who testify. You may find the testimony of a small number of witnesses to be more persuasive than that of a greater number.

A witness may be discredited or “impeached” by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness’s testimony.

If you believe that any witness has been impeached, then you must determine whether to believe the witness’s testimony in whole, in part, or not at all, and how much weight to give to that testimony.

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

A corporation can only act through its employees, agents, directors, or officers.
Therefore, a corporation is responsible for the acts of its employees, agents, directors and officers performed within the scope of their authority.

In this lawsuit, the plaintiff, Julio Escobar, has made several claims against the defendant, Checkpoint Systems, Inc. You must consider each claim separately.

Escobar's first claim is that in terminating his employment, Checkpoint discriminated against him based on his race (Hispanic) and/or his national origin (Mexican).

Escobar's second claim is that in terminating his employment, Checkpoint retaliated against him for making a complaint about discrimination.

Escobar's third claim is that while he was employed at Checkpoint, he was subjected to a hostile work environment based on his race (Hispanic) and/or his national origin (Mexican).

Checkpoint denies each of these claims.

In the following instructions, I will use the term “preponderance of the evidence.” When I use the term “preponderance of the evidence,” I mean evidence that persuades you that a particular proposition is more likely true than not true.

In deciding whether any proposition has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

First claim - termination - race and national origin

To succeed on his first claim, Escobar must prove by a preponderance of the evidence that Checkpoint terminated him because he was Hispanic and/or because of his Mexican national origin. To determine whether Escobar was terminated because he was Hispanic and/or because of his Mexican national origin, you must decide whether Checkpoint would have terminated Escobar if he was not Hispanic or of Mexican national origin, but everything else was the same.

If you find that Escobar has proved this by a preponderance of the evidence, then you should find in favor of Escobar on this claim.

If you find that Escobar has failed to prove this by a preponderance of the evidence, then you should find in favor of Checkpoint on this claim.

Second claim - termination - retaliation

To succeed on his second claim, Escobar must prove both of the following propositions by a preponderance of the evidence:

First, that directly or through his attorney Juan Soliz, he made a complaint to his superiors that he was being discriminated against based on his race (Hispanic) and/or national origin (Mexican).

Second, that Checkpoint would not have terminated Escobar if he had not made a complaint about discrimination, but everything else was the same.

If you find that Escobar has proved both of these propositions by a preponderance of the evidence, then you should find in favor of Escobar on this claim.

If you find that Escobar has failed to prove either one of these propositions by a preponderance of the evidence, then you should find in favor of Checkpoint on this claim.

Third claim - harassment based on race and national origin

To succeed on his third claim, Escobar must prove each of the following five propositions by a preponderance of the evidence.

First, that supervisory personnel subjected Escobar to racially and/or ethnically abusive language, slurs, insults, and/or other differential treatment. Tony Weaver and Janet Rathgeb were supervisory personnel within the meaning of this instruction.

Second, Escobar was subjected to this conduct because he was Hispanic and/or because he was of Mexican national origin;

Third, the conduct was unwelcome;

Fourth, at the time the conduct occurred, Escobar believed that it made his work environment hostile or abusive such that it changed the conditions of his employment; and

Fifth, the conduct was sufficiently severe or pervasive that a reasonable person in Escobar's position would have found his work environment to be hostile or abusive such that it changed the conditions of employment. To determine this, you must look at all the circumstances, including the frequency of the conduct; its severity; its duration; whether it was humiliating or physically threatening, as opposed to a merely offensive utterance; and whether it unreasonably interfered with Escobar's work performance. No single factor is more important than any other factor.

If you find from your consideration of all the evidence that Escobar has failed to prove any one of these propositions, then you should find in Checkpoint's favor on this claim.

If, on the other hand, you find from your consideration of all the evidence that Escobar

has proved each of these propositions, then you must consider whether Escobar has proved by a preponderance of the evidence one additional fact: that Weaver and/or Rathgeb's conduct caused plaintiff's suspension or termination. If so, you should find in Escobar's favor on this claim. If not, you should still find in Escobar's favor on this claim, unless you find that Checkpoint has proved the following two things by a preponderance of the evidence, in which case you should find in Checkpoint's favor on this claim:

First, that Checkpoint exercised reasonable care to prevent and correct any racial or national origin-based harassing or abusive conduct in the workplace; and

Second, that Escobar unreasonably failed to take advantage of opportunities provided by Checkpoint to prevent or correct harassment or to otherwise avoid harm.

In determining whether Checkpoint exercised reasonable care to prevent and correct hostile or abusive conduct, you may consider whether Checkpoint established anti-harassment policies and complaint procedures, whether there was a need for such policies and procedures, and whether such policies and procedures, if any, were suitable in both policy and practice to the employment circumstances.

Damages

If you find in Escobar's favor on any one of his claims, then you must determine what amount of damages, if any, he is entitled to recover from Checkpoint.

If you decide in Checkpoint's favor on all of Escobar's claims, then you will have no occasion to consider the question of damages.

You should not interpret the fact that I am giving you instructions about damages as any indication that I believe that Escobar should, nor should not, win this case. It is up to you to decide that question. I am instructing you on damages only so that you will have guidance in the event that you find in Escobar's favor on one or both of his claims.

Escobar has the burden of proving his damages to a reasonable degree of certainty. In addressing this issue, you should be guided by reason and common sense. You may not award damages based on sympathy, speculation or guesswork. On the other hand, the law does not require Escobar to prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

In this case, Escobar is seeking three types of damages: back pay, compensatory damages, and punitive damages.

Back pay

If you find in Escobar's favor on either or both of his first two claims (namely, the claims arising from his termination), you must award him an amount that reasonably compensates him for any lost pay and benefits resulting from his termination, through the present date, taking into consideration any increases in pay that Escobar would have received if he had not been terminated. This is referred to as "back pay." The purpose of back pay is to make the plaintiff whole for any pay and benefits that he lost as a result of a discriminatory or retaliatory employment decision.

A plaintiff is required to make every reasonable effort to minimize his damages. This is called the duty to "mitigate" damages. Checkpoint contends that Escobar failed to mitigate his damages by failing to make reasonable efforts to find another job. Checkpoint has the burden of proving this by a preponderance of the evidence.

If you find that Checkpoint has proven that Escobar failed to mitigate his damages, you must reduce his damages by the amount that you find he could have avoided by using reasonable efforts from the time of the discrimination through the present date.

Compensatory damages

As to each of Escobar's claims, the law permits you to award him compensatory damages in an amount that will reasonably compensate him for any humiliation, emotional pain and suffering, mental anguish, loss of enjoyment of life, and out of pocket expenses (not including lost pay) that he experienced as a direct result of discriminatory termination or a discriminatory hostile work environment.

You may award damages only for injuries that Escobar proves by a preponderance of the evidence were the direct result of discrimination that he experienced at Checkpoint.

The damages you award must be fair compensation, no more and no less. No evidence of the monetary value of such intangible things as humiliation, pain and suffering, and the like has been or needs to be introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize Checkpoint.

Punitive damages

The law also allows you, but does not require you, to assess punitive damages. The purposes of punitive damages are to punish a wrongdoer for misconduct and to serve as an example or warning to others against doing the same.

You may assess punitive damages only if Escobar has proven by a preponderance of the evidence, both of the following propositions:

First, that Checkpoint intentionally discriminated against him with malice or reckless indifference to his federally protected rights of an employee; *and*

Second, that Checkpoint employees who discriminated against Escobar were managerial agents acting within the scope of their employment.

(I will define these terms on the next page of these instructions.)

If you find that Escobar has proven both of these elements, then you may award punitive damages, unless you find that Checkpoint has proven by a preponderance of the evidence that it engaged in good faith efforts to implement and carry out a policy against discrimination.

In setting an amount of punitive damages, you should consider: How offensive was the conduct? What amount is needed, considering the defendant's current financial condition, to punish the defendant? What amount is needed to warn others against engaging in similar conduct? Does the amount have a reasonable relationship to the actual damages awarded?

If you do award punitive damages, you should fix the amount using calm discretion and sound reason. You must not be influenced by sympathy for or dislike for any party in the case.

Punitive Damages – Definitions

The terms “malice” and “reckless indifference” in the preceding instruction mean that Escobar must prove by a preponderance of the evidence that Checkpoint knew, or perceived a risk, that its actions would violate federal law, and not simply that Checkpoint was aware that it was engaging in discrimination.

In determining whether Checkpoint intentionally discriminated against Escobar with malice or with reckless indifference to his federally protected rights, you may consider:

- whether Checkpoint’s managerial agents (as defined below) knew of or were familiar with the anti-discrimination laws;
- whether Checkpoint had adopted effective policies for implementing those laws; and
- whether Checkpoint’s employees lied to cover up discrimination.

In determining whether the employees who discriminated against Escobar were managerial agents acting within the scope of their employment, you may consider the kind of authority the employer has given the employee, the amount of discretion given to the employee in executing his job duties, and the manner in which those duties are carried out.

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

A form of verdict has been prepared for you.

[Read the verdict form.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer.

If any communication is made, it should not indicate your numerical division, that is, do not inform the court or even hint at how many among you were or are in favor or against reaching any particular verdict.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the views of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or solely for the purpose of returning a unanimous verdict.

All of you should give fair consideration to all the evidence and deliberate with the goal of reaching a verdict which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

VERDICT FORM

Claim 1 - termination - race and national origin

We, the jury, find as follows on plaintiff Julio Escobar's first claim against Checkpoint Systems, Inc.:

_____ For Julio Escobar

_____ For Checkpoint Systems, Inc.

Claim 2 - termination - retaliation

We, the jury, find as follows on plaintiff Julio Escobar's second claim against Checkpoint Systems, Inc.:

_____ For Julio Escobar

_____ For Checkpoint Systems, Inc.

Claim 2 - hostile work environment based on race and national origin

We, the jury, find as follows on plaintiff Julio Escobar's third claim against Checkpoint Systems, Inc.:

_____ For Julio Escobar

_____ For Checkpoint Systems, Inc.

Damages

(To be answered *only* if you found for Julio Escobar on one or more of his claims)

We, the jury, award Julio Escobar damages as follows:

\$ _____ Back pay

\$ _____ Emotional pain and suffering, mental anguish, and loss of enjoyment of
life

\$ _____ Out of pocket expenses (not including lost pay)

\$ _____ Punitive damages, if any (if none, write the word "none")

\$ _____ TOTAL

Foreperson

Date: _____