

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---------------------------|---|--------------------------------|
| FLOUNICE HIGH, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. 98 C 1819 |
| v. |) | |
| |) | Magistrate Judge Morton Denlow |
| CITY OF HARVEY, ILLINOIS) |) | |
| and MARION BECK, |) | |
| |) | |
| Defendants. |) | |

JURY INSTRUCTIONS

INTRODUCTION TO THE FINAL CHARGE

Members of the Jury:

Now that you have heard all of the evidence to be received in this trial and each of the arguments of counsel it becomes my duty to give you the Court's final instructions as to the law that is applicable to this case and which will guide you in your decisions.

All of the instructions of law given to you by the Court -- those given to you at the beginning of the trial, those given to you during the trial, if any, and these final instructions-- must guide and govern your deliberations.

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them from the evidence received during the trial.

Counsel have quite properly referred to some of the applicable rules of law in their closing arguments to you. If, however, any difference appears to you between the law as stated by counsel and that as stated by the Court in these instructions, you, of course, are to be governed by the instructions given to you by the Court.

You are not to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions of the Court just as it would be a violation of your sworn duty, as the judges of the facts, to base your verdict upon anything but the evidence received in the case.

You were chosen as jurors for this trial in order to evaluate all of the evidence received and to decide each of the factual questions presented by the allegations brought by the plaintiff, and the denial of these allegations by the defendant.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

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 in life. Regardless of whether a party is a municipality, such as the City of Harvey, or an individual such as Flounice High or Marion Beck, it is entitled to the same fair trial at your hands.

When a municipality is a party, of course, it may act only through natural persons as its agents or employees; and, in general, only officials of the municipality whose edicts or acts may fairly be said to represent official policy may bind the municipality by his or her acts and declarations made while acting within the scope of authority delegated to him or her by the municipality, or within the scope of his or her duties as an employee of the municipality.

As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses, the exhibits admitted in the record, and stipulated or admitted facts. A stipulation is a statement of fact agreed to between the parties, and you must regard stipulated facts as true.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of your own experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case. However, you are also not to allow your own personal employment experience to substitute for a review of all of the evidence presented to you in this case.

When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received as evidence, regardless of who may have produced them; and all facts which may have been judicially noticed.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

You as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by the evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony, given the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the

testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

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 evidence in the case.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the

testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The burden is on the plaintiff in a civil action such as this to prove every essential element of her claim by a "preponderance of the evidence. " A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence means to prove that the claim is more likely so than not so. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining- whether any fact in issue has been proved by a "preponderance of the evidence", the jury may 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.

If the proof should fail to establish that any essential element of the plaintiff's claim is more likely true than not true, then the plaintiff has failed to carry her burden of proof by a preponderance of the evidence and you must return a verdict for the defendants.

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find", or "if you decide", I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

THE NATURE OF THE CLAIM

This is an action brought under the First Amendment to the United States Constitution. Flounice High alleges that the Defendants, the City of Harvey and Marion Beck, violated her civil rights under Federal law by terminating her from her position with the City of Harvey in retaliation against her for exercising her rights under the First Amendment of the Constitution of the United States in regards to her political and union activities. The Defendants deny this claim. The Defendants have stated that it terminated Flounice High from her position with the City of Harvey for legitimate reasons related to her performance. It is your responsibility to decide whether the Plaintiff has proven her claim against the Defendants by a preponderance of the evidence, as that term is defined in these instructions.

THE ESSENTIAL ELEMENTS OF A PLAINTIFF'S CLAIM

In order for Plaintiff Flounice High to establish her claim of retaliatory discharge against Defendants City of Harvey and Marion Beck, she has the burden of proving by a preponderance of the evidence the following essential elements:

Defendant terminated her employment; this is agreed between the parties; and

(1) Defendant terminated her employment; this is agreed between the parties;

and

(2) Plaintiff's expression of political opinion or engaging in union activities was a substantial factor or was a motivating factor in the Defendants' decision to terminate the Plaintiff from her employment; this is disputed between the parties; and

(3) Defendants were acting under color of state law; this is agreed among the parties.

However, your verdict must be for the Defendants if any of the above elements has not been proved by a preponderance of the evidence.

DEFENSES

If you find that the Plaintiff has met her burden of proof, then you must determine whether the Defendants have shown by a preponderance of the evidence that the Plaintiff would have been terminated from her employment even if the Plaintiff's political and union activities had not been considered, because of the Plaintiff's poor job performance.

If the Defendants show, by a preponderance of the evidence, that the Plaintiff would have been terminated in any event, then you should find for the Defendants.

DAMAGES

If you find that the City of Harvey and Marion Beck did not terminate Flounice High for retaliatory reasons, you need not consider the question of damages.

If you have found that the City of Harvey and Marion Beck did terminate Flounice High for retaliatory reasons then you must consider whether to award her damages. The law places a burden upon the Plaintiff to prove such facts as will enable you to arrive at the amount of damages with reasonable certainty and without speculation. While it is not necessary that Ms. High prove the amount of those damages with mathematical precision, she is required to present such evidence as might reasonably be expected to be available under the circumstances.

You should not interpret the fact that I have given instructions about damages as an indication in any way that I believe that Ms. High should, or should not, win this case or should, or should not, receive damages.

LOST WAGES

If you determine that the City of Harvey and Marion Beck terminated Plaintiff for retaliatory reasons, then you must determine the amount of damages that the Defendants have caused her.

If you find for Ms. High, she may be entitled to recover backpay. The measure of the backpay is determined by what she would have earned but for the violation - here, the termination of Ms. High from employment with the City of Harvey on July 17, 1997. To

calculate backpay, you must look to the evidence introduced concerning what Ms. High would have earned or other monies and value of benefits she would have received had she not been terminated.

To determine the amount of backpay, you must make several calculations:

- (1) First, determine the amount of pay Ms. High would have earned had she remained in the position with the City of Harvey;
- (2) Then, determine the value of the employee benefits she would have received if she had remained in the position with the City of Harvey;
- (3) Then, subtract the amount Ms. High actually earned after being terminated from her position with the City of Harvey.

You are also instructed that Ms. High 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 by the preponderance of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to him, you must reduce her damages by the amount she reasonable could have avoided if she had sought out or taken advantage of such opportunity. Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.

COMPENSATORY DAMAGES

If you determine that the City of Harvey and Marion Beck violated Ms. High's First Amendment rights, she may be entitled to damages in an amount which will reasonably compensate her for the loss and injury suffered as a result of Defendants' conduct. You are not required to give an award of compensatory damages.

You may award her reasonable compensation for the following:

- (1) Pain, suffering, and physical or emotional distress;
- (2) Embarrassment and humiliation;
- (3) Loss of enjoyment of life; that is, Ms. High's loss of the ability to enjoy certain aspects of her life as a result of the City of Harvey and Marion Beck's conduct.

In determining the amount of the award, if any, it will often be impossible for you to arrive at a precise award. These damages are intangible, and it is difficult to arrive at a precise evaluation of actual damage for emotional harm from loss of a job. No opinion of any witness is required as to the amount of such reasonable compensation. Nonetheless, it is necessary to arrive at a reasonable award that is supported by the evidence.

PUNITIVE DAMAGES

In addition to the actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the Defendant Marion Beck for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of Plaintiff and against Defendant Marion Beck and if you find by the preponderance of the evidence that plaintiff's firing was motivated by evil motive or interest, or that Defendant was callously indifferent to plaintiff's rights, then in addition to any damages to which you find Plaintiff entitled, you may, but are not required, to award Plaintiff an additional amount as punitive damages if you find it is appropriate to punish the Defendant or to deter Defendant and others from like conduct in the future.

Whether to award Plaintiff punitive damages, and the amount of those damages are within your discretion.

You may assess punitive damages against Defendant Marion Beck but not against defendant the City of Harvey or you may refuse to impose punitive damages against defendant Marion Beck.

VERDICT - UNANIMOUS - DUTY TO DELIBERATE

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. 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. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow 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 your fellow jurors, or for the mere purpose of returning 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.

EFFECT OF INSTRUCTIONS AS TO DAMAGES

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the Plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

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

Verdict forms have been prepared for your convenience.

If you find in favor of Plaintiff Flounice High and against Defendants the City of Harvey and/or Marion Beck you should calculate damages using jury verdict form Number 1, which reads as follows:

"We the jury find in favor of Plaintiff Flounice High and against (circle one or both) City of Harvey and/or Marion Beck for retaliatory termination in violation of the First Amendment. Having found in favor of Plaintiff Flounice High, we assess:

(1) lost wages and benefits damages in the following amount: \$_____;

(2) compensatory damages in the following amount: \$_____;

If you find that the Marion Beck engaged in retaliatory termination in violation of the First Amendment, and you further find that punitive damages are appropriate, you

may award punitive damages against Marion Beck in addition to compensatory damages, using jury verdict form Number 2 which reads as follows:

"We the jury find, as to punitive damages for the Plaintiff Flounice High and against Defendant Marion Beck in the following amount \$_____."

If you find that that Marion Beck engaged in retaliatory termination in violation of the First Amendment, but that punitive damages are not appropriate, you should place a zero in jury verdict form Number 2.

If you find in favor of the Defendants City of Harvey and/or Marion Beck and against Plaintiff Flounice High, you should use the jury verdict form Number 3 which reads as follows:

"We the jury find that the Plaintiff Flounice High has not proven that the Defendants City of Harvey and/or Marion Beck engaged in retaliatory termination in violation of the First Amendment, and therefore, we find for (circle one or both) Defendants City of Harvey and/or Marion Beck and against the Plaintiff Flounice High."

You will take the verdict forms to the jury room and, when you have reached unanimous agreement as to your verdict, you will all sign and date the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the courtroom.

VERDICT FORMS -- JURY'S RESPONSIBILITY

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

COMMUNICATIONS BETWEEN COURT AND JURY
DURING DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiff that [s]he too, 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 that you are never to reveal to any person -- not even to the Court - how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

JURY VERDICT FORM 1

We, the jury, find in favor of Plaintiff Flounice High and against (circle one or both) Defendants City of Harvey and/or Marion Beck for retaliatory termination in violation of the First Amendment. Having found in favor of Plaintiff Flounice High and against Defendants the City of Harvey and Marion Beck, we assess:

(1) lost wages and benefits damages in the following amount:

\$ _____;

(2) compensatory damages in the following amount:

\$ _____;

Date

Foreperson

JURY VERDICT FORM 2

We, the jury, find as to punitive damages, for the Plaintiff Flounice High and

against Defendant Marion Beck in the following amount: \$_____.

| _____ | _____ |
|-------|------------|
| Date | Foreperson |
| | _____ |
| | _____ |
| | _____ |
| | _____ |
| | _____ |
| | _____ |
| | _____ |

JURY VERDICT FORM 3

We, the jury, find that the Plaintiff Flounice High has not proven that Defendants the City of Harvey and/or Marion Beck engaged in retaliatory termination in violation of the First Amendment, and therefore, we find for the (circle one or both) Defendants City of Harvey and/or Marion Beck and against the Plaintiff Flounice High.

Date

Foreperson

