

MEMBERS OF THE JURY, now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

Source: Joint Agreed Instruction No. 1

There are two types of evidence: direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of an event, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances that tend to show whether or not an asserted fact is true. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Opening statements of counsel are for the purpose of acquainting you in advance with the facts counsel expect the evidence to show. Closing arguments of counsel are for the purpose of discussing the evidence.

Opening statements, closing arguments, the statements by counsel between the witnesses' testimonies, and any of the other statements of counsel should be disregarded to the extent that they are not supported by the evidence or are inconsistent with the law that I am giving you in these instructions.

Source: Joint Agreed Instruction No. 2 (first paragraph)

Joint Agreed Instruction No. 10 (second and third paragraph)

As I have mentioned, 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 respective sides 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 in the case. What the lawyers say is not binding on you.

A stipulation is an agreed statement of facts between the parties and you should regard agreed statements as true.

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 common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

Inferences are deductions or conclusions which you draw from using your reason and common sense and the facts which have been established by the evidence in the case.

In determining any fact in issue you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Source: Joint Agreed Instruction No. 3

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

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.

Source: Joint Agreed Instruction No. 4 (first and third paragraphs)

Joint Agreed Instruction No. 5 (second paragraph)

Joint Agreed Instruction No. 7 (fourth paragraph)

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 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 he or she has testified, and whether he or she 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; and 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.

Source: Joint Agreed Instruction No. 4

A witness may be discredited or “impeached” by contradictory evidence, by 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, or has failed to say or do something, that is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it remains your exclusive province to give testimony of that witness such credibility or weight, if any, as you may think it deserves.

When any witness is questioned about an earlier statement that he or she may have made, or earlier testimony that he or she may have given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of his or her testimony at the trial. In addition, if that earlier statement was made under oath and is inconsistent with the witness' testimony at the trial, you may consider that earlier sworn statement as evidence of the truth or accuracy of such earlier statement.

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with his or her trial testimony is entirely for you to determine.

Source: Joint Agreed Instruction No. 6

The rules of evidence do not ordinarily permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call “expert witnesses.” Witnesses who, by education and experience have become expert in some art, science, profession, or calling, may state their opinion as to relevant and material matters in which they profess to be an expert, and may state their reasons for the opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert’s opinion as the facts. You should assess the weight to be given to the expert opinion in the light of all the evidence in this case.

Source: Joint Agreed Instruction No. 8

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Source: Joint Agreed Instruction No. 9

The parties have agreed to the date each plaintiff would have been promoted to the rank of Lieutenant from the 1986 Lieutenants' exam, but for the City's unlawful conduct. Plaintiffs have been compensated for the delay in their promotion to Lieutenant and each has attained the rank of Lieutenant.

Source: Joint Agreed Instruction No. 21

Defendant's Proposed Instruction No. 2. (modified during Pretrial Conference)

Because liability has already been found against the Defendant City of Chicago, you must determine as to each plaintiff the amount of damages of back pay and interest, front pay, pension benefits he has lost, if any, and any compensatory damages for emotional distress he suffered. These categories of damages are stated on the verdict form for each plaintiff. The fact that a category of damages is listed for a particular plaintiff does not mean that you are expected to award damages to that plaintiff in the category. You, as the jury, must decide what damages each plaintiff has proven he is entitled to based upon the evidence.

You must consider the damage claims of each plaintiff separately and you should consider each plaintiff's claim separately. You may not infer the existence of damages for a plaintiff from the testimony and evidence pertaining to another plaintiff. Each plaintiff must prove his entitlement to damages by a preponderance of the evidence.

Source: Joint Agreed Instruction No. 13

Each plaintiff has the burden of proof as to the damages he is claiming. When I say that a party has the burden of proof on any proposition, or use the expression, “preponderance of the evidence,” or use the words “if you find,” or “if you decide,” or “determine,” I mean you must be persuaded, considering all of the evidence in the case, that the proposition on which the party has the burden of proof is more probably true than not true.

The rule does not require proof to an absolute certainty since proof to any absolute certainty is seldom possible in any case.

Source: Joint Agreed Instruction No. 12

Each plaintiff in this case has established that his promotion to Lieutenant from the 1986 Lieutenants' exam was unlawfully denied on account of his race.

The primary finding you must make as to each plaintiff, is whether that plaintiff lost a chance to be promoted to Captain and to Battalion Chief and you must determine the wages such as back pay, prejudgment interest, and front pay each plaintiff lost as a result of losing the chance to be promoted to Captain and Battalion Chief. Additionally, included for your determination are any pension losses you may find owing to the plaintiff.

Also, you must determine the amount of any compensatory damages sustained by each plaintiff, such as emotional distress damages, supported by the evidence.

In determining the percentage chance that a plaintiff lost to be promoted to these higher ranks, you must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

Source: Joint Agreed Instruction No. 19 (modified)

Plaintiff-Intervenors' Proposed Instruction No. 1 (modified during Pretrial Conference)

In making your findings regarding the lost chances of promotion for each plaintiff, you must first determine what the likelihood of promotion to Captain and to Battalion Chief was for the average candidate for promotion from the evidence presented in the trial as a starting point in your analysis. You may assume that but for the City's racial discrimination, each plaintiff would have had the same probability of promotion of all test takers on each of the Captains' and Battalion Chiefs' exams.

In determining the probability of each plaintiff's lost chances for promotion, you may consider whether each plaintiff has established by a preponderance of the evidence the extent to which his lost chances for promotion to Captain and to Battalion Chief were greater than that of the probability of promotion of all test takers on each of the exams for those positions.

You may also consider whether a preponderance of the evidence establishes that each plaintiff's lost chances were less than the probability of promotion of all test takers on the exams.

In other words, you may consider whether any party has successfully rebutted the assumption that each plaintiff's lost chances were equal to the probability of promotion of all test takers on each of the exams, bearing in mind that the plaintiffs were competing against the other test takers.

Source: Court's Preliminary Instruction page 6 (with last paragraph deleted). Replaces previous Joint Instruction 20.

To find that any plaintiff lost a chance to be promoted to the rank of Captain, you must find that that plaintiff would have had some chance of promotion if he had been able to compete for that rank.

To find that plaintiff lost a chance to be promoted to Battalion Chief, you must first find that plaintiff had some chance to be promoted to Captain, as a firefighter must be a Captain before ascending to the rank of Battalion Chief.

In determining the percentage chance that a plaintiff lost to be promoted to these higher ranks, you must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence, including the evidence comparing the plaintiff to other test takers who were promoted, bearing in mind that only a demonstration that a plaintiff would have done much better on the promotional tests than his rivals so as to place him in the group of test takers who were promoted would support a verdict that the chance lost was 100 % for promotion.

Of course, plaintiffs Peter Biondo and Brian Gilhooly have qualified to be promoted to Captain, so there is a 100% chance of their promotions to Captain. For Peter Biondo and Brian Gilhooly, you must decide: “Would Peter Biondo and Brian Gilhooly have made the rank of Captain earlier?”.

Source: Plaintiff-Intervenors’ Proposed Instruction No. 2 (modified during Pretrial Conference and further modified as underlined above)

Defendant’s Proposed Instruction No. 1 (modified during Pretrial Conference)

*Biondo v. City of Chicago*, 382 F.3d 680, 689-90 (7th Cir. 2004).

I will now define for you the different categories of damages that are set forth for your consideration and decision on the verdict forms.

The first category of that verdict form deals with “back pay and prejudgment interest.” “Back pay” is the amount of income a plaintiff would have earned at the higher ranked position that you find he would have achieved minus the income that he did earn at his current position. In this part of the verdict form, you are to include the prejudgment monetary interest that the back pay amount would have earned. Back pay and prejudgment interest are calculated up to the day of your verdict.

“Front pay,” with which category 2 of the verdict form deals, is the amount of money starting the day of your verdict forward to provide each plaintiff with the income, reduced to present value, of the higher rank that he should have attained but for the City’s unlawful conduct. Front pay should only be awarded for a limited period of time, until the next unimpeded promotional opportunity a plaintiff has, and cannot extend past the time a reasonable person would need to achieve the same or an equivalent position in the absence of discrimination.

“Pension losses,” with which category 3 deals, are the amount of pension benefits including duty disability benefits each plaintiff lost, assuming that proper contributions had been made, because each plaintiff was not promoted to the higher ranks, that you find he would have achieved minus the pension benefits he will receive at his current rank when he retires from the Chicago Fire Department or is placed on disability status.

Categories 4 and 5 of the verdict form deal with “emotional distress damages.” Emotional distress damages are a part of the compensatory damages you, as the jury, may award and should include damage amounts for any emotional distress, suffering, inconvenience and mental anguish suffered by each plaintiff that was caused to that particular plaintiff by the City’s promotion decisions from the 1986 Lieutenants’ exam.

Source: Court’s Preliminary Instruction page 5 (first paragraph replaced).

As I mentioned, you may award compensatory damages for any emotional distress, suffering, inconvenience, and mental anguish suffered by a plaintiff that you find, if at all, were caused by the City's unlawful conduct regarding the 1986 Lieutenants' exam.

There is no exact standard for fixing the compensation to be awarded for emotional distress damages. Any award you make should be fair in light of the evidence relating to each plaintiff and the emotional distress each plaintiff individually suffers presented at the trial – no more and no less.

Again, in determining the amount of any damages, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages by way of punishment or through sympathy. You must not engage in speculation, conjecture or guess work. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

Source: Joint Agreed Instruction No. 22 (first paragraph modified)

Defendant's Proposed Instruction No. 3 (modified during Pretrial Conference)

In determining what amount, if any, of emotional distress damages to award each plaintiff, your award must be proportional to the wrongs suffered by that plaintiff as a result of the City's unlawful conduct. You should use that plaintiff's lost chances of promotion to Captain and Battalion Chief in making your determination of the fair compensation for that plaintiff's emotional distress relating to the chances that were lost for promotion. You should consider this along with any other basis for emotional distress that you find that the plaintiff suffered.

In determining what amount, if any, of compensatory damages to award each plaintiff, you are instructed that any evidence or testimony concerning the damages of any third party are not to be taken into account. You are to determine only damages caused to the plaintiffs, not to third parties.

Source: Joint Agreed Instruction No. 23 (first paragraph)

Defendant's Proposed Instruction No. 4 (first paragraph)

*Biondo v. City of Chicago*, 382 F.3d 680, 689-90 (7th Cir. 2004) (first paragraph)

Joint Agreed Instruction No. 14 (second paragraph)

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.

Source: Joint Agreed Instruction No. 15

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.

Official forms of special verdict have been prepared for your convenience. You will take these Official forms to the jury room.

[Form of special verdict read.]

You will note that two separate verdict forms have been prepared for each Plaintiff. Each question on each verdict form must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict forms, when completed. You will then return with the completed special verdict forms to the courtroom after first informing the marshal in charge of the jury that you have reached a verdict.

Source: Joint Agreed Instruction No. 16

Members of the jury, you are free to deliberate in any way you decide or select whomever you like as a foreperson. However, I am going to provide some general suggestions on the process to help you get started. When thinking about who should be foreperson, you may want to consider the role that the foreperson usually plays. The foreperson serving as the chairperson during the deliberations should ensure a complete discussion by all jurors who desire to speak before any vote. Each juror should have an opportunity to be heard on every issue and should be encouraged to participate. The foreperson should help facilitate the discussion and make sure everyone has an opportunity to say what they want to say.

You may, if you find it necessary during your deliberations, submit written questions to me about the case, but you should understand that the you, as the jury, must decide the facts. You should make a determined effort to answer any question by referring to the jury instructions before you submit a question to me. If you do submit a question, I must show it to the lawyers for each side and consult with them before responding. I will either answer your question, or explain why I cannot answer your question.

Source: 7th Circuit Jury Project Manual pages VII-3; VII-5.

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 surrendering your 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 reexamine 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.

Source: Joint Agreed Instruction No. 17