

The functions of the Court and the jury

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. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

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.

Parties are entitled to equal consideration

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 stand equal before the law and are to be dealt with as equals in a court of justice.

Note Taking

Any notes you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memory and not your notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

The Evidence

In determining the facts of this case, 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 stipulations.

Deposition Testimony

During the trial, certain testimony was presented to you by the reading of a deposition.

Deposition testimony is entitled to the same consideration as testimony that was given in Court.

You are to judge its truthfulness and accuracy, and you are to weigh and consider it, insofar as possible, in the same way as if the witness had been present and testified from the witness stand.

What is not evidence

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

First, testimony that I struck from the record, or that I told you to disregard, is 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. This includes any press, radio, or television reports that you may have seen or heard.

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 purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what the lawyers said, your memory is what counts.

Definition of “direct” and “circumstantial” evidence

Some of you may have heard the phrases “direct” 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. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

Jury should consider all evidence

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.

Common sense - Inferences

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 often 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. Any inferences that you make must be reasonable and must be based on the evidence in the case.

Credibility of Testimony

In determining the facts of this case, you may 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 the testimony of each witness.

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

- the opportunity and ability of the witness to see or hear or know the things that the witness testifies 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 manner of the witness 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 smaller number of witnesses to be more persuasive than that of a greater number.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

Impeachment of Witness

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.

Burden of Proof

In a civil lawsuit like this one, the burden is on the plaintiff to prove every essential element of his or her claim by a “preponderance of the evidence.”

A preponderance of the evidence simply means evidence that persuades you that the plaintiff’s claim is more likely true than not true.

In deciding whether any fact 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.

If the proof establishes each essential element of the plaintiff’s claim by a preponderance of the evidence, then you should find for the plaintiff as to that claim.

If the proof fails to establish any essential element of the plaintiff’s claim by a preponderance of the evidence, then you should find for the defendant as to that claim.

In this case, Plaintiff claims that she was sexually harassed at work by her co-workers. More specifically, Plaintiff claims that she was subjected to a hostile work environment due to her sex. To succeed on this claim, Plaintiff must prove seven propositions by a preponderance of the evidence. In determining the first five propositions, you are to consider **both** the conduct of Plaintiff's co-workers and that of her supervisors. In determining the sixth and seventh propositions, you are to consider **only** the conduct of Plaintiff's co-workers.

1. Plaintiff was subjected to a hostile work environment based on the presence of peep holes in the wall to the changing room and/or by inappropriate comments and/or by inappropriate touching by male co-workers;
2. The conduct was unwelcome;
3. The conduct was because of Plaintiff's sex;
4. At the time the conduct occurred, Plaintiff believed that the conduct made her work environment hostile or abusive;
5. The conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff's position would have found her work environment to be hostile or abusive;
6. Defendants knew or should have known about the conduct; and
7. Defendants did not take reasonable steps to correct the situation.

If you find that Plaintiff has proved by a preponderance of the evidence each of the propositions required of her, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the propositions required of her, then you must find for Defendants.

In this case Plaintiff claims that she was subjected to a hostile work environment due to her sex based on the conduct of her supervisors. To succeed on this claim, Plaintiff must prove six propositions by a preponderance of the evidence. In determining each of these propositions, you are to consider *only* the conduct of Plaintiff's supervisors.

1. Plaintiff was subjected to the presence of peep holes in the wall to the changing room and/or inappropriate comments and/or inappropriate touching by one or more of her supervisors.
2. The conduct was unwelcome;
3. The conduct was because of Plaintiff's sex;
4. The conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff's position would find Plaintiff's work environment to be hostile or abusive;
5. That at the time the conduct occurred, Plaintiff believed that the conduct made her work environment hostile or abusive; and
6. The conduct was done by a supervisor, that is, a person who had the power to affect the conditions of Plaintiff's employment, such as by disciplining, transferring, promoting, demoting, hiring, or firing Plaintiff. What matters is the particular person's authority and power over Plaintiff, not his or her title.

If you find that Plaintiff did not prove by a preponderance of the evidence each of the propositions required of her, then you must find for Defendants. If, on the other hand, you find from your consideration of all the evidence that Plaintiff has proven each of these propositions, you must also consider whether Defendants have proven two propositions by a preponderance of the evidence.

Defendants must prove:

1. Defendants exercised reasonable care to prevent and correct any gender-based harassing or abusive conduct in the workplace; and
2. Plaintiff failed to take advantage of opportunities provided by Defendants to prevent or correct harassment, or otherwise avoid harm, or if Plaintiff did take advantage of preventive or corrective opportunities, Defendants' responsive actions were timely and reasonably likely to prevent similar conduct from recurring.

In determining whether Defendants exercised reasonable care to prevent and correct hostile or abusive conduct, you may consider whether Defendants 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.

In determining whether Plaintiff took advantage of preventive or corrective opportunities, you may consider whether Plaintiff failed to use any complaint procedures provided by Defendants, if such complaint procedures existed, and if so, whether the failure was unreasonable under the circumstances.

If you find that Defendants have proved these two propositions by a preponderance of the evidence, your verdict should be for Defendants. If you find that Defendants have not proved both of these propositions, your verdict should be for Plaintiff.

If you find in favor of Ciesielski on either or both of her claims, you must also decide whether the Defendants “constructively discharged” her from her employment. Constructive discharge occurs when discriminatory working conditions become so intolerable that a reasonable person in Ciesielski’s position would be forced to resign. In the ordinary case, an employee is expected to remain employed while seeking redress.

The law permits you to award Plaintiff compensatory damages in an amount that will reasonably compensate her for any humiliation, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and/or stress, as well as any decreased compensation, that she experienced as a result of a hostile work environment.

You may award damages only for injuries that Plaintiff proves by a preponderance of the evidence were the direct result of gender-based harassment that she experienced at Hooters.

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 the Defendants.

Plaintiff has a duty to mitigate her damages, which means that she must take reasonable actions to reduce her damages.

Defendant must prove that Plaintiff's claim for lost wages and benefits should be reduced by her earnings subsequent to leaving Hooters.

If you find that Plaintiff did not take reasonable actions to reduce her damages, you should reduce any amount you might award Plaintiff for lost wages and benefits by her earnings subsequent to leaving Hooters.

Defendant must prove both that the reduction should be made and its amount.

You have heard testimony that Plaintiff filed this lawsuit after receiving a notice of Right to Sue from the Equal Employment Opportunity Commission (EEOC). That notice is a prerequisite to filing a lawsuit like this one, and it does not mean that the EEOC has approved, sanctioned, or rendered an opinion on the merits of the case. The issuance of the Notice should not enter into your deliberations in any way.

To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct, the severity, its duration, whether it was physically threatening or humiliating, and whether it unreasonably interfered with the Plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender-related jokes and occasional teasing, does not constitute an abusive or hostile environment. Only conduct amounting to a material change in the terms and conditions of employment amounts to an abusive or hostile environment.

To find that a supervisor had constructive knowledge of a hostile or abusive work environment – that is, that the supervisor should have known of such environment – the Plaintiff must prove that the hostile or abusive environment was so pervasive and so open and obvious that any reasonable person in the supervisor’s position would have known that the harassment was occurring. Even though you may have already determined that the Plaintiff was in fact exposed to a hostile or abusive work environment, that alone is not determinative of the issue of the supervisor’s knowledge; rather, you must find that the discriminatory harassment to which the Plaintiff was exposed was so pervasive and unconcealed that knowledge on the part of the supervisor may be inferred.

Ordinarily, proof of the following facts relating to the affirmative defense will suffice to establish the exercise of “reasonable care” by the employer: (a) that the employer had promulgated an explicit policy against sexual harassment in the workplace; (b) that such policy was fully communicated to its employees; and (c) that such policy provided a reasonable avenue for the Plaintiff to make a complaint to higher management. Conversely, proof that an employee did not follow a complaint procedure provided by the employer will ordinarily suffice to establish that the employee “unreasonably failed” to take advantage of a corrective opportunity.

If you find that the Plaintiff has proved her claim based upon alleged harassment by co-workers, or that Plaintiff has proved her claim of harassment by managers and that the Defendants have not proved their affirmative defense relating to alleged management harassment, you must then determine the amount of damages the Plaintiff has sustained.

In considering the issues of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less.

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendants. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to Defendants and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendants. You may assess punitive damages only if you find that Defendants' higher management was in reckless disregard of Plaintiff's rights. An action is in reckless disregard of Plaintiff's rights if taken with knowledge that it may violate the law.

Plaintiff must prove by a preponderance of the evidence that Defendants' higher management acted within the scope of their employment and in disregard for Plaintiff's right not to be discriminated against. In determining whether an individual is higher management, you should consider the amount of discretion he had in carrying out his job duties and the manner in which he carried them out. You should not, however, award Plaintiff punitive damages if Defendants prove that they made a good faith effort to implement an anti-discrimination policy.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendants' conduct;
- the impact of Defendants' conduct on Plaintiff;
- the relationship between Plaintiff and Defendants;
- the likelihood that Defendants will repeat the conduct if an award of punitive damages is not made; and
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

Selection of Foreperson – Verdict

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.

Forms of verdict have been prepared for you.

Take these forms 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.

Communication with Court

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.

Disagreement Among Jurors

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 an 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.