

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EDWARD D. HEATON,

Plaintiff,

vs.

THE WEITZ COMPANY, INC.,

Defendant.

No. 05-CV-102-LRR

FINAL JURY INSTRUCTIONS

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

INSTRUCTION NO. 1

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

INSTRUCTION NO. 2

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, you may consider a witness's intelligence, the opportunity a witness had to see or hear the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a 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, a 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. 3

In these instructions you are told that your verdict depends on whether you find certain facts have been proven. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove 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. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "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. 4

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 5

Certain testimony has been received into evidence from a deposition. A deposition is testimony taken under oath before the trial and, in this case, preserved on a DVD. Consider that testimony as if it had been given here in court.

INSTRUCTION NO. 6

In this case Defendant The Weitz Corporation, Inc., is a corporation. The fact that Defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any person.

INSTRUCTION NO. 7

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. 8

State and federal laws make it unlawful for an employer to retaliate against an employee because the employee opposed conduct or employment practices made unlawful under those laws. State and federal laws make national origin harassment and national origin discrimination unlawful in the workplace.

Plaintiff contends that he reported national origin harassment or discrimination to Defendant's Human Resource Personnel and Benefits Manager, Chantry DeVries, who reported it to Defendant's Vice President, Michael Novy. Plaintiff also filed complaints with a local civil rights agency.

Plaintiff contends that, after he made the complaints, Mr. Novy told him that he could take a demotion to journeyman or there would be no work for him. Plaintiff contends that, when he refused the demotion, he was laid off and was not offered any work in any management position again. Plaintiff also contends that he was not rehired after an ironworker superintendent was terminated in January of 2005.

It is your responsibility to decide whether Plaintiff has proven his claim against Defendant by the greater weight of the evidence.

INSTRUCTION NO. 9

To win on his "retaliation" claim, Plaintiff must prove the following elements by a greater weight of the evidence:

- One,* Plaintiff opposed or complained about conduct that was, or that he reasonably believed was, harassment or discrimination based on his national origin;
- Two,* Defendant subsequently took adverse employment action against Plaintiff; and
- Three,* Plaintiff's opposition to or complaint about national origin harassment or discrimination was a motivating factor in Defendant's actions in demoting or laying Plaintiff off from work and not recalling him to a management position.

If any of the above elements has not been proved by the greater weight of the evidence, your verdict must be for Defendant. If Plaintiff proved all of these elements by a greater weight of the evidence, then your verdict must be for Plaintiff.

INSTRUCTION NO. 10

State and federal law define an "adverse employment action" as termination, demotion, transfers involving changes in pay or working conditions, transfers that significantly reduce an employee's career prospects, offers to substitute a sufficiently inferior new job for one that has been eliminated, or any action that would discourage a reasonable worker from making or supporting a charge of discrimination or harassment.

It is your responsibility to decide whether Plaintiff has proven by a greater weight of the evidence that he suffered an "adverse employment action."

INSTRUCTION NO. 11

Something is a “motivating factor” if it played a part in a person’s decision. However, it need not have been the only reason for the person’s decision. You may find that Plaintiff’s opposition to national origin harassment or discrimination was a motivating factor in Defendant’s actions if Plaintiff has proved by a greater weight of the evidence that Defendant’s stated reason for its actions are not the true reasons, but are instead a pretext to hide a retaliatory decision.

However, you cannot find the “motivating factor” element has been proved simply because you disagree with Defendant’s decisions or think that those decisions were harsh or unreasonable. An employer may demote, lay off or fail to recall an employee to a management position for any reason, good or bad, fair or unfair, as long as it is not for a retaliatory reason. Therefore, the fact that an employment decision may be erroneous, based on poor administration or bad policy or based on poor communication or lack of study or even based on personal dislike or animosity, does not constitute retaliation, unless the intent to retaliate also played a part in the decision. In short, the “motivating factor” element is only proved if you find by the greater weight of the evidence that Plaintiff’s opposition to national origin harassment or discrimination was a motivating factor in Defendant’s decision to demote or lay Plaintiff off from work and not to recall him to a management position. It is for you to decide whether Plaintiff’s opposition to or complaint about national origin harassment or discrimination was a “motivating factor” for the adverse employment action by Defendant.

INSTRUCTION NO. 12

The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event that you should find that Plaintiff is entitled to damages in accord with other instructions.

If you find in favor of Plaintiff, then you must award him such sum as you find by the greater weight of the evidence will fairly and justly compensate him for any damages that you find were proximately caused to him by Defendant's conduct at issue in Plaintiff's claim. An act is a proximate cause of damage if the act was a substantial factor in producing the damage and the damage would not have happened except for the act. "Substantial" means that the act has such an effect in producing damage as to lead a reasonable person to regard it as a cause of the damage.

In arriving at an amount of damages on a claim, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages. Rather, you must use your sound judgment based upon an impartial consideration of the evidence.

Remember, throughout your deliberations, you must not engage in any speculation, guess or conjecture. You must not award damages under these Instructions by way of punishment or through sympathy. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against either party.

Finally, if you find that Plaintiff is entitled to damages, you must award full damages in accordance with the damage instructions on each claim on which you find Plaintiff has prevailed. I will prevent the award of any duplicative damages.

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INSTRUCTION NO. 12 (cont'd)

A plaintiff has a duty under the law to “mitigate” his damages, that is, to exercise reasonable diligence under the circumstances to minimize his damages. Therefore, if you find that Defendant has proved by the greater weight of the evidence that Plaintiff failed to seek out or take advantage of an opportunity to reduce his damages that was reasonably available to him, then you must reduce his damages by the amount that he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.

Attached to these instructions is a Verdict Form, which you must fill out. In the “damages” sections of the Verdict Form, that is, Question 3, you should only award those damages, if any, that Plaintiff has proved by the greater weight of the evidence were proximately caused by Defendant’s wrongful conduct toward Plaintiff.

INSTRUCTION NO. 13

Plaintiff seeks damages for back pay and other monetary benefits he lost and for emotional distress damages. I will explain these items of damages in turn. You must consider these two types of damages separately.

Compensatory damages are those sums that you find by a greater weight of the evidence that will fairly and justly compensate Plaintiff for any damages you find he suffered as a direct result of Defendant's actions.

Plaintiff claims he lost wages and other monetary benefits at work because of retaliation. Plaintiff contends that he could have continued to work at Weitz as a superintendent until July 7, 2006. Plaintiff also claims he lost yearly bonuses, overtime and double time pay, his pension and his superintendent's truck. Plaintiff also claims he had to pay extra money out of his pocket to obtain health insurance coverage for him and his family after he was laid off from work.

Emotional distress damages are the amount of damages that will reasonably compensate Plaintiff for the emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life that were proximately caused by Defendant's wrongful conduct at issue in Plaintiff's claims. The amount, if any, that you assess for damages for emotional distress cannot be measured by an exact or mathematical standard, and Plaintiff is not required to introduce evidence of the monetary value of such damages. However, you must use your sound judgment, based upon impartial consideration of the evidence, to determine the amount of such damages. Emotional distress damages must compensate Plaintiff for any emotional distress that he suffered from the time of the wrongful conduct in question, until the time that you give your verdict.

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INSTRUCTION NO. 13 (cont'd)

The amount of emotional distress damages, if any, that you award must reflect the amount of emotional distress, if any, caused by Defendant's wrongful conduct at issue in the claims.

INSTRUCTION NO. 14

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes, and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 15

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach 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.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

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INSTRUCTION NO. 15 (cont'd)

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Fifth, I am giving you a Verdict Form. The Verdict Form is simply the written notice of the decision that you reach in this case. The answers to the Verdict Form must be the unanimous decisions of the jury. You will take the Verdict Form to the jury room, and when you have completed your deliberations and each of you has agreed on the answers to the Verdict Form, your foreperson will fill out the form, and sign and date it. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict. When you have reached your verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such verdict as accord with the evidence and these instructions.

DATED this 29 day of November, 2006.



LINDA R. READE
JUDGE, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EDWARD D. HEATON,

Plaintiff,

vs.

THE WEITZ COMPANY, INC.,

Defendant.

No. 05-CV-102-LRR

VERDICT FORM

We, the jury, unanimously find the following verdict on Plaintiff Edward D. Heaton's claim submitted to us:

Question 1: Did Plaintiff Edward D. Heaton prove by the greater weight of the evidence that he suffered an adverse employment action when he was demoted and laid off from Defendant The Weitz Company, Inc., as foreman, general foreman or superintendent?

Please answer "yes" or "no."

Answer: _____

(If your answer to Question 1 is "yes," please proceed to Question 2 and answer that question. If your answer to Question 1 is "no," do not answer any further questions, sign and date this Verdict Form.)

Question 2: Did Plaintiff Edward D. Heaton prove by the greater weight of the evidence that his protected activity was a motivating factor for the adverse employment actions listed in Question 1?

Please answer "yes" or "no."

Answer: _____

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VERDICT FORM (cont'd)

(If your answer to Question 2 is "yes," please proceed to Question 3 and answer that question. If your answer to Question 2 is "no," do not answer any further questions, sign and date this Verdict Form.)

Question 3:

Note: Answer Question 3 only if you answered "yes" to both Question 1 and Question 2.

State the amount of damages, if any, Plaintiff suffered as a direct result of Defendant's wrongful conduct:

- | | | |
|----|---|----------|
| 1. | Lost wages for November 4, 2003, to July 7, 2006 | \$ _____ |
| 2. | Overtime or double time wages for November 4, 2003, to July 7, 2006 | \$ _____ |
| 3. | Lost bonuses for 2003, 2004 and 2005 | \$ _____ |
| 4. | Lost health insurance benefits | \$ _____ |
| 5. | Lost pension benefits | \$ _____ |
| 6. | Loss of use of a superintendent's truck | \$ _____ |
| 7. | Past emotional distress damages | \$ _____ |

Total Damages: \$ _____

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VERDICT FORM (cont'd)

This is the end of the Verdict Form.

Dated this ____ day of _____, 2006.

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror