

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

ANNE DAVIDSON,

Plaintiff,

No. C 05-3037-MWB

vs.

KINSETH HOSPITALITY CORP.,
and its subsidiary, KINSETH HOTEL
CORP., and FRANK SMILLIE,
Individually and in his Corporate
Capacity,

Defendants.

**PRELIMINARY AND FINAL
INSTRUCTIONS
TO THE JURY**

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PRELIMINARY INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, before the lawyers make their opening statements, I am giving you these preliminary instructions to help you better understand the trial and your role in it. Consider these instructions, together with any oral instructions given to you during the trial and the written final instructions given at the end of the trial, and apply them as a whole to the facts of the case. In considering these instructions, the order in which they are given is not important.

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence to decide the facts. You are entitled to consider the evidence in light of your own observations and experiences, and you may use reason and common sense to draw conclusions from facts that have been established by the evidence. In your deliberations, you will apply those facts to the law, which I will give you in these preliminary instructions, any instructions given during the trial, and in the final instructions at the conclusion of the case, and in this way, reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not. Although you must follow my instructions, you should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the parties. Do not allow sympathy or prejudice to influence you. The

law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I will give it to you.

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. In this case, defendants Kinseth Hospitality Corporation and its subsidiary, Kinseth Hotel Corporation, are corporations. The mere fact that a party is a corporation does not mean that it is entitled to any greater or lesser consideration by you. All persons, including plaintiff Davidson and defendants Kinseth Hospitality Corporation, Kinseth Hotel Corporation, and Frank Smillie, stand equal before the law, and are entitled to the same fair consideration by you. When a corporation is involved, of course, it may act only through natural persons, such as its officers and employees, as its agents.

PRELIMINARY INSTRUCTION NO. 2 - BURDEN OF PROOF

In these instructions, you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. In this case, unless I tell you otherwise, plaintiff Davidson bears this burden of proof.

The party with the burden of proof must prove facts by the “greater weight of the evidence.” To prove something “by the greater weight of the evidence” means to prove that it is more likely true than not true. The “greater weight of the evidence” is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the 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. The testimony of a single witness that produces in your mind a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if, after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

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.

PRELIMINARY INSTRUCTION NO. 3 - THE PLAINTIFF'S CLAIMS

As I explained during jury selection, plaintiff Davidson asserts three claims against the defendants: (1) hostile environment sexual harassment; (2) sexual discrimination; and (3) retaliation for opposing sexual discrimination in the work place. The defendants deny these claims. Therefore, you must give separate consideration to each of Ms. Davidson's claims and to the defendants' defenses to those claims, and reach a separate verdict on each of those claims.

Each of Ms. Davidson's claims consists of "elements," which she must prove by the greater weight of the evidence to win on that claim. I will now give you preliminary instructions on the elements of Ms. Davidson's claims to assist you in understanding the evidence. However, these preliminary instructions provide only a preliminary outline of the elements of Ms. Davidson's claims. At the end of the trial, I will give you further final written instructions that explain these claims. Because the final instructions are more detailed, they govern on the elements of Ms. Davidson's claims.

**PRELIMINARY INSTRUCTION NO. 4 - HOSTILE ENVIRONMENT
SEXUAL HARASSMENT**

Plaintiff Davidson's first claim is that the defendants created a sexually hostile work environment. To win on her "hostile environment" claim, plaintiff Davidson must prove the following five elements by the greater weight of the evidence:

One, Ms. Davidson was subjected to sexually offensive conduct or conditions by the defendants or their employees;

Two, such conduct was unwelcome;

Three, such conduct was because of Ms. Davidson's sex;

Four, such conduct was sufficiently severe or pervasive that a reasonable person in Ms. Davidson's position would have found the work environment to be sexually hostile or abusive;

Five, at the time that such conduct occurred, and as a result of such conduct, Ms. Davidson believed that her work environment was sexually hostile or abusive.

If Ms. Davidson does not prove *all* of these elements by the greater weight of the evidence, *then* your verdict must be for the defendants on Ms. Davidson's "hostile environment" claim. On the other hand, *if* Ms. Davidson proves *all* of these elements by the greater weight of the evidence, *then* she is entitled to damages in some amount.

PRELIMINARY INSTRUCTION NO. 5 - SEXUAL DISCRIMINATION

Plaintiff Davidson's second claim is that the defendants discriminated against her on the basis of her sex.

Ms. Davidson's claim

To win on her "sexual discrimination" claim, plaintiff Davidson must prove the following elements by the greater weight of the evidence:

One, Ms. Davidson was subjected to different, more adverse employment actions or conditions than similarly-situated male employees; and

Two, Ms. Davidson's sex was a motivating factor for that different treatment.

If Ms. Davidson does not prove *both* of these elements by the greater weight of the evidence, *then* your verdict must be for the defendants on Ms. Davidson's "sexual discrimination" claim. On the other hand, if Ms. Davidson proves *both* of these elements by the greater weight of the evidence, then you must consider the defendants' "same decision" defense, as explained below.

The defendants' "same decision" defense

If Ms. Davidson proves *both* of the elements of her "sexual discrimination" claim, then you must consider whether the defendants can prove by the greater weight of the evidence that they would have made the same decision about their actions toward Ms. Davidson or the conditions of her employment regardless of her sex. *If* the defendants prove that they would have made the same decision, *then* you

will still enter a verdict in favor of Ms. Davidson on this claim, *but* you will not award damages to Ms. Davidson's on this claim. Instead, she will only be entitled to certain relief provided by the court.

PRELIMINARY INSTRUCTION NO. 6 - RETALIATION

Plaintiff Davidson's third claim is that the defendants retaliated against her for opposing sexual discrimination in the work place.

Ms. Davidson's claim

To win on her "retaliation" claim, Ms. Davidson must prove the following three elements by the greater weight of the evidence:

One, Ms. Davidson opposed or complained about conduct that was, or that she reasonably believed was, sexual discrimination;

Two, the defendants subsequently took adverse employment action against her; and

Three, Ms. Davidson's opposition to, or complaint about, sexual discrimination was a motivating factor for the adverse employment action taken by the defendants.

If Ms. Davidson does not prove *all* of these elements by the greater weight of the evidence, then your verdict must be for the defendants on Ms. Davidson's "retaliation" claim. On the other hand, if Ms. Davidson proves *all* of these elements by the greater weight of the evidence, then you must consider the defendants' "same decision" defense, as explained below.

The defendants' "same decision" defense

If Ms. Davidson proves *all* of the elements of her “retaliation” claim, then you must consider whether the defendants can prove by the greater weight of the evidence that they would have made the same decision about their actions toward Ms. Davidson or the conditions of her employment regardless of her opposition to or complaints about sexual discrimination. *If* the defendants prove that they would have made the same decision, *then* you will still enter a verdict in favor of Ms. Davidson on this claim, *but* you will not award damages to Ms. Davidson’s on this claim. Instead, she will only be entitled to certain relief provided by the court.

PRELIMINARY INSTRUCTION NO. 7 - ORDER OF TRIAL

The trial will proceed as follows:

After these preliminary instructions, the plaintiff's lawyer may make an opening statement. Next, the lawyer for the defendant may make an opening statement. An opening statement is not evidence, but simply a summary of what the lawyer expects the evidence to be.

After opening statements, the plaintiff will present evidence and call witnesses and the lawyer for the defendants may cross-examine them. Following the plaintiff's case, the defendants may present evidence and call witnesses and the lawyer for the plaintiff may cross-examine them.

After the evidence is concluded, I will give you most of the final instructions. The lawyers will then make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will then give you the remaining final instruction on deliberations, and you will retire to deliberate on your verdict.

PRELIMINARY INSTRUCTION NO. 8 - DEFINITION OF EVIDENCE

You must decide the facts in this case based on the evidence presented in court. Evidence is:

1. Testimony.
2. Exhibits I admit into evidence.
3. Stipulations, which are agreements between the parties.

Evidence may be “direct” or “circumstantial.” The law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

A particular item of evidence is sometimes admitted only for a limited purpose, and not for any other purpose. I will tell you if that happens, and instruct you on the purposes for which the item can and cannot be used.

The fact that an exhibit may be shown to you does not mean that you must rely on it more than you rely on other evidence.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I tell you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence is not necessarily determined merely by the number or

volume of documents or exhibits. The weight of evidence depends upon its quality, which means how convincing it is, and not necessarily upon its quantity. For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict that witness's testimony. The quality and weight of the evidence are for you to decide.

PRELIMINARY INSTRUCTION NO. 9 - CREDIBILITY OF WITNESSES

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 says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the witness's drug or alcohol use or addiction, if any, 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 see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

Ordinarily, witnesses may only testify to factual matters within their personal knowledge. However, you may hear evidence from persons described as experts. Persons may become qualified as experts in some field by knowledge, skill, training, education, or experience. Such experts may state their opinions on matters in that field and may also state the reasons for their opinions. You should consider expert testimony just like any other testimony. You may believe all of what an expert says, only part of it, or none of it, considering the expert's qualifications, the soundness

of the reasons given for the opinion, the acceptability of the methods used, any reason the expert may be biased, and all of the other evidence in the case.

PRELIMINARY INSTRUCTION NO. 10 - DEPOSITIONS

Certain testimony from a deposition may be read into evidence. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

PRELIMINARY INSTRUCTION NO. 11 - INTERROGATORIES

During this trial, you may hear the word “interrogatory.” An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

PRELIMINARY INSTRUCTION NO. 12 - STIPULATED FACTS

The plaintiff and the defendants have agreed or “stipulated” to certain facts and have reduced these facts to a written agreement or stipulation. Either counsel may, throughout the trial, read to you all or a portion of the stipulated facts. You should treat these stipulated facts as having been proved.

PRELIMINARY INSTRUCTION NO. 13 - OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon. If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself. Also, the lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer has made objections.

PRELIMINARY INSTRUCTION NO. 14 - BENCH CONFERENCES

During the trial it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference here while the jury is present in the courtroom, or by calling a recess. Please be patient, because while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error, and to save your valuable time. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

PRELIMINARY INSTRUCTION NO. 15 - NOTE-TAKING

If you want to take notes during the trial, you may, but be sure that your note-taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes on your chair. At the end of the trial, you may take your notes out of the notebook and keep them, or leave them, and we will destroy them. No one will read the notes, either during or after the trial.

You will notice that we have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching your verdict.

**PRELIMINARY INSTRUCTION NO. 16 - CONDUCT OF JURORS
DURING TRIAL**

You will not be required to remain together while court is in recess. However, to insure fairness, you, as jurors, must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers, or witnesses involved in this case—you should not even pass the time of day with any of them. It is important that you not only do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case you will know more about the matter than anyone will learn through the news media.

Sixth, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation *about this case* on your own. You must decide this case based on the evidence presented in court.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Eighth, if at anytime during the trial you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer, who will deliver it to me. I want you to be comfortable, so please do not hesitate to inform me of any problem.

DATED this 11th day of December, 2006.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

FINAL INSTRUCTION NO. 1 - INTRODUCTION

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.

Nothing I have said or done during the trial was intended to suggest that I have any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 - IMPEACHMENT OF WITNESSES

In Preliminary Instruction No. 9, I instructed you generally on the credibility of witnesses. I will now give you some further instructions on how the credibility of witnesses can be “impeached.”

Any witness may be discredited or “impeached” by contradictory evidence; by a showing that the witness 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’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and, therefore, whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 3 - HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Plaintiff Davidson's first claim is that the defendants created a sexually hostile work environment. I will now explain in more detail the elements of this "hostile environment" claim.

To win on her "hostile environment" claim, plaintiff Davidson must prove the following elements by the greater weight of the evidence:

One, Ms. Davidson was subjected to sexually offensive conduct or conditions by the defendants or their employees.

Two, such conduct was unwelcome.

Conduct is "unwelcome" if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive.

Three, such conduct was because of the plaintiff's sex.

Offensive conduct does not amount to unlawful sexual harassment unless the harassment was "because of the plaintiff's sex." Conduct was "because of sex" if it was, for example, motivated by sexual desire or motivated by a general hostility to the presence of one gender in the work place. The fundamental issue is whether members of one sex were subjected to unfavorable conditions of employment that the members of the other sex were not. Thus, harassing conduct was "because of the plaintiff's sex" when members of the plaintiff's sex were exposed to conditions of employment to which members of the other sex were not exposed. The harassment need not have been explicitly sexual in nature, nor must the plaintiff

show that only women were subjected to the harassment. However, she must prove by the greater weight of the evidence that women were the primary target of such harassment, that is, that a majority of the defendants' harassing conduct was directed toward females.

Four, such conduct was sufficiently severe or pervasive that a reasonable person in Ms. Davidson's position would have found the work environment to be sexually hostile or abusive.

The objectionable environment must be one that a reasonable person in the plaintiff's position would have found to be hostile and abusive because of the sexual harassment. Whether an environment is sufficiently hostile or abusive must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating or merely offensive; the status of the alleged harasser as either a co-worker or a supervisor; the physical proximity of the alleged harasser; the presence or absence of other people; and whether it unreasonably interfered with an employee's work performance. However, no single factor is required in order to find a work environment hostile or abusive.

Anti-harassment laws do not prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. Nor are they intended as a general civility code. Therefore, simple teasing, offhand comments, and isolated incidents or isolated offensive utterances (unless extremely serious) will not amount to sexual harassment in the form of creation of a hostile environment. Similarly, conduct that is boorish, chauvinistic, unpleasant, rude, and immature may not be enough;

rather, such conduct must be sufficiently severe or pervasive that a reasonable person in the plaintiff's position would have found the work environment to be hostile or abusive.

Five, at the time that such conduct occurred, and as a result of such conduct, Ms. Davidson believed that her work environment was sexually hostile or abusive.

For sexual harassment to create a sexually hostile work environment, the victim must, in fact, perceive the environment to be hostile or abusive because of the sexual harassment.

If Ms. Davidson has not proved *all* of these elements by the greater weight of the evidence, *then* your verdict must be for the defendants on Ms. Davidson's "hostile environment" claim. On the other hand, *if* Ms. Davidson has proved *all* of these elements by the greater weight of the evidence, *then* she is entitled to damages in some amount.

FINAL INSTRUCTION NO. 4 - SEXUAL DISCRIMINATION

Plaintiff Davidson's second claim is that the defendants discriminated against her on the basis of her sex. I will now explain in more detail the elements of this "sexual discrimination" claim and the defendants' defense to this claim.

Ms. Davidson's claim

To win on her "sexual discrimination" claim, plaintiff Davidson must prove the following elements by the greater weight of the evidence:

One, Ms. Davidson was subjected to different, more adverse employment actions or conditions than similarly-situated male employees.

To prove sexual discrimination, the plaintiff must show that she was similarly situated in all relevant respects to one or more male co-workers who were treated more favorably. In order to determine whether a plaintiff has shown that the male co-workers involved were "similarly situated," you must consider, for example, whether the employees were involved in the same or similar jobs, or were accused of the same or similar misconduct, but were treated or disciplined in different ways. Ms. Davidson alleges that the defendants discharged her on the basis of her sex by using different standards than those used or applied to similarly-situated male employees.

The different treatment must also be sufficient to constitute "adverse employment action." Not everything that makes an employee unhappy is an "adverse employment action" sufficient to prove a discrimination claim. Rather, an "adverse employment action" must be

more disruptive than a mere inconvenience, alteration of job responsibilities, or change in duties and working conditions that causes no materially significant disadvantage. The “adverse employment action” claimed by Ms. Davidson as the basis for her sexual discrimination claim is the termination of her employment by the defendants. Termination is an “adverse employment action.” Thus, you must determine whether or not Ms. Davidson’s termination was different and more adverse than the treatment of similarly-situated male employees.

Two, Ms. Davidson’s sex was a motivating factor for that different treatment.

Ms. Davidson’s sex was a “motivating factor” if her sex played a part or played a role in the defendants’ decision to terminate her employment. However, Ms. Davidson’s sex need not have been the only reason for that employment decision.

You may find that Ms. Davidson’s sex was a motivating factor in the defendants’ adverse employment decision if Ms. Davidson has proved by the greater weight of the evidence that the defendants’ stated reasons for their decision are not the true reasons, but are instead pretexts or false reasons to hide a discriminatory decision based on Ms. Davidson’s sex.

You cannot find that the “motivating factor” element of Ms. Davidson’s sexual discrimination claim has been proved, however, simply because you disagree with the defendants’ decision, or think that decision was harsh and unreasonable. An employer may make employment decisions as it sees fit, as long as its decisions are not unlawful. Instead, the “motivating factor” element is only proved if you find by the greater weight of the evidence

that Ms. Davidson's sex was a motivating factor for the defendants' "adverse employment action."

If Ms. Davidson has not proved *both* of these elements by the greater weight of the evidence, *then* your verdict must be for the defendants on Ms. Davidson's "sexual discrimination" claim. On the other hand, if Ms. Davidson has proved *both* of these elements by the greater weight of the evidence, then you must consider the defendants' "same decision" defense, as explained below.

The defendants' "same decision" defense

If Ms. Davidson has proved *both* of the elements of her "sexual discrimination" claim, then you must consider whether the defendants have proved by the greater weight of the evidence that they would have made the same decision about their actions toward Ms. Davidson or the conditions of her employment regardless of her sex. *If* the defendants have proved that they would have made the same decision regardless of Ms. Davidson's sex, *then* you will still enter a verdict in favor of Ms. Davidson on this claim, *but* you cannot award damages to Ms. Davidson on this claim. Instead, she is only entitled to certain relief provided by the court.

FINAL INSTRUCTION NO. 5 - RETALIATION

Plaintiff Davidson's third claim is that the defendants retaliated against her for opposing sexual discrimination in the work place. I will now explain in more detail the elements of this "retaliation" claim and the defendants' defense to this claim.

Ms. Davidson's claim

To win on her "retaliation" claim, Ms. Davidson must prove the following three elements by the greater weight of the evidence:

One, Ms. Davidson opposed or complained about conduct that was, or that she reasonably believed was, sexual discrimination.

Federal and state anti-discrimination laws make it unlawful for an employer to discriminate against an employee because of the employee's "opposition" to conduct or employment practices made unlawful under those laws. Ms. Davidson contends that she opposed sexual discrimination by complaining about Frank Smillie's conduct to him, to management, and to personnel managers. She also contends that she threatened to report Frank Smillie for certain conduct. Ms. Davidson must prove that a reasonable person could have believed that the incidents about which she complained violated the anti-discrimination laws. In deciding whether a reasonable person could have believed that the incidents about which Ms. Davidson complained violated anti-discrimination laws, you must determine whether the conduct involved or reasonably appeared to involve different, more adverse treatment of female employees than similarly-situated male employees engaged in the same conduct. In order to

determine whether the male co-workers involved were “similarly situated,” you must consider, for example, whether the employees were involved in the same or similar jobs, or were accused of the same or similar misconduct, but were treated or disciplined in different ways.

Two, the defendants subsequently took adverse employment action against Ms. Davidson.

The “adverse employment action” claimed by Ms. Davidson as the basis for her retaliation claim is the termination of her employment by the defendants. Termination is an “adverse employment action.” Thus, you must determine whether or not the defendants terminated Ms. Davidson.

Three, Ms. Davidson’s opposition to, or complaint about, sexual discrimination was a motivating factor for the adverse employment action taken by the defendants.

Something was a “motivating factor” if it played a part or played a role in the defendants’ decision to terminate Ms. Davidson’s employment. However, Ms. Davidson’s opposition to or complaint about sexual discrimination need not have been the only reason for that employment decision. You may find that Ms. Davidson’s opposition to sexual harassment was a motivating factor in the defendant’s adverse employment action if Ms. Davidson has proved by the greater weight of the evidence that the defendants’ stated reasons for their actions are not the true reasons, but are, instead, a pretext or false reason to hide a retaliatory decision.

However, you cannot find that the “motivating factor” element has been proved simply because you

disagree with the defendants' decisions or think that those decisions were harsh or unreasonable. An employer may terminate an employee 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 to take adverse action against the plaintiff.

In short, the "motivating factor" element is only proved if you find by the greater weight of the evidence that Ms. Davidson's *opposition to sexual discrimination* was a motivating factor for the defendants' adverse employment action. It is for you to decide whether Ms. Davidson's opposition to or complaint about sexual discrimination were a "motivating factor" for the adverse employment action by the defendants.

If Ms. Davidson has not proved all three of these elements by the greater weight of the evidence, *then* your verdict must be for the defendants on Ms. Davidson's claim of retaliation. On the other hand, *if* Ms. Davidson has proved *all* of these elements by the greater weight of the evidence, *then* you must consider the defendants' "same decision" defense, as explained below.

The defendants' "same decision" defense

If Ms. Davidson has proved *all* of the elements of her "retaliation" claim, then you must consider whether the defendants have proved by the greater weight of the evidence that they would have made the same decision about their actions toward Ms. Davidson or the conditions of her employment regardless of her opposition to

sexual discrimination. *If* the defendants have proved that they would have made the same decision regardless of Ms. Davidson's opposition to sexual discrimination, *then* you will still enter a verdict in favor of Ms. Davidson on this claim, *but* you cannot award damages to Ms. Davidson on this claim. Instead, she is only entitled to certain relief provided by the court.

FINAL INSTRUCTION NO. 6 - DAMAGES—IN GENERAL

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 whether any 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 the plaintiff is entitled to damages in accord with the other instructions.

If you find in favor of the plaintiff on a particular claim, and that the defendants have failed to prove their “same decision” defense, where applicable, then you must award her such sum as you find by the greater weight of the evidence will fairly and justly compensate her for any damages that you find were proximately caused to her by the conduct of the defendants at issue in that 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 had 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 for any particular item of damages, 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 that, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. Except where instructed otherwise, in your consideration of punitive damages in Final Jury Instruction No. 8, 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 any of the parties.

You must award the full amount of damages, if any, that Ms. Davidson has proved by the greater weight of the evidence. However, the amount you assess for damages must not exceed the amount proximately caused by the wrongful conduct of the defendants as proved by the evidence. Also, do not allow any amount awarded for one item of damages on a particular claim to be included in any amount awarded for any other item of damages on that claim, because the plaintiff is not entitled to recover duplicate damages.

A plaintiff 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 that the defendants have proved by the greater weight of the evidence that the plaintiff failed to seek out or take advantage of an opportunity to reduce her damages that was reasonably available to her, then you must reduce her damages by the amount that she reasonably could have avoided if she 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, you should only award those damages, if any, that the plaintiff has proved by the greater weight of the evidence were

proximately caused by the defendants' wrongful conduct toward her that is at issue in the particular claim you are considering.

**FINAL INSTRUCTION NO. 7 - ITEMS OF COMPENSATORY
DAMAGES**

On each claim, plaintiff Davidson seeks damages for emotional distress and backpay. I will explain these items of damages in turn.

Emotional distress damages. Damages for “emotional distress” are the amount of damages that will reasonably compensate the plaintiff for the emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life that were proximately caused by the wrongful conduct of the defendants at issue in the claim in question. The amount, if any, that you assess for damages for emotional distress cannot be measured by an exact or mathematical standard, and the plaintiff is not required to introduce evidence of the monetary value of such damages. Even so, you must use your sound judgment based upon an impartial consideration of the evidence to determine the amount of such damages. Damages for emotional distress must compensate the plaintiff for any emotional distress that she suffered from the time of the wrongful conduct in question until the time that you give your verdict. You may also award emotional distress damages for future emotional distress, but only if you find that Ms. Davidson has proved by the greater weight of the evidence that her emotional distress proximately caused by the defendants’ wrongful conduct is reasonably certain to extend into the future.

The amount of emotional distress damages, if any, that you award for each claim may be the same or different, but the damages awarded must reflect the

amount of emotional distress, if any, caused to the plaintiff by the wrongful conduct at issue in each particular claim.

Backpay. Ms. Davidson also seeks an award of backpay for wages she lost because of sexual harassment, sexual discrimination, and/or retaliation. “Backpay” is the amount of any wages and fringe benefits that Ms. Davidson would have earned from the date of her termination until the date of your verdict, *minus* the wages and fringe benefits, if any, that she actually did earn during that time from other employment after she was terminated from her job with Kinseth Hospitality Corporation.

You may award backpay for each claim on which Ms. Davidson prevails, if you find that Ms. Davidson was terminated as a direct result of the wrongful conduct at issue in that claim. However, Ms. Davidson can only recover one award of backpay, even if she prevails on more than one of her claims. Therefore, I will prevent the award of duplicate damages for backpay, if you award backpay as damages on more than one claim.

FINAL INSTRUCTION NO. 8 - PUNITIVE DAMAGES

In addition to compensatory damages described in Final Jury Instruction No. 7, the law permits the jury, under certain circumstances, to award punitive damages in order to punish the defendants or to deter defendants and others from like conduct in the future. Punitive damages can be awarded on each of the claims on which the plaintiff has prevailed, but only against the corporate defendants, Kinseth Hospitality Corporation and Kinseth Hotel Corporation. Punitive damages cannot be awarded against individual defendant Frank Smillie, in either his individual or corporate capacity.

If you find that Ms. Davidson has proved one or more of her claims, and that the defendants have failed to prove their “same decision” defense, where applicable, then you must consider what, if any, punitive damages you should award on that claim or those claims. On any such claims, whether or not to award punitive damages and the amount of any punitive damages are for you to decide.

You may, but are not required to, award punitive damages on a particular claim only if you find that Ms. Davidson has proved the following two elements by the greater weight of the evidence as to the wrongful conduct at issue on that particular claim:

One, the defendants acted with malice or reckless indifference to Ms. Davidson’s right not to be subjected to the wrongful conduct at issue in the claim in question.

The defendants acted with malice or reckless indifference if the plaintiff has proved by the greater weight of the evidence that the defendants or their employees who terminated or harassed the plaintiff knew that the termination or harassment of the plaintiff was in violation of the law prohibiting sexual harassment, sexual discrimination, or retaliation, or acted with reckless disregard of that law. On the other hand, you may not award punitive damages if it has been proved by the greater weight of the evidence that the defendants made a good-faith effort to comply with the law prohibiting the wrongful conduct in question.

Two, it is appropriate to punish the defendants or to deter the defendants and others from like conduct in the future.

If the plaintiff proves both of these elements, then you may, but are not required to, award that plaintiff an additional amount as punitive damages. Whether or not to award punitive damages to the plaintiff on a particular claim and the amount of any punitive damages to award are within your discretion. You may award the same or different amounts of punitive damages on the claims, including awarding no punitive damages on one or more claims and some punitive damages on another or other claims.

If you decide to award punitive damages on a particular claim, you should consider the following factors in determining the amount of the punitive damages to award: the nature of the defendant's conduct under the totality of the circumstances; the frequency of the defendant's conduct; how reprehensible the defendant's conduct toward the plaintiff was; what amount of punitive damages, in addition to any damages for emotional distress and backpay already awarded, is needed, considering

the defendant's financial condition, to punish the defendant for its wrongful conduct toward the plaintiff that is at issue in that particular claim and to deter the defendant and others from similar wrongful conduct in the future; the amount of fines and civil penalties, if any, applicable to similar conduct; and whether the amount of punitive damages bears a reasonable relationship to the compensatory damages awarded.

FINAL INSTRUCTION NO. 9 - DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules that you must follow.

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.

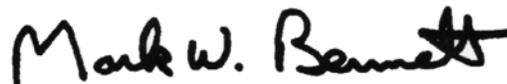
Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed 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.*

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

Finally, I am giving you the Verdict Form. A Verdict Form is simply the written notice of the decision that you reach in this case. *Your verdict must be unanimous*. You will take the Verdict Form to the jury room. When you have reached a unanimous verdict, your foreperson must complete one copy of the Verdict Form and all of you must sign that copy to record your individual agreement with the verdict and to show that it is unanimous. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict. When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

DATED this 13th day of December, 2006.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

ANNE DAVIDSON,

Plaintiff,

vs.

KINSETH HOSPITALITY CORP.,
and its subsidiary, KINSETH HOTEL
CORP., and FRANK SMILLIE,
Individually and in his Corporate
Capacity,

Defendants.

Nos. C 05-3037-MWB

VERDICT FORM

On the claims of plaintiff Anne Davidson, we, the Jury, find as follows:

| HOSTILE ENVIRONMENT SEXUAL HARASSMENT | | | | | | | | | | |
|--|---|------------------|-----------------------------------|--|----|-------------------------------------|--|----|-------------------|--|
| Step 1: Verdict | <p>On Ms. Davidson’s claim of hostile environment sexual harassment, as explained in Final Jury Instruction No. 3, in whose favor do you find? <i>(If you find in favor of Ms. Davidson on this claim, then consider what damages, if any, she has proved on this claim in Step 2. However, if you find in favor of the defendants, then do not consider any more Steps in this section of the Verdict Form. Instead, go on to consider your verdict on Ms. Davidson’s sexual discrimination claim.</i></p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center; border: none;">___ Ms. Davidson</td> <td style="width: 50%; text-align: center; border: none;">___ The defendants</td> </tr> </table> | ___ Ms. Davidson | ___ The defendants | | | | | | | |
| ___ Ms. Davidson | ___ The defendants | | | | | | | | | |
| Step 2: Compensatory Damages | <p>If you found in favor of Ms. Davidson in Step 1, what amount, if any, do you award for the following items of “compensatory damages” on this claim, as such damages are explained in Final Jury Instruction No. 7?</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 10%; text-align: center; border: none;">\$</td> <td style="width: 80%; border: none;">_____ for past emotional distress</td> <td style="width: 10%; border: none;"></td> </tr> <tr> <td style="text-align: center; border: none;">\$</td> <td style="border: none;">_____ for future emotional distress</td> <td style="border: none;"></td> </tr> <tr> <td style="text-align: center; border: none;">\$</td> <td style="border: none;">_____ for backpay</td> <td style="border: none;"></td> </tr> </table> | \$ | _____ for past emotional distress | | \$ | _____ for future emotional distress | | \$ | _____ for backpay | |
| \$ | _____ for past emotional distress | | | | | | | | | |
| \$ | _____ for future emotional distress | | | | | | | | | |
| \$ | _____ for backpay | | | | | | | | | |

| | | |
|--|---|--------------------|
| Step 3: Punitive Damages | If you found in favor of Ms. Davidson in Step 1, what amount, if any, do you award for “punitive damages” on this claim, as such damages are explained in Final Jury Instruction No. 8? <i>(Remember that punitive damages, if any, can only be awarded against defendants Kinseth Hospitality Corporation and Kinseth Hotel Corporation, but not against defendant Frank Smillie.)</i> | |
| | \$ _____ for punitive damages | |
| SEXUAL DISCRIMINATION | | |
| Step 1: Verdict | On Ms. Davidson’s claim of “sexual discrimination,” as explained in Final Jury Instruction No. 4, in whose favor do you find? <i>(If you find in favor of Ms. Davidson on this claim, please go on to consider the question in Step 2. However, if you find in favor of the defendants, then do not consider any further Steps in this section of the Verdict Form. Instead, go on to consider your verdict on Ms. Davidson’s “retaliation” claim.)</i> | |
| | ___ Ms. Davidson | ___ The defendants |
| Step 2: “Same Decision” Defense | Do you find that the defendants have proved their “same decision” defense to this claim, as explained in Final Jury Instruction No. 4, beginning on page 30? <i>(If your answer is “no,” then consider your verdict on damages on this claim in Steps 3 and 4. However, if your answer is “yes,” then you cannot award damages on this claim, because Ms. Davidson is only entitled to certain relief from the court. Therefore, if your answer is “yes,” do not consider Steps 3 and 4 for this claim. Instead, go on to consider your verdict on Ms. Davidson’s “retaliation” claim.)</i> | |
| | ___ No | ___ Yes |
| Step 3: Compensatory Damages | If you found in favor of Ms. Davidson on this claim in Step 1, and answered “no” to the question in Step 2, what amount, if any, do you award for the following items of “compensatory damages” on this claim, as such damages are explained in Final Jury Instruction No. 7? | |
| | \$ _____ for past emotional distress | |
| | \$ _____ for future emotional distress | |
| | \$ _____ for backpay | |

| | | |
|---|--|--|
| Step 4: Punitive Damages | If you found in favor of Ms. Davidson on this claim in Step 1, and answered “no” to the question in Step 2, what amount, if any, do you award for “punitive damages” on this claim, as such damages are explained in Final Jury Instruction No. 8? <i>(Remember that punitive damages, if any, can only be awarded against defendants Kinseth Hospitality Corporation and Kinseth Hotel Corporation, but not against defendant Frank Smillie.)</i> | |
| | \$ _____ for punitive damages | |

RETALIATION

| | | |
|----------------------------|---|--------------------|
| Step 1: Verdict | On Ms. Davidson’s claim of retaliation, as explained in Final Jury Instruction No. 5, in whose favor do you find? <i>(If you find in favor of Ms. Davidson on this claim, please go on to consider the question in Step 2. However, if you find in favor of the defendants, then do not consider any further Steps in this section of the Verdict Form. Instead, please notify the Court Security Officer that you have reached a verdict.)</i> | |
| | ___ Ms. Davidson | ___ The defendants |

| | | |
|--|---|---------|
| Step 2: “Same Decision” Defense | Do you find that the defendants have proved their “same decision” defense to this claim, as explained in Final Jury Instruction No. 5, beginning on page 33? <i>(If your answer is “no,” then consider your verdict on damages on this claim in Steps 3 and 4. However, if your answer is “yes,” then you cannot award damages on this claim, because Ms. Davidson is only entitled to certain relief from the court. Therefore, if your answer is “yes,” do not consider Steps 3 and 4 for this claim. Instead, please notify the Court Security Officer that you have reached a verdict.)</i> | |
| | ___ No | ___ Yes |

| | | |
|---|---|--|
| Step 3: Compensatory Damages | If you found in favor of Ms. Davidson on this claim in Step 1, and answered “no” to the question in Step 2, what amount, if any, do you award for the following items of “compensatory damages” on this claim, as such damages are explained in Final Jury Instruction No. 7? | |
| | \$ _____ for past emotional distress | |
| | \$ _____ for future emotional distress | |
| | \$ _____ for backpay | |

| | |
|--|---|
| <p>Step 4: Punitive Damages</p> | <p>If you found in favor of Ms. Davidson on this claim in Step 1, and answered “no” to the question in Step 2, what amount, if any, do you award for “punitive damages” on this claim, as such damages are explained in Final Jury Instruction No. 8? <i>(Remember that punitive damages, if any, can only be awarded against defendants Kinseth Hospitality Corporation and Kinseth Hotel Corporation, but not against defendant Frank Smillie.)</i></p> |
| | <p>\$ _____ for punitive damages</p> |

Date: _____ **Time:** _____

| | |
|------------|-------|
| _____ | _____ |
| Foreperson | Juror |
| _____ | _____ |
| Juror | Juror |
| _____ | _____ |
| Juror | Juror |
| _____ | _____ |
| Juror | Juror |