

**Duty of Jury to Find Facts and Follow Law**

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Also, you must not read into these instructions or into anything the court may have said or done as giving any suggestion as to what verdict you should return - that is a matter entirely up to you.

You should not worry about memorizing or writing down all of the instructions as I state them, because I will send into the jury room a written copy of my instructions. However, you must know that the law is as I will give it to you from the bench; the written copy is merely a guide to assist you.

**What Is Evidence**

The evidence from which you are able to decide what the facts are consists of:

1. the sworn testimony of witnesses;
2. the exhibits which have been received into evidence; and
3. any facts to which the lawyers have agreed or stipulated.

### **What Is Not Evidence**

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their openings statements and closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

### **Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact.

You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Direct evidence can prove a material fact by itself. It does not require any other evidence. It does not require you to draw any inferences. A witness's testimony is direct evidence when the witness testifies to what she saw, heard, or felt. In other words, when a witness testifies about what is known from her own personal knowledge by virtue of her own senses, what she sees, touches, or hears—that is direct evidence. The only question is whether you believe the witness's testimony. A document or physical object may also be direct evidence when it can prove a material fact by itself, without any other evidence or inference. You may, of course, have to determine the genuineness of the document or object.

Circumstantial evidence is the opposite of direct evidence. It cannot prove a material fact by itself. Rather, it is evidence that tends to prove a material fact when considered together with

other evidence and by drawing inferences. There is a simple example of circumstantial evidence that I used at the beginning of this trial that you may recall.

Assume that when you got up this morning it was a nice, sunny day. But when you looked around you noticed that the streets and sidewalks were very wet. You had no direct evidence that it rained during the night. But, on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to infer that it had rained during the night.

Not all circumstantial evidence presents such a clear compelling inference; the strength of the inferences arising from circumstantial evidence is for you to determine. It is for you to decide how much weight to give to any evidence.

An inference from circumstantial evidence may be drawn on the basis of reason, experience, and common sense. Inferences may not, however, be drawn by guesswork, speculation, or conjecture.

The law does not require a party to introduce direct evidence. A party may prove a fact entirely on circumstantial evidence or upon a combination of direct and circumstantial evidence. Circumstantial evidence is not less valuable than direct evidence.

You are to consider all the evidence in the case, both direct and circumstantial, in determining what the facts are, and in arriving at your verdict.

**Deposition Testimony**

Some of the testimony before you was presented in the form of depositions which have been received into evidence. A deposition is a procedure whereby a lawyer for a party questions a witness under oath in the presence of a court stenographer. You may consider the testimony of a witness at a deposition according to the same standards you would use to evaluate the testimony of a witness at trial.

### **Credibility of Witnesses**

In deciding the facts of this case, you may have to 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 at all. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness' testimony; and
6. the reasonableness of the witness' testimony in light of all the evidence.

**Witness - Impeachment - Prior Statements**

In assessing the credibility of a witness, you may also consider whether, on some prior occasion, the witness made statements that contradict the testimony he or she gave at the time of trial. If you conclude that a witness did, at some prior time, make statements that were materially different from what the witness said during this trial, you may take this into account in assessing the credibility of such witness, or determining the weight that you will give to such witness's testimony.



**Witnesses - Number - Weight of Testimony**

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness' testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses' testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or quality of the testimony that determines where the weight of the evidence lies.

### **Corporations**

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. The corporate defendants in this case are entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life or in the community. Corporations act through their agents and employees.

**Individual Liability**

As you are aware, in addition to the corporate Defendants, the Plaintiff is also suing Defendant Ernest Masse in his individual capacity. With respect to individual liability, it is possible for a supervisor at a company to wear "two hats" - that is, a supervisor may act as the agent of a company, or switch hats, and engage in conduct clearly outside the scope of his duties. In other words, there may be occasions where a supervisor is himself personally liable on the ground that, by engaging in certain discriminatory conduct, the supervisor was acting personally and not on behalf of the employer.

**Burden of Proof**

The law imposes on the Plaintiff the responsibility or burden of proving his claim. It is not up to the Defendants to disprove the claim. Furthermore, the Plaintiff must prove the things he claims by what is called a fair preponderance of the evidence, which I will now define in more detail.

**Burden of Proof - Fair Preponderance**

I have just told you that the burden of proof in this case is on the party making the claim in question, and in a few minutes I am going to describe in detail just what the Plaintiff must prove in order to prevail on his claim.

The Plaintiff must prove his claim by what the law refers to as "a fair preponderance of the evidence" which is another way of saying that the party must prove them by "the greater weight of the evidence."

To put it another way, you must be satisfied that the evidence shows that what the party making a claim is claiming is "more probably true than not."

Do not confuse the burden of proving something by a fair preponderance of the evidence with the burden of proving something beyond a reasonable doubt. As most of you probably know or have heard, in a criminal case the prosecution must prove the defendant is guilty beyond a reasonable doubt. That is a very stringent standard of proof. However, this is not a criminal case. Therefore, in order to prevail, the Plaintiff need not prove his claim beyond a reasonable doubt; he need only prove it by a fair preponderance of the evidence.

Perhaps the best way to explain what is meant by a fair preponderance of the evidence is to ask you to visualize an old fashioned scale with two counter balancing arms and use it to

mentally weigh the evidence with respect to the claim being made by the Plaintiff.

If, after you have heard all the evidence relevant to the claim, you determine that the scale tips in favor of the Plaintiff, no matter how slightly it may tip, then the Plaintiff has sustained his burden of proving that particular claim to you by a fair preponderance of the evidence because he has made the scale tip in his favor.

If, on the other hand, you determine that the scale tips in favor of the Defendants, or that the scale is so evenly balanced that you cannot say whether it tips one way or the other, then the Plaintiff has failed to prove his claim by a fair preponderance of the evidence because he has not made the scale tip in his favor.

**Nature of this Action - Disparate Treatment**

I am now going to instruct you on the specific law that applies to this case. The law will guide you as to the factual determinations you must make. You must accept the law that I give you, whether you agree with it or not.

In this case, the Plaintiff claims that the Defendants discriminated against him by terminating the Plaintiff's employment because of his age in violation of the Federal Age Discrimination in Employment Act (commonly referred to as the ADEA), and the age discrimination provisions of the Rhode Island Fair Employment Practices Act of 1967 (commonly referred to as the FEPA) and the Rhode Island Civil Rights Act of 1990 (commonly referred to as the RICRA). Under these federal and state laws, it is unlawful to discharge any employee because of that employee's age when the employee is at least 40 years of age.

Defendants contend they did not discharge the Plaintiff because of his age. Instead, the Defendants claim the Plaintiff was discharged for performance-related reasons that had nothing to do with his age.

**Disparate Treatment - Elements**

In order to prevail in this case, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

First: That the Plaintiff was at least 40 years old;

Second: That the Plaintiff's job performance was meeting the Defendants' legitimate job expectations;

Third: That the Defendants discharged the Plaintiff; and

Fourth: That the Defendants had a continuing need for the same services the Plaintiff had been performing.



**Legitimate, Nondiscriminatory Reasons Other than Age**

If you find the Plaintiff has established the initial elements of his claim by a preponderance of the evidence, you must then consider the defense raised by the Defendants, which is that the Plaintiff was discharged for legitimate, nondiscriminatory reasons unrelated to his age. Specifically, the Defendants assert they discharged the Plaintiff solely because of performance-related issues. In raising this defense, the Defendants need only produce some evidence of a legitimate, nondiscriminatory reason for the discharge; they are not required to prove their defense by a preponderance of the evidence.

If you find the Defendants have presented evidence of a legitimate, nondiscriminatory reason for discharging the Plaintiff, the Plaintiff must then show that the reason offered by the Defendants is not the true reason for discharging the Plaintiff, but merely a pretext (or cover-up) for unlawful discrimination based upon the Plaintiff's age. A pretext (or cover-up) is an excuse given in order to hide the true intentions underlying a decision.

Ultimately then, if you find the Defendants have presented evidence of a legitimate, nondiscriminatory reason for discharging the Plaintiff, the Plaintiff bears the burden of proving that age was a motivating factor in the Defendants' decision to discharge him. If the Plaintiff does not prove that the reason offered by

the Defendants to justify his discharge is more likely than not a pretext (or cover-up) for intentional age discrimination, you must find for the Defendants.

**Defendants' Business Judgment**

Defendants' business judgment is not on trial in this action. The law entitles employers to exercise their business judgment and make their own lawful employment decisions. Therefore, your focus must be on the Defendants' motivation in discharging the Plaintiff; you may not question the Defendants' business judgment.

The law applicable to this case requires only that an employer not discriminate against an employee because of the employee's age. An employer may discharge, refuse to promote, or otherwise adversely affect the employment of an employee for any other reason, good or bad, fair or unfair. So even though you personally may not agree with the actions taken by the Defendants, and may have acted differently under the circumstances, you may not find in favor of the Plaintiff unless you find by a preponderance of the evidence that the Defendants discriminated against the Plaintiff because of the Plaintiff's age.

On the other hand, it is not necessary for the Plaintiff to prove that age was the sole or exclusive reason for the Defendants' decision. It is sufficient if the Plaintiff proves that age was a motivating factor in the Defendants' decision to discharge him.

**Damages - Introductory**

I will now turn to the question of damages. In discussing damages, I do not, in any way, mean to suggest an opinion that the Defendants are legally responsible or liable for the damages being claimed. That is a matter for you to decide.

Since I do not know how you are going to decide the case, I am instructing you about damages only so that if you find that the Defendants are liable, you will know what principles govern an award of damages.

You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award as damages, if any, in the event that you find the Defendants are liable. You need consider the question of damages only if you find that the Defendants are liable. If you do not find liability, no award of damages can be made.

The burden of proof as to the existence and extent of damages is on the party claiming to have suffered those damages and must be proven by a fair preponderance of the evidence. In other words, you may make an award for damages only to the extent that you find damages have been proven by the evidence. You may not base an award of damages or the amount of any such award on speculation or guesses. You must base any award of damages on the evidence presented and on what you consider to be fair and adequate compensation for such damages as you find have been proven.

**Damages - Compensatory**

If you find the Defendants liable to the Plaintiff for discriminating against Plaintiff based upon his age, then you must consider the question of damages. Damages are defined in law as that amount of money that will compensate an injured party for the harm or loss that he has sustained. The rationale behind compensatory damages is to restore a person to the position he was in prior to the harm or the loss. Compensatory damages, then, are the amount of money which will replace, as near as possible, the loss or harm caused to a person. In this regard, you may consider the previous instructions I have given on the matter of damages.

When you assess damages, you must not be oppressive or unconscionable, and you may assess only such damages as will fairly and reasonably compensate the Plaintiff insofar as the same may be computed in money. You must confine your deliberations to the evidence, and you must not indulge in guesswork, speculation or conjecture.

**Damages - Requirement of Causation - Apportionment**

The Plaintiff is not necessarily entitled to damages even though you may find the Defendants liable for violating the age discrimination laws. In order for the Plaintiff to recover damages from any of the Defendants, he must also prove that the conduct for which you have found a particular Defendant liable was the direct and proximate cause of the damages sustained by the Plaintiff.

Secondly, if you find that the damages suffered by the Plaintiff were partly the result of improper conduct by one or more of the Defendants, you must apportion the damages accordingly so that any Defendant is required to pay only that portion of the damages attributable to that Defendant's improper conduct. You are not, however, permitted to award the Plaintiff a double recovery for a single loss. If two separate claims result in a damages award to compensate the Plaintiff for the same loss or injury, only one award can be made.

I have tried to simplify your task by structuring the questions and verdict form that will be submitted to you in such a way that you need only determine how much, if anything, the Plaintiff is entitled to recover in damages and what Defendants, if any, are liable.

**Damages - Economic - Backpay**

If you find the Defendants liable to the Plaintiff for discriminating against Plaintiff based upon his age, you may award the Plaintiff backpay. Backpay is the sum of money equal to the salary, including commissions, plus the value of the fringe benefits which the Plaintiff would have received between the date of his termination and the present time, minus any severance pay and the value of any fringe benefits and other payments made to him in connection with his discharge. From this amount, you must also deduct any earnings or wages the Plaintiff actually received during the period in question.

**Damages - Mitigation**

Even when a person has been wrongfully discharged, that person still has an obligation to seek to minimize or mitigate his damages for loss of compensation by making reasonable efforts to seek comparable employment. This is referred to as "mitigation of damages." If the Defendants prove by a preponderance of the evidence that the Plaintiff unjustifiably failed to take a new job of like kind, status, and pay which was available to the Plaintiff, or failed to make reasonable efforts to find a new job, you should subtract from the actual damages any amount the Plaintiff could have earned in a new job after the discharge.

In making this determination, you should be mindful that the Plaintiff is not required to seek or accept employment of a different or inferior nature, but he is required to make reasonable efforts to seek employment similar to the job he had.



**Willful Violation of the ADEA**

If you find the Defendants unlawfully discharged the Plaintiff because of his age, then you must determine if the Defendants' conduct was willful.

The term "willful violation" refers to conduct that is more than just mere negligence. The Defendants' conduct was willful if the Defendants knew or showed reckless disregard for whether their termination of the Plaintiff was prohibited by the law.

If, however, you find the Defendants did not know the termination was prohibited by the law, or if the Defendants simply knew of the potential applicability of the age discrimination laws, their violation was not willful.

**Selection of Foreman and Duty to Deliberate**

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

**Communications with the Court**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

**Return of Verdict**

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

**Verdict - Unanimity Required**

In order to return a verdict in this case, all of you must agree as to what that verdict will be. You cannot return a verdict for either party unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

**Jury Recollection Controls - Rehearing Testimony**

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

**Copy of Instructions**

I have instructed you on the law that governs your deliberations. As I mentioned at the beginning, I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; and the written copy is merely a guide to assist you.