

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AZELL MALONE

Plaintiff,

v.

C.A. No. 07-65ML

LOCKHEED MARTIN CORPORATION,

CARL SUPANCIC,

Defendants.

JURY INSTRUCTIONS

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PART I

1. PROVINCE OF THE COURT AND JURY

Members of the Jury, now that you have heard the evidence and the arguments of counsel, it becomes my duty to give you instructions as to the law applicable to this case.

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

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you are to adhere to the Court's instructions.

Further, nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather that is yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

2. ALL PERSONS EQUAL BEFORE THE LAW – CORPORATIONS

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 of life. A

corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

3. EVIDENCE IN THE CASE

The evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

In determining the facts in this case, you are to consider only the evidence that properly has been put before you. It is the duty of the Court, during the course of trial, to pass upon the admissibility of proffered evidence, that is, to decide whether or not you should consider proffered evidence. Such evidence as the Court admits is properly before you for your consideration; such evidence as the Court has refused to admit is not a proper subject for your deliberations and should not be given consideration by you.

Papers, documents, and other objects admitted into evidence by the Court are a part of the evidence properly before you and will be available to you in the jury room for consideration during your deliberations.

The fact that the Court admitted evidence over objection should not influence you in determining the weight you should give such evidence. Nor should statements made by counsel, either for or against the admission of such evidence, influence your determination of the weight you will give the evidence, if admitted. In other words, you should determine the weight you will give such evidence on the basis of your own consideration of it and without regard to the ruling

of the Court or the statements of counsel concerning the admissibility of such evidence.

Nor should you permit objection by counsel to the admission of evidence, or the rulings of the Court thereon, to create any bias or prejudice in your minds with respect to counsel or the party he or she represents. It is the duty of counsel to protect the rights and interests of his or her client, and in the performance of that duty he or she freely may make objection to the admission of proffered evidence and should not, in any manner, be penalized for doing so.

4. PREPONDERANCE OF THE EVIDENCE

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in this case, you must find for the defendant.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds the belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in this case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

5. “IF YOU FIND”

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression “if you find,” I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

6. EVIDENCE – DIRECT, INDIRECT, OR CIRCUMSTANTIAL

As I told you at the beginning of the case, there are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

7. STIPULATIONS

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the plaintiff and the defendants accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need to evidence apart from the stipulation. You may accept the stipulation as fact and give it whatever weight you choose.

8. INFERENCES – DEFINED

You are to consider only the evidence in the case. In your consideration of the evidence,

however, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in this case. Inferences may not be based on speculation or conjecture.

9. CREDIBILITY OF WITNESSES – DISCREPANCIES IN TESTIMONY

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witnesses, the manner in which the witness testified, the character of the testimony given, or evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case—including statements that he or she may have made on some prior occasion.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves. You may, in short, accept or reject the testimony of any witness in whole or in part. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

PART II

10. NATURE OF THE PLAINTIFF'S CLAIMS

In this case, the plaintiff Mr. Malone makes a claim of employment discrimination under a Federal Civil Rights statute and two Rhode Island statutes that prohibit employers from discriminating against an employee in the terms and conditions of employment because of the employee's race, color, sex, or national origin. Mr. Malone also makes a claim under a Rhode Island state statute that prohibits an employer from retaliating against an employee who has reported illegal activities. More specifically, Mr. Malone alleges that Lockheed Martin and Mr.

Supancic subjected him to discriminatory treatment, including demoting, disciplining, or re-assigning him from a position he held, because he is African American. He further alleges that he was subjected to race-based comments which caused him embarrassment and that he received unfair treatment in his performance review and job assignments. Finally, Mr. Malone alleges that he was unfairly disciplined when he reported illegal activities of a subordinate to Mr. Malone's direct supervisor.

Lockheed Martin and Mr. Supancic deny that Mr. Malone was discriminated against in any way. Further, Lockheed Martin and Mr. Supancic assert that the changes in Mr. Malone's employment were the result of a company-wide reorganization of Lockheed Martin and that Mr. Malone's unfavorable performance reports were due to unscheduled absences.

11. SEPARATE CLAIMS

Mr. Malone has asserted two types of claims against the Defendants. I will first discuss Mr. Malone's claims of unlawful discrimination on account of race and then I will discuss Mr. Malone's claim of a violation of the Rhode Island Whistleblower's Act.

12. EMPLOYMENT DISCRIMINATION – INTRODUCTION

As I have told you, Mr. Malone has brought claims of employment discrimination in violation of a Federal Civil Rights statute known as Title VII and two state statutes, the Rhode Island Fair Employment Practices Act and the Rhode Island Civil Rights Act. All three statutes prohibit the same type of discriminatory conduct. Therefore, in order to succeed on his claims, Mr. Malone must prove the same things or elements with respect to each.

Of these three statutes, only the Rhode Island Civil Rights Act applies to Mr. Supancic.

13. DISPARATE TREATMENT -INTRODUCTION

Mr. Malone's claims are also known as disparate treatment discrimination. Disparate treatment discrimination occurs when an employer purposely treats an employee differently because of his/her race, or such employee's race is a motivating factor in the actions taken by the employer. It requires proof of an intent to discriminate.

A plaintiff under Title VII may raise an inference of discriminatory animus by offering evidence comparing himself or herself to similarly situated individuals who are not a member of that protected class, who are treated more favorably. However, Plaintiff must demonstrate that those other individuals engaged in the same conduct as Malone without any different or mitigating circumstances that would distinguish their conduct from Malone's.

14. EMPLOYMENT DISCRIMINATION – ELEMENTS

In order for Mr. Malone to prevail on his disparate treatment claim against Lockheed Martin and Mr. Supancic, he must establish that he was discriminated against because of his race, or that his race was a motivating factor. To do that, he must first must prove four elements or things by a preponderance of the evidence:

First, that he is a member of a protected class;

Second, that he was performing satisfactorily so as to meet the employer's legitimate job-performance expectations;

Third, that he was demoted, disciplined, or suffered some other adverse employment

action or was denied a position or benefit at the hands of his employer; and

Fourth, that he was treated less favorably than someone outside his protected class.

With respect to the first element, I will tell you that being African American is being in a protected class.

15. EMPLOYMENT DISCRIMINATION - SHIFTING BURDENS OF PROOF

If you find that Mr. Malone has proved all of the elements I have just outlined to you, it then becomes the Defendants' obligation to present some legitimate non-discriminatory reason why Mr. Malone was disciplined or denied the position or benefit. In other words, Lockheed Martin and Mr. Supancic would then have the responsibility of presenting evidence that their actions were not based on Mr. Malone's race.

In this case, Lockheed Martin and Mr. Supancic have presented such evidence. Lockheed Martin and Mr. Supancic contend that Mr. Malone's position was reclassified during a company-wide reorganization of Lockheed Martin's management employees and that he was disciplined because of poor performance and unscheduled absences.

If true, these would be legitimate non-discriminatory reasons for taking the actions of which Mr. Malone is now complaining. Lockheed Martin and Mr. Supancic do not have to prove by a preponderance of the evidence that Mr. Malone was, in fact, disciplined or denied the position or benefits for those reasons. It is enough if Lockheed Martin and Mr. Supancic present legitimate non-discriminatory reasons.

It then becomes Mr. Malone's obligation to prove that the reasons stated by Lockheed Martin and Mr. Supancic were not the real reasons for taking the actions that they did but were

merely pretexts for discrimination. To be successful in this regard, Mr. Malone must prove, by a preponderance of the evidence, that his race was a motivating factor in the discipline or denial of a benefit or position and that the reasons given by Lockheed Martin and Mr. Supancic were merely a pretext.

To prove that race discrimination was a motivating factor, Mr. Malone must establish that “but for” his race, he would have received a benefit or position that he was entitled to and/or he would not have been disciplined.

It is not necessary for Mr. Malone to prove that his race was one of several factors which led to Lockheed Martin and Mr. Supancic’ decision. Mr. Malone is entitled to recover if he proves that a different decision would have been made had he been of a different race.

The focus of your deliberations must be on Lockheed Martin and Mr. Supancic’ motivation, not Lockheed Martin and Mr. Supancic’ business judgment. The purpose of race discrimination law is not to second guess legitimate business decisions. Rather, it is to prevent such decisions from being made on the basis of an individual’s race.

Therefore, the issue is not whether that decision was incorrect or even fair. The question is whether Mr. Malone’s race was a motivating factor. If Mr. Malone was disciplined and/or denied a benefit or position because of his race, Lockheed Martin and Mr. Supancic are liable. If Mr. Malone was disciplined and/or denied a benefit or position for other reasons, Lockheed Martin and Mr. Supancic are not liable.

However, stray remarks in the workplace, statements by non-decision-makers, or decision-makers unrelated to the decisional process itself are not sufficient to satisfy Plaintiff’s burden in this regard.

16. ADVERSE EMPLOYMENT ACTION - DEFINITION

An “adverse employment action” is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action. An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service. An adverse employment action by a supervisor is an action of the employer.

17. R.I. WHISTLEBLOWERS’ PROTECTION ACT - INTRODUCTION

For his fourth claim, Mr. Malone alleges that Lockheed Martin violated his rights under the Rhode Island Whistleblowers’ Protection Act. Mr. Malone alleges that Lockheed Martin discriminated against him because he reported illegal activities of a subordinate to Mr. Malone’s direct supervisor.

The Whistleblowers’ Protection Act provides that “an employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment . . . because the employee reports verbally or in writing to the employer or to the employee’s supervisor a violation, which the employee knows or reasonably believes has occurred or is about to occur, of a law or regulation

or rule promulgated under the laws of this state, a political subdivision of this state, or the United States . . .”

In order for Mr. Malone to prevail on his claim under the Whistleblower Act, he must establish the following three things by a fair preponderance of the evidence:

First, Mr. Malone must prove that he reported verbally or in writing to Lockheed Martin or to his supervisor a violation of a federal, state, or local law or regulation which Mr.

Malone knew or reasonably believed had occurred or was about to occur;

Second, Mr. Malone must prove that he was threatened or otherwise discriminated against by Lockheed Martin; and

Third, Mr. Malone must prove that there was a causal connection between the report and the threat or discrimination.

18. CONSIDER DAMAGES ONLY IF LIABILITY IS PROVEN

I now turn to the question of damages. In doing so, this Court does not intend to indicate that it is of the opinion that either defendant is liable for damages. You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award, if any, in the event that you find that either defendant is liable.

You need consider the question of damages only if you find that Mr. Malone has proved either his employment discrimination claim or his whistleblower claim; for if you do not find Lockheed Martin and/or Mr. Supancic liable, no award of damages can be made.

Damages must be proven. The burden of proof as to the existence and extent of damages is on the plaintiff. In other words, you may make an award for damages only to the extent that you

find damages have been proved by a preponderance of the evidence. You may not base an award of damages or the amount of any such award on speculation or conjecture. You must base an 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 proved. In making an award of damages, it is required that you determine the precise amount to be awarded.

19. DAMAGES

Mr. Malone seeks to recover damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-economic losses.

You must not consider any lost wages or fringe benefits. Federal law requires that I as the Judge determine the amount of any lost wages and fringe benefits that Mr. Malone shall recover if you find Lockheed Martin and Mr. Supancic liable. Distress arising from this lawsuit, or legal expenses incurred in this lawsuit must also not be included in these damages. You must determine instead what other loss, if any, Mr. Malone has suffered or will suffer in the future caused by any race discrimination that you find Lockheed Martin and/or Mr. Supancic have committed or any violation of the Whistleblower Statute that you find Lockheed Martin has committed under the instructions I have given you. We call these compensatory damages. You may award compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-economic losses if you determine that Mr. Malone has proven by a preponderance of the evidence that he has experienced any of these consequences as a result of race discrimination and/or retaliation. No evidence of the monetary value of intangible things like emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses is available and there is no

standard I can give you for fixing any compensation to be awarded for these injuries. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, of the amount of emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses you find that Mr. Malone has undergone and can probably be expected to suffer in the future as a result of Lockheed Martin and/or Mr. Supancic's conduct. And you must place a money value on this, attempting to come to a conclusion that will be fair and just to both of the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

20. DAMAGES - COMPENSATORY -MENTAL SUFFERING

In this case, Mr. Malone claims that Lockheed Martin and Mr. Supancic's discriminatory acts have resulted in his mental suffering.

Mental suffering is a type of harm or injury for which you may award compensatory damages. However, in order to make such an award, you must find that Mr. Malone has proved that he actually incurred such damages. Also, you may only make such an award if Mr. Malone has proved that Lockheed Martin and/or Mr. Supancic are liable.

If you find that Mr. Malone has proved that he did, in fact, experience mental suffering, the amount of compensatory damages you award him will depend on your assessment of what Mr. Malone has proved regarding the nature, extent, duration and consequences of any such suffering and upon the extent to which any such suffering was directly caused by any illegal acts committed

by Lockheed Martin and/or Mr. Supancic from which he seeks to recover.

21. NOMINAL DAMAGES

If you return a verdict for Mr. Malone on any of his discrimination claims, but you find that Mr. Malone has failed to prove actual injury and therefore is not entitled to compensatory damages, you may consider an award of nominal damages. Nominal damages are essentially symbolic. Their purpose is to prove a point or vindicate a right that a plaintiff can prove was violated when the plaintiff is unable to prove that he sustained any actual loss, harm or injury.

In other words, nominal damages are a substitute for compensatory damages. They serve as a tangible indication of a defendant's liability when proof of actual damages is lacking.

If you find that Mr. Malone has proved unlawful discrimination but has failed to prove entitlement to compensatory damages, you should award damages in some nominal amount such as one dollar (\$1.00).

You may not award both compensatory and nominal damages with respect to any one claim. You may award only one or the other. However, you may award compensatory damages on one claim and nominal damages on another if you find that the evidence warrants it.

22. DAMAGES - PUNITIVE

If you have awarded compensatory or nominal damages for Plaintiff's discrimination claims, you may also award punitive damages to Mr. Malone under some circumstances. To obtain punitive damages, Mr. Malone must prove by a preponderance of the evidence that in disciplining, demoting or re-assigning him, Lockheed Martin either knew that its actions violated the law or

acted with reckless or callous indifference to that risk. If Mr. Malone satisfies this requirement, it is entirely up to you whether or not to award punitive damages. It should be presumed that Mr. Malone has been made whole by compensatory damages, so you should award punitive damages only if Lockheed Martin's culpability is so reprehensible as to warrant further sanctions to achieve punishment or deterrence.

The race discrimination alleged here was on the part of Mr. Supancic. You may hold Lockheed liable in punitive damages for his conduct only if you find that Lockheed Martin ratified or authorized his actions or that he committed the wrongful conduct while he was (a) serving in a managerial capacity and (b) acting within the scope of his employment. In deciding whether Mr. Supancic was serving in a "managerial capacity," you should consider the type of authority Lockheed Martin gave him and the amount of discretion he possessed in what was to be done and how it was to be accomplished.

A managerial employee is one who supervises other employees and has responsibility for and authority over a particular aspect of the employer's business. An employee must be important, but need not be top management or an officer to be acting in a managerial capacity. Conduct is within the "scope of employment" if the conduct is the kind of activity the employee was hired to perform, occurs substantially within the authorized time and space limits and was motivated at least in part by the purpose to serve Lockheed Martin.

However, if you determine that Mr. Supancic's alleged race discrimination was contrary to Lockheed Martin's good faith efforts to comply with the law forbidding race discrimination, Mr. Malone is not entitled to punitive damages. In determining the good faith of Lockheed Martin, you may consider whether, before the conduct in question, Lockheed Martin instituted policies

prohibiting discrimination, and trained its personnel to ensure equal treatment of African Americans. On this issue of good faith, Lockheed Martin bears the burden of proof.

If you decide to award punitive damages, the amount to be awarded is within your sound discretion. The purpose of a punitive damage award is to punish a defendant or deter a defendant and others from similar conduct in the future. Factors you may consider include, but are not limited to, the nature of Mr. Supancic's conduct (how reprehensible or blameworthy was it), the impact of that conduct on Mr. Malone, the ratio between the actual compensatory damages and the punitive damages, the relationship between Mr. Malone and Mr. Supancic, the likelihood that Mr. Supancic or others would repeat the conduct if the punitive award is not made, and any other circumstances shown by the evidence, including any mitigating or extenuating circumstances that bear on the size of such an award.

You may not award punitive damages if you find the Defendant liable under the Rhode Island Whistleblowers' Statute.

PART III

23. DELIBERATIONS – GENERAL CONSIDERATIONS

Ladies and Gentlemen, in a moment I will dismiss you so that you may commence your deliberations. However, before I do that I need to give you some instructions about the procedures you must use in the course of your deliberations.

As I said at the beginning of my instructions, it goes without saying that prejudice, sympathy, or compassion should not be permitted to influence you in the course of your deliberations. From what I have said I do not and did not mean to imply that you should approach

your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life. Indeed, your experiences and observations in the ordinary, everyday affairs of life are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; it is your right and duty to consider the evidence in the light of such experience and observations.

24. VERDICT – UNANIMITY & DUTY TO DELIBERATE

In order for you to return a verdict, your decision must be a unanimous decision, that is, all eight of you must concur in the decision. You cannot return a verdict, either for the plaintiff or for a defendant, unless and until you are in unanimous agreement as to what your verdict shall be.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide this for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Again, each of you must make your own decision about the proper outcome of this case based on your consideration of the evidence and your discussions with your fellow jurors. No

juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

25. COMMUNICATIONS BETWEEN COURT AND JURY DURING DELIBERATIONS

During your deliberations, if you need further instruction or assistance by the Court in any way, I ask that, through your foreperson, you reduce such requests or questions as you may have to writing. The foreperson may then hand such written requests or questions to the officer in whose charge you will now be placed. The officer will then bring such written requests to me and I will attempt to fulfill your request or answer the question as the case may be. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Finally, you are never to reveal to any person – not even to the Court – how you stand, numerically or otherwise, on the questions before you, until you have reached a unanimous verdict.