

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

_____)	
LORI FRANCHINA,)	
Plaintiff,)	
)	
v.)	C.A. No. 12-517M
)	
CITY OF PROVIDENCE,)	
Defendant.)	
_____)	

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

A. PROVINCE OF THE COURT AND JURY

It is your duty as jurors to follow the law as I 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 be concerned with the wisdom of any rule of law. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Further, nothing I say in these instructions and nothing that I have said or done during the trial is to be taken as an indication that I have any opinion about the facts of the case. I do not. It is not my role to determine the facts, that is your role.

You must perform your duties as jurors without bias or prejudice to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties — and the law — 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.

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. All

parties are entitled to the same fair trial at your hands. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

B. EVIDENCE IN THE CASE

In determining the facts of this case, you are to consider only the evidence that has been properly put before you. That evidence consists of the sworn testimony of witnesses and the exhibits that have been received into evidence. Evidence that the court admits is properly before you for your consideration; evidence that this Court has refused to admit is not a proper subject for your deliberations and you should not consider it when reaching a verdict. Admitted evidence will be available to you in the jury room 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 the evidence was admitted.

Certain things are not evidence, and you may not consider them in deciding what the facts are.

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments, and at other times, may 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 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.

C. CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. 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 that witness testified about;
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.

After making your own judgment, you may believe everything a witness says, or part of it, or none of it at all. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses.

D. EVIDENCE – DIRECT AND CIRCUMSTANTIAL

There are two types of evidence. 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 and circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

In your consideration of the evidence in this case, you are allowed to make reasonable inferences from witnesses' testimony and the admitted exhibits. Inferences are deductions that reason and common sense lead you to draw from facts that have been established by the evidence in this case. Inferences, however, may not be based on pure speculation or conjecture.

Let me give you an example of a reasonable inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the letter carrier delivered the mail. Now, obviously, you didn't see the letter carrier deliver the mail, but from the facts that the mailbox was empty this morning and it is filled tonight, you can properly infer that the letter carrier came by in the interim and delivered the mail. That is all that we mean by an inference.

E. BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

The burden is on the Plaintiff in a civil action, such as this, to prove every essential element of her claims 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, then you should find for the Defendant on that claim. The Defendant does not have any obligation to disprove that which the Plaintiff asserts or claims.

To establish by "a preponderance of the evidence" means to prove that something is more probably true than not true. In other words, if you were looking at opposite ends of a scale, the Plaintiff's evidence would have to make one end of the scale tip to its side.

When I say in these instructions that a party has the burden of proof on any proposition, I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true. This rule does not, of course, require proof to an absolute certainty or even to a near certainty.

II. CASE-SPECIFIC INSTRUCTIONS

A. NATURE OF THE PLAINTIFF'S CLAIMS

In this case, Ms. Franchina brings two claims against the City of Providence:

- 1. Hostile Work Environment:** Ms. Franchina asserts that she was subjected to harassment and a hostile work environment based on her gender; and
- 2. Retaliation:** Ms. Franchina asserts that she suffered discrimination in retaliation for making harassment complaints.

B. EMPLOYMENT DISCRIMINATION – Title VII

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin. It also prohibits retaliation against employees who make discrimination complaints.

1. Hostile Work Environment

Discriminatory conduct that is so severe or pervasive that it creates a work environment abusive to employees because of their sex or gender is a violation of Title VII. Ms. Franchina claims that she was subjected to harassment by non-supervisory co-employees on the Providence Fire Department, and that this harassment was based upon her status as a woman. The City of Providence is liable to Ms. Franchina if she proves all six of the following elements by a preponderance of the evidence.

1. That she is a member of a protected class;
2. That she was subjected to unwelcome harassment;
3. That the harassment was based at least in part upon gender;
4. That the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive work environment
5. That the objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive, and that Ms. Franchina in fact did perceive it to be so; and
6. That some basis for employer liability has been established.

I will now explain each of these elements in more detail.

Element one is not in dispute; Ms. Franchina is a member of a protected class because she is a woman.

Element two requires Ms. Franchina to prove that she was subjected to unwelcome harassment. This can include overtly sexual abusive conduct, as well as harassing conduct that is not explicitly sexual in nature, but which nonetheless undermines her ability to succeed at her job. Incidents of nonsexual harassing conduct, such as work sabotage, exclusion, denial of support, and humiliation, can in context contribute to a hostile work environment claim. Whether specific conduct qualifies as harassment is for you to decide.

Element three requires that harassment must be based on gender. Ms. Franchina need not prove that all women were discriminated against or were harassed, but she must prove that she was harassed at least in part because she was a woman. In other words, Ms. Franchina may meet this element by proving that she was harassed because she is part of a subclass of women, in this case lesbians, if she also proves that this harassment was at least in part because of her sex or

gender. One way to determine whether Ms. Franchina met her burden on this element would be to consider whether she would have been harassed if she had been a man, but everything else had been the same.

Element four requires Ms. Franchina to prove that the harassment was so nasty or frequent that it created a hostile or abusive work environment. To determine whether this element is met, you must look at all of the circumstances, which may include:

- The frequency of the offensive conduct.
- The severity of the conduct.
- Whether the conduct was directed toward Ms. Franchina.
- Whether the conduct was physically threatening or humiliating, or a mere offensive utterance.
- Whether the conduct unreasonably interfered with Ms. Franchina's work performance

A hostile work environment requires extreme or pervasive conduct. Isolated incidents, unless extremely serious, will not amount to a hostile work environment. Conduct that results from genuine, but innocuous differences in the ways men and women routinely interact with members of the same sex and the opposite sex do not constitute a hostile work environment.

Element five requires that the conduct was objectively and subjectively offensive. This requires Ms. Franchina to prove two points: one, that she actually felt that the conduct was offensive; and two, that a reasonable person would have found the conduct offensive. A reasonable person is simply a person of normal sensitivity and emotional make-up.

Element six requires Ms. Franchina to prove some basis for employer liability. In this case, Ms. Franchina must prove that management-level employees of the City of Providence knew, or should have known of the harassment, and that those management-level employees

failed to implement prompt and appropriate remedial actions that are reasonably calculated to stop the harassment and remedy the situation.

2. Retaliation

Ms. Franchina's second claim is that she was subjected to retaliation by the City of Providence. Employers may not retaliate against employees for having exercised their right to speak out about actual or perceived illegal conduct by their employees. The City of Providence is liable to Ms. Franchina for retaliation if she proves all three of the following elements by a preponderance of the evidence.

1. That she engaged in protected conduct;
2. That she suffered an adverse employment action;
3. That a causal nexus exists between Ms. Franchina's protected activity and the adverse employment action. Specifically, Ms. Franchina must show that she would not have suffered the adverse employment action, but for her exercise of a protected right. If an adverse employment action was taken, the City will not be liable if it can prove by a preponderance of the evidence that the adverse employment action was taken for a legitimate, non-retaliatory reason.

I will now explain elements one and two, what constitutes protected conduct and an adverse employment action, in more detail.

First, protected conduct refers to action taken to protest statutorily prohibited discrimination. This can include the filing of formal charges of discrimination, as well as informal protests of discriminatory employment practices. Ms. Franchina's actions are considered "protected conduct" if they were based on her good-faith and reasonable belief that the City discriminated against her because of her gender. To show a good-faith belief, Ms.

Franchina must prove by a preponderance of the evidence that she honestly believed that the City discriminated against her because of her gender. To show a reasonable belief, Ms. Franchina must prove by a preponderance of the evidence that a reasonable person would, under the circumstances, believe that the City discriminated against her because of her gender. Ms. Franchina does not have to prove that the City actually discriminated against her because of her gender, but she must prove she had a good-faith and reasonable belief that the City did so.

Second, an adverse employment action is any type of action that would have made a reasonable employee reluctant to make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because she knew that her employer would engage in the alleged adverse employment action, then the action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

Workplace harassment that is tolerated by the employer, if it is sufficiently severe or pervasive to constitute a hostile work environment, can itself be a retaliatory adverse employment action. To establish that Ms. Franchina suffered an adverse employment action in the form of a hostile work environment, she must prove all of the elements of a hostile work environment claim that I listed before. The only difference is element three, which for a retaliation claim requires her to prove that the harassing conduct occurred because of her protected activity.

C. DAMAGES - COMPENSATORY

I will now instruct you on the law of damages. The mere fact that I am charging you on the law of damages does not indicate in any respect that I feel you should find in favor of Ms.

Franchina. You must remember that before even deciding the question of damages, you must first decide whether Ms. Franchina has sustained her burden of proof relative to all of the elements of either, or both of, the offenses with which she has charged the City. Only if you find that she has, should you proceed to consider damages.

Damages are an additional element of Ms. Franchina's case. That means that she must prove her damages by a preponderance of the evidence. In order to recover compensatory damages, Ms. Franchina must prove that the City's conduct proximately caused her harm. If you find that the City is liable for a hostile work environment, or retaliation, or both, the next question is whether that conduct caused Ms. Franchina to suffer an injury. You must determine whether that conduct was the "proximate cause," meaning the direct cause of her injury. An injury or damage is proximately caused by conduct whenever it appears from the evidence that the conduct played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of that conduct.

Damages are defined in law as that amount of money which will compensate an injured party for the harm or loss that she has sustained. The rationale behind compensatory damages is to restore a person to the position that she was in prior to the harm or loss. Compensatory damages, then, are the amount of money that will replace as near as possible the loss or harm caused to Ms. Franchina.

You may not speculate in awarding damages. If you find in Ms. Franchina's favor, then you should consider awarding her such a sum as you find by the preponderance of the evidence will fairly and justly compensate her for any damages you find she sustained as a direct result of the City's conduct. You may consider the value of her back pay, including overtime, which she

would have received between her last day of active duty, which was on October 23, 2010, and the date of her retirement, which was on December 19, 2013. You may also consider future wages that Ms. Franchina would have earned if she had remained in the employ of the City of Providence.

You may also award Ms. Franchina emotional damages for any pain and suffering she experienced as a result of the City's conduct. Any amount you award for emotional damages should be based upon your consideration of the nature, extent, and duration of her pain and suffering. You may compensate Ms. Franchina for mental suffering, which may include nervousness, anxiety, worry, shock, humiliation, embarrassment, or indignity. It is difficult to measure emotional damages in terms of money. Nevertheless, you may not speculate or guess as to what constitutes fair compensation for pain and suffering.

Any award you determine must be based on the evidence and what in your considered judgment constitutes fair, adequate, and just compensation for such injuries and pain and suffering as have been proved. The determination of that amount, if any, is solely for you, the jury, to make. Suggestions of the attorneys as to how that amount might be computed are not binding upon you. You may, however, consider them if you find them helpful.

i. Mitigation

Any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to mitigate those damages. For purposes of this case, the duty to mitigate damages requires Ms. Franchina to be reasonably diligent in seeking substantially equivalent employment to the position she held with the City.

To prove that Ms. Franchina failed to mitigate damages, the City must prove by a preponderance of the evidence that:

- (1) Work comparable to the position Ms. Franchina held with the City was available, and
- (2) Ms. Franchina did not make reasonably diligent efforts to obtain it.

If however, the City shows that Ms. Franchina did not make reasonable efforts to obtain any work, then the City does not have to prove that comparable work was available. If you find that the City proved by a preponderance of the evidence that Ms. Franchina failed to mitigate damages, then you should reduce the amount of her damages by the amount that could have been reasonably realized if she had taken advantage of an opportunity for substantially equivalent employment.

ii. Taking the Victim as You Find Her

Where a defendant violates the law and causes injury to a plaintiff, that defendant is liable for the proximate results of that injury, even if the consequences in the case of that specific plaintiff are more serious than might be anticipated. That means that the City is responsible for all damages that it caused to Ms. Franchina, even if Ms. Franchina was more susceptible to injury because of a preexisting condition or injury. Ms. Franchina may not recover for the preexisting condition itself, but is entitled to recover the portion of emotional damages attributable to the City's aggravation of the preexisting condition.

iii. Nominal Damages

If you find that Ms. Franchina is entitled to a verdict because she has proved all the elements of one or both of her claims that I explained above, but do not find that she has proved actual damages, you may return a verdict for Ms. Franchina in some nominal sum such as one dollar (\$1.00). You may not award Ms. Franchina both actual and nominal damages. Nominal damages may be awarded only if you find that Ms. Franchina has suffered a violation, but has not proved that she is entitled to actual damages.

D. DAMAGES - PUNITIVE DAMAGES

If you find that the employer acted with malice or reckless indifference to federally protected rights you may award Ms. Franchina punitive damages. The purpose of punitive damages is to punish a defendant for wrongful conduct and to deter such conduct in the future. The terms malice or reckless indifference pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. If you find that the City of Providence knowingly violated federal law, as alleged by Ms. Franchina, then you may award her punitive damages.

III. *FINAL PROCEDURAL INSTRUCTIONS*

Ladies and Gentleman, 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, you must not allow prejudice, sympathy, or compassion to influence you in the course of your deliberations. That does not mean that you should approach this case in an intellectual vacuum. You are not required to put aside 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; and it is your right and duty to consider the evidence in light of such experience and observations.

During your deliberations, you must not communicate with or provide any information to anyone outside of the jury room by any means about this case. You may not use any electronic device or media, such as a cell phone, a tablet, or a computer. You may not communicate to

anyone any information about this case or to conduct any research about this case until I accept your verdict. You can only discuss the case in the jury room with your fellow jurors during deliberations.

Now, in order for you to return a final verdict, your decision must be unanimous. That means that you cannot return a verdict unless and until all ten of you are in agreement as to the verdict.

Therefore, in the course of your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your convictions simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open so that you will not be precluded or prevented from achieving a unanimous verdict by mere stubbornness. Each vote of each juror is as important as the vote of any other juror, and you need not give up your sincerely held convictions simply because a majority holds to the contrary.

I am designating juror #3 as the Foreperson of this jury. It will be your responsibility to organize the group and facilitate organized and healthy deliberations. The Foreperson's opinion, voice, or vote, however, is no more meaningful than any other juror.

When you are in the jury room, you will be provided with the evidence that has been admitted in this case. It may take us a few minutes to gather it up, but as soon as we do, it will be brought to the jury room.

You will also be given a verdict form. When you have reached a verdict, the Foreperson will fill out that form and sign it. Once the verdict form is complete, you will inform the Court Security Officer.

[REVIEW OF VERDICT FORM]

If, in the course of your deliberations, you deem it necessary to be further instructed or assisted by the Court in any way, the Foreperson should reduce such request or question to writing, sign it, and give it to the Court Security Officer in whose charge you will now be placed. The Court Security Officer will then bring such written request to me and I, in consultation with the attorneys, will determine an appropriate response. Other than this method, please do not attempt to communicate privately or in any other way with the Court or with anyone outside the jury room.