

COPY

This verdict \$869,156  
Wrongful termination,  
breach of contract,  
promissory estoppel

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

DAVID RAYMOND

v.

Civil No. 1:95CV158

INTERNATIONAL BUSINESS  
MACHINES CORP.

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

The plaintiff in this action is David Raymond. The defendant, International Business Machines Corp., hereinafter referred to as "IBM," is Mr. Raymond's former employer. Mr. Raymond alleges IBM breached contracts with him when it terminated his employment. He also alleges IBM broke a promise not to retaliate against him for using the company's "open door" policy when it terminated his employment.

IBM denies the plaintiff's allegations. Specifically, IBM denies the existence of any employment contract and, in any event, asserts it had good cause to terminate Mr. Raymond's employment.

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions of the Court 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 as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you 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 be governed by the Court's instructions.

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 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 of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

All Persons Equal Before the Law

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

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always 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; and all facts which may have been admitted or stipulated.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Questions Not Evidence

If a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements are not evidence.

Evidence -- Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury 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 -- 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 it simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

### Inferences Defined

You are to consider only the evidence in the case. But in your consideration of the evidence 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 the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

### Opinion Evidence -- Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.



Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses, including expert witnesses, and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by 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' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; any bias or prejudice; 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.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear

it differently; and 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 one witness, or 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.

### Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning 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.

INSTRUCTIONS OF LAW

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

### Burden of Proof and Preponderance of the Evidence

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

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 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.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have

called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury 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.

### Plaintiff's Theories of Recovery

Mr. Raymond alleges that IBM breached contracts with him when it terminated his employment without good cause. He also claims he was discharged because he had gone over his manager's head with concerns about personnel issues.

In support of his claims, the plaintiff has alleged two alternative theories of recovery: breach of contract and promissory estoppel.

Regarding his breach of contract claims, Mr. Raymond contends he had either an express or implied employment agreement with IBM providing (1) that his employment would not be terminated unless IBM had good cause to terminate (Plaintiff's First Breach of Contract Claim); and (2) that he would not be discharged in retaliation for his "open door" complaint (Plaintiff's Second Breach of Contract Claim). He claims IBM breached these agreements.

Regarding his promissory estoppel claim, it is similar to Mr. Raymond's breach of contract claim in that Mr. Raymond contends IBM promised not to discharge him or otherwise retaliate against him for utilizing IBM's "open door" procedures and that IBM broke that promise.

Note that, even in the event you do not find the existence of an agreement that he would not be discharged in retaliation for his "open door" complaint, based upon the evidence before you, you may nevertheless find IBM made an enforceable promise to the plaintiff to not terminate his



employment or retaliate against him for utilizing the "open door" policy.

I will now explain both these theories of recovery to you in more detail.

### Plaintiff's Breach of Contract Claims

Under Vermont law, employment contracts for an indefinite period of time are presumptively terminable at-will, meaning they may be terminated by the employer or the employee for any reason or for no reason at all. However, this presumption may be overcome when an employee demonstrates the employer modified this at-will status and created a justifiable expectation that he or she may be discharged only for "good cause."

Mr. Raymond claims IBM breached two different contracts with him when it discharged him. To prevail on his First Breach of Contract Claim, the plaintiff must prove by a preponderance of the evidence that IBM, through its handbooks, policies or otherwise, made a promise of employment which is terminable for good cause. To prevail on his Second Breach of Contract Claim, plaintiff must prove by a preponderance of the evidence that IBM agreed not to discharge him in retaliation for his "open door" complaint.

Therefore, it is for you, the jury, to determine in this case: (1) whether the at-will relationship was modified by either contract alleged by the plaintiff; (2) what that contract's terms were; and (3) whether those terms were breached.

You must consider all the evidence, including the handbooks and any other evidence which you find relevant, to determine whether they created a contract precluding IBM from

discharging the plaintiff without cause. When evaluating the evidence and making your determination that such an employment contract did or did not exist, you should consider the following relevant factors.

Under Vermont law, employee manuals or policy statements do not automatically become binding employment agreements. Whether a particular handbook or policy constitutes a contract to terminate employment only for good cause is for you, the jury, to decide after reviewing the evidence.

Only those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself to terminating an employee only for just cause, may be enforced as a contract. "Policies which are definitive in form" include those which expressly or impliedly contain a promise for specific treatment in specific situations.

However, an employer may not always be bound by handbook and policy statements if it conspicuously and effectively states that the policy is not intended to be part of the employment relationship. Accordingly, general statements of policy alone do not create an enforceable contract to terminate employment for good cause or that he would not be terminated for utilizing IBM's "open door" procedure.

Again, it is for you to consider all the evidence and determine whether, under these circumstances, IBM created in the plaintiff a reasonable expectation that his employment would

only be terminated for good cause or for utilizing IBM's "open door" procedure.

### Good Cause for Termination

Regarding Plaintiff's First Breach of Contract Claim, if you find plaintiff has proven an agreement that IBM would only terminate his employment for good cause, then you also must consider whether Mr. Raymond has presented evidence establishing that he was discharged without good cause.

Under Vermont law, a discharge for "good cause" is one where (1) the employee's conduct was egregious enough that the discharge was reasonable; and (2) the employee had fair notice, express or implied, that such conduct could result in discharge.

In determining whether IBM had good cause to terminate the plaintiff's employment, you may consider the following: whether IBM's finding that plaintiff engaged in misconduct is supported by substantial evidence; whether IBM reasonably believed the plaintiff committed any conduct for which he was fired or whether IBM's reason for termination was a pretext for another arbitrary or illegal reason; whether any misconduct amounted to good cause for the discharge under the terms of the employment agreement you have found to exist; and whether IBM's actions were taken in good faith.

Plaintiff's Promissory Estoppel Claim

The plaintiff relies also upon a theory of promissory estoppel to support his claim of retaliation for using the "open door" procedure. As you have heard, IBM had "open door" procedures which Mr. Raymond alleges permitted him to speak to Mr. Luneau's manager, Mr. Wilson, about personnel matters without fear of discharge or retaliation. Mr. Raymond claims that IBM broke this promise by terminating his employment for utilizing the "open door" policy. To prevail on this theory, the plaintiff must prove by a preponderance of the evidence each of the following elements:

(1) IBM made a promise which it should reasonably expect to induce action or forbearance on the part the plaintiff;

(2) The promise did induce such action or forbearance;  
and

(3) Injustice can be avoided only by enforcing the promise.

Corporate Party's Agents and Employees

IBM is a corporation. When a corporation is involved, of course, it may act only through natural persons as its agents or employees. In general, any agent or employee of a corporation may bind the corporation by his or her acts and declarations made while acting within the scope of his or her authority delegated to him or her by the corporation, or within the scope of his or her duties as an employee of the corporation.

Moreover, as a general rule, the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal, regardless of whether that knowledge is actually communicated.

The existence and scope of an agent's authority is a question of fact for the jury to determine.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.



### Damages

If you should find for the plaintiff and against the defendant as to any of his claims, then you must consider the issue of damages.

The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate the plaintiff fully and adequately for all injuries and losses caused by defendant's wrongful conduct. In other words, the purpose of awarding damages is to place the injured person in the position he or she occupied immediately before the injury occurred, as nearly as can be done with an award of money damages.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which he is entitled. You may include only the damages the plaintiff has proven with reasonable certainty. You may not award speculative damages or damages based on sympathy.

In an action based upon an express or implied breach of contract, the plaintiff has the burden of establishing the amount to which he is entitled to recover as a result of the breach. When calculating an award, if any, for wrongful discharge, you may only consider evidence relating to plaintiff's economic damages which resulted from the termination of his employment. You cannot consider evidence of emotional distress in determining this award. The purpose of your award shall be to place Mr. Raymond in as good a financial position as he would be in were it not for his wrongful discharge. You should award an amount equal to the salary, bonuses, and job-related benefits plaintiff would have earned had he remained employed by IBM, minus the wages he has or might have secured in reasonable alternative employment up to now and in the future.

### Mitigation of Damages

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-- that is, to take advantage of any reasonable opportunity he may have had under the circumstances to reduce or minimize the loss or damage.

If you find the defendant has proven by a preponderance of the evidence that the plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available to him under all the circumstances shown by the evidence, then you should reduce the amount of his damages by the amount he could have reasonably realized if he had taken advantage of such opportunity.

### Reduction of Future Damages to Present Value

In the event you award future damages, any such award necessarily requires that payment be made now for a loss that plaintiff will not actually suffer until some future date. If you should find the plaintiff is entitled to future damages, including future earnings, then you must determine the present worth in dollars of such future damages.

If you award damages for loss of future earnings, you must reduce the award to present value by considering the interest the plaintiff could earn on the amount of the award if he made a relatively risk-free investment.

Effect of Taxes

If you should award any damages to plaintiff, you should know plaintiff will be required to pay state or federal income tax on the portion of the award attributable to lost wages.

Election of Foreperson

I will select \_\_\_\_\_ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the form of the special verdict.

[Form of special verdict read.]

You will note that each of these interrogatories or questions call for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

Verdict Forms - Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

### Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the Marshal. He will then bring the message to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.



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UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

DAVID RAYMOND

v.

INTERNATIONAL BUSINESS  
MACHINES CORP.

CIVIL NO. 1:95CV158

SPECIAL INTERROGATORIES AND VERDICT FORM

A. Plaintiff's First Breach of Contract Claim

A(1) Do you find that the plaintiff has proven by a preponderance of the evidence the existence of a contract that IBM would terminate his employment only for good cause?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

If you have answered "yes" to question A(1), proceed to question A(2). If you have answered "no" to question A(1), proceed to question B(1).

A(2) Do you find that the plaintiff has proven by a preponderance of the evidence that IBM terminated his employment without good cause?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

Proceed to question B(1).

B. Plaintiff's Second Breach of Contract Claim

B(1) Do you find that the plaintiff has proven by a preponderance of the evidence the existence of a contract that IBM would not terminate his employment for utilizing the "open door" procedure?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

If you have answered "yes" to question B(1), proceed to question B(2). If you have answered "no" to question B(1), proceed to question C(1).

B(2) Do you find that the plaintiff has proven by a preponderance of the evidence that IBM terminated his employment in retaliation for utilizing the "open door" procedure?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

Proceed to question C(1).

C. Plaintiff's Promissory Estoppel Claim

C(1) Do you find that the plaintiff has proven by a preponderance of the evidence that IBM promised it would not terminate his employment for using the "open door" procedure?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

If you have answered "yes" to question C(1), proceed to question C(2). If you have answered "no" to question C(1), proceed to question D.

C(2) Do you find that the plaintiff has proven by a preponderance of the evidence that IBM terminated his employment in retaliation for using the "open door" procedure?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

Proceed to question D.

D. Damages

If you have answered "yes" to question A(2), B(2) or C(2), then answer question D.

If you have answered "no" to questions A(2), B(2) and C(2), then you have completed your deliberations and you need not answer question D. Your foreperson should sign and date this form.

D. What is the total amount of damages sustained by the plaintiff as a result of the conduct of the defendant?

\$ \_\_\_\_\_

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date