



UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

DAVID BAIN,  
Plaintiff,

v.

TRACY WREND,  
Defendant.

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Case No. 5:15-cv-202

**JURY CHARGE**

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and to apply them to the facts as you determine them.

**I. Part One – General Instructions**

**ROLE OF THE COURT**

You must accept the law as I explain it to you. You should not single out any one instruction as alone stating the law. Instead, you should consider my instructions as a whole.

If any attorney has stated a legal principle which differs from my instructions, you must follow my instructions.

You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law should be, it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you in these instructions.

### **ROLE OF THE JURY**

As members of the jury, you are the sole and exclusive judges of the facts. You should make decisions about the facts based only on the testimony you have heard in court and the exhibits which were admitted by the judge. You will receive copies of these exhibits in the jury room. If you find it to be necessary, you may return to the courtroom to have the testimony of any witness read back to you by the court reporter.

As jurors and judges of the facts in the case, you determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony and draw whatever reasonable inferences you believe are supported by the facts as you have determined them. You determine the weight of the evidence. You are to perform this duty of finding the facts without bias towards any party.

You should reach your judgment impartially and fairly, without prejudice or sympathy, solely upon the evidence in the case and without regard to the consequences of your decision.

### **JURORS' EXPERIENCE OR SPECIALIZED KNOWLEDGE**

Anything you have seen or heard outside the courtroom is not evidence and must be disregarded entirely. It would be a violation of your oath as jurors to consider anything outside the courtroom in your deliberations. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely 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 you feel are justified in light of the

evidence. “Inferences” are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in this case. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

### **ALL PERSONS EQUAL BEFORE THE LAW**

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals in a court of justice.

### **EVIDENCE**

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulations submitted by the parties.

There are two types of evidence that you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses – something she or he has seen, felt, touched or heard. Direct evidence may also be in the form of an exhibit such as a document or photograph.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You may infer on the basis of reason, experience, and common sense from one established fact, the existence or non-existence of some other fact. For example, if your friend enters your home with a wet umbrella, that would be circumstantial evidence that the weather was rainy.

Circumstantial evidence is of no less value than direct evidence; generally, the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict be based on a preponderance of all the evidence presented.

### **CREDIBILITY OF WITNESSES**

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

### **IMPEACHMENT OF A WITNESS**

A witness may be discredited or “impeached” by contradictory evidence, by a showing that the witness testified falsely concerning a matter, or by evidence that at some other time the witness said or did something inconsistent with the witness’s present testimony. It is your exclusive province to give the testimony of each witness such credibility or weight that you think it deserves.

### **OBJECTIONS**

During the trial, I have ruled on objections made by the attorneys. These are legal issues for the court to resolve and are not for your concern or consideration. It is the duty and job of the attorneys to make objections and you should not hold that against either side.

### **ARGUMENTS**

The opening statements and closing arguments of the attorneys and other statements which they made during the course of the trial are not evidence. You should consider the evidence from the witnesses and the exhibits in making your decisions about the facts in this case. The statements and arguments are the attorneys’ efforts to organize and describe the evidence for you. Both of the attorneys have given the case a good deal of thought and attention.

I ask that you consider their arguments carefully. In the end, however, it is the evidence admitted at the trial which must govern your decision-making.

### **THE PARTIES**

The parties to this case are:

1. Plaintiff David Bain
2. Defendant Tracy Wrend.

### **BURDEN OF PROOF**

The plaintiff David Bain has the burden of proof by a preponderance of the evidence on each element of his claim. A “preponderance of the evidence” means the more convincing evidence. It does not mean the most witnesses. If you conclude that the evidence is equally balanced, plaintiff cannot succeed on his claim. In order to meet his burden of proof, he must persuade you that on balance the evidence on the issue you are considering tips to some degree in his favor. As you consider each element of plaintiff’s claim, you must consider whether the evidence is sufficient to meet this standard of “more likely true than not.”

### **ELEMENTS OF THE CLAIM OF UNLAWFUL RETALIATION**

Under the First Amendment to the Constitution, every public employee has the right to freedom of speech addressing issues of public concern. 42 U.S.C. § 1983 provides that a person may sue for an award of damages against anyone who, “under color” of any state law or custom, intentionally violates the plaintiff’s rights under the U.S. Constitution.

In order to succeed in plaintiff's claim that he suffered damages due to defendant's conduct, he must prove the following elements of his claim of unlawful retaliation by a preponderance of the evidence.

**A. Defendant acted under color of state law**

Plaintiff must prove that defendant was acting under color of state law when she commenced the disciplinary investigation against plaintiff in May 2014. The parties agree that defendant acted in her capacity as school superintendent. This element is not in dispute.

**B. Speech directed to a matter of public concern**

Plaintiff must also prove that his statements at the informal union meeting concerned matters of public concern and were not directed at matters primarily affecting him as an individual. For example, a statement that the school administration had issued a school policy affecting all students would likely be directed to a matter of public concern. In contrast, a statement that a teacher's schedule on a particular day was unfair would likely be directed to a matter of individual concern. I have sought to give examples not involved in this case. Your job is to decide whether plaintiff's statements at the meeting concerned matters of public concern or matters which concerned his individual duties at the school.

**C. Whether plaintiff spoke as part of his official duties as an employee**

Plaintiff must also prove that his statements were made in an individual capacity and not in his role as an employee. The school administration, including Ms. Wrend, has the authority to limit and direct statements made by a teacher in their role as teacher. For example, a policy prohibiting teachers from criticizing the school superintendent when they address students at a public assembly would be unlikely to violate the First Amendment. The same criticism

expressed in a private setting and not as part of the teacher's duties would likely qualify for protection under the First Amendment.

#### **D. Causation**

If you find that plaintiff spoke as a private citizen on a matter of public concern, you must consider the next question which is whether retaliation by defendant Wrend caused him to sustain damages. The question of causation has several aspects.

First, you must decide whether plaintiff's statements caused defendant to retaliate against him by initiating disciplinary action. Plaintiff must prove that defendant knew what plaintiff said at the union meeting and took disciplinary steps against him as a result. In other words, plaintiff must prove that defendant's actions were motivated by plaintiff's protected statements. Evidence of defendant's motive can be direct or it can be circumstantial.

A second aspect of the issue of causation is the question of multiple causes. Plaintiff has the burden of proving that retaliation was a substantial motivating factor in causing the disciplinary actions by defendant which led to his investigation. He does not have to prove that retaliation was the sole cause of these actions.

A third aspect of the issue of causation is the question of whether the retaliation caused damages. Plaintiff seeks damages resulting from his investigation in May of 2014. He does not claim that he suffered damages due to the suspension and the "last chance" agreement or his termination in September. You must decide whether the retaliation for his statements in February was a substantial factor in causing his investigation.

In order to prove causation, plaintiff must prove each of these three aspects of the causation issue by a preponderance of the evidence.

### **AFFIRMATIVE DEFENSE**

If you decide that retaliation by defendant was a substantial factor in causing plaintiff's damages, you must also consider whether plaintiff's own conduct at work would have led to his investigation in any event. On this defense the defendant has the burden of proof by a preponderance of the evidence. If you find for the defendant on this issue, your verdict will be for the defendant and against the plaintiff.

### **COMPENSATORY DAMAGES**

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained or is reasonably certain to sustain in the future as a direct result of Defendant's retaliatory conduct.

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include mental aspects of injury, even if these are not easy to measure.

You should consider the following type of compensatory damages, and no other:

1. The emotional pain and suffering that Plaintiff has experienced and is reasonably expected to experience in the future. No evidence of the dollar value of emotional pain has been or needs to be introduced. There is no exact standard for setting the damages to be awarded for this element of loss.

If you find in favor of Plaintiff but find that the plaintiff has failed to prove compensatory damages, you may return a verdict for Plaintiff in the amount of one dollar (\$1.00).



### **PUNITIVE DAMAGES**

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for her conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that his conduct was malicious or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either party. In determining the amount of any punitive damages, you should consider the following factors:

- The reprehensibility of Defendant's conduct;
- The impact of Defendant's conduct on Plaintiff;
- The relationship between Plaintiff and Defendant;
- The likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- Defendant's financial condition;

- The relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

**PLAINTIFF'S ONLY OPPORTUNITY TO RECOVER**

Plaintiff has only day in court to make his claim against defendant. He cannot commence another lawsuit at a later date against defendant.

**FINAL INSTRUCTIONS**

This completes my instructions to the jury. You will retire now to the jury room to deliberate in private about the issues in the case. I will provide a verdict form to guide you in your deliberations. You will also receive the exhibits which were admitted into evidence. I will also provide eight copies of these instructions.

I appoint \_\_\_\_\_ as your foreperson. She shall be responsible for making sure that the deliberations occur in an orderly fashion and that every juror has an opportunity to participate.

Any verdict which you return must be unanimous. This means that you cannot answer a question on the verdict form unless and until all jurors agree on the answer.

If you need to communicate with me, please do so in writing. I will confer with the lawyers about your written question and send back a written response. Please advise the court officer after you reach a verdict but do not tell him or her or anyone else what the verdict is until you return to the courtroom at which time I will receive the verdict form directly from your

foreperson. The foreperson should keep possession of the verdict form in an envelope provided for the purpose until you return to the courtroom.

Dated at Rutland, in the District of Vermont, this 11 day of September, 2019

A handwritten signature in black ink, consisting of a stylized 'G' followed by a series of loops and a final flourish.

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Geoffrey W. Crawford, U.S. District Judge