

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Johnny Ha, Jenny Pham)	
a/k/a Jenny Ha, and Helen)	
Le,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 2:20-cv-155
)	
Tina Conn,)	
)	
Defendant.)	

JURY CHARGE

Members of the Jury:

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word evidence and instruct you on how to assess it, including how to judge the credibility of the witnesses. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the

law ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

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. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully 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.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which 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 their own senses: something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness.

You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying;

their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses.

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 may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you

can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence.

During the course of the trial, I occasionally asked questions of a witness in order to bring out facts not then fully covered in his or her testimony. Do not assume that I hold any opinion on matters related to my questions.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. 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 your experiences.

BURDEN OF PROOF

This is a civil case and as such the Plaintiffs have the burden of proving every element of their claims by a preponderance of the evidence. The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim is more likely so than not so. In determining whether any fact at issue has been proven by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of which party called them, and all the exhibits received in evidence, regardless of which party may have produced them.

INTERPRETERS

A language other than English was used for some evidence during the trial. When a witness testified in a language other than English, the witness did so through an interpreter. The evidence you are to consider and on which you must base your decision on is the English-language interpretation provided by

the interpreter. If you are familiar with the non-English language used, you must disregard that familiarity and rely only on the English-language interpretation.

You should not make any assumptions about a witness or a party based solely on the fact that they use an interpreter to testify.

DEFAMATION

Each Plaintiff claims the Defendant is liable to him or her for defamation. There have been a number of statements offered into evidence in this case that Plaintiffs claim are defamatory. It is for you to decide which statements are at issue.

For a statement to be defamatory, it must be reasonably understood to be stating an actual fact, taking into consideration the background of the case and the context in which the statement was made. If you find that none of the statements at issue in this case are reasonably understood to be stating an actual fact, you should find for the Defendant on the Plaintiffs' defamation claims. If, however, you find that any of the statements at issue are reasonably understood to be stating an actual fact, you must continue to determine whether one or more Plaintiffs has met the elements of defamation.

You must return a verdict for a Plaintiff if the Plaintiff has proved by a preponderance of the evidence that:

- 1) the Defendant made the statement at issue;

- 2) it was about the Plaintiff;
- 3) it was heard or seen by someone other than the Plaintiff;
- 4) it was false; and
- 5) the Defendant made the statement knowing it to be false; believing it to be true but lacking reasonable grounds for such belief; or negligently failing to ascertain facts on which the statement was based.

If a Plaintiff failed to prove any one or more of the five elements listed above as to a particular statement, you must find for the Defendant with respect to that Plaintiff regarding that particular statement.

RACIAL, RELIGIOUS, GENDER, OR ETHNIC ANIMOSITY

In addition to their claims for defamation, Plaintiffs assert claims against the Defendant for intimidation or harassment motivated by racial, religious, gender, or ethnic animosity. You have heard testimony about certain Vietnamese-language words and phrases that Plaintiffs allege were used by the Defendant to intimidate or harass them because of their race, gender, religion, and/or ethnicity.

You must return a verdict for a Plaintiff if the Plaintiff has proven by a preponderance of the evidence that:

1. The Defendant intimidated or harassed the Plaintiff;
2. The Defendant's actions were motivated by racial, religious, gender, or ethnic animosity.

In interpreting these instructions, you should apply the ordinary definitions of the words "intimidated" and "harassed." The word "animosity" means a prejudicial disposition toward an identifiable group of persons such as a particular gender or race.

If a Plaintiff failed to prove any one or both of the elements listed above as to a particular statement, you must find for the Defendant with respect to that Plaintiff regarding that particular statement.

JENNY PHAM VIDEOS

During the trial, you were presented with various videos or translations of videos depicting Plaintiff Jenny Pham. Ms. Pham is not being sued in this case, and there are no pending claims against her. The reason the videos of Ms. Pham were allowed into evidence is so the Defendant can show the context in which she published her words and statements.

If you decide that any Plaintiff has proven the elements of his or her claim, you may not alter that determination in any way because of the Jenny Pham videos. You also may not hold Ms. Pham's words and statements against Plaintiff Helen Le in any way.

If you find that any Plaintiff has proven the elements of his or her claim, you will be asked to award damages. In considering an award of damages, you may consider whether the

Defendant was provoked into making one or more statements after something Ms. Pham did or said. Provocation is not a defense, but you may consider it as a mitigating factor in determining the appropriate amount of damages to award. However, you may not consider it as a mitigating factor in any award of damages to Plaintiff Helen Le.

You may only consider provocation as a mitigating factor, however, if the Defendant made her statement so recently after seeing one of Ms. Pham's videos as to create a fair presumption that there was not enough time for her feelings and passions to subside.

DAMAGES GENERALLY

I will now instruct you regarding damages. The word "damages" is a legal term referring to the amount of monetary payment to which a Plaintiff is entitled in order to compensate for injuries that resulted from the Defendant's conduct. If you determine that the Defendant is liable to a Plaintiff, you must determine the amount of damages that the Plaintiff sustained. The fact that I am about to instruct you about damages does not reflect any view of mine as to which party is entitled to your verdict. Instructions as to damages are given for your guidance in the event you find in favor of any or all Plaintiffs by a preponderance of the evidence in accordance with the other instructions.

In determining the amount of damages, you may draw such inferences as are justified by your common experiences and observations of humankind, from the evidence of the nature of the injuries and the results thereof. The damages you award must be fair and reasonable, and not inadequate nor excessive. You are not required to award any particular amount of damages if you find in favor of one or more Plaintiffs. You may award as little as a nominal sum such as one dollar or as large of an amount as you believe is warranted.

The Plaintiffs are seeking three types of damages in this case. First, they are seeking "compensatory" damages for defamation. Compensatory damages seek to make a plaintiff whole--that is, to compensate them for any harm that they may have suffered. Second, they are seeking compensatory damages for statements motivated by racial, religious, gender, or ethnic animosity. Third, they are seeking "punitive" damages. I will explain each in turn.

DAMAGES FOR DEFAMATION

If you find in favor of a Plaintiff with respect to any of the alleged defamatory statements, the Plaintiff is entitled to recover compensatory damages without any proof of actual or monetary injury. Your verdict should be for an amount that fully and fairly compensates the Plaintiff for any pain,

embarrassment, humiliation, mental suffering, or injury to reputation.

If you find in favor of any Plaintiff with respect to some of the alleged defamatory statements but not others, you may only award damages for the defamatory statements for which you found in favor of that Plaintiff.

DAMAGES FOR RACIAL, RELIGIOUS, GENDER, OR ETHNIC ANIMOSITY

If you find in favor of any Plaintiff with respect to any statements that are based upon racial, religious, gender, or ethnic animosity, that Plaintiff is entitled to recover compensatory damages without any proof of actual or monetary injury. Just as I instructed you with respect to damages for defamation, if you find in favor of any Plaintiff with respect to some of the alleged statements but not others, you may only award damages for the statements for which you found in favor of that Plaintiff.

PUNITIVE DAMAGES

If you award compensatory damages to any Plaintiff for either defamation or for statements motivated by racial, religious, gender, or ethnic animosity, you may consider whether that Plaintiff is additionally entitled to "punitive" damages. Punitive damages are intended to punish the Defendant for her conduct and to serve as an example to deter the Defendant and others from acting in a similar way.

You may award punitive damages only if you find that a Plaintiff has shown by a preponderance of the evidence that the Defendant acted with actual malice toward that Plaintiff or acted under circumstances amounting to a willful and wanton disregard of the Plaintiff's rights. An award of punitive damages is not mandatory, and you may choose whether or not you want to award punitive damages.

VERDICT BASED UPON EVIDENCE

Your verdict in this case must be based solely upon the evidence presented at the trial, whether testimonial or documentary, and legitimate inferences to be drawn therefrom. Your verdict may not be based upon sympathy for a party, prejudice, passion, speculation or conjecture.

UNANIMOUS VERDICT

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

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your 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 your fellow jurors or for the mere purpose of returning a verdict.

CLOSING INSTRUCTIONS

I have selected [REDACTED] to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in court. A copy of this charge will go with you into the jury room for your use.

A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided below each question, and will date and sign the form when it is completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Court Security Officer signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing. All other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject related to the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Dated at Burlington, Vermont this 26th day of June, 2024.

/s/ William K. Sessions III
William K. Sessions III
United States District Court