

COPY

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

MARY COOK

v.

ARROWSMITH SHELBURNE, INC.  
and KDT INDUSTRIES, INC.

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Civil No. 1:92CV380

CHARGE TO THE JURY

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

The plaintiff, Mary Cook, claims that her employer wrongfully terminated her employment on the basis of her gender in violation of state and federal law. The defendants, Arrowsmith Shelburne, Inc. and its parent company, KDT Industries, Inc., claim Mary Cook's gender was not a motivating factor in the decision to terminate her employment and otherwise deny they intentionally discriminated against her.

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 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. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Likewise, 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.

Lastly, you are instructed to consider the two corporate defendants, Arrowsmith Shelburne, Inc. and KDT Industries, Inc., as a single employer for purposes of this case.

### 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; and all facts and events which may have been judicially noticed.

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 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.

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

### 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.



### Oral Admissions

Evidence as to any oral admissions, claimed to have been made outside of court by a party to any case, should always be considered with caution and weighed with great care. The person making the alleged admission may have been mistaken, or may not have expressed clearly the meaning intended; or the witness testifying to an alleged admission may have misunderstood, or may have misquoted what was actually said.

However, when an oral admission made outside of court is proved by reliable evidence, such an admission may be treated as trustworthy and should be considered along with all other evidence in the case.

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 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 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.

### Depositions as Evidence

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. 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 plaintiffs' claim by a preponderance of the evidence in the case, the jury should find for the defendants as to that claim.

As to the affirmative defense of the existence of a preexisting condition, which I will discuss later in these instructions, however, the burden of establishing the essential facts by a preponderance of the evidence is on the defendants.

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.

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 Claim

The plaintiff alleges the defendants intentionally discriminated against her on the basis of her gender in violation of the Vermont Fair Employment Practices Act and Title VII, 42 U.S.C. § 2000e et seq. "Gender" refers to the quality of being male or female.

To prevail on a claim of intentional discrimination, the plaintiff must prove by a preponderance of the evidence that the defendants had a reason or motive to discriminate against her. "Intentional discrimination" means that the plaintiff has proven by a preponderance of the evidence that gender was one motivating factor, but not necessarily the only motivating factor, in the decision to terminate her employment.

The mere fact that Mary Cook is a woman and that she was terminated is not sufficient, in and of itself, to establish her claim under the law. Moreover, merely demonstrating that the defendants disliked her as a person is not sufficient to prove gender-based discrimination. In showing that her gender was a motivating factor, the plaintiff is not required to prove her gender was the sole motivating for the defendants' decision to terminate her employment. The plaintiff need only prove her gender was one motivating factor in the defendants' decision, even though other factors may also have motivated the defendants.

The plaintiff may prove her case by presenting either direct or indirect evidence of discrimination.

Direct evidence includes oral or written statements showing a discriminatory motivation for the defendants' treatment of the plaintiff. Direct evidence is evidence of remarks or actions that, if believed, directly prove the plaintiff's gender was a factor in the defendants' decision to discharge her.

Stray remarks in the workplace do not constitute direct evidence of discrimination. This means that statements made by decision-makers that are unrelated to the decision do not constitute direct evidence that the plaintiff's gender was a factor in the decision.

By contrast, indirect or circumstantial evidence would include proof of a set of circumstances which would allow one to reasonably believe that gender was a motivating factor in the defendants' treatment of the plaintiff.

### Defense Against Direct Evidence of Discrimination

If you find the plaintiff has failed to meet her burden of proof of showing that gender was a motivating factor in the defendants' decision to terminate her employment, then you must decide in favor of the defendants. However, if you decide by a preponderance of the evidence that the plaintiff's gender was a factor that motivated or played a part in the defendants' decision to discharge the plaintiff, then you must decide in favor of the plaintiff, unless the defendants prove their affirmative defense, which I will now discuss with you.

Even if you decide that the plaintiff's gender was a factor in the defendants' action, if you also decide that the defendants demonstrated by a preponderance of the evidence that they would have reached the same decision regardless of the plaintiff's gender, then you must find in favor of the defendants. In regard to this defense, the defendants do not meet their burden merely by showing at the time of the decision they were motivated only in part by non-gender based reasons. The employer must show that its non-gender based reasons, standing alone, would have induced it to make the same decision.

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 any defendant as to any of her 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 defendants' 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 she is entitled. You may include only the damages the plaintiff has proven with reasonable certainty. In awarding compensatory damages, if you decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require a plaintiff to prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. You may not award speculative damages or damages based on sympathy.

In this case, Mary Cook seeks to recover compensatory damages for her physical injury, pain and suffering, and emotional damages, including loss of enjoyment of life.

You must not award compensatory damages more than once for the same injury. The plaintiff is only entitled to be made whole once, and she may not recover more than she has lost.

Moreover, you should not consider or award the plaintiff any back pay or other lost income. Issues concerning the plaintiff's entitlement to an award for lost income, if appropriate, are for the Court to decide at a later date.

Compensatory Damages Not Punitive

If you should find the plaintiff is entitled to a verdict for compensatory damages, in fixing the amount of your compensatory award, you may not include in, or add to an otherwise just award, any sum for the purpose of punishing any defendant, or to serve as an example or warning for others. Nor may you include in your award any sum for court costs or attorney's fees.



### Punitive Damages

In addition to the claims for damages already mentioned, you should consider whether the plaintiff is entitled to punitive damages. These are awarded in exceptional cases as a punishment of the defendants and as a warning to others to keep them from following the defendant's example.

You may award these damages if you determine by a preponderance of the evidence that one or more of the defendants' acts were done with either: (1) actual malice, which is nothing more or less than intentional wrongdoing--an act done with personal ill-will; or, (2) a wanton and willful disregard for the rights of another--in other words, a deliberate act with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of the act.

The plaintiff has produced what she considers evidence of the defendants' personal ill-will or wanton and willful disregard for her civil rights because of her gender.

You may find that one, all or none of these examples indicate a particular defendant's ill-will toward the plaintiff. Again, it is for you to determine the credibility, relevance, and significance of each piece of evidence and whether it supports the plaintiff's contention that punitive damages should be awarded.

If you determine that the facts justify an award of punitive damages, you should try to determine a fair, just, and reasonable amount for the plaintiff under all the circumstances. Punitive damages are not intended to compensate a plaintiff for injuries, but rather to punish the defendants and to prevent similar conduct in the future.

Punitive damages must bear a reasonable relationship to the plaintiff's actual injury. However, no single numerical equation has been made to easily link punitive to compensatory damages. In determining a reasonable relationship to the actual injury, you must consider all relevant factors, including: (1) the impact or severity of the defendants' conduct; (2) the amount of time the defendants conducted themselves in this manner; (3) the amount of compensatory damages; (4) the potential profits the defendant may have made from this conduct; (5) the attitudes and action of the defendants' top management after the misconduct was discovered; (6) the effect of the damages award on the defendants' financial condition, including the defendants' net worth and the impact of their paying an award of punitive damages; and, (7) any punishment the defendants may receive from other sources.

Preexisting Condition

The defendants also claim that the plaintiff suffered from physical and emotional conditions which existed before the alleged wrongful termination. You may award damages for aggravation of existing disease or physical defect, or for activation of any such latent condition, resulting from injury to the plaintiff caused by the defendant. If you find there was such an aggravation, you should determine, if you can, what portion of the plaintiff's condition resulted from the aggravation, and make allowance in your verdict to compensate the plaintiff only for that portion of her condition which resulted from aggravation.

Effect of Taxes

If you should award any damages to plaintiff, you should know there will be no state or federal income tax on the sum. Therefore, you should not include in your verdict any amount to compensate for taxes.

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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CIVIL NO. 1:92CV380

VERDICT FORM

1. Do you find that plaintiff Mary Cook has proven by a preponderance of the evidence that her gender was a motivating factor in the defendants' decision to terminate her employment?

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

If you have answered "yes" to question 1, proceed to question 2. If you have answered "no" to question 1, you have completed your deliberations. Please have your foreperson sign and date this verdict form.

2. Do you find that the defendants have proven by a preponderance of the evidence that they would have reached the same decision and terminated the plaintiff's employment regardless of her gender?

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

If you have answered "yes" to question 1 and "no" to question 2, proceed to questions 3 and 4. If you have answered "yes" to question 2, you have completed your deliberations. Please have your foreperson sign and date the verdict form.

3. If you have answered "yes" to question 1 and "no" to question 2, what is the amount of compensatory damages to which you find the plaintiff is entitled on her claim of gender discrimination?

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



4. If you have answered "yes" to question 1 and "no" to question 2, what is the amount, if any, of punitive damages to which you find the plaintiff is entitled on her claim of gender discrimination?

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When you have answered the questions posed to you, have the foreperson sign and date this form.

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Dated

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SUPPLEMENTAL INSTRUCTION

The Court wishes to suggest a few thoughts to you which you may desire to consider in your deliberations. You should consider these thoughts along with the evidence received during the trial and all the instructions previously given to you.

This is an important case. The trial has been expensive in terms of time, effort, and money to both the plaintiff and the defendants. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of at some time. There appears no reason to believe that a second trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen. So there appears no reason to believe that the case could ever be submitted to seven people more conscientious, more impartial, or more competent to decide it or that more or clearer evidence could be produced on behalf of either side.

These concepts are, of course, clear to all of us who have participated in this trial. The only reason that I mention these facts now is because some of them may have escaped your attention while you have been fully occupied in reviewing the evidence in the case in light of the instructions with your fellow jurors. These are all matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

As stated in the instructions given at the time the case was first submitted to you for decision, you should not surrender your honest beliefs as to the weight or effect of evidence solely because of the opinion of other jurors or for the mere purpose of returning a unanimous verdict.

It is your duty as jurors, however, 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. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. In the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous.

In order to bring seven minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others and listen

to each other's arguments with a disposition to reexamine your own views.

If most of you are in agreement about the outcome of the case, each dissenting juror ought to consider whether his or her disagreement in his or her own mind is a reasonable one since it has failed to persuade so many equally honest, equally conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth.

You are not partisans. You are judges--judges of the facts. Your sole interest here is to determine whether the parties have met their burdens of proof in accordance with the instruction on the law which have been given to you. You are the exclusive judges of the credibility of all the witnesses and of the weight and effect of all the evidence.

Remember, at all times, that no juror is expected to yield a conscientious belief he or she may have as to the weight or effect of evidence. But remember also that after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict if you can do so without violating your individual judgment and your conscience.

You may conduct your deliberation as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you in the light of the Court's instructions on the law.

You may be as leisurely in your deliberations as the occasion may require, and you may take all the time which you may feel is necessary.

You may now retire and continue your deliberations in such manner as shall be determined by your good and conscientious judgment as reasonable men and women.