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UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

CARLENE J. PERRY	:	
	:	
v.	:	Civil No. 1:94CV24
	:	
ETHAN ALLEN, INC.	:	
_____	:	

CHARGE TO THE JURY

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

The plaintiff, Carlene J. Perry, claims fellow employees or co-workers sexually harassed her and that defendant Ethan Allen, Inc. is liable for that harassment. Ethan Allen denies it is liable, claiming that the company took immediate action to stop the harassment. Ethan Allen also maintains that Ms. Perry has exaggerated her alleged emotional problems and that Ms. Perry's emotional problems and seizure disorders were pre-existing conditions which were unrelated to any problem occurring at work.

Now that you have heard the evidence and the argument, 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.

*Court ex. #1*

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, partnerships, unincorporated

associations, and other organizations, 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.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, the jury must, unless otherwise instructed, accept the Court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed.

Unless you are otherwise instructed, the evidence in the case always consisted 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 asks 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 - Presumption of Regularity,

#### Ordinary Course of Business, Obedience to Law

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.

#### Number of Witnesses

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but

which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

### Single Witness

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

### 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.

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 plaintiffs' claim by a preponderance of the evidence in the case, the jury should find for the defendants as to that claim.

As to certain affirmative defenses which will be discussed later in these instructions, however, the burden of establishing the essential facts is on the defendant, as I will explain.

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 Sexual Harassment Claim

To find Defendant Ethan Allen, the employer, liable on Plaintiff's claim of sexual harassment, plaintiff Carlene Perry must prove, by a preponderance of the evidence, that:

First: Plaintiff Carlene Perry suffered from intentional discrimination because of her sex by the intentional conduct of her fellow employees consisting of conduct of an unwelcomed sexual nature, such as unwelcome sexual propositions sexual innuendo, physical contact of a sexual nature, or sexually derogatory language;

Second: This alleged conduct was severe, pervasive and regular;

Third: The alleged conduct detrimentally affected the plaintiff;

Fourth: The conduct would have detrimentally affected a reasonable person in plaintiff's position;

Fifth: Management level employees knew, or should have known, of the alleged sexual harassment described above;

Sixth: Management level employees failed to implement prompt and appropriate corrective action.

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 plaintiffs 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 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. You may not award speculative damages or damages based on sympathy.

In this case, Ms. Perry seeks to recover compensatory damages for her lost wages, lost benefits, and emotional damages. You must not award compensatory damages more than once for the same injury. As another example, you may not award wages plaintiff lost as a result of disability unless you also find plaintiff has proven her disability was a result of defendant's sexual harassment. The plaintiff is only entitled to be made whole once, and she may not recover more than she has lost.

Finally, if you conclude Ms. Perry is entitled to an award of compensatory damages, you only may award damages for injuries she suffered within the applicable statute of limitations period, which I am instructing you is December 7, 1990. Therefore, you may only award damages resulting from conduct which occurred after December 7, 1990.

#### 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 consider two particular factors:

1. You should reduce any award by the amount of the expenses the plaintiff would have incurred in making those earnings.

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

If you make any award for future medical expenses, you should adjust or discount the award to present value in the same manner. However, you must not make any adjustment to present value for any damages you may award for future pain and suffering or future mental anguish.

#### Damages Not Punitive

If you should find the plaintiff is entitled to a verdict, in fixing the amount of your award, you may not include in, or add to an otherwise just award, any sum for the purpose of punishing the 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. The Court will address the matter of attorney's fees and costs.

#### Duty to Mitigate

As an affirmative defense, Ethan Allen has claimed the plaintiff failed to mitigate her damages. The defendant is required to prove this affirmative defense by a preponderance of the evidence. It is the duty of any person who has been injured to use reasonable diligence and reasonable means under the circumstances to prevent the aggravation of such injuries and to effect a recovery from such injuries.

If you determine the plaintiff is entitled to an award of damages but that the plaintiff failed to mitigate her damages, you must reduce these damages by the amount plaintiff could reasonably have been expected to earn following her employment at Ethan Allen, if the plaintiff had used reasonable efforts to secure other employment.

#### Preexisting Condition

The defendant also claims that the plaintiff suffered from physical and emotional conditions which existed before the alleged sexual harassment. You may award damages for aggravation of an 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.