

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

Your final role here is to pass upon and decide the fact issues of this case. You are the sole and exclusive judge 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" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability of witnesses.

You are not to consider any one instruction that I give you as alone stating the law, but you should take all of my 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 to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as 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.

You are to discharge your duty as jurors in an attitude of complete fairness and

impartiality. You should appraise the evidence calmly and deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party.

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, during the course of the trial I occasionally made comments to the lawyers, asked questions of a witness, or admonished a witness concerning the manner in which he or she responded to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of her claims by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

In this case, Plaintiff Gale White brings three claims against Defendant, the United States Immigration and Naturalization Service. Two of these claims charge that the Plaintiff was discriminated against on the basis of her sex; these claims will be referred to as a "quid pro quo" claim and a "hostile work environment" claim. I will shortly define these terms for you. The third claim charges that the Defendant retaliated against the Plaintiff, because she filed complaints about the alleged sex discrimination.

Title VII of the Civil Rights Act of 1964 provides that: "[i]t shall be . . . unlawful . . . for an employer . . . to discriminate . . . because of [an] individual's . . . sex. . ." Sexual harassment constitutes discrimination because of sex. One type of sexual harassment occurs when the terms and conditions of one's employment are conditioned on submission to unwelcome sexual advances and requests for sexual favors. The Plaintiff's first claim involves this type of sexual harassment, and is known as a quid pro quo harassment claim. The creation or toleration of sexually offensive or abusive conditions is another form of sexual harassment. The Plaintiff's second claim charges this type of sexual harassment, and is known as a hostile work environment claim.

**Claim One: Quid Pro Quo**

In order to prevail on her claim of quid pro quo harassment, the Plaintiff must prove by a preponderance of the evidence that:

- ▶ (1) the Plaintiff's supervisor, Thomas Prendergast, made intentional sexual advances to the Plaintiff;
- ✕ (2) the sexual advances were unwelcome to the Plaintiff;
- (3) the acceptance or rejection of the sexual advances was an express or implied condition for the receipt of a job benefit or the imposition of a tangible job detriment; and
- ▶ (4) the Plaintiff's reaction to Mr. Prendergast's advances, in fact, affected a tangible aspect of her employment.

The Plaintiff need not show that the employer, the Defendant in this case, knew or should have known of the quid pro quo harassment. The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee.

With respect to this quid pro quo claim, you may not return a verdict for Plaintiff just because you disagree with Defendant's decision to terminate her, or because you believe it to

be harsh or unreasonable. An employer may make an employment decision for a good reason, a bad reason, or no reason at all so long as it is not because of sex.

### **Claim Two: Hostile Work Environment**

The Plaintiff's second claim is that she was exposed to a hostile work environment. Under Title VII of the 1964 Civil Rights Act, every employee also has the right to work in an environment that is free from intimidation and ridicule based on gender. The Plaintiff claims she was denied that right.

In order to prevail on her hostile work environment claim, the Plaintiff must prove by a preponderance of the evidence:

- ▲ 1) That the Plaintiff was subjected to intentional unwelcome harassment;
- ▲ 2) That the harassment was based on the Plaintiff's gender;
- ▲ (3) That the harassment affected a term, condition or privilege of employment;
- ▲ (4) That the employer did not take reasonable steps to remedy the situation when it knew or should have known of the situation; and
- ▲ 5) That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff.

With respect to the first element, to determine whether sexual advances were "unwelcome," you must consider whether plaintiff solicited or invited the conduct, and

whether the plaintiff regarded the conduct as undesirable or offensive at the time it occurred. To find the conduct was unwelcome, you must find that the plaintiff indicated to Mr. Prendergast, either by words or conduct, that it was unwelcome.

With respect to the third element, the Plaintiff need not show that she lost any tangible job benefit as a result of the harassment. A hostile work environment exists when conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an objectively hostile work environment--that is, a work environment which a reasonable person would find intimidating, hostile, or offensive. To find for the Plaintiff on this claim, you must find that the sexual harassment was continuous and pervasive in nature, and not merely isolated or occasional episodes of offensive conduct. You must further find that Plaintiff herself thought the work environment to be sexually abusive and hostile.

I instruct you with respect to the fourth element that you may consider whether the Defendant provided a reasonable avenue for complaint. An employer has an affirmative duty to eradicate a hostile and offensive work environment that it has knowledge of, and to create an atmosphere free of sexual harassment.

With respect to the fifth element, I instruct you that the term "proximate cause" means that there must be a sufficient causal connection between the acts of the Defendant and any injury or damage sustained by the Plaintiff. An act is a proximate cause of an injury if

it was a substantial factor in bringing about or actually causing the injury; that is, if the injury or damage was a reasonably foreseeable consequence of the Defendant's act. If an injury was a direct result or a reasonably probable consequence of the Defendant's act, it was proximately caused by such act. If the Defendant's act had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act is a proximate cause.

A proximate cause need not always be the nearest cause of an injury either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. More than one factor, or the conduct of more than one person, may operate at the same time, either independently or together, to cause an injury. Any one of them could be a proximate cause.

### **Claim Three: Retaliation**

The Plaintiff's third claim is that the Defendant retaliated against her because she complained that Mr. Prendergast sexually harassed her. In order for the Plaintiff to prevail on this third claim, she must prove by a preponderance of the evidence that:

- ✶ (1) the Plaintiff engaged in an activity protected by Title VII, that is, she made a charge or complaint of unlawful discrimination; and
- ✶ (2) the Defendant took adverse action against the Plaintiff; and



\* (3) there is a causal connection between the charge or complaint and the adverse action.

I instruct you with respect to the first element that the Plaintiff's complaint of sexual harassment is a protected activity within the meaning of the statute. The Plaintiff need not show that the actions she complained about occurred or were in fact illegal, in order to recover for retaliation.

With respect to the third element, the requirement of a causal connection, the Plaintiff need not show that the adverse action taken against her by the Defendants was solely the result of discrimination. In order for her to prevail on this element, it is enough to show that the retaliation was an identifiable motivating factor in the adverse employment decision. If you find that the adverse action taken by the Defendant followed the making of a sexual harassment complaint, this may be considered by you as evidence of a causal connection.

If you find that the Plaintiff has established the three elements I described, you must then decide whether the Defendant has articulated some legitimate, nonretaliatory reason for the adverse actions taken against the Plaintiff. If the Defendant articulates such a reason, then the Plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not its true reasons, but were merely a pretext for unlawful retaliation.

With respect to this retaliation claim, you may not return a verdict for Plaintiff just because you disagree with Defendant's decision to terminate her, or because you believe it to be harsh or unreasonable. An employer may make an employment decision for a good reason, a bad reason, or no reason at all so long as it is not because of sex.

If you should find for the Plaintiff and against the Defendant on any of her claims, you must consider the issue of damages.

In considering the issue of the Plaintiff's damages you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Damages cannot be based on speculation because it is only actual damages -- what the law calls compensatory damages -- that are recoverable. In this case, compensatory damages are limited to the mental and emotional aspects of injury, tangible and intangible, sustained by Plaintiff from the date they were incurred until the present time. You are not to consider lost wages or lost benefits as an element of damages. That will be a matter for the Court to consider, if necessary.

You must not award compensatory damages more than once for the same injury. The Plaintiff is only entitled to be made whole once, and may not recover more than she has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the Plaintiff for all of such injuries.

Of course, the fact that I have given you instructions concerning the issue of the Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Now, I have said that you must consider all the evidence. That does not mean, however, that you must accept all the evidence as true or accurate. I instructed you that one of your principal functions during the trial would be to observe the witnesses and to determine their credibility.

You are the sole judges of the credibility or believability of witnesses and the weight to be given to their testimony. In weighing the testimony of witnesses, you should consider their relation to the Plaintiff or to the Defendant, their interest, if any, in the outcome of the case, their candor and manner of testifying, their opportunity to gather or acquire knowledge concerning their testimony, their fairness and intelligence and the extent to which they have been supported or contradicted by other credible evidence. You may accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Now, one factor to be considered in assessing credibility is any interest a witness may have in the outcome of a trial. In appraising a witness's credibility, you may take into consideration the fact of the witness's interest. It by no means follows, however, that because a person has a substantial interest in the outcome that the person is not capable of telling a straightforward or truthful account. It is for you to decide to what extent, if at all, an interest in the outcome of a case has affected a witness's testimony.

You may also consider any demonstrated bias, prejudice or hostility of a witness toward a party in determining the weight to be accorded to that witness's testimony.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

When you retire to the jury room, how you go about your business is entirely up to you. I suggest to you, however, that you select a foreperson whose duty it will be to preside over your deliberations and who will be your spokesperson here in court. You can go about selecting your foreperson by vote or whichever way you want.

The foreperson has no greater voice or vote than any other juror, but sees that some order is established in the manner in which you proceed and is your spokesperson here in court.

If during your deliberations you should desire to communicate with the Court, please reduce your message or question to writing signed by your foreperson and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, that with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

A form of verdict has been prepared for your convenience. You will take the verdict form into the jury room and when you have reached unanimous agreement you will have the

foreperson fill in the verdict form, date and sign it. You will then return to the courtroom where the verdict will be read, and each of you will be asked individually if that is your verdict.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous as to each claim.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must 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 the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges -- judges of facts. Your sole interest is to seek the truth from the evidence in the case.

FORM OF VERDICT

CLAIM ONE: QUID PRO QUO HARASSMENT

1. Has Plaintiff proven by a preponderance of the evidence that Plaintiff was subjected to quid pro quo harassment?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 1 is "YES," go on to Question No. 2. If your answer to Question No. 1 is "NO," skip Question No. 2 and go on to Question No. 3.

2. Under the law as given to you in the instructions, state the amount of compensatory damages Plaintiff should be awarded from Defendant for being subjected to quid pro quo harassment.

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CLAIM TWO: HOSTILE WORK ENVIRONMENT

3. Has Plaintiff proven by a preponderance of the evidence that she was subjected to a hostile work environment?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 3 is "YES," complete Question No. 4. If your answer to Question No. 3 is "NO," go on to Question No. 5.

4. Under the law as given to you in the instructions, state the amount of compensatory damages Plaintiff should be awarded from Defendant for being subjected to a hostile work environment.

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CLAIM THREE: RETALIATION

5. Has Plaintiff proven by a preponderance of the evidence that she suffered retaliation because she complained about sexual harassment?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 5 is "YES," then go on to Question No. 6. If your answer to question No. 5 is "NO," then skip the remaining questions and have the foreperson sign and date the Form of Verdict.

6. Has Defendant proven by a preponderance of the evidence that it would have discharged Plaintiff even if the unlawful retaliatory motive was not present?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 6 is "YES," skip Question No. 7 and have the foreperson sign and date the Form of Verdict. If your answer to Question No. 6 is "NO," complete Question No. 7.

7. Under the law as given to you in the instructions, state the amount of compensatory damages Plaintiff should be awarded from Defendant for being unlawfully discharged in retaliation for her complaint.

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When you have completed this form, please have the Foreperson sign and date the Form of the Verdict below.

SO SAY WE ALL.

\_\_\_\_\_  
FOREPERSON

\_\_\_\_\_  
DATE