

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

RENEE D. VINCENT,	:	
Plaintiff,	:	
	:	
v.	:	No. 2:96-CV-166
	:	
ALEXIS M. HERMAN, Secretary,	:	
U.S. Department of Labor,	:	
Defendant.	:	

JURY CHARGE

Members of the Jury:

The Plaintiff in this case is Renee Vincent, represented by Eileen Blackwood and Susan Buchanan. The Defendant is Alexis M. Herman, on behalf of the United States Department of Labor, represented by Carol Shea and Christine Eskilson.

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.

As I mentioned at the beginning of the trial, Ms. Vincent has brought her claim under the legal theories of sex discrimination and retaliation, based on Title VII of the Civil Rights Act of 1964. The Department denies these claims.

Each theory is separate and distinct, requiring proof of different elements. Later I will instruct you on each theory

in turn. First, I would like to give you some general instructions.

Role of the Court, the Jury and Counsel

You have listened carefully to the testimony that has been presented to you. Now you must 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 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 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.

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.

Proper Party

Title VII of the Civil Rights Act requires that the head of the employing agency be made the Defendant, and it is for that reason that Alexis M. Herman, Secretary of the U.S. Department of Labor is the proper party to be sued. But it is the actions of the Bureau of Apprenticeship and Training, or BAT, and the Office of the Assistant Secretary for Administration and Management, OASAM, that are at issue here.

The acts of Ms. Vincent's supervisors and the management officials at BAT and OASAM are to be treated as the acts of the Secretary of Labor for the purposes of this case.

That having been said, a government agency is entitled to the same fair trial as is a private individual. All persons, including government agencies, stand equal before the law and are to be dealt with as equals in a court of justice.

Evidence in the Case

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. 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, you must accept the stipulation and regard that fact as proved.

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.

The evidence includes any stipulated facts, the sworn testimony of the witnesses and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

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.

Direct and Circumstantial Evidence

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.

The following anecdote is a simple example of circumstantial evidence. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence.

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.

Burden of Proof

This is a civil case and as such the Plaintiff has the burden of proving every element of her 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. In other words, 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. 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 after considering all of the testimony you are satisfied that Ms. Vincent has carried her burden of proof on each element of her claim, then you must find for Ms. Vincent on that claim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then Ms. Vincent has failed to sustain her burden and you must find for the Department.

Witness Credibility

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's knowledge, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to Ms. Vincent or the Department; any interest he or she may have in the outcome of the case; 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 you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear

it differently; and people naturally tend to forget some things or remember other things inaccurately. 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 should 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. 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.

A witness may be discredited or impeached by contradictory evidence; or 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.

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

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may 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.

Ordinarily, under the rules of procedure governing the preparation of a case for trial, the parties are permitted to take and record the testimony of witnesses, under oath, in the same manner as you have seen witnesses sworn and questioned here before you; and, under certain conditions, that testimony, which is called a "deposition," may then be offered as evidence before the jury at the trial. You should consider such deposition testimony, and evaluate the weight or credibility to which it is entitled, in the same way you consider and evaluate all the other testimony in the case.

Similar Acts -- Intent, Knowledge, Absence of Mistake

Ms. Vincent has offered evidence suggesting that on other occasions Mr. Sangiovanni engaged in conduct similar to the conduct Ms. Vincent claims was discrimination or retaliation against her.

In that connection, let me remind you that the Department of Labor is not on trial for discrimination or retaliation against anyone other than Renee Vincent. Accordingly, you may not consider evidence of any similar acts as a substitute for proof that the Department discriminated against Ms. Vincent.

If you determine that the Department discriminated or retaliated against Ms. Vincent and also against other women, then you may, but you need not, draw an inference that in doing the acts Ms. Vincent alleges, the Department acted knowingly and intentionally and not for innocent reasons.

Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the Department committed the other acts it must also have committed the acts alleged by Ms. Vincent.

It is now my duty to give you instructions on the legal theories that apply to this case.

Claim One: Sex Discrimination

Ms. Vincent bases her lawsuit on Title VII of the Civil Rights Act of 1964. The Act provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."

An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. A "motivating factor" means a factor that played a part in the employer's decision to undertake the employment practice.

It is your duty to consider whether Ms. Vincent has proved her claims of sex discrimination and retaliation for events which took place after November 21, 1991 only. The law provides that the Court must determine liability for any actions occurring before that date. You have heard evidence concerning events prior to November 21, 1991. This evidence is meant to serve as background information for you.

You must find for Ms. Vincent on her sex discrimination claim if she has proven the following elements by a preponderance of the evidence:

First, that she is a member of a protected class under the statute,

Second, that she was qualified for and sought a promotion,

Third, that the Department failed to promote her, and

Fourth, that Ms. Vincent's gender was a motivating factor in the Department's decision not to promote her.

You must find for the Department if any of these elements has not been proven.

Females are a protected class under Title VII, and Ms. Vincent is female. Therefore, you need only concentrate on the other three elements.

With respect to the second element, seeking a promotion, Ms. Vincent need not have applied for every open position, if you find that applying for that position would have been futile. You may also find that the Department knew of Ms. Vincent's desire for promotion through means other than a formal application.

Same Decision

If you find for Ms. Vincent, you must then determine whether the Department has proved by a preponderance of the

evidence that it would have failed to promote Plaintiff regardless of Plaintiff's gender.

Bear in mind that this determination does not alter Ms. Vincent's burden of proof. Ms. Vincent must still have proved the elements of her claim by a preponderance of the evidence. If she has done so, however, then you may consider whether the Department has proven by a preponderance of the evidence that it would not have promoted her regardless of her gender.

Of course, if you do not find for the Plaintiff initially, you need not make this determination at all.

Intentional Discrimination -- Defined

Discrimination is intentional if it is done voluntarily, deliberately, and willfully, and not by accident, inadvertence or other innocent reason. Ms. Vincent is not required to produce direct evidence of intentional discrimination. Intentional discrimination may be inferred from the existence of statements made, acts done or omitted and other facts and circumstances.

Statistical Evidence

Statistics are one form of evidence from which you may find, but are not required to find, that the Department discriminated against Ms. Vincent. In particular, statistics

may be used to rebut the Department's showing that it had business reasons for its decisions.

However, the usefulness of statistics depends on the surrounding facts and circumstances. In other words, the statistics and numbers offered must be compared with a number of factors, including the relevant labor market, which is the qualified applicant pool, the relative numbers of men and women who were both qualified for and interested in technical jobs with BAT.

You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether Ms. Vincent has proven that the Department intentionally discriminated against her.

Affirmative Action Plans and Reports

In determining whether Ms. Vincent was qualified for and sought a promotion, you may consider whether the Department followed its own policies of upward mobility and affirmative action. However, a government agency's failure to follow its own such policies does not by itself justify an inference of discrimination. That is, a conclusion that the Department did not follow these policies may contribute to a finding of discrimination, but only if you find other evidence which supports that finding as well.

Claim Two: Retaliation

Ms. Vincent's retaliation claim is also brought under Title VII of the Civil Rights Act of 1964. You must find for Ms. Vincent on her retaliation claim if she has proven the following elements by a preponderance of the evidence:

First, that she engaged in a protected activity under Title VII,

Second, that the Department took adverse employment action against her, and

Third, that her protected activity was a motivating factor in the Department's decision to take adverse employment action; in other words, that a retaliatory motive made a difference in the adverse employment action.

You must find for the Department if any of these elements has not been proven.

Under the law of this case, filing a grievance, an Equal Employment Opportunity complaint, or a lawsuit about sex discrimination is a protected activity.

An "adverse employment action" is one which affects the terms, privileges, duration or conditions of employment. To constitute an adverse employment action, the action must have a material employment consequence.

To permit recovery for retaliation, you do not have to find that Ms. Vincent was in fact discriminated against or that

the Department's actions were illegal. You need only find that Ms. Vincent's complaint about discrimination was a motivating factor in the adverse employment action. "Motivating factor" has the same definition here as it does with regard to the sex discrimination claim.

Same Decision

As with the sex discrimination claim, if you find that Ms. Vincent has proven retaliation, the Department may then attempt to prove that it would have taken adverse employment action against her regardless of her gender. You must determine whether the Department has proven by a preponderance of the evidence that it would have done so, but only if you have first found that Ms. Vincent met her burden of proof as to her retaliation claim.

Effect of Discrimination Claim

In determining if Ms. Vincent has proven retaliation, you may consider the timing of the incidents, the messages conveyed to her, the individuals involved, and the manner in which she was singled out. For example, if you find that discriminatory adverse action taken by the Department followed the filing of the sex discrimination complaint, you may consider this as evidence of retaliation.

Though you may draw such a conclusion from the evidence, you may not assume that the filing of a grievance or claim automatically means any subsequent adverse action is retaliation. Furthermore, you may conclude from the evidence that Ms. Vincent's protected activity was too remote in time from the Department's actions to be of consequence, or that the Department had legitimate reasons for its actions.

Business Judgment

The question for you in this case is not whether the employee in your view was treated well or fairly, but whether illegal discrimination or retaliation occurred.

In considering the Department's reasons for an adverse employment action, bear in mind that the Department is entitled to exercise its management discretion and make its own business judgments. Under the law that governs this case, the Department had the right to make decisions concerning Ms. Vincent for good reasons, for bad reasons, or even for no reason at all, so long as its decisions were not based on unlawful discrimination or retaliation. In order to prevail, Ms. Vincent must demonstrate that intentional discrimination or retaliation was behind the personnel actions instituted against her.

Damages

As explained above, Ms. Vincent has made claims against the Department for sex discrimination and retaliation. If you decide for the Department on the question of liability, you will have no occasion to consider the question of damages.

The fact that I am about to 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 find in favor of Ms. Vincent by a preponderance of the evidence in the case in accordance with the other instructions.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that Ms. Vincent prove the exact amount of her damages with absolute certainty. Nevertheless, the damages you award, if you do so, may not be based on sympathy, speculation, or guesswork, because it is only actual damages which are recoverable. Remember that Ms. Vincent has the burden of proving damages by a preponderance of the evidence.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

Compensatory Damages

You will only determine whether Ms. Vincent is entitled to compensatory damages for injuries she sustained after November 21, 1991. While you have heard evidence about actions or conduct prior to that date, that evidence should be used as background in determining whether the Department discriminated or retaliated after that date. According to the law, the Court must make the determination as to liability and damages for all acts occurring prior to November 21, 1991.

If you should find that the Department is liable for discrimination or retaliation, then you must determine an amount that is fair compensation for Ms. Vincent's damages. You may award compensatory damages only for injuries that Ms. Vincent proves by a preponderance of the evidence were caused by the Department's allegedly wrongful conduct. The damages that you award must be fair compensation, no more and no less. The award is intended to put Ms. Vincent in the same position she would have been in had the Department's actions not occurred.

In calculating damages, you should not consider any back pay that Ms. Vincent lost. The award of back pay, should you find the Department liable, will be calculated and determined by the Court.

You may award compensatory damages for emotional pain,

suffering, inconvenience, mental anguish, and similar damages if you find these were caused by the Department's illegal act. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

You may not award compensatory damages more than once for the same injury. However, if you find that different injuries are attributable to different claims, you must compensate Ms. Vincent for all her injuries.

An injury or harm to Ms. Vincent that is not the result of unlawful conduct does not entitle her to damages. Similarly, Ms. Vincent is not entitled to damages for conduct that does not cause harm or injury.

Punitive Damages

You may not award any punitive damages in this case. Thus, you may not base any monetary award on a desire to punish the Department, to prevent unlawful discrimination or retaliation from happening in the future, or to warn other employers not to engage in unlawful discrimination or retaliation. Rather, any monetary award that you make must be calculated solely to provide fair compensation to Ms. Vincent

for her actual injuries caused by unlawful discrimination or retaliation, and on no other basis.

Nominal Damages

If you find, after considering all the evidence presented, that the Department violated Ms. Vincent's rights but that she suffered no injury as a result of this violation, you may award Ms. Vincent "nominal damages." "Nominal damages" are awarded as recognition that the plaintiff's rights have been violated. You would award nominal damages if you conclude that the only injury that Ms. Vincent suffered was the deprivation of her civil rights, without any resulting physical, emotional, or financial damage.

You may also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing.

You may not award both nominal and compensatory damages to Ms. Vincent; either she was measurably injured, in which case you must award compensatory damages, or else she was not, in which case you may award nominal damages.

Nominal damages may not be awarded for more than a token sum, usually one dollar.

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. Your verdict must be unanimous as to each claim.

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 other 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 other jurors, or for the mere purpose of returning a verdict.

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

Notes

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors,

controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

Closing Instructions

I have selected _____ 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 form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special verdict form requires 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.

Communications with the Court

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the

Courtroom 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, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching 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, in the District of Vermont, this _____ day of April, 1998.

William K. Sessions III
District Judge