

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|----------------------|---|------------------------|
| EFFIE MAYHEW, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Case No. 2:15-cv-00147 |
| | : | |
| HERMITAGE CLUB, LLC, | : | |
| | : | |
| Defendant. | : | |

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is 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.

Plaintiff in this case is Effie Mayhew. The Defendant is the Hermitage Club, LLC. Plaintiff alleges that she was wrongfully terminated from her employment in violation of public policy. Specifically, she claims that her termination was in retaliation for her acts in furtherance of Vermont's public policy prohibiting animal cruelty.

ROLE OF THE COURT AND THE JURY

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts.

You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them.

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

Nothing I say in court or in these instructions is to be taken as an indication that I have any opinion about the facts of the case. 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.

EVIDENCE

You have seen and heard the evidence produced in this trial, and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence,

and all the facts admitted or stipulated. I would now like to call to your attention to certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

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

CREDIBILITY OF WITNESSES

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

or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have different points of view regarding various occurrences. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance or to unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

CORPORATE PARTY

In this case, the defendant is a corporation. The mere fact that one of the parties is a corporation does not mean it is entitled to any lesser consideration by you. All litigants are

equal before the law, and corporations, big or small, are entitled to the same fair consideration as you would give any other individual party.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties, and all exhibits admitted into evidence. When the attorneys for Plaintiff and Defendant stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

BURDEN OF PROOF AND PREPONDERANCE OF THE EVIDENCE

Because this is a civil case, Plaintiff has the burden of proving every element of her claim "by a preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

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 evidence, you conclude that Plaintiff has failed to establish any essential element of her claim by a preponderance of the evidence, you should find for Defendant. If after such consideration you find the evidence of both parties to be in balance or equally probable, then Plaintiff has failed to sustain her burden and you must find for Defendant. If you find that Plaintiff has established all essential elements of her claim by a preponderance of the evidence, you should find for Plaintiff.

PLAINTIFF'S LEGAL CLAIM

In Vermont, employees hired without a contract for a specific term of employment are considered "at-will" employees, who can be fired at any time for any lawful reason or no reason at all. However, even an at-will employee may not be wrongfully terminated in violation of public policy. Plaintiff alleges that she was wrongfully terminated in violation of Vermont's public policy concerning the treatment of animals. I will instruct you on the elements of this claim.

Wrongful Discharge in Violation of Public Policy: Elements

To prevail on her claim of wrongful discharge in violation of public policy, Plaintiff must prove four elements:

1. Plaintiff engaged in a protected activity
2. The Hermitage Club knew of the protected activity
3. The Hermitage Club terminated her employment
4. The termination was motivated by Plaintiff's engagement in the protected activity

I will elaborate on each of these elements.

1. Protected activity

To establish that she engaged in protected activity, Plaintiff must show that she had an objective, good faith belief that the actions or practices she reported to management might violate a public policy of the state of Vermont. Public policy is defined as the community common sense and common conscience, extended and applied throughout the state to matters of public morals,

public health, public safety, public welfare and the like. Public policy may be reflected in law or statute, or in the people's clear consciousness and conviction of what is naturally and inherently just and right between man and man, such that the action at issue is contrary to society's concern for providing equity and justice.

Vermont has a public policy against cruelty to animals. State criminal law prohibits depriving an animal that a person owns or possesses of adequate food, water, shelter, rest, sanitation or necessary medical attention. Necessary medical attention is defined to "include medical treatment for illness, injury, disease, excessive parasitism, or malformed or overgrown hoof." Sanitation is defined as "the maintenance of clean conditions for indoor and outdoor enclosures to minimize health hazards, including periodic cleanings to remove excretions or other waste materials, dirt, and trash." "Adequate shelter" means shelter which protects the animal from injury and environmental hazards. "Adequate food" means food that is not spoiled or contaminated and is of sufficient quantity and quality to meet the normal daily requirements for the condition and size of the animal and the environment in which it is kept. The law provides that "an animal shall be fed or have food available at least once each day, unless a licensed veterinarian instructs otherwise, or withholding food is in accordance with

accepted agricultural or veterinarian practices." In addition, Vermont law prohibits exposing a poison with the intent that it be taken by an animal.

2. Hermitage Club's knowledge

Plaintiff must show that Defendant was aware that Plaintiff made reports to management about actions or practices which she had an objective, good-faith basis to believe would violate the state's policy against animal cruelty.

3. Termination

Plaintiff must show that Hermitage Club terminated her employment.

4. Causation

Generally, if the plaintiff establishes that a causal connection can be shown by circumstances which give rise to an inference of unlawful termination, then the defendant must proffer a legitimate, lawful reason for the adverse employment action. If the defendant provides such a reason, the burden then shifts back to the plaintiff to show that the Defendant's proffered reason was a pretext for the termination.

However, you may find that Defendant's termination was motivated by Plaintiff's protected activity and also by other lawful reasons. If you find that Plaintiff's protected activity was a motivating factor in Defendant's decision to terminate her, Plaintiff is entitled to your verdict, even if you find

that Defendant's conduct was also motivated by other, lawful reasons. However, if you find that Defendant's decision was motivated by both lawful reasons and because of Plaintiff's protected activity, then you must decide whether Plaintiff is entitled to damages. Plaintiff is entitled to damages unless Defendant proves by a preponderance of the evidence that Defendant would have made the same decision even if Plaintiff's protected activity had played no role in the employment decision.

In addition, Defendant has offered evidence that it terminated Plaintiff for reasons entirely aside from Plaintiff's protected activity. Remember that it is Plaintiff's burden to prove that at least one of the motivating reasons for her termination was her protected activity, and that an employer may terminate an employee for any reason, good or bad, as long as it is not due to protected activity. However, you should scrutinize the reasons proffered by Defendant, just as you would any other evidence. If you find that the reasons were "pretextual," that is, they were not the real reasons for the decision, then you may infer or not infer, as you choose, that the pretext was designed to conceal that Plaintiff was terminated due to her protected activity.

DAMAGES

I will now instruct you on damages. The fact that I am instructing you on how to award damages does not mean that I have any opinion on whether or not Plaintiff should prevail on the merits of her claim. In the event that you do not conclude Plaintiff's rights were violated, you need not reach the question of damages. If you do find for the Plaintiff, you must determine damages. Plaintiff has the burden of proving damages by a preponderance of the evidence.

Compensatory damages

"Compensatory damages" is a legal term referring to the amount of monetary payment to which the Plaintiff is entitled to compensate her for her losses, if any, which resulted from Defendant's termination. Compensatory damages seek to make the Plaintiff whole--that is, to compensate her for any harm that she may have suffered.

For each item of loss or harm that the Plaintiff claims, she has the burden of proving by a preponderance of the evidence that (1) she has or will have such a loss or harm, and (2) the loss or harm was caused by the legal fault of the Defendant. If you decide that the Plaintiff has proven these two matters to be more probable than not, you must then decide how much money will fully, fairly, and adequately compensate her for each of those items of loss or harm. Plaintiff's claim for damages includes

two distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages and fringe benefits Plaintiff would have earned in her employment with defendant if she had not been discharged, less what she actually received from other employment.

Second, you must determine the amount of any other damages sustained by Plaintiff, such as emotional distress caused by her termination. You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

In determining the amount of damages to allow the Plaintiff, you may draw such inferences as are justified by your common experiences and observations of humankind, from the evidence of the nature of the injuries and the results thereof. The damages you award must be fair and reasonable, neither inadequate nor excessive. You should not award damages for speculative injuries, but only for those injuries that the Plaintiff has actually suffered. In awarding compensatory damages, should 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 the Plaintiff to prove the amount of her losses with

mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

I remind you that you may award compensatory damages only for injuries that Plaintiff proves were proximately caused by the Defendant's allegedly wrongful termination.

Factors not to be considered in determining damages

In determining the amount of damages to award to the Plaintiff, you must consider only the evidence in the case. You must not consider, discuss, or speculate upon any events, factors, possibilities or other matters not admitted in evidence. The only proper consideration is what amount of money will fully, fairly, and adequately compensate the Plaintiff for the injuries she has sustained as you find from the evidence. You may not consider or speculate on whether the Plaintiff has received benefits from other sources in connection with her injuries. Finally, you should not add any sum to such an award to compensate for presumed income tax.

Mitigation of damages

A person who has suffered harm by the wrongful act of another is obligated to exercise reasonable care and effort to avoid loss and to minimize, or "mitigate," the damages. He or she may not recover for losses which could have been prevented by him or her making reasonable efforts without undue risk or expense on his or her part.

Once Plaintiff has proved that she suffered damages, it is the Defendant's burden to prove that any of those damages reasonably could have been avoided. In deciding whether to reduce the Plaintiff's damages due to some failure to mitigate on her part, therefore, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the Defendant has satisfied its burden of proving that the Plaintiff could have avoided the damages in question.

VERDICT BASED UPON EVIDENCE

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

UNANIMOUS VERDICT

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. That is, 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 your 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 to change your opinion if you become 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 may have taken notes during the trial for use in your deliberations. These notes 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 your fellow 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 verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the form when it is completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the 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. 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 17th
day of May, 2017.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge