

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY**

Stacy Trussler,

Plaintiff

v.

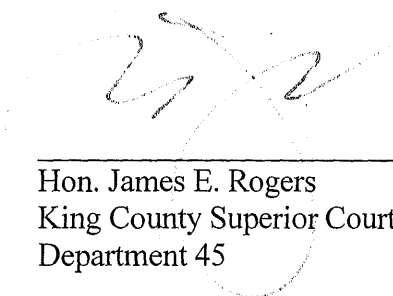
State of Washington,

Respondent

16-2-30183-5 SEA

COURT'S INSTRUCTIONS

DATED June 21, 2018



Hon. James E. Rogers
King County Superior Court
Department 45

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness, and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the

witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The comments of the lawyers during this trial are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because

of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or his information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

The Washington State Department of Transportation is a department of the State of Washington. The State can act only through its officers and employees. If an officer, manager, supervisor or agent has knowledge of certain facts or events within the scope of her or ~~her~~^{his} authority, the State is presumed to know of the same facts or events.

INSTRUCTION NO. 5

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 6

The same acts or omissions by the State may support multiple claims by Plaintiff.

INSTRUCTION NO. 7

The Plaintiff claims that she was unlawfully discriminated against because her employer failed to reasonably accommodate her disability.

To establish her claim of discrimination on the basis of failure to reasonably accommodate a disability, Ms. Trussler has the burden of proving each of the following propositions:

- (1) That she had an impairment that is medically recognizable or diagnosable or exists as a record or history; and
- (2) That either
 - (a) the employee gave the employer notice of the impairment; or
 - (b) no notice was required to be given because the employer knew about the employee's impairment; and
- (3) That either:
 - (a) the impairment had a substantially limiting effect on
 - (i) her ability to perform her job; or
 - (ii) her ability to be considered for a job; or
 - (b) the plaintiff has provided medical documentation to the employer establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect; and
- (4) That she would have been able to perform the essential functions of the job; and
- (5) That the employer failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the employer on this claim.

INSTRUCTION NO. 57

A disability is a sensory, mental, or physical impairment that:

- (1) Is medically recognized or diagnosable; or
- (2) Exists as a record or history; or
- (3) Is perceived by the employer to exist, whether or not it exists in fact.

A disability may exist whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity.

INSTRUCTION NO. 9

An "impairment" includes but is not limited to a physiological disorder or condition affecting one or more of the following body systems: neurological and special sense organs or any traumatic disorder including but not limited to a cognitive limitation.

INSTRUCTION NO. 10

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

- (1) whether the reasons the position exists include performing that function;
- (2) the employer's judgment as to which functions are essential;
- (3) the judgment of those who have experience working in and around the position in question;
- (4) any written job descriptions such as those used to advertise the position; and
- (5) the amount of time spent on the job performing the particular function.

INSTRUCTION NO. 11

A reasonable accommodation is a measure that enables the proper performance of the essential job functions.

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The employee has a duty to cooperate with her employer to explain the nature and extent of the employee's impairment and resulting limitations as well as her qualifications.

An employer must provide a reasonable accommodation for an employee with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

There may be more than one reasonable accommodation of a disability.

An employer is not required to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions as a reasonable accommodation.

The duty to accommodate is continuing. If an employer's first attempt at accommodation fails, it must continue to attempt modes of accommodation unless it can demonstrate that remaining modes of accommodation constitute an undue hardship. An employer's previously unsuccessful attempts at accommodation do not give rise to liability if the employer ultimately provides a reasonable accommodation.

A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.

INSTRUCTION NO. 12

If an employee cannot be reasonably accommodated in her current position, the employer has a duty to take affirmative steps reasonably calculated to assist the employee in finding a vacant, funded position that the employee is otherwise qualified to perform with or without accommodation. The employee's reciprocal duties include informing the employer of her qualifications, applying for all jobs which might fit her abilities, and accepting reasonably compensatory work ^{she} ~~he~~ could perform. The employer is not required to reassign an employee to a position that is already occupied, to create a new position, to alter the fundamental nature of a job or to reassign or eliminate essential job functions.

INSTRUCTION NO. 13

As an employer, the State of Washington can exercise business judgment and make business decisions that you may believe are ill-advised, unwise, mistaken or unfair. The question in this case is whether the State of Washington has made decisions or acted in a manner that was discriminatory or retaliatory or evidences a failure to reasonably accommodate a disability as defined in these instructions.

INSTRUCTION NO. 14

Discrimination in employment on the basis of disability is prohibited.

To establish her claim of discrimination on the basis of disability, Ms. Trussler has the burden of proving each of the following propositions:

(1) That she has a disability or is perceived to have a disability;

(2) That she is able to perform the essential functions of the job in question with reasonable accommodation; and

(3) That her disability or the perception of her disability was a substantial factor in the State of Washington's decision to decision to lay her off, or in its decision to deny her reassignment and subject her to a disability separation. Ms. Trussler does not have to prove that disability was the only factor or the main factor in the decision. Nor does Ms. Trussler have to prove that she would have been retained but for her disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Ms. Trussler on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the State of Washington on this claim.

INSTRUCTION NO. 15

To establish her claim of harassment on the basis of disability, Ms. Trussler has the burden of proving each of the following propositions:

(1) That there was language or conduct concerning a disability, or that occurred because of the plaintiff's disability;

(2) That this language or conduct was unwelcome in the sense that Ms. Trussler regarded the conduct as undesirable ^{or} and offensive, and did not solicit or incite it;

(3) That this language or conduct was so offensive or pervasive that a reasonable person with a disability would find that it altered the conditions of Ms. Trussler's employment; and

(4) Either:

(a) That a manager of the State participated in the conduct or language; or

(b) That management knew, through complaints or other circumstances, of this language or conduct, and the State of Washington failed to take reasonably prompt and adequate corrective action reasonably designed to end it.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Ms. Trussler on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the State of Washington on this claim.

INSTRUCTION NO. 16

A "manager" is a person who has the authority and power to affect hours, wages, and working conditions. "Management" means one or more managers.

INSTRUCTION NO. 17

The Plaintiff claims she was retaliated against by her employer for opposing what the person reasonably believed to be discrimination on the basis of disability, or providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.

To establish a claim of unlawful retaliation by the State of Washington, the plaintiff has the burden of proving each of the following propositions:

(1) That the plaintiff was opposing what she reasonably believed to be discrimination on the basis of disability, requested accommodation, or participated in a proceeding to determine whether discrimination or retaliation had occurred; and

(2) That a substantial factor in the State's decision to take adverse employment action against Ms. Trussler was her opposition to what she reasonably believed to be discrimination, plaintiff's request for accommodation, or her participating in a proceeding to determine whether discrimination or retaliation had occurred.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for that plaintiff on her retaliation claims. On the other hand, if any one of these propositions has not been proved, your verdict should be for the State of Washington on this claim.

The plaintiff does not have to prove that opposition was the only factor or the main factor in the State of Washington's decision.

INSTRUCTION NO. 18

“Substantial factor” means a significant motivating factor in bringing about the employer's decision. “Substantial factor” does not mean the only factor or the main factor in the challenged act or decision.

INSTRUCTION NO. 19

The term “adverse” means unfavorable or disadvantageous. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making a complaint of discrimination, harassment, or retaliation. Whether a particular action is adverse is judged from the perspective of a reasonable person in the plaintiff's position.

INSTRUCTION NO. 20

Plaintiff claims that she was wrongfully terminated by her employer in violation of public policy.

To recover on her claim of wrongful termination in violation of public policy, Ms. Trussler has the burden of proving that a substantial factor motivating the employer to terminate her employment was her reporting what she reasonably believed to be employer misconduct (regarding Leah Bolotin).

If you find from your consideration of all of the evidence that Ms. Trussler has not met this burden, then you must find for the defendant State of Washington on this claim.

If you find from your consideration of all of the evidence that Ms. Trussler has met this burden, then you must find for plaintiff Stacy Trussler on this claim.

INSTRUCTION NO. 21

The term “whistleblower” may be commonly understood to refer to a person who informs on another or makes public disclosure of corruption or wrongdoing. The term “whistleblower” may also be understood to apply to a person who makes a report under the State Employee Whistleblower Protection Act and has certain protections under that Act. Certain government officials, for example Katy Taylor, are designated to receive complaints under the State Employee Whistleblower Protection Act.

Ms. Trussler was not a “whistleblower” under the State Employee Whistleblower Protection Act. If you find that Ms. Trussler may have informed on another person or made public disclosure of corruption or wrongdoing, the term “whistleblower” should be given a meaning with its common meaning rather than any legal meaning or significance.

INSTRUCTION NO. 22

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the acts of the defendant, the State of Washington.

If you find for the plaintiff, you should consider the following elements:

- (1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;
- (2) The reasonable value of lost future earnings and fringe benefits; and
- (3) The emotional harm to the plaintiff caused by the defendant's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by the plaintiff in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you

must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 23

The term "proximate cause" means a cause which in a direct sequence, produces the injury complained of and without which such injury would not have happened.

INSTRUCTION NO. 24

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to retire or fully recover from the continuing effects of the discrimination and/or retaliation, decreased by any projected future earnings from another employer.

Noneconomic damages such as emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish are not reduced to present cash value.

“Present cash value” means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the earnings and/or benefits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.

INSTRUCTION NO. 25

Mathematical certainty is not required in calculating plaintiff's economic damages. Any ambiguity in what the plaintiff would have received but for discrimination should be resolved against the discriminating defendant or ~~defendant~~.

INSTRUCTION NO. 26

If you find for Ms. Trussler on the damages element of “front pay,” you have the ability to recommend that the Court order her reinstatement as an employee. While it is not binding on the Court, you should decide if you believe Ms. Trussler should be reinstated to a WMS 4 job with the State of Washington, in lieu of accepting any award of front pay that the jury may award. In deciding whether to recommend Ms. Trussler's reinstatement, you should consider whether a hostile or otherwise unsuitable environment counsels against reinstatement.

Regardless of your decision on this issue, if you find for Ms. Trussler, you should reach a verdict on the issue of “front pay.”

INSTRUCTION NO. 27

Ms. Trussler has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, the State has the burden of proving:

(1) There were openings in comparable positions available for Ms. Trussler elsewhere after the State disability separated her;

(2) Ms. Trussler failed to use reasonable care and diligence in seeking those openings; and

(3) The amount by which damages would have been reduced if Ms. Trussler had used reasonable care and diligence in seeking those openings.

You should take into account the characteristics of Ms. Trussler and the job market in evaluating the reasonableness of her efforts to mitigate damages.

If you find that the State has proved all of the above, you should reduce your award of damages for wage loss accordingly.

INSTRUCTION NO. 28

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. Deliberations are to occur only in the jury room when all twelve jurors are present.

You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice. If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury.

You will be given the exhibits admitted in evidence, these instructions, and a special verdict form for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, *ten* jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as *ten* jurors agree to each answer. When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.