

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

PHILECIA BARNES, formerly known as PHILLIP W. BARNES	:	Case No. C-1-00-780
	:	
Plaintiff	:	District Judge Susan J. Dlott
	:	
v.	:	
	:	
CITY OF CINCINNATI	:	
	:	
Defendant	:	

**INSTRUCTIONS
TO THE JURY**

February 26, 2003

INTRODUCTION 1

DUTY TO FOLLOW INSTRUCTIONS 3

DUTY TO BE FAIR TO ALL PARTIES 4

BURDEN OF PROOF 5

CONSIDERATION OF THE EVIDENCE 6

STIPULATED FACTS 8

DIRECT AND CIRCUMSTANTIAL EVIDENCE 9

LAWYERS’ OBJECTIONS 10

CREDIBILITY OF WITNESSES 11

OPINIONS OF EXPERT WITNESSES 13

NUMBER OF WITNESSES AND EXHIBITS 14

SUMMARY OF PLAINTIFF’S LEGAL CLAIMS 15

DISPARATE TREATMENT – NATURE OF THE CLAIM 16

DISPARATE TREATMENT – STATUTES 17

DISPARATE TREATMENT – ESSENTIAL ELEMENTS 18

DISPARATE TREATMENT – INTENT 20

EQUAL PROTECTION – NATURE OF THE CLAIM 21

EQUAL PROTECTION – STATUTE 22

EQUAL PROTECTION – ESSENTIAL ELEMENT 23

EQUAL PROTECTION – CUSTOM, ORDINANCE, POLICY,
REGULATION, OR DECISION 24

NO SECOND GUESSING BUSINESS JUDGMENTS 25

PLAINTIFF'S CONDUCT	26
EFFECT OF INSTRUCTIONS AS TO DAMAGES	27
DAMAGES	28
COMPENSATORY DAMAGES	29
BACK PAY	30
FRONT PAY	31
FRONT PAY – REDUCTION TO PRESENT VALUE	32
JURY DELIBERATIONS	33
JUROR NOTES	35
EXPERIMENTS, RESEARCH, AND INVESTIGATION	36
REQUIREMENT OF UNANIMOUS VERDICT AND EXPLANATION OF VERDICT FORM	37
FOREPERSON	39
ITEMS TO GO TO JURY ROOM	40
PROCEDURE WHEN VERDICT REACHED	41
FINAL INSTRUCTION ON HOW TO DELIBERATE	42

INTRODUCTION

Ladies and Gentlemen of the jury, now that you have heard all of the evidence, it becomes my duty to give you the instructions of the Court concerning the law that is applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

I will start by explaining your duties and the general rules that apply in every civil case. Next, I will explain some of the rules that you must use in evaluating particular testimony and evidence. Then, I will explain the elements of the claims that Plaintiff Philecia Barnes is bringing against Defendant City of Cincinnati in this case. And last, I will explain the rules that you must follow during your deliberations in the jury room and the possible verdicts that you may return. Please listen carefully to everything I say.

DUTY TO FOLLOW INSTRUCTIONS

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second job is to take the law that I give you, apply it to the facts, and decide whether the Plaintiff has proven her case by a preponderance of the evidence. It is my job to instruct you about the law, and you are bound by the oath you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial and the instructions that I am now giving you. All of the instructions are important, and you should consider them together as a whole.

The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say.

Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence presented to you in this case.

DUTY TO BE FAIR TO ALL PARTIES

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

BURDEN OF PROOF

This is a civil case. In a civil case, the plaintiff has the burden of proving each element of his or her claims by a “preponderance of the evidence.” In this case, this means that Plaintiff has to produce evidence which, considered in light of all the facts presented, leads you to believe that it is more likely true than not that Defendant violated Plaintiff’s rights.

In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposing 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. To put it differently, if you were to put Plaintiff’s and Defendant’s evidence on opposite sides of the scales, Plaintiff would have to make the scales tip somewhat on her side. If Plaintiff fails to meet this burden, the verdict must be for Defendant. If Plaintiff succeeds in meeting this burden, then the verdict must be for Plaintiff.

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 into evidence, regardless of who may have produced them.

CONSIDERATION OF THE EVIDENCE

As I stated 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 and any facts to which all the lawyers have agreed or stipulated.

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.

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 should respond to the question. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case.

In the final analysis, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you; and 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.

During the trial, I did not let you hear answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all these things. Do not even think about them.

Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

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 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.

STIPULATED FACTS

Plaintiff is a transgendered person. Her current name is Philecia Barnes. She works for the City of Cincinnati Police Division. When she filed this lawsuit in September 2000 she was known as Phillip Barnes. The events of this lawsuit took place in 1998 and 1999 when she was known as Phillip.

In July 1981 Phillip Barnes became a police officer for the City of Cincinnati Police Division. In June 1998 the Cincinnati Civil Service Commission held a promotional test for police sergeant. Officer Barnes took the exam and finished 18th out of 105 officers who sat for the exam. Officer Barnes successfully completed 80 hours of New Sergeant Training at the Cincinnati Police Academy. He graduated from the training in the Fall of 1998.

On January 24, 1999, Officer Barnes was promoted to sergeant in the City of Cincinnati Police Division. Officer Barnes was then transferred from District 5 to District 1 and put on six months probation. At District 1 he was under the command of Captain Demasi.

All members of his new sergeant training class who were promoted were also placed on six months probation. While on probation, Sgt. Barnes underwent field training. On April 15, 1999, Capt. Demasi recommended that Sgt. Barnes fail probation. This recommendation was not approved. On June 16, 1999, Capt. Demasi recommended that Sgt. Barnes fail probation. This recommendation was approved.

As a result of his failure of probation, on June 22, 1999, Sgt. Barnes was demoted to police officer. He remains employed as a police officer with the City of Cincinnati Police Division. Officer Barnes is the only sergeant in the City of Cincinnati Police Division to have

failed sergeant's probation.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Now, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude it was raining.

It is your job to decide how much weight to give direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one; nor does the law say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

LAWYERS' OBJECTIONS

The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. These rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. In the event that I sustained an objection and did not permit a witness to answer a question, you must not draw any inferences from that question or speculate on what the answer of the witness might have been. Remember that your decision must be based only on the evidence that you saw and heard here in court.

CREDIBILITY OF WITNESSES

Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

Let me suggest some things for you to consider in evaluating each witness's testimony.

Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to clearly see or hear what was happening and may make a mistake.

Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

Ask yourself if the witness had any relationship to the Plaintiff or the Defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, prejudice, or reason for testifying that might cause the witness to lie or to slant testimony in favor of one side or the other.

Ask yourself if the witness testified inconsistently while on the witness stand, or if the

witness said or did something or failed to say or do something, at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important or about some unimportant detail. Ask yourself if it seemed like an innocent mistake or if it seemed deliberate.

And, ask yourself how believable the witness's testimony is in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe and how much weight you think it deserves.

OPINIONS OF EXPERT WITNESSES

Normally, a witness may not express an opinion. However, those who follow a profession or special line of work may express opinions because of their education, knowledge, and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

As with other witnesses, you alone decide what weight to give to the testimony of the experts. In determining its weight, consider an expert's skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules for testing credibility and determining the weight to give to testimony.

NUMBER OF WITNESSES AND EXHIBITS

In resolving disputed issues of fact, you should not permit your decision concerning any particular question to be determined merely by the number or quantity of witnesses or exhibits that one side or the other has introduced into evidence. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witnesses and which evidence you find sufficiently believable and trustworthy. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

SUMMARY OF PLAINTIFF'S LEGAL CLAIMS

Plaintiff Philecia Barnes asserts three claims in this case.

First, Plaintiff claims that Defendant City of Cincinnati discriminated against her in violation of federal law by demoting her from sergeant to police officer because she failed to conform to sex stereotypes. Defendant maintains that it did not violate federal law because Plaintiff's conformance to sex stereotypes did not play a role in the decision to demote her. Instead, Defendant maintains that Plaintiff was demoted for failing to perform adequately her duties as a probationary sergeant.

Second, Plaintiff claims that Defendant discriminated against her in violation of state law by demoting her from sergeant to police officer because she failed to conform to sex stereotypes. Defendant maintains that it did not violate state law because Plaintiff's conformance to sex stereotypes did not play a role in the decision to demote her. Instead, Defendant maintains that Plaintiff was demoted for failing to perform adequately her duties as a probationary sergeant.

Third, Plaintiff claims that Defendant's decision to demote her was based upon her perceived sexual orientation, gender identity, or transsexuality, or because she failed to conform to sex stereotypes. Plaintiff claims that a decision to demote based on these non-job-related matters violates her right to equal protection under the United States Constitution. Defendant maintains that it did not violate Plaintiff's constitutional rights because Plaintiff's perceived sexual orientation, gender identity, transsexuality, or conformance to sex stereotypes did not play a role in the decision to demote her. Instead, Defendant maintains that Plaintiff was demoted for failing to perform adequately her duties as a probationary sergeant.

DISPARATE TREATMENT – NATURE OF THE CLAIM

Having summarized Plaintiff's claims, I will first address Plaintiff's first and second claims together. Under both federal and Ohio law, it is unlawful for an employer to intentionally discriminate against any person with respect to compensation, tenure, conditions, or privileges of employment because of such person's sex. One form of sex discrimination is discrimination against a man because he fails to conform to stereotypes associated with being male.

Plaintiff claims that Defendant intentionally discriminated against Plaintiff because of Plaintiff's failure to conform to sex stereotypes, in violation of both federal and Ohio law. This sort of claim is referred to as a "disparate treatment" claim. Defendant denies Plaintiff's charges and maintains that the decision to demote Plaintiff was based on Plaintiff's performance as a probationary sergeant.

It is your responsibility to decide whether Plaintiff has proven Plaintiff's claims of disparate treatment by Defendant by a preponderance of the evidence.

DISPARATE TREATMENT – STATUTES

Plaintiff claims that Defendant violated both federal and Ohio law. The federal statute in question, 42 U.S.C. § 2000e-2(a), provides:

It shall be an unlawful employment practice for an employer--

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Plaintiff also claims that Defendant violated Ohio law. The Ohio statute in question, O.R.C. § 4112.02, provides:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

DISPARATE TREATMENT – ESSENTIAL ELEMENTS

In order for Plaintiff to establish her disparate treatment claims against Defendant, she has the burden of proving by a preponderance of the evidence that Defendant intentionally discriminated against Plaintiff. In other words, Plaintiff must prove that her failure to conform to sex stereotypes was a motivating factor in Defendant's decision to demote Plaintiff. The mere fact that Plaintiff was not a stereotypical male and was demoted is not sufficient, in and of itself, to establish Plaintiff's claim under the law. On this claim, Defendant is responsible for the actions of all of its supervisory employees.

As used in these instructions, Plaintiff's failure to conform to sex stereotypes was a "motivating factor" if it played a part in Defendant's decision to demote Plaintiff. In showing that Plaintiff's failure to conform to sex stereotypes was a motivating factor, Plaintiff is not required to prove that Plaintiff's failure to conform to sex stereotypes was the sole motivation or even the primary motivation for Defendant's decision. Plaintiff need prove only that failure to conform to sex stereotypes played a motivating part in Defendant's decision even though other factors may also have motivated Defendant.

Your verdict will be for Plaintiff if you find that Plaintiff demonstrated by a preponderance of the evidence that Plaintiff's failure to conform to sex stereotypes was a motivating factor in Defendant's decision to demote Plaintiff, even if other factors also motivated Defendant's decision. However, if you find that Defendant's treatment of Plaintiff was motivated by both Plaintiff's failure to conform to sex stereotypes and lawful reasons, 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 demoted Plaintiff even if Plaintiff's failure to conform to sex stereotypes had played no role in the decision.

DISPARATE TREATMENT – INTENT

Plaintiff must show that Defendant intentionally discriminated against her. However, Plaintiff is not required to produce direct evidence of intentional discrimination. Intentional discrimination also can be proven circumstantially. In other words, it may be inferred from the existence of other facts.

EQUAL PROTECTION – NATURE OF THE CLAIM

Plaintiff also claims that Defendant, while acting “under color” of state law, intentionally discriminated against Plaintiff based on Plaintiff’s perceived sexual orientation, gender identity, or transsexuality, or because she failed to conform to sex stereotypes in violation of Plaintiff’s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Defendant denies that it violated Plaintiff’s rights in any way.

EQUAL PROTECTION – STATUTE

42 U.S.C. section 1983, the federal civil rights statute under which Plaintiff sues, provides that a person may seek relief in this Court by way of damages against any person or persons who, under color of any state law or custom, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

Section 1983 was enacted by Congress to enforce the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment to the Constitution provides that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination against public employees on the basis of an employee's perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes.

EQUAL PROTECTION – ESSENTIAL ELEMENT

In order to prevail on her claim under the Fourteenth Amendment, Plaintiff must prove by a preponderance of the evidence that Defendant intentionally discriminated against Plaintiff in the terms and conditions of Plaintiff's employment based on Plaintiff's perceived sexual orientation, gender identity, or transsexuality, or because she failed to conform to sex stereotypes.

EQUAL PROTECTION – CUSTOM, ORDINANCE, POLICY, REGULATION, OR DECISION

Ordinarily, a corporation – including a public body or agency such as Defendant – is legally responsible for the acts of its employees carried out in the regular course of their job duties as employees. This is known in the law as the doctrine of “respondeat superior,” which means “let the superior respond” for any losses or injuries wrongfully caused by its employees in the performance of their jobs. This doctrine applies to disparate treatment claims under federal and state law, but does not apply when a claim is based on the United States Constitution.

In this case, Defendant can be held liable on Plaintiff’s constitutional claim only if you find that the deprivation of Plaintiff’s constitutional rights was the direct result of Defendant’s ordinance, regulation, decision, policy, or custom. A governmental entity is responsible only when an injury is inflicted through the execution of its policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. It is not enough merely to show that an employee of Defendant caused Plaintiff’s injury.

The Court has determined that Chief of Police Thomas Streicher, Jr. was the policy maker responsible for demoting Plaintiff, within the meaning of this instruction. A policy maker who relies on the recommendations of others acts intentionally. Therefore, if you find that the acts of Chief Streicher deprived Plaintiff of constitutional rights, Defendant is liable for such deprivations.

NO SECOND GUESSING BUSINESS JUDGMENTS

The employment discrimination laws are concerned only with unlawful discrimination. The law does not prohibit employers from treating employees unfairly, nor does the law prohibit an employer from making decisions which seem contrary to good business judgment. An employer may make a subjective judgment to hire, fire, promote, or demote an employee for any reason that is not discriminatory or otherwise illegal. Thus, you may not return a verdict for Plaintiff just because you might disagree with Defendant's decision or believe it to be harsh or unreasonable.

PLAINTIFF'S CONDUCT

In determining whether Plaintiff has proven her claims against Defendant, you must base your conclusions solely on whether Defendant intentionally discriminated against Plaintiff. You may not consider whether Plaintiff's own actions contributed to her injury. Specifically, whether Plaintiff should have diagnosed herself or independently referred herself to counseling during her probationary period is irrelevant to whether Defendant intentionally discriminated against Plaintiff.

EFFECT OF INSTRUCTIONS AS TO DAMAGES

I will now instruct you as to the proper measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered, or to suggest that if you find for Plaintiff, you are required to award any damages at all. Plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

DAMAGES

Plaintiff seeks three forms of damages for the discrimination she allegedly was subjected to by Defendant. If you find for Plaintiff on any of her claims, you must then determine the amount of damages, if any, she is entitled to receive from Defendant. You may not award damages to Plaintiff on these claims unless you first find liability on the part of Defendant.

If you find for Plaintiff on her discrimination claims, you must consider the following types of damages:

- 1) compensatory damages;
- 2) back pay; and
- 3) front pay.

I will next explain each type of damage in turn.

COMPENSATORY DAMAGES

If you find that Plaintiff has prevailed on any of her discrimination claims, then you must determine by a preponderance of the evidence an amount of money that will reasonably compensate Plaintiff for the actual injury caused by the conduct of the City.

In awarding compensatory damages, you should consider the nature, character, seriousness, and duration of any emotional pain, suffering, inconvenience, and mental anguish that Plaintiff may have experienced. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence.

The damages that you award must be fair compensation—no more and no less. In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective loss that, although possible, is wholly remote or left to conjecture or guess. Damages are considered speculative when their existence is uncertain or when the proof is insufficient to enable you to make a fair and reasonable assessment of damages.

BACK PAY

If you find that Plaintiff has prevailed on any of her discrimination claims, then she is entitled to recover lost wages and benefits, including any increases in wages and benefits that Plaintiff would have received had Plaintiff not been discriminated against.

The parties have stipulated that the amount of back pay would be \$30,511.00.

FRONT PAY

If you find for Plaintiff, the Court will determine whether to reinstate Plaintiff to the rank of sergeant. In the event that the Court declines to reinstate Plaintiff, then Plaintiff will be awarded an amount of front pay to be determined by you. In that event, you must calculate separately, as future damages, an award of front pay. Front pay includes the amount Plaintiff would have earned from the date of the verdict until the date you find that Plaintiff would have voluntarily resigned or obtained other employment. The purpose of front pay is to temporarily compensate Plaintiff while she seeks comparable employment, not to give long-term compensation from the date of the verdict to retirement. Among the factors to be considered in deciding the amount of front pay are the following:

- 1) Plaintiff's future in the position from which she was demoted;
- 2) the availability of comparable employment opportunities;
- 3) the period within which one by reasonable efforts may achieve comparable employment; and
- 4) Plaintiff's work and life expectancy.

In determining the amount of front pay, you must deduct the amount of wages and benefits that you believe will be received from replacement income during the period of front pay awarded.

FRONT PAY – REDUCTION TO PRESENT VALUE

Should you decide to award front pay to Plaintiff, any award of front pay that you make must be reduced to its present value in order to take into account the earning power of money. The reason you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to Plaintiff if Plaintiff receives it today than if Plaintiff were to receive it in the future, when Plaintiff would otherwise have earned it. To calculate the present value of the award, you should first determine the highest, safe rate of return that Plaintiff could reasonably expect to receive on any lump sum amount. You should multiply the rate of return by the number of years between now and when Plaintiff would receive the money. Then, reduce the actual future loss amount by that resulting percentage to determine its present value. You should not reduce any lost back pay or benefits, or compensatory damages to present value.

JURY DELIBERATIONS

It is your duty as jurors to confer with one another and to deliberate with a view to reaching an agreement, if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so 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 you are convinced it is erroneous.

However, do not surrender your honest convictions 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 always that you are not partisans. You are judges—impartial judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case. Do not take a firm position at the outset and then be too proud to change your position.

If it becomes necessary during your deliberations to communicate with the Court, you may send a written message through the Mr. Snyder to the Court, signed by your foreperson or by one of the other jurors. No member of the jury should ever attempt to communicate with the Court other than by a signed writing. The Court will not communicate with you other than in writing or in open court, on the record, and with counsel present.

All court personnel are prohibited from talking to you about the merits of this case.

Should your deliberations extend to 4:30 p.m., Mr. Snyder will inquire whether you wish to continue to deliberate to a later hour. The purpose of the inquiry is to facilitate the scheduling of Court personnel. Do not give the Mr. Snyder any indication of how your vote stands or

provide any information other than the hour to which you wish to deliberate.

The jury deliberation room is a non-smoking area. If any of you wishes to smoke during your deliberations, the jury must recess deliberations, and the juror who wishes to smoke must go to an area where smoking is permitted.

JUROR NOTES

Let me say a word about the use of notes during your deliberations. Please remember that notes should be used only to refresh the recollection of the juror who took the notes. You should not use your notes in jury deliberations to prove to other jurors that your notes are in fact what a witness actually said; they are only your impression of what the witness said. We depend on the judgment of all members of the jury. Notes are only aids to memory and should not be given precedence over your own independent recollection of the facts.

EXPERIMENTS, RESEARCH, AND INVESTIGATION

Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.

For example, do not conduct any experiments inside or outside the jury room; do not bring any books, like a dictionary, or anything else with you to help your deliberations; do not conduct any independent research, reading, or investigation about the case; and do not visit any of the places that were mentioned during the trial. Make your decision based only on the evidence admitted in this case.

**REQUIREMENT OF UNANIMOUS VERDICT
AND EXPLANATION OF VERDICT FORM**

Each of you has a copy of the instructions that I am now reading and attached to these instructions is a copy of the verdict form. These will accompany you to the jury room.

The verdict form contains a series of questions called “interrogatories.” You must answer each of them in writing. You must be unanimous as to the answer to each question.

Nothing that the Court has said in these instructions and nothing in the verdict form that has been prepared for your verdict is intended to suggest or convey in any way the verdict that the Court thinks you should return. The verdict is the exclusive duty and responsibility of the jury.

After you have reached agreement, the jury foreperson should complete, sign, and date the verdict form. After the foreperson signs and dates the form, each juror must also sign the verdict form. To avoid confusion, you are instructed to fill in, date, and sign the copy of the verdict form contained in the black notebook that I will give you when you leave to deliberate, rather than the verdict forms attached to your individual copies of these instructions.

Your verdict must represent the considered judgment of all jurors; in other words, it must be unanimous. In order to return a verdict for Plaintiff or for Defendant with respect to any claim, it is necessary that all jurors agree with that verdict and indicate their agreement by signing the appropriate verdict form.

Once again, if, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson, and pass the

note to Mr. Snyder 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, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

FOREPERSON

When you arrive in the jury room, your first order of business will be the selection of a foreperson to preside over your deliberations.

The foreperson acts as the chairperson of the meeting. He or she must see to it that the issues are taken up as given to you; that everyone has a chance to speak to these matters; and that your deliberations proceed in an orderly way.

ITEMS TO GO TO JURY ROOM

All of the exhibits that have been admitted into evidence will go to the jury room with you, together with a copy of these instructions and the verdict form.

PROCEDURE WHEN VERDICT REACHED

When you have reached your verdict and have filled out, signed, and dated the verdict form, the foreperson of the jury shall notify Mr. Snyder that the jury has reached its verdict. Never reveal to anyone exactly how the jury stands, numerically or otherwise, until it comes time for you to return to court with a complete verdict.

FINAL INSTRUCTION ON HOW TO DELIBERATE

You will now retire to the jury room to begin your deliberations. Before you do, however, I would like to give you a few practical instructions regarding how you should conduct your deliberations.

As I stated previously, when you retire to the jury room, the first thing that you should do is to elect a foreperson.

All eight of you must be present in the jury room when you are deliberating. You may take breaks whenever you want—for instance if someone would like to go downstairs to smoke a cigarette—but you must cease your deliberations until everyone has returned to the jury room.

If your deliberations extend beyond today, you should decide what time in the morning you wish to start your deliberations. You may elect to start earlier in the morning if that is more convenient for you. However, you should start no later than 9:00 a.m. Remember, you cannot begin your deliberations each day until all eight of you have arrived.

As I informed you, you may deliberate beyond the hour of 4:30 p.m. At that time the Courtroom Deputy will inquire whether you wish to continue to deliberate to a later hour. When you are ready to leave for the day, you will come back into the courtroom and I will give you our regular admonition.

With that, I will send you back to the jury room to begin your deliberations.