

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KIMBERLY HARTMAN,

Plaintiff,

Case No. 13-cv-14774
Honorable Thomas L. Ludington

v.

THE DOW CHEMICAL COMPANY,

Defendant.

JURY INSTRUCTIONS

I. GENERAL INSTRUCTIONS

- (1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.
- (2) I will start by explaining your duties and the general rules that apply in every civil case.
- (3) Then I will explain some rules that you must use in evaluating particular testimony and evidence.
- (4) Then I will explain the elements, or parts, of the claim that Plaintiff Hartman has made against Defendant Dow Chemical Company (“Dow”).
- (5) 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.
- (6) Please listen very carefully to everything I say.
- (7) I have given each of you a copy of these instructions for your use while deliberating. They are available to each of you. If you have questions about the law or your duties as jurors, you should consult the copy of the instructions as given to you.

Duties of Judge and Jury

- (1) 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 that I have said or done during this trial was meant to influence your decision about the facts in any way.
- (2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the Ms. Hartman has proven her claim against Dow by a preponderance of the evidence. It is my job to instruct you about the law, and you are bound by the oath that 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 these instructions. All the instructions are important, and you should consider them together as a whole.
- (3) The parties may talk about the law during their arguments. But if what they say is different from what I say, you must follow what I say. What I say about the law controls.
- (4) Perform these duties fairly and with an open mind. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

II. EVALUATION OF THE EVIDENCE

Evidence

- (1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.
- (2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; and the stipulations that the parties agreed to.
- (3) Nothing else is evidence. The parties' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.
- (4) During the trial I did not let you hear the answers to some of the questions that the parties asked. 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 of these things. Do not even think about them. Do not speculate about what a witness might have said. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.
- (5) Make your decision based only on the evidence, as I have defined it here, and nothing else.
- (6) 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.

Inferences

- (1) You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.
- (2) "Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in this case.

Witnesses – Credibility

- (1) 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' 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.
- (2) Let me suggest some things for you to consider in evaluating each witness' testimony.
 - (a) 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 see or hear what was happening, and may make a mistake.
 - (b) Ask yourself how good the witness' memory seemed to be. Did the witness seem able to accurately remember what happened?
 - (c) Ask yourself if there was anything else that may have interfered with the witness' ability to perceive or remember the events.
 - (d) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?
 - (e) Ask yourself if the witness had any relationship to Ms. Hartman or Dow, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.
 - (f) 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.
 - (g) And ask yourself how believable the witness's testimony was 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.
- (3) These are only some of the things that 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.

Opinion Testimony

- (1) You have heard the testimony of Frank P. Stafford and Malcolm Cohen who testified as opinion witnesses. An opinion witness has special knowledge or experience that allows the witness to give an opinion.
- (2) In deciding how much weight to give opinion testimony, you should consider the witness's qualifications and how the witness reached the conclusions given.
- (3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Weighing Conflicting Evidence – Number of Witnesses

- (1) Another point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.
- (2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

Presentation of Witnesses/Exhibits

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Direct and Circumstantial Evidence

- (1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."
- (2) 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, and you believed him, that would be direct evidence that it was raining.
- (3) 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 that it was raining.

- (4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one and does not 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.

Objections

- (1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the claim that Ms. Hartman asserts against Dow.
- (2) The parties objected to some of the things that were said or done during the trial. Do not hold that against either side. The parties have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.
- (3) 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 my opinion about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

All Litigants Are Equal Before the Law

In this case, the defendant is a corporation and the plaintiff is an individual. All parties are equal before the law. The corporation is entitled to the same fair consideration that you would give to any individual person.

Conclusion to Evaluation of Evidence

That concludes the part of my instructions explaining your duties and the general rules that apply in every civil case. In a moment, I will explain the elements of the claim that the Ms. Hartman asserts against Dow.

III. SUBSTANTIVE INSTRUCTIONS

The Family and Medical Leave Act (FMLA)

- (1) Ms. Hartman's claim arises under the Family and Medical Leave Act, or the FMLA. The FMLA allows eligible employees to take job-protected leave for a total of twelve workweeks in any twelve month period because of an employee's serious health condition.
- (2) The FMLA makes it unlawful for an employer, such as Dow, to discriminate or retaliate against an employee for having exercised or having attempted to exercise FMLA rights.

Nature of the Claim

- (1) Ms. Hartman claims that Dow retaliated against her for taking an FMLA leave of absence by terminating her employment.
- (2) Dow denies that it retaliated against Ms. Hartman. Dow asserts that it terminated Ms. Hartman's employment because she falsely represented the number of hours she worked away from Dow's office; that is, Dow paid her for time she recorded that she did not work.

Burden of Proof: Preponderance of the Evidence

- (1) Ms. Hartman has the burden of proving each and every element of her claim by a preponderance of the evidence. If you find Ms. Hartman has not proved any one of the elements by a preponderance of the evidence, you must return a verdict for Dow.
- (2) To "establish by the preponderance of the evidence" means to prove that something is more likely so than it is not so. In other words, a preponderance of the evidence in this case means such evidence as, when considered and compared to that opposed to it, has more convincing force, and produced in your mind a belief that what is sought be proved is more likely true than not true.
- (3) In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Plaintiff's Claim

Ms. Hartman's only claim is that Dow retaliated against her for taking FMLA leave.

- (1) In order for Ms. Hartman to recover on her FMLA retaliation claim, she has the burden to prove the following elements:
 - (a) That she took leave protected by the FMLA;
 - (b) That Dow terminated her employment after she took FMLA leave;
 - (c) That there was a causal connection between Dow's termination of Ms. Hartman's employment and her taking FMLA leave.
- (2) Your verdict will be for Ms. Hartman if she has proved the above elements by a preponderance of the evidence. Your verdict will be for Dow if Ms. Hartman has not proved any one of the above elements.

Causal Connection

- (1) Causal connection means that, if not for Ms. Hartman's taking FMLA leave, the termination of her employment would not have occurred.
- (2) If you find that Dow terminated Ms. Hartman's employment because it concluded she engaged in time-card fraud, the "causal connection" element of her claim would not be proven even if Dow was mistaken in its conclusion.
- (3) Dow's investigation leading to its conclusion that Ms. Hartman engaged in time-card fraud need not be perfect. The investigation need only be reasonable under the circumstances.

Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as suggesting that Ms. Hartman has proven the elements of her claim. Instructions as to the measure of damages are given for your guidance only in the event you should find that Ms. Hartman has proven the elements of her claim.

- (1) If you find that Ms. Hartman has proven the elements of her claim, you must award Ms. Hartman an amount of money that will reasonably, fairly, and adequately compensate her for the damages caused by Dow's violation of the FMLA.

You should include "economic loss" damages, including lost wages, lost employment benefits, and miscellaneous expenses that you decide:

- (a) Ms. Hartman has sustained from the date her employment was terminated to the present time; and
- (b) She is reasonably certain to sustain in the future.

The FMLA does not allow Ms. Hartman to recover for any mental or emotional distress or pain and suffering that may have been caused if Dow violated the law's requirements.

- (2) Whether these damages have been proved is for you to decide based upon evidence and not upon speculation, guess, or conjecture. The amount of money to be awarded for certain of these elements of damages cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment.
- (3) Your verdict must be solely to compensate Ms. Hartman for her damages, and not to punish Dow.

- (4) Ms. Hartman has the burden of proving by the preponderance of the evidence the amount of her damages.

Mitigation of Damages

- (1) Ms. Hartman, as plaintiff, must make every reasonable effort to minimize or reduce her damages for loss of compensation by seeking employment. This is called “mitigation” of damages. Dow must prove by a preponderance of the evidence that Ms. Hartman failed to mitigate her damages for loss of compensation.
- (2) If you find that Ms. Hartman is entitled to damages, you must reduce these damages by:
 - (a) What Ms. Hartman earned from the date of her termination to the present time; and
 - (b) What Ms. Hartman could have earned with reasonable effort during the period from plaintiff’s discharge until the date of trial.
- (3) Ms. Hartman must accept employment that is “of a like nature.” In determining whether employment is “of a like nature,” you may consider:
 - (a) The type of work,
 - (b) The hours worked,
 - (c) The compensation,
 - (d) The job security,
 - (e) The working conditions, and
 - (f) Other conditions of employment.
- (4) You must decide whether Ms. Hartman acted reasonably in not seeking or accepting a particular job. If you determine Ms. Hartman did not make reasonable efforts to obtain another similar job, you must decide whether any damages resulted from plaintiff’s failure to do so.
- (5) You must not compensate Ms. Hartman for any portion of her damages resulting from her failure to make reasonable efforts to reduce her damages.

IV. CLOSING STATEMENTS

- (1) Shortly, we will hear the closing arguments of the attorneys. Please pay attention to the arguments, but remember that the closing arguments are not evidence but are only intended

to assist you in understanding the evidence and the theory of each party. You must base your decision only on the evidence.

- (2) Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if Ms. Hartman has proved her claim against Dow by a preponderance of the evidence.

V. DELIBERATIONS AND CONCLUDING INSTRUCTIONS

Deliberations and Verdict

- (1) Now let me explain some things about your deliberations in the jury room, and your possible verdicts.
- (2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions and will speak for you here in court.

Communications with Other Jurors Only

- (1) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign and date them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.
- (2) During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a smart phone or computer with internet service, or any text service to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

Communications About Deliberations

Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 3-3 or 4-2, or whatever your vote happens to be. That should stay secret until you are finished.

Exhibits

I will send the exhibits into the jury room with you.

Decision Based Only on Evidence

- (1) 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.
- (2) 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 you with 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.
- (3) Make your decision based only on the evidence that you saw and heard here in court.

Notes of Trial

Some of you have taken notes during the trial. Whether or not you took notes, you should not be influenced by the notes of another juror, but you should rely on your own memory of what was said. Notes are only an aid to recollection and are not entitled to any greater weight than actual recollection or the impression of each juror as to what the evidence actually is.

Reaching Your Decision

- (1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.
- (2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that – your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.
- (3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.
- (4) Listen carefully to what the other jurors have to say, and then decide for yourself if Ms. Hartman has proven Dow liable by a preponderance of the evidence.

Verdict

- (1) I have prepared an original verdict form that you should use to record your verdict. It will be provided to you in a brown folder. Each of you has been furnished with a copy of the verdict form to aid you in your deliberations. However, when you reach your decision, your foreperson should complete only the official verdict form.
- (2) Follow the instructions on the form and fill in the answers to the questions by having your foreperson mark the appropriate place on the forms.
- (3) When you have completed the form according to the instructions, your foreperson should then sign the form, put the date on it, and return it to me.
- (4) Your verdict for each question on the verdict form must be unanimous.
- (5) To reach a unanimous verdict of yes on any question, every one of you must agree that the party with burden of proof on that question has met their burden of proof by a preponderance of the evidence.
- (6) To return a unanimous verdict of no, every one of you must agree that the party with the burden of proof on that question has not met their burden of proof by a preponderance of the evidence.
- (7) Either way, your verdict must be unanimous.

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_____ /

Verdict Form

Please answer the following questions. Your answers must be unanimous.

- (1) Did Ms. Hartman prove by a preponderance of the evidence the elements of her FMLA claim against Dow?

YES _____

NO _____

If your answer is "NO," do not answer any further questions and go to the Concluding Instruction. If your answer is "YES," go to Question No. 2.

- (2) Did Ms. Hartman prove that she suffered damages as a result of Dow terminating her employment between the date of her termination on October 3, 2013, and today's date?

YES _____

NO _____

If your answer is "NO," do not answer any further questions and go to the Concluding Instruction. If your answer is "YES," go to Question No. 3.

- (3) State the amount of damages Ms. Hartman should be awarded to fairly compensate her for her claimed lost wages between October 3, 2013 and today's date:

AMOUNT: \$ _____

- (4) Did Ms. Hartman prove that she will continue to suffer economic damages in the future as a result of her termination?

YES _____

NO _____

If your answer is "NO," do not answer any further questions and go to the Concluding Instruction. If your answer is "YES," go on to Question No. 5.

- (5) State the amount of damages Ms. Hartman should be awarded for her future economic damages:

AMOUNT: \$ _____

CONCLUDING INSTRUCTION

If you have properly followed the jury instructions that accompany this Verdict Form you will have completed your deliberations when you have reached this point. Please review the Verdict Form once more to make sure that you have answered all the questions that you were called upon to answer by the instructions and that you have recorded no response to the questions that, under the instructions, there was no occasion for you to address. After you have completed your review, your foreperson should place his or her signature, the date, and his or her printed name in the appropriate spaces below.

_____ (print name)

Foreperson

Dated: April ____, 2015