IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
KEYBOARD()DIVISION

KEYBOARD(),	]	
	]	
Plaintiff,	]	
	]	
v.	]	**CV**
	]	
KEYBOARD(),	]	
	]	
Defendants.	]	

COURT'S INSTRUCTIONS TO THE JURY (CIVIL)
SEXUAL HARASSMENT

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished and the lawyers have made their closing arguments, you will go to the jury room and begin your discussions – what we call your deliberations.

A jury trial has, in effect, two judges. I am one of the judges; the other judge is the jury. My duty is to preside over the trial and to decide what evidence is proper for your consideration. My duty at the end of the trial is to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give some general instructions that apply in every case; for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

Duty

Your duty will be to decide whether [name of plaintiff] has proved by a preponderance of the evidence the specific facts necessary to find [name of the defendant] liable on the claims asserted. I will give you more instructions about the specific claims in a minute.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial. You, as jurors, are the judges of the facts. You must not be influenced in any way by either sympathy or prejudice, for or against either party, but in determining what actually happened – that is, in reaching your decision as to the facts – your sworn duty is to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is

or ought to be. Your duty is to apply the law as I explain it to you, regardless of whether you like the law or its consequences.

Your duty also is to base your verdict solely upon the evidence, without prejudice or sympathy for or against anyone. You made that promise and took that oath before being accepted by the parties as jurors, and they have the right to expect nothing less.

Remember that anything the lawyers say is not evidence in the case. Your own recollection and interpretation of the evidence controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Nor should you give any special attention to any questions I have asked. 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 decision concerning the facts.

[Corporate Party

The fact that corporations are involved as parties must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and

statements of its employees that are made within the scope of their duties as employees of the company.]

Evidence

In your deliberations you should consider only the evidence–that is, the testimony of the witnesses and the exhibits I have admitted in the record. As you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions that reason and common sense lead you to make. In other words, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of your common experience.

You should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence, or to the reasonable inferences you draw from direct or circumstantial evidence.

Credibility

Now, in saying that you must *consider* all of the evidence, I do not mean that you must *accept* all of the evidence as true or accurate. You should decide

whether you believe what each witness had to say, and how important that testimony was. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of this case or a related case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things about which he or she testified? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether evidence was offered tending to prove that a witness testified falsely concerning some important fact; or, whether evidence was offered that at some other time a witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

[The fact that a witness has been convicted of a felony offense, or a crime

involving dishonesty or false statement, is another factor you may consider in deciding whether you believe the testimony that witness gave in this trial. Of course, the conviction is only one factor, and you must decide for yourself whether to believe that witness.]

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory, an innocent mistake, or an intentional falsehood; and the significance of that consideration may depend on whether the misstatement relates to an important fact or with only an unimportant detail.

When a witness is questioned about an earlier statement he or she may have made, or earlier testimony he or she may have given, such questioning is permitted to aid you in evaluating the truth or accuracy of the witness' testimony here *at this trial*.

Earlier statements made by a witness or earlier testimony given by a witness are not ordinarily offered or received as evidence of the truth or accuracy of *those* statements, but are referred to for the purpose of giving you a comparison and

aiding you in making your decision as to whether you believe or disbelieve the witness' testimony that you hear *at trial.* However, if the prior inconsistent statement of the witness was made under oath, you may also consider it as evidence, if you so choose.

Whether such prior statements of a witness are, in fact, consistent or inconsistent with his or her trial testimony is entirely for you to determine. You can also decide whether to believe the earlier testimony given under oath, or the testimony given in this trial, or you can disregard both. You are the sole judge of the credibility of witnesses.

[Deposition Testimony

In this case, we have heard the testimony of some witnesses by deposition. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify. (Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.) You should treat deposition testimony the same as any

other testimony presented in court.]

[Expert Witness

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, you decide whether to rely upon that testimony.]

Burden of Proof

In this case each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a "preponderance of the evidence." This requirement is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a claim or defense is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but in deciding whether any fact has been proved by a preponderance of the evidence,

you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the party making that claim or defense.

Each count makes a separate claim against more than one of the Defendants. For each claim, the law assigns specific requirements called "elements," everyone of which the Plaintiff's must prove by a preponderance of the evidence. You must consider each element of each claim and the evidence relating to it separately. And you must consider the claims against each Defendant separately and individually.

If you find a Defendant liable for one claim, that must not affect your verdict on any other claim or for any other Defendant, except where I instruct you that the claims are specifically related. In other words, you must consider each count and each Defendant separately.

SPECIFIC LEGAL CHARGES

I. Claims Against [Defendant Employer]

As to claims against [Defendant Employer] only, [Plaintiff] brings claims

under federal law

A. Title VII – Sexual Harassment/Hostile Work Environment

In this case, [Plaintiff] makes a claim under Federal law that prohibits employers from discriminating against their employees in the terms and conditions of their employment because of the employee's sex. More specifically, [Plaintiff] claims [Defendant Employer] subjected her to a hostile or abusive work environment because of sexual harassment, which is a form of prohibited employment discrimination. I will call this claim her "sexual harassment claim." Under Title VII, only the employer can be held liable for any kind of discrimination in the workplace.

To prevail on this claim, [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [Plaintiff] was subjected to a hostile or abusive work environment, as I will later define, because of her sex;

Second: That such hostile or abusive work environment was permitted and/or created by a supervisor with immediate or successively higher authority over [Plaintiff]; and

Third: That [Plaintiff] suffered damages as a proximate or legal result of such hostile or abusive work environment.

[Plaintiff's] work environment was hostile or abusive because of sexual harassment only if (1) [Plaintiff] was subjected to sexually offensive acts or

statements; (2) such acts or statements were unwelcome and had not been invited or solicited, directly or indirectly, by [Plaintiff's] own acts or statements; (3) such acts or statements resulted in a work environment that was so permeated with sexual intimidation, ridicule or insult of sufficient severity or pervasiveness that it materially altered the conditions of [Plaintiff's] employment; (4) a reasonable person, as distinguished from someone who is unduly sensitive, would have found the workplace to be hostile or abusive; and (5) [Plaintiff] personally believed the workplace environment to be hostile or abusive.

You should determine whether a workplace is "hostile" or "abusive" by looking at all the circumstances including the frequency of the sexual conduct; its severity; whether it was physically threatening or humiliating; and whether it unreasonably interfered with the employee's work performance. The effect on [Plaintiff's] mental and emotional well being is also relevant to your determination of whether she actually found the workplace environment to be hostile or abusive; but while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Conduct that only amounts to ordinary socializing in the workplace -- such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing -- does not constitute an

abusive or hostile environment. Only extreme conduct amounting to a material change in the terms and conditions of employment is actionable. However, words and conduct that are sufficiently gender-specific, derogatory, and humiliating and either severe or pervasive may establish a hostile work environment, even if the words are not directed specifically at the Plaintiff. Evidence that a supervisor aimed insults at women may give rise to the inference of an intent to discriminate on the basis of sex, even though the insults are not directed at the Plaintiff. Also, one egregious yet isolated incident may be sufficiently severe as to alter the terms, conditions, or privileges of employment so as to constitute a hostile work environment. The opposite is also true: frequent incidents of harassment, though not severe, can reach the level of pervasive and thereby alter the terms, conditions or privileges of employment such as to create a hostile work environment.

You have heard various witnesses testify as to whether certain conduct is or is not sexual harassment. Ladies and Gentlemen, I instruct you that the decision about whether the conduct alleged by [Plaintiff] occurred, and if so, whether it constituted sexual harassment is a question for you to decide based on these instructions about sexual harassment.

When a supervisor with immediate or successively higher authority over the employee creates a hostile or abusive work environment, the employer is

responsible under the law for such behavior and the resulting work environment. So, if you find that [supervisor] was [Plaintiff's] supervisor with authority over her and that he created a hostile or abusive work environment for [Plaintiff], then [Defendant Employer] would be responsible for that conduct.

Finally, for [Plaintiff] to recover damages for having been exposed to a hostile or abusive work environment because of sex, she must prove that such damages were proximately or legally caused by the unlawful discrimination. For damages to be the proximate or legal result of unlawful conduct, [Plaintiff] must show that, except for such conduct, the damages would not have occurred. I will explain how to determine an appropriate measure of damages after you first render a decision on liability.

[Defendant Employer's] Affirmative Defense

If you find that [Plaintiff] has proven each of the things she must prove in support of her claim, then you will consider [Defendant Employer's] affirmative defense to that claim. To prevail on the affirmative defense, the burden rests on [Defendant Employer] to prove each of the following facts by a preponderance of the evidence:

First: That [Defendant Employer] exercised reasonable care to prevent and promptly correct any sexually harassing behavior in the workplace; and

Second: That [Plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities provided by [Defendant Employer] to avoid or correct the harm.

Ordinarily, proof of the following facts will suffice to establish the exercise of "reasonable care" by [Defendant Employer] : (a) that [Defendant Employer] had promulgated an explicit policy against sexual harassment in the workplace; (b) that such policy was fully communicated to its employees; and (c) that such policy provided a reasonable avenue for [Plaintiff] to make a complaint to higher management. Conversely, proof that [Plaintiff] did not follow a complaint procedure provided by [Defendant Employer] will ordinarily suffice to establish that [Plaintiff] unreasonably failed to take advantage of a corrective opportunity.

B. Title VII – Retaliation

[Plaintiff] alleges that [Defendant Employer] – through the actions of its employees – retaliated, that is, took revenge against her because she took steps seeking to enforce her rights under the federal employment discrimination statutes. [Defendant Employer] in turn denies that it retaliated against [Plaintiff].

The law prohibiting discrimination and sexual harassment in the workplace also prohibits an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those laws. Making an internal complaint with the employer alleging sexual harassment or the

filing of an EEOC charge is protected activity. So, even if you find that [Plaintiff's] complaint of sexual harassment is without merit, if you find that [Plaintiff] made the complaint as a means of seeking to enforce what she believed in good faith to be her lawful rights, then [Defendant Employer] is not allowed to penalize her in retaliation for having made such a complaint.

To establish "good faith" for her complaint, however, [Plaintiff] must do more than merely allege that her belief about sexual harassment was honest and bona fide. Rather, the allegations and the record must establish that her belief – even if a mistaken belief – was objectively reasonable.

To establish her claim of unlawful retaliation, [Plaintiff] must prove by a preponderance of the evidence each of the following:

First: That she engaged in statutorily protected activity – that is, that she in good faith asserted objectively reasonable claims or complaints of sexual harassment that are prohibited by law;

Second: That an adverse employment action then occurred;

Third: That the adverse employment action was causally related to her complaints; and

Fourth: That she suffered damages as a proximate or legal result of such adverse employment action.

For an adverse employment action to be "causally related" to statutorily protected activities, [Plaintiff] must show that, but for the protected activity, the

adverse employment action would not have occurred. Or, stated another way, [Plaintiff] must show that her protected activity was a substantial, motivating cause that made a difference in [Defendant Employer's] actions.

You should be mindful, however, that the law applicable to this case requires only that an employer not retaliate against an employee because that employee has complained about sexual harassment. So far as you are concerned, an employer may take adverse action against an employee for any other reason, whether it be a good, bad, fair, or unfair reason. You must not second guess that decision or permit any sympathy that you may have for [Plaintiff] to lead you to substitute your own judgment for that of [Defendant Employer]'s, even though you may not personally favor the action it took and may have acted differently under those circumstances.

The provision prohibiting retaliation covers those – and only those – employment actions that would have been materially adverse to a reasonable employee. That means that [Plaintiff] must show that a reasonable employee would have found the challenged employment action to be materially adverse such that it could well dissuade a reasonable worker from making a sexual harassment complaint.

Constructive Discharge

In this case, [Plaintiff] claims that the retaliatory conduct amounted to a constructive discharge of her. You must decide whether she was constructively discharged as [Plaintiff] alleges, or whether she voluntarily resigned or quit as [Defendant Employer] contends.

To prove a constructive discharge, [Plaintiff] must demonstrate that working conditions were so intolerable because of the retaliatory actions taken against her that a reasonable person in like circumstances would have felt compelled to resign.

If you find from a preponderance of the evidence that, because of retaliation, [Plaintiff's] conditions of employment were so intolerable she was forced to quit, then you may conclude that she was constructively discharged. If [Plaintiff] has not proven such intolerable working conditions, then you may find that [Plaintiff's] resignation was voluntary and, if so, [Plaintiff] would not be entitled to any economic damages as a result of the loss of employment. I will explain more about the measure of damages later.

If you find in [Plaintiff's] favor with respect to each of the facts that she must prove, you must then decide whether [Defendant Employer] has shown by a preponderance of the evidence that it would have taken the same action for other reasons even in the absence of the complaints about sexual harassment.

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in any way as an indication that I believe that the plaintiff should, or should not, prevail in this case.

We will now hear summations, or closing arguments, from the attorneys. Remember that what the lawyers say is not evidence. I encourage you to test what the lawyers say against your own memory of the evidence. You are the judges of the facts – not the lawyers.

Final Instruction

Ladies and Gentlemen of the Jury:

I remind you once again that the arguments of counsel are not evidence in this case. The court allows counsel to make closing arguments or summations to help you recall the evidence and to help you tie the evidence together. You should not substitute what the lawyers say about the evidence for your own recollection. Neither should you decide this case based on the eloquence of the lawyers and their arguments. You must decide the case solely based on your view of the facts as you find them to be from the evidence, and applying the law to those facts as I have instructed you.

Notes

In this case you have been permitted to take notes during the course of the trial, and most of you – perhaps all of you – have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Your duty as jurors is to discuss the case with one another and consult with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full and impartial consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind, if you become convinced that your initial opinion was wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because the others think differently, or merely to return a verdict.

Remember, in a very real way you are judges – judges of the facts and judges of the credibility of the witnesses. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will guide your deliberations and will speak for you here in court.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

The court has prepared a verdict form for your convenience.

(EXPLAIN – SPECIAL INTEROGS?)

You will take the verdict form to the jury room. When you have reached unanimous agreement, you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom. When you have reached your decision knock on the jury room door and tell the marshal that you have a verdict.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal, 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, regarding any message or question you might send, that you should not tell me your numerical division at the time.

From this point, you will decide when you want to take your breaks, and when you want to stop for the day. Just let the court security officer know. But you can only discuss the case when all of you are together in the jury room.

I remind you again: do not discuss this case, or anything about it, with anyone outside the jury room. Do not post anything about this case or your jury service on any blog or social networking page. Do not send email messages about the case to anyone. Do not call, text or email each other. Do not conduct any

research about any aspect of this case – that means do not consult a dictionary; do not use Google or Wikipedia; do not ask questions of anyone other than each other or me. Remember, as I told you earlier, the only information you should use to decide this case is the evidence presented and the law explained in this courtroom.

At this time, please move to the jury room. You may select your foreperson but wait until Ms. Calahan brings the exhibits to you. Then you may begin your deliberations.