UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SHANNON MILLER, Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA, Defendant.	Case No. 15-CV-3740 (PJS/LIB) FINAL INSTRUCTIONS

Instruction No. 1

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as the instructions I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of the instructions I gave at the beginning of trial and during trial are not repeated here.

The instructions I am about to give are in writing and will be available to you in the jury room. This does not mean, however, that these instructions are any more important than my earlier instructions. Again, you must follow all of my instructions, whenever given and whether in writing or not.

Neither in these instructions nor in any ruling, action, or remark that I have made during this trial have I intended to give any opinion or suggestion about what your verdict should be.

During the trial, I have asked questions of some witnesses. Do not assume that because I asked questions I have any opinion whatsoever about the case, or about the subject I asked about, or about the witness whom I questioned. I decide all questions of law that arise during the trial, but you jurors decide all questions of fact.

Instruction No. 2

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you think the law is different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

Instruction No. 3

Your verdict will depend on whether, in light of all the evidence, you find that certain facts have been proved. The burden of proving a fact is on the party whose claim or defense depends on that fact. Unless I tell you otherwise, the party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true.

To determine whether a fact is more likely true than not true, you must consider all of the evidence and decide which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that the issue has been proved.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits that a party has presented. In determining whether any fact in issue has been proved by the greater weight of the evidence, you may 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.

You may have heard the phrase "proof beyond a reasonable doubt." That is a stricter standard that applies only in criminal cases. It does not apply in civil cases such as this one. You should, therefore, put it out of your minds.

If any reference by the parties or by me to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection that should control during your deliberations and not the statements of the parties or me.

You are the sole judges of the evidence received in this case.

Instruction No. 4

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses; documents and other things that were received as exhibits; and any facts that have been stipulated—that is, formally agreed to by the parties.

Certain things are not evidence. I will list those things again for you now:

(1) Statements, arguments, questions, and comments by a lawyer are not evidence.

(2) Objections are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection; you should not, for example, be prejudiced in any way against a lawyer who makes an objection or the party whom he or she represents. If I sustained an objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the information might have been.

(3) Testimony and exhibits that I struck from the record, or told you to disregard, are not evidence and must not be considered.

(4) Exhibits that were identified by a party but were not offered or received in evidence are not evidence.

(5) Anything you saw or heard about this case outside the courtroom is not evidence.

If you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Instruction No. 5

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony, and the extent to which their testimony is consistent with other evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent mistake or lapse of memory, or an intentional falsehood, and that may depend on whether the contradiction relates to an important fact or only a small detail.

Instruction No. 6

You have heard testimony in the form of a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testified here in person. You should not place any significance on the manner or tone of voice used to read the witness's answers to you.

Instruction No. 7

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education, or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

Instruction No. 8

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in

the case, you should disregard these charts and summaries and determine the facts from the books, records, or other underlying evidence.

Instruction No. 9

You were permitted to take notes during the course of the trial. If you took any notes, those notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence.

If you did not take notes, you should rely on your own independent recollection of the evidence and should not be influenced by the notes of other jurors.

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

Instruction No. 10

As I explained at the beginning of trial, Shannon Miller alleges that the decision of the University of Minnesota-Duluth (or "UMD") not to offer her a new employment contract was motivated by her sex. She also alleges that UMD's decision was in retaliation for her complaints regarding differences in treatment between the men's and women's hockey programs.

Instruction No. 11

A University acts only through its agents or employees. A University is liable for acts of an agent or employee who is acting within the scope of the authority delegated to him or her by the University, or who is acting within the scope of his or her duties as an employee of the University.

Instruction No. 12

Ms. Miller alleges that UMD's decision not to offer her a new contract was motivated by her sex. "Sex" refers to the fact that Ms. Miller is female. "Sex discrimination" refers to discrimination based on the fact that Ms. Miller is female.

To prevail on this claim, Ms. Miller must prove both of the following elements:

1. UMD decided not to offer her a new contract; and

2. Ms. Miller's sex was a motivating factor in UMD's decision.

The mere fact that Ms. Miller is female and was not offered a new contract is not sufficient, in and of itself, for you to find that her sex was a motivating factor in UMD's decision. Rather, to prove that her sex was a motivating factor, Ms. Miller must prove that her sex played a part in UMD's decision not to offer her a new contract. At the same time, Ms. Miller does not have to prove that her sex was the only reason for UMD's decision not to offer her a new contract.

You may find, but do not have to find, that Ms. Miller's sex was a motivating factor in UMD's decision if Ms. Miller has proved that UMD's stated reasons for its decision are not the real reasons, but are instead a pretext to hide sex discrimination.

Instruction No. 13

If you find in favor of Ms. Miller on her claim of sex discrimination, then you must decide whether UMD would have decided not to offer Ms. Miller a new contract regardless of her sex. UMD bears the burden of proving that it would have made the same decision regardless of her sex.

Instruction No. 14

Ms. Miller also alleges that UMD's decision not to offer her a new contract was in retaliation for her complaints regarding unequal treatment of the men's and women's hockey programs. To prevail on this claim, Ms. Miller must prove all four of the following elements:

1. She complained to UMD about unequal treatment of the women's hockey program as compared to the men's hockey program;

2. She reasonably and in good faith believed that UMD's treatment of the men's and women's hockey programs violated Title IX of the Education Amendments of 1972 (or "Title IX");

3. UMD decided not to offer her a new contract; and

4. If she had not complained of unequal treatment of the men's and women's hockey programs, UMD would have offered her a new contract.

Ms. Miller need not prove that her complaints of unequal treatment were the only reason for UMD's decision not to offer her a new contract. She must, however, prove that, in the absence of such complaints, UMD would have offered her a new

contract. In other words, her complaints must have been a determining (or "but-for") factor in UMD's decision.

You may find, but do not have to find, that Ms. Miller's complaints were a determining factor if Ms. Miller has proved that UMD's stated reasons for its decision are not the real reasons, but are instead a pretext to hide retaliation.

Instruction No. 15

To help you determine whether Ms. Miller had a good faith, reasonable belief that UMD's treatment of the men's and women's hockey programs violated Title IX, you are instructed that, under Title IX, no person may, on the basis of sex, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity." Among other things, Title IX requires that an educational institution that offers intercollegiate athletics must provide equal athletic opportunity for members of both sexes.

Title IX does not require educational institutions to spend equal amounts of money on men's and women's athletics. However, the amounts of money spent may be relevant if disparities in the amounts of money spent create or contribute to the absence of equal athletic opportunities for men and women.

Ms. Miller's complaints that UMD's women's hockey team did not have the same resources as the women's hockey teams at other schools are not Title IX complaints.

Instruction No. 16

You may not find in favor of Ms. Miller just because you might disagree with UMD's decision not to offer her a new contract or believe that decision to be harsh or unreasonable. An employer has the right to make personnel decisions for good reasons, bad reasons, or no reason at all, so long as the employer does not unlawfully discriminate or retaliate.

Instruction No. 17

If you find in favor of Ms. Miller on her discrimination claim or her retaliation claim (or both), then you must award Ms. Miller such sum as you find will fairly and justly compensate her for any damages that she sustained as a direct result of UMD's decision not to offer her a new contract. Ms. Miller's claim for damages includes three distinct types of damages, and you must consider each type of damages separately.

First, you must determine the amount of any past wages and fringe benefits that Ms. Miller would have earned in her employment with UMD from June 30, 2015 through the date of your verdict, or through the date that you find Ms. Miller's employment with UMD would have ended—whichever of those dates is earlier. In calculating the amount of past wages and benefits, you should not include any amounts for retirement contributions for the academic years 2013-2014 or 2014-2015.

Second, you must determine the amount of any other past damages, such as emotional distress, mental anguish, loss of reputation, and other non-monetary losses that Ms. Miller has sustained from June 30, 2015 through the date of your verdict. No evidence of the monetary value of such intangible things as emotional distress has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at trial.

Third, you must determine the amount of future damages other than lost wages and fringe benefits, such as emotional distress, mental anguish, loss of reputation, and other non-monetary losses that Ms. Miller is reasonably certain to suffer in the future. Again, there is no exact standard for fixing the compensation for these elements of damage, and any award of such future damages should be fair in light of the evidence presented at trial. To be clear: Any award of future damages should *not* include any amounts attributable to lost wages or benefits; that is a matter for the judge, not the jury, to decide.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture, and you must not award damages by way of punishment or through sympathy.

Instruction No. 18

You are instructed that Ms. Miller has a duty under the law to "mitigate" her damages—that is, to exercise reasonable diligence under the circumstances to minimize her damages. Therefore, if you find that Ms. Miller failed to seek out or take advantage of a suitable opportunity that was reasonably available to her, you must reduce her damages by the amount she reasonably could have avoided if she had sought out or taken advantage of such an opportunity. It is the defendant's burden to prove that Ms. Miller failed to mitigate her damages.

Instruction No. 19

If you find in favor of Ms. Miller on her discrimination claim or her retaliation claim (or both), but you find that Ms. Miller's damages have no monetary value, then you must return a verdict for Ms. Miller in the nominal amount of one dollar.

Instruction No. 20

You have heard evidence about UMD's finances, budget, and endowment. That evidence should not be considered in any way in determining the amount, if any, of Ms. Miller's damages.

Instruction No. 21

That concludes my instructions on the parties' claims and defenses. I will now give you some final instructions about conducting your deliberations and returning your verdict.

First, when you go to the jury room, you must select one of your members to serve as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous. In other words, all of you must agree.

Each of you must make your own conscientious decision, but only after you have considered all of the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Further, you must only discuss the case when all jurors are present in the jury room. So if someone leaves the room for whatever reason, you must stop discussing the case until that person returns.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans for any party in this case. You are judges—judges of the facts. Your only job is to seek the truth from the evidence in the case.

Third, you must decide this case based solely on the evidence presented in court and the instructions that I give you. You must not do any research or make any

investigation on your own about anyone or anything involved in this case, including the parties, lawyers, and witnesses; the matters in dispute; and the applicable law. For example, you must not consult dictionaries or other reference materials, search the Internet, or use any electronic devices to obtain information about this case or to help you decide this case. Again, you must decide this case based solely on the evidence that was presented in court and the instructions that I give you.

Fourth, during your deliberations, you must not communicate with anyone about this case, except, of course, your fellow jurors. I know that many of you use cell phones, smart phones, tablets, laptop computers, and other tools of technology. You must not use these devices to communicate electronically with anyone about this case, including your family and friends. That means that you must not call or text or email anyone about this case, and you must not communicate about this case on Facebook or Twitter or any other social media. You must not use any other type of technology or social media to communicate about this case, even if I have not specifically mentioned it. Please let me know immediately if you become aware that any juror has violated these instructions.

Fifth, if you need to communicate with me during your deliberations, you may send a note to me through the court-security officer who will be stationed outside of the door to the jury room. The note should be signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

You should know that if you do send me a note, it could take me anywhere from five minutes to an hour or two to respond. I will try to respond as soon as possible, but I may not be able to respond immediately because, for instance, I may be in a hearing or a meeting, or I may need to do legal research or consult with the attorneys before answering your question. I ask you to be patient and to understand that sometimes I may not be able to respond immediately to a note from you.

If you do not reach a verdict by the end of the day, I will send you a note shortly before 4:30 p.m. dismissing you and telling you when to return. If you would like to stay past 4:30 p.m. or return before 8:30 a.m. on any particular day, please let me know as soon as possible, so that we can make staffing arrangements.

Sixth, I emphasize again that your verdict must be based solely on the evidence and on the law that I have given to you in my instructions. And, again, your verdict

must be unanimous—all of you must agree. Nothing I have said or done is intended to suggest what your verdict should be. That is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decisions that you reach in this case. You will take the verdict form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court-security officer that you are ready to return to the courtroom.