

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**ORIGINAL
FILED**
OCT 29 2018
SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

IXL LEARNING, INC.,

Defendant.

Case No. 17-cv-02979-VC

**COURT'S FINAL JURY
INSTRUCTIONS**

Dated:

10/29/18



VINCE CHHABRIA
United States District Judge

INSTRUCTION NO. 1

DUTY OF JURY

It is your duty to find the facts from all the evidence in the case. To those facts, you will apply the law as I give it to you. You must follow the law as I give it to you, whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, biases, stereotypes, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

INSTRUCTION NO. 2

BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE

The standard of proof in this case is called "a preponderance of the evidence." When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

The plaintiffs have the burden of proving their claims by a preponderance of the evidence. You should base your decision on all of the evidence, regardless of which party presented it.

INSTRUCTION NO. 3

WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I have instructed you to accept as proved.

INSTRUCTION NO. 4
WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

- (1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
- (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
- (3) Testimony that is excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.
- (4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 5

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

INSTRUCTION NO. 6
CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying (although keep in mind that different people react differently to testifying in court);
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

INSTRUCTION NO. 7
STIPULATIONS OF FACT

The parties have agreed to certain facts to be placed in evidence as Exhibit 167. You must therefore treat these facts as having been proved.

INSTRUCTION NO. 8

CHARTS AND SUMMARIES

Certain charts and summaries have been shown to you to help explain the contents of records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

INSTRUCTION NO. 9

ADA RETALIATION – ELEMENTS

The plaintiffs allege that IXL retaliated against Mr. Duane in violation of the ADA for complaining in the Glassdoor post about disability discrimination in the workplace. The plaintiffs have the burden of proving each of these three elements by a preponderance of the evidence:

1. Mr. Duane complained about disability discrimination in the Glassdoor post;
2. Mr. Duane's complaints in the Glassdoor post were made in a reasonable manner and were based on a reasonable and good faith belief that IXL did, in fact, discriminate on the basis of disability, even if his beliefs were mistaken. (A complaint is not automatically unreasonable because it is public or because it would harm the company.)
3. Mr. Duane was fired because of his complaints about disability discrimination in the Glassdoor post. (The disability discrimination complaints need not be the only reason why IXL fired Mr. Duane, but the plaintiffs must prove by a preponderance of the evidence that IXL would not have fired Mr. Duane if he had not complained about disability discrimination in the Glassdoor post.)

If you find that the plaintiffs have proved all three of these elements, your verdict should be for the plaintiffs on their ADA claim. If, on the other hand, you find that the plaintiffs have failed to prove one or more of these elements, your verdict should be for IXL on the ADA claim.

INSTRUCTION NO. 10

TITLE VII RETALIATION – ELEMENTS

The plaintiffs allege that IXL retaliated against Mr. Duane in violation of Title VII for complaining in the Glassdoor post about discrimination on the basis of race, sex, gender, gender identity, and/or sexual orientation. The plaintiffs have the burden of proving each of these three elements by a preponderance of the evidence:

1. Mr. Duane complained about discrimination on the basis of race, sex, gender, gender identity, and/or sexual orientation in the Glassdoor post;
2. Mr. Duane's complaints in the Glassdoor post were made in a reasonable manner and were based on a reasonable and good faith belief that IXL did, in fact, discriminate on the basis of race, sex, gender, gender identity, and/or sexual orientation, even if his beliefs were mistaken. (A complaint is not automatically unreasonable because it is public or because it would harm the company.)
3. Mr. Duane was fired because of his complaints about discrimination on the basis of race, sex, gender, gender identity, and/or sexual orientation in the Glassdoor post. (The discrimination complaints need not be the only reason why IXL fired Mr. Duane, but the plaintiffs must prove by a preponderance of the evidence that IXL would not have fired Mr. Duane if he had not complained about discrimination prohibited by Title VII in the Glassdoor post.)

If you find that plaintiffs have proved all three of these elements, your verdict should be for the plaintiffs on their Title VII claim. If, on the other hand, you find that plaintiffs have failed to prove one or more of these elements, your verdict should be for IXL on the Title VII claim.

INSTRUCTION NO. 11

DAMAGES

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest which side should win.

If you find for the plaintiffs, you must determine Mr. Duane's damages. Damages means the amount of money that will reasonably and fairly compensate Mr. Duane for any injury you find was caused by the defendant. The plaintiffs have the burden of proving damages by a preponderance of the evidence. There are four types of damages available in this case: (1) lost earnings and benefits; (2) out-of-pocket expenses; (3) compensation for any emotional pain and suffering by Mr. Duane; and (4) punitive damages. The third and fourth categories of damages are not available for Mr. Duane's ADA claim.

In determining the amount of damages, you should consider:

- Any emotional pain and suffering, mental anguish, depression, anxiety and loss of enjoyment of life that Mr. Duane experienced as a consequence of IXL's alleged retaliatory firing.
- The reasonable value of wages, earnings, and benefits Mr. Duane lost from January 8, 2015 to December 31, 2015, which the parties have stipulated as \$101,808.04.
- The reasonable value of necessary out-of-pocket expenses Mr. Duane incurred for a job search from January 8, 2015 to December 31, 2015.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture. However, the law does not require that plaintiffs prove the amount of Mr. Duane's losses with mathematical precision.

INSTRUCTION NO. 12

PUNITIVE DAMAGES

If you find for the plaintiffs on the Title VII claim, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

The plaintiffs have the burden of proving by a preponderance of the evidence that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that the conduct by IXL that harmed the plaintiff was malicious, oppressive or in reckless disregard of Mr. Duane's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring Mr. Duane. Conduct is in reckless disregard of Mr. Duane's rights if, under the circumstances, it reflects complete indifference to Mr. Duane's well-being or rights, or if IXL acted in the face of a perceived risk that its actions would violate Mr. Duane's rights under federal law. An act or omission is oppressive if IXL violated Mr. Duane's rights with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of Mr. Duane.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of IXL's conduct.

INSTRUCTION NO. 13

DUTY TO DELIBERATE

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

INSTRUCTION NO. 14

CONSIDERATION OF THE EVIDENCE – CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me

as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

INSTRUCTION NO. 15

TRANSCRIPT OF TRIAL NOT AVAILABLE

You will not have a transcript of the trial in the jury room. If, during your deliberations, you determine that you want to review the testimony of a witness again, you can request to have that witness's testimony read back to you in the courtroom, with all of us present. It is up to me whether to permit a readback, and I may require that the entirety of the witness's testimony be read back into the record, rather than just the portion of your request. The readback could contain errors. This readback will not reflect the witness's demeanor, tone of voice, and other aspects of the live testimony. The way you remember and understand the live testimony controls. Finally, in your exercise of judgment, the testimony read cannot be considered in isolation, but must be considered in the context of all the evidence presented.

INSTRUCTION NO. 16

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Courtroom Deputy, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

INSTRUCTION NO. 17

RETURN OF VERDICT

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the Courtroom Deputy that you are ready to return to the courtroom.