UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TERI TUCKER, Plaintiff, v. JOURNAL REGISTER EAST, a division of the JOURNAL REGISTER CO., d/b/a THE NEW HAVEN REGISTER, Defendant.	: : : : : : : :	CIVIL ACTION NO. 3:06cv307 (SRU)

JURY INSTRUCTIONS

Members of the jury, you now have heard all of the evidence. At this point, I am going to instruct you about the law that applies to this case. At the outset, I want to express my thanks to you for the time and energy you have devoted to this trial. Jury service is rarely convenient, but without you justice could not be done in this case.

It will take some time for me to read these instructions to you, but it is important that you listen carefully. You have been provided with a copy of my instructions so that you can read along as we go. Feel free to make notes on your copy, because you can take it into the jury room with you.

My instructions will be in three parts: First, I will discuss general rules concerning the role of the court and the duty of the jury; second, I will go over the issues in this case and set out the specific questions of fact that you must answer based on the evidence at trial; and third, I will give you some rules and guidelines for your deliberations.

Before we begin, I ask you to look over the other document that was placed on your seats--namely, the verdict form. After I have given these instructions and you hear the parties' closing arguments, you will go back into the jury room to deliberate. You will have with you the

following: the original of the verdict form, the original exhibits, your own copies of these instructions, and any personal notes that you may have taken. At the conclusion of your deliberations, you will use the verdict form to report your verdict to the court and the parties.

SECTION I: GENERAL INSTRUCTIONS

ROLE OF THE COURT

As Judge, I perform basically two functions during the trial. First, I decide what evidence you may consider. You have heard me doing that throughout the trial. Second, I instruct you on the law that you are to apply to the facts in this case. I gave you some preliminary instructions before trial began, and some during the course of the trial, but it is now—at the close of evidence—that most of the instructions are given, so please be patient and listen closely.

If either of the lawyers state the law differently from the way I am explaining it to you, you are to follow my instructions.

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

This is a long instruction, and I may repeat certain parts. That does not mean that those parts should be emphasized. You should not single out any one part of my instructions and ignore the rest. Instead, you should consider all of the instructions as a whole and consider each instruction in light of all the others. The order in which I give you instructions does not indicate their relative importance. Do not read into these instructions, or into anything I have said or done, any suggestion about what verdict you should return – that is a matter for you alone to decide.

I should also point out that, although you have been given a copy of the instructions to

follow as I deliver them, if I say aloud anything at all different from what is written, you must follow what I say here in court.

BOTH SIDES ENTITLED TO FULL AND FAIR HEARING

Regardless of your ultimate decision about the parties' disputes, the parties in this case are entitled to their day in court. You must remember that one of the most important functions of our system is to give all the parties to a dispute a full and fair hearing, regardless of the final outcome of the case.

It is your duty, therefore, to give careful thought to every issue set forth by these instructions, regardless of any general feeling that you may have about which party is right.

OBJECTIONS AND RULINGS

It is the duty of a lawyer to object to testimony or other evidence that the lawyer believes is not properly admissible. You should neither prefer nor dislike a lawyer or their client because the lawyer made objections -- or because the attorney failed to make objections.

If I have allowed testimony or evidence that was objected to, you should not give that evidence greater or lesser weight. My rulings on objections have nothing to do with the credibility of the witnesses.

If I have sustained an objection to a question asked of a witness, you must disregard the question entirely, and may draw no inference from the question, nor speculate about what the witness would have said if he or she had been permitted to answer the question. If I have granted a motion to strike, you must disregard the part of the answer that was stricken, because it is not evidence.

DUTIES OF THE JURY

It is your duty to find the facts from all the evidence in the case. In reaching a verdict you must carefully and impartially consider all of the evidence in the case and then apply the law as I have explained it to you. Regardless of any opinion you may have about what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any understanding or interpretation of the law other than the one I give you. And you must do your duty as jurors regardless of any personal likes, dislikes, opinions, prejudices, or sympathies. In other words, you must decide the case solely on the evidence before you, and you must do so fairly and impartially.

The verdict you reach must be unanimous; that is, agreed upon by each of you.

You must each decide the case for yourself, but do so only after impartial consideration of the evidence in the case with your fellow jurors.

"PROVE," "FIND," AND “ESTABLISH”

Throughout the remainder of my instructions to you, I will use the word "prove" when talking about what the plaintiff must do in order to win this case. My use of the word "prove" means "prove by the appropriate burden of proof," even if I do not always repeat those words. Similarly, when I speak of your "finding" various facts, you must find those facts to have been proven by the plaintiff by the appropriate burden of proof, even if I simply use the word "find." Likewise, I will speak of the parties “establishing” various facts. Even if I simply use the word "establish," you must find that fact have been established by the appropriate burden of proof.

BURDEN OF PROOF - PREPONDERANCE OF THE EVIDENCE

Because this is a civil case, the plaintiff has the burden of proving every disputed element of her claims by a preponderance of the evidence.

To establish a fact by a preponderance of the evidence, the plaintiff must prove that the fact is more likely true than not true. In other words, if you find that the credible evidence on a given issue is evenly divided between the plaintiff and the defendant, then you must decide that issue for the defendant. However, if the plaintiff proves that a fact is more likely true than not, even slightly more true than not, then you are to find that the plaintiff has proven the fact by a preponderance of the evidence.

In determining whether a claim has been proven by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have presented them. A preponderance of the evidence means the greater weight of the evidence; it refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should not consider or discuss that standard in your deliberations.

SECTION II: ISSUES IN THIS CASE

TITLE VII RETALIATION CLAIM
CONNECTICUT FAIR EMPLOYMENT PRACTICES ACT CLAIM

Now, let me turn to the specific claims in this case. The plaintiff, Teri Tucker, has sued the defendant, The New Haven Register, which I will refer to as The Register, under Title VII of

the Civil Rights Act as well as the Connecticut Fair Employment Practices Act, or "CFEPA." She claims that The Register retaliated against her by firing her after she expressed reluctance about testifying for The Register in its defense of a sexual harassment complaint filed with the Connecticut Commission on Human Rights and Opportunities, or "CHRO," by one of Tucker's former subordinates, Denise Pecoraro. The Register denies these allegations. It is your responsibility to decide whether the plaintiff has proven her claim of retaliation by the preponderance of the evidence.

Title VII generally prohibits discrimination in employment on the basis of race, gender, religion and certain other characteristics. In addition, Title VII makes it unlawful "for an employer to discriminate against any of its employees . . . because [s]he has opposed any practice made an unlawful employment practice by [Title VII], or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." Title VII's anti-retaliation provision applies to investigations, proceedings and hearings conducted by the Connecticut Commission on Human Rights and Opportunities.

The Connecticut Fair Employment Practices Act similarly prohibits discrimination "against any person because such person has filed a complaint or testified or assisted in any proceeding" before the Connecticut Commission on Human Rights and Opportunities.

The elements of a Title VII claim and a CFEPA claim are identical. Both statutes make it unlawful for an employer to retaliate against an employee for engaging in a "protected activity," which I will define in a moment. Because these federal and state laws are similar in content and purpose, retaliation claims under Title VII and CFEPA are subject to the same proof requirements and, therefore, you should consider those claims jointly.

To prevail on her retaliation claim, Tucker must prove each of the following four elements by a preponderance of the evidence:

(1) That Tucker engaged in a protected activity;

(2) That The Register was aware of Tucker's protected activity;

(3) That The Register took an adverse employment action against her; and

(4) That a causal relationship existed between the protected activity and the adverse employment action.

A. FIRST ELEMENT OF A TITLE VII/CFEPA RETALIATION CLAIM: PROTECTED ACTIVITY

As a threshold matter, Tucker must establish that she engaged in statutorily protected activity. Title VII enumerates two ways in which a complainant can establish she was engaged in protected activity: (1) the statute protects a complainant who opposes an employment practice made unlawful under the provisions of Title VII, either by way of formal or informal protests; (2) the statute also protects an individual who participates in a proceeding brought under Title VII, for example, by responding to a CHRO investigation or testifying in a Title VII lawsuit.

In a retaliation claim alleging that the plaintiff opposed unlawful practices under Title VII, "protected activity" refers to an action taken by an employee to protest or oppose behavior on the part of an employer that the employee reasonably believes to be unlawful and in violation of Title VII, and includes both filing formal charges alleging an unlawful practice, as well as making informal complaints about such a practice. No magic words are required to be used when complaining about perceived unlawful activity, so long as they are sufficient to put the employer on notice that the plaintiff believes that unlawful activity is occurring.

To prove that she engaged in activity protected by Title VII, Tucker must demonstrate

that (a) she in good faith protested or opposed a directive from The Register, either explicit or implicit, to provide false or misleading testimony on The Register's behalf, or expressed an intention to provide truthful testimony unfavorable to The Register's position, in connection with a proceeding before the CHRO in the Pecoraro case, and (b) she had an objectively reasonable basis for that protest or opposition, and (c) Tucker communicated her protest or opposition in a form sufficient to make The Register aware of her opposition.

If you find by a preponderance of the evidence that Tucker protested or opposed testifying falsely on behalf of The Register before the CHRO in the Pecoraro matter or that she intended to testify truthfully against The Register's position before the CHRO in the Pecoraro matter, that her basis for doing so was objectively reasonable, and that she made The Register aware of her opposition, Tucker has satisfied the first element of her retaliation claim. If you do not find by a preponderance of the evidence that Tucker protested or opposed testifying falsely on behalf of The Register before the CHRO in the Pecoraro matter or that she intended to testify truthfully against The Register's position before the CHRO in the Pecoraro matter, that her basis for doing so was objectively reasonable, and that she made The Register aware of her opposition, Tucker has not satisfied the first element of her retaliation claim.

In a retaliation claim alleging that a plaintiff suffered an adverse employment action in retaliation for participating in a proceeding under Title VII, participation in that proceeding in any manner is a protected activity. "Any manner" includes, but is not limited to, an individual who testifies against his or her employer in a legal proceeding alleging unlawful discrimination on his or her own behalf or on behalf of a co-worker, a volunteer witness poised to testify in support of a co-worker's discrimination claims who does not actually testify, an individual who

indicates to his or her employer that he or she intends to testify in such a legal proceeding, or an individual who defends him or herself against charges of discrimination. If you find by a preponderance of the evidence that Tucker participated in a Title VII proceeding in any manner, then she has satisfied the first element of her retaliation claim. If you instead find that Tucker has not proven by a preponderance of the evidence that she participated in a Title VII proceeding, then her Title VII claim fails.

B. SECOND ELEMENT OF A TITLE VII/CFEPA RETALIATION CLAIM: EMPLOYER KNOWLEDGE OF PROTECTED ACTIVITY

If you find that Tucker engaged in activity that is protected under Title VII and CFEPA, you must then determine whether Tucker has met her burden of proving The Register had knowledge of the protected activity before terminating Tucker's employment.

To meet this burden, Tucker must prove by a preponderance of the evidence that an individual or individuals, who participated in the decision to terminate Tucker, was aware that Tucker engaged in protected activity.

If you find that Tucker did not prove by a preponderance of the evidence that anyone who participated in the decision to terminate her employment had knowledge of her protected activity at the time the decision to fire her was made, then Tucker has not satisfied her burden and you should find for The Register.

C. THIRD ELEMENT OF A TITLE VII/CFEPA RETALIATION CLAIM: ADVERSE EMPLOYMENT ACTION.

Under Title VII and CFEPA, an adverse employment action is an action that substantially alters the terms and conditions of employment. Discharge is an "adverse employment" action

under Title VII and CFEPA. The Register does not dispute this element of Tucker's claim. As such, I instruct you that Tucker has satisfied this element.

D. FOURTH ELEMENT OF A TITLE VII/CFEPA RETALIATION CLAIM: CAUSAL RELATIONSHIP

Finally, Tucker must establish the existence of a causal relationship between her protected activity and The Register's adverse employment action against her. To establish a causal relationship, Tucker need not prove that her protected activity, that is, either her opposition of activities made unlawful by Title VII or her participation in a proceeding under Title VII, was the only motivation for firing her, but she must prove that it was, at least, a substantial or motivating factor for that decision.

Tucker's protected activity need not have been the only reason for the decision, nor does it need to have been the primary reason. Tucker must prove her protected activity made a difference, at least in part, in the decision to fire her, even if there were other, permissible considerations affecting that decision.

The Register has proffered other lawful, non-retaliatory reasons why it fired Tucker. If you find that The Register's proffered reasons are true then you may still find for Tucker if: (1) the Register fired Tucker for both retaliatory and the proffered non-retaliatory reasons (i.e., "mixed reasons"); or (2) The Register's proffered reason is pretextual, that is, The Register was merely disguising an underlying intent to retaliate on an illegal basis.

If you find that The Register's proffered reasons are not true, you may, but need not, infer from that finding that Tucker's protected activity was a motivating factor in the decision to fire Tucker. In effect, your finding of falsity regarding the suggested reasons permits, but does not

require, an inference that The Register's reason is merely a pretext for what was, in fact, intentional retaliation.

In considering The Register's proffered reasons for its decision, bear in mind that The Register is entitled to exercise its management discretion and make its own business judgments. Under the law that governs this case, The Register had the right to make decisions concerning Tucker for good reasons, bad reasons, reasons based on erroneous facts, or even for no reason at all, so long as its decisions were not based on unlawful retaliation.

You may not find for Tucker merely because you feel that The Register made poor or unwise or unfair management decisions or that another supervisor might have made different decisions. The Register does not have to show that it conducted its business in an optimum manner. In order to prevail, Tucker must demonstrate that retaliation was a substantial or motivating cause for the personnel actions against her.

You may also not find for Tucker to reward her for past services to the defendant or because of some general feeling that she deserved better from The Register. The question for you is not whether Tucker or any other employee in your view was treated well or fairly. The question is whether illegal retaliation occurred.

Again, it bears repeating that Tucker may prove that The Register had a retaliatory motive either directly or indirectly, that is, by direct and/or circumstantial evidence. Tucker may show that a retaliatory motive played a part in The Register's decision through direct evidence by, for example, presenting specific statements that indicate that The Register acted, at least in part, upon a retaliatory motive when deciding to fire Tucker. Tucker is not required, however, to produce direct evidence of retaliatory motive. Instead, she may prove improper retaliatory

motive through indirect or circumstantial evidence. For example, she may present evidence from which you may, but need not, infer that The Register had a retaliatory motive, such as the timing of events and circumstances that culminated in Tucker's discharge.

Finally, because the third element of Tucker's retaliation claim is not in dispute, if she establishes the first, second and fourth elements of her claim – the "protected activity" element, "employer knowledge" element, and the causal relationship element – by a preponderance of the evidence, you should find for Tucker on the question of liability. If you do find for Tucker on the question of liability, then you will need to calculate the damages, if any, to which she is entitled.

If Tucker fails to carry her burden of proof on the "protected activity" element or on the employer knowledge element or on the causal relationship element, you should find for The Register on the question of liability, and you need not consider the question of damages.

WRONGFUL TERMINATION CLAIM UNDER CONNECTICUT GENERAL STATUTES SECTION 31-51q

Section 31-51q of the Connecticut General Statutes makes it illegal for an employer to discipline or discharge an employee because such employee exercised her freedom of speech rights guaranteed under the federal or state constitutions.

To prevail on her Section 31-51q claim, Tucker must prove each of the following elements by a preponderance of the evidence:

(1) she exercised free speech rights protected by the First Amendment to the United States Constitution (or an equivalent provision of the Connecticut Constitution);

(2) she was fired on account of her exercise of such rights; and

(3) her exercise of her first amendment free speech rights did not substantially or

materially interfere with her bona fide job performance or with her working relationship with her employer.

Because The Register does not dispute that Tucker has satisfied the third element of her claim under section 31-51q, you should consider that element proven. I will now instruct you on the first two elements of that claim.

A. PUBLIC CONCERN

Section 31-51q protects speech that addresses a matter of public concern; that is, the statute applies to expressions regarding public concerns that are motivated by an employee's desire to speak out as a citizen. The statute does not protect speech expressing personal grievances to an employer.

Public concern is something that is a subject of legitimate news interest, meaning a subject of general interest and of value and concern to the public at the time of publication, such as concerns raised to the government about the lawfulness of public officials' actions. Thus, an employee's speech addresses a matter of public concern when the speech can fairly be considered as relating to any matter of political, social, or other concern to the community. Whether speech pertains to a matter of public concern is determined by looking at the content, form, and context of the particular statements in question. Speech that asserts the right to testify truthfully in a legal proceeding, or that is part of an overall effort to correct unlawful practices or bring them to public attention, is speech that affects a matter of public concern. Speech that, on the other hand, is an employee's speech upon matters only of personal interest, does not affect a matter of public concern.

Tucker bears the burden of proving by a preponderance of the evidence that any

statements she made to Mr. Lee concerning her participation or her reluctance to testify in a proceeding before the CHRO in connection with the Pecoraro case were motivated by a desire to speak out as a citizen on a matter of concern to the community, in furtherance of a broader public purpose, rather than an employee upon matters of only personal interest to herself and The Register.

B. CAUSATION

As with her claims under Title VII and CFEPA, Tucker must establish the existence of a causal relationship between her speech on a matter of public concern and The Register's adverse employment action against her. Again, to establish a causal relationship, Tucker need not prove that her protected speech was the only motivation for firing her, but she must prove that it was, at least, a substantial or motivating factor for that decision.

Tucker's protected speech was a "motivating factor" in the decision to fire her if Tucker's reluctance played some part in that decision, and it need not have been the only reason for the decision nor the primary reason. Tucker must prove that her protected speech was, at least in part, a consideration in the decision to fire her, even if there were other, permissible considerations affecting that decision. As with Tucker's Title VII and CFEPA claims, if you find that The Register's proffered reasons are true then you may still find for Tucker if: (1) the Register fired Tucker for both retaliatory and the proffered non-retaliatory reasons (i.e. "mixed reasons"); or (2) The Register's proffered reasons are pretextual, that is, The Register was merely disguising an underlying intent to retaliate on an illegal basis.

If you find that The Register's proffered reasons are not true, you may, but need not, infer from that finding that Tucker's speech was a motivating factor in the decision to fire Tucker. In

effect, your finding of falsity regarding the suggested reasons permits, but does not require, an inference that The Register's reasons are merely a pretext for what was, in fact, intentional retaliation. As with the other claims in this case, you may not find for Tucker merely because you feel that The Register made poor or unwise or unfair management decisions or that another supervisor might have made different decisions, and in order to prevail, Tucker must demonstrate that retaliation was a substantial or motivating cause for the personnel actions against her.

Finally, because the third element of Tucker's retaliation claim is not in dispute, if she establishes the first and second elements of her claim – the "protected speech" element and the causal relationship element – by a preponderance of the evidence, you should find for Tucker on the question of liability. If you do find for Tucker on the question of liability, then you will need to calculate the damages, if any, to which she is entitled.

If Tucker fails to carry her burden of proof on the "protected speech" element or on the causal relationship element, you should find for The Register on the question of liability, and you need not consider the question of damages for her claim under section 31-51q.

DAMAGES

I will now instruct you on the law governing damages. The fact that I charge you on the law governing damages should not be taken as a suggestion that you should necessarily reach the question of damages. It is your job to decide the issue of liability first; I am instructing you on elements of damages only so that you will have guidance should you decide that Tucker is entitled to recover damages. You should not consider the question of damages unless and until you find The Register liable to Tucker.

You should award damages only for those injuries caused by the conduct you find satisfies the elements of Tucker's claim, and only in accordance with these instructions.

A. COMPENSATORY DAMAGES

One type of damages you can award Tucker is compensatory damages. The purpose of awarding compensatory damages is to award, as far as possible, fair and just compensation to an injured plaintiff. Compensatory damages seek to make the plaintiff whole – that is, to compensate her for the damages that she has suffered or will suffer. In this case, compensatory damages could include both economic and non-economic damages, which I will explain later.

In order to award damages for a given injury or harm, you must find that Tucker has proven by a preponderance of the evidence that The Register caused her injuries. You must not award compensatory damages based on speculation or sympathy. You also must not award damages based on the abstract "value" or "importance" of a statutory right. Damages must be based on the evidence at trial and must be fair and reasonable. On the other hand, the law does not require Tucker to prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

B. CALCULATING COMPENSATORY DAMAGES

If you determine that Tucker is entitled to compensatory damages, you should award her economic damages. One type of economic damages that Tucker may have suffered is the loss of wages and fringe benefits she would have received if she had not been discharged. These are called "lost wages" or "back pay." You do not need to calculate the actual amount of lost wages to which Tucker may be entitled, but only whether she is entitled to receive lost wages at all. If you determine that Tucker is entitled to lost wages, it is my responsibility to calculate the amount

of lost wages to which Tucker is entitled.

You may also determine that it is appropriate to award Tucker non-economic damages for injuries that Tucker suffered as the proximate cause of The Register's unlawful acts. Non-economic damages include emotional distress, mental anguish, inconvenience, humiliation, and loss of enjoyment of life. No evidence of the value of such intangible things as mental or emotional distress need be introduced. In that respect, it is not a value you are trying to determine, but rather an amount that will fairly compensate Tucker for the damage she has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. That is a matter left to the conscience, good sense, and sound judgment of the jury. You should not act unreasonably through bias, passion, or sympathy, but rather should exercise common sense and fix an amount of damages, that, in accordance with the evidence and the law, will fairly compensate Tucker for all injuries suffered.

The problem of quantifying damages is not easy. You are not at liberty to guess or speculate what the damages are. You must use your best judgment, remembering always that it is incumbent upon Tucker, even if you find that she is entitled to recover, to prove by a fair preponderance of the evidence the amount of the damages to which she is entitled.

C. NOMINAL DAMAGES

A second type of damages to which Tucker may be entitled is "nominal damages." If you find that Tucker has proven her claim but you find that Tucker suffered or proved no compensatory damages, you may award her nominal damages.

Nominal damages are awarded as recognition that a plaintiff's rights have been violated. You should award nominal damages if you conclude that Tucker's rights were violated, without

any resulting compensatory damages. For example, you may deem it necessary to award Tucker nominal damages if she proves that The Register had an improper retaliatory motive in discharging Tucker, but that The Register would have discharged Tucker in any event because of other lawful reasons.

You should also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you are unable to compute monetary damages except by engaging in speculation or guesswork.

You may not award both nominal and compensatory damages to Tucker; either she was measurably injured, in which case you must award compensatory damages, or she was not or you cannot reasonably calculate such damage, in which case you should award nominal damages.

"Nominal damages" are a token sum, such as ten dollars.

D. PUNITIVE DAMAGES

Tucker seeks to recover punitive damages in addition to compensatory damages. In employment discrimination cases, punitive damages are limited to circumstances in which an employer has engaged in intentional discriminatory conduct in violation of the law and has done so with malice or with reckless indifference to a plaintiff's protected rights.

Malice and reckless indifference refer to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. A positive element of conscious wrongdoing is required for an award of punitive damages.

An employer may not be vicariously liable for the discriminatory employment actions of managerial employees where those actions are contrary to the employer's good faith efforts to comply with the law.

If, but only if, you find The Register violated the law and acted in a malicious or reckless fashion, then you may, but are not required to, award Tucker punitive damages, and the amount of those damages is within your discretion.

If you do award punitive damages, you should fix the amount using calm discretion and sound reason. You must not be influenced by sympathy for or dislike of any party in the case.

SECTION III: INSTRUCTIONS FOR DELIBERATIONS

THREE FORMS OF EVIDENCE

Next I want to discuss with you generally what we mean by evidence and how you should consider it. The evidence from which you are to decide what the facts are comes in one of three forms:

First, there is the sworn testimony of witnesses, both on direct examination and cross-examination, and regardless of who called the witness.

Second, there are the exhibits that have been received into the trial record.

Third, there are any facts to which all the parties have agreed or stipulated, or that I have directed you to find.

WHAT IS AND IS NOT EVIDENCE

The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence and the stipulations.

It is the witnesses's answers that are evidence. At times, a lawyer on cross-examination may have incorporated into a question a statement that assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and if

there is no evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because it was contained in the question.

Testimony that has been stricken or excluded by the court also is not evidence and may not be considered by you in rendering your verdict. Further, if certain testimony was received for a limited purpose, such as for the purpose of assessing a witness's credibility, you must follow the limiting instructions I have given for that testimony.

What the lawyers say in their opening statements, closing arguments, comments, objections and questions is not evidence. What they say in their closing arguments is intended to help you understand the evidence and to reach your verdict. However, if your recollection of the facts differs from their statements, you should rely on your memory.

Moreover, what I may have said during the trial or what I may say in these instructions is not evidence and my rulings on the admissibility of evidence do not, unless expressly stated by me, indicate any opinion about the weight or effect of such evidence. Exhibits that have been marked for identification may not be considered by you as evidence unless and until they have been received into evidence by the court. Exhibits were received into evidence either because the parties stipulated to their admission, or when I said that an exhibit was admitted as a "full" exhibit.

In addition, materials used only to refresh a witness's recollection are not evidence unless they are admitted as full exhibits.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and to the exhibits you have seen.

<u>DIRECT & CIRCUMSTANTIAL EVIDENCE</u>

There are two types of evidence that you may properly use in reaching your verdict.

One type of evidence is direct evidence. Direct evidence includes a witness's testimony about something the witness knows by virtue of his or her own senses -- something he or she has seen, felt, touched or heard.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts.

For example, assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that, because there are no windows in this courtroom, you could not look outside. As you were sitting here, someone walked in with an umbrella that was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. On the basis of your reason, experience and common sense, you infer from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that your verdict must be based on a preponderance of all of the evidence presented.

INFERENCE DEFINED

During the trial you may have heard the attorneys use the term "inference" and in their arguments they may have asked you to infer, on the basis of your reason, experience and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical conclusion that a disputed fact exists because another fact has been shown to exist.

There are times when different inferences may be drawn from the same facts, whether proved by direct or circumstantial evidence. The plaintiff may ask you to draw one set of inferences, while the defendant may ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion that you are permitted, but not required, to draw from the facts that have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense. The mere existence of an inference against a defendant does not relieve a plaintiff of the burden of establishing her case by a preponderance of the evidence. Finally, you may not draw any inferences from the mere fact that the plaintiff filed this lawsuit.

WITNESS CREDIBILITY - GENERAL

You have had the opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence that may help you decide the truth and the importance of each witness’s testimony.

How do you determine truthfulness? You base it on what you have seen and heard. You watched the witnesses testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Was he or she frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was his or her demeanor -- that is, their behavior, manner and appearance while testifying? Often it is not what a person says but how he or she says it that convinces us.

You should use all the tests for truthfulness that you would use in determining matters of credibility in your every day lives. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness may have in the outcome of the case. You should consider the opportunity the witness had to see, hear and know the things about which he or she testified, the accuracy of the witness's memory, candor or lack of candor, intelligence, the reasonableness and probability of the witness’s testimony, its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

Always remember that in assessing a witness’s testimony you should use your common sense, your good judgment, and your own life experiences.

IMPEACHMENT OF WITNESS

A witness may be discredited or "impeached" by contradictory evidence, by a showing

that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something inconsistent with the witness's present testimony. It is your exclusive province to give the testimony of each witness such credibility or weight, if any, as you think it deserves.

If a witness testified untruthfully in some respect, you may consider that fact in deciding the weight you will give to that witness's testimony. Considering that fact and all other relevant evidence, you may accept or reject the testimony of each witness either in whole or in part.

UNCONTRADICTED TESTIMONY

You are not required to accept testimony even though the testimony is uncontradicted and the witness is not discredited or impeached. You may decide, because of the witness's manner and demeanor or because of the improbability of his or her testimony or for other reasons, that such testimony is not worthy of belief.

On the other hand, the testimony of a single witness may be enough to convince you of a fact in dispute, if you believe that the witness has truthfully and accurately related what in fact occurred.

JURY BIAS

Your verdict must be based solely upon the evidence developed at this trial, or the lack of evidence. Please bear in mind that all litigants are equal before the law. You should not, therefore consider any personal feelings you may have about the race, religion, national origin, sex, age, wealth, lifestyle, or other features of the parties. Similarly, it would be wrong for you to allow feelings you might have about the nature of the claims to influence you in any way.

You have been chosen to try the issues of fact and reach a verdict on the basis of the evidence presented here. If you let sympathy or prejudice interfere with your clear thinking about the facts, there is a risk that you will not arrive at a just verdict.

In reaching your verdict, you are not to be affected by sympathy for, or prejudice against, any of the parties. Each of the parties to this case must be regarded as equals by you. This is the agreement you made when you were selected as jurors and it is the position that must guide your deliberations.

CLOSING ARGUMENTS

At this point we will interrupt the instructions to hear closing arguments. I will conclude the instructions after those summations. Remember, what the lawyers say in their closing arguments is not evidence, but it is merely argument about what the evidence shows.

[BREAK FOR CLOSING ARGUMENTS]

ARGUMENTS ARE NOT EVIDENCE

You have just heard closing arguments. I want to remind you that what the lawyers have said is not evidence, even if it seemed at times as if they were testifying. The lawyers merely presented their arguments about what the evidence has shown.

NOTE-TAKING

You were permitted to take notes during the course of the trial. Any notes you have taken should be used only as memory aids; do not give your notes more importance than your independent recollection of the evidence. If you did not take notes, you should rely on your own

memory of the proceedings and should not be unduly influenced by the notes of other jurors. The fact that a particular juror has taken notes entitles that juror's opinions to no greater weight than those of any other juror, and your notes are not to be shown to any other juror during the course of deliberations.

CONCLUSION

Your verdict must be unanimous and represent the considered judgment of each juror.

Each of you must make your own decision, but you must consider impartially all of the evidence and the views of your fellow jurors. It is your duty to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so consistent with the individual judgment of each juror. Until a verdict is agreed to by each juror, it is not a unanimous verdict.

In the course of your discussion, do not hesitate to re-examine your own individual views, or to change your opinions, if the deliberations and the views of your fellow jurors convince you to do so. However, you should not surrender your honest convictions about the facts or about the weight or effect of the evidence solely because of the opinion of your fellow jurors or merely to bring an end to deliberations.

Remember at all times that you are not biased, rather you are the judges of the facts and your sole interest is to seek the truth from the evidence in this case.

When you return to the jury room, you should first elect one person to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court.

A verdict form has been prepared for your convenience. Focusing on the questions set

forth in the verdict form will assist you in your deliberations. You must complete and return the verdict form in court when you have reached your decision. You will be asked to answer the questions in the order in which they appear on the form, and each answer must be unanimous. When you have reached unanimous agreement as to your verdict, you will have your foreperson fill in your answers, date and sign the verdict form. Then inform the court security officer or clerk that you have reached a verdict. The verdict form must be used only in connection with the charge I have just given to you. The terms used in the verdict form are discussed in my instructions, and these instructions must govern your deliberations.

I want to caution you now to take your time when completing the verdict form. As you will see when you retire to the jury room, the form consists of several questions. Each question calls for either a "yes" or "no" answer or a monetary amount. Answer each question as it appears and only those questions. As you review the form, you will see that there are instructions printed in *italics print* after each question. Please read these instructions and follow them carefully. Depending on your answer to a particular question, it may not be necessary to answer a later question. The *italicized instructions* will guide you through the verdict form. Finally, be consistent in your responses.

When you go into the jury room to begin your deliberations, you will have exhibits with you but you will not have a transcript of the testimony. If you want any of the testimony read to you, that can be done and will occur in open court. I encourage you to limit the recitation of testimony. It is not easy to locate specific portions of the testimony, and reading the testimony is a time-consuming process, so please be as specific as possible if and when you decide to request a reading of portions of the testimony.

Requests that testimony be read back, as well as any other communication with the court, should be made in writing, signed by your foreperson, and given to the clerk or a marshal. I will respond to your request as promptly as possible either in writing or by having you return to the courtroom so that I can address you orally.

I also must warn you that in your communications with the court you should never reveal your numerical division at any time.

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdict should be. The verdict is your exclusive duty and responsibility.

Thank you for your attention.