

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

---

SHEILA WHITE, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 99-2733  
 )  
 THE BURLINGTON NORTHERN AND )  
 SANTA FE RAILWAY COMPANY, )  
 )  
 Defendant. )

---

JURY INSTRUCTIONS

---

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the

instructions as a whole and regard each in the light of all the others.

Now let me outline for you the parts of the charge so that you can follow it more easily. First, I will instruct you as to the burden of proof and upon which party the law places that burden in the case, and I will give you some rules to help you as you consider the evidence. Second, I will outline for you the contentions and theories of the parties. Third, I will outline for you the law to apply in determining the legal issues with respect to discrimination and retaliation. Fourth, I will instruct you on the law with respect to damages. Finally, I will explain to you about the form of your verdict.

## I. GENERAL INSTRUCTIONS

Corporate Defendant:  
All Persons Equal Before the Law

In this case, the defendant, The Burlington Northern and Santa Fe Railway Company, is a corporation. The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

While The Burlington Northern and Santa Fe Railway Company ("Burlington Northern") is the defendant in this case, that does not mean that only the actions of as one body can be considered by you in determining its liability in this case. A corporation acts not only through the policies and decisions that it makes, but also through its designated supervisory employees, such as its roadmasters, and others designated by Burlington Northern to act on its behalf.

Pay close attention to the remainder of these instructions. As you apply subsequent portions of these instructions, you will have to determine whether or not individual Burlington Northern employees were authorized to act on behalf of The Burlington Northern and Santa Fe Railway Company.

Burden of Proof and  
Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When, as in this case, the defendant denies the material allegations of the Plaintiff's claim, the law places upon the Plaintiff the burden of supporting and making out her claim upon every essential element of her claim by the greater weight or preponderance of the evidence.

Preponderance of the evidence - - means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue - in this case, the Plaintiff - must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

Weighing the Evidence (2-12)

You members of the jury are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you, and to give the testimony of the witnesses the weight, faith, credit and value to which you think it is entitled.

You will note the manner and demeanor of witnesses while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. An act or omission is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

These are the rules that should guide you, along with your common judgment, your common experience and your common observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case. If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which ones of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect of a discrepancy, always consider whether it pertains to a matter

of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the Plaintiff, upon whom the burden of proof has been cast in accordance with these instructions.



## Direct and Circumstantial Evidence

There are two kinds of evidence -- direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

## Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

## Expert Testimony

You have heard the testimony of Dr. D. Annice Golden, psychologist, who is an expert witness. An expert is allowed to express her opinion on those matters about which she has special knowledge and training. In weighing the expert's testimony, you may consider the expert's qualifications, her opinions, her reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness' testimony merely because she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Deposition Testimony

Certain testimony has been read into evidence from the depositions of Eddie Spears and Dr. Ashok Roa. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

Totality of the Evidence (2-A)

The jury may consider all evidence admitted in the case. Testimony and documents which the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. For example, matters and things which a decisionmaker is told may be considered for the purpose of explaining the basis upon which that person acted or made a decision. This, of course, is all for you, the jury, to decide.

## II. THEORIES AND CONTENTIONS IN THIS CASE

### Stipulated Facts

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the Plaintiff and Defendant entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without either party presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

Facts stipulated to by the parties in this case include the following:

1. Defendant hired Plaintiff on June 23, 1997.
2. Plaintiff was interviewed by Ms. Cathy McGee, Human Resources Director, 547 West Jackson Blvd., Ste. 1509, Chicago, Illinois, 60661.
3. Plaintiff's was hired as a maintenance of way track laborer at \$14.76 per hour.
4. Plaintiff was a maintenance of way track laborer at all time during her employment for the same rate of pay.

5. Plaintiff complained to Defendant about sexual discrimination and sexual harassment on September 16, 1997.
6. Bill Joiner was suspended without pay for ten days and required to attend EEO training.
7. Plaintiff filed a charge of discrimination with the EEOC on October 10, 1997.
8. Plaintiff filed a second charge of discrimination with the EEOC on December 4, 1997.
9. On December 8, 1997, the U.S. Equal Employment Opportunity Commission mailed a Notice of Charge of Discrimination along with the Charge of Discrimination to Mr. Marvin Brown, Roadmaster, Burlington Northern Railroad, 5280 East Shelby Drive, Memphis, Tennessee, 38118.
10. Defendant removed Plaintiff from service on December 11, 1997.
11. Defendant's stated reason for removing Plaintiff was insubordination.
12. Plaintiff did not receive pay while she was on suspension.
13. Plaintiff filed a third charge of discrimination and retaliation on December 15, 1997.
14. Plaintiff was reinstated to her position on or about January 16, 1998, and was given all back

pay, including all overtime pay she might have received.

15. Plaintiff went on medical leave on February 17, 1998.
16. The parties agree to stipulate to the authenticity of all documents provided in the discovery process [but reserve all other objections for trial].
17. From June 23, 1997 through September 30, 1997, Bill Joiner was foreman of Track Gang #321 and the following individuals were members of Track Gang #321:

<u>EMPLOYEE</u>	<u>GENDER</u>	<u>DATE OF HIRE</u>
Eddie J. Ousley	Male	04/28/72
Darryl L. Knight	Male	06/23/97
Sheila D. White	Female	06/23/97
Gary W. Augustus	Male	07/29/97
Reginald Mosley	Male	07/29/97
Gregory Nelson	Male	07/29/97

18. Marvin Brown and Mr. Spears had many occasions to interact.



## Theories of the Parties

This is a case about alleged discrimination and retaliation in employment. In this case, Plaintiff Sheila White alleges that she was subjected to a hostile work environment because of her sex/gender and, that the defendant retaliated against her after she complained to management about the discrimination and filed complaints with the Equal Employment Opportunity Commission ("EEOC"), in violation of Title VII.

Defendant Burlington Northern denies Plaintiff's allegation that she was subjected to a hostile work environment and asserts that her job duties were changed for a legitimate non-discriminatory reason not in retaliation.

## Plaintiff's Contentions

It is the plaintiff's contention that when she began her employment with the defendant on June 23, 1997, she worked at the Tennessee Yard under Roadmaster Marvin Brown. Plaintiff's job title upon her hiring by Burlington Northern was that of track laborer. Plaintiff contends, however, that she did not perform the duties of track laborer until she complained about sex/gender discrimination and harassment. Instead, plaintiff contends that she was initially assigned by Roadmaster Marvin Brown to operate a forklift and clean up around the material complex - she had gained experience on forklift operation during her employment with Schering Plough.

From June 23, 1997 to October 9, 1997, the plaintiff worked under the supervision of Bill Joiner. Plaintiff contends that Bill Joiner held the belief that women should not work on the railroad. Plaintiff further contends that Mr. Joiner treated her differently because she was a women, including denying her overtime. Plaintiff contends that Joiner made lewd comments and acted inappropriately toward her and that other male employees stated to plaintiff that women should not work at the rail yard. It is the plaintiff's contention that at the railroad there existed a heavy anti-women animus.

Plaintiff complained to the defendant about sexual discrimination and sexual harassment on September 16, 1997. An investigation of plaintiff's complaint was conducted by the defendant on September 22-23, 1997. Defendant Burlington Northern found that Bill Joiner had behaved inappropriately and subsequently suspended Mr. Joiner for ten days without pay. The defendant also required Mr. Joiner to attend EEO training. It is the plaintiff's contentions that on September 26, 1997, Roadmaster Brown removed her from the forklift position in retaliation for complaining about discrimination.

Plaintiff continued to work under Bill Joiner until October 9, 1997, when Mr. Joiner was transferred to Marion, Arkansas. Plaintiff filed her first charge of sex/gender discrimination and retaliation with the EEOC on October 10, 1997. Percy Sharkey then became plaintiff's foreman. On December 4, 1997, plaintiff filed a second charge of discrimination with the EEOC alleging sex/gender discrimination and retaliation. Plaintiff contends that on December 11, 1997, while working in Blytheville, Arkansas under foreman Percy Sharkey, she was suspended for insubordination. Plaintiff further contends that on December 11, 1997, Roadmaster Marvin Brown made the decision to suspend her without pay. Plaintiff filed a third charge of discrimination and retaliation with the EEOC on December 15, 1997.

Plaintiff contends that a hearing was held pursuant to the Collective Bargaining Agreement and that she was found not to have been insubordinate and was reinstated to her position on or about January 16, 1998. Plaintiff was paid back pay that she lost as a result of her suspension. Plaintiff contends that she continued to work under Percy Sharkey until February 17, 1998 when she was placed on medical leave by D. Annice Golden, Ph.D., her psychologist, due to depression caused by the actions of the defendant.

## Defendant's Contentions

It is the defendant's contention that the plaintiff began working for Burlington Northern as a maintenance of way track laborer on June 23, 1997. That on October 10, 1997, the plaintiff filed her first charge of discrimination against Burlington Northern with the EEOC. The defendant contends that in her first charge of discrimination, the plaintiff alleged that she had been sexually harassed by her foremen, Bill Joiner, and that her position in the maintenance of way department had been changed from the position of forklift operator to another position in the maintenance of way department and that she remained under the supervision of Mr. Joiner. That, according to the plaintiff's own deposition, Burlington Northern promptly and appropriately responded to the plaintiff's complaints about Mr. Joiner by suspending him for ten days without pay and by requiring Mr. Joiner to attend EEO training as directed by Burlington Northern Human Resources Department. Defendant contends that plaintiff remained a trackman, was not given a reduction in pay, and was only given a different job duty within the position of track laborer. Defendant further contends that the plaintiff admitted that she had no more problems with Mr. Joiner after he returned from his suspension and that Mr. Joiner was transferred to a different gang in another city just a few days after he came back from his suspension.

Defendant contends that the plaintiff has only two direct comments that were made to her by her male co-workers or supervisors while she was actively employed by Burlington Northern that were improper and that the comments made concerning the general feeling about women on the railroad were not made directly to her. Defendant contends that plaintiff is unable to establish the elements of her hostile work environment claim.

Plaintiff's second charge of discrimination alleged that (1) she was subjected to discrimination because there were no female restroom facilities for the maintenance of way department at the Tennessee Yard in Memphis; (2) the roadmaster required plaintiff to seek approval from him personally before she could take a day off and checked up on her attendance on a daily basis; and (3) the plaintiff was involuntarily selected for a job assignment in Blytheville, Arkansas, over less senior employees. The foregoing EEOC charge was filed by the plaintiff on December 4, 1997, and the plaintiff was suspended for insubordination on December 11, 1997.

Defendant contends that it made accommodations to the maintenance of way restroom facilities at the Tennessee Yard in Memphis; however, because the plaintiff was suspended on December 11, 1997, and plaintiff never returned to work in the Tennessee Yard, plaintiff did not know what accommodations had been made to

the restroom facilities. Moreover, defendant contends that plaintiff admitted that her entire track gang was sent to Blytheville, Arkansas, and that under the Collective Bargaining Agreement, Blythville, Arkansas was part of her territory. Finally, defendant contends that plaintiff's absenteeism for the short duration she was actively employed at Burlington Northern gave the roadmaster, Marvin Brown, cause for concern such that he monitored plaintiff's attendance. It is the defendant's contention that Mr. Brown monitored all employees with the absenteeism problems similar to the plaintiff in the same fashion.

Plaintiff's third charge of discrimination, filed December 15, 1997, claimed that Burlington Northern's action in suspending plaintiff for insubordination was really in retaliation for the two previous charges that plaintiff had filed against defendant. Defendant contends, however, that the record reflects that plaintiff's foreman at the time, Percy Sharkey, felt that plaintiff was being insubordinate for failing to follow instructions. Defendant further contends that Mr. Sharkey, who no longer works for Burlington Northern, testified in his deposition that he felt plaintiff was being insubordinate, notwithstanding the fact that in the union investigation it was ultimately found that plaintiff should not have been suspended. Defendant contends that in any event, plaintiff was returned to

her position with all back pay, including any overtime she would have received.



### III. GENERAL INSTRUCTIONS ON THE APPLICABLE LAW

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If any lawyer has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty. However, it is your duty, and yours alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice or sympathy, either one way or the other.

In the complaint, the Plaintiff alleges that she was subjected to a hostile work environment based on sex/gender discrimination by Defendant Burlington Northern and that after she opposed this discrimination, she was retaliated against by the defendant, in violation of Title VII.

Title VII - Language

The language of Title VII that is applicable to Plaintiff's discrimination claims provides:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....

42 U.S.C. § 2000e-2(a)(1).

## Title VII - Policy

The policy of Title VII is to provide a work environment free from discrimination based on sex, race, color, national origin, or religion. Under Title VII, it is illegal to discriminate against an employee because of the employee's gender.

An employee is not entitled to a friendly, congenial, or pleasant work place. Title VII does not create a general civility code. In other words, Title VII does not create a federal remedy for all offensive language and conduct in the workplace, nor does it require refinement or sophistication, or a happy workplace. Title VII only guarantees a workplace free of unlawful discrimination.

I will now discuss Plaintiff's cause of action under Title VII.

#### IV. TITLE VII - THE LAW

##### Hostile Work Environment

In order for the plaintiff to recover on her hostile work environment claim based on sex/gender discrimination, the plaintiff must prove the following elements by a preponderance of the evidence:

19. That the plaintiff was a member of a protected class;
20. That the plaintiff was subjected to unwelcome harassment;
21. That the harassment was based on the plaintiff's gender;
22. That the harassment created a hostile work environment; and
23. That the defendant is liable.

In determining whether or not the plaintiff was subjected to a hostile work environment based on her sex/gender, you, the jury, must decide if the conduct of the defendant was severe or pervasive enough to create an environment that a reasonable person would find hostile.

Harassment is unwelcome and hostile if, considering all the evidence, it is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and to create an abusive work environment, or unreasonably interfere with the plaintiff's work performance.

The more severe the conduct, the less pervasive it must be for you to find that it is hostile. In determining whether conduct is hostile, you may consider whether:

1. The conduct was verbal, physical, or both;
2. The conduct occurred one time or repeatedly;
3. The conduct was plainly offensive;
4. That Bill Joiner was the plaintiff's supervisor;
5. That others joined in the harassment; and
6. That the harassment was directed at more than one person.

In evaluating plaintiff's hostile work environment based on sex/gender discrimination, you may also consider the following factors:

1. The total physical environment of the plaintiff's work area;
2. The degree and type of behavior that filled the environment of the workplace, both before and after plaintiff arrived;
3. The reasonable expectations of the plaintiff upon entering the environment;
4. The nature of the unwelcome acts or words;
5. The frequency of the offensive encounters;
6. The severity of the conduct;
7. The context in which the sex/gender discrimination occurred;
8. Whether the conduct was unwelcome;
9. The effect on the plaintiff's psychological well-being;
10. Whether the conduct was physically threatening;
11. Whether the conduct was merely an offensive utterance; and
12. Whether it unreasonably interfered with the plaintiff's work performance.

In determining whether a hostile work environment existed, you must also consider the evidence from the perspective of a reasonable person in the position of the plaintiff. This is an objective standard, and you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person. Rather, you must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would alter the conditions of employment and create a hostile or offensive working environment or unreasonably interfere with a person's performance of her job duties.

## Employer Liability

Finally, to establish her claim of a hostile work environment based on sex/gender discrimination, the plaintiff must prove, by a preponderance of the evidence, that the defendant employer, Burlington Northern, is liable. The appropriate standard in determining employer liability where a supervisor is involved is that it is not enough for an employer to take corrective action; employers have an affirmative duty to prevent discrimination by supervisors.

Based upon the evidence presented in this case, Bill Joiner was a supervisor. [This issue has been resolved and you do not need to further address this issue.]



## Vicarious Liability (P-3)

You must determine whether the defendant is liable for the actions of Bill Joiner under plaintiff's hostile work environment theory. Whether the defendant is liable may depend on whether a tangible employment action was, in fact, taken against plaintiff.

A "tangible employment action" is a significant change in the employment relationship, such as firing, denial of a raise, bonus, promotion, overtime pay, or holiday pay, demotion, undesirable reassignment, substantial changes in the work schedule, or a decision causing a significant change in benefits.

Accordingly, if you find that plaintiff suffered a tangible employment action, defendant is automatically liable for discrimination under Title VII.

If you find that no tangible employment action was, in fact, taken against plaintiff by her supervisor, and you find that plaintiff was subjected to discrimination because of her sex/gender and the discrimination was severe or pervasive, defendant will be liable for the discrimination unless the defendant proves by a preponderance of the evidence that:

1. The defendant exercised reasonable care to prevent and correct promptly any discriminating behavior;  
and
2. The plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the defendant or to otherwise avoid harm.

Factors in determining whether an employer has exercised reasonable care to prevent discrimination include:

1. Whether defendant has disseminated a meaningful and effective policy on discrimination;
2. Whether defendant's management made meaningful and effective efforts to monitor the conduct of its supervisors;

3. Whether the anti-discriminatory policy includes a credible assurance that the discriminating supervisors can be bypassed in registering complaints; and
4. Whether employees have been trained regarding their rights and responsibilities under the anti-discrimination policy.

Factors to consider in determining whether the plaintiff failed to take advantage of their anti-discrimination policy include:

1. Whether the plaintiff actually knew of the anti-harassment policy and how to invoke its procedures;
2. Whether the plaintiff had cause to believe that she would not be retaliated against if she invoked those procedures; and
3. Whether the plaintiff had reason to believe that invoking the policy would be effective in changing the discriminatory conduct.

In determining whether the defendant took prompt and effective corrective action, you may consider the procedures undertaken by the defendant to investigate plaintiff's allegations and whether the corrective procedures were reasonably designed to correct and put an end to any discriminating behavior. In other words, you must determine if the corrective action taken by the Defendant (the ten day suspension without pay and EEO training) were (1) prompt and (2) reasonably adequate to correct and end any discriminating behavior.

In determining the adequacy of the investigation, you may consider whether the defendant consulted the obvious sources - those individuals involved in the events. You may also consider whether the investigation resulted in a reasonable and thorough inquiry of the events.

Retaliation

As to plaintiff's second cause of action, her retaliation claim, the language of Title VII that is applicable provides:

It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [Title VII].

42 U.S.C. § 2000e-3(a).

The defendant does not need to prove that it acted lawfully or, specifically, that its actions with respect to the plaintiff were not motivated by unlawful retaliation. Instead, the plaintiff at all times has the burden of proving by a preponderance of the evidence that the defendant subjected her to an adverse employment action in retaliation for her protected activity.

The fact that the plaintiff has alleged that the defendant retaliated against her for allegedly making an internal complaint of alleged sex/gender discrimination and/or for filing a formal charge of sex/gender discrimination with the Equal Employment Opportunity Commission, is not enough to hold the defendant liable under Title VII. The mere fact that an adverse employment actions may have occurred after the plaintiff complained of alleged sexual harassment or filed an EEOC charge likewise is not enough, by itself, to establish a claim of unlawful retaliation under Title VII.

In order to recover on her retaliation claim against the defendant, the plaintiff must prove that the defendant intentionally discriminated against her for engaging in protected activity under Title VII. That is, the plaintiff must establish that she was subjected to an adverse employment action by the

defendant because of her alleged internal complaint about alleged discrimination and/or her filing a formal charge of discrimination with the EEOC.

To determine whether the plaintiff has met her burden, you should analyze the proof in the following manner. First, you must decide whether the plaintiff has proven, by a preponderance of the evidence, all the elements of unlawful retaliation. If you find that she has done so, then you must determine if the defendant has articulated a legitimate, non-retaliatory reason for its actions with respect to the plaintiff. Finally, if you find that the defendant has stated such reason, then you must determine if the plaintiff has proven that the reason given by the defendant is a pretext and that the defendant in fact was motivated by unlawful retaliation.

Remember, at all times, that the ultimate question in a retaliation claim is whether or not the defendant took an adverse employment action against the plaintiff because she engaged in a protected activity. Because the defendant in this case is a company, you should bear in mind that it acts only through its employees and agents. Therefore, in considering the actions of The Burlington Northern and Santa Fe Railway Company, you must consider the actions of those authorized to speak and act for it,

such as the roadmaster, foremen, and others placed in positions of authority by Burlington Northern.



To establish her case of unlawful retaliation, the plaintiff must prove, by a preponderance of the evidence, each one of the following elements:

1. That the plaintiff engaged in protected activity by making an oral or written complaint or complaints of discrimination to persons of authority within the company and/or by filing an EEOC charge;
2. That the defendant had knowledge of the plaintiff's protected activity;
3. That thereafter, the plaintiff suffered an adverse employment action; and
4. That there was a causal connection between the plaintiff's protected activity and the adverse employment actions.

I will now discuss the third and fourth element in more detail. The plaintiff must, of course, prove each of the elements by a preponderance of the evidence in the case.

To establish the third element of her retaliation claim - the existence of an adverse employment action - the plaintiff must show that she suffered a materially adverse change in the terms or conditions of employment because of the employer's actions.

In determining whether the plaintiff suffered a materially adverse change in the terms or conditions of her employment, you may consider the following:

1. Termination of employment;
2. Demotion evidenced by a decrease in wage or salary;
3. Less distinguished title;
4. Material loss of benefits;
5. Significantly diminished material responsibilities; or
6. Other indications that might be unique to a particular situation.

To establish the fourth element of her retaliation claim - that there was a causal connection between the plaintiff's protected activity and any adverse employment actions - the plaintiff must establish that her protected activity was a significant factor in the adverse employment action taken against her, but the plaintiff does not have to establish that it was the only reason. The mere fact that any adverse employment action may have occurred after the plaintiff engaged in protected activity is not sufficient, by itself, to establish that the protected activity was a significant factor in the adverse employment action.

If you find that the plaintiff has failed to prove any one of the four elements of retaliation set out in these instructions, then you must find for the defendant. If you find that the plaintiff has proven each of the four elements by a preponderance of the evidence, then you must decide whether the defendant has given a non-retaliatory reason for the treatment of the plaintiff.

The defendant can satisfy this requirement if it articulates a reason for its actions which does not violate Title VII. The defendant does not have the burden of proving that this was the reason for its actions or that its actions were motivated by an absence of unlawful retaliation. The burden of proving that the

adverse employment action was in retaliation for the plaintiff's alleged internal complaint or formal charge discrimination remains at all times on the plaintiff.

If you find that the defendant has articulated - that is, explained or otherwise produced evidence of - a non-retaliatory reason for its adverse employment action against the plaintiff, then you must decide if the plaintiff has proven, by a preponderance of the evidence, that the non-retaliatory reason given by the defendant was merely a pretext for the real reason for the adverse employment action, which was unlawful retaliation.

The plaintiff may establish pretext by proving, by a preponderance of the evidence, that the reason given by the defendant for its actions either:

1. Has no basis in fact; or
2. Was not the actual reason for its actions; or
3. Is insufficient to explain the adverse action against the plaintiff.

Unless you find by a preponderance of the evidence that the defendant's stated reason for its actions was a pretext, and that the plaintiff actually suffered an adverse employment action in retaliation for her alleged internal complaint about discrimination based on sex/gender or her filing of an EEOC charge, then you must find for the defendant.

In determining whether the reason given by the defendant for the adverse employment action is a pretext, the principal consideration is not whether that reason, in fact, is true or not true. Rather, the principal consideration is whether the defendant genuinely believed that the reason was true at the time it made the decision to take the adverse employment action against the plaintiff. A non-retaliatory reason for taking the adverse employment action against an employee, if genuinely believed by the defendant, is not a "pretext" even if it ultimately is proven to be false, mistaken or poorly founded.

## Inferring Required Mental State

Next, I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

An entity's state of mind may be inferred from the actions of its authorized designated supervisory personnel.

In summary, to prove her claim for retaliation, plaintiff must prove by a preponderance of the evidence that defendant took action against her for engaging in protected activity by making an oral or written complaint or complaints of sex/gender discrimination to persons of authority within the company and/or by filing an EEOC charge. Plaintiff does not have to prove that retaliation was defendant's only motive, but she must prove that defendant intentionally acted at least in part to retaliate. To determine that question, you should analyze the proof in the following manner:

If you find that plaintiff has proven that there was retaliation, then you must decide whether defendant has given a non-retaliatory explanation for its treatment of the plaintiff.

If you find the defendant has given such an explanation, then you must decide whether plaintiff has proven by a preponderance of the evidence that the reasons given by defendant were not the true reasons for its actions, that is, that they were excuses for retaliation.



## Business Judgment

The law allows an employer, such as The Burlington Northern and Santa Fe Railway Company, broad discretion in the implementation of its legitimate business objectives, including the supervision and management of its employees and their assignments and discipline. Conversely, an employer may not take action against an employee, in whole or in part, for a discriminatory reason. Therefore, an employer, acting through its agents and supervisory employees, may not retaliate against an employee because the employee has engaged in protected activity.

If you find that the defendant's actions with respect to the plaintiff in this case were not motivated by the plaintiff's internal complaint about sex/gender discrimination or the filing of a an EEOC charge of discrimination, then you must render a verdict for the defendant, even though you might feel that the defendant's actions were unreasonable, arbitrary, or unfair. It is not your role, as jurors, to determine the reasonableness or fairness of the defendant's employment decisions, to second-guess the defendant's business judgment, or to substitute your judgment for the defendant's as to the appropriate course of action in dealing with the plaintiff. You are, of course, as previously discussed, to determine whether the defendant acted in

retaliation for the plaintiff's making an internal complaint or filing an EEOC charge. Your sole responsibility is to determine the legality of the defendant's actions in accordance with these instructions.

## V. DAMAGES

In this case, if you find for the defendant on Question No. 1 and/or Question No. 2 of Verdict Form as plaintiff's claim of hostile work environment and retaliation, you will not be concerned with the question of damages on the Verdict Form. But if you find in favor of the plaintiff on her claim of hostile work environment and/or retaliation, you will, of course, be concerned with the question of damages. It is my duty to instruct you as to the proper measure of damages to be applied in that circumstance.

The fact that I instruct you as to the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions I have given you.

## Damages

I will now give you instructions on how to calculate damages if you answer "Yes" to Question No. 1 and/or Question No. 2 on the Verdict Form. Again, the fact that I give these instructions does not mean that I think you should award any damages -- that is entirely for you to decide.

For each claim on which defendant is liable, plaintiff is entitled to recover an amount which will reasonably compensate her for the loss and damage she has suffered as a result of defendant's unlawful conduct. Conduct by defendant that does not cause harm does not entitle plaintiff to damages. By the same token, harm to the plaintiff which is not the result of unlawful conduct by defendant does not entitle plaintiff to damages.

## Proximate cause

In order to recover damages for any injury, plaintiff must prove that the defendant's acts were a proximate cause of the harm sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the acts or omissions of defendant and any injury sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of defendant's acts or omissions, it was proximately caused by such act or omission. In other words, if defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

A proximate cause need not always be the nearest cause either in time or space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more persons may operate at the same time, either independently or together, to cause an injury.

If you find that the defendant is liable for hostile work environment and/or retaliation, you may award plaintiff reasonable compensation for the following:

- expenses for psychological treatment; and
- worry, distress, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, humiliation, and embarrassment or shame.

Remember, however, that you may not award duplicate (or double) damages for the same injury. For example, if you find for plaintiff on her hostile work environment claim and her retaliation claim, you may not count twice plaintiff's damages. In other words, if the only damages for hostile work environment are the same damages that you would also award for retaliation and you cannot separate the two sets of damages, plaintiff can only recover once for those damages against the defendant. That is, you must subtract any damages for retaliation from damages already awarded for hostile work environment based on sex/gender discrimination.

## Verdict

Your verdict, if any, on damages for plaintiff's claim of hostile work environment and/or retaliation under these instructions should be recorded on the Verdict Form as to the defendant.

You may not award damages based simply on speculation or guesswork. Any award must fairly compensate plaintiff for her injury but must have a basis in the evidence and be reasonable in the light of that evidence.

## Compensatory Damages

If you should find that the defendant is liable for a hostile working environment and/or for retaliating against the plaintiff for engaging in a protected activity, then you must determine an amount that is fair compensation for plaintiff's damages. You may award compensatory damages only for injuries that the plaintiff proves were proximately caused by defendant's unlawful conduct. The damages, if any, that you award must be fair compensation, no more and no less.

You may award plaintiff for expenses for psychological treatment if you find that these expenses were incurred by the plaintiff and were proximately caused by any unlawful conduct for which you may find the defendant liable.

You may also award compensatory damages for worry, distress, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, humiliation, and embarrassment or shame if you find that these were suffered by the plaintiff and were proximately caused by any unlawful conduct for which you may find the defendant liable. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages.



Any award you make should be fair in light of the evidence presented at trial.

In determining the amount of damages that you may decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, bias, speculation, or guess work. On the other hand, the law does not require that the plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

In addition, the amount of damages claimed in the argument of either counsel must not be considered by you as evidence of reasonable compensation.

## Emotional Distress

Emotional distress is mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry.

With regard to the element of compensatory damages which compensates for physical pain and mental anguish, you are instructed that it is not necessary that evidence of the value of such intangible emotions be introduced by the plaintiff in order for her to recover for such damages. In that respect, it is not value you are trying to determine, but an amount that will fairly compensate plaintiff for the physical pain and mental anguish she suffered. There is no exact standard for fixing the compensation to be awarded for such elements of damage. Rather, any such award should be fair and just in light of the evidence presented.

### Pre-existing condition or disability

A person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, she is entitled to recover damages for any aggravation of such pre-existing condition or disability proximately resulting from the injury.

This is true even if the person's condition or disability made her more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person would not have suffered any substantial injury.

Where a pre-existing condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury or harm caused by the aggravation. However, if the pre-existing condition caused no harm or disability before the conduct complained of, the defendant is responsible for all the harm or disability caused by that conduct even though it is greater because of the pre-existing condition than it might otherwise have been.

Overtime Pay (P-1)

If you find that the defendant is liable for a hostile working environment, then you may also award the plaintiff overtime pay. An award of overtime pay should make the plaintiff whole, that is, to place her in a position she would have been in but for discrimination. An award of overtime pay should completely redress the economic injury plaintiff has suffered as a result of the discrimination.

An overtime award should not be reduced by the amount of income and social security taxes which would have been deducted from the wages the plaintiff would have received but for discrimination. Any unemployment benefits received also should not be deducted from an award of overtime.

Overtime pay should be awarded even where the precise amount of the award cannot be determined. An ambiguity in what the plaintiff would have received but for discrimination should be resolved against the discriminating employer.

## Punitive Damages

Plaintiff has asked that you make an award of punitive damages, but this award may be made only under the following circumstances. You may consider an award of punitive damages only if you find that the plaintiff has suffered actual damage as a legal result of the defendant's fault.

The purpose of punitive damages is not to further compensation the plaintiff but to punish a wrongdoer and deter others from committing similar wrongs in the future. Punitive damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

## Clear and Convincing

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusion drawn from the evidence.

Intentionally, Recklessly,  
Maliciously and Fraudulently

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial and unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under all the circumstances.

A person acts maliciously when the person is motivated by ill will, hatred or personal spite.

A person acts fraudulently when: (1) the person intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon that representation.

Again, if you decide to award punitive damages, you will not assess an amount of punitive damages at this time. You will report your finding to the court.



If you award damages to the plaintiff, you may also consider that the plaintiff will be taxed on any award that you may make.

Verdict Form

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form which reflects your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a foreperson after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your foreperson will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgments. Each of you must decide the case for yourself, but do so only after an impartial

consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may not have seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all eight of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

---

SHEILA WHITE, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 99-2733  
 )  
 THE BURLINGTON NORTHERN AND )  
 SANTA FE RAILWAY COMPANY, )  
 )  
 Defendant. )

---

V E R D I C T

---

1. Has plaintiff Sheila White proved by a preponderance of the evidence that she was subjected to a hostile work environment based on her sex/gender?

YES \_\_\_\_\_ NO \_\_\_\_\_

2. Has plaintiff Sheila White proved by a preponderance of the evidence that defendant The Burlington Northern and Santa Fe Railway Company retaliated against her for reporting of unlawful sex/gender discrimination or her filing of a charge of discrimination with the Equal Employment Opportunity Commission?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 1 **and/or** Question No. 2 is "YES", then proceed to the following questions on damages. If your answer to both Question No. 1 and Question NO. 2 is "NO", the Foreperson should sign the verdict form and you should not answer any more questions.

Answer these questions only if Question No. 1 and/or Question No. 2 was answered "YES".

3. Has plaintiff Sheila White proven by a preponderance of the evidence that she is entitled to overtime pay?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 3 is "YES", then under the laws as given to you in these instructions, state the amount of overtime pay that the plaintiff should be awarded from the defendant.

AMOUNT: \$ \_\_\_\_\_

4. Has plaintiff Sheila White proven by a preponderance of the evidence that she suffered compensatory damages, such as medical expenses, or expenses for psychological treatment, which were proximately caused by the unlawful conduct for which you have found defendant The

Burlington Northern and Santa Fe Railway Company  
liable?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 4 is "YES", then under the laws as given to you in these instructions, state the amount of compensatory damages that the plaintiff should be awarded from the defendant.

AMOUNT \$\_\_\_\_\_

5. Has plaintiff proved by a preponderance of the evidence that she suffered compensatory damages, such as emotional pain and suffering, including anguish, distress, fear, humiliation, shame or worry, which were proximately caused by the actions of defendant The Burlington Northern and Santa Fe Railway Company?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to Question No. 5 is "YES", then under the laws as given to you in these instructions, state the amount of compensatory damages that the plaintiff should be awarded from the defendant.

AMOUNT: \$ \_\_\_\_\_

6. Has the Plaintiff shown by clear and convincing evidence that the Defendant The Burlington Northern and Santa Fe Railway Company's actions as to the plaintiff's claim of hostile work environment were intentional, reckless, malicious, or fraudulent?

YES \_\_\_\_\_ NO \_\_\_\_\_

7. Has the Plaintiff shown by clear and convincing evidence that the Defendant The Burlington Northern and Santa Fe Railway Company's actions as to the plaintiff's claim of retaliation were intentional, reckless, malicious, or fraudulent?

YES \_\_\_\_\_ NO \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

\_\_\_\_\_  
DATE

INDEX  
CIVIL CHARGE BOOK  
[Jury Instructions]

99-2733

White v. Burlington Northern

1. General Instruction
  - (a) Corporate Defendant/All Persons Equal Before the Law
  - (b) Burden of Proof and Consideration of the Evidence
  - (c) Weighing the Evidence
  - (d) Direct and Circumstantial Evidence
  - (e) Statements of Counsel
  - (f) Totality of the Evidence
  
2. Theories and Contentions in this Case
  - (a) Stipulated Facts
  - (b) Theories of the Parties
  - (c) Plaintiff's Contentions
  - (d) Defendant's Contentions
  
3. General Instructions on the Applicable Law
  - (a) Title VII - Language
  - (b) Title VII - Policy
  
4. Title VII - The Law
  - (a) Hostile Work Environment
  - (b) Retaliation
  
5. Damages
  - (a) Punitive Damages
  - (b) Intentionally, Recklessly, Maliciously, Fraudulently - Defined
  - (c) Clear and Convincing
  
6. Verdict Form