

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

---

SHERRYE N. WHEELER, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 00-2616  
 )  
 MEMPHIS/SHELBY COUNTY )  
 HEALTH DEPARTMENT, )  
 )  
 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 theories of the parties. Third, I will outline for you the law to apply in determining the legal issues with respect to liability. Fourth, I will instruct you on the law with respect to damages. Finally, I will explain to you about the form of your verdict.

Governmental Entity Defendant  
All Persons Equal Before the Law

The defendant, Memphis/Shelby County Health Department, is a governmental entity. The fact that a governmental entity is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between governmental entities 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 governmental entity is entitled to the same fair trial at your hands as a private individual. All persons, including governmental entities and other organizations, and individuals stand equal before the law, and are to be dealt with as equals in a court of justice.

While the Memphis/Shelby County Health Department ("Health Department") is the defendant in this case, that does not mean that only the actions of the Health Department as one body can be considered by you in determining its liability in this case. The Health Department acts not only through the policies and decisions that it makes, but also through its designated supervisory employees and others designated by the Health Department 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 Health Department employees were authorized to act on behalf of the Memphis/Shelby County Health Department.

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 claims, the law places upon the plaintiff the burden of supporting and making out her claims upon every material issue in controversy 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 must fail.

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

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.

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.

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 that party 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.



If either party has failed to call a witness, you must ask yourself if the witness was equally available to the other party. Neither party is required to call witnesses who are equally available to the other party.

You must decide this case based on the record presented in the courtroom (i.e., the testimony, exhibits, and stipulations placed in evidence) and must not speculate about witnesses or documents that were not presented in the courtroom.

## Stipulations of the EEOC Charge

The parties have stipulated that a right to sue letter was issued to the plaintiff by the EEOC. A right to sue letter is a formal requirement in order for a lawsuit to be filed and does not indicate any determination by the EEOC as to the claim.

## Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel or the pro se litigant while acting as counsel 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.

During the course of a trial, I occasionally asked questions of a witness, in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

## Stipulated Facts

Before the trial of this case, the parties agreed to the truth of some facts which underlie this action. As a result of this agreement, plaintiff and defendant entered into a stipulation in which they agreed that the stipulated fact 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 are as follows:

1. Plaintiff was employed by defendant from July 16, 1986 until August 5, 1999.

The plaintiff asserts that while employed with the defendant she was subject to a hostile work environment based on her race in violation of Title VII of the Civil Rights Act of 1964. Plaintiff also asserts that the defendant subjected her to adverse employment action in retaliation for making an internal complaint and filing a charge of discrimination with the EEOC also in violation of Title VII. Plaintiff claims that she was constructively discharged from her employment.

The defendant denies the plaintiff was subject to any hostile environment based on race. The defendant denies the plaintiff was retaliated against or that the plaintiff was forced to resign. The defendant exercised reasonable care to prevent and correct promptly any racial harassment resulting in an impermissible hostile environment. The defendant further contends the plaintiff failed to take advantage of any preventive or corrective opportunity and that it acted at all times in good faith in accordance with the Constitution and the law of the United States and the state of Tennessee.

I will now instruct you on the elements of each of the plaintiff's claims.

## The Law

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If any lawyer or party 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.

The plaintiff alleges two separate causes of action you may consider against the defendant -- racial harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964.

## Policy

The policy of Title VII is to provide a work environment free from discrimination based on sex, race, color, national origin, or religion. Pursuant to that policy, employers, when confronted with a report of racial harassment, must take appropriate affirmative actions to investigate, remove the illegal conduct if found, and provide the reporting employee with a work environment in which the discriminatory conduct has been removed.

Although an employee is not entitled to a friendly, congenial, or pleasant work environment, an employee is entitled to a work environment free from illegal discrimination based on race. An employee may not be required to forego desired employment in order to escape racial discrimination or racial harassment or retaliation for reporting such discrimination or harassment. Reporting of alleged racial discrimination or racial harassment is encouraged and protected by Title VII.

I will now discuss plaintiff's racial discrimination cause of action under Title VII.



Racial Harassment

The language of Title VII that is applicable to plaintiff's racial harassment claim provides:

It shall be an unlawful employment practice for an employer-

(1) . . . 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).

In this case, plaintiff alleges a hostile work environment racial harassment claim.

## Hostile Work Environment

With respect to plaintiff's hostile work environment racial harassment claim, defendant Memphis/Shelby County Health Department, the employer, is responsible or liable for plaintiff's claim of racial harassment if plaintiff Sherrye Wheeler proves, by a preponderance of the evidence, each of the following four (4) elements:

1. The plaintiff belongs to a protected class;
2. The plaintiff was subjected to racial harassment, either through words or actions, based on race;
3. The harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an objectively intimidating, hostile, or offensive work environment; and
4. That defendant knew or should have know of the harassment, but failed to implement prompt and appropriate corrective action.

In evaluating plaintiff's hostile work environment racial harassment claim, you may consider the following factors:

1. The total physical environment of the plaintiff's work area;
2. The degree and type of racial language 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 racial words;
5. The frequency of the offensive encounters;
6. The severity of the conduct;
7. The context in which the racial references 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 it was merely an offensive utterance; and
12. Whether it unreasonably interfered with the plaintiff's work performance.

The work environment is racially 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. The actor was the plaintiff's co-worker or supervisor;
5. Others joined in the harassment; and
6. The harassment was directed at more than one person.

In determining whether or not defendant failed to adequately investigate plaintiff's complaint of hostile work environment racial harassment, whether defendant took prompt and effective remedial action, and whether defendant retaliated against plaintiff for engaging in protected activity (that is, reporting racial harassment), you may consider whether or not defendant followed its own policy regarding racial harassment.

However, mere negligence of the employer in investigating or responding to plaintiff's complaints is not enough to make the employer liable. Rather, the employer's response to plaintiff's complaints must indicate an attitude of such indifference as to indicate an attitude of permissiveness that amounts to discrimination.

In determining whether a hostile work environment existed, you must 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.

The fact that a plaintiff is African American does not in itself give rise to an inference that the defendant's conduct is racially motivated or discriminatory.

As to whether management level employees took prompt and appropriate corrective action, an employer is liable for racial harassment only if, after the employer learns of the alleged conduct, it fails to take prompt and corrective remedial action reasonably calculated to end the current harassment. In this respect, an employer acts unreasonably if it either delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring.

If you find that the defendant took prompt and corrective remedial action reasonably calculated to end the harassment, then you must render a verdict for the defendant on plaintiff's claim for hostile work environment racial harassment, even though you might feel that the defendant's actions were not as severe as they could have been or that you would have imposed a more severe disciplinary action.

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 sexual or racial harassment and/or for filing a formal charge of sexual or racial harassment with the Equal Employment Opportunity Commission, is not enough to hold the defendant liable under Title VII. The mere fact that any adverse employment actions may have occurred after the plaintiff complained of alleged sexual or racial 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

sexual or racial harassment and/or her filing a formal charge of sexual or racial harassment 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 established a prima facie case 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 governmental entity, you should bear in mind that it acts only through its employees and agents. Therefore, in considering the actions of the Memphis/Shelby Health Department, you must consider the actions of those authorized to speak and act for it.

To establish a prima facie 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 sexual or racial harassment to persons of authority within the Memphis/Shelby County Health Department 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 fourth element in more detail. The plaintiff must, of course, prove each of the elements by the preponderance of the evidence in the case.

To establish the fourth element of the prima facie case -- 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 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.

If the plaintiff proves each of the four elements of a prima facie case of unlawful retaliation by a preponderance of the evidence, then you must decide whether the defendant has given a non-retaliatory reason for its treatment of the plaintiff (in this case, the treatment of the plaintiff consisted of her 10-day suspension in August, 1999, and her resignation, if you find that her resignation was, in fact, a constructive discharge). 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 of sexual or racial harassment 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 complaints about sexual or racial harassment 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.

A governmental 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 sexual or racial harassment to persons of authority within the Memphis/Shelby County Health Department 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 Memphis/Shelby Health Department, 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 sexual or racial harassment or the filing of a charge of sexual or racial harassment, 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.

Constructive Discharge (88-28B)

Here, the plaintiff claims that she was constructively discharged from her position. To establish a "constructive discharge," a plaintiff must show that the employer deliberately made her working conditions so unbearable that she was forced into an involuntary resignation. "Constructive discharge" does not arise simply because an employee is dissatisfied with assignments, feels that her work has been unfairly criticized or was subjected to unpleasant working conditions. Rather, working conditions must have been so difficult that a reasonable person in the employee's shoes also would have been compelled to resign.

## Damages

In this case, if you find for the defendant on Question No. 1 of Verdict Form "A" on the question of racial harassment and Question No. 1 on Verdict Form "B" on the question of retaliation, you will not be concerned with the question of damages on those verdict forms. But if you find in favor of the plaintiff on the hostile work environment theory of racial harassment (Verdict Form "A") or on the retaliation for protected activity theory (Verdict "B"), 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 those 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 on either theory 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.

Damage Instruction/Racial Harassment Claim

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 racial harassment or retaliation, you may award plaintiff reasonable compensation for the following:

- lost wages; and
- worry, distress, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, humiliation, and embarrassment or shame.

You may not, however, award duplicate (or double) damages for the same injury. For example, if you find for plaintiff on racial harassment, you may not count twice plaintiff's damages nor may you double count (that is count twice) damages under different theories (i.e., racial hostile environment and retaliation claims). In other words, if the only damages for racial harassment 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.

## Verdict

Your verdict, if any, on damages for racial harassment under these instructions should be recorded on Verdict Form "A" as to the defendant. Your verdict, if any, on damages for retaliation under these instructions should be recorded on Verdict Form "B" 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.



Damages - Back Pay

If you find that the plaintiff lost any wages as a result of a racially hostile environment (Verdict Form "A") or retaliation (Verdict Form "B"), then the plaintiff is entitled to recover that pay that she would have received from the defendant from the date of her loss through the date of the trial. This, of course, is for you to decide.

## Compensatory Damages

If you should find that defendant Memphis/Shelby County Health Department is liable to Sherrye Wheeler under either theory of liability, 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. In calculating these compensatory damages, you should not consider any lost wages that the plaintiff lost. The award of lost wages, should you find the defendant liable, will be calculated and determined as previously instructed.

You may 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.

### 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.

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 two verdict forms (Form "A" and Form "B") which reflect your findings. The verdict forms read as follows:

[Read Verdict Forms]

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 forms.

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 have not 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 (8) 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

---

SHERRYE N. WHEELER, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 00-2616-M1/Bre  
 )  
 MEMPHIS/SHELBY COUNTY )  
 HEALTH DEPARTMENT, et al., )  
 )  
 Defendants. )

---

VERDICT FORM "A"  
[VERDICT FORM AS TO PLAINTIFF'S RACIAL HARASSMENT CLAIMS]

---

1. Has plaintiff Sherrye Wheeler proven by a preponderance of the evidence that the defendant Memphis/Shelby County Health Department is liable for hostile work environment racial harassment in violation of Title VII of the Civil Rights Act of 1964?

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

If your answer to Question No. 1 is "YES" then answer Question No. 2. If your answer to Question No. 1 is "NO", the Foreperson should sign and date this verdict, and you should not answer any more questions on this form. In that case, you should go to Verdict Form "B", if you have not already done so.

2. Damages for Hostile Work Environment Racial Harassment

(a) Has plaintiff Sherrye Wheeler proven by a preponderance of the evidence that she suffered lost wages, which were proximately caused by the unlawful conduct for which you have found defendant Memphis/Shelby County Health Department liable?

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

If your answer to Question No. 2(a) is "YES", then under the laws as given to you in these instructions, state the amount of lost wages that the plaintiff should be awarded from the defendant.

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

(b) Has plaintiff Sherrye Wheeler proven by a preponderance of the evidence that she suffered compensatory damages, such as worry, distress, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, humiliation, or embarrassment or shame, which were proximately caused by the unlawful conduct for which you have found defendant Memphis/Shelby County Health Department liable?

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

If your answer to Question No. 2(b) 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: \$ \_\_\_\_\_

\_\_\_\_\_  
FOREPERSON

\_\_\_\_\_  
DATE

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

---

SHERRY N. WHEELER, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 00-2616-M1/Bre  
 )  
 MEMPHIS/SHELBY COUNTY )  
 HEALTH DEPARTMENT, et al., )  
 )  
 Defendants. )

---

VERDICT FORM "B"  
[VERDICT FORM AS TO PLAINTIFF'S RETALIATION CLAIM]

---

1. Has plaintiff Sherrye Wheeler proven by a preponderance of the evidence that the defendant Memphis/Shelby County Health Department retaliated against plaintiff because of her internal complaint of unlawful sexual and racial harassment or her filing of a charge of discrimination with the Equal Employment Opportunity Commission, in violation of Title VII of the Civil Rights Act of 1964?

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

If your answer to Question No. 1 is "YES", then proceed to the following questions. If your answer to Question No. 1 is "NO", the Foreperson should sign and date the verdict, and you should not answer any more questions on this form.

2. Has plaintiff Sherrye Wheeler proven by a preponderance of the evidence that she suffered lost wages, which were proximately caused by the unlawful conduct for which you have found defendant Memphis/Shelby County Health Department liable?

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

If your answer to Question No. 2 is "YES", then under the laws as given to you in these instructions, state the amount of lost wages that the plaintiff should be awarded from the defendant.

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

3. Has plaintiff Sherrye Wheeler proven by a preponderance of the evidence that she suffered compensatory damages, such as worry, distress, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, humiliation, or embarrassment or shame, which were proximately caused by the unlawful conduct for which you have found defendant Memphis/Shelby County Health Department liable?

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

compensatory damages that the plaintiff should be awarded from the defendant.

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

\_\_\_\_\_  
FOREPERSON

\_\_\_\_\_  
DATE

**INDEX** **00-2616**  
**CIVIL CHARGE BOOK** Wheeler v. Mphs/Shelby Cty Hlth Dpt  
**[Jury Instructions]**

1. General Instruction
2. Governmental Agency Defendant (2-8)
3. Individual Employees Authorized to Act on Behalf of Defendant Entity
4. Burden of Proof and Consideration of the Evidence
5. Direct and Circumstantial Evidence
6. Equal Availability of Witnesses
7. Stipulations of the EEOC Charge
8. Statements of Counsel
9. Questioning of a Witness by the Court
10. Stipulated Facts
11. Contentions of the Parties
12. The Law - Racial Harassment Claims
  - a. Policy of Title VII
  - b. Racial Harassment - 42 U.S.C. § 2000e -2(a)(1)
  - c. Hostile Work Environment - Elements
13. Damages - Racial Harassment Claims
  - a. Instruction - Racial Harassment
  - b. Proximate Cause
  - c. Verdict
  - d. Back Pay
  - e. Compensatory Damages
  - f. Pre-existing Condition or Disability
14. The Law - Retaliation Claim
  - a. Title VII - Retaliation - 42 U.S.C. § 2000e-3(a)
  - b. Prima Facie Case - Elements
  - c. Inferring Required Mental State
  - d. Business Judgment
  - e. Constructive Discharge (88-28B)
15. Damages - Retaliation Claim
  - a. Proximate Cause

- b. Verdict
  - c. Back Pay
  - d. Compensatory Damages
  - e. Pre-existing Condition or Disability
- 16. Verdict Form (2-26)
  - 17. Verdict Form "A"
  - 18. Verdict Form "B"