UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

JANET D. LEWIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**3:06-cv-00053-JWS**
	)	
MICHAEL B. DONLEY, Secretary the United States Air Force,	)	
	)	
Defendant.	)	
	)	

JURY INSTRUCTIONS

INSTRUCTION NO. 1

PLAINTIFF LEWIS' CLAIMS

Plaintiff Janet Lewis has brought a claim of employment discrimination based on race against defendant Michael Donley. She claims that her race was either the sole reason or a motivating factor for Donley's decision not to select her to fill the position of director of the Sitka Center. Donley denies that Lewis' race was either the sole reason or a motivating factor for the decision not to select Lewis as director of the Sitka Center.

Plaintiff Lewis has brought an additional claim of employment discrimination based on race against defendant Donley. She claims that her race was either the sole reason or a motivating factor for Donley's decision to terminate her employment by the Air Force. Donley denies that Lewis' race was either the sole reason or a motivating factor for the decision to terminate her employment by the Air Force.

Plaintiff Lewis also claims defendant Donley retaliated against her for pursuing claims before the Equal Employment Opportunity Office of the Air Force, which I will refer to as the EEO. Defendant Donley denies that there was any retaliation.

Defendant Donley did not personally participate in the events at issue, but under the law as Secretary of the Air Force, Donley is correctly named as the defendant and is responsible for the employment actions. If you return a verdict awarding damages to Lewis, the judgment would be paid by the United States Air Force.

INSTRUCTION NO. 2

RACIAL DISCRIMINATION IN HIRING– RACE AS SOLE REASON

As to Lewis' claim that her race was the sole reason for Donley's decision not to select her to be the director of the Sitka Center, Lewis has the burden of proving both of the following elements by a preponderance of the evidence:

1. Lewis was not selected by Donley; and
2. Lewis was not selected solely because of her race.

The parties agree that the first element has been proved, so you should concentrate on the second element. If you find that Lewis has proved the second element, your verdict should be for Lewis. If, on the other hand, you find Lewis has failed to prove the second element, your verdict should be for Donley unless you find for Lewis based on Instruction No. 3.

INSTRUCTION NO. 3

RACIAL DISCRIMINATION IN HIRING– RACE AS MOTIVATING FACTOR

As to Lewis' claim that her race was a motivating factor for Donley's decision not to select her to be the director of the Sitka Center, Lewis has the burden of proving both of the following elements by a preponderance of the evidence.

1. Lewis was not selected by Donley; and
2. Lewis' race was a motivating factor in Donley's decision not to select her.

The parties agree that the first element has been proved, so you should concentrate on the second element. If you find that Lewis has proved the second element, your verdict should be for Lewis, even if you also find that Donley's decision was also motivated by a lawful reason. If, however, you find that Donley has proved by a preponderance of the evidence that he would have made the same decision even if Lewis' race had played no role whatsoever in his decision, your verdict should be for Donley.

INSTRUCTION NO. 4

RACIAL DISCRIMINATION IN TERMINATION OF EMPLOYMENT–RACE AS REASON

As to Lewis' claim that her race was the reason for Donley's decision to terminate her employment by the Air Force, Lewis has the burden of proving both of the following elements by a preponderance of the evidence:

1. Lewis' Air Force employment was terminated by Donley; and
2. Lewis' Air Force employment was terminated because of her race.

The parties agree that the first element has been proved, so you should concentrate on the second element. If you find that Lewis has proved the second element, your verdict should be for Lewis. If, on the other hand, you find Lewis has failed to prove the second element, your verdict should be for Donley unless you find for Lewis based on Instruction No. 5.

INSTRUCTION NO. 5

RACIAL DISCRIMINATION IN TERMINATION OF EMPLOYMENT–RACE AS MOTIVATING FACTOR

As to Lewis' claim that her race was the motivating factor for Donley's decision to terminate her employment by the Air Force, Lewis has the burden of proving both of the following elements by a preponderance of the evidence:

1. Lewis' Air Force employment was terminated by Donley; and
2. Lewis' race was a motivating factor in Donley's decision to terminate her employment by the Air Force.

The parties agree that the first element has been proved, so you should concentrate on the second element. If you find that Lewis has proved the second element, your verdict should be for Lewis even if you find that Donley's decision was also motivated by a lawful reason. If, however, you find that Donley has proved by a preponderance of the evidence that he would have made the same decision, even if Lewis' race had played no role whatsoever in his decision, your verdict should be for Donley.

INSTRUCTION NO. 6

RETALIATION

Lewis claims that Donley retaliated against her. To succeed on her claim of retaliation, Lewis has the burden of proving each of the following elements by a preponderance of the evidence:

1. Lewis engaged in or was engaging in an activity protected under federal law, specifically pursuing claims before the Equal Employment Office of the Air Force, which I will refer to as the EEO;
2. Donley subjected Lewis to an adverse employment action; and
3. Lewis was subjected to the adverse employment action because she made or pursued claims before the EEO.

If you find Lewis has proved all three of these elements, your verdict should be for Lewis. If, on the other hand, you find Lewis has failed to prove any of these elements, your verdict should be for Donley. The parties agree that the first element has been proved, so you should concentrate on the second and third elements.

Lewis contends that the following actions were adverse employment actions taken in retaliation for her having made an EEO claim:

1. Reducing the scores on Ms. Lewis' mid-term and annual appraisals;
2. Taking disciplinary action against Ms. Lewis;
3. By assigning extra work to Ms. Lewis;
4. Improperly handling Ms. Lewis' Form 332 work orders;
5. Denying some of Ms. Lewis' leave requests;
6. Criticizing Ms. Lewis' spending decisions;
7. Treating plaintiff Lewis improperly during the 2006 accreditation process by doing one or more of the following:
   (a) Changing her work schedule;
   (b) Requiring plaintiff Lewis to use different hiring procedures than the other CDC directors;

(c) Causing turmoil at the Katmai Center; and

(d) Obtaining statements from Ms. Noceda and Ms. Norman.

8. Denying Ms. Lewis' request for Family Medical Leave; and

9. Terminating Ms. Lewis' employment.

As used in this instruction, an adverse employment action is an action which a reasonable worker would consider materially adverse and which could persuade a reasonable worker not to make or pursue a claim of racial discrimination.

Whether any of the claims before the EEO had merit is irrelevant to your determination of whether Donley retaliated against Lewis for making or pursuing EEO claims. You may consider a close proximity in time between Lewis' actions regarding the EEO claims and an adverse employment action as circumstantial evidence that the adverse employment action was taken because Lewis made or pursued the EEO claims.

INSTRUCTION NO. 7

BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

INSTRUCTION NO. 8

WHAT IS EVIDENCE

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

1. the sworn testimony of any witness;
2. the exhibits which are received into evidence; and
3. any facts to which the parties have agreed.

INSTRUCTION NO. 9

DEPOSITION IN LIEU OF LIVE TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth. The questions and answers are recorded.

The depositions of Lee Tomlinson and Colonel Borgert were read to you. You should consider deposition testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as if the witness had been present to testify.

Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

INSTRUCTION NO. 10

EXHIBITS ADMITTED IN EVIDENCE FOR LIMITED PURPOSE

Three exhibits have been admitted in evidence for a limited purpose only. These are exhibits 58, 83, and 84. Each is a response prepared by plaintiff Lewis and her lawyer to a proposed action by her employer. You may not consider any of these exhibits as evidence of the truth or accuracy of what is said in the exhibit. You may only consider these exhibits as evidence of some of the material which was available to a particular decision maker for whose actions defendant Donley is responsible, prior to the time the decision maker made his or her final decision. In evaluating the motivation for a final decision, you should consider the material which was available to the decision maker and you should consider evidence of how the decision maker evaluated that material.

INSTRUCTION NO. 11

STIPULATIONS OF FACT

The parties have agreed to certain facts which I read to you at the outset of the trial and which have been set out in Exhibit 73. It is one of the exhibits which will be provided to you when you retire to deliberate. You should treat the facts in that exhibit as having been proved.

INSTRUCTION NO. 12

WHAT IS NOT EVIDENCE

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

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits are received only for a limited purpose; when I have given a limiting instruction, you must follow it.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 13

DIRECT AND CIRCUMSTANTIAL EVIDENCE

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

INSTRUCTION NO. 14

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case and any bias or prejudice;

(5) whether other evidence contradicted the witness's testimony;

(6) the reasonableness of the witness's testimony in light of all the evidence; and

(7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

INSTRUCTION NO. 15

PRETEXT

Plaintiff Lewis has offered evidence concerning various incidents to show intent to discriminate on the basis of race and retaliation for bringing EEO complaints. Defendant Donley has offered evidence of nondiscriminatory and nonretaliatory reasons why various actions against Ms. Lewis were taken. You should determine whether the explanations of the actions were legitimate or whether they are a "pretext" to cover up discrimination or retaliation.

Proof that Donley's explanation is unworthy of belief is one form of circumstantial evidence that you may consider when deciding whether there was racial discrimination or retaliation. You may infer from the falsity of an explanation that the defendant is attempting to cover up a discriminatory purpose.

INSTRUCTION NO. 16

TREATING LARGE AND SMALL DEFENDANTS ALIKE

The fact that the defendant is the Secretary of the Air Force should not affect your decision. All persons are equal before the law, and a defendant whether large or small, is entitled to the same fair and conscientious consideration by you as any other person.

INSTRUCTION NO. 17

CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries not received in evidence have been shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

INSTRUCTION NO. 18

CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

INSTRUCTION NO. 19

DAMAGES

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If a plaintiff prevails in a lawsuit involving the kind of claims brought by plaintiff Lewis against defendant Donley, the law requires the Court to determine the amount of any lost pay, both past and future, caused by defendant's wrongful actions. The jury is not permitted to make an award for lost pay. Similarly, if there is to be an award of interest, costs or attorney fees, that award must be made by the Court, not the jury. Questions about possible reinstatement of plaintiff Lewis in her job or any declaration regarding defendant's conduct are also for the Court, not the jury to consider.

If you find for Lewis on any of her claims of racial discrimination or retaliation, you must determine the total amount of damages she has proved by a preponderance of the evidence were caused by the acts of racial discrimination or retaliation you find she proved. The types of damages which you should consider and include in your determination of the total are the following: (1) the reasonable value of necessary medical care, treatment and services received to the present time; (2) the reasonable value of necessary medical care, treatment and services, if any, which with reasonable probability will be required in the future; (3) the reasonable value of mental, physical and emotional pain and suffering to the present time; and (4) the reasonable value of mental, physical and emotional pain and suffering, if any, which with reasonable probability will be suffered in the future.

As used in this Instruction, "medical care, treatment and services" includes doctor visits; hospital care; prescriptions; psychological and psychiatric care, treatment and services; and rehabilitation therapy.

INSTRUCTION NO. 20

DUTY TO DELIBERATE

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

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

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

INSTRUCTION NO. 21

COMMUNICATION WITH COURT

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

INSTRUCTION NO. 22

RETURN OF VERDICT

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

INSTRUCTION NO. 23

COPIES OF EXHIBITS AND JURY INSTRUCTIONS

The exhibits which have been admitted will be gathered up and provided to you in the jury room as soon as practicable after you retire to deliberate. The lawyers have worked with the court to make sure that only exhibits which may properly be admitted into evidence will be provided to you. In a few instances exhibits which were presented to the court for its consideration have not been admitted. As a result, you may notice gaps in the numbering of exhibits. This should not concern you, and you may not speculate as to what might have been in any exhibit which was not provided to you.

Four copies of these jury instructions will also be provided to you for you to consult after you retire to deliberate.

GIVEN this 18th day of February 2011.

SIGNATURE REDACTED

JOHN W. SEDWICK
UNITED STATES DISTRICT COURT JUDGE