IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

Civil Action No. 17-cv-00844-WYD-SKC

BRANDON FRESQUEZ,

Plaintiff,

v.

BNSF RAILWAY CO.,

Defendant.

JURY INSTRUCTIONS

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and before hearing the closing arguments, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

These instructions include both general instructions and instructions specific to the claims and defenses in this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law, as you are now instructed, to the facts as you find them to be.

The lawyers may properly refer to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

INSTRUCTION NO. 2

This a civil case brought by the Plaintiff, Brandon Fresquez, against the Defendant, BNSF Railway Company. Fresquez was an employee of BNSF from November of 2005 to May of 2016, when BNSF terminated him. Fresquez alleges that BNSF terminated him in retaliation for engaging in activity protected under the Federal Railroad Safety Act, 49 U.S.C. § 20109 ("FRSA"). BNSF denies Fresquez's claims and alleges that it terminated him for legitimate reasons unrelated to any FRSA-protected activity.

INSTRUCTION NO. 3

The parties have agreed to certain facts as follows:

1. Defendant is a corporation.
2. Defendant is a railroad carrier engaged in interstate commerce.
3. Plaintiff began working for Defendant in the Maintenance of Way Department on November 7, 2005.
4. The Maintenance of Way Department is responsible for constructing, inspecting, and maintaining BNSF's railroad tracks.
5. Plaintiff first worked as a track inspector in 2006, and he has spent much of his career as a Track Inspector.
6. A Track Inspector's job entails finding and reporting track defects, which are deviations from Defendant's or Federal Railroad Administration's ("FRA") track safety standards.
7. Working as a Track Inspector requires extensive training and testing, including a week-long class at Johnson County Community College in Overland Park, Kansas, a certification test after the class and multiple other tests throughout one's career to become FRA tier I, II, and III qualified, and a rules qualification test that every Maintenance of Way employee is required to take and pass annually.
8. Track defects are usually reported by inputting information about the defect into an electronic track inspection database at Defendant called TIMS.
9. Track inspectors report directly to Assistant Roadmasters or Roadmasters.
10. On May 27, 2016, Defendant dismissed Plaintiff.

You will therefore take these facts to be true for purposes of this case.

INSTRUCTION NO. 4

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations and other organizations, stand equal before the law, and are to be treated as equals.

INSTRUCTION NO. 5

You must not be influenced by sympathy, bias, or prejudice for or against any party in this case.

Also, do not decide the case based on "implicit biases". As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases", that we may not be aware of. These hidden thoughts can impact what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

INSTRUCTION NO. 6

The parties have different burdens to prove different things.

When I tell you that a party must "establish something by a preponderance of the evidence," that means the party must offer evidence, which as a whole, shows that the fact sought to be proved is more probable than not. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

When I tell you that a party must "establish something by clear and convincing evidence," that means the party must offer evidence that produces in your mind a firm belief or conviction as to the matter at issue. Clear and convincing evidence involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard applicable in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 7

The evidence in the case consists of the following:

1. The sworn testimony of the witnesses, no matter who called a witness.
2. All exhibits received in evidence, regardless of who may have produced the exhibits.
3. Depositions received into evidence. Depositions contain sworn testimony, with the lawyers for each party being entitled to ask questions. Deposition testimony may be accepted by you, subject to the same instructions that apply to witnesses testifying in open court.
4. Statements and arguments of the lawyers are not evidence in the case, unless made as an admission or stipulation of fact. A "stipulation," is an agreement between both sides that certain facts are true. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

If I sustained an objection to any evidence or if I ordered evidence stricken, that evidence must be entirely ignored.

Some evidence was admitted for a limited purpose only. If I instructed you that an item of evidence was admitted for a limited purpose, you must consider it only for that limited purpose and for no other purpose.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the statements of the witness. In other words, you are not limited solely to what you see and hear as the witnesses testified. You may draw from the facts that you find have been proved, such reasonable inferences or conclusions as you feel are justified in light of your experience.

INSTRUCTION NO. 8

"Direct evidence" is direct proof of a fact, such as testimony by a witness about what the witness said 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. You are to decide how much weight to give any evidence.

INSTRUCTION NO. 9

In deciding the facts, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. In considering the testimony of any witness, you may take into account many factors, including the witness' opportunity and ability to see or hear or know the things the witness testified about; the quality of the witness' memory; the witness' appearance and manner while testifying; the witness' interest in the outcome of the case; any bias or prejudice the witness may have; other evidence that may have contradicted the witness' testimony; and the reasonableness of the witness' testimony in light of all the evidence. The weight of the evidence does not necessarily depend upon the number of witnesses who testify.

INSTRUCTION NO. 10

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness' other testimony 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 “knowingly” done, if the act is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

INSTRUCTION NO. 11

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence producing such belief in your minds.

The test is not which side brings the greater number of witnesses or takes the most time to present its evidence, but which witnesses and which evidence appeal to your minds as being most accurate and otherwise trustworthy.

INSTRUCTION NO. 12

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. There is an exception to this rule for "expert witnesses." An expert witness is a person who by education and experience has become expert in some art, science, profession, or calling.

Expert witnesses state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude the reasons given in support of the opinion are not sound, or if you feel the expert's is outweighed by other evidence, you may disregard the opinion entirely.

INSTRUCTION NO. 13

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

INSTRUCTION NO. 14

Certain documents have been partially redacted to protect private or personally identifiable information irrelevant to the issues in this case or other irrelevant or inadmissible information. You should not speculate about what has been redacted and the redactions should not affect your decision in this case.

INSTRUCTION NO. 15

To prove the Defendant retaliated against the Plaintiff in violation of the FRSA, the Plaintiff must prove by a preponderance of the evidence that

1. He engaged in a protected activity as defined by the FRSA;
2. The Defendant knew the Plaintiff engaged in the protected activity;
3. The Plaintiff suffered an unfavorable personnel action; and
4. The protected activity was a contributing factor in the unfavorable action.

INSTRUCTION NO. 16

An employee engages in protected activity as defined by the FRSA if the employee, in good faith, commits an act, or the employer perceives the employee to have committed an act or to be about to commit an act

1. to lawfully provide information, directly cause information to be provided, or directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety if the information is provided to an employee's supervisor or the FRA; or
2. to lawfully refuse to violate or assist in violating any Federal law, rule, or regulation relating to railroad safety or security; or
3. to report a hazardous safety or security condition.

INSTRUCTION NO. 17

Protected activity is done in "good faith" if the employee had a subjectively and objectively reasonable belief that he was providing information to a supervisor or the FRA about violations of any Federal law, rule, or regulation, that he was refusing to violate or assist in violating any Federal law, rule, or regulation relating to railroad safety or security, or that he was reporting a hazardous safety or security condition.

INSTRUCTION NO. 18

A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable action. For protected activity to be a contributing factor in an unfavorable action, the employee must prove the decisionmakers had knowledge of the protected activity and the decisionmaker's retaliation was prompted by the employee engaging in protected activity.

INSTRUCTION NO. 19

Even if the Plaintiff proves the elements of his claim in Instruction Number 15, the Defendant is still not liable for wrongful retaliation if it has proven by clear and convincing evidence that it would have taken the same unfavorable personnel action against the Plaintiff even if the Plaintiff had not engaged in any protected activity.

INSTRUCTION NO. 20

The law does not require an employer's managerial personnel to use good judgment, to make correct decisions, or even to treat its employees fairly. Therefore, in deciding the Plaintiff's retaliation claim, it is not your function to second-guess the Defendant's business decisions or question whether the decision was wise, fair or even correct, or act as a personnel manager. Your function is to decide whether the decision violated the law.

INSTRUCTION NO. 21

If you find in favor of the Plaintiff on his retaliation claim, then you must determine an amount that is fair compensation for the Plaintiff's losses. You may award compensatory damages for injuries that the Plaintiff proved by a preponderance of the evidence were caused by the Defendant's wrongful conduct. The damages that you award must be fair compensation, no more and no less.

In calculating compensatory damages, you should not consider any back pay or front pay that the Plaintiff lost. The award of back pay and front pay, should you find the Defendant liable on the Plaintiff's claim, will be calculated and determined by the Court.

The Plaintiff claims damages for any emotional distress, pain, suffering, inconvenience, or mental anguish that the Plaintiff experienced as a consequence of his termination by the Defendant. 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 setting 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 any damages you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

INSTRUCTION NO. 22

You are not permitted to award speculative damages. You must not include in any verdict compensation for any prospective loss that, although possible, is not reasonably certain to occur in the future.

INSTRUCTION NO. 23

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages. The purpose of an award of punitive damages is to punish a wrongdoer for misconduct, and also to provide a warning to others.

You may award punitive damages if you find the Plaintiff has proved by a preponderance of the evidence that the Defendant acted with reckless or callous disregard of the Plaintiff's right to be free from retaliation for engaging in a protected activity. The Defendant acted with reckless or callous disregard if the Plaintiff proved by a preponderance of the evidence that the Defendant's employees who made the decision to terminate the Plaintiff's employment knew that the termination was in violation of the law prohibiting retaliation, or acted with reckless or callous disregard of that law.

In deciding the amount of punitive damages, you may consider the following:

1. The offensiveness of the conduct;

2. The amount needed, considering the Defendant's financial condition, to prevent the conduct from being repeated; and

3. Whether the amount of punitive damages bears a reasonable relationship to the actual damages awarded.

However, you may not award punitive damages if the Defendant has proved by a preponderance of the evidence that the retaliatory actions by the Defendant's employees were contrary to the Defendant's good faith efforts to comply with the FRSA

by implementing and enforcing policies and programs designed to prevent unlawful retaliation.

INSTRUCTION NO. 24

The fact I have instructed you as to the proper measure of damages should not be considered as indicating 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 only in the event you should find in favor of Plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

INSTRUCTION NO. 25

The verdict must be unanimous and represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agrees.

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 judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine 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.

Remember at all times that you are not partisans. You are judges--judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTION NO. 26

Upon retiring to the jury room, you shall select one of your fellow jurors to act as your foreperson. The foreperson will preside over your deliberations and be your spokesperson here in court. A verdict form has been prepared for your convenience to take to the jury room.

You will note that the form includes a number of interrogatories or questions which call for a “yes” or “no” answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each response. As you will note from the wording of the questions, it may not be necessary to consider or answer every question.

When you have completed the verdict form, the foreperson will sign and date the form, all other jurors will sign the form, and you will give the form to the Court Security Officer, alerting him or her that you have reached a verdict.

INSTRUCTION NO. 27

In your deliberations, your duty is to apply my instructions of law to the evidence that you have seen and heard in the courtroom. You are not allowed to look at, read, consult, or use any material of any kind, including any dictionaries or medical, scientific, technical, religious, or law books, the Internet, or any material of any type or description in connection with your jury service. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes Google, Wikipedia, blogs, and any other web site. You are not allowed to do any research of any kind about this case.

During your deliberations, you must not communicate with or provide any information to anyone about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the Internet; any Internet service; any text or instant messaging service, or any internet chat room, blog or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social

media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

INSTRUCTION NO. 28

I do not invite communications from you, but if it becomes necessary during your deliberations to communicate with the court, you may send a note by the Court Security Officer, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case other than in writing, or orally here in open court. Upon receipt of a note from you, I will need to convene a meeting with counsel to discuss your question or request. It may well take considerable time and effort to respond.

You will note from the oath about to be taken by the Court Security Officer that he or she, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. Let me know immediately if anyone attempts any such communication.

Bear in mind also that you are never to reveal to any person--not even to the court--how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

INSTRUCTION NO. 29

These instructions contain the law that you must use in deciding this case. No single instruction states all the applicable law. All the instructions must be read and considered together.

Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any suggestion or hint as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.