

KENNETH FETT,

Plaintiff,

vs.

ASRC ENERGY SERVICES - HOUSTON
CONTRACTING COMPANY, INC.,
f/k/a AES PIPELINE POWER AND
COMMUNICATIONS, INC.,

Defendant.

Case No. 3AN-07-11025 CI

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Members of the jury, you have now heard and seen all of the evidence in the case and you have heard argument about the meaning of the evidence. We have reached the stage of the trial where I instruct you about the law to be applied.

It is important that each of you listen carefully to the instructions. Your duty as jurors does not end with your fair and impartial consideration of the evidence. Your duty also includes paying careful attention to the instructions so that the law will properly and justly be applied to the parties in this case. You will have a copy of my instructions with you when you go in to the jury room to deliberate and to reach your verdict. But it is still absolutely necessary for you to pay careful attention to the instructions now. Sometimes the spoken word is clearer than the written word, and you should not miss the chance to hear the instructions. I will give them to you as clearly as I can in order to assist you as much as possible.

The order in which the instructions are given has no relation to their importance. The length of instructions also has no relation to importance. Some concepts require more explanation than others, but this does not make longer instructions more important than shorter ones. All of the instructions are important and all should be carefully considered. You should understand each instruction and see how it relates to the others given.

INSTRUCTION NO. 2

Do not assume that I have any views about the case because of the instructions that I am now giving you. What I am telling you in these instructions is the law that applies to all parties appearing before the court. Nothing that I say or do should lead you to think that I favor or disfavor any party. I try to be fair and impartial, just as you are required to be. But if anything that I have said or done during the trial or in these instructions has caused you to believe that I favor or disfavor any party, I now instruct you that it is your duty to disregard my actions. You must decide the case without favoritism or prejudice on the basis of the evidence and the law as it is explained to you.

INSTRUCTION NO. 3

In these instructions, I have tried to use correct pronouns when referring to the parties and to use the plural form when it is appropriate. You should interpret the instructions in a reasonable way. The choice of pronouns is not important. What is important is that you follow the rules given in the instructions.

INSTRUCTION NO. 4

Many of the instructions that follow ask you to decide whether something is more likely true than not true. Something is more likely true than not true if you believe that the chance that it is true is even the slightest bit greater than the chance that it is not true. In more familiar language, something is more likely true than not true if you believe that there is a greater than 50 percent chance that it is true. Fifty-one percent probability is enough; no more is required for you to decide that something is more likely true than not true.

If you believe that the chance that something is true is 50/50 or less, you must decide that it is not true.

INSTRUCTION NO. 5

You have been instructed on the law of damages in this case because it is my duty to instruct you on all the law that may be applicable to your deliberations. The fact that you have been given instructions on damages does not indicate any opinion of the court on the issue of liability or on which party is entitled to your verdict. You must decide those issues based on the evidence presented and the law that I have given you in these instructions.

INSTRUCTION NO. 6

The court will decide whether any party should be reimbursed for some or all of the expenses of this lawsuit, including attorney fees. You should not discuss this subject during your deliberations because it has no bearing on any issue that you will decide.

INSTRUCTION NO. 7

You must not determine any issue in this case by flipping a coin, drawing straws, or other resort to chance. If you decide that a party is entitled to recover damages, you cannot agree to simply average estimates from each juror. Each of you should use your independent judgment in deciding what you think the appropriate amount of damages should be. But ten of you must agree on an amount before entering it on the verdict form.

INSTRUCTION NO. 8

You have heard a number of witnesses testify in this case. You must decide how much weight to give the testimony of each witness.

In deciding whether to believe a witness and how much weight to give a witness's testimony, you may consider anything that reasonably helps you to evaluate the testimony. Among the things that you should consider are the following:

- (1) the witness's appearance, attitude, and behavior on the stand and the way the witness testified;
- (2) the witness's age, intelligence, and experience;
- (3) the witness's opportunity and ability to see or hear the things the witness testified about;
- (4) the accuracy of the witness's memory;
- (5) any motive of the witness not to tell the truth;
- (6) any interest that the witness has in the outcome of the case;
- (7) any bias of the witness;

- (8) the consistency of the witness's testimony and whether it was supported or contradicted by other evidence.

You should bear in mind that inconsistencies and contradictions in a witness' testimony, or between a witness's testimony and that of others, do not necessarily mean that you should disbelieve the witness. It is not uncommon for people to forget or to remember things incorrectly and this may explain some inconsistencies and contradictions. It is also not uncommon for two honest people to witness the same event and see or hear things differently. It may be helpful when you evaluate inconsistencies and contradictions to consider whether they relate to important or unimportant facts.

If you believe that part of a witness's testimony is false, you may also choose to distrust other parts of that witness's testimony, but you are not required to do so. You may believe all, part, or none of the testimony of any witness. You need not believe a witness even if the witness's testimony is uncontradicted. However, you should act reasonably in deciding whether you believe a witness and how much weight to give to the witness's testimony.

You are not required to accept testimony as true simply because a number of witnesses agree with each other. You may decide that even the unanimous testimony of witnesses is erroneous. However, you should act reasonably in deciding whether to reject uncontradicted testimony.

When witnesses are in conflict, you need not accept the testimony of a majority of witnesses. You may find the testimony of one witness or of a few witnesses more persuasive than the testimony of a larger number.

INSTRUCTION NO. 9

The testimony of some witnesses was presented telephonically.

The law does not distinguish between telephonic testimony and live testimony. Both are valid forms of testimony. Telephonic testimony should be weighed by you as you would any other testimony. However, you may consider that you have not seen the witness testify. It is for you to decide whether this is significant.

INSTRUCTION NO. 10

During the trial, exhibits were admitted as evidence. In deciding how much weight, if any, to give an exhibit, you should examine its contents and consider how it relates to other evidence in the case. Keep in mind that exhibits are not necessarily better evidence than testimony from witnesses. You will have the exhibits with you in the jury room when you deliberate. The fact that an exhibit is available to you for your examination does not mean that it is entitled to more weight than testimony from witnesses.

INSTRUCTION NO. 11

You are reminded that the law prohibits some types of information from being presented as evidence in a court of law. This helps you to focus on important and reliable evidence by excluding irrelevant, improper, or unreliable information.

An attorney has a duty to object when the other side offers evidence that the attorney believes is not admissible. You should not be influenced by the fact that objections were made to certain questions or to certain evidence. You should also not be influenced by the number of objections that were made.

You should also draw no conclusions about the case from my rulings on the objections. These rulings were determined by the law and were not based on my views as to the merits of the case, the evidence, the witnesses, or the attorneys.

If I sustained an objection, you must disregard the question and any answer entirely. You may not draw any inference from the question, or speculate what the witness would have said if permitted to finish answering the question.

During your deliberations, you must not consider any evidence that I instructed you to disregard.

Remember that the questions asked by attorneys are not evidence. Only the answers to questions are evidence. You may consider questions only to help you understand the answers.

After the evidence was presented, you heard closing arguments. During closing arguments, the parties told you what they believe the evidence has proved and urged you to draw certain conclusions about the evidence. Remember that what was said in closing arguments is not evidence.

INSTRUCTION NO. 12

The weight to be given the evidence is for you to determine. You must examine the evidence carefully and decide how to evaluate it in light of the law that I have given you in these instructions.

In your deliberations, you must not be governed by mere sentiment, unsupported conjecture, sympathy, passion, prejudice, public opinion, or public feeling. You should consider the evidence in light of your own common sense and observations and experiences in everyday life. But you may not consider other sources of information not presented to you in this court.

INSTRUCTION NO. 13

This is an employment case in which Plaintiff Ken Fett, a former employee of Defendant PPC, brings claims against PPC for wrongful termination. Fett claims retaliatory discharge and breach of the covenant of good faith and fair dealing, based on his contention that he was wrongfully discharged in retaliation for raising issues of safety and public concern to PPC and Alyeska.

Defendant PPC contends that Fett's termination was based on Fett's work-related misconduct, and that PPC did not retaliate against him for raising safety concerns.

INSTRUCTION NO. 14

Now I will instruct you on the implied promise or covenant of good faith and fair dealing.

In every contract, there is an implied promise or covenant of good faith and fair dealing. This means that each party promises not to do anything to destroy or injure the right of the other party to receive the benefits of the contract. The implied promise of good faith and fair dealing does not modify the express terms of the contract by adding terms to the contract or prohibiting what the contract explicitly permits.

The defendant violated the implied promise of good faith and fair dealing if you find that it is more likely true than not true that the defendant deprived the plaintiff of a benefit of the contract:

1. intentionally; or
2. by acting in a manner that a reasonable person would regard as unfair.

When a breach of the covenant occurs, it is characterized as being either objective or subjective. A subjective breach occurs if it is shown that the breaching party has acted with a bad faith purpose, or has acted with an improper purpose when, for instance, discharging an employee.

An objective breach of the covenant occurs when an employer acts in a manner that a reasonable person would not consider reasonable or fair. Examples of objective breaches include discriminatory discharges, discharges that violate public policy, or are in retaliation for an employee's exercise of a protected right.

INSTRUCTION NO. 14 (CONTINUED)

Plaintiff here claims the defendant breached the covenant of good faith and fair dealing when it discharged him for speaking out about violation of safety boat rules and procedures in the workplace in front of Alyeska officials. Defendant denies this reason for plaintiff's discharge, instead alleging it discharged plaintiff due to poor job performance and attitude problems.

INSTRUCTION NO. 15

Proof that an employer's actions violated public policy may qualify as a breach of the implied covenant. Fett alleges PPC breached the implied covenant of good faith and fair dealing. Specifically, Fett alleges PPC fired him in retaliation for his reports in front of Alyeska officials, questioning whether the TCC safety boats could timely respond if an employee fell in the water.

Firing an employee in retaliation for requesting safety equipment gives rise to a cause of action for breach of the implied covenant of good faith and fair dealing. Firing an employee in good faith for legitimate, non-retaliatory reasons does not violate the covenant.

INSTRUCTION NO. 16

If you find there is direct evidence of retaliatory discharge, plaintiff only needs to show that a prohibited reason was a motivating factor for his discharge, not necessarily the only reason.

Upon such a conclusion, plaintiff is entitled to recover unless defendant has established by a preponderance of the evidence that it would have discharged plaintiff even though plaintiff had not engaged in the protected activity.

INSTRUCTION NO. 17

Fett alleges PPC retaliated against him by firing him for reporting his concerns about the TCC safety boats to Alyeska officials.

To establish his retaliation claim, Fett must first establish what is called a prima facie case showing:

1. that he was engaged in a protected activity;
2. that an adverse employment decision was made; and
3. that there was a causal connection between the two.

If you find that Fett has not established a prima facie case of retaliation, you must find for PPC.

INSTRUCTION NO. 18

A causal connection sufficient to establish plaintiff's claim for retaliatory discharge may be found from the proximity, or closeness in time, between the period plaintiff exercised his protected speech concerning safety boat matters, and the time of the alleged retaliatory action, in this case plaintiff's discharge.

INSTRUCTION NO. 19

If you find that Fett has established a prima facie case of retaliation, the burden of producing evidence shifts to PPC to articulate a legitimate non-retaliatory explanation for Fett's discharge.

To satisfy this burden, PPC need only produce admissible evidence which would allow you rationally to conclude that its decision to discharge Fett was not motivated by Fett's comments about the TCC safety boats but instead was made for legitimate, non-retaliatory business reasons.

*This
is Medli's
only
instruction*

INSTRUCTION NO. 20

If you find that PPC has met its burden of production by articulating a legitimate reason for discharging Fett, then the burden shifts once again to Fett to show that PPC's proffered explanation for discharging Fett was merely a pretext for retaliation. Pretext means false or unworthy of credence, not the real reason. It is your responsibility to determine what PPC's motives were for discharging Fett. Were the reasons offered by PPC genuine or pretextual?

If you find the reasons offered by PPC for Fett's discharge were not genuine or true but were instead pretextual or unworthy of credence, then you must find for Fett. On the other hand, if you find the reasons offered by PPC for Fett's removal as foreman and his firing were true or genuine, then you must find for PPC.

INSTRUCTION NO. 21

I instruct you that in deciding whether plaintiff was discharged for his having reported matters of public concern and safety, you do not need to determine the truth or falsity of his speech. ~~A~~ An employee need not prove an actual violation of law or public policy; it is sufficient if he reported reasonably based suspicions of illegal activity or breach of public policy.

INSTRUCTION NO. 22

If you decide in favor of Fett, you must then decide how much money, if any, will fairly compensate Fett. I will list for you the items of loss claimed by Fett. You may not assume because I list an item of loss or explain how to measure a particular loss that you are required to make an award for that loss. For each item of loss you must decide that it is more likely true than not true that:

1. Fett had such a loss and
2. The loss was legally caused by the conduct of PPC.

If both of these things are more likely true than not true, you must then decide how much money will fairly compensate Fett for that item of loss. If you do not conclude that both of these things are more likely true than not true for a particular item of loss, you may not make an award for that loss. You should add up any awards for all items and record the sum on your verdict form.

The items of loss claimed by Fett are the following:

1. lost wages and benefits;
2. claimed expenses to reduce losses; and,
3. emotional distress damages.

INSTRUCTION NO. 23

The first claimed item of damages is lost benefits and wages. When an employee is wrongfully discharged due to a retaliatory discharge, the employee may recover money damages based on what he would have earned for the likely duration of employment had the discharge not occurred less the amount the employee earned after the discharge. Fett's damages claim against PPC ends in 2007. You may not subtract any of his earnings from later years, if you decide in his favor.

INSTRUCTION NO. 24

The plaintiff is not entitled to be paid for any loss or for part of any loss he could have avoided with reasonable efforts and without undue risk, hardship or embarrassment, even though the loss originally resulted from an act or omission for which the defendant is legally responsible. If you decide that it is more likely true than not true that Fett could have avoided any loss or part of any loss with reasonable efforts and without undue risk, hardship or embarrassment, you may not require PPC to pay the amount Fett could have reasonably avoided.

INSTRUCTION NO 25

The second item of claimed loss by Fett are the expenses he claims he reasonably incurred in an effort to avoid or reduce other losses resulting from his discharge. You may make an award to Fett for such expenses.

INSTRUCTION NO. 26

The third item of loss claimed by Ken Fett is for emotional distress associated with pain, fear, anxiety, humiliation, or embarrassment resulting from the defendant's actions.

You may award a fair amount to compensate Mr. Fett for any loss of this type you determine was legally caused by the defendant's actions, and that Ken Fett experienced from the date of the loss up to the present. You may award a fair amount for any similar loss he may experience if it is more likely true than not true that he will experience such a loss in the future.

The law does not establish a definite standard for fixing the amount of compensation for a loss of this type. You must fix a fair amount in light of the evidence and your experience and reasonable judgment.

INSTRUCTION NO. 27

The plaintiff has requested that you award him punitive damages. Punitive damages are a separate amount of money awarded for the purpose of punishing the defendant and deterring the defendant and others from repeating similar acts.

At this time, you must determine whether the plaintiff is eligible for an award of punitive damages. The plaintiff is eligible for an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct which forms the basis of your verdict demonstrated reckless indifference to the interests of others, or was outrageous. Outrageous conduct includes acts done with malice or bad motives.

I will now define what it means to prove something by clear and convincing evidence. An alleged fact is established by clear and convincing evidence if the evidence leads you to believe that the alleged fact is highly probable. It is not necessary that the alleged fact be certainly true or true beyond a reasonable doubt or conclusively true. However, it is not enough to show that the alleged fact is more likely true than not true.

At this time, you must only decide whether the plaintiff is eligible for an award of punitive damages. You should not discuss or decide the amount of any punitive damage award. If you decide that the plaintiff is eligible for an award of punitive damages, I will give you additional instructions regarding a punitive damage award.

INSTRUCTION NO. 28

You are still bound by your oath as a juror to render a verdict according to the law and the evidence. During deliberations, you must conscientiously consider and weigh the evidence, apply the law, and work to reach a verdict.

You will take my instructions, the exhibits, and the verdict form with you to the jury room. When you get to the jury room, you should elect one juror to be your foreperson. That person will preside over the deliberations and speak for you in court.

You will then discuss the case with your fellow jurors. Each of you must decide the case for yourself, but only after you have fully considered the evidence, discussed it with the other jurors, and listened to their views. It is rarely productive for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to insist upon a certain verdict. When that happens, that juror may hesitate to change his or her announced position even if shown that it is incorrect.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not change an honest belief about the evidence simply to reach a verdict.

You are to deliberate from [8:30 a.m. until 4:30 p.m.] each day, except Saturday and Sunday. You may decide among yourselves when to take

your lunch break. The bailiff will arrange for lunch and will make phone calls to your families if necessary to let them know your schedule.

You are never to reveal to any person — not even to the bailiff or to the judge — how the jury stands, numerically or otherwise, on the questions before you, until authorized by the judge in open court.

Any juror who believes there has been a violation of my instructions concerning deliberations must send a note reporting this to me as soon as possible.

INSTRUCTION NO. 29

If it becomes necessary during your deliberations to communicate with me, you may give the bailiff a note. The note should be signed by your foreperson or by one or more members of the jury and should contain the date and time of the communication. No member of the jury should ever communicate with me by any means other than a signed note.

Judges sometimes receive written questions from jurors during their deliberations. Although I cannot always answer those questions, if you desire to ask a question, you may write the question on a piece of paper and hand it to the bailiff. A delay will occur prior to a response to your question, since I must first convene the attorneys for consideration of the question.

The law prohibits the bailiff from answering questions about the case or providing you with any books or materials. The bailiff is forbidden to communicate with any juror about the substance of the case.

If you would like to re-hear the testimony of a witness, you may send me a note, and I will decide whether you should hear the testimony again. No new evidence will be presented.

INSTRUCTION NO. 30

During deliberations, you may have any notes that you took during trial. You may use your notes only to refresh your own recollection. Do not read your notes aloud or show them to other jurors. The recollection of a juror who took notes is not necessarily more accurate than the recollection of another juror who did not take notes.

When the case is over, your notes will be collected and destroyed.

INSTRUCTION NO. 31

The verdict form has a series of questions that the jury must answer. Read the verdict form very carefully. Each question is followed by specific instructions telling you what to do next. On this form, you must complete Parts A, B, and C, and then follow directions about what to do with Part D.

At least ten of you must agree to the answer to each question on the verdict form. But the same ten people need not agree on each answer. When at least ten of you reach agreement on each question that you are required to answer, your foreperson should date and sign the verdict form.

If you agree on a verdict before 4:30 p.m., your foreperson should advise the bailiff by a written note that you have reached a verdict. The bailiff will advise the court, and the court will contact the parties and counsel. As soon as everyone returns to the courtroom, the jury will present the verdict in open court. After the verdict is presented, members of the jury will be excused.

If you do not agree on a verdict before 4:30 p.m., but you agree later tonight, your foreperson should date and sign the verdict form and place it, together with the instructions, in the envelope I am giving you. The foreperson will seal the envelope and [give the sealed envelope to the bailiff]. [Exhibits shall be turned over to the bailiff]. If you use this method of sealing your verdict, you must return to the jury room tomorrow

morning by 8:30 a.m. You must not speak with anyone concerning the case and the verdict until the verdict is opened in court in your presence.

If you do not agree on a verdict before 4:30 p.m., you may return to your homes. You must not talk about the case or your deliberations outside of the jury room. Before you go home, the foreperson of the jury should take the unsigned verdict form and these instructions and place them in the envelope I am giving you, seal the envelope and give the sealed envelope to bailiff and lock the jury room so that the exhibits, instructions, and unsigned verdict form will remain undisturbed. If you have not agreed on a verdict, you must return to the jury room tomorrow morning by 8:30a.m. to continue deliberations.