

SETTLEGOODE v. PORTLAND PUBLIC SCHOOLS, et al
CV-00-313-ST

JURY INSTRUCTIONS FOLLOWING CLOSE OF EVIDENCE

These instructions will be in three parts: first, general rules that define and control your duties as jurors; second, the rules of law that you must apply in deciding whether Dr. Settlegoode has proven her claims; and third, after closing arguments by the attorneys, some rules for your deliberations.

GENERAL RULES CONCERNING JURY DUTIES

Now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return -- that is a matter entirely up to you.

EVIDENCE

You should base your decision on all of the evidence, regardless of which party presented it. The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. the exhibits which have been received into evidence; and
3. any facts to which all the attorneys have agreed or stipulated.

Certain things are not evidence, and you may not consider them in deciding what the facts are.

They are:

1. Arguments and statements by the attorneys are not evidence. The attorneys are not witnesses. What they have said in their opening statements, will say in closing arguments, and said 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 attorneys have stated them, your memory of them controls.
2. Questions and objections by attorneys 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 my 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 some testimony and exhibits have been received only for a limited purpose; where 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.

ARBITRATION AWARD

You have heard testimony that Dr. Settlegoode's union brought a grievance against the defendant Portland Public Schools ("School District") on Dr. Settlegoode's behalf and that the arbitrator rendered a decision which is an exhibit in this case. You may consider the arbitrator's decision, but it is not binding on you. You may give it whatever weight you believe it deserves, considering the differences in the issues involved and evidence presented. You are to make your own decision about Dr. Settlegoode's claims based on all the evidence presented at this trial.

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 the 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.

EVALUATING WITNESSES TESTIMONY

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.

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

1. the manner in which the witness testifies;
2. the nature or quality of the witness' testimony;
3. contradictory evidence that you find to be more probably true;
4. the witness' interest in the outcome of the case and any bias or prejudice;

Generally, the testimony of any witness whom you believe is sufficient to prove any fact in dispute. You are not simply to count the witnesses, but you are to weight the evidence.

WITNESS FALSE IN PART

If you find that any person has intentionally given false testimony in some part, you should distrust the rest of that person's testimony.

OPINION EVIDENCE (Expert Witnesses)

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

FAIR TREATMENT

All persons are equal before the law and an entity such as the School District is entitled to the same fair and conscientious consideration by you as any other person.

TWO OR MORE PARTIES--DIFFERENT LEGAL RIGHTS

You should decide the case as to each defendant separately. Unless otherwise stated, the instructions apply to all parties.

II. RULES OF LAW

A. BURDEN OF PROOF

Dr. Settlegoode alleges three different claims against defendants for retaliation, all of which defendants deny. Dr. Settlegoode has the burden of proving each of her claims by a preponderance of the evidence. "Preponderance of the evidence" means the greater weight of the evidence. It is such evidence that when weighed against opposing evidence persuades you that the claim is more probably true than not true. In the absence of such proof, Dr. Settlegoode cannot prevail as to that claim. If the evidence appears to be equally balanced, or if you cannot say on which side it weighs heavier, then you must resolve that question against Dr. Settlegoode who has the burden of proof.

B. MERITS OF COMPLAINTS

This case involves whether or not defendants retaliated against Dr. Settlegoode based on her complaints about the School District's education of students with disabilities. Although the School District denies that many of Dr. Settlegoode's complaints had merit, it agrees that she complained in good faith. Good faith means that Dr. Settlegoode did not act out of malice, spite, jealousy, or personal gain, but had reasonable cause to complain. Therefore, the merits of Dr. Settlegoode's complaints are irrelevant. In other words, you are not to concern yourselves with whether Dr. Settlegoode's complaints were valid or invalid, but only if they caused retaliation against Dr. Settlegoode.

C. CLAIMS

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Each of Dr. Settlegoode's three claims are based on alleged retaliation against her, ultimately resulting in the nonrenewal of her contract for the 2000-01 school year. Although these claims seem similar, they are based on different laws and are different in scope and therefore must be considered separately.

1. REHABILITATION ACT CLAIM

For her first claim, Dr. Settlegoode alleges that the School District violated the Rehabilitation Act by retaliating against her for reporting violations of the Rehabilitation Act.

The Rehabilitation Act requires public entities receiving federal funds, such as the School District, to provide the same facilities and services to persons with disabilities as to persons without disabilities. It also prohibits retaliation against persons who report what they reasonably believe to be violations of the Rehabilitation Act with respect to students with disabilities.

To prevail on this claim, Dr. Settlegoode must prove by a preponderance of the evidence that:

1. She engaged in activity protected by the Rehabilitation Act;
2. The School District subjected her to an adverse employment action, that is, the nonrenewal of her contract; and
3. The School District would have renewed her contract but for Dr. Settlegoode having engaged in the protected activity.

Protected activity is the reporting by Dr. Settlegoode of what she, in good faith, believed were violations by the School District of the Rehabilitation Act concerning students with disabilities. Violations of the Rehabilitation Act also include violations of the Individuals with Disabilities Education Act (IDEA).

The School District can act only through its employees. Therefore, if any employee of the School District engaged in retaliation against Dr. Settlegoode prohibited by the Rehabilitation Act, then the School District is liable for that retaliation.

2. CIVIL RIGHTS CLAIM

For her second claim, Dr. Settlegoode alleges that the School District, Susan Winthrop, and Robert Crebo each intentionally violated her rights under the First Amendment of the United States Constitution when they retaliated against her for exercising her right of free speech.

The First Amendment protects the right of every public employee to “freedom of speech” addressing issues of public concern. Dr. Settlegoode’s complaints about deficiencies in the School District’s education of students with disabilities are issues of public concern. The First Amendment does not protect freedom of speech on purely private issues, such as Dr. Settlegoode’s complaint that she received no “C”s on her 1998-1999 evaluation.

To prevail on this claim, Dr. Settlegoode must prove by a preponderance of evidence that:

1. Her interest in speaking on an issue of public concern outweighed the School District’s legitimate interests; and
2. Her speech was a substantial or motivating factor in the defendants’ retaliation, ultimately resulting in their decision not to renew her contract.

When determining whether Dr. Settlegoode’s interest in speaking on issues of public concern outweighed the School District’s legitimate interests, you may consider the following factors:

1. Whether Dr. Settlegoode's protected speech impeded the School District's abilities to perform its duties efficiently;
2. The manner, time, and place of her protected speech; and
3. The context within which she made the protected speech.

Because some anger or unhappiness necessarily accompanies speech on issues of public concern, defendants must prove that the School District suffered an actual injury to its legitimate interests beyond mere disruption of the workplace.

Defendants may create reasonable restrictions on the time, place, and manner for Dr. Settlegoode to engage in protected speech.

To prove that Dr. Settlegoode's protected speech was a substantial or motivating factor for her nonrenewal, you may consider:

1. The proximity in time between her protected speech and her nonrenewal;
2. Whether the defendants expressed opposition to her protected speech to her or others;
3. Whether the defendants' proffered explanations for the nonrenewal were false and pretextual.

However, Dr. Settlegoode may not rely solely on the timing of events. In other words, you may not conclude that the defendants' nonrenewal decision was motivated by Dr. Settlegoode's protected speech merely because that decision came after her speech.

Dr. Settlegoode does not have to prove that her protected speech activities was the only reason for the nonrenewal decision. It is sufficient if she proves that her protected speech activities were a determinative consideration that made a difference in the nonrenewal decision.

If you find in favor of Dr. Settlegoode with respect to each of the facts that she must prove, you must then decide whether the defendants have proven by a preponderance of the evidence that Dr.

Settlegoode's contract would not have been renewed for other reasons even in the absence of the protected speech activity. If you find a defendant would not have renewed Dr. Settlegoode's contract for reasons apart from her protected speech activity, then your verdict is in favor of that defendant on this claim.

If Dr. Settlegoode was deprived of her constitutional right as a result of the official policy of the School District, then the School District is also liable for that deprivation. "Official policy" means retaliation against Dr. Settlegoode that was ratified or approved by the School District's Board.

3. WHISTLEBLOWER ACT CLAIM

For her third claim, Dr. Settlegoode claims that the School District violated her rights under Oregon's Whistleblower Act. The Whistleblower Act requires that no public employer shall:

"Prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of . . . a violation of any federal or state law, rule or regulation . . . or mismanagement . . . by the [School District];
or

* * *

Discourage, restrain, dissuade, coerce, prevent or otherwise interfere with disclosure . . ."

The School District is a public employer subject to the Whistleblower Act.

To prevail on this claim, Dr. Settlegoode must prove by a preponderance of the evidence that:

1. She disclosed information that she reasonably believed was evidence of a violation of federal or state law or mismanagement by the School District; and
2. Such disclosure was a substantial or motivating factor for the School District's nonrenewal of her contract.

The Whistleblower Act does not protect complaints to a supervisor about the supervisor's own conduct.

Dr. Settlegoode does not have to prove that her protected speech activities was the only reason for the nonrenewal decision. It is sufficient if she proves that her protected speech activities were a determinative consideration that made a difference in the nonrenewal decision. The School District can act only through its employees. Therefore, if any employee of the School District violated the Whistleblower Act, then the School District is liable for that violation.

D. DAMAGES

If you find from the evidence and the instructions that Dr. Settlegoode is entitled to prevail on any claim against one or more defendants, then it becomes your duty to decide whether she has been damaged and, if so, the amount of her damages.

In deciding the amount of any such damages, you must determine each of the items of damages that I am now about to mention, provided that you find Dr. Settlegoode sustained them as a result of a defendant's actions. Dr. Settlegoode must prove each item of damage by a preponderance of the evidence. Your award of damages must be based on the evidence and not upon speculation, guesswork or conjecture.

The mere fact that I am instructing you with regard to the measure of damages is not to be considered by you as an attempt by me to suggest or indicate that you should or should not award damages.

You must decide damages for each claim separately. Do not be concerned about potential multiple recovery for Dr. Settlegoode. If necessary, I will make the appropriate adjustments when entering the final Judgment in this case.

1. REHABILITATION ACT CLAIM

If you find in favor of Dr. Settlegoode on her first claim that the School District violated the Rehabilitation Act, then you must determine her damages, if any, caused by that violation. She seeks non-economic damages not to exceed \$500,000 and economic damages not to exceed \$402,000.

a. Non-economic Damages

Non-economic damages are the subjective, nonmonetary losses incurred by Dr. Settlegoode. The law does not furnish you with any fixed standard by which to measure the exact amount of non-economic damages. The law does require that all compensation allowed be reasonable. You must apply your own considered judgment, therefore, to determine the amount of non-economic damages.

In determining the amount of non-economic damages, if any, consider the mental, physical, and emotional pain and suffering that Dr. Settlegoode has experienced as a result of the retaliation until the present time and that it is reasonably probable that she will continue to experience in the future.

I have withdrawn from your consideration any claim for damages based upon Dr. Settlegoode's thyroid condition, thyroid surgery, or side effects of any thyroid medication. You are not to concern yourselves with why I have withdrawn that claim.

b. Economic Damages

Economic damages are objectively verifiable monetary losses incurred by Dr. Settlegoode. In determining the amount of economic damages, if any, consider the reasonable value of lost wages sustained by Dr. Settlegoode from the date of her nonrenewal until today and which, with reasonable probability, she will lose in the future. Lost wages means the salary, including any raises, as well as

the value of sick leave, vacation pay, pension benefits and other fringe benefits that Dr. Settlegoode would have received.

2. CIVIL RIGHTS CLAIM

If you find on the second claim that any defendant violated Dr. Settlegoode's First Amendment rights, then you must determine her damages, if any, caused by that violation. On this claim, she seeks non-economic damages not to exceed \$500,000 and economic damages not to exceed \$402,000.

As I previously instructed you, non-economic damages are the subjective, nonmonetary losses and economic damages are objectively verifiable monetary losses incurred by Dr. Settlegoode. My prior instructions regarding these types of damages apply to this claim.

If you find for Settlegoode on this claim, but also find that she has failed to prove any actual damages, then you shall return an award of nominal damages not to exceed one dollar.

If you have found that Dr. Settlegoode is entitled to an award of non-economic, economic, or nominal damages, then you must consider whether to award punitive damages against defendants Susan Winthrop and/or Robert Crebo. You may not award punitive damages against the School District.

Punitive damages may be awarded to a plaintiff in addition to non-economic and economic damages to punish the wrongdoer and to discourage the defendant and others from engaging in wanton misconduct. In considering punitive damages, you must first determine whether the defendant was guilty of wanton misconduct that caused damage to the plaintiff. "Wanton misconduct" is conduct amounting to a particular aggravated, deliberate, or reckless disregard of the rights of others. If you decide this issue against a defendant you may award punitive damages, although you are not required

to do so because punitive damages are discretionary. In the exercise of that discretion, you may consider the importance to society in deterring similar misconduct in the future.

If you decide to award punitive damages, you may properly consider the following items in fixing the amount:

1. The character of the defendant's conduct;
2. The defendant's motives; and
3. The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future.

If you have found that punitive damages are appropriate against more than one of the defendants, the amount assessed against each need not be the same, but may vary according to the above factors. You must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy

toward any party. Dr. Settlegoode seeks the sum of \$50,000 in punitive damages from each defendant.

3. WHISTLEBLOWER ACT CLAIM

If you find on the third claim that the School District violated the Whistleblower Act, then you must determine Dr. Settlegoode's damages, if any, caused by that violation. On this claim, she seeks non-economic damages not to exceed \$500,000, and economic damages not to exceed \$402,000.

As I previously instructed you, non-economic damages are the subjective, nonmonetary losses and economic damages are objectively verifiable monetary losses incurred by Dr. Settlegoode. My

prior instructions regarding these types of damage apply to this claim. You may not award punitive damages on this claim.

III. JURY DELIBERATIONS

You will be retiring to the jury room in a moment to begin your deliberations. You will have with you in the jury room all of the exhibits that have been received in this case.

You also may take with you any notes that you have taken during the trial. You may use your notes to aid your recollection of the testimony and evidence in this trial. Bear in mind, however, that such notes are simply another form of recollection and you should not place undue emphasis on them simply because they are written. Also remember that each party is entitled to the considered decision of each juror. Therefore, you should not give undue weight to another juror's notes if those notes conflict with your recollection of the evidence.

You will also have a verdict form with you in the jury room.

DUTY TO DELIBERATE

When you retire to the jury room, your first duty is to select one of your members to act as your presiding juror. The presiding juror will preside over the deliberations and be the spokesperson for the jury, but otherwise has no greater vote or authority than any other juror.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous which means that all of you must agree on each question answered.

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

Do not be afraid to change your opinion if the discussion persuades you that you should. However, 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.

RETURN OF VERDICT

When all of you have agreed on each question answered, your presiding juror should complete the answers on the verdict form, sign and date the form, and advise the bailiff that you have reached a verdict. The court then will be reassembled to receive your verdict.

COMMUNICATION WITH THE COURT

If it becomes necessary to communicate with me during deliberations, you may send a folded note through the bailiff or clerk, signed by a juror. Do not disclose the content of your note to the bailiff or clerk.

Do not communicate with me about the case except by a signed note. I will only communicate with you regarding the case in writing or in open court.

Do not disclose any vote count in any note to the court.