

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DREW TRACY, et al.,

Plaintiffs,

v.

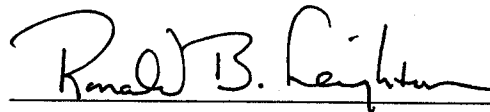
CITY OF VANCOUVER,

Defendant.

CASE NO. C17-5414 RBL

COURT'S INSTRUCTIONS TO THE JURY

Dated this 14th day of January, 2019.



Ronald B. Leighton
United States District Judge

INSTRUCTION NO. 1

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law of the case.

Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

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. And 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 to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

INSTRUCTION NO. 2

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 lawyers have agreed.

INSTRUCTION NO. 3

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. 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, will say 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 give 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. 4

Some evidence may be admitted for a limited purpose only.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

INSTRUCTION NO. 5

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. 6

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. 7

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those 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's education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. 8

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim 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. 9

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

INSTRUCTION NO. 10

The Fair Labor Standards Act's regarding overtime wage requirements do not apply to employees who are "exempt."

The eight Plaintiff employees claim that the Defendant owes them overtime pay because they are not exempt from the FLSA's requirements, and the Defendant claims they are exempt. The defendant in an FLSA case bears the burden of proving that an employee is exempt.

The following instructions are to aid you in determining whether the Defendant has proven that one or more of the Plaintiffs are exempt from the FLSA's overtime provisions. You may determine that some of the Plaintiffs are exempt and that others are not exempt.

INSTRUCTION NO. 11

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the exemptions as described in these instructions.

INSTRUCTION NO. 12

The FLSA provides minimum standards that may be exceeded but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the FLSA from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium than provided by the FLSA. While collective bargaining agreements cannot waive or reduce the FLSA's protections, nothing in the FLSA relieves employers from their contractual obligations under collective bargaining agreements.

INSTRUCTION NO. 13

Firefighters who are first responders are not exempt from the FLSA's overtime requirements (regardless of their rank or pay) where their primary duty is preventing, controlling, or extinguishing fires of any type; rescuing fire or accident victims; or other similar work. This is known as the "first responder rule."

However, this rule does not apply, and the Plaintiffs may be exempt under another FLSA exemption, if Defendant proves by a preponderance of the evidence that the Plaintiff's primary duty is the management of the enterprise that employs him (the Vancouver Fire Department).

If you find that a plaintiff is a first responder under this rule, then your verdict should be for that plaintiff. If, on the other hand, you find that the Defendant has proved that a Plaintiff was not a first responder under this rule, you should consider whether the Plaintiff is exempt from the FLSA's overtime requirements under one of the exemptions described in Instruction Nos. 16 and 19.

INSTRUCTION NO. 14

As used in these instructions, the term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in this case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to:

- the relative importance of the management duties as compared with other types of duties;
- the amount of time spent performing management work; the employee's relative freedom from direct supervision; and
- the relationship between the employee's salary and the wages paid to other employees for the kind of non-management work performed by the employee.

The amount of time spent performing management work can be a useful guide in determining whether management work is the primary duty of an employee. Thus, employees who spend more than 50% of their time performing management work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and the law does not require that management employees spend more than 50% of their time performing management work. Employees who do not spend more than 50% of their time performing management duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

INSTRUCTION NO. 15

As used in these instructions, "management" includes, but is not limited to, activities such

as:

- interviewing and selecting of employees;
- setting and adjusting employees' rates of pay and hours of work;
- maintaining records for use in supervision or control;
- appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- handling employee complaints and grievances;
- disciplining employees;
- apportioning the work among the employees;
- planning and controlling the budget;
- monitoring or implementing legal compliance measures.
- enforcing and imposing penalties for violations of rules and regulations;
- having particular weight given to recommendations about hiring, promotion, discipline, or termination;
- coordinating and implementing training programs;
- providing for the safety and security of the employees or the property;
- maintaining payroll and personnel records;
- handling community complaints;
- preparing budgets and controlling expenditures;
- managing the distribution of equipment; maintaining inventory of property and supplies; and
- directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed.

INSTRUCTION NO. 16

A Plaintiff is exempt from the FLSA's overtime requirements if the following elements are met:

- (1) He is compensated on a salary basis at a rate of not less than \$913 per week;
- (2) His primary duty is management of the City of Vancouver Fire Department;
- (3) He customarily and regularly directs the work of two or more other employees outside the context of emergency response duties; and
- (4) He has the authority to hire or fire other employees, or his suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

This is known as the "executive" exemption. The parties agree that the first element is established. The parties disagree as to whether the second, third, and fourth elements are established.

This exemption does not apply if you find that a Plaintiff is a "first responder" under Instruction No. 13. If you find that Defendant has proven that a Plaintiff is not a first responder, and also that he meets all four of the elements of this exemption, your verdict should be for Defendant for each such Plaintiff.

INSTRUCTION NO. 17

As used in these instructions, the term "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

INSTRUCTION NO. 18

To determine whether an employee's suggestions and recommendations are given "particular weight," as that term is used in these instructions, factors to be considered include, but are not limited to:

- whether it is part of the employee's job duties to make such suggestions and recommendations;
- the frequency with which such suggestions and recommendations are made or requested; and
- the frequency with which the employee's suggestions and recommendations are relied upon.

Generally, the suggestions and recommendations must pertain to employees whom that individual customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An individual's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

INSTRUCTION NO. 19

A Plaintiff is exempt from the FLSA's overtime requirements if the following elements are met:

(1) He receives total annual compensation of at least the annualized earnings amount of the 90th percentile of full-time non-hourly workers nationally; and

(2) He customarily and regularly performs any one or more of the exempt duties or responsibilities described in the "executive" exemption. (Instruction No. 16). Those duties are:

(a) management of the City of Vancouver or of a customarily recognized department or subdivision thereof;

(b) customarily and regularly directing the work of two or more other employees outside the context of emergency response duties;

(c) hiring or firing other employees or making suggestions and recommendations that are given particular weight as to the hiring, firing, advancement, promotion or any other change of status of other employees.

(3) His primary duty includes performing office or non-manual work. "Manual labor" refers to work involving repetitive operations with the employee's hands, physical skill and energy.

This is known as the "highly compensated employee" exemption. The parties agree that the first element is proven. The parties disagree as to the second and third elements.

This exemption does not apply if you find that a Plaintiff is a "first responder" under Instruction No. 13. If you find that Defendant has proven that a Plaintiff is not a first responder, and also that he meets all three elements of this exemption, your verdict should be for Defendant for each such Plaintiff.

INSTRUCTION NO. 20

If you find that a Plaintiff is owed back wages due to the Defendant's FLSA overtime violations, then under the FLSA, that Plaintiff is entitled to an equal amount of additional damages, also known as "liquidated damages."

The Court will award liquidated damages automatically, unless you find that the Defendant has proved by a preponderance of the evidence that its failure to pay a Plaintiff overtime compensation was in good faith.

"Good faith" in this context means that the Defendant took active steps to ascertain and follow the FLSA's requirements, and that it had objectively reasonable grounds for believing that its conduct complied with the FLSA. Ignorance of the law is not good faith and will not allow the Defendant to avoid liquidated damages.

INSTRUCTION NO. 21

When you begin your deliberations, elect one member of the jury as your foreperson who 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 the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But 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. 22

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

INSTRUCTION NO. 23

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

INSTRUCTION NO. 24

Those exhibits capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer. You will also be provided with a paper list of all exhibits received in evidence. If you need additional equipment or supplies, you may make a request by sending a note.

In the event of any technical problem, or if you have questions about how to operate the computer or other equipment, you may send a note to the clerk, signed by the foreperson or by one or more members of the jury. Be as brief as possible in describing the problem and do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with the clerk present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any non-juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non-juror other than to describe the technical problem or to seek information about operation of equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to make sure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover

1 that the computer provides or allows access to such materials, you must inform me immediately
2 and refrain from viewing such materials. Do not remove the computer or any electronic data
3 from the jury room, and do not copy any such data.
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INSTRUCTION NO. 25

A verdict form has been prepared for you. After you have reached unanimous agreement on the verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.