

**Electronically Filed
Supreme Court
SCMF-11-0000655
07-SEP-2011
08:58 AM**

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the Publication and Distribution
of the
Hawai‘i Pattern Jury Instructions - Civil

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAI‘I PATTERN JURY INSTRUCTIONS - CIVIL
(By: Recktenwald, C.J., for the court¹)

Upon consideration of the request of the Standing Committee on Pattern Civil Jury Instructions to publish and distribute (a) amendments to the Hawai‘i Pattern Jury Instructions - Civil Index and Instructions 1.3, 2.4, 16.19, 16.20, and 16.26 and (b) the addition of Civil Jury Instruction 1.2,

IT IS HEREBY ORDERED that the attached Civil Jury Instructions Index and Instructions 1.2, 1.3, 2.4, 16.19, 16.20, and 16.26 are approved for publication and distribution.

¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.

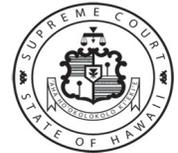
IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, September 7, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



INDEX

PRELIMINARY INSTRUCTIONS

<u>INSTRUCTION NO. 1.1:</u>	PRELIMINARY INSTRUCTIONS OF LAW
<u>INSTRUCTION NO. 1.2:</u>	PRELIMINARY INSTRUCTIONS TO THE JURY
<u>INSTRUCTION NO. 1.3:</u>	JUROR NOTETAKING

A. INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

<u>INSTRUCTION NO. 2.1:</u>	CONSIDERATION AND APPLICATION OF INSTRUCTIONS
<u>INSTRUCTION NO. 2.2:</u>	CONSIDER ONLY THE EVIDENCE
<u>INSTRUCTION NO. 2.3:</u>	OBSERVATIONS AND EXPERIENCE
<u>INSTRUCTION NO. 2.4:</u>	NO USE OF INDEPENDENT SOURCES OF INFORMATION
<u>INSTRUCTION NO. 2.5:</u>	NO FAVORITISM, PASSION, PREJUDICE, OR SYMPATHY
<u>INSTRUCTION NO. 2.6:</u>	NO DISCRIMINATION
<u>INSTRUCTION NO. 2.7:</u>	CONSIDERATION OF BUSINESS ENTITY PARTIES
<u>INSTRUCTION NO. 2.8:</u>	MULTIPLE PARTIES
<u>INSTRUCTION NO. 2.9:</u>	REMARKS OF THE COURT

INSTRUCTION NO. 1.2

PRELIMINARY INSTRUCTIONS TO THE JURY

As the judge in this case, I have three main duties:

(1) to make sure that the court proceedings are kept orderly;
(2) to determine what evidence may be received during this trial; and (3) to instruct you on the law that you must apply in this case.

You are the judges of the facts. You will decide the true facts solely on the evidence received at trial. The evidence in this case will come from the testimony of witnesses and from exhibits received into evidence. A very important part of your job will be to decide whether witnesses are truthful, whether witness testimony is accurate, and how much weight or importance to give to the testimony and exhibits.

The following are not evidence and you must not consider them as evidence in deciding the facts of this case: statements and arguments by attorneys; questions and objections by attorneys; excluded or stricken testimony or exhibits; and anything you see or hear while the court is not in session.

During the course of this trial, you may hear the attorneys make objections to testimony and exhibits. It is an attorney's right to object when he or she believes an objection is

appropriate or necessary. Objections help the court keep out matters that are not relevant to the issues in this trial.

I will rule on objections according to the law. When I rule on objections or motions, do not be concerned with the reasons for my rulings.

If I sustain an objection to a question and I do not allow the question to be answered, you must not speculate about what the answer might have been or draw any conclusion from the question itself.

At times you may be excused from the courtroom so that the attorneys can discuss legal matters with me. Under the law, some matters must be heard outside of your presence. At other times, the attorneys may approach me at the bench and quietly discuss a legal matter. This is called a bench conference. Please do not be offended by our whispering and do not guess or speculate about the reasons for the bench conference.

During this trial, you must not discuss this case with anyone, not even your friends, co-workers, family or household members. Do not allow anyone to discuss this case with you. You must not discuss this case with anyone in person, over the telephone, or by e-mail, text message, tweet, blog, through Facebook, or any other form of communication. If anyone asks you about this case, I instruct you to tell that person the judge ordered you not to discuss this case and excuse yourself.

You must immediately tell the bailiff about any such contact. Do not talk to the parties, the attorneys, the witnesses or anyone else connected with this case, except for court staff.

You must not discuss this case even among yourselves until I instruct you to begin your deliberations. During your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not investigate the case in any way, on your own or as a group. You must not visit any places mentioned during this trial or conduct experiments. Do not consult any dictionaries, encyclopedias, maps, or other reference materials. You are not permitted to search the internet, for example, by using Google* or any other search engine to look for information about this case or about the judge, parties, lawyers and witnesses. You must not read, listen to, or watch anything about this case from any source, such as a television or radio broadcast, a newspaper article, or an internet transmission.

Your decision must be based only on the evidence you receive in this courtroom and the court's instructions on the law.

If you receive any information about this case from any source outside this trial, even unintentionally, do not share that information with any other juror. If you do receive such

information, or if anyone tries to influence you or any other juror, you must immediately tell the bailiff.

Keep an open mind throughout this trial. Do not make up your mind about the verdict or about any issue until after you have discussed the case with the other jurors during deliberations. Do not conclude from my rulings or from anything that I say or do during the trial that I favor one side over the other. Do not let bias, sympathy, prejudice, or public opinion influence you during this trial.

*Practice Note: The reference to "Google" should be modified in the event other search engines become more commonly used and known.

INSTRUCTION NO. 1.3

JUROR NOTETAKING

You are allowed to take notes during the presentation of this case. The bailiff will give you note paper and a pen or pencil. You are not required to take notes.

If you choose to take notes, you must follow some important rules:

1. As you take notes, do not distract yourself or your fellow jurors from listening to the evidence.
2. Do not doodle on your note paper or let your notetaking take priority over your duty to pay attention to the witnesses. Do not permit your notetaking to interfere with your listening to the testimony, or with your observation of the witnesses while they testify because your observation of the witnesses is a means you will use to evaluate their honesty.
3. Do not take your notes outside this courtroom. When you leave the courtroom, leave your notes face down on your seat.
4. At the end of this case, when you leave this courtroom to retire to the jury deliberation room, take your notes with you into the jury room. When you leave the jury room during deliberations, leave your notes face down on the table.
5. Keep your notes to yourself. Do not show them to any other person.

6. If there is an inconsistency between your memory of the evidence and what you have recorded in your notes, treat your memory of the evidence as accurate and controlling.

7. After you have reached a verdict, your notes will be collected by the bailiff and will be destroyed.

Notes are only for a juror's personal use, to assist the juror in refreshing his or her memory of the evidence. Jurors who do not take notes should rely on their own memory of the evidence and should not be influenced by the fact that another juror has taken notes.

INSTRUCTION NO. 2.4

NO USE OF INDEPENDENT SOURCES OF INFORMATION

You must not use any source outside the courtroom to assist you.

This means that you must not talk to anyone about this case, except for court staff. Do not communicate with anyone else, including the parties, witnesses, your fellow jurors, friends or family members, about anything having to do with this trial. Do not talk to anyone in person, over the telephone, or by e-mail, text message, tweet, blog or any other form of communication until the court receives the jury's verdict or you are excused from jury service.

In addition, you must not conduct an independent investigation of the facts or the law. You must not visit the scene on your own, conduct experiments, or consult dictionaries, encyclopedias, textbooks, the internet, electronic resources, or other reference materials for additional information. Do not read, listen to or watch any news reports about this trial, if there are any.

INSTRUCTION NO. 16.19

UNLAWFUL DISCRIMINATORY PRACTICES: GENERAL DEFINITION

It is an unlawful discriminatory practice for any employer to [refuse to hire/refuse to employ/bar or discharge from employment] or otherwise to discriminate against any person in compensation or in the terms, conditions, or privileges of employment because of the person's [race/sex/sexual orientation/age/religion/color/ ancestry/disability/marital status/arrest and court record/other¹].

In this case, plaintiff(s) claim(s) that defendant(s) [refused to hire plaintiff(s)/refused to employ plaintiff(s)/barred or discharged plaintiff(s) from

¹ Laws enacted after Haw.Rev.Stat. § 378-2(1) (A) have recognized additional protected categories under certain circumstances. Under the following paragraphs of Haw.Rev.Stat. § 378-2, it is unlawful to discriminate "because of" the:

- (5) "assignment of income for the purpose of satisfying the individual's child support obligations as provided for under section 571-52";
- (6) "known disability of an individual with whom the qualified individual is known to have a relationship or association";
- (7) breastfeeding or expressing of "milk at the workplace"; or
- (8) "individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification under section 378-3(2)."

employment/discriminated against plaintiff(s) in compensation, or in the terms, conditions, or privileges of employment] because of plaintiff's(s') [race/sex/sexual orientation/age/religion/color/ancestry/disability/marital status/arrest and court record/other²].

Haw.Rev.Stat. § 378-2(1)(A); *Nelson v. University of Hawaii*, 97 Hawai'i 376, 387, 38 P.3d 95, 106 (2001).

² See footnote 1.

INSTRUCTION NO. 16.20

DISCRIMINATION: ESSENTIAL FACTUAL ELEMENTS

Plaintiff(s) claim(s) that defendant(s) wrongfully discriminated against him/her/them.¹ To prevail on this claim of discrimination, plaintiff(s) must prove all of the following:

1. Plaintiff(s) [are/were employed by/sought employment with] defendant [employer's name];
2. Plaintiff(s) was/were [not hired/refused employment/barred or discharged from employment/discriminated against in compensation, or in the terms, conditions, or privileges of employment];
3. Plaintiff(s) is/are qualified for [his/her/their position(s)/the position(s) sought];

¹ A plaintiff claiming discrimination has the burden of establishing either (1) intentional discrimination against a protected class to which the plaintiff belongs (also known as "pattern-or-practice" discrimination); (2) unintentional discrimination based on a neutral employment policy that has a disparate impact on a protected class to which the plaintiff belongs (also known as "disparate impact" discrimination); or (3) intentional discrimination against an individual who belongs to a protected class (also known as individual "disparate treatment" discrimination). See *Shoppe v. Gucci America, Inc.*, 94 Hawai'i 368, 377-78, 14 P.3d 1049, 1058-59 (2000). The vast majority of discrimination cases are of the third variety, for which this instruction is appropriate.

4. Plaintiff's(s') [*state protected status—e.g., race,² age,³ gender,⁴ disability,⁵ marital status,⁶ etc.*⁷] was a substantial or motivating factor in [the failure or refusal to hire/the discharge/the discrimination in

² See *Furukawa v. Honolulu Zoological Society*, 85 Hawai`i 7, 12-13, 936 P.2d 643, 648-49 (1997). A person may be "discriminated against" because of race in comparison to other "similarly situated" employees. Similarly situated employees are those who are generally subject to the same policies and subordinate to the same decision-maker as the plaintiff, *i.e.*, those whose "relevant aspects" of employment are similar. See Instruction 6.13.

³ See *Shophe v. Gucci America, Inc.*, 94 Hawai`i 368, 378, 14 P.3d 1049, 1059 (2000).

⁴ See *Nelson v. University of Hawaii*, 97 Hawai`i 376, 387, 38 P.3d 95, 106 (2001) (sex discrimination/sexual harassment); *Sam Teague, Ltd. v. Hawaii Civil Rights Commission*, 89 Hawai`i 269, 279 n. 10, 971 P.2d 1004, 1114 n. 10 (1999) (sex/pregnancy discrimination).

⁵ See *French v. Hawaii Pizza Hut, Inc.*, 106 Hawai`i 462, 99 P.3d 1046 (2004); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). A plaintiff has the burden of establishing that: (1) he or she is an individual with a "disability" within the meaning of the statute; (2) he or she is otherwise qualified to perform the essential duties of his or her job with or without reasonable accommodation; and (3) he or she suffered an adverse employment decision because of his or her disability.

⁶ See *Ross v. Stouffer Hotel Co.*, 76 Hawai`i 454, 458-9, 879 P.2d 1037, 1041-42 (1994); HRS §§378-1 and 378-2(1)(A). A plaintiff has the burden of establishing that he or she was qualified for the position, but suffered an adverse employment action because of plaintiff's status as a married or unmarried person, or because of the identity and occupation of plaintiff's spouse.

⁷ Other protected categories are stated in paragraphs (5) through (8) of Haw.Rev.Stat. § 378-2, as noted in Instruction No. 16.19 at footnote 1.

compensation, or in the terms, conditions, or
privileges of employment];

5. Plaintiff(s) was/were harmed; and
6. The [adverse action] was a legal cause of
plaintiff's(s') harm.

INSTRUCTION NO. 16.26

BONA FIDE OCCUPATIONAL QUALIFICATION: AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that he/she/it/they is/are not liable for discrimination because defendant's(s') [*describe employment action, e.g., "hiring of males only"*] was necessitated by a Bona Fide Occupational Qualification (BFOQ). To establish a BFOQ, defendant(s) must prove both of the following elements:

1. The [*describe employment action*] was reasonably necessary to the normal operation of defendant's(s') particular business; and
2. The [*describe employment action*] was substantially related to the functions of the position in question.

A BFOQ cannot be based on assumptions, stereotypes, or the subjective preferences of the defendant(s) or of other employees, clients or customers.

If defendant(s) prove(s) this affirmative defense, then you must find in favor of defendant(s) on the claim of discrimination.

PRACTICE NOTE: *The Hawai`i Administrative Rules recognize a BFOQ based on sex (Haw. Admin. R. § 12-46-102); marital status (Haw. Admin. R. § 12-46-122); age (Haw. Admin. R. § 12-46-132);*

ancestry (Haw. Admin. R. § 12-46-172); and disability (Haw. Admin. R. § 12-46-193(3)). However, there are no Rules recognizing a BFOQ for discrimination based on other protected classes, including race and color. Haw.Rev.Stat. § 378-2(8) codifies the 2009 addition of the protected category of credit history or credit report, subject to bona fide occupational qualifications, as well as to exceptions stated in Haw.Rev.Stat. § 378-2.7.

Haw.Rev.Stat. § 378-3(2); *Sam Teague, Ltd. v. Hawaii Civil Rights Commission*, 89 Hawai'i 269, 280, 971 P.2d 1104, 1115 (1999).