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SCMF-11-0000655

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

AMENDED¹

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAI‘I PATTERN JURY INSTRUCTIONS - CIVIL
(By: Recktenwald, C.J., for the court²)

Upon consideration of the request of the Standing Committee on Pattern Civil Jury Instructions to publish and distribute a new Civil Instruction 14.4, and amend Civil Instructions 1.2, 2.6, 16.19, and 16.35 of the Hawai‘i Pattern Jury Instructions - Civil,

¹ The original order was filed on June 1, 2021 at 10:32 a.m. This amended order corrects Page 2 of Instruction No. 1.2 by deleting "-15- Hawai‘i Civil Jury Instructions" which was erroneously included in the original order.

² Considered by: Recktenwald, C.J., Nakayama, McKenna, Wilson, and Eddins, JJ.

IT IS HEREBY ORDERED, that the request is granted and the attached civil jury instructions 1.2, 2.6, 14.4, 16.19, and 16.35 are approved for publication and distribution.

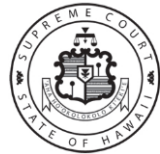
IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, June 3, 2021.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



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 the attorney 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.

Each one of us may have biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, what we see, hear and remember, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, sympathy, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of the person's actual or perceived race, color, ancestry, national origin, ethnicity, sex, gender, gender identity, sexual orientation, marital status, age, disability, religion, socioeconomic status, or political affiliation.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist

the urge to reach a verdict that is influenced by bias for or against any party or witness.

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

INSTRUCTION NO. 2.6

NO DISCRIMINATION¹

Your personal feelings or biases about a person's actual or perceived race, color, ancestry, national origin, ethnicity, sex, gender, gender identity, sexual orientation, marital status, age, disability, religion, socioeconomic status, or political affiliation are not a proper basis for deciding any issue of fact in this case. You must not allow any of these personal feelings or biases to influence your verdict.

¹ This instruction may need revision in cases involving claims of discrimination.

INSTRUCTION NO. 14.4

INFORMED CONSENT

A physician must give his or her patient information a reasonable patient objectively needs to make an informed and intelligent decision about whether to consent to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure. This is the basis of informed consent.

To prevail on a claim of failure to obtain informed consent, plaintiff(s) must prove that defendant(s) failed to disclose at least one of the following before the proposed treatment or procedure:

- (a) The condition to be treated;¹
- (b) A description of the proposed treatment or procedure;²
- (c) The intended and anticipated results of the proposed treatment or procedure;³
- (d) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;⁴

¹ Hawaii Revised Statutes (HRS) § 671-3(b) (1).

² HRS § 671-3(b) (2).

³ HRS § 671-3(b) (3).

⁴ HRS § 671-3(b) (4).

- (e) The recognized material risks of serious complications or death associated with the proposed treatment or procedure;⁵
- (f) The recognized material risks of serious complications or death associated with the recognized alternative treatments or procedures;⁶
- (g) The recognized material risks of serious complications or death associated with not undergoing any treatment or procedure;⁷ or
- (h) The recognized benefits of the recognized alternative treatments or procedures.⁸

A plaintiff(s) must also prove that:

- (a) The patient sustained injury; and
- (b) Defendant's(s') failure to make the disclosure(s) was a legal cause of the patient's injury in that:

⁵ HRS § 671-3(b)(5)(A). This element substitutes the word "death" for the statutory word "mortality."

⁶ HRS § 671-3(b)(5)(B). This element substitutes the word "death" for the statutory word "mortality."

⁷ HRS § 671-3(b)(5)(C). This element substitutes the word "death" for the statutory word "mortality."

⁸ HRS § 671-3(b)(6).

(i) Defendant's(s') treatment or the procedure was a substantial factor in bringing about the patient's injury; and

(ii) A reasonable person in the patient's position would not have consented to the treatment or procedure had the patient received the required disclosure; and

(c) There is no superseding cause of the patient's injury.

Expert testimony is not required to prove what information needs to be given to a patient in order for the patient to make an informed and intelligent choice about whether to consent to the proposed treatment or procedure.

However, expert testimony is required to prove: (1) the recognized material risks of serious complications or death associated with the proposed treatment or procedure, including the nature of the risks inherent in a particular treatment or procedure; (2) the probabilities of therapeutic success; (3) the nature of available alternatives to the proposed treatment or procedure; and (4) the recognized material risks of serious complications or death associated with not undergoing any treatment or procedure.⁹

⁹ Practice Note: The list of elements requiring expert testimony should be modified on a case-by-case basis.

INSTRUCTION NO. 16.19

UNLAWFUL DISCRIMINATORY PRACTICES: GENERAL DEFINITION

It is an unlawful discriminatory practice for any employer to [refuse to hire/¹refuse 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/including gender identity or expression/sexual orientation/age/religion/color/ancestry/disability/marital status/arrest and court record/or domestic or sexual violence victim status if the domestic or sexual violence victim provides notice to the victim's employer of such status or the employer has actual knowledge of such status/or other protected statuses as listed in HRS § 378-2(a)²].

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 employment/discriminated against plaintiff(s) in compensation,

¹ See *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1, 346 P.3d 70 (2015) (*held*, employer failed to satisfy its burden under the second prong of the *McDonnell Douglas* burden-shifting test to articulate a legitimate, nondiscriminatory reason for declining to hire the plaintiff).

² See Haw. Rev. Stat. §378-2(a) for a complete list of all protected categories. The statute was first enacted in 1981, and the Legislature has added other protected categories from time to time. See, e.g., Haw. Rev. Stat. §378-2(a)(4) (National Guard status), §378-2(a)(5) (child support obligors).

or in the terms, conditions, or privileges of employment] because of plaintiff's(s') [race/sex, including gender identity or expression/sexual orientation/age/religion/color/ancestry/disability/marital status/arrest and court record/ domestic or sexual violence victim status if the domestic or sexual violence victim provides notice to the victim's employer of such status or the employer has actual knowledge of such status/or other protected statuses as listed in HRS § 378-2(a)].

INSTRUCTION NO. 16.35

CONVICTION DISCRIMINATION:
AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that the nature of the plaintiff's(s') criminal conviction record bears a rational relationship to the duties and responsibilities of the position. If defendant(s) prove(s) this affirmative defense, then you must find in favor of defendant(s) on the claim of discrimination on the basis of conviction record.

Haw. Rev. Stat. § 378-2.5; *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 142 P.3d 265 (2006); *Shimose v. Hawai'i Health Systems Corp.*, 134 Hawai'i 479, 345 P.3d 145 (2015).