

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

AVA MARIA McMAHON

v.

REBOUND CARE

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NO. 3:00-0160  
JUDGE CAMPBELL

**JURY CHARGE**

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## **I. Introduction**

Members of the jury, you have now heard all the evidence in the case, as well as the closing arguments. Now it is time for me to instruct you about the law that you must follow in deciding this case.

I will start by explaining your duties as jurors;

Then, I will explain certain principles of law;

Then, I will explain certain general rules that apply in every civil case;

And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

Please listen carefully.

## **II. Jurors' Duties**

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in Court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you and apply it to the facts. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial and these instructions. All the instructions are important, and you should consider them together as a whole.

The parties have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

## II Burden of Proof

The Plaintiff has the burden of proof in this case. The party who has the burden of proof must carry that burden by a preponderance of the evidence. This means, simply, the greater weight of the evidence. It may be helpful to envision a set of balancing scales. After considering all the proof on a particular element of the Plaintiff's case, the scales must be tipped in favor of the Plaintiff on that issue, be it ever so slightly, for the Plaintiff to prevail on that issue.

A preponderance of the evidence, thus, means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

#### **IV. Substantive Law**

(1) Discrimination Under Title VII and THRA

The Plaintiff, Ava Marie McMahon, brings this case against the Defendant, Rebound Care, under Title VII of the Civil Rights Act, and the Tennessee Human Rights Act (THRA), alleging intentional discrimination by the Defendant based upon the Plaintiff's race. Plaintiff alleges both disparate treatment and constructive discharge based on race. Defendant denies any discrimination.

It is unlawful for an employer to intentionally discriminate against any person with respect to compensation, tenure, conditions, or privileges of employment because of such person's race. It is your responsibility to decide whether the Plaintiff has proved her claim by a preponderance of the evidence.

The proof required to establish a claim under Title VII is generally the same as the proof required to establish a claim under the Tennessee Human Rights Act.

(2) Elements of Discrimination Claim

In order for Plaintiff to establish her claim against Defendant, she has the burden of proving that Defendant's actions were, more likely than not, motivated by Plaintiff's race. The mere facts that Plaintiff is African-American and was demoted and transferred are not sufficient, in and of themselves, to establish Plaintiff's claim under the law.

The Plaintiff is not required to produce direct evidence of the Defendant's unlawful motive. Direct evidence is evidence of remarks or actions that, if believed, directly prove that the Plaintiff's race was a factor in the Defendant's employment actions with regard to Plaintiff.

Stray remarks in the workplace do not constitute direct evidence of discrimination. This means that statements made by persons not involved in the decision or statements made by decision

makers that are unrelated to the decision do not constitute direct evidence that Plaintiff's race was a factor in the employment decision.

Intentional discrimination, if it exists, is a fact which you may infer from the existence of other facts. In order for Plaintiff to establish her claims of discrimination based on race, she must first prove each of the following essential elements by a preponderance of the evidence.

First: she is a member of a protected group;

Second: she was qualified for the position;

Third: despite her qualifications, she was subjected to an adverse employment action; and

Fourth: a person not of the protected class who was similarly situated was treated differently.

These elements establish what is called a "prima facie case."

If Plaintiff fails to prove any one of the above elements by a preponderance of the evidence, you must find for the Defendant.

If you find that the Plaintiff was demoted because of factors other than her race, then you must find in favor of the Defendant. If you find that Plaintiff's race was a factor that motivated or played a part in the Defendant's decision to demote Plaintiff, then you must find in favor of the Plaintiff. If you find, however, that Plaintiff's race was a factor in Defendant's decision to demote Plaintiff, but Defendant would have demoted her regardless of her race, then you may not award Plaintiff any damages.

If you find that the Plaintiff has proved all the elements of her prima facie case, then you must determine whether the Defendant has shown a legitimate, nondiscriminatory reason for its actions.

The Defendant need only present legitimate nondiscriminatory reasons for treating Plaintiff differently. The Defendant need not persuade you that it was actually motivated by the proffered reasons, but it is sufficient if the Defendant's evidence raises a genuine issue as to whether it discriminated against the Plaintiff.

If you find that the Defendant has presented legitimate nondiscriminatory reasons for its conduct, the Plaintiff must then prove by a preponderance of the evidence that the reasons are merely a pretext for hiding discriminatory conduct.

At all times the burden to prove discrimination by a preponderance of the evidence remains on the Plaintiff.

(3) Legitimate Nondiscriminatory Reasons

An employer is entitled to demote or transfer an employee for any reason that is not discriminatory as defined by the law. Demoting an employee who is a minority is not illegal if the reason for doing so is unrelated to the employee's race. Therefore, the fact that the Plaintiff is African-American is not, in and of itself, evidence of discrimination.

As long as the employer has legitimate nondiscriminatory reasons, that is, bona fide business or economic reasons unconnected with discriminatory reasons, the employer cannot be held liable for violation of Title VII or the Tennessee Human Rights Act. In this regard, you must bear in mind that an employer is entitled to make its own subjective business judgments, however misguided they may appear to you, and may demote or transfer an employee for any reason that is not discriminatory as defined by the law.

The failure of an employer to follow its own policies does not alone constitute discriminatory conduct, but it is a fact, if proved, that may be considered along with other facts.

Your inquiry, however, does not stop if you find that Defendant has articulated legitimate nondiscriminatory reasons for its decision concerning the Plaintiff. You must then determine whether Defendant's legitimate nondiscriminatory reasons are pretextual.

(4) Pretext

The term pretext means that the reasons which Defendant asserts motivated it concerning Plaintiff were in fact not the actual reasons for the decisions concerning the Plaintiff. The Plaintiff has the burden of proving by a preponderance of the evidence that the reasons asserted by Defendant were a pretext used to hide the fact that Defendant's actions were, more likely than not, because of Plaintiff's race. You must determine whether the Plaintiff has proved that the reasons given by Defendant were a pretext, and you may consider all the evidence in making this determination.

To establish pretext, the Plaintiff must prove each of the following two elements by a preponderance of the evidence:

First: the reasons offered by Defendant for its employment decisions are false; and

Second: the true reasons for the employment decisions are related to the Plaintiff's race.

(5) Constructive Discharge

The Plaintiff also claims that she was constructively discharged from her employment based on race. The law recognizes that a forced resignation is the same as being fired and refers to that forced resignation as a constructive discharge. If the Plaintiff proves that she was forced to resign because of intolerable working conditions, you must determine that she was constructively discharged.

To establish a claim of constructive discharge, Plaintiff must show:

(A) Defendant made Plaintiff's working conditions so intolerable that a reasonable person would have felt compelled to resign;

(B) Defendant knew or reasonably should have know about the intolerable conditions and their effect on the Plaintiff; and

(C) Plaintiff's resignation was a reasonably foreseeable result of Defendant's actions.

## V. Damages

If you find that the Defendant intentionally discriminated against the Plaintiff based upon Plaintiff's race, and you find that Plaintiff has actually suffered damages as a proximate result of the Defendant's conduct, then you must award her damages in an amount that will reasonably compensate her for those injuries.

You should consider the following elements of damage, to the extent you find that Plaintiff has proven them by a preponderance of the evidence:

(1) Back Pay

You may award as actual damages an amount that reasonably compensates the Plaintiff for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that the Plaintiff would have received had she not been discriminated against. You may also include in back pay any bonuses that Plaintiff would have earned. You should make the Plaintiff whole for any wages or other benefits that she has lost as a result of Defendant's discriminatory actions.

(2) Compensatory Damages — Mental & Emotional Suffering

If you find that the Plaintiff is entitled to a verdict against the Defendant, then you may award reasonable compensation for any mental or emotional injuries suffered by the Plaintiff and proximately caused by the Defendant's conduct. These injuries may include suffering such as anguish, distress, fear, anxiety, humiliation, embarrassment, grief, shame and worry.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for mental or emotional suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for mental or emotional suffering,

you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

(3) Damages - Proximate Cause

You shall award damages only for those injuries which you find Plaintiff has proven by a preponderance of the evidence. Moreover, you shall award damages only for those injuries that you find were proximately caused by the Defendant. That is, you may not award damages for any injury or condition suffered by the Plaintiff unless it has been established by a preponderance of the evidence that such injury was proximately caused by the Defendant.

A proximate cause is a cause which, in natural and continuous sequence, produces the loss, and without which the loss would not have occurred. A wrongful act gives rise to no liability unless it is the proximate cause of the loss of which the Plaintiff complains. The Plaintiff has the burden to prove by a preponderance of the evidence that the Defendant's conduct was the proximate cause of her losses.

(4) Damages - Reasonable and Not Speculative

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

Damages must be reasonable. If you should find that the Plaintiff is entitled to damages, you may award her only such damages as will reasonably compensate her for such injury and damage as you find, from a preponderance of the evidence in the case, that she has sustained as a proximate result of Defendant's actions.

You are not permitted to award speculative damages. So, you are not to include in any verdict compensation for any perspective loss which, although possible, is not reasonably certain to occur in the future.

(5) Punitive Damages

If you find that Plaintiff has suffered actual damage caused by any action of the Defendant, in violation of Title VII, then you may, in your sole discretion, award additional damages known as punitive damages against the Defendant. You do not have to award punitive damages. You may not award punitive damages for violations of the Tennessee Human Rights Act.

The purpose of punitive damages is not to further compensate the Plaintiff, but to punish a wrongdoer and deter others from committing similar wrongs in the future.

You may award the Plaintiff punitive damages against the Defendant if you find that Defendant engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of the Plaintiff.

“Malice” means the intentional doing of a wrongful act without just cause or excuse and with an intent to injure the person or property of another person.

“Recklessness indifference” means with serious disregard for the consequences of one’s actions.

Punitive damages may not be awarded if you determine that Defendant’s conduct was merely negligent or that Defendant illegally discriminated against the Plaintiff with the reasonable belief that its actions were lawful.

If you decide that the Plaintiff is entitled to punitive damages, you will not assess the amount of those damages at this time. You will report only your finding on the issue of liability for punitive damages to the Court.

You cannot award punitive damages to a Plaintiff unless you have awarded either back pay or compensatory damages to that Plaintiff. You do not have to award punitive damages if you award compensatory damages.

(6) Damages Admonition

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that Plaintiff should, or should not, be awarded damages in this case.

(7) Duty to Mitigate

It is the duty of the Plaintiff to make every reasonable effort to minimize or reduce her damages for loss of employment by seeking employment.

If you determine the Plaintiff is entitled to damages, you must reduce the damages by (1) what the Plaintiff earned and (2) what the Plaintiff could have earned had she made a reasonable effort to find comparable employment from her demotion date until the date of the trial. The Defendant has the burden of proving that Plaintiff failed to mitigate her damages.

If you determine that the Plaintiff did not make reasonable efforts to obtain another similar job, you must decide whether any damages resulted from her failure to do so. You must not compensate the Plaintiff for any portion of her damages that resulted from her failure to make reasonable efforts to reduce her damages.

## **VI. General Rules**

### **(1) Evidence Defined**

You must make your decision based only on the evidence that you saw and heard here in Court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of Court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath and the exhibits that I allowed into evidence.

Nothing else is evidence. My legal rulings are not evidence. And my comments and questions are not evidence. The opening and closing statements are not evidence. Questions asked by the lawyers of witnesses are not evidence.

During the trial I did not let you hear the answers to some of the questions that were asked. You must completely ignore those questions. Do not even think about them. Do not speculate about what a witness might have said. They are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Make your decision based only on the evidence, as I have defined it here, and nothing else.

### **(2) Consideration of Evidence**

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

### **(3) Direct and Circumstantial Evidence**

Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one. Neither does the law say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

(4) Credibility of Witness

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to that witness' testimony. In weighing the testimony of a witness, you should consider the circumstances under which each witness has testified. Consider the witness' manner of testifying and the opportunity to observe or acquire knowledge concerning the facts about which the witness testified. Consider the witness' candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other credible evidence. Consider also any relationship which the witness may have to the Plaintiff or the Defendant; how the witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other

evidence in the case. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Discrepancies in a witness' testimony or between his testimony and that of others do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is also possible that two persons witnessing an incident or a transaction may see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

(5) Potential Witnesses & Exhibits

The law does not require a party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in this case.

(6) Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial.

As to any question to which an objection was sustained, you must not speculate on what the answer might have been or on the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

(7) Lawyers' Objections

The lawyers objected to some of the things that were said or done during the trial. Do not hold that against either side. They have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in Court.

Remember also that any statements, objections or arguments made by the lawyers are not evidence in the case. Lawyers try to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might

otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case.

(8) Corporation Is A Person

The fact that a corporation is a party in this case must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration, and to justice by the same legal standards.

A corporation can act only by and through its officers and employees, and the conduct of an officer or employee of a corporation is the conduct of the corporation itself.

## **VII. Deliberations and Verdict**

### **(1) Introduction**

That concludes the part of my instructions explaining the rules for considering the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room and your possible verdicts.

The first thing that you should do in the jury room is choose someone to be your foreperson. You may select the foreperson in any fair and reasonable way. The foreperson shall preside over your deliberations and speak for the jury in the Courtroom when you have reached your verdict. The case should not be decided simply on what the foreperson wants. You each must exercise your independent judgment. The foreperson's opinion carries no more weight than any other juror's opinion.

Once you start deliberating, do not talk to the court security officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the court security officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson and must be in writing.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. That should stay secret until you are finished.

(2) Experiments, Research, and Investigation

Remember that you must make your decision based only on the evidence that you saw and heard here in Court. You may consider the exhibits admitted into evidence. Do not try to gather any information about the case on your own while you are deliberating.

For example, do not conduct any experiments inside or outside the jury room; do not bring any books with you to help you with your deliberations, and do not conduct any independent research, reading, or investigation about the case. You will be permitted to take with you any notes you may have taken during the course of the trial.

Make your decision based only on the evidence that you saw and heard here in Court.

(3) Unanimous Verdict

Your verdict, whether it is for the Plaintiff or for the Defendant, must be unanimous. In other words, every one of you must agree on the verdict.

After you reach a verdict, and it is announced in the courtroom, I will ask each of you if it is in fact your verdict. This is to make sure the verdict is, in fact, unanimous.

(4) Verdict Form

(A) Instructions on the Verdict Form

I now want to explain the verdict form to you. Each of you will be provided copies for use in your deliberations. The foreperson should complete and sign the original verdict form when you reach your verdict.

The verdict form is divided into two sections, with a separate section for each of the Plaintiff's claims. Section I is Title VII and Section II is THRA.

Each section, in turn, is divided into a number of questions. Certain questions have instructions written above them. It is very important to follow these instructions carefully. These instructions tell you which questions must be answered, or skipped, based on your answers to previous questions. Thus, please carefully read and follow all the instructions on the verdict form.

(B) Damages - Itemized by Claim

I also want to explain how to complete the questions regarding the dollar amount of damages awarded, if any. For each of Plaintiff's claims, there are separate questions asking for the dollar amount of damages awarded. Depending on how you answer previous questions, you may or may not be required to answer the damages questions.

Any damages awarded must be itemized claim-by-claim. For instance, hypothetically, you could award "X" amount for claim one and "Y" amount for claim two. The total damages amount, if any, the Plaintiff will be awarded for the entire case will be arrived at by adding all the damage amounts listed for each claim on the verdict form. In other words, all the dollar numbers will be added up. So, do not take the total amount of damages for the entire case and then repeat that total case amount over and over in response to the damages questions for each claim. Again, do not repeat the total damages award for the entire case in response to the various damages questions. Damages, if any, must be itemized claim-by-claim to make clear which damages are for which claims and to avoid double, or multiple, counting of the damages.

Remember, the Court has no opinion on whether you should or should not award damages in this case.

(5) Duty to Deliberate

Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that -- your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what the other jurors have to say, and then decide for yourself if the Plaintiff has proved her claim for damages against the Defendant.

### **VIII. Court Has No Opinion**

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves whether or not the Plaintiff has proved her claims against the Defendant.

Thank you for your service as jurors. The Court is now in recess for the purpose of jury deliberations.