

INSTRUCTION 1

These instructions contain the law that you must use in deciding this case. No single instruction states all the applicable law. All the instructions must be read and considered together. You must not be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law should be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court. The Court does not, by these instructions, express any opinions as to what has or has not been proved in the case, or to what are or are not the facts of the case.

INSTRUCTION 2

1. Plaintiff Churchill has the burden of proving his claims by a preponderance of the evidence.
2. Defendant University has the burden of proving its affirmative defenses by a preponderance of the evidence.
3. To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not.
4. "Burden of proof" means the obligation a party has to prove his or its claims or defenses by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you.
5. If a party fails to meet his or its burden of proof as to any claim or defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance of the evidence on either side, you must reject that claim or defense.

INSTRUCTION 3

Any finding of fact you make must be based on probabilities, not possibilities.

You should not guess or speculate about a fact.

INSTRUCTION 4

You must not be influenced by sympathy, bias, or prejudice for or against any party in this case.

A witness qualified as an expert by education, training, or experience may state opinions. You should judge expert testimony just as you would judge any other testimony. You may accept it or reject it, in whole or in part. You should give the testimony the importance you think it deserves, considering the witness's qualifications, the reasons for the opinions, and all of the other evidence in the case.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

Based on these considerations, you may believe all, part, or none of the testimony of a witness.

INSTRUCTION 5

The evidence in the case consists of the sworn testimony of all the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or agreed to, and all presumptions stated in these instructions.

In deciding the facts, you must consider only the evidence received at trial. Evidence offered at the trial and rejected or stricken by the Court must not be considered by you. Statements, remarks, arguments, and objections by counsel and remarks of the Court not directed to you are not evidence.

You are to consider only the evidence in the case and the reasonable inferences from that evidence. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from other facts which have been proved.

Evidence may be either direct or circumstantial. Circumstantial evidence is the proof of facts or circumstances from which the existence or nonexistence of other facts may reasonably be inferred. All other evidence is direct evidence. The law makes no distinction between the effect of direct evidence and circumstantial evidence.

INSTRUCTION 6

Certain testimony has been read into evidence and displayed from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given by the witness from the witness stand.

INSTRUCTION 7

In this case the Plaintiff claims that the Defendants, while acting "under color" of state law, intentionally deprived the Plaintiff of the Plaintiff's rights under the Constitution of the United States. Specifically, the Plaintiff claims that while the Defendants were acting under color of authority of the State of Colorado as the University of Colorado and the Regents of the University of Colorado they intentionally violated the Plaintiff's constitutional rights under the First Amendment to the Constitution when the Defendants discharged the Plaintiff from employment in retaliation for Plaintiff's exercise of the right of free speech.

Under the First Amendment to the Constitution of the United States, every public employee has the right to "freedom of speech" addressing issues of public concern. However, the plaintiff as a public employee has a right to practice freedom of speech only to the extent that it does not unduly interfere with the duties and responsibilities of the plaintiff's employment or the operations of the public employer.

The law further provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the Plaintiff's rights under the Constitution of the United States.

In order to prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the actions of the Defendants were "under color" of the authority of the State;

Second: That the Plaintiff engaged in protected speech activity concerning 9-11;

Third: That a majority of the Board of Regents of the University of Colorado used Plaintiff's protected speech activity as a substantial or motivating factor in the decision to discharge the Plaintiff from employment; and

Fourth: That the Defendants' acts were the proximate or legal cause of damages sustained by the Plaintiff.

In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.

In this case the parties have stipulated or agreed that the Defendants acted "under color" of state law, and that the Plaintiff engaged in protected speech activity concerning 9-11 and you should, therefore, accept these facts as proven.

You should be mindful that the law applicable to this case requires only that a public employer refrain from terminating a public employee in retaliation for the employee's exercise of protected First Amendment rights. So far as you are concerned in this case, a public employer may discharge a public employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the Defendants even though you personally may not approve of the action taken and would have acted differently under the circumstances. Neither does the law require that a public employer extend any special or favorable treatment to public employees because of their exercise of protected First Amendment rights. On the other hand, in order to prove that the Plaintiff's protected speech activities were a "substantial or motivating" factor in the Defendants' decision, the Plaintiff does not have to prove that the protected speech activities were the only reason the Defendants acted against the Plaintiff. It is sufficient if

the Plaintiff proves that the Plaintiff's protected speech activities were a determinative consideration that made a difference in the Defendants' adverse employment decision.

Finally, for damages to be the proximate or legal result of wrongful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

If you find in the Plaintiff's favor with respect to each of the facts that the Plaintiff must prove, you must then decide whether the Defendants have shown by a preponderance of the evidence that the Plaintiff would have been dismissed for other reasons even in the absence of the protected speech activity. If you find that the Plaintiff would have been dismissed for reasons apart from the speech activity, then your verdict should be for the Defendants.

INSTRUCTION NO. 8

Plaintiff Churchill has the burden of proving, by a preponderance of the evidence, the extent of his damages. If you find in favor of Plaintiff Churchill on his claim that Defendant University retaliated against him, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the retaliation.

In determining such damages, you shall consider the following: (1) Any noneconomic losses or injuries which Plaintiff Churchill has had to the present time, including physical and mental pain and suffering, inconvenience, emotional distress, loss of reputation, and impairment of the quality of life; and (2) any economic losses or injuries which plaintiff has had to the present time.

INSTRUCTION 9

If you find that Plaintiff Churchill has actual damages, then you must consider whether Defendant University has proven its affirmative defense of failure to mitigate or minimize damages. The plaintiff has the duty to take reasonable steps under the circumstances to mitigate or minimize his damages. Damages, if any, caused by Plaintiff's failure to take such reasonable steps cannot be awarded to the plaintiff. This affirmative defense is proven if you find that the defendants have established each of the following propositions by a preponderance of the evidence: (1) Plaintiff Churchill failed to seek equivalent employment after Defendant University terminated him; and (2) Plaintiff Churchill had increased damages because he did not seek equivalent employment.

If you find that any one or more of these propositions has not been proved by a preponderance of the evidence, then you shall make no deduction from Plaintiff Churchill's damages.

On the other hand, if you find that Defendant University has proven both of these propositions by a preponderance of the evidence, then you must determine the amount of damages caused by the plaintiff's failure to take such reasonable steps. This amount must not be included in your award of damages.

INSTRUCTION 10

The fact that an instruction on measure of damages has been given to you does not mean that the Court is instructing you to award or not to award damages. The question of whether or not damages are to be awarded is a question for the jury's consideration.

INSTRUCTION 11

Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.

INSTRUCTION 12

The original forms of the written instructions and the exhibits are part of the court record. Do not place any marks or notes on them. The instructions labeled "copy" may be marked or used in any way you see fit.

The Bailiff will escort you to the jury room. After you get to the jury room you shall select one of your members to be the foreperson of the jury. That person will be in charge of your discussions. You must all agree on your verdict, and you must sign the original form of whatever verdict you reach.

Please notify the Bailiff when you have reached a verdict, but do not tell the Bailiff what your verdict is. You shall keep the verdict forms, these instructions and the exhibits until I give you further instructions.

Handwritten signature and initials, possibly "J. V. 4/29/09".

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street, Denver, Colorado 80202	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
Plaintiff(s): WARD CHURCHILL  v.  Defendant(s): UNIVERSITY OF COLORADO, and THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate.	
<b>VERDICT FORM</b>	

We, the jury, have arrived at the following verdict in this lawsuit. We have made any findings by a preponderance of the evidence.

**Please answer Question 1.**

1. When it terminated Professor Churchill's employment, did a majority of the Board of Regents of the University of Colorado use Plaintiff's protected speech activity as a substantial or motivating factor in the decision to discharge the Plaintiff from employment?

ANSWER:  yes  no

**If you have answered "no" to Question 1, you do not need to answer any of the following questions on this verdict form. Please sign and date this verdict form. If you answered "yes" to Question 1, please answer Question 2.**

2. Did the termination harm Plaintiff Churchill?

ANSWER:  yes  no

**If you have answered "no" to Question 2, you do not need to answer any of the following questions on this verdict form. Please sign and date this verdict form. If you answered "yes" to Question 2, please answer Question 3.**

3. Have the Defendants shown by a preponderance of the evidence that the Plaintiff would have been dismissed for other reasons even in the absence of the protected speech activity?

ANSWER: \_\_\_\_\_ yes  no

**If you have answered "yes" to Question 3, you do not need to answer any of the following questions on this verdict form. Please sign and date this verdict form. If you answered "yes" to Questions 1-2 and "no" to Question 3, please answer Question 4.**

4. Please describe the dollar amount of compensation, in each category, that you will provide to Plaintiff Churchill for prevailing on his claim for retaliation based on Defendant University's decision to terminate his employment. In making such awards, you should deduct any sums that were proven by a preponderance of the evidence to have occurred because of Plaintiff Churchill's failure to mitigate his damages.

Past non-economic damages \$ 0

Past economic loss \$ 1

Please sign and date this Verdict Form. After you have signed and dated this Verdict Form, please notify the bailiff that you have completed your deliberations. Do not inform the bailiff of your verdict.

Dated this 2 day of April, 2009:

BY THE JURY:

[Signature]

Vinnie Sciacchitano

Amanda Marks

Bethany Quirell

Shadi Ahmad  
Foreperson

Lacy Wallace