

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SUSAN FARRELL,

Plaintiff,

v.

**EARTHINTEGRATE, INC. AND
PAGEFLEX, INC.**

Defendants.

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CIVIL ACTION NO. 4:16-cv-2706

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

You have now heard all of the evidence in this lawsuit filed by Ms. Susan Farrell against her former employer, PageFlex. I will now instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

I will first give you general instructions that apply in many cases, including this one. Then I will give you more specific instructions that apply to this case in particular. Finally, I will give you instructions about deliberating to a verdict.

I. General Instructions

Consider these instructions as a whole and in context. Do not consider any instruction to be more important than others, and do not take any instruction out of context. Your duty as jurors is to follow the law that I give you in these instructions. You, the jurors, are the sole finders of fact. But in finding those facts, you must apply the law as I give it to you in these

instructions, regardless of any opinion you may have as to what the law ought to be. If I have given you the impression during the trial that I favor either party, or that I have an opinion about the facts of this case, you must disregard that impression.

All parties must be treated as equals before the law in a court of justice. The fact that one of the parties is an individual and one is a corporation is irrelevant. Your duty is to make fair and impartial decisions based only on the evidence and law presented to you here. A corporation and all other persons are equals before the law and must be treated as equals in a court of justice. Our system does not permit jurors to be influenced by bias, prejudice, sympathy, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as it is given to you, and reach a just verdict, regardless of the consequences.

The verdict form, which I will explain in detail later, tells you to answer questions about the factual disputes in the case. Base your answers on the facts as you find them. Do not first decide who you think should win and then answer questions accordingly.

The evidence for you to consider consists of the witnesses' testimony and the exhibits that I have admitted into evidence. You may also consider fair inferences you choose to draw from the facts you find to be proven. Lawyer statements and arguments are not evidence and are not instructions on the law. Although what the lawyers say is not evidence, you may consider their statements and arguments in light of the evidence and determine whether it supports the arguments. Juror notes taken during a trial are not evidence. They are only aids to a juror's memory of the evidence. If you took notes and your memory of the evidence differs from your notes, rely on your memory and not the notes. If you did not take notes, rely on your own independent memory of the evidence and do not be unduly influenced by any other juror's notes.

Unless otherwise indicated, your fact findings and your answers to the questions you are asked to answer must be based on a preponderance of the evidence. This means the greater weight and degree of credible evidence before you. To establish a fact by a preponderance of the evidence means to prove that fact is more likely true than not true. In determining whether a fact has been proven by a preponderance of the evidence, you may consider all of the evidence, regardless of which party brought it to you.

Facts may be proven by direct evidence, such as testimony of an eyewitness. Facts can also be proven by indirect or circumstantial evidence, which is evidence that proves a fact from which you can logically conclude another fact exists. Consider both direct and circumstantial evidence in finding the facts and arriving at your answers from all the evidence.

Witness credibility or truthfulness is for you to decide. In determining credibility, you may consider a wide range of matters, including each witness's demeanor, the consistency or inconsistency of the witness's answers to questions, and the witness's feelings, prejudices, or biases. In determining the weight to give to a witness's testimony, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at trial. A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

Do not decide this case by merely counting the number of witnesses who have testified about a fact. The testimony of a single witness can prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all the evidence, you believe that witness.

The fact that a person brought a lawsuit and is in court seeking damages creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

II. Specific Instructions

Certain testimony has been presented to you through deposition testimony—the sworn, recorded answers to questions that a witness was asked in advance of the trial with a court reporter and attorneys representing the parties present. Mr. Romik was the Chief Executive Officer of Pageflex. He was involved in a number of events relating to this case, including hiring Ms. Farrell, supervising her, making the decision to terminate her employment, and declining to extend her severance pay. Mr. Romik provided sworn testimony in this proceeding a few months ago at a deposition, and a court reporter was present and recorded the testimony. Unfortunately, Mr. Romik died unexpectedly a few weeks before this trial was scheduled to begin. Because he is not available to testify, some of his prior sworn testimony was read to you. Recording deposition testimony is never perfect. While Mr. Romik spoke English fluently, it was not his first language. What was read to you may sound a bit different than testimony from a live witness in court. Nonetheless, this testimony was given under oath and is entitled to be

weighed and otherwise considered by you in the same way as if Mr. Romik had been present and testified from the witness stand in court.

As the party bringing this lawsuit, the plaintiff, Susan Farrell has the burden of proving her case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that Ms. Farrell has failed to prove any element of her claim by a preponderance of the evidence, then she may not recover on that claim.

This lawsuit arises out of certain provisions in the written offer letter that became the employment agreement between Ms. Farrell and PageFlex. The parties agree that PageFlex had the right to terminate Ms. Farrell's employment, with or without cause. The issue is not whether PageFlex was entitled to fire her—PageFlex had that right. The only issue is whether Ms. Farrell is entitled under her employment agreement with PageFlex to be paid a severance.

The part of the agreement at issue reads:

If your [Ms. Farrell's] employment is terminated by the Company [PageFlex] for any reason other than cause as defined in Addendum A to this offer, you will receive a severance payment equal to one year for every year you are employed by the Company up to a maximum amount of six years.

Addendum A to the employment agreement defines "cause" as the occurrence of one of several possible listed events. One listed event is as follows:

The Executive's [Ms. Farrell's] continued failure to perform . . . her obligations under the Agreement, but only if the Company notifies the Executive in writing of the failure within thirty (30) days following the occurrence and the failure remains uncured after the expiration of thirty (30) days from receipt of such notice.

Another listed event is:

the Executive's engaging in conduct that is injurious to the Company.

The employment agreement stated that:

The determination of whether the Executive's employment is terminated for Cause shall be made solely by the Company, which shall act in good faith in making such determination.

You are asked to decide two questions. The first question is whether Ms. Farrell has proven by a preponderance of the evidence that when she and PageFlex entered into the employment agreement, they intended her to receive a severance if she worked for less than a year before she was fired. Ms. Farrell contends that the language in the employment agreement at issue here means that if she was fired without cause by PageFlex, she is entitled to a severance based on the amount of time she worked at PageFlex, up to a maximum of six years, even if it was less a year. She is seeking a pro rata payment of her first year's salary based on the length of time she worked at PageFlex before she was fired, contending that she was fired without cause. That amount is \$167,057.53 in severance (296 days at a yearly salary of \$206,000).

PageFlex contends that the language at issue means that Ms. Farrell must have worked for at least one year to be entitled to any severance, even if she was fired without cause. Page Flex contends that because Ms. Farrell did not work for one year before she was fired, she is owed no severance.

Jury Question No. 1 asks whether you find that Ms. Farrell has proved, by a preponderance of the evidence, that the parties' agreement means that she is entitled to a pro rata severance payment if she had worked less than a year when she was fired. You must decide the meaning of these terms by determining the intent of the parties at the time they entered into the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the parties' interpretation of the agreement, and the parties' conduct.

Jury Question No. 2 asks whether Ms. Farrell has proved by a preponderance of the evidence that PageFlex did not act in good faith in determining that it had cause to terminate Ms.

Farrell's employment. Conduct is in good faith when it is honest in fact, free of improper motive or willful ignorance of the facts at hand. Good faith does not require proof of a "reasonable" investigation by the party whose act is challenged. It is not enough to show negligent or unreasonable conduct. Instead, proving that conduct is not in good faith requires proof that it was done out of an improper motive or with willful ignorance of the facts.

III. Final Instructions on Deliberations and Verdict

When you go to the jury room to begin deliberating, you should first select a foreperson to preside over your deliberations and speak for you here in the courtroom. Your verdict must represent the considered judgment of each juror. It is your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case. Remember that you are not partisans. You are the judges of the facts. Your sole interest is to seek the truth from the evidence in the case and the instructions on the law.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. A verdict form has been prepared for your convenience. The form has space for your answers to the specific jury questions. You will take the verdict form to the jury room. When you have reached an agreement as to your unanimous answer to each of the questions, your foreperson will fill the answers in on the verdict form, sign and date it, and return to the courtroom.

If you need to communicate with me during your deliberations, your foreperson

should write the message or question in a written note, sign it, and pass the note to the court security officer who will be outside the jury room. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberations.

SIGNED on August 8, 2017, at Houston, Texas.

A handwritten signature in black ink, reading "Lee H. Rosenthal". The signature is fluid and cursive, with a large loop at the end of the last name.

Lee H. Rosenthal
Chief United States District Judge