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TEACHING TORTS THROUGH EXERCISES ON DRAFTING VERDICT FORMS

ROBERT E. KEETON*

I. INTRODUCTION

I am grateful for the opportunity to contribute to this *Law Journal* issue on “Teaching Torts.” It is a welcomed break from the combination of judicial challenges and judicial routines that are my regular fare as a federal trial judge. I count myself as especially privileged to be a trial judge, but I also occasionally enjoy an escape to a more academic undertaking.

The subject I have selected is *Teaching Torts Through Exercises on Drafting Verdict Forms*. The verdict form I propose for an illustrative exercise is the kind that I commonly ask trial lawyers who appear before me to help me prepare for use in trials of cases involving federal law claims. Cases in this area have become increasingly complex over the last two decades because of changes in the governing statutes and precedents. Rapid change is inevitably accompanied by new complications and unsettled issues that trial lawyers and trial judges must explore before they reach appellate courts. Learning what is settled and what remains unsettled is hard work. Trying to draft a good verdict form for a case involving unsettled issues of law is a great learning experience for everyone who participates.

II. AN ILLUSTRATIVE EXERCISE

Consider, for illustrative purposes, a case in which the plaintiff is a female employee of a nationwide entity that markets a shopping service for disabled persons who would have to depend on relatives, neighbors or other friends to do regular shopping for groceries, drugs and routine clothing purchases absent such a shopping service as the defendant employer entity offers.

One of the counts of the plaintiff’s complaint alleges gender discrimination grounded in the notion that plaintiff was promoted into the lowest rank of company executive responsibility three years before her federal lawsuit was filed, and, since that promotion has experienced gender discrimination, she attributes in part to company policies and practices that favor males over females otherwise similarly situated.

* United States District Judge for the District of Massachusetts.

One of the unsettled issues of law presented by this count of plaintiff's case, and company defenses to this count, is whether the standard of adjudication is subjective (that is, based on the state of mind of the company actor whose decision to lay off plaintiff is challenged by plaintiff in this lawsuit) or objective (that is, based on whether the decision to lay off plaintiff is beyond the range of what a reasonably competent executive in the position of that actor, at the time of the conduct that is challenged, must have chosen).

III. A KEY CHARACTERISTIC OF RELEVANT LAW

When, as trial lawyer or trial judge, one begins to consider the background of statutory provisions, administrative regulations and judicial opinions that may be invoked as sources of authority bearing upon issues presented by a claim like plaintiff's, met by defenses like those asserted by the defendant entity and the individual executive (male or female—who made the decision to lay off plaintiff rather than laying off some other executive or lower-level employee to whom responsibilities like those plaintiff had been performing might be assigned), a problem becomes apparent immediately. It is impossible to know what the relevant law will turn out to be. Existing sources of authority leave that question in doubt. The best one can do is make a prediction about how it will be resolved by a trial or appellate court in a particular case if the case is not settled before that decision is made.

IV. A DRAFTING EXERCISE FOR APPROACHING THE PROBLEM OF UNSETTLED LAW

A drafting exercise in which potential learners are given drafting assignments works best if the instructor identifies for each student a role that student is to occupy. Is the student a trial lawyer representing the plaintiff? Or an associate in that lawyer's firm, assigned to assist the trial lawyer? Or a trial lawyer representing the individual executive who made the lay-off decision? Or an associate assigned to assist that trial lawyer? Or a trial judge? Or a law clerk to the trial judge?

V. MORE ABOUT RELEVANT FACTS AND LAW

For this exercise, we assume as an added background fact that plaintiff received less in termination benefits than two male employees, similarly situated in all respects, who were laid off near the time plaintiff was laid off.

Plaintiff argues that under applicable law these adverse employment decisions violate not only state anti-discrimination law (statutory, administrative and judicial in origin) but also Title VII of the Civil Rights Act of 1964.¹ Title VII provides:

1. 42 U.S.C. §§ 2000e-e17 (1994 & Supp. IV).

It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .²

Assume, for the purposes of this exercise, that the trial judge denied a motion to dismiss on the pleadings in this case, and in a Memorandum gave the following explanation:

Plaintiff has adequately alleged a prima facie showing of disparate treatment sex discrimination with regard to her termination benefits. She alleges that similarly situated male employees have received severance payments far in excess of those that she received. When considering the facts as alleged in plaintiff's complaint as true, as I must in this challenge to the adequacy of her pleadings, I conclude that she has adequately alleged a prima facie case with regard to her adverse-treatment claim by alleging that: (1) she is a member of a protected class; (2) she was performing her job at a level that met her employer's legitimate expectations; (3) she was terminated; and (4) upon termination she was not offered a severance package equal to those severance packages offered to similarly positioned male employees whose employment has also been terminated. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1824 (1973) (stating the prima facie case for a disparate treatment claim in the context of racial discrimination in job re-hiring as follows: (1) plaintiff is a member of a protected class; (2) plaintiff was subjected to adverse employment action; (3) plaintiff's employer treated similarly situated non-black employees more favorably; and (4) plaintiff was qualified to do the job). *See also Lang v. Star Herald*, 107 F.3d 1308, 1311 (8th Cir. 1997) (stating the elements for a prima facie case of gender discrimination in the context of job benefits as follows: (1) that she belonged to a protected class; (2) that she was qualified to receive the benefit of an indefinite unpaid leave of absence with a guarantee of returning to her former position; (3) that she was denied the benefit; and (4) that the same benefit was available to others with similar qualifications); *Lawton v. State Mut. Life Assurance Co. of America*, 924 F. Supp. 331, 345 (D. Mass. 1996) (discussing elements of a prima facie case of gender discrimination in the context of severance packages). Plaintiff's complaint, therefore, survives defendant's motion to dismiss.

VI. DIRECTIONS FOR THIS EXERCISE

Assume that, for the first phase of this exercise, the person occupying the role of teacher has instructed each student to approach the first assignment in the role of an associate in the law firm of the trial lawyer representing the plaintiff. The trial lawyer tells you that the trial judge has scheduled a case

2. *Id.* §2000e-2(a).

management conference for consideration of the precise drafting of questions to be included in a verdict form for submission of this case to the jury by special questions only, with no general verdict, under Federal Rule of Civil Procedure 49. He tells you also that the trial judge has delivered to the attorneys for all parties a proposed draft for questions on the subject identified above, in Part V. That draft begins with a set of instructions to the jury, as follows:

Claims of Gender Discrimination in Termination Pay Benefits

Instructions to Jurors: The court has ruled that on the record before us in this case it is beyond genuine dispute that one male executive, whose forty-third birthday was in October 1998, and whose employment with the company began on January 1, 1978, was laid off effective at midnight December 31, 1998, and was allowed termination pay benefits equal to salary for two years; that another male executive, whose forty-sixth birthday was in August 1998, and whose employment with the company began on January 1, 1976, was laid off effective at midnight December 31, 1998, and was allowed termination pay benefits equal to salary for thirty months; and that the plaintiff, whose forty-fourth birthday was in August 1999, was laid off effective at midnight January 31, 1999, and was allowed termination pay benefits equal to salary for eighteen months.

The next segment of the trial judge’s draft contains alternative forms of Question 1(a). The first form places the burden of persuasion on the plaintiff. The second form places the burden of persuasion on the defendant. Should the trial judge submit both forms to the jury? Or only one? If only one, which one?

FIRST FORM

1(a). Do you find by a preponderance of the evidence that relevant circumstances existing on January 31, 1999, were *so similar* to those existing on December 31, 1998, that the defendant company *had no objectively reasonable grounds* for allowing the plaintiff only eighteen months of termination benefits *though* the company had allowed greater termination benefits to the male executives laid off effective December 31, 1998?

_____YES _____NO

If YES to 1(a), proceed to 1(b). Otherwise, skip to Question 2.

SECOND FORM

1(a). Do you find by a preponderance of the evidence that relevant circumstances existing on January 31, 1999, were *so different from* those existing on December 31, 1998, that defendant company *had objectively reasonable grounds* for allowing the plaintiff only eighteen months of

termination benefits *after* the company had allowed greater termination benefits to the male executives laid off effective December 31, 1998?

____ YES ____ NO

If NO to 1(a), proceed to 1(b). Otherwise, skip to Question 2.

1(b). Did the company executive who chose to allow the plaintiff only eighteen months of termination benefits though the company had allowed greater termination benefits to the male executives laid off effective December 31, 1998, have knowledge at the time he made the decision to award plaintiff only eighteen months of termination benefits that the male employees terminated effective December 31, 1998, had been allowed greater benefits?

- (1) ____ YES, we unanimously find by a preponderance of the evidence.
- (2) ____ NO, we unanimously find by a preponderance of the evidence.
- (3) ____ We find no preponderance of the evidence either way.

If your answer to 1(b) is 1(b)(1) or 1(b)(3), proceed to 1(c). Otherwise, skip to Question 2.

1(c) Did the company executive who chose to allow the plaintiff only eighteen months of termination benefits knowingly discriminate against the plaintiff on grounds of gender?

- (1) ____ YES, we unanimously find by a preponderance of the evidence.
- (2) ____ NO, we unanimously find by a preponderance of the evidence.
- (3) ____ We find no preponderance of the evidence either way.

If your answer to 1(c) is 1(c)(1) or 1(c)(3), proceed to 1(d). Otherwise, skip to Question 2.

1(d). Did the company executive who chose to allow the plaintiff only eighteen months of termination benefits discriminate against the plaintiff on gender grounds willfully and in the scope of employment for the company?

(A) Willfully

____ YES ____ NO

(B) In the scope of employment for the company

____ YES ____ NO

VII. TAKING THE PERSPECTIVE OF THE PLAINTIFF'S
TRIAL LAWYER AND HIS ASSISTANT

A. *Introduction*

Put yourself in the role of student. The trial lawyer you are assisting asks you to prepare for him your recommendation, and reasons for it, about the choice between the FIRST FORM and SECOND FORM of Question 1(a). Also, he asks you to draft and explain any proposed modification of any of Questions 1(a) through 1(d) that you would propose to modify.

Note that the answer form for Questions 1(b) and 1(c) gives the jury a three-part choice rather than simply YES or NO. By using the three-part form, the trial judge learns whether the jury's answer will be decisive of outcome regardless of where the law (as finally determined, even though now unsettled) places the burden of persuasion. That is, if the jury makes a finding "unanimously by a preponderance of the evidence," the unsettled legal issue about where the law places the burden of persuasion does not have to be decided in this case. Only if the jury answers that they "find no preponderance of the evidence either way" will it be necessary to decide that unsettled legal issue.

Could Question 1(a) be modified to use the three-part answer form? To say the least, trying to do so in a way that is crisp and clear will be difficult. Here is a possibility that I believe to be clear, but not crisp:

1(a) Were the relevant circumstances existing on January 31, 1999: (1) *so similar to* those existing on December 31, 1998, that the defendant company *had no objectively reasonable grounds* for allowing the plaintiff only eighteen months of termination benefits though the company had allowed greater termination benefits to the male executives laid off effective December 31, 1998, or (2) *so different from* those existing on December 31, 1998, that the defendant company *had objectively reasonable grounds* for allowing the plaintiff only eighteen months of termination benefits *after* the company had allowed greater termination benefits to the male executives laid off effective December 31, 1998, or (3) so unproved by the evidence before you in this case that you unanimously find no preponderance of the evidence for either (1) or (2)?

(1) _____ We unanimously find by a preponderance of the evidence that (1) is proved.

(2) _____ We unanimously find by a preponderance of the evidence that (2) is proved.

(3)____ We unanimously find no preponderance of the evidence either way.

This is a draft somewhat edited to improve upon my first draft, but in my view not the best that can be done. Students might be encouraged to propose improvements.

B. A Blend of Substantive Law and Drafting Issues

Taking the perspective of the plaintiff's trial lawyer and his assistant, what things about the substantive content and the drafting of any of the alternative forms of the trial judge's proposed two FORMS of Question 1(a) should we consider?

The FIRST FORM of Question 1(a) places the burden of persuasion on the party who wishes to show that relevant circumstances were "so similar . . . that the defendant company had no objectively reasonable grounds for allowing the plaintiff" less in termination benefits than the laid-off male executives received. This, of course, is what we (representing the plaintiff) want the jury to find. But do we also want to contend that under *McDonnell Douglas Corp. v. Green*³ and its progeny the trial judge's first two questions to the jury should be about the first two elements in the order of the usual statement of the elements of a prima facie case, discussed in Part V, above? In other words, unless the defendant will stipulate that these two elements are satisfied in this case, should the judge ask the jury the two questions stated here?

- (1) Was plaintiff a member of a protected class?
 (2) Was plaintiff subjected to adverse employment action?

The drafting of other appropriate questions to be answered in order to complete a showing of a prima facie case under *McDonnell Douglas* as adapted to our case, is more difficult. For a third question, instead of asking if plaintiff was "denied the benefit," as the Court of Appeals for the Eighth Circuit framed the question in *Lang v. Star Herald*,⁴ should we suggest (again, unless the defendant will stipulate) that the third question should identify what we contend was exactly what plaintiff received in termination benefits and ask the jury if they so find? Then the final question to complete the showing of the prima facie case might be as follows:

(4) Did the male executives laid off effective December 31, 1998, receive greater termination benefits than those received by plaintiff?

3. 411 U.S. 792 (1973).

4. 107 F.3d 1308, 1311 (8th Cir. 1997).

We might consider proposing that these questions be followed by a fifth question as follows:

(5) Was defendant's response to the burden shifted to it by the plaintiff's showing of a prima facie case a pretext rather than an articulation of a reason for denying plaintiff equal benefits that was entirely gender neutral?

If we pursue this course, we will still have to consider whether questions on the subject-matter content of the trial judge's Question 1(a) must be asked. Is the standard for liability objective ("no objectively reasonable grounds for allowing the plaintiff" less, or some other framing of an objective standard)? Or is the standard subjective ("knowledge" of what the different benefits were, or "knowingly discriminate," or "willfully")? Whether objective or subjective, does the standard also involve a scope of employment component? I postpone discussion of these substantive-law issues to a later part of this article⁵ in order, first, to turn to more questions about placing burdens in the framing of special questions for the jury.

C. *More About Placing Burdens in the Framing of Questions*

When preparing special questions for use in a verdict form, a party must craft the *precise* questions of historical fact that the party asserts remain in genuine dispute and that would be material, as a matter of law, to the decisionmaker responsible for making the determination that all required elements for each of that party's articulated theories of claim can be satisfied by jury findings supported by evidence. Plaintiff will not be able to meet this burden by drafting questions that call for "black-box" or unexplained findings.

I am not aware of any reported decision that addresses this pretext issue, suggested as Question (5) in Part B, immediately above, and the need for something better than a "black-box" question, in a context involving alleged discrimination on grounds of gender. Perhaps it is easier to think about the possible need for something better than a "black-box" question in a context involving an alleged common-law deceit cause of action. For example, the draft questions to support submission of a claim of common law deceit must refer to specific conduct or specific words spoken that directly or inferentially constitute the deceitful words or phrases and the time, place and circumstances in which those words or phrases were used, to support the trial-worthiness of the claim.

Generalized questions that merely restate the words of a decisional or statutory prescription do not show that a triable issue of fact exists in the

5. See Parts VIII and IX, *infra*.

particular case. In order to show that a particular draft verdict question presents a trial-worthy issue, a party must, in that party's supplemental submission in support of the court's using that question in the verdict form, explain first, how the ultimate finding of historical fact framed in the proposed question would be *material* to a determination that each particular element of a particular theory of a claim or defense can be satisfied. Second, the party must point to *admissible evidence*, proffered in the record before the court that could reasonably support an answer to the question, by the finder of fact, in that party's favor.

This point is further explained in the following excerpt:

When exceptional complexity or lack of clarity of issues is a barrier to framing issues clearly by more traditional methods, a court may appropriately require early (and, if needed, continuing) consultations with the aim of framing precisely the questions that will be submitted to the jury if the case goes to jury trial.

For example, when cross-motions for summary judgment have been filed, the court may deny each motion because of the movant's failure to meet the movant's burden under Rule 56 of the Federal Rules (or a similar state rule). It may nevertheless be appropriate for the court, even after denying the cross-motions, to set a schedule within which each party has an opportunity to file a new, better-focused motion if the party concludes it can surmount any obstacles to doing so by pressing for more precisely framed legal and factual theories. One effective way of focusing contentions, so the trial judge may then consider whether any genuine dispute of material fact exists, is to consider how any fact questions might be framed for consideration by the finder of facts.

In any event, questions to be submitted to the jury must be framed precisely at some point before the case goes to the jury. The trial judge and trial lawyers may well commence this task early, to aid as well the focusing of arguments on motions for summary judgment, on the appropriate scope of discovery, and on any other matter that depends on what the issues will be at trial.

An attorney who contends that a genuine dispute exists as to some material fact should be able to frame clearly a "written question[] susceptible of categorical or other brief answer," proposed for use in a "special verdict." If, when challenged to do so, an attorney cannot state precisely any proposed question of fact that is disputed and material, summary judgment is almost certainly appropriate. If, on the other hand, counsel can frame even a single disputed and material question of fact, summary judgment is inappropriate.

In some instances, the efforts of the trial lawyers and trial judge to frame disputed and material questions of fact for submission to a jury may reveal complexities that are obstacles to their efforts. Obstacles may be especially serious when the independent complexity of legal and factual issues that are

relevant to claims or defenses is enhanced by complex relationships among the legal and factual issues. Relationship with public policy reasoning underlying the applicable legal rules may add still more obstacles to framing jury questions that are clear and correct.⁶

VIII. MORE ABOUT PRETEXT AND COMPLEXITY

The complexity incident to unsettled law regarding pretextual explanation of grounds for a decision to terminate employment is greater than has been illustrated in Parts III through VII of this Essay. One of the most interesting areas in which law regarding pretextual explanations is invoked involves cases in which the employee has asserted violations of the employee's freedom of speech. More about pretext and the complexity of law applicable in this context appears in *Lynch v. City of Boston*.⁷

I have chosen here, however, to discuss only two sources of complexity.

First, who has the burden of proof? The First Form of Question 1(a) in Part VI, above, is crafted to place the burden on the plaintiff. The Second Form of Question 1(a) is crafted to place the burden on the defendant. The answer forms for Questions 1(b) and 1(c) are crafted to tell the jury explicitly to recite their unanimous finding that no party has proved its contention by a preponderance of the evidence, if that is their view.⁸ Second, does applicable law invoke a subjective standard of judgment or instead an objective standard?⁹

IX. MORE ABOUT SUBJECTIVE AND OBJECTIVE STANDARDS OF JUDGMENT

As an instructor responsible for an exercise on achieving a better understanding of substantive law with respect to applicable standards of judgment, I propose some drafts that you might consider making available to students at some point along the way during the exercise, but not before they have made some first attempt to draft without this added guidance. These draft questions might follow whatever set of subquestions you and your students have used in Question 1. I present these as subparts of a proposed Question 2. Notice that even if the question uses terminology identical to that used somewhere for the questions appearing in subparts of Question 1, Part VI,

6. ROBERT E. KEETON, JUDGING IN THE AMERICAN LEGAL SYSTEM § 16.6.8 (1999) (footnotes omitted).

7. 989 F. Supp. 275 (D. Mass. 1997) (omitting appellate history not involving any ruling on appropriateness of the verdict form).

8. For a discussion of the use of this method of submission see KEETON, *supra* note 6, §20.2.2. See also *id.* §§ 20.1.1, 20.1.2.

9. On this issue, more appears in the following sources: *Federal Deposit Ins. Corp. v. Insurance Co. of North America*, 928 F. Supp. 54, 60 (D. Mass. 1996); *Foster v. McGrail*, 844 F. Supp. 19-21, 22-23 (D. Mass. 1994). Concerning subjective and objective standards of decisions also see KEETON, *supra* note 6, §§ 3.2-3.4.

above, a difference is that the “Instructions to Jurors” here sharpen the meaning of the subquestions by defining words and phrases used.

Question 2

Instructions to Jurors: As used throughout Question 2:

The phrase “objectively reasonable” means that you are to apply an “objective” standard of judgment of the conduct about which a subpart of Question 2 asks.

A question about acting “with knowledge,” or “knowingly,” or “willfully,” or “with reckless disregard,” means that you are to apply a “subjective” standard of judgment of the conduct about which a subpart of Question 2 asks. That is, you are to decide whether, in fact, the person whose conduct the subpart asks about did have the state of mind of “knowledge,” or “willfulness,” or “reckless disregard.” It is not enough to show that YES is the proper answer that you believe an ordinarily prudent person would have had that state of mind. The question is whether you find that the person whose conduct is asked about did, at the time of the conduct asked about, have that state of mind.

2(a)(1) Did the company executive who chose to allow the plaintiff only eighteen months of termination benefits know, at the time he made the decision to award her only eighteen months of benefits, that the two male employees terminated on December 31, 1998, had been allowed greater benefits?

____ YES ____ NO

If YES to 2(a)(1), proceed to 2(a)(2). Otherwise, skip to 2(b).

2(a)(2) Applying the standard of “objectively reasonable,” was that decision of the company executive beyond the range of choices an executive in the position of that executive could make without violating the standard of “objectively reasonable” decisionmaking?

____ YES ____ NO

If YES to 2(a)(2), proceed to 2(a)(3). Otherwise, skip to 2(a)(4).

2(a)(3) Did the company executive who chose to allow the plaintiff only eighteen months of termination benefits act at that time with knowledge that this decision discriminated against plaintiff on grounds of gender?

____ YES ____ NO

If YES to 2(a)(3), skip to 2(b). Otherwise, answer 2(a)(4).

2(a)(4) Did the company executive act at that time with reckless disregard for whether or not this decision discriminated against plaintiff on grounds of gender?

____ YES ____ NO

2(b) Did the company executive who chose to allow the plaintiff only eighteen months of termination benefits act at the time in the scope of employment for the company or instead out of personal animosity and as a departure from acting as an executive of the company?

____(1) We find unanimously, by a preponderance of the evidence, that the executive acted within the scope of employment for the company.

____(2) We find unanimously, by a preponderance of the evidence, that the executive acted out of personal animosity and as a departure from acting as an executive for the company.

____(3) We unanimously find no preponderance of the evidence either way.

A more extended exercise might address additional questions about whether more detailed instructions explaining one or more of the subparts of Question 2 should be requested by one or more of the attorneys, and used by the trial judge.

In addition, such an extended exercise might address additional questions of law and fact that might be raised by different assumptions about when plaintiff's employment with the company began. When her employment was terminated, had she been employed as long as one or both of the male executives had been employed when they were laid off on December 31, 1998? Did the company have a benefits plan that spoke especially to this issue?

I conclude this Essay without discussing these and other issues of fact and law that might be parts of a more extended exercise. I do so in part because of its length, but also because of my hope that I have proceeded far enough to explain the usefulness of this kind of drafting exercise, and my hope that the citations I have provided will enable a teacher who wishes to press farther to have some help and encouragement to do so.