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Jury Instructions

by

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I. The Art of Crafting Useful Instructions

Employment lawyers on both sides do not seem to do a very good job in thinking through the implications of jury instructions during the heat of trial; my impression from reading hundreds of appellate decisions a year is that most challenged instructions or failures to give instructions are reviewed for plain error, no one having objected at the time.

Meanwhile, I have heard a number of Federal judges say that they rarely get useful draft instructions from counsel on either side in employment cases, because counsel often present short passages from appellate opinions divorced of their context, or pattern instructions never meant to be used in the context of the type of situation at bar.

Having served as a juror several times in the District of Columbia Superior Court, I can testify to the unmet need for clarity. Too often, bench and bar are satisfied with instructions that are phrased in terms of art that make perfect sense to us, and that we are pleased to assume jurors will understand equally well.

Judge Posner recently observed in a concurrence that the phrase "motivating factor"—which appears no fewer than 40 times in the pattern instructions quoted below—is more confusing than clear when used in a jury charge:

> My reason for writing separately is to urge district judges to do a better job of presenting the issue of "motivating factor" to a jury than was done in the original instruction, even though that instruction did not misstate the law. It may be unrealistic to think that jury instructions are very important *to the jury*; their principal importance may lie in placing bounds on what the lawyers can say to the jury in their closing arguments. Still, some pains should be taken to make jury instructions clear. As we said in *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir.1994), in disapproving the use of the term "determining factor" in jury instructions in cases under the age discrimination law, "What the jury needs to know can, and should, be expressed in simple language." Jury instructions should turn the language of statutes and judicial opinions, which is generally not drafted with a lay readership in mind, into language that poses concrete decisions for lay jurors to make. An instruction that uses the term "motivating factor" does not do this.
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> The original instruction did try to explain the term: "you may find that plaintiffs' race was a 'motivating factor' if the racial composition of the plaintiff group played [a] part or a role in the defendant's salary determinations to set plaintiffs' salaries. However, the racial composition of the plaintiff group need not have been the only reason for defendant's salary determinations." But to say that something plays "a part or a role" in the decision about which the plaintiff is complaining is not illuminating.
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> Of course, jurors should not be burdened with terms like "sufficient condition" or "necessary condition" (or for that matter "catalyst") or introduced to the complex meanings of "cause." They should be told simply that the plaintiff must prove that he would have been fired, because of his race, even if he had been a satisfactory worker (not necessarily a superlative worker, but a worker who would have been retained had he been of a different race), but that if the defendant presents evidence to show that the plaintiff

would have been fired anyway, regardless of his race, because he was an unsatisfactory employee, it is the defendant's burden to prove this by a preponderance of the evidence. This is more precise and informative than talk about "motivating factor" and whether something "played a part or a role" in the defendant's action.

Boyd v. Illinois State Police, 384 F.3d 888, 898–99 and 900–01, 94 FEP Cases 839 (7th Cir. 2004) (Posner, J., concurring in the opinion and judgment).

Part II of this paper sets forth the general suggestions of the Manual on Complex Litigation, and Part III sets forth selected portions of the pattern or model jury instructions of the Circuits that have adopted them, and comments.

To keep this paper within reasonable bounds—to the extent that it is in fact within reasonable bounds—many relevant topics have not been included: retaliation, constructive discharge (except in the sexual harassment context), adverse employment actions, and more. One panel can address only so much. These may be useful topics for future panels.

II. Guidance from the MANUAL ON COMPLEX LITIGATION, 4TH EDITION

The following is taken from the Administrative Office of the U.S. Courts, MANUAL ON COMPLEX LITIGATION, 4TH ED. (2004), at 154–63:

12.43 Jury Instructions[362]

362. *See generally* Benchbook, *supra* note 45, §§ 2.07–2.08, 6.05–6.06 (jury instructions in criminal and civil cases, respectively).

A. 12.431 General Principles

A complex and protracted trial makes understandable jury instructions particularly important. Instructions should use language that laypersons can understand—instructions should be concise, concrete, and simple, be in the active voice, avoid negatives and double-negatives, and be organized in logical sequence. Counsel should submit proposed instructions at the final pretrial conference to focus the judge's and lawyers' attention on the issues to be tried (see section 11.65).

Substantive instructions should be tailored to the particular case, and the judge should avoid a generalized pattern of instructions. The judge should explain propositions of law with reference to the facts and parties in the case; illustrations familiar to jurors may also help. Instructions using the language of appellate opinions are rarely meaningful to jurors. Most judges reword—or at least edit—counsel's proposed instructions, which are often argumentative and one-sided. Combining the proposals submitted by counsel for each side rarely produces sound and intelligible instructions.

Instructions should be read to the jury in a manner that enhances comprehension and retention; rarely should the reading take more than thirty minutes. Some judges use the court's evidence presentation system to put the jury instructions on a screen or monitors in the courtroom so that jurors can read along as the instructions are given orally.[363] Jurors usually like to have one or more copies of the instructions in the jury room (see section 12.434). In complex cases with long verdict forms, it is helpful for each juror to have an individual copy of the verdict form.

363. See *Effective Use of Courtroom Technology*, *supra* note 85, at 149–53, for related discussion and suggestions.

B. 12.432 Preliminary Instructions

Jurors can deal more effectively with the evidence in a lengthy trial if they are provided with a factual and legal framework to give structure to what they see and hear. Moreover, jurors should understand the trial process in which [155] they are about to participate and what they can expect. Preliminary instructions provide context and basic guidance for the jurors' conduct. These instructions typically contain or delineate the following:

• *Preliminary statement of legal principles and factual issues.* The instructions should summarize the key factual issues, including the undisputed facts and the parties' major contentions (which may be drafted jointly by the parties), and explain briefly the basic legal issues and principles, such as the elements of claims and defenses to be proved. The court should emphasize that these instructions are preliminary—they don't cover all the issues or principles—and that instructions given at the conclusion of the case will govern deliberations. Since one purpose of these instructions is to prepare jurors for opening statements, they are usually given first, permitting counsel to refer to them in opening statements. The judge may, however, defer instructions until after opening statements or give supplemental preliminary instructions at that time.

• *The conduct of the trial.* The judge should inform jurors of the anticipated course of the trial from opening statements to verdict, the methods for presenting evidence, and the procedure for raising and resolving objections. It is also useful to introduce court personnel—the clerks, bailiffs, and reporters—and to provide a short orientation to the equipment in the courtroom.[364]

364. *See id.* at 146–49 (suggesting language for explaining courtroom technology to jurors).

• *Schedule.* Jurors should be informed of the hourly and daily trial schedule and any holidays or other recesses.

• *Precautions to prevent mistrial.*[365] The judge should direct jurors not to discuss the case or communicate with trial participants. It is also important that they be warned against exposure to publicity and attempts at independent fact-finding, such as viewing the scene of some occurrence or undertaking experiments or research.

365. *See also infra* section 12.44 (avoiding mistrial).

• *Pretrial procedures.* The instructions should briefly describe the various discovery devices used during the pretrial stage of the litigation, such as depositions, document production, and interrogatories. This information will be helpful when the evidence is introduced, and it explains how the parties learned the facts of the case.

• *The functions and duties of the jury.* The judge should describe the jury's role as fact-finder; the burden of proof; assessing the credibility of witnesses; the nature of evidence, including circumstantial evidence [156] and the purpose of rules of evidence; and the jurors' need to rely on their recollection of testimony (including any special instructions about the use of juror notebooks, note taking, or questions). Most of these instructions should be repeated in the final jury charge, supplemented by any special explanations (such as use of convictions to impeach credibility) warranted by developments at trial, or the use of special verdicts or interrogatories.[366]

366. *See infra* sections 12.436, 12.45 (supplemental instructions and verdicts, respectively).

C. 12.433 Interim and Limiting Instructions

Developments in the course of trial may require additional instructions. Under Federal Rule of Evidence 105, when evidence is admitted that is admissible as to some but not all parties or for a limited purpose only, the court must, upon request, instruct the jury accordingly. At counsel's request, the judge may repeat such limiting instructions at the close of trial. Counsel should be advised that when they contemplate offering such evidence, they should raise the issue promptly (if possible, before trial) and submit proposed instructions. The judge may also give instructions at any point in the trial where they might be helpful to the jury. An explanation of applicable legal principles may be more helpful when the issue arises than if deferred until the close of trial, but counsel should be permitted to comment or object before an instruction is given. As with preliminary instructions, the judge should caution the jury that these are only interim explanations, and that the final, complete instructions on which they will base their verdict will come at the close of trial. If the parties are presenting their evidence according to a prescribed sequence of issues (see section 12.34), the instructions should be structured accordingly.

D. 12.434 Final Instructions

Although proposed instructions should generally be submitted to the court in connection with the final pretrial conference, developments during the trial may require their revision or supplementation. Counsel are entitled to file written requests for instructions "at the close of the evidence or at such earlier time as the court reasonably directs," and are entitled to notice of the judge's proposed action before closing arguments.[367] Most judges, rather than responding to particular requests, provide counsel with the entire charge they propose to give and then hold a charge conference to consider counsel's objections and requests; generally there will be little controversy if the judge has prepared [157] instructions.[368] Having proposed instructions submitted electronically can expedite the editing process.

367. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

368. For a general discussion of procedures and options, see *Benchbook*, *supra* note 45, §§ 2.08, 6.06.

Final instructions may be given before or after closing arguments, or both.[369] Though traditionally instructions have been given after counsel's closings, there are advantages to giving the bulk of the instructions before argument.[370] Instructions on the law may make closing arguments easier to understand, and counsel can refer to instructions already given in arguing their application to the facts. At a minimum, counsel should know before closing arguments what final instructions will be given. This may help them structure their arguments. The judge should reserve the final closing instructions, however, until after arguments, reminding the jury of the instructions previously given and instructing them about the procedures to follow in deliberations.[371]

369. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

370. *See* Fed. R. Civ. P. 51 committee note.

371. *See* Stonehocker v. Gen. Motors Corp., 587 F.2d 151, 157 (4th Cir. 1978); Babson v. United States, 320 F.2d 662, 666 (9th Cir. 1964).

Most judges give jurors copies of the instructions to use during deliberations. Because jurors are unlikely to remember lengthy and complex legal terms, define these terms in advance so that they can listen to the charge for a general understanding rather than try to memorize it. Some judges keep the written charge from jurors while they deliver the instructions, to focus attention on the delivery. Others permit the jurors to follow the text in hard copy or on a monitor, or at least give them a brief topical outline to follow as the instructions are given. Jurors should have any special verdict forms or interrogatories for use during deliberations. The oral charge, which the court reporter transcribes, should be complete within itself (i.e., not merely refer to writings that the jury may be given). The judge should instruct jurors that, in the event of any variations between the oral and written charges, the oral charge controls and governs their deliberations. Some judges have experimented with providing jurors with a tape recording of the charge for use during deliberations. Access to specific passages may be facilitated by recording designated portions on separate tapes, or maintaining a record of the counter number where different portions begin.[372] The charge should focus on helping the jurors understand the law and their responsibilities.

372. *See* Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Judges in the Second Circuit*, 60 N.Y.U. L. Rev. 423, 456–69 (1985).

[158] In complex litigation, some judges comment on evidence in order to explain subject matter foreign to jurors and to keep them from being confused or misled by adversarial presentations. Such comments should be impartial and assist comprehension only. Before commenting on the evidence, however, consider submitting the proposed language to counsel for comment and objections. The judge's comments may be included with the written instructions given to the jury, but it may be preferable not to do so to avoid giving the comments undue weight. A judge's expression of a personal opinion on disputed facts can be problematic.[373]

373. *See* Quercia v. United States, 289 U.S. 466, 469 (1933). *Quercia*, in which Chief Justice Hughes discusses judicial comments on evidence in detail, is still cited as the leading case on the issue. *See, e.g.*, United States v. Beard, 960 F.2d 965, 970 (11th Cir. 1992).

After the judge has given all instructions, and before the jury retires, counsel are entitled to record any objections to the charge outside the presence of the jury.[374] It is helpful to remind counsel that objections and the grounds must be stated distinctly or be deemed waived.[375] The judge can then give corrective or supplemental instructions (see section 12.436) before deliberations begin.

374. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.
375. Fed. R. Civ. P. 51; Fed. R. Crim. P. 30.

E. 12.435 Jurors' Use of Exhibits During Deliberation

Some judges send all exhibits received in evidence (except items such as currency, narcotics, weapons, and explosive devices) directly to the jury room for reference during deliberations. Other judges await requests from the jury, or withhold some items—such as those received for impeachment or another limited purpose—until and unless requested by the jury, when they repeat the limiting instructions. If the exhibits are voluminous, jurors should be given an index or other aids to assist their examination (see section 12.31).

F. 12.436 Supplemental Instructions and Readbacks

Requests by the jury for supplemental instructions during deliberations are handled in much the same manner as final instructions, i.e., the appropriate response is determined after consulting with counsel and allowing them to object to the proposed response on the record. The instructions should be given orally in open court, with a reminder to the jury to consider the instructions as a part of those previously given, which remain binding.

The final instructions should advise the jurors that in deliberating on their verdict, they will not have a transcript available but will have to rely on the ex-[159]hibits and their recollection of the testimony. Nevertheless, after long and complex trials, most juries will request readbacks of testimony. The court should instruct the jury to make requests as specific and narrow as possible to avoid excessively long readbacks, then should confer with the attorneys to seek agreement on the portions of the testimony to be read. Counsel should state any objections on the record.

Readbacks should not unduly emphasize any part of the evidence.[376] Some judges decline readback requests altogether, to save time and to avoid potentially unfair distortions of the record. This approach can sometimes make the jury's task more difficult. Some readbacks can be avoided, however, by an agreed-on statement of the parties' positions on the matter at issue. Readbacks should never be authorized absent counsel's consent or, at least, absent an opportunity to be heard.

376. *See* United States v. Hernandez, 27 F.3d 1403, 1408–10 (9th Cir. 1994).

G. 12.44 Avoiding Mistrial

Complex trials increase the potential and consequences of mistrials. Accordingly, the judge might consider the following precautions to minimize the most obvious risk, the jury's failure to reach a verdict:

• *Evidence and instructions.* Trials and charges should present the facts and the law so as to maximize jury comprehension.

• *Stipulations on verdict.* In advance of trial, the judge should encourage the parties to stipulate under Federal Rule of Civil Procedure 48[377] to accept a nonunanimous verdict, or under Rule 39(a)(1) to accept a nonjury decision on the same evidence if a jury verdict cannot be obtained (see section 11.62). Such stipulations may be made during trial or deliberations—indeed, the parties may not seriously consider them until actually faced with the possibility of mistrial caused by the need to remove a juror—but are generally easier to obtain in advance.

377. *See* section 12.411.

• *Partial verdicts.* Permit juries to return a partial verdict on issues on which they can agree.

• *Cautionary instructions.* As discussed in section 12.432, the jurors, at the outset and periodically during the trial, should be given appropriate instructions regarding improper conduct. The final instructions may also include a brief explanation of the consequences of a mistrial.

• *Special verdicts and interrogatories.* These are discussed in section 12.451.

[160] • *The jury room.* The jury deliberation room should be "sanitized" before the jury retires, and all counsel should review all material before it is sent into the room, to ensure that it includes nothing extraneous.

• *Sequestration.* The judge should consider sequestration only in extraordinary cases where public interest and media coverage are so intense as to jeopardize the fairness of the trial.

• *Seating a sufficient number of jurors.* If a juror is excused or disqualified during deliberations, it need have no effect as long as six jurors remain. If the loss of one or more jurors would reduce the jury to fewer than six members, however, the court cannot accept the resulting verdict (absent the stipulation described above). Seating a sufficient number of jurors helps to avoid this situation (see section 12.411).

H. 12.45 Verdicts

I. 12.451 Special Verdicts and General Verdicts with Interrogatories

Special verdicts and interrogatories are common in complex trials. As discussed in section 11.633, they simplify instructions, help jurors organize their deliberations, facilitate partial verdicts, isolate issues for possible appellate review, and reduce the costs and burdens of a retrial. A general verdict form should at least require separate verdicts on each claim and on damages, but be drafted so as to prevent duplicate damage awards. Counsel and the court should consider the form of verdict during pretrial.

Special verdicts may require the jury to return findings on each issue of fact, leaving the court to apply the law to the jury's findings. Some courts have held that the court may also amend special verdict responses to conform to the jury's obvious intention or to correct a manifest error.[378] The preparation of special verdict forms can be complicated. Federal Rule of Civil Procedure 49(a) suggests the court submit "written questions susceptible of categorical or other brief answer," or "written forms of the several special findings which might properly be made under the pleadings and evidence." Alternatively, the rule [161] permits any "method of submitting the issues and requiring the written findings thereon as [the judge] deems most appropriate."

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378. *See* Aquachem Co. v. Olin Corp., 699 F.2d 516, 520 (11th Cir. 1983); Shaffer v. Great Am. Indem. Co., 147 F.2d 981 (5th Cir. 1945), *but cf.* Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc., 934 F.2d 1217, 1224 (11th Cir. 1991) (*Aquachem* does not apply to general verdicts with interrogatories).

The verdict form should be concise, clear, and comprehensive. If any issue of fact raised by the pleadings is omitted, the parties must demand its submission before the jury retires or they will waive their right to a jury trial on that issue. The court may make its own findings on issues omitted without such demand.[379]

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379. Fed. R. Civ. P. 49(a).

Inconsistent verdicts are a concern even with standard verdict forms, but careful structuring and instructions should minimize the risk of inconsistency. Rule 49 requires the court to instruct the jury on how to complete the verdict form properly, including both the procedure for rendering special verdicts and the specific substantive issues to be decided. Consider having the jury return partial verdicts seriatim, instructing on each issue individually before the jury deliberates on it.

Alternatively, the court could submit a general verdict form with interrogatories. The jury both determines the facts and applies the law; it also makes findings on "issues of fact the decision of which is necessary to a verdict."[380]

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380. Fed. R. Civ. P. 49(b).

Some consider this procedure an attractive compromise between a simple general verdict and special verdicts. It maintains the traditional role of the jury while diminishing the need to relitigate factual issues if an error of law taints the general verdict. On the other hand, interrogatories increase the length and complexity of deliberations and are more likely to produce inconsistencies. When the interrogatory answers are consistent

with each other but inconsistent with the general verdict, the court may simply enter judgment according to the *answers,* or may return the jury for further deliberation or order a new trial.[381] The court may not accept the verdict if the answers are inconsistent with each other and at least one is also inconsistent with the general verdict; it must first try to reconcile the answers, ordering further deliberations or a new trial if it cannot.[382] After the return of special verdicts or a general verdict with interrogatories, it is important to allow counsel to be heard before discharging the jury. That will allow further deliberations to cure inconsistencies following supplemental instructions, and, perhaps, amendment of the verdict form.[383]

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381. *Id*.

382. *See id*.; Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962).

383. Case law on the court's authority to amend or supplement verdict forms after the jury has returned a verdict is scarce; for a case holding it permissible to amend interrogatories, see *United States v. 0.78 Acres of Land*, 81 F.R.D. 618, 622 (E.D. Pa.) (mem.), *aff'd,* 609 F.2d 504 (3d Cir. 1979).

[162] * * * [163]

J. 12.453 Return of Verdict[386]

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386. For general procedures for receipt of civil verdicts, see *Benchbook*, *supra* note 45, § 6.07.

When the jury has returned a special verdict or a general verdict with interrogatories, the judge and counsel should promptly review it for inconsistencies so as to permit appropriate steps before the jury is discharged. After consultation with counsel, the judge should promptly approve a form of judgment for entry by the clerk.[387] If the judgment does not resolve all aspects of the litigation, entering final judgments as to some claims or parties allows an appeal to be taken.[388]

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387. *See* Fed. R. Civ. P. 58.

388. *See* Fed. R. Civ. P. 54(b); *see also* 28 U.S.C. § 1291 (West 2002); *infra* section 15.1.

Where issues have been bifurcated or submitted to the jury for seriatim verdicts, the jury may need to resume hearing evidence and receive further instructions or begin deliberations on other issues.[389] If a recess is called, the judge should instruct the jurors that they remain under the restrictions originally imposed; if the recess extends more than a few days, a supplementary examination of jurors may be necessary on their return to determine whether grounds for disqualification have arisen in the interim.

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389. *See supra* sections 11.632 (separate trials), 12.34 (sequencing of evidence and arguments).

If the jury is deadlocked, the judge will need to consider appropriate inquiries and instructions. Although the large investment in a long trial makes a mistrial costly, there should not be undue pressure on jurors to reach agreement. The incorrect use of an *Allen* charge may trigger a reversal.[390]

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390. Darks v. Mullin, No. 01-6308, 2003 U.S. App. LEXIS 6977, at *288 (10th Cir. Apr. 11, 2003) (prohibiting use of *Allen* charge if found to impermissibly coerce the jury); United States v. Brennan, No. 01-3148, 2003 U.S. App. LEXIS 6546, at *37 (3d Cir. Apr. 7, 2003) (noting that the circuit has "developed a prophylactic rule prohibiting the use of such an *Allen* charge because of its power to coerce," but allowing a modified *Allen* charge with noncoercive language); *but cf.* Mason v. Mitchell, 320 F.3d 604, 642 (6th Cir. 2003) (holding that *Allen* charge was not so coercive as to deny due process rights); United States v. Walrath, No. 02-2824, 2003 U.S. App. LEXIS 6359, at *7–*10 (8th Cir. Apr. 3, 2003) (reviewing challenged jury instruction for abuse of discretion); United States v. Crispo, 306 F.3d 71, 76–78 (2d Cir. 2002) (reviewing *Allen* charge under an abuse of discretion standard); United States v. Weymouth, 45 Fed. Appx. 311, 312 (4th Cir. 2002) (per curiam) (same).

III. Guidance from Pattern Jury Instructions on Certain Critical Issues

A. Burden of Proof

Instructions on the burden of proof are clearly important, and the Circuits vary in their approach to it.

1. Questions to Be Considered

a. Why Use the Term "Preponderance of the Evidence"?

The Manual states in § 12.431: "Instructions should use language that laypersons can understand—instructions should be concise, concrete, and simple . . . ."

The term "preponderance of the evidence" is hard to reconcile with that test. The term is not used outside of law—can one imagine a sports broadcast in which the announcer says that the Patriots had a "preponderance of the points"?—and it makes little sense to define a professional jargon phrase in plain English and then use the jargon phrase throughout the instructions instead of just using plain English throughout.

b. What About "Greater Weight of the Evidence"?

This term also seems to me capable of causing confusion. Some Circuit pattern instructions expressly caution jurors against considering the mere number of witnesses as creating greater weight, but some do not. None caution jurors against assigning greater weight to particular witnesses simply because they are placed more highly in the defendant organization, or have an advanced degree, or specialize in personnel matters.

c. Is there a "plain English" Substitute?

How about something along the lines of this? "You should decide what evidence you believe and find reliable, and whether there are differences in the believability or reliability of some evidence compared to other evidence. Considering only the evidence you find believable and reliable and keeping any such differences in mind, you must decide if it is more likely than not that XYZ Company discriminated against Susan Jones because of her sex."

d. Is it Useful to Distinguish the Criminal Standard?

The Eighth Circuit model instructions are the only set to mention the higher standard in criminal cases, and its inapplicability to civil cases. The phrase "proof beyond a reasonable doubt" is so much a part of the lay understanding of the law that jurors may think of it by default, particularly if the instructions use professional jargon. This strikes me as useful enough to justify its inclusion as a matter of course.

e. How Useful Are Instructions that Jurors May Consider Evidence Favorable to One Side Even if the Other Put it In?

The Fifth, Ninth, and Eleventh Circuits make a point of mentioning that evidence may be considered for one side even if the other side called the witness or introduced the exhibit. The Seventh and Eighth Circuits do not make this point.

Is there a need for such an instruction?

2. Fifth Circuit Model Instructions 2.14, 2.20, and 3.1

a. 2.14 Clear and Convincing Evidence

> Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required.

b. 2.20 Burden of Proof When Only Plaintiff Has Burden

> In this case, the plaintiff must prove every essential part of his claim by a preponderance of the evidence.
>
> A preponderance of the evidence simply means evidence that persuades you that the plaintiff's claim is more likely true than not true.
>
> In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.
>
> If the proof fails to establish any essential part of the plaintiff's claim by a preponderance of the evidence, you should find for the defendant as to that claim.

c. 3.1 General Instructions for Charge

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence just means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

3. Seventh Circuit Draft Model Instruction 1.27

When I say a particular party must prove something by "a preponderance of the evidence," or when I use the expression "if you find," or "if you decide," this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

4. Eighth Circuit Model Instruction 3.04

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim [or defense][1] depends upon that fact. The party who has the burden of proving a fact must prove it by the [(greater weight) or (preponderance)][2] of the evidence. To prove something by the [(greater weight) or (preponderance)] of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. [If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.]

[The [(greater weight) or (preponderance)] of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.]

[You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.]

Notes on Use

1. Include when an affirmative defense will be submitted to the jury.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. Ninth Circuit Model Instructions 1.13 and 1.14

a. 1.13 Burden of Proof—Preponderance of the Evidence

When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

b. 1.14 Burden of Proof—Clear and Convincing Evidence

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means you must be persuaded by the evidence that the claim or defense is highly probable. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

You should base your decision on all of the evidence, regardless of which party presented it.

6. Eleventh Circuit Model Instructions 6.1 and 6.2

a. 6.1 When Only Plaintiff Has Burden Of Proof

In this case it is the responsibility of the Plaintiff to prove every essential part of the Plaintiff's claim by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that the Plaintiff's claim is more likely true than not true.

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

If the proof fails to establish any essential part of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

b. 6.2 Multiple Claims of Parties with Burdens

In this case each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence you should find against the party making that claim or contention.

B. Prior Inconsistent Statements or Actions

1. Questions to Be Considered

a. Context

Many employment cases turn on the question whether the defendant sincerely believed that its proffered nondiscriminatory reason for the challenged action was true, in which event a plaintiff without other evidence of discrimination generally loses. Many other cases turn on the credibility of the plaintiff, an alleged harasser, or an official of the defendant to whom a complaint was made. Litigators on both sides rely heavily on consistency to show credibility, and inconsistency to show deceit.

b. Is Such an Instruction Useful?

The Fifth, Seventh, Eighth, and Eleventh Circuits include such instructions in their model sets, but the Ninth Circuit does not.

Based on my personal experience in jury rooms, I think such an instruction helps the realistic persuade the unrealistic, helps facts get the upper hand over emotions, and therefore helps bring about a just result.

c. Is it Adequate Simply to Relegate This to Argument?

Jurors are commonly instructed that the statements of counsel in argument are not evidence and that only the judge instructs them on law. Some jurors will simply not believe the argument of plaintiffs' counsel informing them that they have the right to draw an inference of discrimination or of retaliation, but no obligation to do so. Unlike specific comments on the evidence, this touches on how they carry out their core functions. I believe it needs to be in the instructions.

d. Should Such an Instruction Include Inconsistent Conduct?

The Fifth, Seventh, and Eleventh Circuits include mention of inconsistent acts or omissions in their model sets, but the Eighth and Ninth do not.

Inconsistent conduct can be an indicator of deception even stronger than inconsistent statements, and should be included in the instructions.

e. Should Inconsistent-Conduct Instructions Discuss Degrees of Inconsistency?

None of the model instructions mentioning inconsistent conduct discuss the degree to which the witness's act or omission is inconsistent with the witness's testimony, although they are careful to discuss the relative importance of different inconsistencies with prior statements.

There does not seem to be any good reason to differentiate between conduct and statements in weighing the sharpness of inconsistencies with testimony.

2. Fifth Circuit Model Instructions 2.16 and 3.1

a. 2.16 Impeachment by Witnesses' Inconsistent Statements

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely about some important fact, or, 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 he gave at the trial.

b. 3.1 General Instructions for Charge

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or 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 the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

3. Seventh Circuit Draft Model Instruction 1.14

You may consider statements given by [*Party*] [*Witness under oath*] before trial as evidence of the truth of what he said in the earlier statements, as well as in deciding what weight to give his testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement [not under oath] [or acted in a manner] that is inconsistent with his testimony here in court, you may consider the earlier statement [or conduct] only in deciding whether his testimony here in court was true and what weight to give to his testimony here in court.

[In considering a prior inconsistent statement[s] [or conduct], you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.]

4. Eighth Circuit Model Instruction 3.03 on Credibility of Witnesses

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time,[1] the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

[In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.]

Notes on Use

1. With respect to the use of prior inconsistent statements (second paragraph of this instruction), Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. Note, however, that such a limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

5. Eleventh Circuit Model Instruction 4.1

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

C. Permissive-Inference Pretext Instructions

1. Questions to Be Considered

There is a substantial conflict among the Circuits on whether juries should be informed of their power to draw the inference of discrimination or retaliation when plaintiff shows that the defendant's proffered nondiscriminatory reason for the challenged action is false. The Eighth Circuit is the only Circuit to include the topic in its pattern jury instructions, but some others require such an instruction where plaintiff requests it.

Because some jurors may wrongly believe that there must be direct or circumstantial evidence pointing to the impermissible motive, in a close case it is difficult to see how a just result can be achieved without their being informed of their power. Relegating the information to the argument of counsel is not an adequate substitute because the court's failure to mention the subject may lead the jury to reject the concept of such a power as the mere puffery of an advocate.

None of the decisions on this point identify any harm that would arise from requiring such an instruction.

2. First Circuit Case Law

Fite v. Digital Equipment Corp., 232 F.3d 3, 84 FEP Cases 524 (1st Cir. 2000), affirmed the judgment on a jury verdict to the ADA and ADEA defendant on the cocaine-addicted plaintiff's difficult claim that discrimination, not declining job performance, was the real reason for his discharge. On appeal, plaintiff argued that the jury should have been instructed that it was permitted to infer discrimination from a finding of pretext. The court stated: "While permitted, we doubt that such an explanation is compulsory, even if properly requested." *Id.* at 7. Plaintiff did not anticipate *Reeves*, and did not timely request a permissive-pretext instruction. The court held that the failure to give such an instruction was not plain error.

3. Second Circuit Case Law

Cabrera v. Jakabovitz, 24 F.3d 372, 382, 64 FEP Cases 1239 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994), a housing discrimination case following Title VII principles, held that a pretext instruction must be given where the defendant has satisfied its burden of production:

> If the defendant has met its burden of producing evidence that, if taken as true, would rebut the prima facie case, a threshold matter to be decided by the judge, the jury need not be told anything about a defendant's burden of production. In that event, whether or not the facts of the plaintiff's prima facie case are disputed, the jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or job) was denied because of race (or, in other cases, because of some other legally invalid reason) . . . and (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation . . . . There is no need to inform the jury that the defendant had a burden of production because it is no longer relevant. . . . There is also no need to refer to a burden shifting back to the plaintiff because, if the case requires submission to the jury, all the jury needs to be told about the plaintiff's burden of proof is that the burden of persuasion as to discrimination is on the plaintiff; the presumption that triggered the defendant's burden of production has "drop[ped] out of the picture."

Id. (citations and footnotes omitted).

4. Third Circuit Case Law

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280, 77 FEP Cases 119 (3d Cir. 1998), reversed the judgment on a jury verdict for the ADEA defendant because the lower court failed to instruct the jury on pretext:

> Applying these principles, it is clear that the jury must be given the legal context in which it is to find and apply the facts. It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext, as we instructed in *Fuentes v. Perskie*, 32 F.3d 759, 764–65 (3d Cir.1994), if the jurors are never informed that they may do so. Accordingly, we join the Second Circuit in holding that the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision. [FN4]
>
> _____
>
> FN4. This does not mean that the instruction should include the technical aspects of the McDonnell Douglas burden shifting, a charge reviewed as unduly confusing and irrelevant for a jury. . . .

5. Fifth Circuit Case Law

Ratliff v. City of Gainesville, 256 F.3d 355, 360–61, 86 FEP Cases 472 (5th Cir. 2001), reversed the judgment on a jury verdict for the defendant, in part because the lower court failed to give a pretext instruction making clear that an inference of unlawful motivation may be drawn, but is not required, when plaintiff shows that defendant's proffered nondiscriminatory reason is false. The court adopted the *Cabrera* and *Smith* decisions requiring that such an instruction be made. *Id.* at 361 n.7.

Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 9 Wage & Hour Cas.2d (BNA) 865 (5th Cir. 2004), an FLSA retaliation case, called for *en banc* reconsideration of *Ratliff*, based on its view that *Ratliff* extended *Reeves* by applying the permissive-pretext rule outside the context of summary judgment and judgment as a matter of law. It saw no basis for applying *Reeves* to jury instructions, but did not identify the harm it feared from letting juries know their actual function. The court held that it was bound by the decision, but held that the omission was harmless error. Judge Benavides concurred specially but disagreed that the *Ratliff* rule should be reconsidered *en banc*.

6. Seventh Circuit Case Law

Gehring v. Case Corp., 43 F.3d 340, 343, 66 FEP Cases 1373 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995), affirmed the judgment on a jury verdict for the ADEA defendant. The court rejected plaintiff's argument that the jury should have been instructed in each of the *McDonnell Douglas* elements, and continued:

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law

. . . but a judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel. . . . Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.

7. Eighth Circuit Model Instructions 5. 91 and 5.95

a. Model Instruction 5.91

5.91 DISPARATE TREATMENT CASES - PRETEXT/INDIRECT EVIDENCE INSTRUCTION - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (age)[2] discrimination claim][3] if all the following elements have been proved by the [(greater weight) or (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (age) was a[6] determining factor7 in defendant's decision.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for defendant.

"(Age) was a determining factor" only if defendant would not have discharged plaintiff but for plaintiff's (age); it does not require that (age) was the only reason for the decision made by defendant.[8] [You may find (age) was a determining factor if you find defendant's stated reason(s) for its decision(s) [(is) (are)] not the true reason(s), but [(is) (are)] a "pretext" to hide [(age) (gender) (race)] discrimination].[9]

Committee Comments

In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), the Supreme Court held that an age discrimination plaintiff may create a submissible issue by showing that the defendant's stated reason for its decision was pretextual. This instruction may be used in "pretext" cases filed under ADEA, § 1981, and § 1983, if the trial court believes it is appropriate to follow the pretext/mixed motive distinction identified in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). See Introductory Note to Section 5. This basic instruction should not be given if the plaintiff is proceeding on a "mixed motive" theory. Mullins v. Uniroyal, Inc., 805 F.2d 307, 309 (8th Cir. 1986). If the trial court is inclined to adhere to the pretext/mixed motive distinction, but cannot determine how to categorize a particular case, see infra Model Instruction 5.92.

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Ryther v. KARE 11, 108 F.3d 832 (8th Cir. 1997). See Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18, 20 (8th Cir. 1985); see generally Bell v. Gas Serv. Co., 778 F.2d 512, 516 (8th Cir. 1985) (inquiry should focus on whether age was a determining factor in employer's decision, not on any particular step in the McDonnell Douglas paradigm). Instead, the submission to the jury should focus on the ultimate issue of whether

intentional discrimination was a determining factor in the defendant's employment decision. Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404, 1408 (8th Cir. 1987) (ultimate issue is whether intentional discrimination was a determining factor in the action taken by the employer); Bethea v. Levi Strauss & Co., 827 F.2d 355, 357 (8th Cir. 1987) (same); see also Grebin, 779 F.2d at 20 n.1 (approving definition of "determining factor").

Plaintiffs can prove that unlawful bias was a "determining factor" by showing "either direct evidence of discrimination or evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in age discrimination cases brought pursuant to the ADEA. It should be modified for race discrimination cases under 42 U.S.C. 1981 and constitutional discrimination cases under 42 U.S.C. 1983.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. This first element is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. See infra Model Instruction 5.93.

6. Historically, cases have approved use of "a" determining factor in pretext cases. See Ryther v. KARE 11, 108 F.3d 832, 846-47 (8th Cir. en banc 1997). However, in Rockwood Bank v. Gaia, 170 F.3d 833 (8th Cir. 1999), a panel decision held that "the" determining factor should be used.

7. The phrase "age was a determining factor" must be defined. The Committee sees no problem in allowing a plaintiff to submit the issue to the jury using "determining factor" rather than "motivating factor" if plaintiff wishes to do so, even in mixed-motive cases.

8. This definition of the phrase "(age) was a determining factor" is based on Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

9. The bracketed phrase may be added at the court's option in cases in which plaintiff relies on indirect evidence/pretext to prove discriminatory motive.

b. Model Instruction 5.95

5.95 PRETEXT INSTRUCTION

You may find that plaintiff's (age)[1] was a motivating factor in defendant's (decision)[2] if it has been proved by the [(greater weight) (preponderance)][3] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] not the true reason(s), but [(is) (are)] a pretext to hide [(age) (gender) (race)] discrimination.

Committee Comments

Plaintiffs can establish unlawful bias through "either direct evidence of discrimination or evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). This instruction, which is based on St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), may be used in conjunction with the essential elements instruction when the plaintiff relies substantially or exclusively on "indirect evidence" of discrimination. In an attempt to clarify this standard, the Eighth Circuit, in Ryther v. KARE 11, 108 F.3d 832 (8th Cir. 1997), stated:

> In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The elements of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.

Id. at 837 (footnote omitted).

Notes on Use

1. This term must be modified if the plaintiff alleges discrimination on the basis of race, gender, or some other prohibited factor.

2. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

8. <u>Eighth Circuit Proposed Model Instruction 5.01</u>

Proposed model instruction 5.01 differs from current model instruction 5.01 in that the proposed instruction adds a reference to pretext:

5.01 TITLE VII - DISPARATE TREATMENT - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (sex)[2] discrimination claim][3] if all the following elements have been proved by the [(greater weight) (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (sex) [was a motivating factor][6] [played a part][7] in defendant's decision.

If either of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim. [You may find that plaintiff's (sex) [was a motivating factor] [played a part] in defendant's (decision)[8] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide (sex) discrimination.] [9]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or some other prohibited factor.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language that corresponds to the burden-of-proof instruction given.

5. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. See infra Model Instruction 5.93.

6. The Committee believes that the phrase "motivating factor" should be defined. See infra Model Instruction 5.96. It appears to be an open question after Costa whether a plaintiff may chose to submit under section 2000e2(a)(1) using the determining factor/McDonnell Douglas format. Those instructions may be found at Model Instructions 5.10 et seq.

7. See Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. Consistent with the various essential elements instructions in this section, t This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

9. This sentence may be added, if appropriate. See Model Instruction 5.95 and Moore v. Robertson Fire Protection Dist., 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit the issue of liability in "disparate treatment" Title VII cases that are subject to the amendments set forth in the Civil Rights Act of 1991. Prior to these amendments, Title VII cases were not jury-triable, Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978), and the liability standards depended upon whether the case was classified as a "pretext" case or a "mixed motive" case. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Under the Civil Rights Act of 1991, these cases will be triable to a jury, see CRA of 91, 102 (codified at 42 U.S.C. 1981a(c) (1994)), and, more importantly, the plaintiff prevails on the issue of liability if he or she shows that discrimination was a "motivating factor" in the challenged employment decision. See CRA of 91, 107 (codified at 42 U.S.C. 2000e-2(m) (1994) (pretext cases)). Plaintiffs who prevail on the issue of liability will be eligible for a declaratory judgment and attorney fees; however, they cannot recover actual or punitive damages if the defendant shows that it would have made the same employment decision irrespective of any discriminatory motivation. See CRA of 91, 107 (codified at 42 U.S.C. 2000e-5(g)(2)(B) (1994)); see infra Model Instruction 5.01A ("same decision" instruction).

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). See Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18, 20-21 (8th Cir. 1985) (ADEA case). See generally Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 135 (8th Cir. 1985) (after all of the evidence has been presented, inquiry should focus on ultimate issue of intentional discrimination, not on any particular step in the McDonnell Douglas paradigm). Accordingly, this instruction is focused on the ultimate issue of whether the plaintiff's protected characteristic was a "motivating factor" in the defendant's employment decision.

9. Tenth Circuit Case Law

Townsend v. Lumbermens Mutual Casualty. Co., 294 F.3d 1232, 89 FEP Cases 306 (10th Cir. 2002), a three-opinion case, reversed the judgment on a jury verdict for the § 1981 and Title VII racial discrimination defendant. Senior Judge Holloway wrote at 1241:

> This is a difficult matter for courts, and would certainly be difficult for a jury. We consider the danger too great that a jury might make the same assumption that the Fifth Circuit did in Reeves. Therefore, we hold that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory. Moreover we are persuaded by the position of the EEOC that the issue is whether in the absence of any instructions about pretext, "the jury found for the defendant because it believed the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment decisions."
>
> We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

(Footnote and citations omitted.) Judge Henry concurred at 1244, stating: "Given the recent confusion regarding the nature of the proof necessary to prevail on a Title VII claim, I am persuaded that, absent the proposed instruction, jurors are left without adequate guidance as to the circumstances in which they may infer discriminatory intent. Thus, under similar facts and where requested, I believe the instruction must be given; I concur." Senior Judge Brorby dissented. *Id.* at 1244–48.

10. Eleventh Circuit Case Law

Palmer v. Board of Regents, 208 F.3d 969, 974–75, 82 FEP Cases 1024 (11th Cir. 2000), affirmed the judgment on a jury verdict for the Title VII religious discrimination defendant, but held that a pretext instruction could be useful but that it was not required. The court stated: "We would however suggest that it might be helpful for the Committee On Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit to revisit the pattern jury instruction on this issue to consider whether any improvements in clarity might be warranted." Judge Cox concurred specially, stating that such an instruction may confuse more than clarify.

Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1233–35, 94 FEP Cases 107 (11th Cir.), *cert. denied*, __ U.S. __, 125 S. Ct. 811 (2004), affirmed the judgment on a jury verdict for the ADEA defendant. The court held that plaintiff's proposed pretext instruction described the law accurately, but that the use of such instructions, while proper, is not compulsory.

> Even if Palmer were not controlling here, we would still hold there was no error in failing to give Conroy's requested instruction. Conroy argues that the jury was misled to believe that it could not infer discrimination or retaliation from a finding of pretext due to the district court's charge to the jury that (1) it was Conroy's burden to prove discrimination and (2) the jury could not second guess Abraham Chevrolet's legitimate business decisions. We do not agree, however, that either of these instructions misled the jury. First, the instruction on burden of proof required Conroy to establish discrimination, but it did not limit the methods by which he could prove it. Second, although the business judgment instruction explained to the jury that it could not second guess Abraham Chevrolet's legitimate business motives, it did not require the jury to believe that any of the legitimate reasons advanced by the employer were in fact the true

motivations behind Conroy's discharge. Not only do we reject Conroy's assertion that these instructions inhibited the jury from inferring discrimination or retaliation based on a finding of pretext, but we consider them both to be standard jury instructions that accurately reflect the law in this Circuit.

Though we do acknowledge that Conroy's pretext instruction is also a correct statement of law, we can only reverse the district court's decision if (1) the contents of the requested instruction were not adequately covered by the jury charge and (2) Conroy suffered prejudicial harm. . . . The charge to the jury gave instructions on drawing inferences from the evidence and weighing the credibility of witnesses. This was sufficient to allow the jury to find discrimination or retaliation so long as they disbelieved Abraham Chevrolet's explanation for Conroy's termination. We also find it significant that Conroy's counsel made good use of his opportunity to argue pretext to the jury in closing statements:

> A claim has been made, there is no confession. Nobody ever confesses in a discrimination case. You're going to have [to] weigh the testimony and decide do you think age had something to do with it. And I would suggest to you that when the man who fires him or without any warning, any documented reports of anything going wrong and comes up here with inconsistent statements that you can read into, that inconsistency and make an inference that, perhaps, the reason that was given by them may not have been the real reason. That's going to be one of the jury instructions[,] that you can read into and understand what the evidence is, make reasonable inferences in terms of their explanation . . . You can certainly read into that. If there's an inconsistent reason, then the age maybe had something to do with it.

We therefore reject Conroy's contention that he was prejudiced by the district court's failure to give his requested instruction. . . . Accordingly, we find no reversible error and hold that the district courts, though permitted, are not required to give the jury a specific instruction on pretext in employment discrimination cases.

Id. at 1234–35.

D. "Business Judgment" Instructions

1. Questions to Be Considered

The risk to fairness in a "business judgment" instruction is that, without more, it can readily short-circuit the process of deliberation by leading jurors to believe they should not question the sincerity of the proffered nondiscriminatory reasons. Its specificity winds up trumping the general instructions about credibility and the weight of the evidence.

Even trial judges have made this mistake, granting defendants summary judgment or judgment as a matter of law without even considering the evidence against the defendant, on the ground that the adverse employment decision was first and foremost a business decision they are not allowed to second-guess:

- *Byrnie v. Town of Cromwell Public Schools*, 73 F.Supp.2d 204, 214, 85 FEP Cases 307 (D. Conn. 1999), relied on the "business judgment" doctrine in refusing to compare the candidates' qualifications, and granted summary judgment to the Title VII, ADEA, and State-law defendant. Reversing, the Second Circuit relied on the fact that plaintiff was better-qualified on paper, and that there were numerous procedural and substantive anomalies raising doubts about the defendant's good faith in evaluating the candidates. It stated: "That is to say that '[w]hile the business judgment rule protects the sincere employer against second-guessing of the reasonableness of its judgments, it does not protect the employer against attacks on its credibility.'" *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 105, 85 FEP Cases 323 (2d Cir. 2001).

- *Wexler v. White's Furniture*, 317 F.3d 564, 576–78, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court held that the lower court paid unwarranted deference to the defendant's business judgment in blaming plaintiff for the store's low sales. The court held: "A plaintiff can refute the legitimate, nondiscriminatory reason that an employer offers to justify an adverse employment action 'by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'" *Id.* at 576.

  > The district court therefore erred by invoking the business judgment rule to exclude consideration of evidence relevant to the question of pretext. As a result, the district court ignored inferences in favor of Wexler that can be drawn from the evidence about whether it was reasonable to blame him for the Morse Road store's declining sales. Wexler produced evidence indicating that White's was aware that the decline in revenue was not his fault. He pointed to evidence showing that the management of White's knew that the company's advertising strategy had hurt sales throughout the chain, including a decrease in sales at the Morse Road store. If believed, a trier of fact could reasonably infer that the justification for Wexler's demotion was insufficient to warrant the adverse decision.

  Id. at 577. Judges Krupansky and Boggs dissented. *Id.* at 578–97.

- *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 926, 87 FEP Cases 596 (10th Cir. 2001), reversed the grant of summary judgment to the Title VII and § 1981 national-origin or ethnic discrimination plaintiffs, commenting on the short0-circuiting of analysis below by defendant's talismanic invocation of "business judgment": "Although the district court did not evaluate All Star's explanation for terminating Plaintiffs against this evidence, the employer's business judgment cannot be immunized from the totality of the circumstances inquiry."

- *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1169, 76 FEP Cases 1865 (10th Cir.), *cert. denied*, 525 U.S. 1054 (1998), affirmed in part and reversed in part the grant of summary judgment to the defendant, stating:

> But this principle does not immunize all potential "business judgments" from judicial review for illegal discrimination. . . . Such a doctrine would defeat the entire purpose of the ADEA. . . . There may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination.

The Eighth Circuit is the only Circuit to require that this type of instruction be given when requested, but it also has a pattern instruction informing the jury that it is permitted, but not required, to draw the inference of unlawful motive from proof that the defendant's proffered nondiscriminatory reasons are false.

The text of the Seventh Circuit's "cautionary" instruction and the Eighth Circuit's instruction illustrate the dangers of going down this road. Both tell jurors to ignore defendant's unreasonableness, but that unreasonableness can be powerful evidence of discrimination. The overly harsh treatment of a black or Hispanic or female or older or sabbatarian employee, compared with others from different groups, is one of the things a jury would rationally and accurately find unreasonable. Telling them to disregard such matters invites miscarriages of justice.

Courts should rethink their willingness to issue "business judgment" decisions in the absence of instructions making clear that the jury must examine the *bona fides* of the defendant's exercise of business judgment.

In addition, cautionary instructions must be balanced. A natural counterbalance to the "business judgment" type of instruction would be provided by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977): "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (Footnote omitted.)

2. First Circuit Case Law

Kelley v. Airborne Freight Corp., 140 F.3d 335, 350–51, 76 FEP Cases 1340 (1st Cir.), *cert. denied*, 525 U.S. 932 (1998), affirmed judgment on a jury verdict for the ADEA and Massachusetts-law plaintiff in the amounts of $1,244,152.24 on the ADEA claim, $3,136,858.29

on the Massachusetts Chapter 151B claim, and awarded attorney fees of $190,000. The court held that, while a business-judgment instruction might have been useful, it was not required:

> While perhaps a business judgment instruction might have been useful in this case, its omission does not provide a basis for undermining the adequacy of the charge as a whole. We cannot see how the jury could have thought that it was free to find that age had a determinative influence on Kelley's discharge if it merely disagreed with Airborne's business judgment. The district court instructed the jury, on more than one occasion, that Kelley could prevail on his federal claim only if he proved by a preponderance of the evidence that the he would not have been fired but for his age. Interrogatory number 2, which the jury answered affirmatively, asked "has the plaintiff proved that his age had a determinative influence on defendant's decision to discharge him?" These instructions did not permit or suggest that the jury could predicate a finding of age discrimination on their disagreement with Airborne's business judgment. Similarly, we cannot agree that the instruction prevented the jury from focusing on the state of mind of the decisionmaker.

(Footnote omitted.)

3. Fifth Circuit Case Law

Julian v. City of Houston, 314 F.3d 721, 727, 90 FEP Cases 887 (5th Cir. 2002), affirmed the judgment on a jury verdict for the ADEA plaintiff, and held that the lower court did not abuse its discretion in denying defendant's proposed "business judgment" instruction where the lower court covered the substance of such an instruction in other language:

> Your verdict should be for the defendant if you find that the defendant has proved that plaintiff would not have received the promotion regardless of his age. You should not find that the decision is unlawful just because you may disagree with the defendant's stated reason or because you believe the decision was harsh or unreasonable, as long as defendant would have reached the same decision regardless of plaintiff's age.
>
> ....
>
> It is not against the law for an employer to fail to promote an employee who is over forty years of age if the reason for doing so is unrelated to the employee's age....
>
> If you determine that Julian was not promoted because of factors other than his age, you must decide in favor of the City.

Incorrectly citing *Julian* as approving business-judgment instructions rather than the mere choice between two different forms of such an instruction, the Fifth Circuit held that the giving of a business-judgment instruction was not plain error. *Kanida v. Gulf Coast Medical Personnel LP*, 363 F.3d 568, 581, 9 Wage & Hour Cas.2d (BNA) 865 (5th Cir. 2004) (FLSA retaliation). The instruction at issue was:

> You may not return a verdict for Ms. Kanida just because you might disagree with Gulf Coast's or Nursefinders' actions or believe them to be harsh or unreasonable. Under the law, employers are entitled to make employment decisions for a good reason, for a bad reason, or for no reason at all, so long as the decision is not motivated by unlawful

retaliation. You should not second-guess Gulf Coast or Nursefinders' decision or substitute your own judgment for theirs.

Id. at 581 n.13.

4. Seventh Circuit Case Law

Wichmann v. Board of Trustees of Southern Illinois University, 180 F.3d 791, 804–05, 79 FEP Cases 1673 (7th Cir. 1999), *vacated and remanded for reconsideration in light of vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Kimel v. Florida Board of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000)*, 528 U.S. 1111 (2000), affirmed the judgment on a jury verdict for the ADEA plaintiff, and held that the trial court did not abuse its discretion in refusing to give defendant's proffered "business judgment" instruction:

> The jury instructions given were accurate—to find liability only if "Plaintiff's age was a substantial motivating factor in the decision to terminate his employment, that is, but for Plaintiff's age, his employment would not have been terminated." But according to the University, the jury might have been improperly swayed by the facts that Wichmann was a sympathetic plaintiff, capable, hardworking, popular, and that his firing could have seemed unwise or unfair. The ADEA, the University argues, does not prohibit incompetence, stupidity or general injustice by employers, but only age discrimination. . . . The University contends that for these reasons the trial court stated the law insufficiently to the point of misleadingness. Our civil justice system, however, is based on the idea that "the jury is well-equipped to evaluate the evidence and use its good 'common sense' to come to a reasoned decision." . . . A judge "need not deliver instructions describing all valid legal principles. . . ." . . . Generally speaking, "the judge may and usually should leave the subject to the argument of counsel." . . .
>
> All parties are entitled to jury instructions which are accurate and complete. But trial courts need not take any extraordinary measures in instructing the jury to protect employers who make foolish or inequitable decisions about sympathetic employees. In employment discrimination law, as in tort law, one takes one's plaintiffs as one finds them, sympathetic or not. Moreover, a defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext. Since the challenged jury instruction involved no misstatement or insufficient statement of the law, we need not consider whether the University was prejudiced by any error.

(Citations omitted.)

5. Seventh Circuit Draft Model Cautionary Instruction 3.07

> In deciding Plaintiff's claim, you should not concern yourselves with whether Defendant's actions w ere wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proven that Defendant [*adverse employment action*] him [because of race/sex] [in retaliation for complaining about discrimination].

6. Eighth Circuit Model Instructions 5.58 and 5.94

The text of Eighth Circuit Model Instruction 5.58 is identical to that of Model Instruction 5.94; only the Committee Comments differ, and their only difference is that the last case cited in the Comment below is not mentioned in the Comment to Model Instruction 5.94.

5.58 BUSINESS JUDGMENT INSTRUCTION

You may not return a verdict for plaintiff just because you might disagree with defendant's (decision)[1] or believe it to be harsh or unreasonable.

Committee Comments

In Walker v. AT&T Technologies, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction which explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. Moreover, the Circuit has expressly approved the language of the instruction set forth here. See Wolff v. Brown, 128 F.3d 682, 685 (8th Cir. 1997) ("In an employment discrimination case, a business judgment instruction is 'crucial to a fair presentation of the case,' and the district court must offer it whenever it is proffered by the defendant."). Cf. Blake v. J.C. Penney Co., 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as sufficient).

Notes on Use

1. This instruction makes reference to the defendant's "decision." It may be modified if another term—such as "actions" or "conduct"—is more appropriate.

7. Ninth Circuit Comment on Model Instruction 14.1

In the Comment to Model Instruction 14.1 (Age Discrimination—Disparate Treatment—Elements and Burden Of Proof—Discharge), the Ninth Circuit Jury Instruction Manual states:

The court should also consider whether a business judgment instruction may be required. In *Walker v. AT & T Technologies,* 995 F.2d 846 (8th Cir.1993), the Eighth Circuit, in an ADEA case, held it was reversible error not to give a business judgment instruction. *See* also *Doan v. Seagate Technology, Inc.,* 82 F.3d 974, 977–78 (10th Cir.1996); *Faulkner v. Super Valu Stores, Inc.,* 3 F.3d 1419, 1425–26 (10th Cir.1993). The Ninth Circuit has not ruled on this issue in a published opinion. For a proposed business judgment instruction see e.g. Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* § 171.75 (5th ed. 2001).

E. Mixed Motives

1. Questions to Be Considered

a. Who Wins the Verdict if Both Sides Make their Respective Showings?

If plaintiff shows that a forbidden characteristic was a motivating factor but defendant carries its burden of showing the "same decision" defense, the Seventh Circuit Draft Model

Instruction 3.01(c) says in the context of Title VII that the verdict should be for plaintiff, but no damages should be awarded.

The Eighth Circuit pattern instructions cover ADEA, § 1991, and § 1983 mixed-motive cases, and correctly state that the verdict must be for the defendant if the jury finds that the same decision would have been made anyway. There is no Title VII discrimination mixed-motive instruction, and the notes under the mixed-motives instructions do not state that Title VII discrimination cases must be treated differently. This creates the risk that someone, somewhere in the states within the Circuit will use one of these instructions in a Title VII mixed-motive case. Its proposed verdict form in complex cases can be applied to any kind of mixed-motive case.

b. Should Jurors Know Who Has the Burden of Proving the "Same Decision"?

The Eighth Circuit instruction system for mixed-motives cases is elaborate, but flawed. In each instance, its mixed-motive instructions fail to inform the jury that, once the plaintiff has proven that an impermissible factor formed part of the defendant's motivation for the challenged decision, it is the defendant that has the burden of proving that it would have made the same decision in the absence of discrimination, not the plaintiff having the burden of showing defendant would not have made the same decision. The wording of the instruction might even lead a legally unsophisticated jury to think that the plaintiff somehow bears the burden of showing the "same decision."

2. Seventh Circuit Draft Model Instruction Comments 3.01(c)

The Committee Comments to the Draft Model Instructions discuss mixed-motive cases and their effect on the draft model instructions:

> In such a case, the pattern instruction (drawn from *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994), which did not address a mixed motive issue), would call upon the jury to decide whether the plaintiff had disproved the mixed motive, after which the jury would decide whether the defendant had proven it. Under such circumstances, the Committee recommends the following language instead of the pattern instruction:
>
> > Plaintiff must prove by a preponderance of the evidence that his [*protected class*] was a motivating factor in Defendant's decision to [*adverse employment action*] him. A motivating factor is something that contributed to Defendant's decision.
> >
> > If you find that Plaintiff has proved that his [*protected class*] contributed to Defendant's decision to [*adverse employment action*] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [*adverse employment action*] him even if Plaintiff was not [*protected class*]. If so, you must enter a verdict for the Plaintiff but you may not award him damages.
>
> The Committee recommends use of a verdict form that makes clear, if no damages are awarded, whether the jury decided the plaintiff had not proven her claim or decided that the defendant had met its burden on the mixed motive issue. Without clear guidance in the circuit case law, the Committee cannot offer assistance in determining when a "mixed motive" instruction is appropriate.

3. Eighth Circuit Model Instructions 5.11, 5.21, 5.31, and 5.92

a. 5.11 ADEA—Disparate Treatment—Essential Elements (Mixed Motive Case)

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's age discrimination claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [discharged][4] plaintiff; and

Second, plaintiff's age was a motivating factor[5] in defendant's decision.

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] age.

Committee Comments

* For a pretext case, the format of Model Instruction 5.91, infra, is recommended.

This instruction is designed to submit the issue of liability in "disparate treatment" cases brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994). The burden-shifting analysis used in this instruction had been adopted by the Supreme Court in "mixed motive" cases under both Title VII and 42 U.S.C. § 1983. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286-87 (1977). Moreover, a similar burden-shifting approach has been legislatively adopted in all Title VII cases by virtue of the Civil Rights Act of 1991. See Introductory Note to Section 5.

To be sure, there is an important difference between Title VII cases and ADEA cases in the use of this format. In Title VII cases, the plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the challenged employment decision, and a finding that the employer would have made the "same decision" in the absence of any discriminatory motive precludes an award of damages or reinstatement, but does not preclude an award of attorney fees or equitable relief. 42 U.S.C. 2000e-2(m). It is unclear whether the same result would occur in an age discrimination case. See Fast v. Southern Union Co., Inc., 149 F.3d 885, 889 (8th Cir. 1998) and Breeding v. Arthur J. Gallagher and Co., 164 F.3d 1151, 1156 (8th Cir. 1999) (same) (citing Fast).

At the court's option, a short statement which defines the Age Discrimination in Employment Act may be included at the beginning of this instruction or as a separate instruction. The following language, based on Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5, 779 F.2d 18, 20 n.1 (8th Cir. 1985), is recommended:

Under the Age Discrimination in Employment Act, it is unlawful for an employer to make an employment decision on the basis of an individual's age when that individual is 40 years of age or older.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. See infra Model Instruction 5.93.

5. The Committee believes that the phrase "motivating factor" should be defined. See infra Model Instruction 5.96.

b. 5.21 42 U.S.C. § 1981—Race Discrimination—Essential Elements (Mixed Motive Case)

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's race discrimination claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [failed to hire][4] plaintiff; and

Second, plaintiff's race was a motivating factor[5] in defendant's decision.

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have decided not to [hire] plaintiff regardless of [his/her] race.

(Essentially duplicative comments and notes omitted.)

c. 5.31 42 U.S.C. § 1983—Essential Elements (Mixed Motive Case)

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (sex)[2] discrimination claim][3] if both of the following elements have been proved by the [(greater weight) or (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (sex) was a motivating factor[6] in defendant's decision[; and

Third, defendant was acting under color of state law].[7]

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (sex).

(Essentially duplicative comments and notes omitted.)

d. 5.92 Special Interrogatories to Elicit Findings in Borderline Pretext/Mixed Motives Cases

Directions

The verdict in this case will be determined by your answers to a series of questions set forth below. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

In Question No. 1, you will be asked whether plaintiff's (age)[1] was a motivating factor[2] in defendant's decision to [discharge][3] [him/her]. If it has been proved that plaintiff's (age) was a motivating factor in defendant's decision, you must answer "yes" to Question No. 1. If it has not been proved, you must answer "no" to Question No. 1.

In Question No. 2, you will be asked whether plaintiff's (age) was a determining factor in defendant's decision to [discharge] [him/her]. "(Age) was a determining factor" only if defendant would not have discharged plaintiff but for plaintiff's (age). It does not require that (age) was the only reason for the decision made by defendant.[4] [You may find that (age) was a determining factor if you find defendant's stated reason(s) for its decision are not the true reason(s), but are a pretext to hide [(age) (gender) (race)] discrimination.][5] If it has been proved that plaintiff's (age) was a determining factor in defendant's decision, you must answer "yes" to Question No. 2. If it has not been proved, you must answer "no" to Question No. 2.

In Question No. 3, you will be asked whether defendant would have [discharged] plaintiff regardless of [his/her] (age). If it has been proved that defendant would have discharged plaintiff regardless of [his/her] (age), you must answer "yes" to Question No. 3. If it has not been proved, you must answer "no" to Question No. 3.

Question No. 4 deals with the amount of damages plaintiff is eligible to recover. In answering Question No. 4, you are instructed to assess plaintiff's damages in accordance with Instruction ____[6] [and Instruction ____].[7]

Question No. 5 deals with whether defendant's conduct was "willful," as defined in Instruction ____.[8]

QUESTIONS

Question No. 1: Has it been proved by the [(greater weight) or (preponderance)] of the evidence that plaintiff's (age)[1] was a motivating factor[2] in defendant's decision to [discharge][3] [him/her]?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Question No. 2 only if you answered "yes" to Question No. 1. If you answered "no" to Question No. 1, you need not answer Questions 2 through 5. You should have your foreperson sign and date this form because you have completed your deliberation on this age-discrimination claim.

Question No. 2: Has it been proved by the [(greater weight) or (preponderance)] of the evidence that plaintiff's (age) was a determining factor in defendant's decision to [discharge] [him/her]?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Question No. 3 only if you answered "no" to Question No. 2. If you answered "yes" to Question No. 2, go directly to Questions No. 4 and 5.

Question No. 3: (Answer this question if you answered "yes" to Question No. 1 and "no" to Question No. 2.) Has it been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (age)?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Questions No. 4 and 5 only if you answered "no" to Question No. 3. If you answered "yes" to Question No. 3, have your foreperson sign and date this form because you have completed your deliberations on this age-discrimination claim.

Question No. 4: (Answer this question only if you answered "yes" to Question No. 2 or "no" to Question No. 3.) What is the amount of plaintiff's damages as that term is defined in Instruction _____?[6] $_____ (stating the amount [or, if you find that plaintiff' damages have no monetary value, write in the nominal amount of One Dollar ($1.00)]).[7]

Question No. 5: (Answer this question even if you answered "yes" to Question No. 2 or "no" to Question No. 3.) Has it been proved by the [(greater weight) or (preponderance)] of the evidence that defendant's conduct was "willful" as that term is defined in Instruction ____?[8]

_____ Yes _____ No
(Mark an "X" in the appropriate space)

_____

Foreperson

Date: _____

Committee Comments

See Introductory Note to Section 5.

These special interrogatories are designed for use where the trial court is inclined to adhere to a mixed motive/pretext distinction but cannot readily classify a case under a "mixed motive" or "pretext" theory. For example, if plaintiff presents some direct evidence which does not clearly address the employment decision at issue, such as general statements of age bias by the employer, it may be unclear whether the case should be submitted under a "mixed motive" or "pretext" instruction. As explained below, the first three basic interrogatories will permit the court to create a complete record to permit analysis under either theory.

Question No. 1 is designed to test the proof on the "motivating factor" issue. The note following Question No. 1 directs the jury to continue in its analysis only if it answers "yes" to this question. If the jury does not find that unlawful discrimination was a motivating factor, judgment may be entered for the defendant.

Question No. 2 is designed to test the ultimate issue in a "pretext" case of whether plaintiff's age, race, or other protected characteristics was a "determining factor" in the employment decision being challenged. As reflected in the note following Question No. 2, the plaintiff wins under either a pretext or mixed motive theory if the jury finds that unlawful discrimination was a "determining factor." Thus, analysis on the issue of liability should end if the jury answers "yes" to Question No. 2. The jury must go on to Question No. 3 only if it found that discrimination was a motivating factor but not a "determining factor."

Question No. 3 is designed to reach the final issue in a "mixed motive" case. As noted above, the defendant clearly wins if the jury answers "no" to Question No. 1, and the plaintiff clearly wins if the jury answers "yes" to Question No. 2. It also is clear that the defendant wins if the jury answers "no" to Question No. 2 and "yes" to Question No. 3. Thus, the court will be revisited with the issue of whether a case should be classified as "mixed motive" or "pretext" only if the jury reaches Question No. 3 and only if the jury answers "no" to that question. Based on that jury finding, the plaintiff wins if the case is classified under a "mixed motive" theory, while the defendant wins if the case is classified under a "pretext" case theory.

Questions No. 1, 2 and 3 are to be submitted in lieu of, not in conjunction with, any elements instruction. However, actual damages and, if appropriate, a "willfulness" or punitive damages instruction must also be submitted. The Committee makes no recommendation regarding whether all issues should be submitted to the jury simultaneously or whether jury deliberations should be bifurcated and damages and willfulness submitted separately from Questions No. 1, 2 and 3.

Notes on Use

1. This set of interrogatories is designed for use in an age discrimination case. It should be modified for race discrimination cases under 42 U.S.C. § 1981 or constitutional discrimination cases under 42 U.S.C. § 1983.

2. The Committee believes that the term "motivating factor" may be of such common usage that it need not be defined. If the jury has a question regarding this term, the following may be a suitable definition: "The term 'motivating factor' means a consideration that moved the defendant toward its decision." The phrase "a factor that played a part" also may be an appropriate substitute for the phrase "motivating factor." See Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101 (8th Cir. 1988). But cf. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (equating "motivating factor" with "substantial factor").

3. These interrogatories are designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the interrogatories and directions must be modified.

Where the plaintiff resigned but claims that he or she was "constructively discharged," the directions must be modified and an additional interrogatory should be given as a threshold to the interrogatories shown above and the subsequent interrogatories will have to be renumbered. See infra Model Instruction 5.93. An appropriate interrogatory would be:

Question No. 1: Has it been proved by the [(greater weight) or (preponderance)] of the evidence that defendant made plaintiff's working conditions intolerable for the purpose of forcing plaintiff to resign?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Question No. 2 only if you answered Question No. 1 "yes." If you answered this question "no," you need not answer Questions Nos. 2 through 6. You should have your foreperson sign this form because you have completed your deliberations on this age-discrimination claim.

4. The definition of the term "(age) was a determining factor" is based on Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

5. The bracketed phrase may be added at the court's option, in cases in which plaintiff relies primarily on indirect evidence/pretext to prove discriminatory motive.

6. Fill in the number of the "actual damages" instruction here. See infra Model Instructions 5.12, 5.22, 5.32. In cases where special interrogatories are submitted instead of an elements instruction, the first two lines of the damages instruction should be modified as follows:

If you reach Question No. 4 of the Verdict Form, plaintiff's damages are defined as such sum as you find by the . . . .

7. Regarding the submission of the issue of nominal damages, see infra Model Instructions 5.13, 5.23, 5.33.

8. Because this model set of interrogatories is designed for age discrimination cases, Question No. 5 is designed to submit the issue of "willfulness." See infra Model Instruction 5.14. If the issue of "willfulness" is not submitted in an age discrimination case, Question No. 5 should be omitted; otherwise, insert the number of the "willfulness" instruction here. In cases where special interrogatories are submitted instead of an elements instruction, the first sentence of Model Instruction 5.14 should be modified as follows:

If you reach Question No. 5 of the Verdict Form, then you must consider whether the conduct of defendant was "willful."

In race discrimination cases and constitutional discrimination cases, Question No. 5 should be used to submit the issue of punitive damages, if appropriate. See infra Model Instructions 5.24, 5.34. If the issue of punitive damages is not submitted to the jury, Question No. 5 should be omitted. If the issue of punitive damages is submitted, the "Directions" section of these interrogatories should be modified as follows:

Question No. 5 deals with punitive damages that may be assessed, in accordance with Instruction ___.

Similarly, the "Questions" section of the interrogatories should be modified as follows:

Question No. 5: (Answer this question only if you answered "yes" to Question No. 2 or "no" to Question No. 3). What amount, if any, do you assess for punitive damages as that term is defined in Instruction ___? $_____ (stating the amount or, if none, write the word "none").

Finally, if the issue of punitive damages is submitted in connection with these interrogatories, the first sentence of the second paragraph of the model instructions for punitive damages (Model Instructions 5.24, 5.34, infra) should be modified as follows:

If you reach Question No. 5 of the Verdict Form, . . .

4. Eighth Circuit Proposed Model Instructions in Employment Cases

These are in the same format as the existing instructions, except that Instruction 5.91 is omitted.

5. Ninth Circuit Model Jury Instruction 12.1A

12.1A DISPARATE TREATMENT—WHERE EVIDENCE SUPPORTS "SOLE REASON" OR "MOTIVATING FACTOR"

The plaintiff has brought a claim of employment discrimination against the defendant. The plaintiff claims that [his] [her] [[race] [color] [religion] [sex] [national origin]] was either the sole reason or a motivating factor for the defendant's decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] the plaintiff. The defendant denies that plaintiff's [[race] [color] [religion] [sex] [national origin]] was either the sole reason or a motivating factor for the defendant's decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] the plaintiff [and further claims the decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] the plaintiff was based upon [a] lawful reason[s]].

Comment

Use this instruction and Instructions 12.1B and 12.1C whenever the Title VII claim is based on disparate treatment.

For a definition of "adverse employment action" in disparate treatment cases, see Instruction 12.4A.2.

The Civil Rights Act of 1991 clarified the extent to which an improper motive may be the basis for liability when a defendant's actions are based upon both lawful and unlawful motives. The Act rendered such cases triable by jury on the issue of compensatory and punitive damages. 42 U.S.C. § 1981a(c). The Act further clarified that a defendant is liable if the plaintiff shows that the discrimination was a "motivating factor" in the challenged decision or action, "even though other factors also motivated" the challenged action or decision and regardless of whether the case was one of "pretext" or "mixed motives." 42 U.S.C. § 2000e-2(m).

Where the defendant would have made the same decision in the absence of a discriminatory motive, the plaintiff's remedies are limited under the 1991Act to declaratory or injunctive relief, as well as attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B) (modifying *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). *See also Washington v. Garrett*, 10 F.3d 1421, 1432 n.15 (9th Cir.1993), for a discussion of remedy limitations under the 1991 Act.

The judge should consider providing the jury with the following special verdict form to determine the jury's findings on the question of sole or mixed motive.

Special Verdict

1. Has the plaintiff proved by a preponderance of the evidence, that the plaintiff's [[race] [color] [religion] [sex] [national origin]] was the sole reason for the defendant's decision to [*state adverse action*]?

Yes No

If the answer to Question No. 1 is "yes," proceed to Question No. 5. If the answer to Question No. 1 is "no," proceed to Question No. 2.

2. Has the plaintiff proved by a preponderance of the evidence that the plaintiff's [[race] [color] [religion] [sex] [national origin]] was a motivating factor for the defendant's decision to [*state adverse action*]?

Yes No

If the answer to Question No. 2 is "no," do not answer any further questions on [*the plaintiff's claim of disparate treatment*]. If the answer to Question No. 2 is "yes," proceed to Question No. [*if same decision affirmative defense applies:* 3] [*if same decision affirmative defense does not apply:* 5]

[If "same decision" affirmative defense applies, add question 3, and if appropriate, question 4:]

3. Has the defendant proved by a preponderance of the evidence that the defendant's decision to [*state adverse action*] was also motivated by a lawful reason?

Yes No

If your answer to Question No. 3 is "no," proceed to Question No. 5. If your answer to Question No. 3 is "yes," proceed to Question No. 4.

4. Has the defendant proved, by a preponderance of the evidence, that the defendant would have made the same decision to [*state adverse employment action*] even if the plaintiff's [[race] [color] [religion] [sex] [national origin]] had played no role in the defendant's decision to [*state adverse employment action*] ?

Yes No

If your answer to Question No. 4 is "yes," do not answer any further questions on damages related to the plaintiff's claim of disparate treatment.

If your answer to Question No. 4 is "no", proceed to Question 5.

5. *[The judge should draft further special verdict questions to cover damages, including punitive damages if appropriate.]*

Approved 8/2004

6. Eleventh Circuit Model Jury Instructions

a. 1.1.1 Public Employee First Amendment Cases

* * *

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] [not have been promoted] for other reasons even in the absence of the protected speech activity. If you find that the Plaintiff would [have been dismissed] [not have been promoted] for reasons apart from the speech activity, then your verdict should be for the Defendants.]

If you find for the Plaintiff [and against the Defendants on their defense], you must then decide the issue of the Plaintiff's damages.

* * *

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

[1. That the actions of the Defendants were "under color" of the authority of the State?

Answer Yes or No]

1. That the Plaintiff engaged in speech activity concerning [describe the subject of public concern]?

Answer Yes or No

2. That such speech activity was a substantial or motivating factor in the Defendants' decision to [discharge the Plaintiff from employment] [not promote the Plaintiff]?

Answer Yes or No

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

Answer Yes or No

[Note: If you answered No to any of the preceding questions you need not answer any of the remaining questions.]

4. That the Plaintiff [would have been discharged from employment] [would not have been promoted] for other reasons even in the absence of the Plaintiff's protected speech activity?

Answer Yes or No

[Note: If you answered Yes to Question No. 4 you need not answer the remaining questions.]

b. 1.2.1 Title VII—Civil Rights Act (partial)

* * *

In this case the Plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of their employment because of the employee's [race] [sex or gender].

More specifically, the Plaintiff claims that [he] [she] was [discharged from employment] [denied a promotional opportunity] by the Defendant because of the Plaintiff's [race] [sex or gender].

The Defendant denies that the Plaintiff was discriminated against in any way and asserts that [describe the Defendant's theory of defense or affirmative defenses, if any].

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 Plaintiff was [discharged from employment] [denied a promotional opportunity] by the Defendant; and

Second: That the Plaintiff's [race] [sex or gender] was a substantial or motivating factor that prompted the Defendant to take that action.

[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.]

You should be mindful that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's [race] [sex or gender]. So far as you are concerned in this case, an employer may [discharge] [fail to promote] an 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 Defendant even though you personally may not favor the action taken and would have acted differently under the circumstances. Neither does the law require an employer to extend any special or favorable treatment to employees because of their [race] [sex or gender].

On the other hand, it is not necessary for the Plaintiff to prove that the Plaintiff's [race] [sex or gender] was the sole or exclusive reason for the Defendant's decision. It is sufficient if the Plaintiff proves that [race] [sex or gender] was a determinative consideration that made a difference in the Defendant's decision.

[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 Defendant has shown by a preponderance of the evidence that the Plaintiff would [have been dismissed] [not have been promoted] for other reasons even in the absence of consideration of the Plaintiff's [race] [sex or gender]. If you find that the Plaintiff would [have been dismissed] [not have been promoted] for reasons apart from the Plaintiff's [race] [sex or gender], then your verdict should be for the Defendant.]

If you find for the Plaintiff and against the Defendant on its defense, you must then decide the issue of the Plaintiff's damages:

* * *

F. Harassment and the Affirmative Defense

1. Questions to Be Considered

a. Should There Be Separate Pattern Instructions for Harassment Cases?

The Fifth Circuit does not have pattern instructions for such cases, but all other Circuits with pattern instructions do.

b. Can Sexual Flirtation and Gender-Related Jokes Never Be Considered Part of a Hostile Environment?

The Seventh Circuit draft model Ameliorating Instruction begins: "Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment." The word "occasional" modifies only three of the five illustrative types of conduct listed, creating the implication that constant sexual flirtation and constant gender related jokes are always part of "ordinary socializing" and can never be part of a hostile environment. That is not the law. This needs to be reworded.

c. Does an Employee Have to Take the Workplace "As Is"?

The Seventh Circuit draft model Ameliorating Instruction ends: "Only conduct amounting to a material change in the terms and conditions of employment amounts to an abusive or hostile environment." This implies that any women transferred into an already hideously hostile environment have no claim unless it becomes worse. It would be better to begin this sentence with "Only conduct having a material effect on" and then continue as before.

d. Constructive Discharge as a Tangible Employment Action

The Seventh Circuit Draft Model Jury Instructions cite *Pennsylvania State Police v. Suders*, __ U.S. __, 124 S. Ct. 2342, 93 FEP Cases 1473 (2004), erroneously for the proposition that a plaintiff seeking to prove constructive discharge as a tangible employment action must show that defendant "purposely made his working conditions so intolerable that a reasonable person in his position would have had to quit."

A reasonable juror hearing this language would conclude that defendant had to intend to get rid of the plaintiff, or that the defendant at least had to take some affirmative action that would result in the resignation of a reasonable employee. Thus, an employer that wanted to keep the plaintiff employed, but repeatedly delayed action, or limited itself to remedial half-measures to avoid losing the harasser, could not be found to have engaged in a constructive discharge. *Suders* held that the *Faragher* / *Ellerth* affirmative defense is available unless the defendant takes official action that would cause a reasonable person to resign, but that is a far cry from stating that defendant intended that result, or had to take an affirmative step even without intending that result.

In most harassment cases, the error would have little effect because the evidence that was inadequate to show purpose will normally be adequate to defeat the affirmative defense.

However, this instruction could contaminate the jury's consideration of a stand-alone constructive-discharge claim.

e. Why Excuse Defendants from Liability if They Had Longstanding Knowledge of a Serial Co-Worker Harasser Who Sexually Assaults Female Employees, But Only the New Employees, and Only Once per Victim?

The Seventh and Eighth Circuit instructions on co-worker harassment require plaintiffs to show that the defendant was aware of the conduct affecting the plaintiff but failed to take reasonable steps to correct the situation. It occurs with some frequency, however, that serial harassers single out only new female employees, without time to develop allies in the workplace, for groping and other misconduct. All of us would agree that an employer armed with this knowledge in advance of the hiring of a new female employee should be liable when the pattern recurs as to the new hire. In many cases, the employer was on notice of the problem before the plaintiff walked into the situation. The instructions should encompass this situation.

The Eleventh Circuit's Model Instruction 1.2.2 is a model of clarity that accurately sets forth this aspect of the law: "That the Defendant exercised reasonable care to precent and correct promptly, any sexually harassing behavior in the workplace."

f. Why Not State that a Corrective Measure Should be Proportionate to the Seriousness of the Offense?

The Ninth Circuit's pattern instruction 12.2C states that an effective remedy should be proportionate to the seriousness of the offense.

This seems useful because it gives some guidance to the jury. It is easy to see the instruction helping defendants in some cases where jurors might think the only effective remedy is termination, and helping plaintiffs in cases of repeated half-measures.

g. Why Not State that the Defendant Has the Burden of Establishing the Affirmative Defense?

The Seventh and Ninth Circuits clearly state that defendant has the burden of proof on the affirmative defense.

The Eighth Circuit instructions do not state who has the burden, but use the passive voice of which the MANUAL disapproves: "Your verdict must be for defendant . . . if it has been proved . . ." Jurors should be told plainly that defendant has the burden of proof.

h. Why Not State that Plaintiff Wins if the Defendant Fails to Establish the Affirmative Defense?

The Seventh Circuit Draft Model Instructions 3.05B state at the end: "If you find that Defendant has not proved both of these things, your verdict should be for Plaintiff." The Eighth Circuit Pattern Instruction 5.42(A) is confusingly written and does not clarify this question. The Ninth Circuit does not clarify this question. It is clearer to complete the circle on this instruction.

i. Does the Objective Test Depend on a "Reasonable Person in the Plaintiff's Circumstances" or "Reasonable [Man] [Woman] in the Plaintiff's Circumstances"?

The Ninth Circuit is the only Circuit whose pattern instructions refer to the reasonable man or woman in the plaintiff's circumstances.

j. Why Limit Constructive Knowledge of Harassment to the Knowledge of Plaintiff's Direct Supervisors?

The Eleventh Circuit's Model Instruction 1.2.2 states that the defendant is liable for harassment by nonsupervisory fellow employees only if the "Plaintiff's supervisor or successively higher authority" knew or should have known of the hostile environment and took no action.

Employers commonly have sexual harassment policies allowing employees to complain through an "800" number to a service organization, or to corporate headquarters, or to the local or regional HR officials. None of these persons are in plaintiff's chain of direct supervision, but the knowledge of each of these persons would be attributable to the defendant under ordinary agency principles.

2. Seventh Circuit Draft Model Instructions 3.04, 3.05A, and 3.05B

a. 3.04 General Sex (or Race) Harassment Instruction by Co-Employee or Third-Party

In this case, Plaintiff claims that he was [racially/sexually] harassed at work. To succeed on this claim, Plaintiff must prove seven things by a preponderance of the evidence:

1. Plaintiff was subjected to [*alleged conduct*];

2. The conduct was unwelcome;

3. The conduct was because Plaintiff was [race/sex];

4. At the time the conduct occurred, Plaintiff believed that the conduct made his work environment hostile or abusive;

5. The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive;

6. Defendant knew or should have known about the conduct; and

7. Defendant did not take reasonable steps to correct the situation.

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant.

Committee Comments

a. **Authority:** *See Rizzo v. Sheahan*, 266 F.3d 705, 711 (7th Cir. 2001); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000); *Parkins v. Civil Contractors, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

b. **No Dispute as to Alleged Conduct:** If no dispute exists that the defendant's alleged conduct took place, a court should simplify the instruction by changing the beginning of the instruction as follows:

> In this case, Plaintiff claims that she was [racially/sexually] harassed at work [*describe conduct*]. To succeed in her claim, Plaintiff must prove six things by a preponderance of the evidence:
>
> 1. The conduct was unwelcome;
>
> 2. Plaintiff was subjected to this conduct because she was [race/sex];

The remainder of the instruction should remain the same.

c. **Hostile or Abusive Work Environment:** In some cases, a court may want to give the jury more guidance on what constitutes a hostile or abusive work environment. If so, the Committee suggests the following language:

> To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); *Harris v. Forklift System, Inc.*, 510 U.S. 17, 23 (1993); Eighth Circuit Pattern Instructions § 5.42 Committee Comments.

d. **Ameliorating Instruction:** As an optional addition to the instruction, the

Committee suggests that a court consider including the following language:

> Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment. Only conduct amounting to a material change in the terms and conditions of employment amounts to an abusive or hostile environment.

b. 3.05A General Supervisor Sex or Race Harassment Instruction: With Tangble Employment Action

Plaintiff says that he was [racially/sexually] harassed by [*Alleged Supervisor*]. To succeed on this claim, Plaintiff must prove seven things by a preponderance of the evidence.

1. [*Name*] was Plaintiff's supervisor. A supervisor is someone who can affect the conditions of Plaintiff's employment. By this I mean someone who has the power to hire, fire, demote, promote, transfer or discipline Plaintiff.

2. Plaintiff was subjected to [*alleged conduct*];

3. The conduct was unwelcome;

4. The conduct was because Plaintiff was [race/sex];

5. The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive;

6. At the time the conduct occurred, Plaintiff believed that the conduct made his work environment hostile or abusive; and

7. [*Name's*] conduct caused Plaintiff [*adverse employment action*].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant.

Committee Comments

a. **Scope:** This instruction should be used where the parties do not dispute that the plaintiff experienced a tangible employment action, such as a demotion, a discharge, or an undesirable reassignment. *See Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). In such situations, affirmative defenses are unavailable to the defendant. *Id. See also Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). For cases where no tangible employment action took place, see Instruction 3.05B, below. For guidance on modifying the instruction in cases where the parties dispute whether the supervisor's conduct led to a tangible employment action, see Committee comment d to Instruction 3.05B, below.

b. **Supervisor Definition:** *See NLRB v. Kentucky River Comm. Care*, 532 U.S. 706, 713 (2001); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *NLRB v. Yeshiva Univ*., 444 U.S. 672, 691 (1980); *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981).

c. **Employer's Vicarious Liability for Supervisor Conduct:** *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Rizzo v. Sheahan*, 266 F.3d 705, 711 (7th Cir. 2001); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000); *Parkins v. Civil Contractors, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

d. **Hostile or Abusive Work Environment:** In some cases, a court may want to give the jury more guidance on what constitutes a hostile or abusive work environment. If so, the Committee suggests the following language:

> To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); *Harris v. Forklift System, Inc.*, 510 U.S. 17, 23 (1993); Eighth Circuit Pattern Instructions § 5.42 Committee Comments.

e. **Constructive Discharge:** If the adverse employment action alleged by plaintiff is constructive discharge, the Committee suggests altering the instruction as follows:

> 7, [*Name*]'s conduct forced plaintiff to quit his job. To show this, Plaintiff must prove that Defendant purposely made his working conditions so intolerable that a reasonable person in his position would have had to quit.

See Pennsylvania Police Dept. v. Suders, ___ U.S. ___, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004).

f. **Facts Not in Dispute:** A court should modify the instruction to account for situations where facts are not in dispute. For example, if the parties do not dispute that the alleged harasser is the plaintiff's supervisor, a court does not need to give the first element of the instruction. Similarly, if the parties do not dispute that the defendant's alleged conduct took place, a court should describe the conduct at the beginning of the instruction and then modify the instruction by replacing the elements 2-4 with the following two elements:

> 2. The conduct was unwelcome;

3. Plaintiff was subjected to this conduct because he was [race/sex];

The remainder of the instruction should remain the same.

c. 3.05B General Supervisor Sex or Race Harassment Instruction: With No Tangible Employment Action

Plaintiff says that he was [racially/sexually] harassed by [*Alleged Supervisor*]. To succeed on this claim, Plaintiff must prove six things by a preponderance of the evidence.

1. [*Name*] was Plaintiff's supervisor. A supervisor is someone who can affect the conditions of Plaintiff's employment. By this I mean someone who has the power to hire, fire, demote, promote, transfer or discipline Plaintiff.

2. Plaintiff was subjected to [*alleged conduct*];

3. The conduct was unwelcome;

4. The conduct was because Plaintiff was [race/sex];

5. The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive.

6. That at the time the conduct occurred, Plaintiff believed that the conduct made his work environment hostile or abusive.

If you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant. If, on the other hand, you find that Plaintiff has proven each of these things, you must go on to consider whether Defendant has proven two things by a preponderance of the evidence:

1. Defendant exercised reasonable care to prevent and correct any harassing conduct in the workplace.

2. Plaintiff unreasonably failed to take advantage of opportunities provided by Defendant to prevent or correct harassment, or otherwise avoid harm.

If you find that Defendant has proved these two things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Defendant has not proved both of these things, your verdict should be for Plaintiff.

Committee Comments

a. **Scope:** This instruction should be used when a supervisor's alleged harassment has *not* led to a tangible employment action. In such cases, the affirmative defense set out in the instruction becomes available to the defendant. *See Hill v. American General Finance, Inc.*, 218 F.3d 639, 643 (7th Cir. 2000) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)). In cases where the defendant does not raise the affirmative defense, the beginning of the instruction should be modified as follows:

> Plaintiff says that he was [racially/sexually] harassed by [*Name of Alleged Supervisor*]. To succeed in his claim against Defendant, Plaintiff must prove six things by a preponderance of the evidence.

The remainder of the instruction should remain the same, with the instruction concluding after the jury receives the sixth element of the claim.

b. **Supervisor Definition:** *See NLRB v. Kentucky River Comm. Care*, 532 U.S. 706, 713 (2001); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *NLRB v. Yeshiva Univ*., 444 U.S. 672, 691 (1980); *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981).

c. **Employer's Vicarious Liability for Supervisor Conduct:** *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Rizzo v. Sheahan*, 266 F.3d 705, 711 (7th Cir. 2001); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000); *Parkins v. Civil Contractors, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

d. **Hostile or Abusive Work Environment**: In some cases, a court may want to give the jury more guidance on what constitutes a hostile or abusive work environment. If so, the Committee suggests the following language:

> To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); *Harris v. Forklift System, Inc.*, 510 U.S. 17, 23 (1993); Eighth Circuit Pattern Instructions § 5.42 Committee Comments.

e. **Tangible Employment Action Disputed:** In some cases, the parties might dispute whether the supervisor's alleged harassment led to a tangible employment action. In such situations, a court should modify the instruction by including the following language after listing the elements:

> If Plaintiff did not prove each of these things by a preponderance of the evidence, you must find for Defendant. If you find that Plaintiff has proved all of these things by a preponderance of the evidence, you must consider whether Plaintiff can prove one additional fact: That [*Name*]'s conduct caused Plaintiff [*adverse employment action*].
>
> If so, your verdict must be for Plaintiff. If not, you must go on to consider whether Defendant has proven two things to you by a preponderance of the evidence.

The remainder of the instruction should remain the same.

f. **Facts Not in Dispute:** A court should modify the instruction to account for situations where facts are not in dispute. For example, if the parties do not dispute that the alleged harasser is the plaintiff's supervisor, a court does not need to give the first element of the instruction. Similarly, if the parties do not dispute that the defendant's alleged conduct took place, a court should describe the conduct at the beginning of the instruction and then modify the instruction by replacing the elements 2-4 with the following two elements:

2. the conduct was unwelcome;

3. Plaintiff was subjected to this conduct because he was [race/sex];

The remainder of the instruction should remain the same.

g. **Plaintiff Complaint and Defendant Response:** At the time of the Committee's work, the Seventh Circuit had not addressed the issue of whether a defendant can exculpate itself by taking immediate remedial measures after a plaintiff has complained about harassment. Other circuits are split. *Compare Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265 (5th Cir. 1999) (defense available because "plaintiff has received the benefit Title VII was meant to confer") *with Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1025-26 (10th Cir. 2002) (employer's "prompt corrective action" is not alone sufficient to avoid employer liability for supervisor harassment under Title VII).

3. Eighth Circuit Model Jury Instructions 5.41, 5.42, 5.42A, and 5.43

a. 5.41 Sexual Harassment—Essential Elements (By Supervisor with Tangible Employment Action)

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, defendant (specify action(s) taken with respect to plaintiff)[6]; and

Fifth, plaintiff's [(rejection of) (failure to submit to)][7] such conduct was a motivating factor[8] in the decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Committee Comments

This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998). These cases (i.e., cases based on threats which are carried out) are "referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." Id. at 750.

The "Unwelcome" Requirement

In sexual harassment cases, the offending conduct must be "unwelcome." Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986). In the Eighth Circuit, "conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986); see also Burns v. McGregor Elec. Indus., Inc. [Burns I], 955 F.2d 559, 565 (8th Cir. 1992). In the typical quid pro quo case, where the plaintiff asserts a causal connection between a refusal to submit to sexual advances and a tangible employment action, the "unwelcome" requirement will be met if the jury finds that the plaintiff in fact refused to submit to a supervisor's sexual advances. However, if the court allows a plaintiff to pursue a quid pro quo claim despite his or her submission to the supervisor's sexual advances, the "unwelcome" element is likely to be disputed and must be included.

Conduct Based on Sex

In general, the plaintiff must establish that harassment was "based on sex" in order to prevail on a sexual harassment claim. See, e.g., Burns v. McGregor Elec. Indus., Inc. [Burns II], 989 F.2d 959, 964 (8th Cir. 1993). Because quid pro quo harassment involves behavior that is sexual in nature, there typically will not be a dispute as to whether the objectionable behavior was based on sex. As the Eighth Circuit has stated, "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." Burns I, 955 F.2d 559, 564 (8th Cir. 1992).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S.75 (1998); accord Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "vicariously liable" when its supervisor's discriminatory act results in a tangible employment action. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998)

("A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."). No affirmative defense is available is such cases. Id. at 763.

Tangible Employment Action

According to the Supreme Court, a "tangible employment action" for purposes of the vicarious liability issue means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (citations omitted). In most cases, a tangible employment action "inflicts direct economic harm." Id. at 762.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim (e.g., requests for sexual relations by his or her supervisor) should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. See Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. See Tyler v. Hot Springs Sch. Dist. No. 6, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).

5. Because quid pro quo harassment usually involves conduct that is clearly sexual in nature, this element ordinarily may be omitted from the instruction.

6. Insert the appropriate language depending on the nature of the case (e.g., "discharged," "failed to hire," "failed to promote," or "demoted"). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. See infra Model Instruction 5.93.

7. This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. If the plaintiff submitted to the supervisor's sexual advances, and the court allows the plaintiff to pursue such a claim under this instruction rather than requiring plaintiff to submit such a claim under Model Instruction 5.42, infra, this instruction must be modified or, alternatively, the trial court may use special interrogatories to build a record on all of the potentially dispositive issues. See, e.g., Karibian v. Columbia University, 14 F.3d 773, 778 (2d Cir.), cert. denied, 512 U.S. 1213 (1994).

8. The Committee recommends that the definition of "motivating factor" set forth in Model Instruction 5.96, infra, be given.

9. Because this instruction is designed for use in cases in which tangible employment action has been taken, plaintiff's claim may be analyzed under the "motivating factor/same decision" format used in other Title VII cases. See infra Model Instruction 5.01A. For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, infra, may be used.

b. 5.42 Sexual Harassment—Essential Elements (By Supervisor With No Tangible Employment Action)

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, [or if defendant is entitled to a verdict under Instruction ____,][7] your verdict must be for the defendant and you need not proceed further in considering this claim.

Committee Comments

This instruction is designed for use in sexual harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but

rather suffered "intangible" harm flowing from a supervisor's sexual harassment that is "sufficiently severe or pervasive to create a hostile work environment." See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742,751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment sexual harassment claim under Title VII. Some examples of this kind of conduct include: verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. See Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994); Hukkanen v. International Union of Operating Eng'rs Local No. 101, 3 F.3d 281 (8th Cir. 1993); Burns v. McGregor Elec. Indus., Inc. [Burns II], 989 F.2d 959 (8th Cir. 1993); Burns v. McGregor Elec. Indus., Inc. [Burns I], 955 F.2d 559 (8th Cir. 1992); Jones v. Wesco Invs., Inc., 846 F.2d 1154 (8th Cir. 1988); Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988).

Conduct Based on Sex or Gender

In general, the plaintiff must establish that the alleged offensive conduct was "based on sex." Burns II, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. See Burns I, 955 F.2d at 564; see also Stacks v. Southwestern Bell, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct which is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. See, e.g., Gillming v. Simmons Indus., 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee "herpes" and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); see also Stacks, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee's hostile work environment claim); Shope v. Board of Sup'rs, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir. 1993) (table) (rude, disparaging, and "almost physically abusive" conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), abrogated on other grounds, 510 U.S. 17 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In a similar vein, the district court in Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, Kopp suggests that the "equal opportunity harassment" defense can present a question of fact for the jury. But see Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); accord Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996).

Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (quoting Meritor Savings Bank v. Vinson, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982))); accord Parton v. GTE North, Inc., 971 F.2d 150, 154 (8th Cir. 1992); Burns v. McGregor Elec. Indus., Inc. [Burns I], 955 F.2d 559, 564 (8th Cir. 1992); Staton v. Maries County, 868 F.2d 996, 998 (8th Cir. 1989); Minteer v. Auger, 844 F.2d 569 (8th Cir. 1988). In Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986), the court explained:

> The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Henson v. City of Dundee, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and non trivial.

Id. at 749-50; see Faragher, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted).

"[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances." Stacks, 27 F.3d at 1327 (citation omitted). In Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In

determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris, 510 U.S. at 23. See also Faragher, 524 U.S. at 786 (reiterating relevant factors set forth in Harris); accord Phillips v. Taco Bell Corp., 156 F.3d 884, 889 (8th Cir. 1998) (citing Harris).

Objective and Subjective Requirement

In Harris, the Supreme Court explained that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher, 524 U.S. at 787 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")); accord Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 761 (8th Cir. 1998).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. Id. See infra Model Instruction 5.42(A) & Committee Comments.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. See Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a

particular theory of plaintiff's or defendant's case should also be avoided. See Tyler v. Hot Springs Sch. Dist. No. 6, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex." If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993), and reiterated in Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense "of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." Nichols v. American Nat'l Ins. Co., 154 F.3d 875, 887 (8th Cir. 1998) (citing Faragher, 524 U.S. at 807; Burlington Indus., 524 U.S. at 763). The bracketed language should be used when the defendant is submitting the affirmative defense. See infra Model Instruction 5.42(A).

c. 5.42(A) Affirmative Defense (For Use in Cases With No Tangible Employment Action

Your verdict must be for defendant on plaintiff's claim of sexual harassment if it has been proved by the [greater weight) (preponderance)][1] of the evidence that (a)

defendant exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that plaintiff unreasonably failed to take advantage of (specify the preventive or corrective opportunities provided by defendant of which plaintiff allegedly failed to take advantage or how plaintiff allegedly failed to avoid harm otherwise).[2]

Committee Comments

Recently, the United States Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by [the employee's] supervisor." Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 762 (8th Cir. 1998) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 777 (1998)). When "no tangible employment action, such as discharge, demotion, or undesirable reassignment" is taken, however, an employer may defend against liability or damages "by proving an affirmative defense of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." Nichols v. American Nat'l Ins. Co., 154 F.3d 875, 887 (8th Cir. 1998) (citing Faragher, 524 U.S. at 807; Burlington Indus., 524 U.S. at 763)); accord Phillips v. Taco Bell Corp., 156 F.3d 884, 888 (8th Cir. 1998) (citing same); Newton v. Cadwell Laboratories, 156 F.3d 880, 883 (8th Cir. 1998) (citing same). The language of the affirmative defense is taken verbatim from the Supreme Court's decisions in Burlington Industries and Faragher.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given.

2. According to the Supreme Court, a defendant asserting this affirmative defense must prove not only that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, but also that "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise." Faragher, 524 U.S. at 807; Burlington Indus., 524 U.S. at 763. For purposes of instructing the jury, however, the Committee recommends that the specific preventive or corrective opportunities of which plaintiff allegedly failed to take advantage or the particular manner in which plaintiff allegedly failed to avoid harm be identified.

d. 5.43 Sexual Harassment—Essential Elements (By Nonsupervisor With No Tangible Employment Action)

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)]; and

Sixth, defendant knew or should have known of the (describe alleged conduct or conditions giving rise to plaintiff's claim)[7]; and

Seventh, defendant failed to take prompt and appropriate corrective action to end the harassment.[8]

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Committee Comments

This instruction is designed for use in cases where the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual harassment by non-supervisors (as opposed to supervisory personnel) sufficiently severe or pervasive to create a hostile working environment. In such cases (i.e., cases not involving vicarious liability), "[e]mployees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employer can be held responsible for failing to correct that behavior, at least ordinarily." Whitmore v. O'Connor Management, Inc., 156 F.3d 796, 800 (8th Cir. 1998) (decided after the Supreme Court's opinions in Burlington Industries and Faragher).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. See Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1222 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a

particular theory of plaintiff's or defendant's case should also be avoided. See Tyler v. Hot Springs Sch. Dist. No. 6, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "[Conduct is 'unwelcome'] if the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive." This definition is taken from Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex." If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993), and reiterated in Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. As noted in the Committee Comments, there are generally two requirements for establishing employer liability in sexual harassment cases where the plaintiff claims harassment by his or her coworkers rather than by supervisory personnel: (1) the plaintiff must show that the employer knew or should have known of the harassment; and (2) the plaintiff must show that the employer failed to take appropriate action to end the harassment. This element sets forth the first half of the test. As a practical matter, it is unlikely that the defendant will seriously contest both issues: if the employer claims it never knew of the harassment, the question of whether its response was appropriate would be moot; conversely, if the employer's primary defense is that it took appropriate remedial action, the "knew or should have known" element may be moot.

8. As discussed in the Introductory Comment, the Supreme Court's recent opinions with respect to employer liability in sexual harassment cases address only those

situations in which a supervisor (as opposed to a non-supervisor) sexually harasses a subordinate. In cases in which the plaintiff alleges sexual harassment by a non-supervisor, the issue of whether courts will leave the burden on plaintiff to prove that the defendant failed to take prompt and appropriate corrective action or whether courts will place the burden on the defendant to prove an affirmative defense that it took prompt and appropriate corrective action as in Faragher and Burlington Industries is an open question. See, e.g., Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, concurring).

9. Because this instruction is designed for use in cases in which no tangible employment action has been taken, plaintiff's claim should not be analyzed under the "motivating factor/same decision" format used in other Title VII cases. See Stacks v. Southwestern Bell, 27 F.3d 1316 (8th Cir. 1994). For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, infra, should be used in a modified format. For a sample constructive discharge instruction, see infra Model Instruction 5.93.

4. Ninth Circuit Model Instructions 12.2, 12.2A, 12.2B, 12.2C, 12.4B

a. 12.2 Hostile Work Environment—Harassment (Comment)

Comment

The Supreme Court addressed the law of harassment claims under Title VII in two companion cases, *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) [collectively, *Ellerth/Faragher*]. Although those cases relate to sexual harassment, the Committee does not discern any conceptual difference between harassment because of sex and harassment because of race or any other protected status. Accordingly, the following instructions are applicable to harassment based upon race, color, sex, religion and national origin.

Ellerth/Faragher clarified the standards governing an employer's liability for harassment. Essentially, when an employee suffers a tangible employment action resulting from a direct supervisor's harassment, the employer's liability is established by proof of the harassment and a resulting tangible employment action. *See Faragher*, 524 U.S. at 807-08. No affirmative defense is available to the employer in those cases. In cases where no tangible employment action has been taken, the employer may interpose an affirmative defense to defeat liability by proving (a) that the employer exercised reasonable care to prevent and correct promptly any discriminatory conduct, and (b) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Id.*; *Ellerth*, 524 U.S. at 764-65; *see also Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1166-67 (9th Cir.2003); *Swinton v. Potomac Corporation*, 270 F.3d 794, 803 (9th Cir.2001). (See Instruction 12.2B) In *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004), the Supreme Court applied the framework of *Ellerth/Faragher* to a case of constructive discharge due to a hostile work environment. In such a case, the *Ellerth/Faragher* affirmative defense is available to the employer, unless an official act, i.e. a tangible employment action, of the employer precipitated the employee's decision to resign. *Id.* at 2355.

If, however, harassment is committed by a co-worker or a non-direct supervisor of the plaintiff, the employer is liable only under a negligence theory. In this situation, the employer may not invoke the *Ellerth/Faragher* affirmative defense. *See Swinton*, 270 F.3d at 803-04 (noting that the principle embodied in the affirmative defense is contained in the requirements for a prima facie case based on negligence). (See Instruction 12.2C)

In *Holly D.*, the Ninth Circuit explained how pre-*Ellerth/Faragher* cases analyzing "quid pro quo" harassment, or "sex for jobs (or job benefits)," are consistent with the *Ellerth/Faragher* analysis. *See Holly D.*, 339 F.3d at 1168-70. Inasmuch as sexual harassment claims, including those referred to as quid pro quo claims, are now analyzed under the *Ellerth/Faragher* framework, the Committee has removed former Instructions 13.6 and 13.7.

b. 12.2A Hostile Work Environment—Harassment Because of Protected Characteristics—Elements

The plaintiff seeks damages against the defendant for a [[racially] [sexually] [*other Title VII protected characteristic*]] hostile work environment while employed by the defendant. In order to establish a [[racially] [sexually] [*other Title VII protected characteristic*]] hostile work environment, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff was subjected to [slurs, insults, jokes or other verbal comments or physical contact or intimidation of a racial nature], [sexual advances, requests for sexual conduct, or other verbal or physical conduct of a sexual nature], or [conduct affecting other Title VII protected characteristics];

2. the conduct was unwelcome;

3. the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create a [[racially] [sexually] [other Title VII protected characteristic]] abusive or hostile work environment;

4. the plaintiff perceived the working environment to be abusive or hostile; and

5. a reasonable [woman] [man] in the plaintiff's circumstances would consider the working environment to be abusive or hostile.

Whether the environment constituted a [[racially] [sexually] [other Title VII protected characteristic]] hostile work environment is determined by looking at the totality of the circumstances, including the frequency of the harassing conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance.

Comment

The elements of this instruction are derived from *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir.1995). The language in the instruction regarding the factors used to determine whether a working environment was sufficiently hostile or abusive is derived from *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

This instruction should be given in conjunction with other appropriate instructions, including 12.2B (Hostile Work Environment Caused by Supervisor—Claim Based Upon Vicarious Liability—Tangible Employment Action—Affirmative Defense); 12.2C (Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based On Negligence; and, if necessary, 12.4B (Tangible Employment Action Defined).

> "A plaintiff must show that the work environment was both subjectively and objectively hostile." *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1113 (9th Cir.2004); *see also Fuller*, 47 F.3d at 1527 (citing *Harris*, 510 U.S. at 21-22). For the objective element, the Ninth Circuit has adopted the "reasonable victim" standard. *Ellison v. Brady*, 924 F.2d 872, 878-80 (9th Cir.1991). Therefore, if the plaintiff/victim is a woman, element five of the instruction should state "reasonable woman," and if the plaintiff/victim is a man, "reasonable man." *Ellison*, 924 F.2d at 879, n.11.

c. 12.2B Hostile Work Environment Caused by Supervisor—Claim Based Upon Vicarious Liability—Tangible Employment Action—Affirmative Defense

An employer may be liable when a supervisor with immediate or successively higher authority over the employee creates a [[racially] [sexually] [*other Title VII protected characteristic*]] hostile work environment for that employee. The plaintiff claims that [he] [she] was subjected to a [[racially] [sexually] [*other Title VII protected characteristic*]] hostile work environment by _____, and that _____ was [his] [her] [immediate supervisor] [a person with successively higher authority over plaintiff].

The defendant denies the plaintiff's claim. The plaintiff must prove [his] [her] claim by a preponderance of the evidence.

[***If Ellerth/Faragher affirmative defense applies, add the following:***]

In addition to denying the plaintiff's claim, the defendant has asserted an affirmative defense. Before you consider this affirmative defense, you must first decide whether plaintiff has proved by a preponderance of the evidence that [he] [she] suffered a tangible employment action as a result of harassment by the supervisor.

If plaintiff has proved that [he][she] suffered a tangible employment action as a result of harassment by the supervisor, you must not consider the affirmative defense.

If plaintiff has not proved that [he][she] suffered a tangible employment action, then you must decide whether the defendant has proved by a preponderance of the evidence each of the following elements:

1. the defendant exercised reasonable care to prevent and promptly correct the [[racially][sexually][*other Title VII protected characteristic*]] harassing behavior, and

2. the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or unreasonably failed to otherwise avoid harm.

If the defendant proves these elements, the plaintiff is not entitled to prevail on this claim.

Comment

See Introductory Comment to this chapter. This instruction should be given in conjunction with Instruction 12.2A (Hostile Work Environment—Harassment Because of Protected Characteristics—Elements) and, if applicable, Instruction 12.4B (Tangible Employment Action Defined).

This instruction is based upon *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) and *Swinton v. Potomac Corporation*, 270 F.3d 794, 802 (9th Cir.2001), *cert. denied*, 535 U.S. 1018 (2002).

This instruction addresses harassment by a supervisor with immediate or successively higher authority over the plaintiff. Use the first two paragraphs if no *Ellerth/Faragher* affirmative defense is applicable. Use the entire instruction if an *Ellerth/Faragher* defense is to be considered by the jury.

When harassment is by the plaintiff's immediate or successively higher supervisor, an employer is vicariously liable, subject to a potential affirmative defense. *Faragher*, 524 U.S. at 780; *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001). For vicarious liability to attach it is not sufficient that the harasser be employed in a supervisory capacity; he must have been the plaintiff's immediate or successively higher supervisor. *Swinton*, 270 F.3d at 805, citing *Faragher*, 514 U.S. at 806. An employee who contends that he or she submitted to a supervisor's threat to condition continued employment upon participation in unwanted sexual activity alleges a tangible employment action, which, if proved, deprives the employer of an *Ellerth/Faragher* defense. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1173 (9th Cir.2003) (affirming summary judgment for the employer due to insufficient evidence of any such condition imposed by plantiff's supervisor). *See Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2349 (2004) for discussion of tangible employment action.

The adequacy of an employer's anti-harassment policy may depend on the scope of its dissemination and the relationship between the person designated to receive employee complaints and the alleged harasser. *See, e.g., Faragher*, 524 U.S. at 808 (policy held ineffective where (1) the policy was not widely disseminated to all branches of the municipal employer and (2) the policy did not include any mechanism by which an employee could bypass the harassing supervisor when lodging a complaint).

"While proof that an employer had promulgated an anti-harassment policy with

complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Although proof that the plaintiff failed to use reasonable care in avoiding harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the defendant, a demonstration of such failure will normally suffice to satisfy this prong. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

If the harasser is not plaintiff's immediate or successively higher supervisor, an employer's liability can only be based on negligence. The *Ellerth/Faragher* affirmative defense is not applicable if the claim is based on negligence. Use instruction 12.2C for a claim based on negligence.

d. 12.2C Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence

The plaintiff seeks damages from the defendant for a hostile work environment caused by [[sexual] [racial] [*other Title VII protected characteristic*]] harassment. The plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff was subjected to a [[sexually] [racially] [*other Title VII protected characteristic*]] hostile work environment by a [non-immediate supervisor] [co-worker]; and

2. the defendant or a member of defendant's management knew or should have known of the harassment and failed to take prompt, effective remedial action reasonably calculated to end the harassment.

A person is a member of management if the person has substantial authority and discretion to make decisions concerning the terms of the harasser's employment or the plaintiff's employment, such as authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the plaintiff's employment. A person who lacks such authority is nevertheless part of management if he or she has an official or strong duty in fact to communicate to management complaints about work conditions. You should consider all the circumstances in this case in determining whether a person has such a duty.

The defendant's remedial action must be reasonable and adequate. Whether the defendant's remedial action is reasonable and adequate depends upon the remedy's effectiveness in stopping the individual harasser from continuing to engage in such conduct and in discouraging other potential harassers from engaging in similar unlawful conduct. An effective remedy should be proportionate to the seriousness of the offense.

If you find that the plaintiff has proved both of the elements on which the plaintiff has the burden of proof, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the

defendant.

Comment

See Introductory Comment to this chapter. *See also Swinton v. Potomac Corporation*, 270 F.3d 794, 803-05 (9th Cir.2001), *cert. denied*, 535 U.S. 1018 (2002). Use this instruction when the claim against the employer is based on negligence and involves harassment by another co-worker or a supervisor who is not plaintiff's direct (immediate or successively higher) supervisor.

Use this instruction in conjunction with Instruction 12.2A (Hostile Work Environment—Harassment Because of Protected Characteristics —Elements).

Under a negligence theory, an employer is liable if the employer (or its "management") knew or should have known of the harassing conduct and failed to take reasonably prompt corrective action to end the harassment. *Swinton*, 270 F.3d at 803-04. There are two categories of employees who constitute "management" for purposes of a negligence claim. *Id.* at 804. The first category is a member of management who possesses substantial authority and discretion to make decisions over the plaintiff's or the harasser's employment, such as "authority to counsel, investigate, suspend or fire the accused harasser, or to change the conditions of the harassee's employment." *Id.* The second category of employees who qualify as management consists of any supervisor who lacks this authority but nonetheless "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *Id.* at 805 (citations omitted).

It should be noted, however, that neither *Swinton* nor any of the cases relied upon by *Swinton* provide a definition of a supervisor or other employee with "an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *See Swinton*, 270 F.3d at 804-805. To aid jury understanding, the Committee has modified the *Swinton* language of "de facto duty to act as a conduit to management . . . ." *Id.* at 805, to "duty in fact to communicate to management . . . ."

The two elements of this instruction are based upon *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir.1999) and *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir.1998). The text of the instruction addressing remedial action is based upon *Mockler*, 140 F.3d at 813 (citing *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir.1991)).

The burden is on the plaintiff to "show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation." *Mockler*, 140 F.3d at 812 (citations omitted). "This showing can . . . be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment." *Id.*

In determining whether an employer's response to the harassment is sufficient to absolve it from liability, "the fact that [the] harassment stops is only a test for measuring the efficacy of a remedy, not a way of excusing the obligation to remedy." *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir.1995). "Once an employer knows or should

know of harassment, a remedial obligation kicks in." *Id.* Therefore, "if 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach." *Id.* at 1528–29.

For purposes of proving that the defendant "knew or reasonably should have known of the harassment," it is appropriate to impute this knowledge to a defendant employer if a management-level employee of the employer defendant knew or reasonably should have known that harassment was occurring. *Swinton*, 270 F.3d at 804.

e. 12.4B Tangible Employment Action Defined

Tangible employment actions are the means by which a supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment action requires an official act of the enterprise, a company act. A tangible employment action consists of a significant change in employment status such as [firing] [failing to promote] [reassignment] [a significant change in responsibilities] [undesirable reassignment] or [a significant change in benefits]. [A tangible employment action occurs when a superior obtains sexual favors from an employee by conditioning continued employment on participation in unwelcome acts.]

Comment

This instruction should be given in conjunction with Instruction 12.2B (Hostile Work Environment Caused by Supervisor —Claim Based Upon Vicarious Liability —Tangible Employment Action—Affirmative Defense).

The meaning of the term "tangible employment action" is discussed in *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004). The Supreme Court granted certiorari in *Suders* in order to resolve a split in the circuits as to whether a constructive discharge brought about by supervisor harassment constitutes a tangible employment action and bars the affirmative defense set out in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). *Id.* at 2350.

The *Suders* Court rejected the Third Circuit's holding that "a constructive discharge, when proved, constitutes a tangible employment action." *Id.* (*quoting Suders v. Easton*, 325 F.3d 432, 447 (3d Cir.2003)). The Court concluded that a constructive discharge, in itself, does not constitute a tangible employment action that bars the *Ellerth/Faragher* affirmative defense. That defense "is available to the employer whose supervisors are charged with harassment," and is barred only if a "tangible employment action" carried out under a supervisor's official authority was part of the conduct leading to the constructive discharge. *Id.* at 2351.

In the context of quid pro quo sexual harassment, the Ninth Circuit recently held that a "tangible employment action" occurs when a supervisor who abuses his supervisorial authority succeeds in coercing an employee to engage in sexual acts by threats of discharge or other material job-related consequence, or fails in his efforts to coerce the employee but then actually discharges her on account of her refusal to submit to his demands. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir.2003). In such situations, the employer may be held vicariously liable for the direct supervisor's

unlawful conduct and may not take advantage of the *Ellerth/Faragher* affirmative defense. *Id.* However, an "unfulfilled, or inchoate, quid pro quo threat by a supervisor is not enough" to constitute a tangible employment action. *Id.* at 1170. Rather, the threat must culminate in the actual coercion of a sexual act or some other "form of sufficiently concrete employment action" on account of the employee's refusal to submit. *See id.*

5. <u>Eleventh Circuit Model Instruction 1.2.2</u>

In this case the Plaintiff makes a claim under the Federal Civil Rights statutes that prohibit employers from discriminating against their employees in the terms and conditions of their employment because of the employee's [race] [sex or gender].

More specifically, the Plaintiff claims that [he] [she] was subjected to a hostile or abusive work environment because of [racial] [sexual] harassment which is a form of prohibited employment discrimination.

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 Plaintiff was subjected to a hostile or abusive work environment, as hereafter defined, because of [his] [her] [race] [sex or gender];

Second: That such hostile or abusive work environment was [created] [permitted] by a supervisor with immediate or successively higher authority over the Plaintiff; and

Third: That the Plaintiff suffered damages as a proximate or legal result of such hostile or abusive work environment.

[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.]

A work environment is hostile or abusive because of [racial] [sexual] harassment only if (1) the Plaintiff was subjected to [racially] [sexually] offensive acts or statements; (2) such acts or statements were unwelcome and had not been invited or solicited, directly or indirectly, by the Plaintiff's own acts or statements; (3) such acts or statements resulted in a work environment that was so permeated with discriminatory intimidation, ridicule or insult of sufficient severity or pervasiveness that it materially altered the conditions of the Plaintiff's employment; (4) a reasonable person, as distinguished from someone who is unduly sensitive, would have found the workplace to be hostile or abusive; and (5) the Plaintiff personally believed the workplace environment to be hostile or abusive.

Whether a workplace environment is "hostile" or "abusive" can be determined only by looking at all the circumstances including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; and whether it unreasonably interfered with the employee's work performance. The effect on the employee's mental and emotional well being is also relevant to determining whether the Plaintiff actually found the workplace environment to be hostile or abusive; but while

psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Conduct that only amounts to ordinary socializing in the workplace such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment. Only extreme conduct amounting to a material change in the terms and conditions of employment is actionable.

When a hostile or abusive work environment is created by the conduct of a supervisor with immediate or successively higher authority over the Plaintiff, the Defendant employer is responsible under the law for such behavior and the resulting work environment.

[When a hostile or abusive work environment is created and carried on by nonsupervisory fellow workers of the Plaintiff, the Defendant, as the Plaintiff's employer, will be responsible or liable for permitting such behavior only if the Plaintiff proves by a preponderance of the evidence that the Plaintiff's supervisor or successively higher authority knew (that is, had actual knowledge), or should have known (that is, had constructive knowledge), of the hostile or abusive work environment and permitted it to continue by failing to take remedial action.

To find that a supervisor had constructive knowledge of a hostile or abusive work environment—that is, that the supervisor should have known of such environment - - the Plaintiff must prove that the hostile or abusive environment was so pervasive and so open and obvious that any reasonable person in the supervisor's position would have known that the harassment was occurring. Even though you may have already determined that the Plaintiff was in fact exposed to a hostile or abusive work environment, that alone is not determinative of the issue of the supervisor's knowledge; rather, you must find that the discriminatory harassment to which the Plaintiff was exposed was so pervasive and unconcealed that knowledge on the part of the supervisor may be inferred.]

Finally, in order for the Plaintiff to recover damages for having been exposed to a discriminatorily hostile or abusive work environment because of [race] [sex], the Plaintiff must prove that such damages were proximately or legally caused by the unlawful discrimination. For damages to be the proximate or legal result of unlawful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

If you find that the Plaintiff has proved each of the things [he] [she] must prove in support of [his] [her] claim, you will then consider the Defendant's affirmative defense to that claim.

In order to prevail on the affirmative defense, the Defendant must prove each of the following facts by a preponderance of the evidence:

FIRST OPTION

[First: That the Defendant exercised reasonable care to prevent and correct promptly, any sexually harassing behavior in the workplace; and

Second: That the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Defendant to avoid or correct the harm [or otherwise failed to exercise reasonable care to avoid harm].]

SECOND OPTION

[First: That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace; and

Second: That the Defendant took reasonable and prompt corrective action after the Plaintiff took advantage of the preventive or corrective opportunities provided by Defendant].]

THIRD OPTION

First: That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace; and

Second: That the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Defendant to avoid or correct the harm [or otherwise failed to exercise reasonable care to avoid harm] or that, if the Plaintiff did take advantage of preventive or corrective opportunities, the Defendant responded by taking reasonable and prompt corrective action].]

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.

[Ordinarily, proof of the following facts will suffice to establish the exercise of "reasonable care" by the employer: (a) that the employer had promulgated an explicit policy against sexual harassment in the workplace; (b) that such policy was fully communicated to its employees; and (c) that such policy provided a reasonable avenue for the Plaintiff to make a complaint to higher management. Conversely, proof that an employee did not follow a complaint procedure provided by the employer will ordinarily suffice to establish that the employee "unreasonably failed" to take advantage of a corrective opportunity.]

If you find that the Plaintiff has proved [his] [her] claim [and that the Defendant has not proved its affirmative defense], you must then determine the amount of damages the Plaintiff has sustained.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Plaintiff was subjected to a hostile or abusive work environment because of [his] [her] [race] [sex or gender]?

Answer Yes or No

2. That such hostile or abusive work environment was [created] [permitted] by a supervisor with immediate or successively higher authority over the Plaintiff?

Answer Yes or No

3. That the Plaintiff suffered damages as a proximate or legal result of such hostile or abusive work environment?

Answer Yes or No

[Note: If you answered No to any one of the preceding three questions, you need not answer the remaining questions.]

OPTION NO. 1

[4. That the Defendant exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the workplace?

Answer Yes or No

5. That the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant to avoid or correct the harm?

Answer Yes or No]

OPTION NO. 2

[4. That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace?

Answer Yes or No

5. That the Defendant took reasonable and prompt corrective action after the Plaintiff took advantage of the preventive or corrective opportunities provided by the Defendant?

Answer Yes or No]

OPTION NO. 3

[4. That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace?

Answer Yes or No

5. That - -

(a) The Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant to avoid or correct the harm?

Answer Yes or No

OR

(b) The Plaintiff took advantage of the preventive or corrective opportunities provided by the Defendant and the Defendant then responded by taking reasonable and prompt corrective action?

Answer Yes or No]

G. Compensatory Damages for Emotional Distress

1. Questions to Be Considered

a. Confusion

Seventh Circuit Draft Model Jury Instruction 3.09 states in its first sentence that plaintiff should be awarded damages if he or she succeeds on any of the claims, but states in its last sentence that plaintiff must be denied damages if he or she does not succeed on all claims.

b. Should There Be a "No Exact Standard" Instruction for Pain-and-Suffering Damages?

Seventh Circuit Model Instruction 3.10 includes in bracket 1 a "no exact standard" statement. Eleventh Circuit Model Instruction 1.1.1 states that no evidence of intangible values is needed.

By contrast, some of the other Circuits' pattern instructions could lead a jury to think plaintiff must prove a scale and where he or she fits on the scale. The inclusion of a statements like the Seventh and Eleventh Circuits' would help jurors accomplish their task without misunderstandings.

c. Plain Language Awards

Seventh Circuit Model Instruction 3.10 and Eleventh Circuit Model Instruction 1.1.1 are indeed models.

However, the Seventh Circuit takes the edge in conciseness. "Full, just and reasonable" in the Eleventh are captured by "fairly" in the Seventh.

d. Damages for Litigation-Related Stress

The stress and anxiety of the lawsuit cannot usually be considered in assessing damages. This is certainly true for cases conducted in an ordinary manner. What of cases conducted in an extraordinary manner, however? Some defense counsel deliberately seek to distress harassment plaintiffs, or engage in conduct in violation of court rules or orders that will foreseeably have that effect.

B.K.B. v. Maui Police Department, 276 F.3d 1091, 1106–09, 87 FEP Cases 1306 (9th Cir. 2002), affirmed the sanction of $5,000 in emotional-distress damages for the plaintiff because of the emotional stress caused by the humiliation of hearing previously-barred evidence come before the jury in violation of FRE 412. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 73 FEP Cases 87 (8th Cir. 1997), reduced the punitive damages award to $350,000, but seems to have accepted that punitive damages may be based in part on defense counsel's unprofessional trial conduct degrading the plaintiff.

2. Fifth Circuit Model Instructions 15.1, 15.2, and 15.3

a. 15.1 Consider Damages Only if Necessary

If the plaintiff has proven his claim against the defendant by a preponderance of the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant.

b. 15.2 Compensatory Damages

If you find that the defendant is liable to the plaintiff, then you must determine an amount that is fair compensation for all of the plaintiff's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole that is, to compensate the plaintiff for the damage that the plaintiff has suffered. [Compensatory damages are not limited to expenses that the plaintiff may have incurred because of his injury. If the plaintiff wins, he is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of the defendant's conduct.]

You may award compensatory damages only for injuries that the plaintiff proves were proximately caused by the defendant's allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. [Damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant.] You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiff has actually suffered or that the plaintiff is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

[Select appropriate charges from Section 15.3, et seq.]

c. 15.3 Calculation of Past and Future Damages (Partial)

15.3 CALCULATION OF PAST AND FUTURE DAMAGES

A. Damages Accrued

If you find for the plaintiff, he is entitled to recover an amount that will fairly compensate him for any damages he has suffered to date.

B. Calculation of Future Damages

If you find that the plaintiff is reasonably certain to suffer damages in the future from his injuries, then you should award him the amount you believe would fairly compensate him for such future damages. [In calculating future damages, you should consider the standard table of mortality as compiled by the United States Bureau of the Census, or other recognized mortality table.]

* * *

If you make any award for future medical expenses, you should adjust or discount the award to present value in the same manner as with loss of future earnings.

However, you must not make any adjustment to present value for any damages you may award for future pain and suffering or future mental anguish.

3. Seventh Circuit Draft Model Instructions 3.09 and 3.10

a. 3.09 Damages: General

If you find that Plaintiff has proved [any of] his claim[s] against [any of] Defendant(s), then you must determine what amount of dam ages, if any, [plaintiff] is entitled to recover. Plaintiff must prove his damages by a preponderance of the evidence.

If you find that Plaintiff has failed to prove [all of] his claim[s], then you will not consider the question of damages.

Committee Comments

These pattern damage instructions are applicable, with certain limitations, to single plaintiff discrimination and retaliation claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq., the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., and the Civil Rights Act of 1866, 42 U.S.C. §1981. Damages instructions relating to claims under the Equal Pay Act, 29 U.S.C. §206(d), are contained in the pattern instructions under that Act. See Instruction No. 5.11. An instruction relating to the recovery of liquidated damages under the Age Discrimination in Employment Act is contained in the pattern employment discrimination instructions. See Instruction No. 3.06.

b. 3.10 Compensatory Damages

Plaintiff must prove his damages by a preponderance of the evidence. Your award

must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

In calculating damages, you should not consider the issue of lost wages and benefits. The court will calculate and determine any damages for past or future lost wages and benefits. You should consider the following types of compensatory damages, and no others:

[1. The physical [and mental/emotional] pain and suffering [and disability/loss of a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Plaintiff for the injury he has sustained.]

[2. The reasonable value of medical care that Plaintiff reasonably needed and actually received [as well as the present value of the care that he is reasonably certain to need and receive in the future.]]

[3. *Describe any expenses, other than lost pay, that Plaintiff reasonably incurred or will incur in the future as a direct result of the Defendant's discrimination/retaliation*]

[4. *Describe any loss (other than lost pay) caused by Defendant in Plaintiff's future earning capacity*.]

Committee Comments

a. **ADEA:** Compensatory damages are available under the ADEA. *Muskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283-284 (7th Cir. 1993).

b. **ADA Retaliation Claims:** Compensatory damages are not available on ADA retaliation claims. *Kramer v. Bank of America Securities*, 355 F.3d 961, 965 (7th Cir. 2004).

c. **Back Pay and Front Pay:** Under Title VII and the ADA, back pay and front pay are equitable remedies to be decided by the court. However, the court may empanel the jury as an advisory jury on the issue; or the parties may, with the court's consent, agree that the jury will decide the issue. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-501 (7th Cir. 2000). Front pay is typically awarded in cases where the equitable remedy of reinstatement is unavailable. *Lindale v. Tokheim Corp.*, 145 F.3d 953, 959 (7th Cir. 1998); *Williams v. Pharmacia Inc.*, 137 F.3d 944, 951-952 (7th Cir. 1998).

d. **Lost Future Earnings:** Compensatory damages may include "lost future earnings," *i.e.*, the diminution in expected earnings in all future jobs due to reputational or other injuries, over and above any front pay award. Where there is such evidence, the

language should be drafted for use in the bracketed fourth paragraph. Care must be taken to distinguish front pay and lost future earnings, which serve different functions. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-954 (7th Cir. 1998):

> [T]he calculation of front pay differs significantly from the calculation of lost future earnings. Whereas front pay compensates the plaintiff for the lost earnings from her old job for as long as she may have been expected to hold it, a lost future earnings award compensates the plaintiff for the diminution in expected earnings in all of her future jobs for as long as the reputational or other injury may be expected to affect her prospects. * * * [W]e caution lower courts to take care to separate the equitable remedy of front pay from the compensatory remedy of lost future earnings. * * * Properly understood, the two types of damages compensate for different injuries and require the court to make different kinds of calculations and factual findings. District courts should be vigilant to ensure that their damage inquiries are appropriately cabined to protect against confusion and potential overcompensation of plaintiffs.

A special interrogatory may be necessary for the court to prevent a double recovery.

4. <u>Eighth Circuit Model Instruction 5.02 (Partial)</u>

If you find in favor of plaintiff under Instruction ____[1] and if you answer "no" in response to Instruction ____[2], then you must award plaintiff such sum as you find by the [(greater weight) (preponderance)][3] of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of [describe defendant's decision—e.g., "defendant's decision to discharge plaintiff"]. Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately:

* * *

Second, you must determine the amount of any other damages sustained by plaintiff, such as [list damages supported by the evidence].[8] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

* * *

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][10]

Committee Comments

* * *

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types

of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

* * *

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, section 102 of the Act expressly states that the jury shall not be advised on any such limitation. Instead, the trial court will simply reduce the verdict by the amount of any excess.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given.

* * *

8. Under the 1991 amendments to Title VII, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 102 of the Civil Rights Act of 1991 include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." CRA of [19]91, § 102 (codified at 42 U.S.C. § 1981a(b)(3) (1994)). See also Model Instruction 4.51, infra, for a list of some of those damages.

* * *

10. This paragraph may be given at the trial court's discretion.

5. Ninth Circuit Model Instructions 7.1 and 7.2

a. 7.1 Damages—Proof

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff [on plaintiff's ____ claim], you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

[*Here insert types of damages. See Instruction 7.2—MEASURES OF TYPES OF DAMAGES*]

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Comment

If liability is not disputed, this instruction should be modified accordingly.

b. 7.2 Measures of Types of Damages (Partial)

In determining the measure of damages, you should consider:
[The nature and extent of the injuries;]
[The [disability] [disfigurement] [loss of enjoyment of life] experienced [and which with reasonable probability will be experienced in the future];]

[The [mental,] [physical,] [emotional] pain and suffering experienced [and which with reasonable probability will be experienced in the future];]

[The reasonable value of necessary medical care, treatment, and services received to the present time;]

[The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;]

* * *

[The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] required to the present time;]

[The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] which with reasonable probability will be required in the future;]

* * *

Comment

Insert only the appropriate bracketed items into Instruction 7.1 (Damages–Proof). Additional paragraphs may have to be drafted to fit other types of damages. Particular claims may have special rules on damages. *See*, *e.g.*, Instructions 9.9 (Negligence or Unseaworthiness—Damages—Proof), 9.11 (Jones Act—Maintenance and Cure), and 14.10 (Age Discrimination—Damages).

Punitive and compensatory damages are subject to caps in Title VII cases. *See* 42

U.S.C. 1981a (b)(3). Regarding the amount of damages available under Title VII, see *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148 (9th Cir.1999). The cap does not apply to front pay and back pay. *See Pollard v. E.I. du Pont de Nemours & Company*, ___ U.S. ___, 121 S. Ct. 1946 (2001). *See also Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1020 (9th Cir. 2000) (includes the definition of front pay and back pay); Introductory Comment to Chapter 12.

6. Eleventh Circuit Model Instruction 1.1.1

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

[On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact standard to be applied; any such award should be fair and just in the light of the evidence.]

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

* * *

(b) Emotional pain and mental anguish.

* * *

H. Economic Damages

Without duplicating needlessly the language set forth in the preceding section, the relevant instructions are set forth below.

1. Questions to Be Considered

a. What Precision is Required?

Fifth Circuit Pattern Instruction 15.2 informs jurors that "mathematical precision" is not required, and that plaintiff is only required to show damages "with as much definiteness and accuracy as the circumstances permit." This is extremely useful

By contrast, the other models could lead a jury to think that plaintiff must show his or her exact economic damages, and may lead juries in those Circuits to make low awards even where the employee has shown as much as he or she can show, and problems in defendant's records are responsible for the imprecision.

b. Mitigation

The law requires plaintiffs to make reasonable efforts to mitigate their damages, but does not require them to be successful. A plaintiff could apply once a day at each of her town's thirty largest employers, register with the State Employment Service, respond promptly to all referrals, and check and follow up on "Help Wanted" ads every day, but not find work for six months. That plaintiff has made reasonable efforts to mitigate her damages, but an instruction requiring "mitigation," without referring to "reasonable efforts," could reasonably lead a jury to reduce or deny an award of back pay.

Each discussion of mitigation in the model instructions seems to meet this test.

2. Fifth Circuit Model Instructions 11.2, 11.3, 15.2, 15.3

a. 11.2 ADEA Claims (Partial)

11.2 AGE DISCRIMINATION IN EMPLOYMENT ACT
(29 U.S.C. SECTIONS 621-634)

* * *

[Enumerate recoverable elements of damage with explanation, as appropriate, of the terms used in describing each element.]

b. 11.3 Hybrid Claims (Partial)

11.3 EMPLOYEE'S CLAIM AGAINST EMPLOYER AND UNION

* * *

DAMAGES

The amount of your verdict should be a sum that you find fairly compensates the plaintiff for the damages he has incurred. The measure of damages to which the plaintiff is entitled, if any, is the amount which the plaintiff would have earned from his employment with the employer if he had not been discharged. You must reduce this amount by any earnings that the plaintiff earned, or reasonably could have earned, from other employment. [The plaintiff has the duty to mitigate or minimize his damage. The defendants are not responsible for lost earnings that the plaintiff could have avoided if he had used reasonable care in seeking other employment to avoid or minimize the injury.]

Once you have arrived at a figure for lost wages or damages, you must apportion those damages between the employer and the union. In making the apportionment, you should follow this guideline. The employer is liable for lost wages due solely to its breach of the collective bargaining agreement in discharging the plaintiff. The union is responsible for any increases in lost wages caused by its failure to process the plaintiff's grievance.

c. 15.2 Compensatory Damages (Partial)

15.2 COMPENSATORY DAMAGES

* * *

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

* * *

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

[Select appropriate charges from Section 15.3, et seq.]

d. 15.3 Calculation of Past and Future Damages

15.3 CALCULATION OF PAST AND FUTURE DAMAGES

A. Damages Accrued

If you find for the plaintiff, he is entitled to recover an amount that will fairly compensate him for any damages he has suffered to date.

B. Calculation of Future Damages

If you find that the plaintiff is reasonably certain to suffer damages in the future from his injuries, then you should award him the amount you believe would fairly compensate him for such future damages. [In calculating future damages, you should consider the standard table of mortality as compiled by the United States Bureau of the Census, or other recognized mortality table.]

C. Reduction of Future Damages to Present Value

An award of future damages necessarily requires that payment be made now for a loss that plaintiff will not actually suffer until some future date. If you should find that the plaintiff is entitled to future damages, including future earnings, then you must determine the present worth in dollars of such future damages.

If you award damages for loss of future earnings, you must consider two particular factors:

1. You should reduce any award by the amount of the expenses that the plaintiff would have incurred in making those earnings.

2. If you make an award for future loss of earnings, you must reduce it to present value by considering the interest that the plaintiff could earn on the amount of the award if he made a relatively risk-free investment. The reason why you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to the plaintiff if he receives it today than if he received it in the future, when he would otherwise have earned it. It is more valuable because the plaintiff can earn interest on it for the period of time between the date of the award and the date he would have earned the money. Thus you should adjust the amount of any award for future loss of earnings by the amount of interest that the plaintiff can earn on that amount in the future.

If you make any award for future medical expenses, you should adjust or discount the award to present value in the same manner as with loss of future earnings.

3. Seventh Circuit Model Instructions 3.11 and 3.12

a. 3.11 Back Pay

If you find that Plaintiff has proven his claim of [discrimination/retaliation] by a preponderance of the evidence, you may award him as damages any lost wages and benefits he would have received from the Defendant if he had not been [*adverse employment action*]. [It is Plaintiff's burden to prove that he lost wages and benefits and their amount. If he fails to do so for any periods of time for which he seeks damages, then you may not award damages for that time period.]

[Defendant argues that Plaintiff's claim for lost wages and benefits should be reduced by [*describe the reduction*]. Defendant must prove to you both that the reduction should be made and its amount.]

Committee Comments

a. **Usage:** Ordinarily, this instruction will not be given, because back pay is an equitable remedy to be decided by the court. However, the court may empanel the jury as an advisory jury on the issue; or the parties may, with the court's consent, agree that the jury will decide the issue. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-501 (7th Cir. 2000).

b. **Limiting Subsequent Events:** Where the plaintiff's back pay damages are limited by a subsequent events, the court should instruct the jury that it may not award back pay damages beyond that event. For example, such a limiting instruction may be appropriate where a plaintiff alleging unlawful discharge subsequently obtains a higher paying job or is offered reinstatement by the employer, *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982); where a plaintiff challenging a denial of a promotion subsequently voluntarily resigns in circumstances not amounting to a constructive discharge, *Hertzberg v. SRAM Corp.*; 261 F.3d 651, 660 n.8 (7th Cir. 2001); where a plaintiff has voluntarily removed himself from the labor market, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1428 (7th Cir. 1986); where a plaintiff becomes medically unable to work, *Flowers v. Komatsu Mining Systems, Inc.*, 165 F.3d 554, 557-558 (7th Cir. 1999); where periodic plant shutdowns limit the amount of time the plaintiff could have worked had he not been terminated, *Gaddy v. Abex Corp.*, 884 F.2d 312, 320 (7th Cir. 1989); or where plaintiff

inexcusably delayed in prosecuting his case, *Kamberos v. GTE Automatic Electric Inc.*, 603 F.2d 598, 603 (7th Cir. 1979, cert. denied, 454 U.S. 1060 (1981).

c. **Interim Wages and Benefits:** Interim wages and benefits earned by the plaintiff or earnable with reasonable diligence will reduce the amount of lost wages and benefits awardable. 42 U.S.C. §2000e-5(g); *Orzel v. City of Wauwatosa*, 697 F.2d 743, 756 (7th Cir. 1983) (ADEA). Additionally, the court may determine that lost wages and benefits should be reduced by other amounts as well. *Wilson v. Chrysler Corp.*, 172 F.3d 500, 511 (7th Cir. 1999) (disability benefits provided by the employer); *Flowers v. Komatsu Mining Systems, Inc.*, 165 F.3d 554, 558 (7th Cir. 1999) (Social Security disability benefits); *Chesser v. State of Illinois*, 895 F.2d 330, 337-338 (7th Cir. 1990) (wages from moonlighting jobs plaintiff could not have held had he continued to be employed); *Syvock v. Milwaukee Boiler Mfg. Co.*,, 665 F.2d 149, 161-162 (7th Cir. 1981) (unemployment benefits). In such situations, the court should instruct appropriately.

d. **Burden of Proof:** The plaintiff bears the burden of presenting evidence that he had lost wages and benefits and their amount. *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 606-608 (7th Cir. 1985). In many cases, whether the plaintiff has presented evidence to satisfy this burden will not be in dispute. In the event it is, the instruction regarding Plaintiff's burden should be given.

e. **Mitigation:** If mitigation is an issue, a separate instruction is provided. *See* Instruction 3.12, *infra*.

f. **Multiple Claims:** Where a plaintiff has multiple claims that might result in separate damage determinations, for example a claim of unlawful failure to promote paired with a claim of unlawful termination, the court should instruct separately on the back pay damages determination as to each claim.

b. 3.12 Mitigation

Plaintiff has a duty to mitigate his damages, which means that he must take reasonable actions to reduce his damages. Defendant must prove that Plaintiff's claim for [lost wages] [benefits] [other damages] should be reduced by [*describe the reduction*].

If you find that Plaintiff did not take reasonable actions to reduce his damages, you should reduce any amount you might award Plaintiff for [lost wages] [benefits] [other damages] by [*describe arguable offsets*].

Defendant must prove both that the reduction should be made and its amount.

Committee Comments

This instruction reflects the "obvious policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of [Title VII] . . . ." *Gawley v. Indiana University*, 276 F.3d 301, 312 (7th Cir. 2001) (internal citations omitted). Defendant bears the burden of showing that plaintiff did or could have mitigated his damages and the amount. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048-

1049 (7th Cir. 1999); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 606-608 (7th Cir. 1985).

4. Eighth Circuit Model Instruction 5.02 (Partial)

If you find in favor of plaintiff under Instruction ____[1] and if you answer "no" in response to Instruction ____[2], then you must award plaintiff such sum as you find by the [(greater weight) (preponderance)][3] of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of [describe defendant's decision—e.g., "defendant's decision to discharge plaintiff"]. Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately:

* * *

First, you must determine the amount of any wages and fringe benefits[4] plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict,[5, 6, 7] minus the amount of earnings and benefits that plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by plaintiff, such as [list damages supported by the evidence].[8] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

[You are also instructed that plaintiff has a duty under the law to "mitigate" his/her damages - that is, to exercise reasonable diligence under the circumstances to minimize his/her damages. Therefore, if you find by the [(greater weight) (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][9]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][10]

Committee Comments

* * *

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. See Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. See Krause v. Dresser Indus., 910 F.2d 674, 680 (10th Cir. 1990); Cornetta v. United States, 851 F.2d 1372, 1381 (Fed. Cir. 1988); Fariss v.

Lynchburg Foundry, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits, and pension benefits ordinarily are not offset against a back pay award. See Doyne v. Union Electric Co., 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); Dreyer v. Arco Chem. Co., 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible), overruled on other grounds by Hazen Paper Co. v. Biggins, 507 U.S. 604, 615 (1993); Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 626-27 (6th Cir. 1983) (same). But cf. Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); EEOC v. Enterprise Ass'n Steamfitters Local No. 638, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, this remedy traditionally has been viewed as an issue for the court, not the jury. Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999). See MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1060 (8th Cir. 1988); Newhouse v. McCormick & Co., 110 F.3d 635, 641 (8th Cir. 1997). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. See Doyne v. Union Elec. Co., 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In Kramer v. Logan County Sch. Dist. No. R-1, 157 F.3d 620 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] □ 1981a(b)(3)." Id. at 626.

* * *

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given.

4. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. See Tolan v. Levi Strauss & Co., 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchased substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161-62 (7th Cir. 1981); Pearce v. Carrier Corp., 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. See Fariss v. Lynchburg Foundry, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

5. In some cases, the defendant will assert some independent post-discharge reason - such as a plant closing or sweeping reduction in force - as to why the plaintiff would have been terminated in any event before trial. See, e.g., Cleverly v. Western Elec. Co., 450 F. Supp. 507, 511 (W.D. Mo. 1978), aff'd, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

6. The trial court may decide to set a time limit beyond which an award of future damages would be impermissibly speculative. See Hybert v. Hearst Corp., 900 F.2d 1050, 1056-57 (7th Cir. 1990); Snow v. Pillsbury Co., 650 F. Supp. 299, 300-01 (D. Minn. 1986) (ADEA case in which front pay was limited to three years); see also Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1062 (8th Cir. 1988) (district court awarded front pay in lieu of reinstatement; the amount of front pay awarded was determined by the district court and was nearly identical to amount of back pay). But cf. Neufeld v. Searle Lab., 884 F.2d 335, 341 (8th Cir. 1989) (in age discrimination cases, if reinstatement is deemed by the court in its equitable powers to be inappropriate, plaintiff is presumptively entitled to front pay through normal retirement age unless employer proves evidence to the contrary).

7. Front pay is essentially an equitable remedy "in lieu of" reinstatement and is an issue for the court, not the jury. Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999). If the issue of front pay is submitted to the jury, the jury's determination may be binding. See Doyne v. Union Elec. Co., 953 F.2d 447, 451 (8th Cir. 1992). If front pay is awarded, it should be excluded from the statutory limit on compensatory damages provided for in 42 U.S.C. 1981a(b)(3). See Kramer v. Logan County Sch. Dist. No. R-1, 157 F.3d 620, 625-26 (8th Cir. 1998).

* * *

9. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. See Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983); Fieldler v. Indianhead Truck Line, Inc., 670 F.2d 806, 808-09 (8th Cir. 1982).

10. This paragraph may be given at the trial court's discretion.

5. Ninth Circuit Model Instructions 7.1, 7.2, 7.3, and 7.4

a. 7.1 Damages—Proof

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff [on plaintiff's ____ claim], you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

[*Here insert types of damages. See Instruction 7.2—MEASURES OF TYPES OF DAMAGES*]

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Comment

If liability is not disputed, this instruction should be modified accordingly.

b. 7.2 Measures of Types of Damages (Partial)

In determining the measure of damages, you should consider:

[The nature and extent of the injuries;]

* * *

[The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] lost to the present time;]

[The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] which with reasonable probability will be lost in the future;]

* * *

Comment

Insert only the appropriate bracketed items into Instruction 7.1 (Damages–Proof).

Additional paragraphs may have to be drafted to fit other types of damages. Particular claims may have special rules on damages. *See, e.g.*, Instructions 9.9 (Negligence or Unseaworthiness—Damages—Proof), 9.11 (Jones Act—Maintenance and Cure), and 14.10 (Age Discrimination—Damages).

* * *

c. 7.3 Damages—Mitigation

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. 1. that the plaintiff failed to use reasonable efforts to mitigate damages; and

2. 2. the amount by which damages would have been mitigated.

Comment

The trier-of-fact is to mitigate damages by discounting awards to present value when there has been received into evidence appropriate discount rates. *Passantino v. Johnson & Johnson Consumer Products, Inc.* 212 F.3d 493, 509 (9th Cir.2000).

d. 7.4 Damages Arising in the Future—Discount to Present Cash Value

[Any award for future economic damages must be for the present cash value of those damages.]

[Noneconomic damages [such as] [pain and suffering] [disability] [disfigurement] [and] [___] are not reduced to present cash value.]

Present cash value means the sum of money needed now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages [will be incurred] [or] [would have been received].

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill. [You should also consider decreases in the value of money which may be caused by future inflation.]

Comment

There must be evidence to support this instruction. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 339–42 (1988). *See also Passantino v. Johnson & Johnson Consumer Products, Inc.* 212 F.3d 493, 508–509 (9th Cir.2000).

6. Eleventh Circuit Model Instruction 1.1.1

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

* * *

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial;

* * *

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages —that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

I. Punitive Damages

1. Questions to Be Considered

a. Obsolete Standard

The Fifth Circuit's Pattern Jury Instructions link punitive damages to extreme conduct: "If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages." That is not an appropriate standard under *Kolstad v. American Dental Association*, 527 U.S. 526, 79 FEP Cases 1697 (1999), which ended the requirement that defendant's conduct be "egregious."

b. Should the Jury Be Given Factors to Consider?

Seventh Circuit Draft Model Instruction 3.13 contains six factors to be considered by the jury. Ninth Circuit Model Instruction 7.6 mentions a few of them.

Given that awards of punitive damages will be reviewed in light of several factors, it seems to me to make sense that the jury be informed of the factors.

c. Should There Be An Instruction on the "Good Faith" Defense?

Eighth Circuit Model Instruction 5.04 is the only one to mention the good-faith defense to awards of punitive damages, but the instruction does not state that defendant has the burden of establishing the defense and does not guide the juries in deciding what that test requires.

A clear instruction on the defense, its elements, and the defendant's burden of proof in establishing it would help juries.

d. Clear English Award

The Seventh and Ninth Circuits take this award.

2. Fifth Circuit Model Instruction 15.13

If you find that the defendant is liable for the plaintiff's injuries, you must award the plaintiff the compensatory damages that he has proven. You also may award punitive damages, if the plaintiff has proved that the defendant acted with malice or willfulness or with callous and reckless indifference to the safety or rights of others. One acts willfully or with reckless indifference to the rights of others when he acts in disregard of a high and excessive degree of danger about which he knows or which would be apparent to a reasonable person in his condition.

If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for shocking conduct, and to deter the defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. It should be presumed a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's misconduct, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. You may consider the financial resources of the defendant in fixing the amount of punitive damages and you may impose punitive damages against one or more of the defendants, and not others, or against more than one defendant in different amounts.

3. Seventh Circuit Draft Model Instruction 3.13

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that [his conduct] [the conduct of Defendant's [managerial employees, officers],] was in

reckless disregard of Plaintiff's rights. An action is in reckless disregard of Plaintiff's rights if taken with knowledge that it may violate the law.

[Plaintiff must prove by a preponderance of the evidence that Defendant's [managerial employees, officers] acted within the scope of their employment and in reckless disregard of Plaintiff's right not to be [discriminated and/or retaliated] against. [In determining whether [*Name*] was a managerial employee of Defendant, you should consider the kind of authority Defendant gave him, the amount of discretion he had in carrying out his job duties and the manner in which he carried them out.] You should not, however, award Plaintiff punitive damages if Defendant proves that it made a good faith effort to implement an antidiscrimination policy.]

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- The reprehensibility of Defendant's conduct;
- The impact of Defendant's conduct on Plaintiff;
- The relationship between Plaintiff and Defendant;
- The likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- [- Defendant's financial condition;]
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

Committee Comments

a. **Authority:** Title 42 U.S.C. §1981a(b)(1) states that punitive damages may be awarded where the Defendant "engaged in a discriminatory practice… with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), interprets "malice" or "reckless disregard" to refer to the employer's knowledge that it may be violating federal law. For cases applying this standard, see, *e.g.*, *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 661-62 (7th Cir. 2001); *Cooke v. Stefani Management Services, Inc.*, 250 F.3d 564, 568-70 (7th Cir. 2001); *Gile v. United Airlines Inc.*, 213 F.3d 365, 375376 (7th Cir. 2000). The same standard applicable to punitive damages claims under 42 U.S.C. §1981a(b)(1) applies under 42 U.S.C. §1981. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 440-441 (4th Cir. 2000). Because including the term malice is potentially confusing in light of his interpretation, it is not used in the instruction.

b. **Governmental Entities:** Punitive damages are not available against a government, government agency, or political subdivision. 42 U.S.C. § 1981a(b)(1).

c. **ADEA:** Punitive damages are available under the ADEA. *Muskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283-284 (7th Cir. 1993).

d. **ADA Retaliation Claims:** Punitive damages are not available on ADA

retaliation claims. *Kramer v. Bank of America Securities, LLC,* 355 F.3d 961, 965 (7th Cir. 2004).

e. **Managerial Capacity:** Where there is an issue as to whether an employee was acting in a managerial capacity justifying the imposition of punitive damages, the relevant bracketed portion of the instruction should be included be included. *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 663 (7th Cir. 2001).

4. Eighth Circuit Model Instruction 5.04

In addition to actual [and nominal] damages mentioned in the other instructions, the law permits the jury under limited circumstances to award an injured person punitive damages.

If you find in favor of plaintiff under Instruction _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether defendant acted with malice or reckless indifference to plaintiff's right not to be discriminated against[3] on the basis of [his/her] (sex).[4] Defendant acted with malice or reckless indifference if:

it has been proved by the [(preponderance) or (greater weight)] of the evidence that [insert the name(s) of the defendant or manager[5] who terminated[6] plaintiff] knew that the (termination)[5] was in violation of the law prohibiting (sex) discrimination, or acted with reckless disregard of that law.

[However, you may not award punitive damages if it has been proved by the [(preponderance) or (greater weight)] of the evidence [that defendant made a good-faith effort to comply with the law prohibiting (sex)[4] discrimination][7].

If you find that defendant acted with malice or reckless disregard and did not make a good-faith effort to comply with the law, then, in addition to any actual [or nominal] damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages, are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][8]

Committee Comments

Under the Civil Rights Act of 1991, a Title VII plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." See 42 U.S.C. □ 1981a(b)(1). See also Model Instruction 4.53, infra, on punitive damages and Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). In 1999, the United States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. Kolstad v.

American Dental Association, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. Id. To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. Id. at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. Id. at 546.

The Kolstad case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good-faith efforts to comply with Title VII or the ADA. Id. at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction if applicable.

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. This instruction is designed for use in a gender discrimination case. It must be modified if other forms of discrimination are alleged.

5. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired plaintiff."

6. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

7. Use this phrase only if the good faith of defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in Kolstad v. American Dental Association, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good-faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

8. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

5. Ninth Circuit Model Instruction 7.6

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

The plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that defendant's conduct was malicious, or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety, rights , or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

[Punitive damages may not be awarded against _____.] [You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.] [Punitive damages may be awarded even if you award plaintiff only nominal, and not compensatory, damages.]

Comment

Punitive damages are not available in every case. For example, punitive damages are not available against municipalities, counties, or other governmental entities unless expressly authorized by statute. *City of Newport, et al. v. Fact Concerts, Inc., et al.*, 453 U.S. 247, 259-71 (1981). Punitive damages may, however, be available against governmental employees acting in their individual capacities. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978); *City of Newport,* 453 U.S. at 254. In diversity cases, look to state law for an appropriate instruction.

Regarding when punitive damages may be awarded in Title VII actions, *see Kolstad v. American Dental Assn.*, 527 U.S. 526 (1999); *Caudle v. Bristol Optical Co.*, 224 F.3d 1014, 1026-27 (9th Cir.2000). *See also Passantino v. Johnson & Johnson Consumer Products*, 212 F.3d 493, 514 (9th Cir. 2000).

Punitive and compensatory damages are subject to caps in Title VII cases. *See* 42 U.S.C. 1981a (b)(3). Regarding the amount of damages available under Title VII, *see Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148 (9th Cir.1999). The cap

does not apply to front pay and back pay. *See Pollard v. E.I. du Pont de Nemours & Company*, 532 U.S. 843 (2001). *See also Caudle v. Bristol Optical Co.*, 224 F.3d 1014, 1020 (9th Cir.2000) (includes the definition of front pay and back pay); Introductory Comment to Chapter 12.

If punitive damages are available, and evidence of defendant's financial condition is offered in support of such damages, the judge may be requested to instruct the jury during trial and/or at the end of the case about the limited purpose of such evidence. See Instructions 1.5 (Evidence for Limited Purpose), 2.10 (Limited Purpose Evidence), and the bracketed material in 3.3 (What Is Not Evidence).

Regarding degree of reprehensibility and punitive damages generally, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). *See State Farm Mut. Auto. Ins. Co. v Campbell*, 538 U.S. 408 (2003), referring to *Gore and Haslip* and stating that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1. (citation omitted) . . .. Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" (*citing Gore*, 517 U.S. at 582.)

6. <u>Eleventh Circuit Model Instruction 1.1.1 (Partial)</u>

* * *

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

[(c) Punitive damages, if any (as explained in the Court's instructions)]

* * *

[The Plaintiff also claims that the acts of the Defendant were done with malice or reckless indifference to the Plaintiff's federally protected rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice or reckless indifference to the Plaintiff's federally protected rights, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

J. The Manner in Which Curative Instructions Are Given

A curative instruction may be deprived of its force and effect if given with a jocular reference, or in connection with an announcement about a lunch break. In *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 87 FEP Cases 1306 (9th Cir. 2001), reversed the lower court's denial of plaintiff's motion for a new trial after defense counsel introduced trial testimony as to the plaintiff's sexually-oriented statements and conduct, without complying with Rule 412. "Having failed in two previous motions to obtain the court's approval to introduce Rule 412 material, the defendants instead simply sprang the offending testimony upon the court and then misrepresented the nature of Becraft's testimony to the trial judge in response to plaintiff's objections that the defense intended to violate Rule 412." *Id.* at 1104–05. The court held that Becraft's testimony as to the plaintiff's sexual practices did not involve any admissions by the plaintiff as to the advances she rejected, and "Plaintiff's alleged statements regarding her sexual habits were not probative as to the welcomeness of any harassing conduct by her coworkers." *Id.* at 1105. The court held that no instruction could have cured the prejudice of Becraft's "lurid" testimony, but that the lower court's curative instruction was in any event not forceful and was diminished in effect by its having been prefaced with a jocular reference to its being nearly lunchtime. *Id.* at 1105–06 & n.7.