

**Faculty of Federal Advocates**

*Ad Hoc Committee*

**MODEL EMPLOYMENT LAW JURY INSTRUCTIONS**

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## **TITLE VII – STATUTE INVOLVED**

The Plaintiff’s claim of discrimination based on [color] [religion] [sex] [national origin] is brought under a federal law known as Title VII of the Civil Rights Act of 1964, as amended, often called Title VII.

Title VII makes it an unlawful employment practice for an employer:

1. To discriminate against any individual with respect to the terms, conditions or privileges of employment because of such individual’s [color] [religion] [sex] [national origin]; or

2. To limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [his] [her] status as an employee because of such individual’s [color] [religion] [sex] [national origin].

### **Notes on Use:**

If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, this instruction and the instruction entitled, “Title VII – DISCRIMINATION BASED ON [COLOR] [RELIGION] [SEX] [NATIONAL ORIGIN]” should be given. If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. §1981, the instructions entitled, “[Title VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED” and “[TITLE VII AND/OR 42 U.S.C. 1981] – DISCRIMINATION BASED ON RACE” should be given instead.

### **Authority:**

42 U.S.C. § 2000 e-2.

**[TITLE VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED**

The Plaintiff's claim of race discrimination is brought under a federal law known as Title VII of the Civil Rights Act of 1964, as amended, often called Title VII; [and also under a federal law known as Section 1981 of the Civil Rights Act of 1991, also known as Section 1981.]

Title VII makes it an unlawful employment practice for an employer:

1. To discriminate against any individual with respect to the terms, conditions or privileges of employment because of such individual's race; or
2. To limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [his] [her] status as an employee because of such individual's race.

[Section 1981 of the Civil Rights Act of 1991 provides in pertinent part as follows:

(a) All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

For purposes of Section 1981, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the employment relationship.]

**Notes on Use:**

If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. § 1981, this instruction and the instruction entitled, “[TITLE VII AND/OR 42 U.S.C. § 1981] – DISCRIMINATION BASED ON RACE” should be given. If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, the instructions entitled, “TITLE VII – STATUTE INVOLVED” and “TITLE VII – DISCRIMINATION BASED ON [COLOR] [RELIGION] [SEX] [NATIONAL ORIGIN]” should be given instead.

**Authority:**

42 U.S.C. §§ 2000 e-2, 1981.

**TITLE VII – DISCRIMINATION BASED ON [COLOR]  
[RELIGION] [SEX] [NATIONAL ORIGIN]**

In order for Plaintiff to establish [his] [her] claim for discrimination based on [color] [religion] [sex] [national origin] under Title VII, [s]he must prove the following by a preponderance of the evidence:

1. The Defendant [describe adverse employment action]; and
2. The Plaintiff's [color] [religion] [sex] [national origin] was a motivating factor for the Defendant's action.

If you find that the Plaintiff has failed to prove either or both of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] discrimination claim and in favor of the Defendant. If, on the other hand, you find that the Plaintiff has proved both propositions by a preponderance of the evidence, then you must find in [his] [her] favor and against Defendant.

**Notes on Use:**

If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, this instruction should be given after the instruction entitled, "Title VII – STATUTE INVOLVED." If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. § 1981, the instructions entitled, "[Title VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED" and "[TITLE VII AND/OR 42 U.S.C. § 1981] – DISCRIMINATION BASED ON RACE" should be given instead.

**Authority:**

Elmore v. Capstan, Inc., 58 F.3d 525, 529 (10<sup>th</sup> Cir. 1995). See also Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

**[TITLE VII AND/OR 42 U.S.C. § 1981] – DISCRIMINATION BASED ON RACE**

In order for Plaintiff to establish [his] [her] claim for race discrimination under [Title VII and/or Section 1981], [s]he must prove the following by a preponderance of the evidence:

1. The Defendant [describe adverse employment action]; and
2. The Plaintiff's race was a motivating factor for the Defendant's action.

If you find that the Plaintiff has failed to prove either or both of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] discrimination claim and in favor of the Defendant. If, on the other hand, you find that the Plaintiff has proved both propositions by a preponderance of the evidence, then you must find in [his] [her] favor and against the Defendant.

**Notes on Use:**

If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. § 1981, this instruction should be given after the instruction entitled, “[TITLE VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED.” If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, the instructions entitled, “TITLE VII – STATUTE INVOLVED” and “TITLE VII – DISCRIMINATION BASED ON [COLOR] [RELIGION] [SEX] [NATIONAL ORIGIN]” should be given instead.

**Authority:**

Elmore v. Capstan, Inc., 58 F.3d 525, 529 (10<sup>th</sup> Cir. 1995). See also Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

## MOTIVATING FACTOR – DEFINED

The Plaintiff is not required to prove that [his] [her] [insert protected status] was the sole or exclusive motivating factor for the Defendant’s decision(s). The Plaintiff must prove, however, that [insert protected status] was a motivating factor. That is,

1. but for the Plaintiff’s [protected status], the Defendant would not have [describe adverse employment action],

OR

2. [The Plaintiff’s [protected status] was the factor that made a difference in the Defendant’s decision to [describe adverse employment action.]

In determining whether [protected status] was a “motivating factor” in the Defendant’s decision to [describe adverse employment action], you may consider any statements made or act done or admitted by the Defendant, and all other facts and circumstances in evidence indicating state of mind. An improper motive, if it exists, is seldom directly admitted and may or may not be inferred from the existence of other facts.

### **Notes on Use:**

This instruction is to be used in Title VII, § 1981 and ADEA cases. The Committee could not reach a consensus on the appropriate “motivating factor” standard, as illustrated by the two alternatives listed above. Cases supporting the “but for” test include Stover v. Martinez, 382 F.3d 1064, 1076 (10<sup>th</sup> Cir. 2004); Hampton v. Dillard Dep’t Stores, Inc., 248 F.3d 1091, 1111 (10<sup>th</sup> Cir. 2001), citing, 534 U.S. 1131 (2002); McKenzie v. Renberg’s Inc., 94 F.3d 1478, 1483 (10<sup>th</sup> Cir. 1996); James v. Sears, Roebuck & Co., 21 F.3d 989, 992 (10<sup>th</sup> Cir. 1994); and Perrell v. Financeamerica Corp., 726 F.2 654, 656 (10<sup>th</sup> Cir. 1984) (Age must “make a difference” in the sense that “but for” the factor of age discrimination, the employee would not have been adversely affected). Cases supporting the use of the “made a difference” standard include Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (recognizing a plaintiff may prevail on a discrimination case even when more than one factor motivated the employer’s employment decision); Elmore v. Capstan, Inc., 58 F.3d 525, 530 (10<sup>th</sup> Cir. 1995); James v. Sears, Roebuck & Co., 21 F.3d 989, 992 (10<sup>th</sup> Cir. 1994); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10<sup>th</sup> Cir. 1988).

### **Authority:**

Stover v. Martinez, 382 F.3d 1064, 1076 (10<sup>th</sup> Cir. 2004); James v. Sears, Roebuck & Co., 21 F.3d 989, 992 (10<sup>th</sup> Cir. 1994); Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

## **PRETEXT**

The Defendant claims that it had legitimate reasons for [describe adverse employment action]. The Plaintiff, on the other hand, claims that the Defendant's asserted reasons are a mere pretext to cover up a discriminatory motive.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual in several ways:

1. Evidence that the stated reasons for the decisions are false;
2. Evidence that the Defendant acted contrary to a written company policy prescribing the action to be taken by the Defendant under the circumstances; or
3. Evidence that the Defendant acted contrary to an unwritten policy or contrary to established company practice when making the [describe adverse employment action] affecting the Plaintiff.

In determining whether the Defendant's stated reasons for the decision are genuine or pretextual, you must examine the facts as they appeared to the person making the employment decision at the time the decision was made.

### **Notes on Use:**

This instruction should be given when the plaintiff contends that the defendant's stated reason(s) for the adverse employment decisions are pretextual. Townsend v. Lumberman's Mut. Cas. Co., 294 F.3d 1232, 1241 (10<sup>th</sup> Cir. 2002). The three enumerated ways for a plaintiff to show pretext are typical but not exclusive. See, e.g., Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10<sup>th</sup> Cir. 2000). When assessing a contention of pretext, the facts must be examined as they appear to the person making the employment decision. See Id. at 1231; Bullington v. United Airlines, Inc., 186 F.3d 1301, 1318 (10<sup>th</sup> Cir. 1999) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs.) Pretext may also be inferred when the only criteria used to evaluate an employee, or potential employee, is entirely subjective in nature. Green v. New Mexico, 420 F.3d 1189, 1195 (10<sup>th</sup> Cir. 2005). In cases involving subjective evaluation of the plaintiff, a fourth paragraph may be added to this instruction as follows: "4. Evidence that the Defendant relied entirely on criteria which is subjective in nature in making [describe adverse employment decision.]"

### **Authority:**

Green v. New Mexico, 420 F.3d 1189, 1195 (10<sup>th</sup> Cir. 2005); Townsend v. Lumbermen Mut. Cas. Co., 294 F.3d 1232 (10<sup>th</sup> Cir. 2002); Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10<sup>th</sup> Cir. 2000); Selenke v. Med. Imaging of Colo., Inc., 248 F.3d

1249, 1261 (10<sup>th</sup> Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made).

## CONSTRUCTIVE DISCHARGE

To prove [his] [her] claim of constructive discharge, the Plaintiff must show that the Defendant by its illegal discriminatory acts made working conditions so difficult that a reasonable person in the Plaintiff's position would feel compelled to resign.

### **Notes on Use:**

In appropriate cases, a plaintiff must show that he/she had no choice but to quit, and the jury may be so instructed. See also James v. Sears Roebuck & Co., 21 F.3d 989, 992 (10<sup>th</sup> Cir. 1994) (“a finding of constructive discharge must not be based only on the discriminatory act; there must also be aggravating factors that make staying on the job intolerable”). Depending on the facts of the case, it may therefore be appropriate to instruct the jury that a demotion or reassignment is insufficient to establish constructive discharge. See, e.g., Cockrell v. Boise Cascade Corp., 781 F.2d 173, 177 (10<sup>th</sup> Cir. 1986).

### **Authority:**

Pa. State Police v. Suders, 542 U.S. 129, 124 S. Ct. 2342, 2350 (2004); Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1221 (10<sup>th</sup> Cir. 2002).

## **BUSINESS JUDGMENT**

In reaching your verdict on the Plaintiff's [race] [etc.] discrimination claim, you should keep in mind that the law requires only that an employer not discriminate against an employee based on [race] [etc.] The law does not require an employer to use good judgment, to make correct decisions, or even to treat its employees fairly. Therefore in deciding the Plaintiff's discrimination claim, it is not your function to second-guess the Defendant 's decisions, such as [describe challenged decision], unless you find that the decisions were motivated by [illegal discrimination and/or retaliation or other illegal act].

### **Notes on Use:**

The Committee could not reach a consensus on how and when this instruction should be given. Some members believe it should be merged with the pretext instruction. Other members believe the instruction should be given separately in cases where it is warranted by the evidence.

### **Authority:**

Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1261 (10<sup>th</sup> Cir. 2001) (juries may not second-guess the business judgment of the employer or question whether the decision was wise, fair or even correct); Bullington v. United Airlines, Inc., 186 F.3d 1301, 1318 (10<sup>th</sup> Cir. 1999) (“The relevant inquiry is not whether United’s proffered reasons were wise, fair or correct, but whether United honestly believed those reasons and acted in good faith upon those beliefs.”); Sanchez v. Philip Morris, Inc., 992 F.2d 244, 247 (10<sup>th</sup> Cir. 1993) (Title VII is not violated by the exercise of erroneous or even illogical business judgment.).

## **STRAY REMARKS**

You have heard evidence during the course of the trial regarding certain allegedly discriminatory remarks. [Race] [Color] [Religion] [Sex] [National origin]-related comments referring directly to the Plaintiff may support an inference of discrimination. However, isolated or ambiguous comments may be too abstract or remote to support a finding of discrimination.

In order to prove discrimination by reference to comments in the workplace, a Plaintiff must demonstrate that a connection exists between the comments made and the Defendant's decision to treat [him] [her] differently.

### **Notes on Use:**

This instruction should be given only when warranted by the evidence, and may not be appropriate in a hostile work environment case. This instruction may be modified as appropriate in cases involving other protected classifications such as age or disability.

### **Authority:**

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10<sup>th</sup> Cir. 1994); Rea v. Martin Marietta Corp., 29 F.3d 1450, 1457 (10<sup>th</sup> Cir. 1994).

## MIXED MOTIVE

You have heard evidence that the Defendant's treatment of the Plaintiff may have been motivated by a desire to discriminate [or retaliate] against the Plaintiff. If you find that discrimination [retaliation] was a motivating factor in Plaintiff's [insert challenged employment action], then Plaintiff is entitled to your verdict even if you find that the [challenged employment action] was also motivated by a non-discriminatory [non-retaliatory] reason.

However, if you find that the Defendant was motivated by both discriminatory [retaliatory] and non-discriminatory [non-retaliatory] reasons, you must decide whether the Plaintiff is entitled to damages. The Plaintiff is entitled to damages unless the Defendant proves by a preponderance of the evidence that the Defendant would have treated the Plaintiff similarly even if discrimination [retaliation] had played no role in the employment decision.

### **Notes on Use:**

Since Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003), courts have struggled to distinguish a "mixed motives" case from a standard "pretext" case. The Committee agrees, however that the Fifth Circuit's definition of the distinction between the two types of cases is instructive. See Keelan v. Majestic Software, Inc., 407 F.3d 332, 341 (5<sup>th</sup> Cir. 2005) (a plaintiff must offer sufficient evidence *either* that the defendant's reason is not true, but is instead a pretext for discrimination, *or* that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic), citing Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5<sup>th</sup> Cir. 2004).

### **Authority:**

42 U.S.C. § 2000e-2(m); Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003); Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989); Davey v. Lockheed, 301 F.3d 1204, 1213-14 (10<sup>th</sup> Cir. 2002). See also Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 550 (10<sup>th</sup> Cir. 1999); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1471 (10<sup>th</sup> Cir. 1992); Keelan v. Majestic Software, Inc., 407 F.3d 332, 340-41 (5<sup>th</sup> Cir. 2005).

## HOSTILE WORK ENVIRONMENT – ELEMENTS

The Plaintiff has alleged that [he] [she] was subjected to a hostile work environment based upon sex in violation of the Title VII of the Civil Rights Act of 1964. In order to prove [his] [her] claim of hostile work environment, the Plaintiff must prove each of the following:

1. The conduct complained of was unwelcome;
2. The conduct complained of was offensive;
3. The conduct complained of was sexual [or other protected status] in nature or directed at the Plaintiff because of [his] [her] sex;
4. The conduct complained of was sufficiently severe or pervasive to alter the terms and conditions of the Plaintiff's employment by creating an abusive working environment; [and]
5. [The Defendant knew or should have known about the conduct to which plaintiff claims [he] [she] was subjected and failed to implement reasonably prompt and appropriate corrective action.]

### **Note on Use:**

Depending on the context of the case, the term “a hostile work environment based upon sex” may be changed to “sexual harassment.”

With appropriate modifications, this instruction may also be used in harassment claims based on other protected characteristics. This instruction, however, is based on Title VII, not 42 U.S.C. § 1981. Authority supporting the proposition that hostile work environment claims are actionable under other statutes include Rodriguez v. Loctite P.R., Inc., 967 F. Supp. 653, 662-63 (D. Puerto Rico 1997) (ADA case); Haysman v. Food Lion, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995) (ADA case). The Tenth Circuit has not expressly recognized a claim for hostile work environment under the ADEA, but has decided a case where the plaintiff raised the issue before the District Court. See Holmes v. Regents of the Univ. of Colo., 1999 U.S. App. LEXIS 8710, \*21 (10<sup>th</sup> Cir. May 7, 1999) (unpublished). See also McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10<sup>th</sup> Cir. 1998) (assuming without deciding that an employee may assert a hostile work environment claim under the ADEA).

### **Authority:**

29 C.F.R. § 1604.11; Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1022 (10<sup>th</sup> Cir. 2001).

## HOSTILE WORK ENVIRONMENT – DEFINED

In determining whether a work environment is hostile, you may consider some or all of the following factors:

- The nature and severity of the conduct;
- Whether the conduct complained of was humiliating;
- Whether the conduct complained of was repeated or a single incident;
- Whether the conduct complained of was by a co-worker or a supervisor;
- The effect of the conduct on the plaintiff's mental or emotional state;
- Whether others joined in the conduct;
- Whether the conduct was directed at more than one person;
- The context in which the conduct occurred;
- Whether the conduct was physically threatening or humiliating or a mere offensive utterance.

### **Authority:**

Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1988); Harris v. Forklift Sys., 510 U.S. 17, 23 (1993); O'Shea v. Yellow Tech. Servs., 185 F.3d 1093, 1097-98 (10<sup>th</sup> Cir. 1999); Penry v. Fed. Home Loan Bank of Topeka, 155 F.3d 1257, 1261 (10<sup>th</sup> Cir. 1998).

## **REASONABLE PERSON – DEFINED**

In determining whether a hostile work environment existed, you must consider the evidence from the perspective of a reasonable person. This is an objective standard, and you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances.

### **Authority:**

Harris v. Forklift Sys., 510 U.S. 17, 21-23 (1993); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998); Andrews v. Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) (An “objective standard protects the employer from the ‘hypersensitive’ employee”).

## **UNWELCOME CONDUCT – DEFINED**

“Unwelcome conduct” means conduct that was not solicited or encouraged by the plaintiff and that was regarded as undesirable by the plaintiff.

### **Authority:**

See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

## **SUPERVISOR – DEFINED**

Regardless of an employee's title, a "supervisor" is an employee with authority to hire, fire, discipline, promote, transfer, or evaluate the performance of other employees, or to effectively recommend such actions.

### **Notes on Use:**

Use this instruction only if there is a dispute about whether the alleged harasser is a supervisor.

There is a more indulgent line of authority holding that lead workers or low-level superiors may also be supervisors if they have the authority to assign other employees to perform daily tasks or job assignments. See, e.g., Grozdanich v. Leisure Hills Health Ctr., 25 F. Supp.2d 953, 972 (D. Minn. 1998).

### **Authority:**

See Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10<sup>th</sup> Cir. 1993); Haynes v. Williams, 88 F.3d 898, 899 (10<sup>th</sup> Cir. 1996) (a supervisor is an individual who serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment); Parkins v. Civil Constructors of Ill., 163 F.3d 1027, 1034 (7<sup>th</sup> Cir. 1998) (The essence of supervisory status is the "power to hire, fire, demote, promote, transfer, or discipline an employee").

## **TANGIBLE EMPLOYMENT ACTION – DEFINED**

A “tangible employment action” means a significant change in employment status, such as hiring, firing, layoff, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in wages or benefits.

A tangible employment action is not limited to monetary losses of benefits or wages, but it must be more than a mere inconvenience or alteration of job responsibility.

### **Authority:**

Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) (conduct is a tangible employment action if it “constitutes a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

## COWORKER HARASSMENT

If you find the Plaintiff has proven that [he][she] was subjected to sexual harassment by co-workers, as opposed to supervisors, you must decide whether the Defendant is responsible for such conduct.

The Defendant is responsible for permitting such behavior if the Plaintiff proves by a preponderance of the evidence that:

1. Management-level employees knew or should have known of the hostile work environment; and
2. The Defendant did not adequately respond to the notice of the hostile work environment.

### **Notes on Use:**

This instruction should be used when the basis for employer liability is the Defendant's negligence in allowing fellow employees to engage in sexual harassment.

### **Authority:**

Adler v. Wal-Mart Store's Inc., 144 F.3d 664, 673 (10<sup>th</sup> Cir. 1998).

## **AFFIRMATIVE DEFENSE – SUPERVISOR HARASSMENT**

If you find that the Plaintiff has proven that [he][she] was exposed to a hostile work environment by a supervisor, then you must find in favor of the Plaintiff unless the Defendant proves each of the following:

1. The hostile work environment did not result in a tangible employment action;
2. The Defendant maintained an effective complaint procedure which provided employees with reasonable options for reporting unwanted workplace behavior; and
3. The Plaintiff unreasonably failed to use the complaint procedure or otherwise avoid harm.

### **Note on Use:**

Use this instruction only if no tangible employment action occurred. If there is a genuine issue of material fact on whether a tangible employment action did occur, the instruction defining tangible employment action should be used.

### **Authority:**

Faragher v. Boca Raton, 524 U.S. 775, 807 (1998). See also Pa. State Police v. Suders, 524 U.S. 129, 211 (2004).

**AGE DISCRIMINATION IN EMPLOYMENT ACT**  
**(“ADEA”) – STATUTE INVOLVED**

The Plaintiff has brought this lawsuit under the Age Discrimination in Employment Act, also called the ADEA.

The ADEA makes it unlawful for an employer to discriminate against an individual who is 40 years of age or older because of his or her age.

**Authority:**

29 U.S.C. § 623(a)(1)-(2); O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996); Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

## **ADEA – EMPLOYER – DEFINED**

The ADEA holds employers liable for violations of the Act. An entity is an “employer” under the ADEA if it is a “person engaged in industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”

### **Notes on Use:**

This instruction should be used *only* where a dispute exists as to whether the Defendant employer is subject to the ADEA.

### **Authority:**

29 U.S.C. § 630(b) (2002).

## ADEA – ELEMENTS

In order for the Plaintiff to establish a claim of age discrimination, [he][she] must prove by a preponderance of the evidence that [his] [her] age was a “determining factor” in the Defendant’s decision to [insert adverse employment action].

Age is a “determining factor” if a defendant’s decision to [insert adverse employment action] was based upon the Plaintiff’s age. The Plaintiff is not required to prove that [his] [her] age was the sole or primary motivation for the Defendant’s decision. Rather, age is a “determining factor” if the Plaintiff’s age made a difference in the Defendant’s decision; that is, but for the Plaintiff’s age, the Defendant would not have [insert adverse employment action].

### **Authority:**

Jones v. Unisys Corp., 54 F.3d 624, 630-31 (10<sup>th</sup> Cir. 1995); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993); Smith v. Consol. Mut. Water Co., 787 F.2d 1441, 1442 (10<sup>th</sup> Cir. 1986).

## **ADEA – PRETEXT**

If you do not believe the reason[s] the Defendant employer offered for [describe adverse action] then you may, but are not required to, presume that the employer was motivated by age discrimination.

### **Authority:**

Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 n.3 (10<sup>th</sup> Cir. 1993); Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10<sup>th</sup> Cir. 2002).

## **ADEA – AGE-RELATED REMARKS**

A plaintiff may prove discriminatory intent under the ADEA, either directly or indirectly, by offering evidence of remarks that are:

1. age-related,
2. proximate in time to the [adverse employment action] at issue,
3. made by an individual with authority over the employment decision at issue, and
4. related to the employment decision at issue.

### **Note on Use:**

This instruction should be used only where evidence exists of age-related remarks.

### **Authority:**

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531-32 (10<sup>th</sup> Cir. 1994); Brown v. CSC Logic, Inc., 82 F.3d 651, 655-56 (5<sup>th</sup> Cir. 1996).

## **ADEA – SINGLE REMARK**

A single spoken statement referring to age, standing alone, does not necessarily prove an intent to discriminate. Such a statement, if you believe it occurred, is like any other evidence and you may consider it or reject it in light of all of the facts as you find those facts to be.

### **Notes on Use:**

This instruction should be used only where evidence exists of an age-related remark.

### **Authority:**

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10<sup>th</sup> Cir. 1994).

## **ADEA – AGE OF REPLACEMENT**

Where the Plaintiff has been replaced in [his] [her] employment position following termination, the fact that the Plaintiff was replaced by another person age 40 or over is irrelevant to the determination of whether discrimination occurred, so long as the Plaintiff was replaced because of [his] [her] age.

### **Notes on Use:**

This instruction should be used only where evidence exists that the replacement employee is over 40 years of age and protected by the ADEA.

In cases involving a reduction in force (“RIF”), you may wish to use the following instruction:

Where, as here, the Plaintiff’s employment position has been eliminated due to a reduction in force (“RIF”), you may infer age discrimination if the Plaintiff proves, by a preponderance of the evidence, that the Defendant could have retained him or her, but chose instead to retain a younger employee.

### **Authority:**

Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1167 (10<sup>th</sup> Cir. 1998); O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996); Greene v. Safeway Stores, Inc., 98 F.3d 554, 560 (10<sup>th</sup> Cir. 1996), citing Lucas v. Dover, 857 F.2d 1397, 1400 (10<sup>th</sup> Cir. 1988).

## **ADEA – WILLFUL – DEFINED**

If you find that the Defendant discriminated against the Plaintiff on the basis of [his] [her] age, you must now determine whether Defendant’s violation was “willful.” If you find that Defendant’s violation was “willful,” the Court may award additional damages under the law.

A defendant acts “willfully” if it either knew or showed reckless disregard for whether its conduct was prohibited by the ADEA.

### **Notes on Use:**

Where applicable, the Defendant may add the following language:

On the other hand, prior to acting, if the Defendant incorrectly, but in good faith and non-recklessly, believed that the law permitted the particular age-based decision, then Defendant did not act “willfully.”

### **Authority:**

29 U.S.C. § 626(b)(7)(b); Hazen Paper v. Biggins, 507 U.S. 604, 616 (1993); Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273, 1283 (10<sup>th</sup> Cir. 2003).

**ADEA – AFFIRMATIVE DEFENSE – *BONA FIDE* OCCUPATIONAL  
QUALIFICATION**

If you find that the Defendant’s employment decision affecting the Plaintiff was based on age, then you must find in favor of the Plaintiff, unless you find that the Defendant’s employment decision was the result of a *bona fide* occupational qualification.

To establish this defense, the Defendant must prove that, as to [the Plaintiff’s job][the job sought by the Plaintiff], at the time of the employment decision affecting the Plaintiff, age was a qualification reasonably necessary to the normal operation of the Defendant’s business.

A qualification is reasonably necessary to the normal operation of the Defendant’s business if it is central to the Defendant’s business and

1. there is a factual basis for believing that all or substantially all individuals over age \_\_\_ would be unable to safely and efficiently perform the duties of [the Plaintiff’s job][the job sought by the Plaintiff], OR
2. if it is impossible or highly impractical to deal with individuals over the age of \_\_\_ on an individualized basis.

**Authority:**

29 U.S.C. § 623(f)(1); Smith v. City of Jackson, 125 S. Ct. 1536, 1540 n.3 (2005); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, (2000); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413-417 (1985); 29 C.F.R. § 1625.6(b).

## **ADEA – AFFIRMATIVE DEFENSE – *BONA FIDE* SENIORITY SYSTEM**

If you find that the Defendant's employment decision affecting the Plaintiff was based on age, then you must find in favor of the Plaintiff, unless you find that the Defendant's employment decision resulted from application of a *bona fide* seniority system.

To establish this defense, the Defendant must prove that, at the time of the employment decision affecting the Plaintiff, the Defendant used a system whose primary criterion for the fair distribution of available employment opportunities and prerogatives among workers was length of service to the Defendant.

### **Authority:**

29 U.S.C. § 623(f)(2)(A); FED-JI § 173.61; Hiatt v. Union Pacific R.R., 65 F.3d 838, 842 (10<sup>th</sup> Cir. 1995), cert. denied 516 U.S. 1115 (1996).

## **ADEA – AFFIRMATIVE DEFENSE – *BONA FIDE* EMPLOYEE BENEFIT PLAN**

If you find that the Defendant's employment decision affecting the Plaintiff was based on age, then you must find in favor of the Plaintiff, unless you find that the Defendant's employment decision was the result of the application of a *bona fide* employee benefit plan.

To establish this defense, the Defendant must prove that, at the time of the employment decision affecting the Plaintiff:

1. The Defendant had an employee benefit plan that provided for and paid benefits to employees; and
2. The Defendant followed the terms of the employee benefit plan in making the employment decision affecting the Plaintiff.

### **Authority:**

29 U.S.C. § 623(f)(2)(B); FED-JI § 173.62.

## **ADEA – OFFSET TO DAMAGES – AFTER-ACQUIRED EVIDENCE**

If the Defendant proves, by a preponderance of the evidence, that it learned about wrongdoing by the Plaintiff which would have led to a legitimate discharge, the Plaintiff's damages must be limited to a calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.

Where, as here, the Defendant seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the Plaintiff, in fact, would have been terminated on those grounds alone if the Defendant had known of it at the time of the discharge.

### **Notes on Use:**

This instruction should be used only where evidence exists of after-acquired knowledge of wrongdoing by the Plaintiff.

### **Authority:**

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-63 (1995).

## AMERICANS WITH DISABILITIES ACT (“ADA”) – STATUTE INVOLVED

The Plaintiff has brought this lawsuit under the Americans With Disabilities Act, also called the ADA. The ADA makes it unlawful for an employer to discriminate against a qualified individual because of his or her disability.

In order to maintain a claim under the ADA, the Plaintiff must prove that, at the time of the employment decision affecting Plaintiff:

1. [He] [She] was disabled within the meaning of the ADA;
2. [He][She] was otherwise qualified for the position [held] [desired] and was able to perform the essential functions of that position with or without reasonable accommodation; and
3. The Defendant discriminated against [him] [her] in its employment decisions because of [his] [her] alleged disability.

### **Authority:**

42 U.S.C. § 12112(a); 29 C.F.R. § 1630.2(m); Croy v. Cobe Labs., Inc., 345 F.3d 1199, 1203-04 (10<sup>th</sup> Cir. 2003); Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1257 and n.4 (10<sup>th</sup> Cir. 2001).

## ADA – ELEMENTS – DISABILITY – DEFINED

Plaintiff must prove by a preponderance of the evidence that [he/she] had a “disability.” A person had a disability if [he/she], at the time of the employment decision affecting [him][her],

[Had a physical or mental impairment that substantially limited one or more of the major life activities of the person] [or]

[Had a record of having a physical or mental impairment that substantially limited one or more major life activities] [or]

[Was regarded as having a physical or mental impairment that substantially limited one or more major life activities.]

The Court has determined that the Plaintiff had the following [mental] [physical] impairment[s]: [insert description of impairments.]

### **Notes on Use:**

Only those portions of the definition that are still at issue in the case at the time of trial should be used.

### **Authority:**

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g); Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1230 (10<sup>th</sup> Cir. 1999); Bolton v. Scrivener, Inc., 36 F.3d 939, 942 (10<sup>th</sup> Cir. 1994); Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1256 (10<sup>th</sup> Cir. 2001).

## **REGARDED AS HAVING – DEFINED**

Plaintiff was “regarded as” having a disability if [he] [she] proves that the Defendant mistakenly believed:

[That Plaintiff had a physical or mental impairment that substantially limited one or more major life activities] [or]

[That Plaintiff’s actual, but nonlimiting, impairment substantially limited one or more major life activities.]

### **Notes on Use:**

Only those portions of the definition that are still at issue in the case at the time of trial should be used.

### **Authority:**

42 U.S.C. § 12102(2)(C); Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999); Doyal v. Okla. Heart, Inc., 213 F.3d 492, 499 (10<sup>th</sup> Cir. 2000); Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1088 (10<sup>th</sup> Cir. 1999).

**PHYSICAL OR MENTAL IMPAIRMENT[S] – DEFINED**

[No separate instruction to be given. See ADA – Elements – Disability – Defined.]

## **SUBSTANTIALLY LIMITED – DEFINED**

The Court has determined that the major life [activity] [activities] involved in this case [was] [were]: [insert description]. In deciding whether or not the Plaintiff's [physical] [mental] impairment substantially limited [his] [her] major life [activity] [activities] at the time of the employment decision affecting [him] [her], you should consider the following factors:

1. The nature and severity of the impairment;
2. The duration or expected duration of the impairment; and
3. The permanent or long-term impact, or expected permanent or long-term impact, of or resulting from the impairment.

### **Notes on Use:**

The Tenth Circuit has held that in order for an employee to prove that he or she was substantially limited in the major life activity of working, he or she must show that he or she was significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See, e.g., Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1158 (10<sup>th</sup> Cir. 2002); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10<sup>th</sup> Cir. 1994). Thus, in cases involving the major life activity of working, language may be added to this instruction regarding the elements of proof stated above.

### **Authority:**

*Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *McGeshick v. Principi*, 357 F.3d 1146, 1150 (10<sup>th</sup> Cir. 2004); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1129 (10<sup>th</sup> Cir. 2003); *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1158 (10<sup>th</sup> Cir. 2002).

**MAJOR LIFE [ACTIVITY] [ACTIVITIES] – DEFINED**

[No separate instruction to be given. See Substantially Limited – Defined.]

## **QUALIFIED INDIVIDUAL WITH A DISABILITY – DEFINED**

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, could perform the essential functions of the employment position that such individual held or desired at the time of the employment decision affecting [him][her].

### **Notes on Use:**

A qualified individual with a disability is not required to accept a proposed accommodation. However, if such individual does not accept a reasonable proposed accommodation that is necessary to enable him/her to perform the essential functions of the position held or desired, and thus can not perform the essential functions of the position, “the individual will not be considered a qualified individual with a disability.” 29 C.F.R. § 1630.9(d). Where failure to accept a reasonable proposed accommodation is an issue, this instruction should be modified accordingly.

### **Authority:**

42 U.S.C. § 12111(8); See also 29 C.F.R. § 1630.2(m); Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114, 1118 (10<sup>th</sup> Cir. 2004), quoting Davidson v. America Online, Inc., 337 F.3d 1179, 1180 (10<sup>th</sup> Cir. 2003); Hudson v. MCI Telecomm., Corp., 87 F.3d 1167 (10<sup>th</sup> Cir. 1996), quoting White v. York Int’l Corp., 45 F.3d 357, 360-61 (10<sup>th</sup> Cir. 1995).

## QUALIFIED – DEFINED

The term “qualified” means that, at the time of the employment decision affecting [him][her], the Plaintiff:

1. Satisfied the required skill, experience, education or other job-related requirements for the position [held or desired]; and
2. Could perform the essential functions of the position [held or desired], with or without reasonable accommodations.

### **Notes on Use:**

The determination of whether an individual with a disability is “qualified” should be based on the individual’s capabilities at the time of the employment decision affecting him or her. It may not be based on the employer’s speculation that the individual might become unable to perform the essential function(s) of the position in the future or might cause increased health insurance or workers compensation insurance premiums.

### **Authority:**

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m); Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114, 1118 (10<sup>th</sup> Cir. 2004), quoting Davidson v. America Online, Inc., 337 F.3d 1179, 1188 (10<sup>th</sup> Cir. 2003); Hudson v. MCI Telecomm. Corp., 87 F.3d 1167, 1168 (10<sup>th</sup> Cir. 1996).

## ESSENTIAL FUNCTION[S] – DEFINED

The term “essential function[s]” means the fundamental [duty] [duties] of the position [held] [desired] by Plaintiff at the time of the employment decision affecting [him] [her]. To determine whether a function was essential to the position that Plaintiff [held] [desired], you must consider:

1. The Defendant’s judgment as to whether the function[s] [was][were] essential; and/or
- [2. The job description that was in existence before the dispute arose.]

In addition, you may consider:

1. The purpose of the position;
2. The number of other employees who were available to perform the particular function[s];
3. The degree of expertise or skill required to perform the particular function[s];
4. The amount of time spent performing the particular function[s];
5. The consequences to the Defendant of not requiring Plaintiff to perform the function[s];
- [6. The terms of the collective bargaining agreement;]
- [7. The work experience of past employees in the position;]
- [8. The work experience of employees in similar positions;] and/or
- [9. Any other factor supported by the evidence.]

### **Notes on Use:**

The factors to be considered in determining whether a function was essential will depend upon the factual issues presented by the case. In particular, those items in brackets should only be used if relevant.

**Authority:**

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n); Davidson v. America Online, Inc., 337 F.3d 1179, 1190-91 (10<sup>th</sup> Cir. 2003); Tate v. Farmland Indus., Inc., 268 F.3d 989, 993 (10<sup>th</sup> Cir. 2001); Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10<sup>th</sup> Cir. 1996), quoting White v. York Int'l Corp., 45 F.3d 357, 361-62 (10<sup>th</sup> Cir. 1995).

## REASONABLE ACCOMMODATION[S] – DEFINED

“Reasonable accommodation[s]” means any reasonable change in the work environment or in the way things are customarily done in the workplace that enables a qualified individual with a disability to perform the essential function[s] of the job [held or desired] [or to enjoy the same benefits and privileges of employment that are available to others who do not have disabilities.]

A reasonable accommodation may include:

1. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
2. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.

### **Notes on Use:**

This instruction may be modified where appropriate to include other examples of what are, or examples of what are not, reasonable accommodations.

A reasonable accommodation does not include: changing or eliminating essential functions of the position, creating a new position, providing a promotion, assigning another employee to perform an essential function of the position or accommodations that create an “undue hardship” on the employer.

To facilitate a reasonable accommodation, the ADA envisions an interactive process that requires good faith communication and participation by both parties. “[T]he interactive process must ordinarily begin with the employee providing notice to the employer of the employee’s disability and any resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee’s existing job....Once the employer’s responsibilities within the interactive process are triggered by appropriate notice by the employee, both parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations....” Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10<sup>th</sup> Cir. 1999). Neither party may create or destroy liability by causing a breakdown of the interactive process. Albert v. Smith’s Food, 356 F.3d 1242, 1253, citing Davoll v. Webb, 194 F.3d 1116, 1133 (10<sup>th</sup> Cir. 1999).

**Authority:**

42 U.S.C. § 12111(9); 29 C.F.R 1630.2(o); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161 (10<sup>th</sup> Cir. 1999); Davidson v. America Online, Inc., 337 F.3d 1179, 1192 (10<sup>th</sup> Cir. 2003); Martin v. Kansas, 190 F.3d 1120, 1133 (10<sup>th</sup> Cir. 1999).

## **AFFIRMATIVE DEFENSE – UNDUE HARDSHIP – DEFINED**

It is a defense to a claim of disability discrimination that providing a reasonable accommodation would impose an undue hardship on the operation of the Defendant's business.

“Undue hardship” means an action requiring significant difficulty or expense when considered in light of various factors, including the nature and cost of the [requested] accommodation, the number of persons employed by the Defendant, the financial resources of the Defendant, and the impact of the [requested] accommodation upon the operations of the Defendant.

### **Notes on Use:**

When appropriate, this instruction may be modified to add additional factors set out in 42 U.S.C. § 12111(10).

### **Authority:**

Rascon v. U.S. West Commc'ns, Inc., 143 F.3d 1324, 1334 (10<sup>th</sup> Cir. 1998), quoting Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1087 (10<sup>th</sup> Cir. 1997); 42 U.S.C. §§ 12112(b)(5)(A), 12111(10)(A), 12111(10)(B).

## **AFFIRMATIVE DEFENSE – DIRECT THREAT**

The Defendant has asserted that the Plaintiff was [describe employment decision] because [his] [her] employment posed a direct threat to the health or safety of [himself] [herself] [and/or] [others]. Your verdict must be in favor of the Defendant if the Defendant proves that:

1. The Plaintiff's [continued] employment posed a significant risk of substantial harm to the health or safety of the Plaintiff and/or others; and
2. Such a risk could not have been eliminated or reduced by [a] reasonable accommodation[s].

The determination of whether a direct threat existed must be based on individualized assessment of the Plaintiff's ability safely to perform the essential function[s] of the position. This assessment of the Plaintiff's ability must have been based on a reasonable medical judgment which, at the time of the employment decision affecting the Plaintiff, relied on the most current medical knowledge and/or the best available objective evidence. In determining whether a person posed a direct threat, you must consider (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm would occur; and (d) the imminence of the potential harm.

### **Notes on Use:**

This instruction should be used when submitting the affirmative defense of "direct threat," on which the Defendant bears the ultimate burden of proof. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78-79 (2002). This instruction should be used in conjunction with others defining several terms upon which it relies, including those for "disability" and "reasonable accommodation."

### **Authority:**

42 U.S.C. §§ 12111(3), 12113(a), (b); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2); Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002); McKenzie v. Benton, 388 F.3d 1342, 1353 (10<sup>th</sup> Cir. 2004).

## RETALIATION – STATUTE INVOLVED – TITLE VII

*Title VII* makes it unlawful for an employer to retaliate against a person because that person has engaged in a protected activity under the statute.

To establish a claim of retaliation, Plaintiff must prove:

1. That [he][she] engaged in a protected activity under [insert statute];
2. Plaintiff suffered a materially adverse action contemporaneously with or subsequent to that protected activity; and
3. There was a casual connection between such protected activity and the adverse action.

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff and against Defendant on this claim. If, on the other hand, you find that Plaintiff has failed to prove any one or more of these elements by a preponderance of the evidence, then you must find against [him][her] on this claim and in favor of Defendant.

### **Notes on Use:**

This instruction should only be used in Title VII retaliation cases. Burlington Ne. & Santa Fe Ry. Co. v. White, No. 05-259, 2006 U.S. LEXIS 4895 (U.S. 2006).

Caveat: Although included at length in the jury instructions, most Circuits, including the Tenth Circuit, believe that it is *not* appropriate to instruct the jury on the McDonnell Douglas burden-shifting analysis, including the elements of a *prima facie* case. See Messina v. Droblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10<sup>th</sup> Cir. 1990) (“The McDonnell Douglas inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury. The district courts, therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges.”) Rather, the courts recommend use of instructions regarding the ultimate question and applying a “motivating factor” standard. See “Motivating Factor” instruction under Title VII section.

The Committee, however, acknowledges that treatises on jury instructions are excellent sources for locating the required elements of various claims. And, of course, oftentimes a particular element (or elements) of a *prima facie* case is or are at issue at trial. Therefore,

instructions articulating these elements have been included for use as an additional tool for a complete examination of the McDonnell Douglas analysis.

The above instruction is designed for use in cases where the Plaintiff alleges both a discrimination claim and a retaliation claim under the applicable statute. In cases where the Plaintiff does not assert a discrimination claim under the statute, and is instead bringing only a claim of retaliation, the Committee advises that an additional instruction be given to inform the jury as to the types of discrimination prohibited by the applicable statute. In this regard, the Committee notes that some judges prefer that the underlying discrimination statute be read verbatim as part of the instruction.

It should also be noted that although the alleged adverse action is often one taken against the Plaintiff by the Defendant employer, a Defendant may be held liable for retaliation committed by Plaintiff's co-workers if that retaliation is committed with the knowledge and acquiescence of the Defendant employer. Gunnell v. Utah Valley State College, 152 F.3d 1253, 1262-63 (10<sup>th</sup> Cir. 1998); Berry v. Stevinson Chevrolet, 74 F.3d 980, 985-86 (10<sup>th</sup> Cir. 1996).

**Authority:**

Burlington Ne & Santa Fe Ry. Co. v. White, No. 05-259, 2006 U.S. LEXIS 4895 (U.S. 2006); 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). See also Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1262-63 (10<sup>th</sup> Cir. 1998); Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1381 (10<sup>th</sup> Cir. 1994). The Tenth Circuit has held that the *prima facie* elements of a retaliation claim under 42 U.S.C. § 1981 are identical to those for a retaliation claim under Title VII. See Roberts v. Roadway Express, 149 F.3d 1098, 1103 & 1103 n.1 (10<sup>th</sup> Cir. 1998).

## RETALIATION – STATUTE INVOLVED – NOT TITLE VII

[Insert statute here, *i.e.*, ADEA, ADA, etc.] makes it unlawful for an employer to retaliate against a person because that person has engaged in a protected activity under the statute.

To establish a claim of retaliation, Plaintiff must prove:

1. That [he][she] engaged in a protected activity under [insert statute];
2. Plaintiff suffered an adverse [employment] action contemporaneously with or subsequent to that protected activity; and
3. There was a casual connection between such protected activity and the adverse action.

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff and against Defendant on this claim. If, on the other hand, you find that Plaintiff has failed to prove any one or more of these elements by a preponderance of the evidence, then you must find against [him][her] on this claim and in favor of Defendant.

### **Notes on Use:**

This instruction should only be used in cases involving claims for retaliation made under statutes other than Title VII. Burlington Ne. & Santa Fe Ry. Co. v. White, No. 05-259, 2006 U.S. LEXIS 4895 (U.S. 2006).

Caveat: Although included at length in the jury instructions, most Circuits, including the Tenth Circuit, believe that it is *not* appropriate to instruct the jury on the McDonnell Douglas burden-shifting analysis, including the elements of a *prima facie* case. See Messina v. Droblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10<sup>th</sup> Cir. 1990) (“The McDonnell Douglas inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury. The district courts, therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges.”) Rather, the courts recommend use of instructions regarding the ultimate question and applying a “motivating factor” standard. See “Motivating Factor” instruction under Title VII section.

The Committee, however, acknowledges that treatises on jury instructions are excellent sources for locating the required elements of various claims. And, of course, oftentimes a particular element (or elements) of a *prima facie* case is or are at issue at trial. Therefore,

instructions articulating these elements have been included for use as an additional tool for a complete examination of the McDonnell Douglas analysis.

The above instruction is designed for use in cases where the Plaintiff alleges both a discrimination claim and a retaliation claim under the applicable statute. In cases where the Plaintiff does not assert a discrimination claim under the statute, and is instead bringing only a claim of retaliation, the Committee advises that an additional instruction be given to inform the jury as to the types of discrimination prohibited by the applicable statute. In this regard, the Committee notes that some judges prefer that the underlying discrimination statute be read verbatim as part of the instruction.

It should also be noted that although the alleged adverse action is often one taken against the Plaintiff by the Defendant employer, a Defendant may be held liable for retaliation committed by Plaintiff's co-workers if that retaliation is committed with the knowledge and acquiescence of the Defendant employer. Gunnell v. Utah Valley State College, 152 F.3d 1253, 1262-63 (10<sup>th</sup> Cir. 1998); Berry v. Stevinson Chevrolet, 74 F.3d 980, 985-86 (10<sup>th</sup> Cir. 1996).

**Authority:**

42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). See also Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1262-63 (10<sup>th</sup> Cir. 1998); Cole v. Ruidoso Mun. Schs., 43 F.3d 1373, 1381 (10<sup>th</sup> Cir. 1994). The Tenth Circuit has held that the *prima facie* elements of a retaliation claim under 42 U.S.C. § 1981 are identical to those for a retaliation claim under Title VII. See Roberts v. Roadway Express, 149 F.3d 1098, 1103 & 1103 n.1 (10<sup>th</sup> Cir. 1998).

## **PROTECTED [ACTIVITY] [ACTIVITIES] – PARTICIPATION – DEFINED**

Protected activities include making a charge [of discrimination, harassment or retaliation], or testifying, assisting or otherwise participating in any manner in [his] [her] own [or someone else's] charge [of discrimination, harassment or retaliation], investigation, proceeding or hearing under [Title VII, ADEA, ADA, etc.]

In this case, Plaintiff asserts that [he] [she] engaged in the following protected [activity] [activities]: [insert activity or activities].

Plaintiff must prove that [he] [she] actually participated in [a] protected [activity] [activities], but Plaintiff does not have to prove that the underlying charge, investigation, proceeding or hearing was successful.

### **Notes on Use:**

This instruction should only be given when the Plaintiff alleges that participation activity (rather than opposition activity) is the basis for the alleged retaliation claim.

It is important to note that even informal, internal complaints to management can be sufficient to invoke the participation clause for purposes of establishing a *prima facie* case of retaliation. In Jeffries v. State of Kansas, 147 F.3d 1220 (10<sup>th</sup> Cir. 1998), for example, the Plaintiff delivered a letter to the superintendent of her employer hospital describing the discrimination. Id. at 1231. That does not, however, mean that all such complaints will amount to participation activity. In Shinwari v. Raytheon Aircraft Co., 251 F.3d 1337, 2000 U.S. App. LEXIS 12816, \*17-18 (10<sup>th</sup> Cir. 2000), overruled on other grounds, Crumpacker v. Kan. Dep't of Human Res., 338 F.3d 1163, 1171 (10<sup>th</sup> Cir. 2003) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001)), the court held the Plaintiff's conclusory and nonspecific allegations of discrimination raised during his performance review did not rise to the level of participation in a protected activity.

### **Authority:**

42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). See also Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253 (10<sup>th</sup> Cir. 1999), abrogated on other grounds, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); Jeffries v. State of Kansas, 147 F.3d 1220, 1231 (10<sup>th</sup> Cir. 1998); Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10<sup>th</sup> Cir. 1993).

## **PROTECTED [ACTIVITY] [ACTIVITIES] – OPPOSITION – DEFINED**

Protected activities include opposing a practice made unlawful by [insert statute here, i.e., Title VII, ADEA, ADA, etc.], such as expressing a [reasonable good faith] belief that the employer has engaged in a discriminatory practice.

In this case, Plaintiff asserts that [he] [she] engaged in the following protected [activity] [activities]: [insert activity or activities].

Plaintiff must prove [he] [she] engaged in [this] [these] [activity] [activities] to oppose a practice made unlawful by the statute.

### **Notes on Use:**

The Committee recognizes that opposition activity can take different forms, such as making complaints to management, writing critical letters to customers about discriminatory treatment by the employer, protesting against discrimination in general, and expressing support of co-workers who have filed formal charges. Accordingly, this instruction may be modified to identify the particular type of opposition activity at issue in the case.

This instruction may be given on its own without the bracketed term “reasonable good faith” if there is not a triable issue as to whether, at the time the Plaintiff engaged in opposition activity, he or she had a mistaken but reasonable good faith belief that Title VII (or the ADEA or the ADA) had been violated. If, however, there is a triable issue as to whether, at the time the Plaintiff engaged in opposition activity, he or she had such a mistaken but reasonable good faith belief, this instruction should be given, the bracketed term “reasonable good faith” should be inserted into it; and the next instruction – “Protected [Activity] [Activities] – Opposition (Mistaken but Reasonable Good Faith Belief)” – should be given also.

### **Authority:**

42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). See also, Shinwari v. Raytheon Aircraft Co., 215 F.3d 1337, 2000 U.S. App. LEXIS 12816, \*15 (10<sup>th</sup> Cir. June 8, 2000) , overruled on other grounds, Crumpacker v. Kan. Dep’t of Human Res., 338 F.3d 1163, 1171 (10<sup>th</sup> Cir. 2003) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001)); Archuleta v. Colo. Dep’t of Insts., 936 F.2d 483, 487 (10<sup>th</sup> Cir. 1991); Love v. Re/Max, 738 F.2d 383, 385 (10<sup>th</sup> Cir. 1984).

**PROTECTED [ACTIVITY] [ACTIVITIES] – OPPOSITION  
(Mistaken But Reasonable Good Faith Belief)**

Plaintiff's [activity] [activities] in opposing a practice [he] [she] believed is unlawful under [Title VII, ADEA, etc.] is protected activity even though it is based on a mistaken but reasonable good faith belief that [the statute] has been violated.

**Notes on Use:**

This instruction should only be given in “opposition,” not “participation” cases, as reasonable good faith belief is only required in opposition cases. In addition, this instruction should be given only when there is a triable issue as to whether, at the time the Plaintiff engaged in the opposition activity, he or she had a mistaken but reasonable good faith belief that Title VII (or the ADEA or the ADA) had been violated.

If the practice or action the Plaintiff opposes does not violate the statute, but the Plaintiff engaged in the opposition activity based on a reasonable, good faith mistake of fact or law, then s/he is entitled to protection from retaliation. Crumpacker v. Kan. Dep't of Human Res., 338 F.3d 1163, 1171 (10th Cir. 2003) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001)).

Obviously, whether or not the Plaintiff's mistake was reasonable and in good faith depends greatly on the facts of a particular case.

However, protected conduct may not be found where, reasonably and in good faith, the Plaintiff is legally wrong about what conduct is protected by the law. For example, sexual favoritism does not violate Title VII. Taken v. Okla. Corp. Comm'n, 125 F.3d 1366, 1369-70 (10<sup>th</sup> Cir. 1997) (rejecting Title VII claim of paramour preference: “Title VII's reference to ‘sex’ means a class delineated by gender, rather than sexual affiliations”). See also Robben v. Runyon, No. 98-3177, 2000 U.S. App. LEXIS 1358, \*11-12 (10<sup>th</sup> Cir. Feb. 1, 2000) (unpublished) (affirming summary judgment as to retaliation claim based upon the Plaintiff's expression of concerns about sexual favoritism to a manager's paramour and claimed retaliation for complaints about it).

**Authority:**

Crumpacker v. Kan. Dep't of Human Res., 338 F.3d 1163, 1171-72 (10<sup>th</sup> Cir. 2003) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001)).

## ADVERSE ACTION – DEFINED

An “adverse action” is one that alters the employee’s terms, conditions, or privileges of employment, or otherwise adversely affects his or her status as an employee. An adverse action, however, does not include a mere inconvenience or personality conflict in the workplace.

### Notes on Use:

This instruction should be used in retaliation cases brought under statutes other than Title VII. In cases brought under Title VII, the instruction on “Materially Adverse Action -- Defined” should be used. Burlington Ne. & Santa Fe Ry. Co. v. White, No. 05-259, U.S. LEXIS 4895 (U.S. 2006). It is not yet clear whether the decision in Burlington will be applied in the context of retaliation claims other than Title VII. If the existence of an adverse action is undisputed, this instruction may not be necessary.

An “adverse action” is not the same as “a tangible employment action,” which has been defined by the U.S. Supreme Court in Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998), as entailing “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.” See also Hillig v. Rumsfeld, 381 F.3d 1028, 1031-33 (10<sup>th</sup> Cir. 2004). To be sure, “adverse action” may include such actions, but also “encompass[es] those acts that carry a ‘significant risk of humiliation, damage to reputation, and a concomitant harm to *future employment prospects*.’” See id. at 1032, quoting Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10<sup>th</sup> Cir. 1996) (emphasis added by Hillig court). See, e.g., Hillig, 381 F.3d at 1035 (negative reference by former employer was adverse action); Berry, 74 F.3d at 984-85 (filing of criminal charges of theft and forgery against the plaintiff was adverse action). At the same time, the term “adverse action” is not so broad to “encompass[] every action taken by a plaintiff’s employer ... that may affect the plaintiff’s future employment opportunities,” particularly those that have a *de minimus* effect. Hillig, 381 F.3d at 1033, quoting Aquilino v. Univ. of Kan., 268 F.3d 930, 935 (10<sup>th</sup> Cir. 2001). See Aquilino, 268 F.3d at 935 (removal of plaintiff from dissertation committee as a result of her legitimate denial of tenure was *de minimus*); Tran v. Trs. of the States of Colls. in Colo., 355 F.3d 1263, 1268 (10<sup>th</sup> Cir. 2004) (reassignments requiring the development of new skills were *de minimus*).

In recent years, there has been much litigation over what actions rise to the level of adverse action under the law. Compare Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10<sup>th</sup> Cir. 1998) (subjecting employee to retaliatory harassment was an adverse action); Jeffries v. Kansas, 147 F.3d 1220, 1232-33 (10<sup>th</sup> Cir. 1998) (threatening employee with lack of supervision was an adverse action); Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10<sup>th</sup> Cir. 1996) (requiring employee to “go through several hoops” to obtain severance benefits was an adverse action); Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10<sup>th</sup> Cir. 1993) (reassigning employee against her wishes was an adverse action); and Deavenport v. MCI Commc’ns Corp., 973 F.Supp. 1221, 1227

(D. Colo. 1997) (taking away major assignments and forcing plaintiff to travel were adverse actions); with Amro v. Boeing Co., 232 F.3d 790, 798 (10<sup>th</sup> Cir. 2000) (arguably mediocre evaluations and salary raises were not adverse actions without a further demonstration that plaintiff's performance merited a higher ranking); Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 857 (10<sup>th</sup> Cir. 2000) (moving plaintiff's desk to a different location, monitoring her telephone calls, acting in a "chilly" manner toward her, refusing to investigate her race discrimination complaint once she filed her EEOC charge, and suggesting to her that she might want to move to a different department because her department was shifting to a commission sales format under which she had previously struggled were "[m]ere inconvenience[s] or alteration[s] of job responsibilities" that did not constitute adverse actions); and Sanchez v. Denver Pub. Schs., 164 F.3d 527, 533 (10<sup>th</sup> Cir. 1998) (requiring plaintiff to bring a doctor's note when sick, threatening to write up the plaintiff for insubordination, threatening to put the plaintiff on a plan for improvement, and failing to place her in a position that she requested were not adverse actions; unsubstantiated oral reprimands and unnecessary derogatory comments "are not included with the definition of adverse action absent evidence that they had some impact on the employee's employment status").

**Authority:**

42 U.S.C. § 2000e-3(a) (adopting definitions in 42 U.S.C. § 2000e-2(a)); Amro v. Boeing Co., 232 F.3d 790, 798 (10<sup>th</sup> Cir. 2000); Heno v. Sprint/United Mgmt. Co., 208 F. 3d 847, 857 (10<sup>th</sup> Cir. 2000).

## **MATERIALLY ADVERSE ACTION - DEFINED**

In order to show that [he][she] suffered a materially adverse action, the Plaintiff must show that the Defendant's actions were harmful to the point that they could well discourage a reasonable worker from making or supporting a charge of discrimination.

### **Notes on Use:**

This instruction should only be used in Title VII retaliation cases. Burlington Ne. & Santa Fe Ry. Co. v. White, No. 05-259, 2006 U.S. LEXIS 4895 (U.S. 2006). Courts outside of the Tenth Circuit have extended the above definition of materially adverse action to retaliation cases brought under other federal statutes. See, e.g., Hartzol v. McDonald's Corp., No. 05 C 2120, 2006 U.S. Dist. LEXIS 46428 (N.D. Ill. July 5, 2005)(applying definition to Section 1981 retaliation claim); Browne v. Potomac Elec. Power Co., No. 05-1177, 2006 U.S. Dist. LEXIS 45074 (D.D.C. July 3, 2006)(applying definition to Section 1981 retaliation claim); Mason v. City of Chicago, No. 05 C 1515, 2006 U.S. Dist. LEXIS 45231 (N.D. Ill. June 23, 2006)(applying definition to ADEA retaliation claim.)

### **Authority:**

Burlington Ne. & Santa Fe Ry. Co. v. White, No. 05-259, 2006 U.S. LEXIS 4895 (U.S. 2006).

## CAUSATION

Plaintiff may establish a causal connection between the protected activity and the adverse action:

1. By demonstrating direct evidence that retaliation was a motivating factor in the employer's decision to take an adverse action, or
2. By demonstrating circumstances raising an inference that retaliation was a motivating factor in the employer's decision to take an adverse action, such as
  - (a) protected conduct closely followed by an adverse action, or
  - (b) proof of any employer efforts to conceal alleged retaliatory conduct.

### **Note on Use:**

Please see Title VII instructions for instruction on “motivating factor.”

Depending on the facts of the case, it may be appropriate to instruct the jury on the specifics of the Defendant's required state of mind. If the Defendant is claiming ignorance of the underlying facts that constitute the alleged protected activity, it may be appropriate to instruct the jury that the Plaintiff must prove Defendant knew of the protected activity before taking the adverse action and took that action based upon the Plaintiff's protected activity. See Peterson v. Utah Dep't of Corrs., 301 F.3d 1182, 1188 (10<sup>th</sup> Cir. 2002). But, because Defendant may not avoid knowledge of certain facts it should have known, it also may be appropriate to instruct the jury that it is only necessary for the Plaintiff to prove that Defendant knew, or should have known, of the facts constituting the alleged protected activity. See Foster v. Allied Signal, Inc., 293 F.3d 1187, 1193 (10<sup>th</sup> Cir. 2002).

### **Authority:**

Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001); Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1218 (10<sup>th</sup> Cir. 2003); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10<sup>th</sup> Cir. 2001); Pastran v. K-Mart Corp., 210 F.3d 1201 (10<sup>th</sup> Cir. 2000); Burrus v. United Tele. Co., 683 F.2d 339, 343 (10<sup>th</sup> Cir.), citing, 459 U.S. 1071 (1982).

## **BACK PAY**

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine the amount of back pay that the Plaintiff proved was caused by the Defendant's wrongful conduct.

In determining back pay, you must make several calculations:

First, calculate the amount of pay and bonuses that Plaintiff would have earned had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until today's date.

Then calculate and add the value of the employee benefits (health, life and dental insurance, vacation leave, etc.) that Plaintiff would have received had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until the date of trial.

Then, subtract from this sum the amount of pay and benefits that Plaintiff actually earned from other employment during this time.

### **Notes on Use:**

There is a question as to whether back pay is an issue of fact for a jury determination, or an issue of law for the Court. Compare Doodoo v. Seagate Tech., Inc., 235 F.3d 522, 527 (10<sup>th</sup> Cir. 2000), as representative of a case where back pay was determined by a jury; with Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1236 (10<sup>th</sup> Cir. 2000)(where back pay was determined by the Court). In cases where a claim is also brought under 42 U.S.C. § 1981, back pay is properly a jury question. See Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10<sup>th</sup> Cir. 1988).

In appropriate cases, this instruction should be followed by an instruction regarding failure to mitigate. The Committee has determined that the question of what, if any, particular collateral sources of income may be deducted from the back pay award (such as unemployment compensation, workers' compensation, etc.) is a question of law for the Court. Once the Court determines what sources may be offset, the question of the amount of the offset should be submitted to the jury.

### **Authority:**

Federal Employment Jury Instructions, § 1:1260; Model Jury Instructions (Civil) Eighth Circuit § 5.02 (1998).

## COMPENSATORY DAMAGES

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine an amount that is fair compensation for Plaintiff's losses. You may award compensatory damages for injuries that the Plaintiff proved were caused by the Defendant's wrongful conduct. The damages that you award must be fair compensation, no more and no less.

*Insert bold provision only if the Court determines back pay is not a jury question:*

**[In calculating damages, you should not consider any back pay or front pay that the Plaintiff lost. The award of back pay and front pay, should you find the Defendant liable on the Plaintiff's claims, will be calculated and determined by the Court.]**

You may award damages for any emotional distress, pain, suffering, inconvenience or mental anguish [insert all other claimed damages, such as embarrassment, humiliation, damage to reputation, etc.] that Plaintiff experienced as a consequence of the wrongful conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for setting the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

*Insert bold provision if Plaintiff is seeking other consequential damages.*

**[You may also reimburse the Plaintiff for the value of other out-of-pocket losses or expenses, including expenses for past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and [insert all other quantifiable out-of-pocket expenses sought by the Plaintiff].]**

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in making an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on speculation or guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

### **Notes on Use:**

Under Title VII and the ADA, the amount of compensatory damages is capped by statute. The elements of compensatory damages that are subject to the statutory cap are (1) future pecuniary losses, and (2) all nonpecuniary losses, which includes emotional distress, anguish, loss of enjoyment of life, embarrassment, reputational damage, adverse effects on credit rating, physical harms caused by distress, etc. The statutory cap does not apply to past pecuniary losses that occurred prior to the date of trial. These losses may include

past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and other quantifiable out-of-pocket expenses. See also, EEOC Enforcement Guidance: Compensatory and Punitive Damage Available Under Section 102 of the Civil Rights Act of 1991 (July 1992).

**Authority:**

42 U.S.C. § 1981a.

## **WILLFUL DISCRIMINATION (ADEA CASES ONLY)**

If you find Plaintiff was discriminated against by the Defendant on the basis of age, then you must decide whether the Defendant's conduct was willful.

A violation is "willful" if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. A violation is willful if it is done voluntarily, deliberately, and intentionally and not by accident, inadvertence, or ordinary negligence.

Intentional discrimination is seldom admitted, and it is not necessary to find direct evidence of intent to discriminate in order to find that the violation was willful. You may consider statements made, acts done or omitted, and all facts or circumstances received into evidence during the trial which show whether or not the Defendant acted willfully as to the Plaintiff's age discrimination claim.

### **Authority:**

Hazen Paper Co. v. Biggins, 507 U.S. 604, 616 (1993); 29 U.S.C. § 636.

## FAILURE TO MITIGATE

Plaintiff is required to make reasonable efforts to minimize damages. In this case, the Defendant claims that Plaintiff failed to minimize damages because [state the reason, *e.g.*, Plaintiff failed to use reasonable efforts to find employment after discharge.]

It is the Defendant's burden to prove that Plaintiff failed to make reasonable efforts to minimize [his][her] damages. This defense is proven if you find by a preponderance of the evidence that:

1. There were or are substantially comparable positions which Plaintiff could have discovered and for which Plaintiff was qualified; and
2. Plaintiff failed to use reasonable diligence to find suitable employment. "Reasonable diligence" does not require that Plaintiff be successful in obtaining employment, but only that [he][she] make a good faith effort at seeking employment.

If the Defendant has proven the above, then you must deduct from any award of back pay the amount of pay and benefits Plaintiff could have earned with reasonable effort.

### **Notes on Use:**

There is authority to support language defining "reasonable diligence" to the effect that, "you may find that Plaintiff failed to use reasonable diligence during periods where Plaintiff was not ready, willing and available for employment," *e.g.*, Plaintiff has enrolled in school. See Miller v. Marsh, 766 F.2d 490, 493 (11<sup>th</sup> Cir. 1985); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 267-68 (10<sup>th</sup> Cir. 1975) overruled on other grounds; Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

However, where the Defendant fails to bring forward any evidence supporting the first prong of this instruction, then the Defendant has failed to meet its burden of showing that Plaintiff failed to mitigate damages, and the Plaintiff's status as a full-time student is then irrelevant. Goodman v. Fort Howard Corp., No. 93-7067, 1994 U.S. App. LEXIS 17507, \*11 (10<sup>th</sup> Cir. July 18, 1994) (unpublished).

Those cases stand in contrast to cases wherein the enrollment period is nonetheless recognized as a "reasonable" attempt to mitigate damages: Bray v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1275-76 (4<sup>th</sup> Cir. 1985); Dailey v. Societe Generale, 108 F.3d 451, 455-57 (2d Cir. 1997); Smith v. American Serv. Co., 796 F.2d 1430, 1431-32 (11<sup>th</sup> Cir. 1986); Hanna v. American Motors Corp., 724 F.2d 1300, 1307-09 (7<sup>th</sup> Cir. 1984). Those cases recognize that only "reasonable" efforts to mitigate damages are required, not ultimate success.

Accordingly, the practitioner is encouraged to review these cases, and to determine on a case-by-case basis whether enrollment in school may constitute a failure to mitigate damages.

**Authority:**

Aguinaga v. United Food & Com. Worker's Intern., 993 F.2d 1463, 1474 (10<sup>th</sup> Cir. 1993) citing, 510 U.S. 1072 (1994); E.E.O.C. v. Sandia Corp., 639 F.2d 600, 627 (10<sup>th</sup> Cir. 1980).

## UNCONDITIONAL OFFER OF EMPLOYMENT

You have heard evidence in this case that the Defendant offered to return Plaintiff to work and that Plaintiff rejected that offer. If you find that the Defendant made an unconditional offer of employment (that is, an offer that was not conditioned upon Plaintiff taking any other action or relinquishing any rights) of a job substantially comparable to Plaintiff's former employment and that Plaintiff unreasonably refused that offer, Plaintiff may not recover back pay after the date of the offer, unless special circumstances exist. In considering whether special circumstances exist, you must consider the circumstances under which the offer was made or rejected, including the terms of the offer and Plaintiff's reasons for refusing the offer.

### **Authority:**

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); Giandonato v. Sybron Corp., 804 F.2d 120,123-24 (10<sup>th</sup> Cir. 1986).

## NOMINAL DAMAGES

If you return a verdict for the Plaintiff, but find the Plaintiff has failed to prove that [he][she] suffered any damages, then you must award the Plaintiff the nominal amount of \$1.00.

### **Authority:**

See Model Jury Instruction (Civil) Eighth Circuit § 5.23 (1999); Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1228 (10<sup>th</sup> Cir. 2001); Salazaar v. Encinias, 2000 U.S. App. LEXIS 32022, \*7-8 (10<sup>th</sup> Cir. Dec. 15, 2000).

## PUNITIVE DAMAGES – ADA AND TITLE VII CASES ONLY

If you find that the Defendant intentionally discriminated against Plaintiff, the law allows, but does not require, an award of punitive damages. The purpose of an award of punitive damages is to punish a wrongdoer for misconduct, and also to provide a warning to others.

You may award punitive damages if you find that the Defendant engaged in discrimination with malice or with reckless indifference to the right of the Plaintiff to be free from such intentional discrimination. In order to find the Defendant liable for punitive damages, you must find that the Defendant discriminated in the face of a perceived risk that its actions would violate federal law.

In deciding the amount of punitive damages, you may consider the following:

1. The offensiveness of the conduct;
2. The amount needed, considering the Defendant's financial condition, to prevent the conduct from being repeated; **and**
3. Whether the amount of punitive damages bears a reasonable relationship to the actual damages awarded.

Where discriminatory acts on the part of the Defendant's managerial employees were contrary to the Defendant's good faith efforts to comply with the law by implementing and enforcing policies and programs designed to prevent unlawful discrimination, you shall not award punitive damages.

### **Notes on Use:**

In appropriate cases, the following language may be added:

“You may infer ‘malice’ or ‘reckless indifference’ on the part of the Defendant where a manager responsible for setting or enforcing policy in the area of discrimination did not respond to complaints, despite knowledge of serious harassment.”

This additional language is supported by Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1244-45 (10<sup>th</sup> Cir. 1999), abrogated on other grounds, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), and is appropriate only in cases where liability for punitive damages is not sought on a vicarious liability basis. This imposition of liability is “premised upon direct liability, not derivative liability, according to the doctrine of *respondeat superior*.” Deters v. Equifax Credit Info. Serv., Inc., 202 F.3d 1263, 1270-72 (10<sup>th</sup> Cir. 2000).

**Authority:**

42 U.S.C. § 1981a(b)(1); Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).