

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 of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, is designed to assure equality of employment opportunities and ensure that all persons enjoy full and adequate protection against employment discrimination.

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

1. To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [his] [her] compensation, 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. § 2000e-2; H.R. REP. 102-40, 2, 1991 U.S.C.C.A.N. 694, 694, 1991 WL 87020, 1 (purpose).

[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 fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [his] [her] compensation, 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. § 2000e-2; 42 U.S.C. § 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 (10th Cir. 1995). See also *Texas Dept. of Comm. 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 (10th Cir. 1995). See also *Texas Dept. of Comm. 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) or that all of the Defendant’s stated reasons for [the decision/adverse employment action] were false. The Plaintiff must prove only that [insert protected status] was a motivating factor. That is, [the Plaintiff’s [protected status] was a 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 ADA cases. The Supreme Court distinguished ADEA cases from Title VII holding that ADEA age discrimination must be proved under a “but-for” test in contrast to race, color, age, national origin, and sex under Title VII, which undergo a “motivating factor” analysis. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Cases supporting the “motivating factor” test 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 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

Authority:

42 U.S.C.A § 2000e-2(m); *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); *Fye v. Oklahoma Corp. Comm’n*, 516 F.3d 1217 (10th Cir. 2008); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

PRETEXT

The Plaintiff claims that the Defendant's stated reason[s] for its adverse employment action is [are] not the true reason[s], but instead is [are] a pretext (an excuse) to cover up for [race/color/religion/sex/national origin] discrimination. If you do not believe [one or more of] the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that [race/color/religion/sex/national origin] was a factor that made a difference in the Defendant's decision. [The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.]

The Plaintiff may show that the Defendant's stated reason[s] for its decision[s] are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reason[s] is [are] pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that [race/color/religion/sex/national origin] was a factor that made a difference in the employer's treatment of Plaintiff.

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 (10th Cir. 2002). The 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 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing

procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities).

See also Matthews v. Euronet Worldwide, Inc., 2008 WL 822461, *4 (10th Cir. 2008) (“[T]o the extent the Defendants’ articulated reasons were subjective in nature, they are supported by objective facts.”); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an “overwhelming disparity”); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) (“Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision.”); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App’x 63, 68 (10th Cir. 2004) (“Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.”); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are “entirely subjective in nature”); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (“[W]hen the Plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.”); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (denying summary judgment where Plaintiff demonstrated that one of many of the Defendant’s stated reasons was pretextual, stating, “It is not simply a question of how many of the Defendant’s reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.”).

CONSTRUCTIVE DISCHARGE

To prove [his] [her] claim of constructive discharge, the Plaintiff must show that the Defendant by its illegal discriminatory acts made or allowed working conditions to become 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 & Company*, 21 F.3d 989, 992 (10th 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”). *See also, MacKenzie v. City & County of Denver*, 414 F.3d 1266, 1281 (10th Cir. 2005); *Vann v. Southwestern Bell Tel. Co.*, 179 F. App'x 491, 498 (10th Cir. 2006) (“An employee is constructively discharged “when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no other choice but to quit”). A demotion or reassignment to a job with lower pay or lower status may, depending on the aggravating nature of the individual facts and circumstances of the case, be sufficient to support a jury verdict of constructive discharge. *Touchet v. Halliburton Co.*, 78 F.3d 598 (10th Cir. 1996).

Authority:

Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342, 2350 (2004); *Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1229-30 (10th Cir. 2009); *Barone v. United Airlines, Inc.*, 355 F. App'x 169, 107 Fair Empl. Prac. Cas. (BNA) 1798 (10th Cir. 2009) (where transfer to a distant state is alternative, court held that situation presented by employer was effectively no choice); *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 980-81 (10th Cir. 2008);

EEOC v. PVNF, LLC, 487 F.3d 790, 805 (10th Cir. 2007); *Garrett v. Hewlett-Packard Company*, 305 F.3d 1210, 1221 (10th Cir. 2002); *Touchet v. Halliburton Co.*, 78 F.3d 598 (10th Cir. 1996); *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1574 (10th Cir. 1992); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1153 (10th Cir. 1990) (jury could reasonably conclude that the Plaintiff was constructively discharged when he was threatened with termination); *Bragg v. Office of the Dist. Atty.*, 704 F.Supp.2d 1032 (D. Colo. 2009) (basis for constructive discharge claim found where Plaintiff alleged she was subjected to frequent harassing and discriminatory language, persistent sexual advances, and interference in, and disruptions of, her job functions); *Colorado Civil Rights Commission v. State of Colorado*, 488 P.2d 83, 86 (Colo. App. 1971) (a signed statement that a resignation is voluntary does not relieve an employer of liability for constructive discharge if the resignation was in fact involuntary).

BUSINESS JUDGMENT

In reaching your verdict on the Plaintiff's [race] [color] [religion] [sex] [national origin] discrimination claim, you should keep in mind that the law requires only that an employer not discriminate against an employee based on [race] [color] [religion] [sex] [national origin]. 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 business decisions or act as a personnel manager, unless you find that the decisions were motivated, in whole or in part, by [illegal discrimination and/or retaliation or other illegal act]. In evaluating Defendant's asserted business judgment, you must examine whether business judgment was truly employed or whether it was merely used as a pretext or to cover up for [illegal discrimination and/or retaliation or other illegal act].

Notes on Use:

The instruction should be merged with the pretext instruction when warranted by the facts of the case.

Romero v. City of Albuquerque, 190 F. App'x 597, 605 (10th Cir. 2006) ("The courts may not act as a super personnel department that second guesses employers' business judgments. Accordingly, minor differences between a Plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext") citing *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308-09) (10th Cir. 2005).

Authority:

Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1261 (10th 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 (10th 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 (10th Cir. 1993) (Title VII is not violated by the exercise of erroneous or even illogical business judgment.). *Montana v. First Federal Savings and Loan Assoc.*, 969 F.2d 100, 106 (2nd Cir. 1988) (Court must "look behind" the employer's claim that it merely exercised a business decision in good faith).

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 even if the comments were not made in the context of Defendant's [adverse employment action]. 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 may not be appropriate where the court has already addressed stray remarks at the summary judgment stage. Additionally, 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:

Plotke v. White, 405 F.3d 1092, 1107 (10th Cir. 2005) ("The Supreme Court has emphasized that courts should not reject a Plaintiff's evidence of additional circumstantial gender-based comments and treatment simply because they 'were not made in the direct context of [the Plaintiff's] termination.'") citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151-53 (2000); *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1479 (10th Cir. 1996); *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 531 (10th Cir. 1994); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th 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], as determined by direct or circumstantial evidence, 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 the same even if discrimination [retaliation] had played no role in the employment decision.

Notes on Use:

This instruction can be given in Title VII cases only. The Supreme Court has ruled, based on difference in statutes, that ADEA cases cannot receive an "mixed motive" analysis. *Gross v. FBL Fin. Servs., Inc.*, 447 U.S. 167 (2009).

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); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217 (10th Cir. 2008); *Davey v. Lockheed*, 301 F.3d 1204, 1213-14 (10th Cir. 2002). *See also Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 (10th Cir. 1992).

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.]

Notes 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 (10th Cir. May 7, 1999) (unpublished). See also *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th 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; *Oncala 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 (10th 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 (10th Cir. 1999); *Penry v. Fed. Home Loan Bank of Topeka*, 1555 F.3d 1257, 1261 (10th 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. 78, 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, he/she is only a “supervisor” when the employer has empowered that employee to take tangible employment actions against the Plaintiff.

Notes on use:

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

“Tangible employment action” is independently defined within the sexual harassment jury instructions and should be used with this instruction.

The Supreme Court clearly intended to establish a bright line rule as to who qualifies as a supervisor in *Vance v. Ball State Univ.*, 570 U.S. ____, 133 S. Ct. 2434 (2013). However, the majority also acknowledged that vicarious liability may be imposed when non-supervisory employees have the power to recommend tangible actions, noting that in some circumstances “the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.” *Id.* at 2452, citing, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

Authority:

Vance v. Ball State Univ., 570 U.S. ____, 133 S. Ct. 2434 (2013).

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 minor 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 Stores Inc., 144 F.3d 664, 673 (10th 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.

Notes 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. If a tangible employment action occurred at the hands of a supervisor, the affirmative defense is not available.

Authority:

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

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

The Plaintiff has brought this lawsuit under the Americans with Disabilities Act, also called the ADA. The purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The ADA makes it unlawful for an employer to discriminate against a qualified individual because of his or her disability with respect to job application procedures, hiring, advancement of employees, compensation, job training, discharge of employees, and other terms, conditions and privileges of employment.

[The ADA also makes it unlawful to fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee [or applicant] with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.]

Authority:

42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12112(a); 42 U.S.C. § 12112(b)(5).

DISPARATE TREATMENT – ELEMENTS

Under the ADA, it is unlawful for an employer to [insert challenged action] or otherwise discriminate against an employee because of that employee’s disability if the employee is qualified to do the job.

In order to prevail on this claim, Plaintiff must prove that:

1. The Plaintiff had a “disability,” as hereafter defined;
2. That the Plaintiff was otherwise “qualified,” as hereafter defined; and
3. That the Plaintiff’s “disability” was a motivating factor in the Defendant’s decision to [insert challenged action].

Notes on Use:

The ADA instructions included here are not intended to be all exhaustive. The Committee has elected to focus on the two most prevalent claims that arise under the ADA: disparate treatment and failure to accommodate. It should be noted that the scope of the ADA is much broader and also prohibits discrimination 1) in the utilization of job standards and criteria that have the effect of discrimination; 2) against employees/applicants because of the disability of an individual with who the employee/applicant is known to have a relationship or association; 3) in the use of qualification standards or employee tests that screen out individuals with disabilities; and 4) in the administration of tests concerning employment and the failure to ensure that test results accurately reflect the skills necessary for the position. 42 U.S.C. § 12112(b). These instructions need to be substantially modified if any of the above claims are raised.

Authority:

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

DISABILITY – DEFINED

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

[insert applicable paragraph]

1. Has a physical or mental impairment that substantially limits one or more of the major life activities of the person [or]
2. Has a record of having a physical or mental impairment that substantially limits one or more major life activities [or]
3. Is believed by the employer to have an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.

Notes on Use:

Paragraph 3 addressing “regarded as” or “perceived” disability claims shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. 42 U.S.C. § 12102(3)(B).

With respect to claims that fall within Paragraph 3, note that many of the following instructions are inapplicable, as identified in each instruction’s Notes on Use.

Authority:

42 U.S.C. § 12102(1) and (3).

PHYSICAL OR MENTAL IMPAIRMENT[S] AND MAJOR LIFE ACTIVITIES –
COURT DETERMINATION

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

The Court has determined that the major life [activity] [activities] involved in this case [was] [were]: [insert applicable major life activities].

Notes on Use:

This instruction should only be given in an “actual” or “record of” disability case. In such cases, the questions of whether the Plaintiff has a physical or mental impairment within the meaning of the ADA, as well as whether the identified affected activity is a “major life activity,” are questions of law for the Court to decide. *See, e.g., Doebele v. Sprint*, 342 F.3d 1117, 1129 (10th Cir. 2003); *Bristol v. Board of County Comm’rs*, 281 F.3d 1148, 1156-57 (10th Cir. 2002). The EEOC Regulations define mental and physical impairments to be: 1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or 2) any mental or psychological disorder, such as intellectual ability, organic brain syndrome, emotional or mental illness, and learning disabilities. 29 C.F.R. § 1630(h).

The ADA Amendments Act of 2008 clarified what types of activities are “major life activities” under the Act: these include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2)(A); *see also* 29 C.F.R. § 1630(i)(1). A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2)(B). The determination of whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.” 29 C.F.R. § 1630(i)(2).

SUBSTANTIALLY LIMITED – DEFINED

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 may consider the following factors:

1. The condition under which the individual performs the major life activity;
2. The manner in which the individual performs the major life activity; and/or
3. The duration of time it takes the individual to perform the major life activity.

An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the use of mitigating measures such as [medication, medical supplies, equipment, prosthetics, hearing aids, implants, mobility devices, or oxygen therapy equipment] or the [use of assistive technology, reasonable accommodations or auxiliary aids, learned behavioral or adaptive neurological modifications].

Notes on Use:

This instruction should only be given in an “actual” or “record of” disability case, as the question of whether an impairment “substantially limits” a major life activity is not relevant to a “regarded as” claim. 29 C.F.R. § 1630(j)(2).

While the question of whether the identified affected activity is a “major life activity” is a question of law for the Court to decide, the jury must decide if the impairment “substantially limits” the major life activity/activities found by the Court. *See, e.g., Doebele v. Sprint*, 342 F.3d 1117, 1129 (10th Cir. 2003); *Bristol v. Board of County Comm’rs*, 281 F.3d 1148, 1156-56 (10th Cir. 2002). The ADA Amendments Act of 2008, however, makes clear that the determination of whether an impairment “substantially limits” a major life activity should not demand extensive analysis. 29 C.F.R. § 1630(j)(1)(iii). Some impairments will automatically be considered “substantially limiting:” deafness, blindness, intellectual disabilities, cancer, autism, diabetes, epilepsy, HIV, multiple sclerosis, major depression, bipolar disorder, post-traumatic stress disorder, and schizophrenia. 29 C.F.R. § 1630(j)(3).

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 (10th Cir. 2002); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th 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.

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630(j)(1)(vii).

Authority:

42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630(j)(4); 29 C.F.R. § 1630(j)(1)(ii). *McGeshick v. Principi*, 357 F.3d 1146, 1150 (10th Cir. 2004); *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003); *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1158 (10th Cir. 2002).

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.

In certain circumstances, the ability of the Plaintiff to safely perform the position may be relevant to whether the Plaintiff could meet the essential functions of the position. *See McKenzie v. Benton*, 388 F.3d 1342, 1355-56 (10th Cir. 2004). *See also Justice v. Crown Cork and Seal Co., Inc.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008). In such cases, the Plaintiff will bear the burden of demonstrating that he or she is not a direct threat, rather than the Defendant, and the instruction should be modified accordingly.

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 cannot 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); 29 C.F.R. § 1630.2(m); *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121, 1127 (10th Cir. 2008), *quoting Tate v. Farmland Industries, Inc.*, 268 F.3d 989, 992-93 (10th Cir. 2001); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004), *quoting Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003); *Hudson v. MCI Telecom. Corp.*, 87 F.3d 1167, 1168 (10th 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. Any written description that was in existence before the dispute arose.

In addition to [these][this] factor[s], you may also 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 essential functions inquiry focuses upon whether a job function was essential at the time it was imposed or sought to be imposed upon the Plaintiff. The additional factors that may be considered in determining whether a function was essential will depend upon the factual issues presented by the case. The inquiry is not intended to second guess the employer or require the employer to lower company standards.

Authority:

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n); *Hennagir v. Utah Dep’t of Corrections*, 587 F.3d 1255, 1262 (10th Cir. 2009); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1190-91 (10th Cir. 2003); *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 993 (10th Cir. 2001); *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996), quoting *White v. York Int’l Corp.*, 45 F.3d 357,361-62 (10th Cir. 1995).

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) or that all of the Defendant’s stated reasons for [the decision/adverse employment action] were false. The Plaintiff must prove only that [insert protected status] was a motivating factor. That is, the Plaintiff’s [protected status] was a 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 ADA cases. The Supreme Court distinguished ADEA cases from Title VII holding that ADEA age discrimination must be proved under a “but-for” test in contrast to race, color, age, national origin, and sex under Title VII, which undergo a “motivating factor” analysis. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Cases supporting the “motivating factor” test 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 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

Authority:

42 U.S.C.A § 2000e-2(m); *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); *Fye v. Oklahoma Corp. Comm’n*, 516 F.3d 1217 (10th Cir. 2008); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

PRETEXT

The Plaintiff claims that the Defendant's stated reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) to cover up for disability discrimination. If you do not believe one or more of the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that Plaintiff's disability was a factor that made a difference in the Defendant's decision. The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that Plaintiff's disability was the factor that made a difference in the employer's treatment of Plaintiff.

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 (10th Cir. 2002). The 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 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the

Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities).

See also Matthews v. Euronet Worldwide, Inc., 2008 WL 822461, *4 (10th Cir. 2008) (“[T]o the extent the Defendants’ articulated reasons were subjective in nature, they are supported by objective facts.”); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an “overwhelming disparity”); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) (“Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision.”); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App’x 63, 68 (10th Cir. 2004) (“Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.”); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are “entirely subjective in nature); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (“[W]hen the Plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.”); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (denying summary judgment where Plaintiff demonstrated that one of many of the Defendant’s stated reasons was pretextual, stating, “It is not simply a question of how many of the Defendant’s reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.”).

REASONABLE ACCOMMODATION

Under the ADA, it is unlawful for an employer to not make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, [or to deny employment opportunities to a job applicant who is an otherwise qualified individual with a disability] unless the employer can prove that the accommodation would impose an undue hardship on the operation of the business.

Notes on Use:

An employer is not required to reasonably accommodate a “regarded as” or “perceived” disability. 42 U.S.C. § 12201(h). In such a case, this instructions, as well as the two subsequent instructions, should not be given.

Authority:

42 U.S.C. 12112(b)(5).

FAILURE TO ACCOMMODATE – ELEMENTS

In order for Plaintiff to prevail on [his] [her] claim that Defendant failed to reasonably accommodate [his] [her] disability, Plaintiff must show:

1. That Plaintiff had a disability;
2. That Defendant knew of Plaintiff's disability;
3. Plaintiff could have performed the essential functions of the job if Plaintiff had been provided with [identify specific accommodations identified];
4. The [specific accommodations requested] were reasonable; and
5. Defendant failed to provide [specific accommodation requested] and unreasonably failed to provide any other accommodation.

Notes on Use:

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 (10th 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 (10th Cir. 1999).

Authority:

42 U.S.C. § 12112(b)(5); *White v. York Int’l Corp.*, 45 F.3d 357, 361 (10th 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. Nor is the employer necessarily obligated to provide the accommodation requested by the employee, if other reasonable accommodations exist that the employer has offered to provide.

Authority:

42 U.S.C. § 12111(9); 29 C.F.R 1630.2(o); *Hennagir v. Utah Dep’t of Corrections*, 587 F.3d 1255, 1264-65 (10th Cir. 2009); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1122-23 (10th Cir. 2004); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1192 (10th Cir. 2003); *Martin v. Kansas*, 190 F.3d 1120, 1133 (10th 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. It is Defendant’s burden to prove this defense by a preponderance of the evidence.

“Undue hardship” means an action requiring significant difficulty or expense when considered in light of various factors, including the following:

1. The nature and cost of the accommodation;
2. The overall financial resources of the Defendant;
3. The number of persons employed by the Defendant; and
4. 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, or eliminate factors, depending upon the facts of the case.

Authority:

42 U.S.C. 12111(10); 29 C.F.R. 1630.2(p); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1334 (10th Cir. 1998), *quoting Der Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1087 (10th Cir. 1997).

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 by a preponderance of the evidence that:

1. The Plaintiff's [continued] employment posed a significant risk 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." In certain circumstances, the ability of the Plaintiff to safely perform the position may go to whether the Plaintiff could meet the essential functions of the position. *See McKenzie v. Benton*, 388 F.3d 1342, 1355-56 (10th Cir. 2004). *See also Justice v. Crown Cork and Seal Co., Inc.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008). In such cases, the Plaintiff will bear the burden of demonstrating that he or she is not a direct threat, rather than the Defendant, and the instruction should be modified accordingly.

Authority:

42 U.S.C. §§ 12111(3), 12113(a), (b); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2); *Justice v. Crown Cork and Seal Co., Inc.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); *McKenzie v. Benton*, 388 F.3d 1342, 1353 (10th Cir. 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 purpose of the ADEA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals who are 40 years of age or older based on their age.

The ADEA makes it unlawful for an employer to discriminate against an individual who is 40 years of age or older, with respect to his or her compensation, terms, conditions, or privileges of employment, because of his or her age.

Authority:

29 U.S.C. § 623(a)(1)-(2); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277 (10th Cir. 2010); *O’Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

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] employer would not have taken the challenged employment decision but for the Plaintiff's age. This standard does not require Plaintiff to show that age was the sole motivating factor in the employment decision. Instead, an employer may be held liable under the ADEA even if other factors contributed to the employer making the challenged decision, so long as age was the factor that made a difference.

Authority:

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

PRETEXT

The Plaintiff claims that the Defendant's stated reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) to cover up for age discrimination. If you do not believe one or more of the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that age was a factor that made a difference in the Defendant's decision. The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that age was the factor that made a difference in the employer's treatment of Plaintiff.

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 (10th Cir. 2002). The 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 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the

Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities). See also *Matthews v. Euronet Worldwide, Inc.*, 2008 WL 822461, *4 (10th Cir. 2008) ("[T]o the extent the Defendants' articulated reasons were subjective in nature, they are supported by objective facts."); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an "overwhelming disparity"); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) ("Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision."); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App'x 63, 68 (10th Cir. 2004) ("Pretext is not established by virtue of the fact that an employee has receive some favorable comments in some categories or has, in the past, received some good evaluations."); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are "entirely subjective in nature"); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) ("[W]hen the Plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility."); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (denying summary judgment where Plaintiff demonstrated that one of many of the Defendant's stated reasons was pretextual, stating, "It is not simply a question of how many of the Defendant's reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.).

ADEA – AGE-RELATED REMARKS

The Plaintiff may prove discriminatory intent under the ADEA, either directly or indirectly, by offering evidence of remarks that are age-related. In considering the weight to place on this evidence, you may consider the following factors:

1. whether the remark(s) [was] [were] close in time to the [adverse employment action] at issue,
2. whether the remark(s) [was] [were] made by an individual with authority over the employment decision at issue, and
3. whether the remark(s) [was] [were] connected to the employment decision at issue.

A single spoken statement referring to age, standing alone, may, but 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.

Note on Use:

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

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2111-12 (2000); *Hare v. Denver Merch. Mart, Inc.*, 255 F. App'x 298, 303 (10th Cir. 2007); *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1251 (10th Cir. 2002); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531-32 (10th Cir. 1994).

ADEA – AGE OF REPLACEMENT

Where the Plaintiff has been replaced in [his] [her] employment position following termination of [his] [her] employment, 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's employment was terminated 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.

Authority:

Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1138 (10th Cir. 2000); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 560 (10th Cir. 1996).

ADEA – REDUCTION IN FORCE

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 in a similar position. The Plaintiff is not required to show that [he] [she] is as or more qualified than the employee[s] who [was] [were] retained.

Notes on Use:

This instruction should be used only in cases involving a reduction in force (“RIF”).

Authority:

Branson v. Price River Coal Co., 853 F.2d 768 (10th 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 the Defendant's violation of the ADEA 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.

Authority:

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

ADEA – AFFIRMATIVE DEFENSE – BONA FIDE OCCUPATIONAL
QUALIFICATION

The Defendant has asserted that the employment decision at issue was the result of a *bona fide* occupational qualification. To avoid liability under the ADEA, 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. there is a factual basis for believing that all or substantially all individuals over the age ____ would be unqualified for [the Plaintiff's job][the job sought by the Plaintiff], OR
3. if it is impossible or highly impractical to deal with individuals over the age of ____ on an individualized basis.

Notes on Use:

In almost all cases where this defense applies, the Defendant must concede that it took age into account in making the employment decision. Use this instruction only where the Defendant asserts that the employment decision was the result of a *bona fide* occupational qualification. The practitioner should consider modifying the instruction consistent with 29 U.S.C. § 623(f)(1) if presented with circumstances where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.

Authority:

29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.6; O'Malley, Grenig & Lee, FED-JI § 173.60 (5th ed. 2001); *Smith v. City of Jackson*, 544 U.S. 228, 233 FN3 (2005); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, (2000); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413-417 (1985).

ADEA – AFFIRMATIVE DEFENSE – BONA FIDE SENIORITY SYSTEM

The Defendant has asserted that the employment decision at issue was the result of a *bona fide* seniority system. To avoid liability under the ADEA, the Defendant must prove that, at the time of the employment decision affecting the Plaintiff,

1. 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;
2. the essential terms and conditions of the seniority system have been communicated to all affected employees; and
3. the seniority system can be shown to be applied uniformly to all those affected, regardless of age.

Notes on Use:

In almost all cases where this defense applies, the Defendant must concede that it took age into account in making the employment decision. Use this instruction only where the Defendant asserts that the employment decision was the result of a *bona fide* seniority system.

Authority:

29 U.S.C. § 623(f)(2)(A); 29 C.F.R. § 1625.8; O'Malley, Grenig & Lee, FED-JI § 173.61(5th ed. 2001); *Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir. 1995), *cert. denied* 516 U.S. 1115 (1996).

ADEA – AFFIRMATIVE DEFENSE – BONA FIDE EMPLOYEE BENEFIT PLAN

The Defendant has asserted that the employment decision at issue was the result of a *bona fide* employee benefit plan. To avoid liability under the ADEA, 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.

Notes on Use:

In almost all cases where this defense applies, the Defendant must concede that it took age into account in making the employment decision. Use this instruction only where the Defendant asserts that the employment decision was the result of a *bona fide* employee benefit plan.

Authority:

29 U.S.C. § 623(f)(2)(B); O'Malley, Grenig & Lee, FED-JI § 173.62 (5th ed. 2001).

RETALIATION – STATUTE INVOLVED

The Plaintiff claims that the Defendant retaliated against [him] [her] in violation of a federal statute called [insert Title VII, the ADA, the ADEA, or 42 U.S.C. § 1981]. The purpose of [insert appropriate statute] is to protect the rights of individuals to be free from workplace discrimination and harassment based on [insert protected group]. The anti-retaliation protection in [insert appropriate statute] provides that it is unlawful for an employer to retaliate against an individual because [he] [she] in good faith opposed what she/he believed were discriminatory or retaliatory employment practices or because [he] [she] has made a charge, testified, assisted or participated in any manner in any investigation, proceeding or hearing governed by [insert appropriate statute].

Authority:

42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 634(d) (ADEA); *Roberts v. Roadway Express*, 149 F.3d 1098, 1103 & n.1 (10th Cir. 1998) (§ 1981).

RETALIATION ELEMENTS

To establish a claim of retaliation, the Plaintiff must prove that:

1. Plaintiff [describe facts alleged to constitute protected activity];
2. Defendant took an action that a reasonable employee would have found materially adverse; and
3. Defendant would not have taken the challenged employment decision but for the Plaintiff's protected activity.

If you find that the Plaintiff has proven each of these elements by a preponderance of the evidence, then you must find for the Plaintiff and against the Defendant on this claim. If, on the other hand, you find that the 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 the Defendant.

Notes on Use:

Whether a Plaintiff's actions constitute protected activities under the various civil rights statutes and whether Plaintiff suffered an adverse action are legal questions for the Court. *Kelley v. City of Albuquerque*, 542 F.3d 802, 821 (10th Cir. 2008) (protected activity is legal question); *Morales-Vallellanes v. Potter, et al.*, 605 F.3d 27, 33 (1st Cir. 2010) (adverse action is legal question); *Gerhart v. Boyerton Area School Dist.*, 2002 WL 31999365 (E.D. Pa. March 4, 2002) (adverse action is legal question); *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 41 (D.D.C. 2004) (protected activity is legal question); *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427, 443 (S.D.N.Y. 2009) (protected activity and adverse action are legal questions). Therefore, in most cases, the Court will not instruct the jury regarding elements (1) and (2), although it may inform the jury of its findings on those issues. The jury may be instructed on elements (1) and (2) where the factual basis for those requirements is in dispute, such as where an employer denies that an employee opposed allegedly discriminatory practices. In the usual case, however, where elements (1) and (2) are not in dispute, element (3) in this proposed instruction is the only instruction that should be given.

As a general rule, the jury is not to be instructed in the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), burden-shifting scheme applicable to retaliation claims. Instead, the jury should be instructed regarding the ultimate question of retaliation and the applicable "motivating factor" standard. 42 U.S.C. § 2000e-2(m) (Plaintiff must prove that improper considerations were "a motivating factor for any employment practice, even though other factors also motivated the practice"); *Messina v. Kroblin Transp. Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) (ultimate question is whether age was a "determinate factor" in the discharge, not the presumptions and burdens inherent in the *McDonnell-Douglas* formulation which drop out of consideration); *Sharkey v. Lasmo*, 214 F.3d 371, 374 (2nd Cir. 2000) (fact finder should determine whether employer was "motivated" by discrimination "without reference to the success of burden-shifting tests that the parties have been required to pass"); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529-30 (10th Cir. 1995) ("motivating factor" does not mean "sole motivating

factor,” rather, opposition to discrimination must be “a reason” and “a factor that made a difference”); *Fisher v. Forest Wood Co., Inc.*, 525 F.2d 972 (10th Cir. 2008) (motivating factor in Title VII retaliation case); *Fye v. Oklahoma Corp. Com’n*, 516 F.3d 1217 (10th Cir. 2008) (motivating factor test in Title VII retaliation case); *Flitton v. Primary Residential Mortg., Inc.*, 238 F. App’x 410 (10th Cir. 2007).

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 (10th Cir. 1998); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985-86 (10th Cir. 1996).

Authority:

The “but for” causation standard adopted for ADEA claims in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) is also applicable to retaliation claims under Title VII. *University of Texas Southwestern Medical Center v. Nassar*, 57 U.S. ____ 2013. The anti-retaliation provisions contained in Title VII, the ADA, and the ADEA are almost verbatim and the same standard has consistently been applied. 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. §623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). See also *Burlington Ne. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (Title VII); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262-63 (10th Cir. 1998) (Title VII); *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1381 (10th Cir. 1994) (Title VII); *Johnson v. Weld County, Colorado*, 594 F.3d 1202 (10th Cir. 2010) (ADA); *Woods v. Boeing Co.*, 355 F. App’x 206 (10th Cir. 2009) (ADEA); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1201 (10th Cir. 2008) (ADEA retaliation); *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007) (ADA retaliation); *Roberts v. Roadway Express*, 149 F.3d 1098, 1103 & 1103 n.1 (10th Cir. 1998) (§ 1981).

TITLE VII/ADA/§ 1981 – RETALIATION – MATERIALLY ADVERSE ACTION

A “materially adverse” action is any action by the employer that is likely to discourage a reasonable worker in the Plaintiff’s position from exercising [his] [her] rights under [insert Title VII, the ADA, the ADEA, or § 1981].

Notes on Use:

Unlike Title VII’s substantive anti-discrimination provision, the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). Petty slights, minor annoyances and simple lack of good manners will not normally be sufficient to show retaliation claim. However, context matters in making this determination. For example, “[a] schedule change ... may make little difference to many workers, but may matter enormously to a young mother with school age children.” *Id.* at 69. Likewise, a reassignment of duties may or may not be retaliatory, depending on the circumstances of the case. *Id.* at 71. “In recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action.” *Jeffries v. State of Kansas, Dept. of Social and Rehabilitation Services*, 147 F.3d 1220, 1231 (10th Cir. 1998).

Authority:

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S.Ct. 2257, 2268 (1998) (conduct is adverse employment action if it “constitutes 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”); *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1279-80 (10th Cir. 2010) (holding that Plaintiff suffered an adverse employment action where reassignment led to decrease in benefits and a loss of professional prestige, even though it was not a demotion); *Medina v. Income Support Division*, 413 F.3d 1131, 1137 (10th Cir. 2005) (disciplinary actions short of termination can be considered adverse employment actions if they increase the likelihood that the employee will be terminated or otherwise affect the employee’s future employment prospects.); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10th Cir. 2004) (finding of adverse employment action where negative references would seriously harm future employment prospects); *Stinnett v. Safeway*, 337 F.3d 1213, 1217 (10th Cir. 2003) (finding transfer to be an adverse employment action because even where Plaintiff “maintained her wage

level, seniority, and title... there is evidence that the reassignment resulted in a de facto reduction in responsibility and required a lesser degree of skill); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (evidence that employer had “‘papered’ [Plaintiff’s] file with negative reports including two written reprimands...are the kinds of serious employment consequences that adversely affected or undermined [Plaintiff’s] position, even if he was not discharged, demoted or suspended”); *Jeffries v. State of Kansas, Dept. of Social and Rehabilitation Services*, 147 F.3d 1220, 1231 (10th Cir. 1998) (Plaintiff’s allegation that after she complained, her supervisor would not supervise her and issued threats that her contract would not be renewed at end of year was sufficient to raise a genuine factual dispute as to whether she suffered an adverse employment action in retaliation for her complaint); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) (employer may be liable for retaliatory acts of co-workers); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996) (showing of adverse employment action where employee required to “go through several hoops” in order to obtain severance benefits); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (showing of adverse employment action where employer reported Plaintiff of suspected crime thereby creating risk of humiliation and damage to reputation); *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324, 329 (10th Cir. 1996) (noting that pattern of retaliation began with Plaintiff being “written up”); *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 799 (10th Cir. 1993) (reassignment may be an adverse employment action when the employee “receives less pay, has less responsibility, or is required to utilize a lesser degree of skill than his previous assignment”), *overruled on other grounds by Buchanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995).

RETALIATION – CAUSATION

In order to prove that Plaintiff's employer would not have taken the challenged employment decision but for the Plaintiff's protected activity, Plaintiff does not need much to show that his/her protected activity was the sole motivating factor in the employment decision. Instead, an employer may be held liable for retaliation even if other factors contributed to the employer making the challenged decision, so long as retaliation was the factor that made a difference.

Authority:

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

FREEDOM OF SPEECH

The Plaintiff alleges that the Defendant violated [his] [her] freedom of speech as guaranteed by the First Amendment to the United States Constitution. Freedom of Speech protects the right of public employees to speak out on issues of public concern. In order for the Plaintiff to prevail on [his] [her] claim that [he] [she] was retaliated against in violation of [his] [her] First Amendment rights, the Plaintiff must prove by a preponderance of the evidence that [his] [her] speech [describe where appropriate] was a substantial or motivating factor in the adverse actions [describe where appropriate] taken against [him] [her].

If you find that the Plaintiff has failed to prove [his] [her] claim by a preponderance of the evidence, then you must find against [him] [her] on this claim and in favor of the Defendant.

If you find that the Plaintiff has proved retaliation by a preponderance of the evidence, you may still find for the Defendant if you find that the Defendant has proved that it would have taken the same action against the employee even in the absence of the protected speech.

Notes on Use:

The elements of a claim for violation of the First Amendment's Freedom of Speech in the employment context are: (1) the speech in question was not expressed pursuant to [his] [her] official duties, (2) the subject of [his] [her] speech is a matter of public concern, (3) [his] [her] interest in commenting on the issue outweighs the potential disruptive effect of that speech, and (4) [his] [her] speech [describe where appropriate] was a substantial or motivating factor in the adverse actions [describe where appropriate] taken against [him] [her]. *Brammer-Hoelter, et al. v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202-03 (10th Cir. 2007) (This decision was modified in several unrelated respects in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175 (10th Cir. 2010)); *see also Garcetti v. Ceballos*, 547 U.S. 410 (2006).

As a general rule, elements (1) through (3) of this instruction are legal questions for the Court to decide and only element (4) and Defendant's affirmative defense are jury questions. *Brammer-Hoelter*, 492 F.3d at 1203. Consequently, in most cases, the jury will only be instructed regarding element (4) and Defendant's defense. However, in certain limited circumstances, the first three elements may turn on resolution of a factual dispute to be decided by the jury, such as deciding precisely what the Plaintiff said, which could affect the analysis of each of the first three steps. *Deutsch v. Jordan*, 618 F.3d 1093 (10th Cir. 2010). *See also Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993).

PROTECTED [ACTIVITY] [ACTIVITIES] – OPPOSITION
(MISTAKEN BUT REASONABLE GOOD FAITH BELIEF)

The 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] [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 [he] [she] is entitled to protection from retaliation. *Crumpacker v. Kan. Dept. 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 (10th 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 (10th 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. Dept. of Human Res., 338 F.3d 1163, 1171-72 (10th Cir. 2003) (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001)).

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

The Plaintiff must prove that [he] [she] actually participated in [a] protected [activity] [activities], but the 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 (10th 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 (10th Cir. 2000), *overruled on other grounds*, *Crumpacker v. Kan Dept. of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003), 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 (10th 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 (10th Cir. 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993).

PRETEXT

The Plaintiff claims that the Defendant's stated reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) to cover up for retaliation. If you do not believe one or more of the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that retaliation was a factor that made a difference in the Defendant's decision. The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[The [describe adverse action] is closely related in time to Plaintiff's [insert protected activity here]; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that retaliation was the factor that made a difference in the employer's treatment of Plaintiff.

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 (10th Cir. 2002). The 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 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities).

See also Matthews v. Euronet Worldwide, Inc., 2008 WL 822461, *4 (10th Cir. 2008) (“[T]o the extent the Defendants’ articulated reasons were subjective in nature, they are supported by objective facts.”); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an “overwhelming disparity”); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) (“Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision.”); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App’x 63, 68 (10th Cir. 2004) (“Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.”); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are “entirely subjective in nature”); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (“[W]hen the Plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.”); *Bryant v. Farmers Ins. Exchange*, 432 F.3d

1114, 1127 (10th Cir. 2005)(denying summary judgment where Plaintiff demonstrated that one of many of the Defendant's stated reasons was pretextual, stating, "It is not simply a question of how many of the Defendant's reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.).

In cases of retaliation: *Annett v. Univ. of Kan.*, 371 F.3d 1233 (10th Cir. 2004) (protected conduct closely followed by adverse action may justify an inference of retaliatory motive); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 386 (10th Cir. 1984) (same); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1290 (10th Cir. 2007); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006) (termination occurring within 6 weeks after employer learned employee would take FMLA leave held sufficiently close to show causation). Although courts have allowed close temporal proximity between protected activity and adverse employment action to operate as a proxy for the evidentiary requirement of causation, the absence of close temporal proximity is not dispositive of whether a causal connection exists between protected activity and adverse action. *Marx v. Schnuck Markets*, 76 F.3d 324, 329 (10th Cir. 1996) ("[P]rotected conduct closely followed by adverse action may justify an inference of retaliatory motive...[T]he phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the...complaint and only culminates later in actual discharge."); *Roberts v. Roadway Express*, 149 F.3d 1098, 1104 (10th Cir. Colo. 1998) (upholding finding of retaliation where Plaintiff was terminated almost two years after complaints of discrimination); *See also, Miller-El v. Cockrell*, 537 U.S. 322 (2003).

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 Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 527 (10th 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 (10th 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 (10th 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 – ADA AND TITLE VII/SECTION 1981 CASES ONLY

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 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 Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 1992).

Authority:

42 U.S.C. § 1981a.

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 position 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 (11th Cir. 1985); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267-268 (10th 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 (10th 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 (4th 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 (11th Cir. 1986); *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1307-09 (7th 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 (10th Cir. 1993) *citing* 510 U.S. 1072 (1994); *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980).

UNCONDITIONAL OFFER OF EMPLOYMENT

You have heard evidence in this case that 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, 123-124 (10th Cir. 1986).

NOMINAL DAMAGES

If you return a verdict for the Plaintiff, but find that 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 Instructions (Civil) Eighth Circuit § 5.23 (1999); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1228 (10th Cir. 2001); *Salazaar v. Encinias*, 2000 U.S. App. LEXIS 32022, *7-8 (10th Cir. Dec. 15, 2000).

PUNITIVE DAMAGES – ADA AND TITLE VII/SECTION 1981 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 (10th Cir. 1999), *abrogated on other ground*, *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 *10th Cir. 2000).

Authority:

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

FAMILY MEDICAL LEAVE ACT
(FMLA) – STATUTE INVOLVED

The Plaintiff brought this lawsuit under the “Family and Medical Leave Act,” also called the “FMLA.” The purposes of the FMLA are to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.

The FMLA entitles eligible employees to take up to twelve weeks of unpaid leave during any twelve month period for several reasons including:

- the employee’s own serious health condition that makes him unable to perform the functions of his position;
- the birth of a son or daughter and to care for the newborn child;
- the placement with the employee of a son or daughter for adoption or foster care;
- to care for the employee’s spouse, son, daughter, or parent who has a serious health condition.

[Additionally, eligible employees are entitled to up to 26 workweeks of leave to care for a covered service member with a serious injury, illness, or qualifying exigency.]

The FMLA generally gives an employee the right following FMLA leave either to be returned by the employer to the position [he] [she] held when the leave began or to an equivalent position.

Notes on Use:

Two theories of recovery are recognized under the FMLA, 29 U.S.C. § 2615(a). One is an interference theory. *Id.* at § 2615 (a)(1). The other is a retaliation or discrimination theory. *Id.* at § 2615 (a)(2). *See, e.g., DeFreitas v. Horizon Inv. Mgmt. Corp.*, 577 F.3d 1151, 1160 (10th Cir. 2009).

The courts often afford Department of Labor FMLA implementing regulations *Chevron* deference because the Department is charged with administering the statute. *See Wilkins v. Packerware Corp.*, 260 F. App’x 98, 104 (10th Cir. 2008), *citing Hackworth v. Progressive Cas., Ins. Co.*, 468 F.3d 722, 726-27 (10th Cir. 2006).

Authority:

29 U.S.C. § 2612; 29 C.F.R. § 825.112.

FMLA – DEFINITION – COVERED EMPLOYER

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs fifty (50) or more employees for each working day during each of the twenty (20) or more calendar workweeks in the current or preceding calendar year.

Authority:

29 C.F.R. 825.104(a).

FMLA – DEFINITION – COVERED WORK LOCATION

An employee who seeks relief against a covered employer as defined in these instructions must show that [he or she] works in an area where the employer employs fifty (50) or more employees within a seventy-five (75) mile radius.

Authority:

29 C.F.R. 825.110(a)(3).

FMLA – DEFINITION – “ELIGIBLE EMPLOYEE”

An “eligible employee” is one who has been employed by the employer for at least twelve months and has worked at least 1,250 hours during the previous twelve-month period.

Notes on Use:

“Whether an employee has worked the minimum 1,250 hours of service is determined according to principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work.” *See Knapp v. America West Airlines*, 207 F. App’x 896, 898, 2006 U.S. App. LEXIS 29116, *4 (10th Cir. 2006), citing 29 C.F.R. § 825.110(c). In *Knapp*, the court ruled that the employee’s reserve duty time did not count as hours of service for purposes of determining FMLA eligibility although she was compensated for those hours. *Id.* at 899, *9-10.

29 C.F.R. § 825.110 (d) provides that once an employer confirms the employee is eligible for leave, the employer may not retroactively claim the employee was not FMLA eligible. However, the Tenth Circuit declined to apply this section in *Knapp*, 207 F. App’x 896, noting that several other circuits have invalidated this section of the Act. *Id.* at 899.

Authority:

29 U.S.C. § 2611 (2)(A).

FMLA – DEFINITION – INTERMITTENT OR REDUCED LEAVE

The FMLA allows an employee to take leave for a serious health condition on an intermittent or reduced schedule basis.

“Intermittent leave” is defined as leave taken in separate blocks of time due to a single qualifying reason and may include leave periods from an hour or more to several weeks.

Authority:

29 C.F.R. § 2612(b); 29 CFR § 825.202(a) and (b)(1). *Winne v. City of Lakewood*, 436 F. App’x 840 (10th Cir. 2011).

FMLA – DEFINITION – SUBSTITUTION OF LEAVE

The FMLA allows employers to require some types of paid leave be substituted for all or part of the 12 week unpaid leave.

Notes on Use:

If an employer allows employees to substitute paid leave for FMLA leave, the employer must allow all employees the same substitutions. *See Orr v. City of Albuquerque*, 531 F. 3d. 1210, 1216-17 (10th Cir. 2008) (the City allowed non-pregnant employees to use vacation time for FMLA leave but required pregnant employees to use sick leave).

Authority:

29 C.F.R. § 2612 (d).

FMLA – DEFINITION – SERIOUS HEALTH CONDITION

A “serious health condition” is an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments.

Authority:

29 C.F.R. 825.113 (a); 29 C.F.R. 825.115.

FMLA – DEFINITION – “SON OR DAUGHTER”

A “son or daughter” includes a biological child, an adopted child, a foster child, a stepchild, a legal ward or the child of a person standing *in loco parentis*.

Authority:

29 U.S.C. § 2611 (12).

FMLA – DEFINITION – “PARENT”

A “parent” includes any person[s] who stood *in loco parentis* to the employee when the employee was a son or daughter.

Notes on Use:

When this category of family member is involved in the leave at issue, the following language may be helpful to include in the instruction: “Although [Name] is not Plaintiff’s biological parent, he is considered a “parent” under the law because he occupied the same role in Plaintiff’s life that a biological parent would be expected to occupy.”

Authority:

29 U.S.C. § 2611(7).

FMLA – DEFINITION – “QUALIFYING EXIGENCY”

FMLA “qualifying exigencies” include a wide variety of activities intended to help the families of members of the National Guard and Reserve manage the members’ affairs before, during and after the member is on active duty or called to active duty status in support of a contingency operation. Such activities include, but are not limited to: short-notice deployment, child care and school activities, financial and legal arrangements, counseling, and rest and recuperation.

Authority:

29 C.F.R. § 825.126.

FMLA – DEFINITION – NOTICE TO EMPLOYER
(LEAVE FORESEEABLE)

The FMLA requires that employees give timely notice to their employers of the need to take leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. Timely notice as used in these instructions means that the Plaintiff must have notified the Defendant of [his or her] need for leave at least thirty (30) days before the leave was to begin.

Notes on Use:

Examples of situations where the need for leave is foreseeable include an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service member.

Authority:

29 CFR § 825.302(a).

FMLA – DEFINITION – NOTICE TO EMPLOYER
(LEAVE UNFORESEEABLE)

The FMLA requires that employees give timely notice to their employers of the need to take leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. Timely notice as used in these instructions means that the Plaintiff must have notified the Defendant of [his or her] need for leave as soon as practicable after [he or she] learned of the need to take leave.

Notes on Use:

As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. *See, e.g., Wilkins v. Packerware Corp.*, 260 F. App'x 98, 104 (10th Cir. 2008).

Authority:

29 C.F.R. § 825.302(a).

FMLA – RIGHT TO REINSTATEMENT

The FMLA generally gives an employee the right following FMLA leave to be returned to the position held when the leave began or to an equivalent position.

Authority:

29 C.F.R. § 214.

FMLA – REINSTATEMENT – EQUIVALENT POSITION

An equivalent position is one that is almost identical to the employee’s former position in terms of pay, benefits and working conditions, and that involves substantially equivalent skill, effort, responsibility and authority.

Notes on Use:

Although the Tenth Circuit has not construed the definition of “equivalent position,” other circuits have addressed the various factors to consider when determining whether an employee returning from FMLA was reinstated to an “equivalent position.” In *Breeden v. Novartis Pharmaceuticals Corp.*, 646 F.3d 43 (D.C. Cir. 2011), the D.C. Circuit focused on 29 C.F.R. §825.215(f), in affirming summary judgment on Plaintiff’s interference claim alleging her employer failed to reinstate her to an “equivalent position.” The Court noted the Plaintiff’s claim failed because she focused on the “*de minimis*, intangible, and unmeasurable” aspects of the job to which she was reinstated, i.e. less prestige, among other things. The *de minimis* exception states: “[t]he requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to *de minimis*, intangible or unmeasurable aspects of the job.” 29 C.F.R. § 825.215(f). Defense counsel may consider proposing an instruction that addresses this exception in appropriate circumstances. See *Smith v. East Baton Rouge Parish School Board*, 453 F.3d 650 (5th Cir. 2006) (affirming summary judgment for employer and applying *de minimis* exception); *Mitchell v. Dutchmen Mfg.*, 389 F. 3d 746 (7th Cir. 2004) (affirming summary judgment for employer and applying *de minimis* exception) *But see also Breneisen v. Motorola, Inc.*, 512 F.3d 972 (7th Cir. 2008) (holding that issue of material fact existed regarding whether employee’s position on production line was equivalent to the process analyst position he held before taking FMLA leave).

Authority:

29 C.F.R. § 825.215(a).

FMLA – EXCEPTION TO REINSTATEMENT
(EMPLOYMENT UNAVAILABLE AT TIME OF REINSTATEMENT)

An employee is not entitled to reinstatement to the former or an equivalent position following FMLA leave if you find that, for reasons unrelated to the employee’s FMLA activity, the employee would not have been employed by the employer when the employee requested reinstatement.

Notes on Use:

This instruction may be used in circumstances where the employee’s position is eliminated while on FMLA leave and for reasons unrelated to the taking of such leave. Section § 825.216(a) of the regulations states: “An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period.” The employee is, therefore, not entitled to job reinstatement if the employer can show that the employee would not otherwise have been employed at the time reinstatement was requested.

Authority:

29 C.F.R. § 825.216 (a)(1)

FMLA – EXCEPTION TO REINSTATEMENT
(EMPLOYEE SEEKING REINSTATEMENT IS A “KEY EMPLOYEE”)

The employee is not entitled to reinstatement to the former or an equivalent position following FMLA leave if you find the employee is a “key employee” and the denial of reinstatement is necessary to prevent substantial and grievous economic injury to the employer’s operations.

A “key employee” is an employee who is paid on a salary basis, is eligible to take FMLA leave, and who is among the highest paid ten percent of all the employees employed by the employer within 75 miles of the employer’s worksite.

In determining what constitutes a substantial and grievous economic injury, you may consider whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee.

Notes on Use:

Section 825.217(c)(1) of the FMLA regulations describes the method for determining whether an employee is among the highest paid ten percent. Section 825.217(c)(2) provides that no more than ten percent of the employer’s employees within 75 miles of the worksite may be “key employees.” Further, the term “salaried” as used in the FMLA has the same meaning as it does under the Fair Labor Standards Act. *See* Section 825.217(b), which states: “[t]he term ‘salaried’ means ‘paid on a salary basis,’ as defined in 29 CFR § 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.”

Authority:

29 C.F.R. § 825.217 and 29 C.F.R. § 825.218

FMLA – INTERFERENCE CLAIM – ELEMENTS

In order for the Plaintiff to prove [his] [her] claim that the Defendant interfered with [his] [her] right to take FMLA leave in violation of the FMLA, [he] [she] must prove by a preponderance of the evidence:

1. [He] [she] was entitled to FMLA leave;
2. Some adverse action by the Defendant interfered with [his][her] right to take FMLA leave; and
3. The Defendant's action was related to the Plaintiff's exercise or attempted exercise of [his][her] FMLA rights.

If you find that the Plaintiff has failed to prove one or more of these propositions by a preponderance of the evidence, then you must find against [him][her] on [his][her] interference claim and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proved all these elements by a preponderance of the evidence, then you must find in favor of the Plaintiff.

Authority:

29 U.S.C. § 2615(a)(1); *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 57 F.3d 1151 (10th Cir. 2009) *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002).

FMLA – INTERFERENCE CLAIM – ADVERSE ACTION

In order to satisfy the “adverse action” requirement for purposes of an FMLA interference claim, the Plaintiff must show that [he] [she] was:

- terminated from employment;
- prevented from taking the full 12 weeks of leave guaranteed by the FMLA;
- denied reinstatement following leave; or
- denied initial permission to take leave.

Notes on Use:

In *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1181 (10th Cir. 2006), the Plaintiff cited her termination as the adverse action at issue in her interference case. The Tenth Circuit noted, without deciding, that her employer’s giving her new duties and failure to train her upon her return from FMLA leave (which then culminated in her termination) might have supported such a claim.

Authority:

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1287 (10th Cir. 2007).

FMLA – INTERFERENCE CLAIM – “RELATED TO”

A Plaintiff can prevail on an interference claim if [he] [she] was denied [his] [her] substantive rights under the FMLA for a reason connected with [his] [her] FMLA leave.

Notes on Use:

An FMLA interference claim is based upon an entitlement theory of relief. In such a case, the employee must demonstrate his entitlement to the disputed leave by a preponderance of the evidence and a denial, interference or restraint of this right is a violation regardless of the employer’s intent. *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 57 F.3d 1151, 1159 (10th Cir. 2009); *Bones v. Honeywell Int’l., Inc.*, 366 F.3d 869, 877 (10th Cir. 2004); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002) (citation omitted).

Unlike an FMLA retaliation claim, where a Plaintiff must show a “causal connection” between the adverse action and the exercise of a right covered by the FMLA, under an interference theory the Plaintiff need only show the adverse action is “related to” the exercise of a right covered by the FMLA.

The requirement that an adverse action be “related to” the exercise of a right covered by the FMLA is most easily satisfied when a termination occurs while the employee is on leave. *See DeFreitas v. Horizon Investment Mgmt. Corp.*, 577 F.3d 1151,1160. The timing in such cases has significant probative force. *Id.*, citing *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 995, 961 (10th Cir. 2002).

A reason for dismissal that is not sufficiently related to FMLA leave will not support recovery under the interference theory. *See McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (Summary judgment for employer affirmed where employee argued the same illness that led her to take FMLA leave caused her performance problems for which she was dismissed. The fact the leave and the dismissal both, independently, resulted from the same circumstance or event did not satisfy the “related to” requirement.). *See also, Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1009 (10th Cir. 2011) (“even if the FMLA entitles an employee to be absent from work, the employee’s violation of a notice-of-absence policy can constitute ‘[a] reason for dismissal that is unrelated to a request for an FMLA leave’”).

Authority:

29 C.F.R. § 825.216(a); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 995, 961 (10th Cir. 2002).

FMLA – INTERFERENCE – AFFIRMATIVE DEFENSE

If you find that the Defendant interfered with the Plaintiff's right to take FMLA leave, then you must find in the Plaintiff's favor unless you also find that the Defendant proved the adverse action would have occurred regardless of the Plaintiff's [request for] [taking] FMLA leave.

Notes on Use:

See, e.g., Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1287 (10th Cir. 2007) (Employer proved the employee, who was laid off during FMLA leave, would have been dismissed regardless of the employee's request for or taking of FMLA leave). *See also DeFreitas*, 577 F.3d 1151, 1161-62 (10th Cir. 2009), where the court found the employer did not meet this burden.

Authority:

29 C.F.R. § 825.216(a)(1); *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 577 F.3d 1151, 1159-60 (10th Cir. 2009).

FMLA – RETALIATION CLAIM – ELEMENTS

In order for the Plaintiff to prove [his] [her] claim that Defendant retaliated against [him] [her] for taking FMLA leave, [he] [she] must prove:

1. Plaintiff engaged in FMLA protected activity;
2. Defendant took an action that a reasonable employee would have found materially adverse; and
3. A causal connection exists between the Plaintiff's FMLA protected activity and the Defendant's decision to take the materially adverse action against the Plaintiff.

If you find that the Plaintiff has failed to prove one or more of these propositions by a preponderance of the evidence, then you must find against [him][her] on [his][her] retaliation claim and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proved all these elements by a preponderance of the evidence, then you must find in favor of the Plaintiff.

Notes on Use:

The FMLA's retaliation clause is derived from Title VII and is intended to be construed in the same manner. *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006). Therefore, reference to the FFA Model Jury Instructions on Title VII may also be helpful to the practitioner.

Retaliation claims under the FMLA are subject to the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). See *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006).

The Tenth Circuit has questioned, but not decided, whether a mixed motive analysis may be applied to FMLA retaliation claims. See *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987 (10th Cir. 2011).

The timing of the employer's adverse action is typically the distinguishing factor between an interference claim and a retaliation claim. See, *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287-88 (10th Cir. 2007). For example, in a retaliation case, the employee may have successfully taken FMLA leave, returned to work, and then been adversely affected by an employment action based on incidents post-dating her return to work. See, e.g., *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1136-38 (10th Cir. 2003) (Sprint returned Doebele to her prior position after FMLA leave, but soon terminated her for alleged attendance problems following her return). If, however, the employer cites only factors predating the employee's return to work, she may also (or only) pursue an interference claim. *Campbell*, 478 F.3d at 1288 ("Campbell's termination was a foregone conclusion by the time she returned to work" from FMLA leave).

Authority:

29 U.S.C. § 2615(a)(2); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007).

FMLA – RETALIATION – MATERIALLY ADVERSE ACTION

A “materially adverse” action is any action by the employer that is likely to discourage a reasonable worker in the Plaintiff’s position from exercising [his] or [her] rights under the FMLA.

Notes on Use:

In *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006), the Tenth Circuit expressly declared that the Supreme Court’s rejection of its “adverse employment action standard” in favor of a “materially adverse” standard applied equally to FMLA retaliation claims as to Title VII retaliation claims. Therefore, reference to the FFA Model Jury Instructions for Retaliation may be helpful in construing this term.

Authority:

Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

FMLA – RETALIATION CLAIM – CAUSAL CONNECTION

A Plaintiff asserting an FMLA retaliation claim may satisfy the causal connection requirement by demonstrating a very close connection in time between the protected activity and the adverse action.

Notes on Use:

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1290 (10th Cir. 2007); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006) (termination occurring within 6 weeks after employer learned employee would take FMLA leave held sufficiently close to show causation).

Until recently the Tenth Circuit has consistently described the causation requirement in FMLA cases as requiring a “causal connection.” However, in *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987 (10th Cir. 2011), the Tenth Circuit used the “motivating factor” language prevalent in Title VII precedent to describe the causation requirement for that FMLA case. Given that the Tenth Circuit has already recognized FMLA claims should be construed consistently with Title VII precedent, “motivating factor” may be an acceptable substitution for “causal connection.”

See also the FFA Model Jury Instructions for Retaliation claims for additional guidance.

Authority:

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1290 (10th Cir. 2007); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006).

FMLA – RETALIATION CLAIM – PRETEXT

The Plaintiff claims that the Defendant’s reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) for retaliation. If you do not believe the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that retaliation was the factor that made the difference in the Defendant’s decision.

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 (excuse) to cover up a retaliatory motive. The Plaintiff may show that the Defendant’s stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant’s stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant’s stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective.]

[The [describe adverse action] is closely related in time to Plaintiff’s [insert protected FMLA activity here]]*

If you find pretext, you may, but are not required to infer that retaliation was the factor that made a difference in the employer’s treatment of Plaintiff.

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 (10th Cir. 2002). As in Title VII retaliation cases, pretext in FMLA cases can be shown in any number of ways. *See Orr v. City of Albuquerque*, 531 F.3d 1210, 1215 (10th Cir. 2008). The 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 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

*In *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006), the Tenth Circuit declared that a Plaintiff relying on proximity in time must also present circumstantial evidence of retaliatory motive in order to satisfy the pretext element.

Authority:

Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006); *Burris v. Novartis Animal Health U.S.*, 309 F. App'x 241, 244 (10th Cir. 2009). *See also* FFA Model Jury Instructions on pretext for other statutory claims.

FMLA – ACTUAL DAMAGES

If you find that the Plaintiff has proven [his][her] claim by a preponderance of the evidence, you should award [him][her] any lost wages and benefits [he][she] would have received from the Defendant if [he][she] had [been granted FMLA leave][been reinstated following FMLA leave][[not been][adverse employment action]]. [You should then reduce this amount by any wages and benefits that the Plaintiff received from other employment during that time [that he would not otherwise have received]]. It is the Plaintiff's burden to prove that [he] [she] lost wages and benefits and their amount. If [he] [she] fails to do so for any period of time for which [he] [she] seeks damages, then you may not award damages for that period of time.

Authority:

29 U.S.C. § 2617(a)(1)

FMLA – ACTUAL DAMAGES – MITIGATION

The Defendant argues that the Plaintiff's claim for lost wages and benefits should be reduced by [describe the reduction]. If you find that (1) the Plaintiff did not take reasonable actions to reduce [his][her] damages, and (2) that the Plaintiff reasonably might have found comparable employment if [he][she] had taken such action, you should reduce any amount you might award the Plaintiff for [lost wages] [benefits] by the amount [he][she] reasonably would have earned during the period for which you are awarding [lost wages] [benefits]. The Defendant must prove both that the reduction should be made and its amount.

Authority:

29 U.S.C. § 2617(a)(1).

FMLA – ACTUAL DAMAGES – WHERE NO LOST WAGES OR BENEFITS

If you find that the Plaintiff has proven [his] [her] claim by a preponderance of the evidence, you should award as damages any actual monetary losses sustained as a result. It is Plaintiff's burden to prove that [he] [she] had monetary losses and their amount.

Notes on Use:

This instruction should be given only if Plaintiff did not lose wages or benefits, such as the cost of care. 29 U.S.C. § 2617(a)(1)(A)(i)(II).

Authority:

29 U.S.C. § 2617(a)(1).

FMLA – GOOD FAITH DEFENSE

If you find that the Plaintiff has proven [his] [her] claim by a preponderance of the evidence, then you must decide whether the Defendant acted in good faith. You must find the Defendant acted in good faith if it has proved that when the Defendant [insert Defendant's act or omission], the Defendant reasonably believed that its actions complied with the FMLA.

Notes on Use:

A prevailing Plaintiff in an FMLA case is entitled to liquidated damages in an amount equal to actual damages plus interest. 29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.401(c). The FMLA allows an employer to avoid liquidated damages if it can show that its act or omission was made in good faith and that it had reasonable grounds for believing it was acting in accordance with the FMLA.

Authority:

29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.401(c).

FLSA – STATUTE INVOLVED

The Plaintiff has brought claim[s] under the Fair Labor Standards Act, also referred to as FLSA. FLSA is a federal law that provides for the payment of [minimum wage for each hour worked] [for the payment of overtime compensation for all hours in excess of forty in one week], among other requirements. The purpose of FLSA is to eliminate the existence of labor conditions which are detrimental to the minimum standard of living necessary for health, efficiency, and general well-being of workers.

[An employer must pay an employee overtime compensation for hours worked in excess of forty in any workweek. Overtime compensation must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked over forty hours in that workweek.]

[An employer must pay at least minimum wage for all hours worked by an employee during each workweek.]

In this case, the Plaintiff claims that the Defendant did not pay the Plaintiff the [minimum wage] [overtime pay] that was required by law. [FLSA contains numerous exemptions and exceptions to these general rules. In this case, the Defendant claims that the following exemptions and/or exceptions apply:_____.]

Notes on Use:

1. In the first and last paragraphs, insert the applicable parenthetical(s).
2. The second and/or third paragraphs should be inserted when applicable.
3. Cases under the FLSA are very fact intensive. As a result, many of these instructions will need to be tailored to fit the facts.

Authority:

29 U.S.C. §§ 202(a), 206, 207.

FLSA – ELEMENTS OF CLAIM FOR OVERTIME PAY

In order for the Plaintiff to establish [his] [her] claim for the Defendant's failure to pay [him][her] overtime pay in violation of the FLSA, [s]he must prove the following by a preponderance of the evidence:

1. Plaintiff was an employee of the Defendant during the period _____; and
2. In the Plaintiff's work for the Defendant, the Plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000]; and
3. Defendant failed to pay the Plaintiff overtime pay for all hours Plaintiff worked, as that term is defined by Instruction No. ____, for the Defendant in excess of forty in one or more workweeks.

["Commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.]

"Overtime pay" means an amount of at least one and one-half times an employee's regular rate of pay, as that term is defined by Instruction No. ____, for all hours worked in excess of 40 in a workweek.

If you find that the Plaintiff has failed to prove one or more of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] claim for overtime pay and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proven all three propositions by a preponderance of the evidence, then you must [find in (his) (her) favor and against the Defendant] [unless the Defendant has proven that [one of] the exemptions to the FLSA applies to Plaintiff].

Notes on Use:

1. Issues in paragraphs 1 and 2 will often be resolved before trial by stipulation of the parties or by pretrial orders.
2. The first element in the list should be used only if employee status or dates of employment are disputed. The test for whether a worker is an employee is the so-called

“economic reality” test that requires consideration of “(1) the degree of control exerted by the alleged employer over the worker; (2) the worker’s opportunity for profit or loss; (3) the worker’s investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work.” *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (citing *United States v. Silk*, 331 U.S. 704, 716 (1947)). See also *Johnson v. Unified Gov’t of Wyandotte County/Kansas City*, 371 F.3d 723, 729 (10th Cir. 2004) (citing *Doty* and *Silk*). The Tenth Circuit also has noted that, “[a]n additional commonly considered factor is the extent to which the work is an integral part of the alleged employer’s business.” *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989). None of the factors is to be considered dispositive; the test is instead based on the totality of the circumstances. *Id.* If employment dates are disputed, insert the date or dates of relevant recovery period.

3. This second element in the list, the appropriate bracketed language, and one or both of the first two bracketed definitions after the list of elements should be inserted only when applicability of the FLSA is in dispute.
4. The language regarding regular rate of pay should be modified to reflect the specific circumstances of the case, based on applicable case law and the Department of Labor guidance published at 29 C.F.R. part 778.
5. In the final paragraph, the first bracketed statement should be used if the Court has held, or Defendant has conceded, that no FLSA exemption applies.
6. If the facts warrant it, the parties may choose to offer the following instruction concerning the non-waiver of rights under the FLSA: “The employee’s right to be paid overtime wages cannot be revoked by his employer or waived by the employee. For this reason, an employer cannot be excused from liability for a violation of the Fair Labor Standards Act even though some or all employees may have consented to be paid for less time than that required by the Fair Labor Standards Act.” *Baker v. Barnard Construction Co., Inc.*, 146 F.3d 1214, 1216 (10th Cir. 1998). An announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee’s right to compensation for work which he is actually suffered or permitted to perform. 29 U.S.C. § 216(c); 29 C.F.R. § 778.316. See *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945).

Authority:

29 U.S.C. § 207 (overtime wages); 29 U.S.C. § 203 (definitions).

FLSA – DEFINITION – WORKWEEK

“Workweek” means a regularly recurring period of seven days or 168 hours, as designated by the employer. [In this case, the parties have agreed that the workweek was from [day of week] at [time] to [day of week] at [time].]

Notes on Use:

1. This instruction is intended for use only when the Court determines that “workweek” should be defined to assist the jury. The bracketed language should be inserted if the parties have so stipulated.

Authority:

29 C.F.R. § 776.4 (and cases cited at n.13).

FLSA – DEFINITION – HOURS WORKED

“Hours worked” means all time spent by an employee that was primarily for the benefit of the employer or the employer’s business. Such time constitutes hours worked if the employer knew or should have known that the work was being performed.

Notes on Use:

1. This instruction is intended for use only when there is a dispute as to whether certain activities constitute hours worked, or there is a dispute as to the number of hours worked. The language should be modified to reflect the specific circumstances of the case based on case law and the U.S. Department of Labor guidance published at 29 C.F.R. part 785.
2. The FLSA does not define “work” but uses the term in its definition of “employ.” See 29 U.S.C. § 254. Under the Act, “employ” means “to suffer or permit to work.” 29 U.S.C. § 203(g); see also 29 C.F.R. § 785.6. For example, an employee may voluntarily continue to work at the end of a shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, past work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that the employee is continuing to work and the time is working time. 29 C.F.R. §785.11; see *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951). For an employer to have “suffered” an employee to work and thereby be obligated to pay the employee for that time, it must know or have reason to believe that the employee is working. 29 C.F.R. § 785.11; see *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951). An employer that has such knowledge cannot passively allow an employee to work without proper compensation, even if the work has not been done at the request of the employer.
3. The Supreme Court in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 598 (1946), stated that there need not be physical or mental exertion at all on the part of the employee and that, when the employee is required to give up a substantial measure of his or her time and effort, the time is hours worked. Accordingly, the workweek typically includes “all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.” *Id.* At 690-91. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes, however, are not considered “hours worked.” An employee is not completely relieved from duty unless the employee is told he or she can cease work until a definitely specified time. For example, a meal period of at least 30 minutes during which employee is completely relieved from duties does not ordinarily constitute hours worked, even if the employee is not permitted to leave the employer’s premises. 29 C.F.R. § 785.19. Additionally, rest or break periods of 20 minutes or less must be included in “hours worked.” 29 C.F.R. §785.18.

4. The FLSA, the U.S. Department of Labor's regulations, and case law impose various qualifications on these rules regarding compensable time. *See, e.g., IBP v. Alvarez*, 126 S.Ct. 514 (2005); 29 U.S.C. §§ 203(o) and 254; 29 C.F.R. § 785.9 (concerning preliminary and postliminary activities and contract and custom); *Mount Clemens Pottery*, 328 U.S. at 692 (the *de minimus* rule); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Pabst et al. v. Oklahoma Gas & Elec.*, 228 F.3d 1128 (10th Cir. 2000); 29 C.F.R. §§ 553.221(c); 785.17 (on-call time); 29 C.F.R. § 785.18 (rest time); 29 C.F.R. § 785.19 (meal time); 29 C.F.R. § 785.18 (sleeping time); 29 C.F.R. § 785.23 (employees residing on employer's premises or working at home); 29 C.F.R. §§ 785.27-785.32 (training time); 29 C.F.R. §§ 785.33-785.41 (travel time).
5. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his own purposes are not "hours worked."

Authority:

Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 598 (1946); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (citing *Anderson* and *Wantock* with approval); 29 U.S.C. §§ 203(g), 254; *see also* 29 C.F.R. pts. 553 & 785.

FLSA – DETERMINING HOURS WORKED

You must determine the number of hours worked by the Plaintiff based on all of the evidence. The Plaintiff bears the burden of proving [he][she] performed work for which [he][she] was not properly compensated. However, the Defendant is legally required to keep accurate records of its employees' hours worked. If you find that the Defendant failed to maintain records of the Plaintiff's hours worked or that the records it kept are inaccurate or inadequate, you must accept the Plaintiff's estimate of hours worked, unless you find it to be unreasonable. Damages may be awarded even though the result is only approximate. The employer cannot complain that the damages lack the precision that would have been possible if the employer had kept the records required by law.

Notes on Use:

1. Use this instruction only when the number of hours worked is in dispute.
2. The FLSA requires employers to “make, keep and preserve such records of the persons employed by him and of wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of the Department of Labor’s Wage and Hour Division] as he shall prescribe by regulation or order . . .” 29 U.S.C. § 211(c). The Department of Labor’s recordkeeping regulations may be found at 29 C.F.R. § 516. The FLSA does not create a private cause of action against an employer for noncompliance with record-keeping obligations. “The employer cannot complain that the damages lack the precision that would have been possible if the employer had kept the records required by law.” *See Baker v. Barnard Constr. Co.*, 146 F.3d 1214, 1220 (10th Cir. 1998). Instead, the employees are to be awarded compensation on the most accurate basis possible. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The Plaintiff bears the burden of proving the extent of any uncompensated work, but may satisfy that burden by “just and reasonable inference.” *Id.* Once the Plaintiff has produced such evidence of uncompensated work, “the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence.” *Id.*

Authority:

See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946); *Baker v. Barnard Constr. Co.*, 146 F.3d 1214, 1220 (10th Cir. 1998); *see also* 29 U.S.C. §§ 203, 254.

FLSA – “REGULAR RATE” OF PAY (GENERAL)

The “regular rate” of pay is the hourly rate actually paid the employee for the normal, nonovertime workweek for which he was employed. The regular rate of pay is determined by dividing the employee’s total compensation for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The regular rate under the Act is a rate per hour.

Notes on Use:

1. Employees may be compensated on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exclusions.
2. Per the regulations which took effect May 5, 2011, if the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired a salary of \$350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee’s regular rate of pay is \$350 divided by 35 hours, or \$10 per hour. When the employee works overtime the employee is entitled to receive \$10 for each of the first 40 hours and \$15 (one and one-half times \$10) for each hour thereafter. If an employee is hired at a salary of \$375 for a 40-hour week the regular rate is \$9.38 an hour. 29 C.F.R. § 778.113(a).

Authority:

Walling v. Youngerman-Reynolds Hardwood Corp., 325 U.S. 419, 424 (1945) (citations omitted); *Chavez v. City of Albuquerque*, 630 F.3d 1300 (10th Cir. 2011). See 29 U.S.C. §207(e); 29 C.F.R. §§ 778.108, 778.109. See also 29 C.F.R. §§ 778.107-778.122 (principles for computing overtime based on the regular rate); 29 C.F.R. §§ 778.200-778.224 (statutory exclusions).

FLSA – “REGULAR RATE” OF PAY (FLUCTUATING WORKWEEK)

An employee employed on a salary basis (as that term is defined in FLSA – DEFINITION – SALARY BASIS below) may work hours that vary from workweek to workweek. Under those circumstances, the regular rate of pay equals the amount of the salary divided by the total number of hours worked. The FLSA permits the employer to pay such a salary as compensation for whatever hours the employee is called upon to work in a workweek, whether few or many, if the employer and employee have a clear mutual understanding that this is their pay arrangement. Such a pay arrangement does not violate the FLSA if:

1. The regular rate is not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and
2. The employer pays the employee for all hours worked in excess of forty in a workweek at a rate not less than one-half [his] [her] regular rate of pay.

Notes on Use:

1. The regular rate of pay for fluctuating workweeks may apply when an employee works a varied schedule from workweek to workweek. The most common circumstance in which it is used is when an employee has been misclassified as an exempt employee.

Authority:

29 C.F.R. § 778.114(a); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008).

FLSA – ELEMENTS OF CLAIM FOR MINIMUM WAGES

In order for the Plaintiff to establish [his] [her] claim for the Defendant's failure to pay [him][her] minimum wage in violation of the FLSA, [s]he must prove the following by a preponderance of the evidence:

1. Plaintiff was an employee of the Defendant during the period _____; and
2. In the Plaintiff's work for the Defendant, the Plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000]; and
3. Defendant failed to pay the Plaintiff minimum wage for all hours worked by the Plaintiff during one or more workweeks.

[The term "commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.] 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] minimum wage claim and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proven all three propositions by a preponderance of the evidence, then you must [find in (his) (her) favor and against the Defendant] [unless the Defendant has proven that [one of] the FLSA exemption[s] applies].

Notes on Use:

1. The first element in the list should be used only if employee status or dates of employment are disputed. Insert the date or dates of relevant recovery period.
2. This second element in the list, the appropriate bracketed language, and one or both of the first two bracketed definitions after the list of elements should be inserted only when applicability of the FLSA is in dispute.
3. In the final paragraph, the first bracketed statement should be used if the Court has held, or Defendant has conceded, that no FLSA exemption applies.

Authority:

29 U.S.C. § 206 (minimum wage); 29 U.S.C. § 203 (definitions).

FLSA – APPLICABLE MINIMUM WAGE RATE[S]

The minimum wage [rate] [rates] applicable in this case [is] [are] as follows:

[July 24, 2007 to July 23, 2008 -- \$5.85 per hour]

[July 24, 2008 to July 23, 2009 – \$6.55 per hour]

[July 24, 2009 to date – \$7.25 per hour.]

You may have heard about other minimum wage rates that may be applicable in certain states or under certain circumstances. You must not consider any minimum wage rates other than those listed above.

Notes on Use:

1. This Instruction is intended for use only when the Plaintiff claims unpaid minimum wage under the FLSA. Select the minimum wage rate(s) applicable to the period of time at issue.
2. If Plaintiff also asserts a claim based upon state law, this Instruction should be modified to clarify which rates apply to the respective claims.
3. Depending on the applicable statute of limitations and the time period in which alleged amounts should have been paid to the Plaintiff(s), more than one applicable minimum wage rate may have to be used.

Authority:

29 U.S.C. § 206(a)(1).

FLSA – MINIMUM WAGE CREDIT FOR BOARD AND LODGING

In determining whether an employer has paid the minimum wage, the employer is entitled to a credit for the reasonable cost it incurred in furnishing board, lodging or other facilities to an employee if the employer regularly provided the board, lodging, or other facilities for the benefit of the employee.

Notes on Use:

1. This instruction is intended for use only when the Defendant claims credit for board and/or lodging. The instruction should be modified to reflect the specific circumstances of the case.
2. “Other facilities,” as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment. 29 C.F.R. § 531.32.

Authority:

29 C.F.R. § 531.29.

FLSA – EXEMPTIONS – GENERAL

In this case, the Defendant claims that the [minimum wage] [overtime pay] law does not apply because the Plaintiff is exempt from these requirements. The exemption[s] claimed by the Defendant [is] [are] [insert applicable exemption(s)]. To establish that the Plaintiff is exempt from the FLSA's [minimum wage] [overtime requirements], Defendant must show the Plaintiff fits plainly and unmistakably within the exemption's terms.

Notes on Use:

1. The exemptions to the FLSA are to be narrowly construed.
2. Generally this issue will be resolved before trial through stipulation of the parties or by pretrial orders.

Authority:

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008); *Reich v. Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993).

FLSA – EXECUTIVE EMPLOYEE EXEMPTION

In order for the Defendant to establish that the Plaintiff was an exempt executive employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. _____) at a rate not less than \$455 per week; and
2. Plaintiff's primary duty was management of [(the enterprise in which the Plaintiff was employed) or (a customarily recognized department or subdivision of the enterprise in which the Plaintiff was employed)]; and
3. Plaintiff customarily and regularly directed the work of at least two or more other fulltime employees or their equivalent; and
4. Plaintiff had authority to hire and fire other employees, or the Plaintiff's suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees were given particular weight.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

“Customarily and regularly” means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Notes on Use:

1. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). This amount is exclusive of board, lodging or other facilities. See 29 C.F.R. § 541.606(b).
2. Generally, “management” includes activities such as interviewing, selecting, and training of employees; setting and adjusting employee rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and

controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

Authority:

29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.101-541.106, 541.700.

FLSA – ADMINISTRATIVE EXEMPTION

In order for the Defendant to establish that the Plaintiff was an exempt administrative employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. _____) at a rate not less than \$455 per week; and
2. Plaintiff's primary duty was the performance of office or non-manual work directly related to the management or general business operations of the Defendant or the Defendant's customers; and
3. Plaintiff's primary duty included the exercise of discretion and independent judgment with respect to matters of significance.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66, or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). This minimum amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
3. In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for a teacher in the educational establishment where Plaintiff is employed. 29 C.F.R § 541.600(c). *See* 29 C.F.R. § 541.204(a)(1).
4. Work directly related to management or general business operations includes work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R § 541.201(b).
5. Factors to consider when determining whether an employee exercises “discretion and independent judgment with respect to matters of significance” include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement

management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R. §541.202(b).

Authority:

29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.200-541.204, 541.700(a).

FLSA – LEARNED PROFESSIONAL EXEMPTION

In order for the Defendant to prove that Plaintiff was an exempt learned professional employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. _____) at a regular rate of not less than \$455 per week; and
2. Plaintiff's primary duty was the performance of work requiring advanced knowledge in a field of science or learning.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

“Advanced knowledge” means work that is predominantly intellectual in character, and that requires the consistent exercise of discretion and judgment. Advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605. The salary basis and minimum salary requirements are inapplicable to certain employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304. This amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).
3. “Field of science or learning” includes traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status. 29 C.F.R. § 541.301(c). This instruction should be modified, as appropriate, for employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

Authority:

29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.301, 541.700(a).

FLSA – CREATIVE PROFESSIONAL EXEMPTION

In order for the Defendant to prove that the Plaintiff was an exempt creative professional employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. ____) at a rate not less than \$455 per week; and
2. Plaintiff's primary duty was performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See*, 29 C.F.R. § 541.605.
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). This amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
3. Recognized fields of artistic and creative endeavor include music, writing, acting and the graphic arts. 29 C.F.R § 541.302(b).
4. The performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor is distinguished from routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of “invention, imagination, originality or talent” distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and may depend on the extent of the invention, imagination, originality or talent exercised by the employee. 29 C.F.R § 541.302(a) and (b).
5. The following are types of positions that may qualify for the creative professional exemption: actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers; and persons

holding the more responsible writing positions in advertising agencies. 29 C.F.R. §541.302(c).

6. Journalists may satisfy the duties requirement for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent; performing on the air radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator. *See* 29 C.F.R. § 541.302(d).
7. The creative professional requirement generally is not met by a person who is employed as a copyist, as an animator of motion-picture cartoons, or as a retoucher of photographs. 29 C.F.R. § 541.302(c). Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. *See*, 29 C.F.R. § 541.302(d).

Authority:

29 C.F.R. § 541.302.

FLSA – COMPUTER PROFESSIONAL EMPLOYEE EXEMPTION

In order for the Defendant to prove that the Plaintiff was an exempt computer professional employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on [(a salary basis as defined in Instruction No. ____ at a rate not less than \$455 per week) or (at a rate not less than \$27.63 per hour)]; and
2. Plaintiff was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field; and
3. Plaintiff's primary duty consisted of at least one of the following:
 - A. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
 - B. The design, development, documentation, analysis, creation, testing, modification of computer systems or programs, including prototypes, based on and related to use or system design specifications;
 - C. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - D. A combination of the aforementioned duties, the performance of which requires the same level of skills.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). The \$455 per week amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

Authority:

29 CFR 541.400.

FLSA – OUTSIDE SALES EXEMPTION

In order for the Defendant to establish that the Plaintiff was an exempt outside sales employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff's primary duty was obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2. Plaintiff was customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

"Primary duty" means the principal, main, major or most important duty that the employee performs.

"Customarily and regularly" means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Notes on Use:

1. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences. 29 C.F.R. § 541.500.
2. The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" include work normally and recurrently performed every workweek; it does not include isolated or one-time tasks. 29 C.F.R. § 541.701.
3. An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration

(i.e., one or two weeks) should not be considered as the employer's place of business. 29 C.F.R. § 541.502.

Authority:

See 29 C.F.R. §§ 541.500 – 541.503; *Clements v. Serco, Inc.*, 530 F.3d 1224, 1226-27 (10th Cir. 2008).

FLSA – DEFINITION – SALARY BASIS

An employee is paid on a “salary basis” if the employee is regularly paid, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, and the amount is not subject to reduction because of variations in the quality or quantity of the work performed. [An employee is paid on a salary basis even if the employee’s salary is subject to reduction for one or more of the following reasons: (insert permissible deduction(s) at issue)]

Notes on Use:

1. Permissible deductions from an employee’s salary include:
 - A. Deductions when an employee is absent from work for one or more full days for personal reasons other than sickness or disability. 29 C.F.R § 541.602(b)(1).
 - B. Deductions for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation or loss of salary occasioned by sickness or disability. Deductions for full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted their leave allowance. Similarly, an employer may make a deduction from pay for absences of one or more full days if salary replacement benefits are provided under a state disability insurance law or under a state workers’ compensation law. 29 C.F.R §541.602(b)(2).
 - C. While the employer may not make deductions for an employee’s absence occasioned by jury duty, attendance as a witness or temporary military leave, the employer may offset any amounts received by the employee as jury fees, witness fees or military pay for a particular week against the salary for that particular week without loss of the exemption. 29 C.F.R § 541.602(b)(3).
 - D. Deductions for penalties imposed in good faith for infractions of safety rules relating to the prevention of serious danger in the workplace or to other employees. 29 C.F.R § 541.602(b)(4).
 - E. Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees. 29 C.F.R § 541.602(b)(5).
 - F. In the initial and final week of employment, the employer may pay a proportionate part of an employee’s salary for the time actually worked. 29 C.F.R § 541.602(b)(6).

- G. When an employee takes an unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. 29 C.F.R. § 541.602(b)(7).

Authority:

29 C.F.R § 541.602(a).

FLSA – DAMAGES

If you find in favor of the Plaintiff under Instruction No. ___ [and you find against the Defendant under Instruction No. ___], you must award the Plaintiff damages in the amount that the Plaintiff should have been paid, less what the Defendant actually paid the Plaintiff.

[The minimum wage amount that should have been paid is the number of hours worked in each workweek up to 40 hours, times the minimum wage applicable to that workweek, as set forth in Instruction No. __.]

[The overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times the regular rate for that workweek, times one and one-half, as set forth in Instruction No. __.]

You must calculate this amount [these amounts] separately [for each Plaintiff] for each workweek.

Notes On Use:

1. Insert the bracketed language in lines 1 and 2 if Defendant has asserted that the Plaintiff is an exempt employee.
2. Insert the second paragraph if the Plaintiff claims damages for a minimum wage violation.
3. Insert the third paragraph if the Plaintiff claims damages for an overtime pay violation.
4. In addition to any award of damages, an employer ordinarily is liable for an additional, equal amount of liquidated damages. 29 U.S.C. § 216(b). Under 29 U.S.C. § 260, such an award of liquidated damages is subject to an exception under which the court, “in its sound discretion,” may but need not decline to award all or a portion of this amount of liquidated damages if the employer “shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that [it] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA].” 29 U.S.C. §260; *Dep’t of Labor v. City of Sapulpa*, 30 F.3d 1285, 1289 (10th Cir. 1994) (holding that even if the trial court finds that the employer acted in good faith and reasonably, it may still award liquidated damages).” Good faith is a subjective test that requires “the employer have an honest intention to ascertain and follow the dictates of [the FLSA].” *City of Sapulpa*, 30 F.3d at 1289 (quotation omitted). Reasonableness “imposes an objective standard by which to judge the employer’s behavior.” *Id.*
5. The issue of whether a violation of the FLSA is willful under 29 U.S.C. § 255 differs in several ways from whether an employer’s violation of the FLSA was in good faith and based on a reasonable belief that its acts or omissions did not violate the FLSA under 29 U.S.C. § 260. First, willfulness affects whether a two- or three-year statute of limitations should be applied, whereas the good faith/reasonable belief standard only affects whether

the court may, in its discretion, decline to award a portion or the full amount of liquidated damages. Second, willfulness is a jury issue; good faith/reasonable belief is a decision for the court. Third, the employee bears the burden of proof in determining whether an employer's actions were willful; the employer bears the burden of proof in determining whether the good faith/reasonable belief standard applies. *Compare* 29 U.S.C. § 255 and 29 U.S.C. § 260.

Authority:

29 U.S.C. §§ 206, 207, 216.

FLSA – DAMAGES (ONLY HOURS WORKED SUBMITTED TO JURY)

If you find in favor of the Plaintiff under Instruction No. ____ [and you find against the Defendant under Instruction No. ____], you must determine the number of hours worked in each workweek, in the way you have been instructed to do in Instruction No. ____.

Notes on Use:

1. Use this instruction only where the parties have agreed or the court determines that the jury will be asked to decide the number of hours worked, but will not be asked to calculate damages. Such an instruction may be appropriate where, for example, the appropriate rate of pay is not in dispute and damages may be calculated as a matter of law once the number of hours worked is determined by the jury.

FLSA – WILLFUL VIOLATION (FOR PURPOSES OF THE
STATUTE OF LIMITATIONS)

If you find in favor of the Plaintiff under Instruction No. ___ [and you find against the Defendant under Instruction No. ___], you must determine whether the Defendant’s failure to pay [minimum wage and/or overtime] was willful. In order for the Plaintiff to establish that the Defendant’s failure to pay [him][her] [minimum wage and/or overtime pay] was willful, [s]he must prove, by a preponderance of the evidence that the Defendant knew that its conduct was prohibited by the FLSA or showed reckless disregard for whether its conduct was prohibited by FLSA.

Notes on Use:

1. The FLSA permits an employee to seek back pay for up to two years before filing a lawsuit. But an employee may seek a third year of back pay if he or she proves that the employer’s violations were willful. Therefore, there is no need to include a jury instruction on willfulness unless the Plaintiff seeks back wages for a period in excess of two years.
2. The issue of whether a violation of the FLSA is willful under 29 U.S.C. § 255 differs in several ways from whether an employer’s violation of the FLSA was in good faith and based on a reasonable belief that its acts or omissions did not violation the FLSA under 29 U.S.C. § 260. First, willfulness affects whether a two- or three-year statute of limitations should be applied, whereas the good faith/reasonable belief standard only affects whether the court may, in its discretion, decline to award a portion or the full amount of liquidated damages. Second, willfulness is a jury issue; good faith/reasonable belief is a decision for the court. Third, the employee bears the burden of proof in determining whether an employer’s actions were willful; the employer bears the burden of proof in determining whether the good faith/reasonable belief standard applies. *Compare 29 U.S.C. § 255 and 29 U.S.C. § 260.*

Authority:

29 U.S.C. § 255; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).