MODEL CIVIL

JURY INSTRUCTIONS

FOR THE
DISTRICT COURTS OF THE
THIRD CIRCUIT

Prepared by
Committee on Model
Civil Jury Instructions
Within the Third Circuit

2010 Edition

COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS
THIRD CIRCUIT

MEMBERS:

Judge Dickinson R. Debevoise, Chair
Judge A. Richard Caputo
Judge Noel L. Hillman
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Judge Louis H. Pollak
Judge Jerome B. Simandle

REPORTER:

Professor Catherine T. Struve

STAFF:

Theresa Burnett, Esq.
Susan Mangino

INTRODUCTION

In the late spring of 2004 Chief Judge Anthony J. Scirica appointed a Committee of district judges to draft model civil jury instructions to help judges communicate more effectively with juries. He and the Committee recruited Professor Daniel J. Capra of Fordham University Law School and Professor Catherine T. Struve of University of Pennsylvania Law School to serve as Reporters for the Committee. Throughout its work the Committee and the Reporters received continuing assistance from Circuit Executive, Toby Slawsky, and Circuit staff members Theresa Burnett, Esq. and Susan Mangino. The project was funded by generous contributions from the Court of Appeals and each District Court in the Third Circuit.[*]

The Committee commenced its work in September 2004[**]. It decided to draft general

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[*] Neither the Court of Appeals nor any Judge of that Court participated in the drafting of the Model Instructions.

[**] Judge Kent A. Jordan served on the Committee until his appointment to the Court of Appeals. Judge William G. Bassler served on the Committee until his retirement from the bench. Professional Daniel J. Capra served as a Reporter for the Committee until March 2009. Professor Catherine T. Struve is now the Committee's sole reporter.

instructions applicable in all civil jury trials and instructions covering the most common types of federal cases in which juries can be requested. An appendix is included which indicates where instructions in other causes of action can be found. The subject matter of the Model Civil Jury Instructions is set forth in the Table of Contents that follows. The extraordinary efforts of the Reporters and the scholarly strength they brought to the task of drafting these Instructions cannot be over-emphasized.

The comments the Reporters prepared that accompany each instruction proved to be so valuable that the Committee decided to include them with the final instructions. They should be useful to district court judges not only when they draft jury instructions but also when they address motions to dismiss and motions for summary judgment.

By referring to the Table of Contents beginning with General Instruction No. 1.1 and then proceeding through the Table of Contents from one instruction to the next, one may select the appropriate instruction applicable to the case at hand and thus assemble a complete charge. It must be emphasized, however, that every case is unique, having its particular fact pattern, and care must be exercised when adapting the Model Instructions to the individual case.

These Model Civil Jury Instructions remain a work in progress. The law develops as time passes. Even as the Instructions were being assembled in final form opinions of the Court of Appeals came down that required additions or revisions. Supreme Court and Court of Appeals decisions have required both major and minor revisions of the Model Instructions and Comments. Judges and lawyers who use these Instructions have submitted suggestions for improvement. All of these suggestions have been reviewed, and many have been incorporated in the Model Instructions and Comments. The Committee meets periodically with its Reporter to review developments in the law and the comments of those who use the Model Instructions. Revised editions will continue to be issued from time to time.

The Committee hopes that this work will ease the burden of district judges in preparing their jury instructions and will also provide a technique for the rapid preparation and assembly of complete instructions in suitable form for submission to the jury.

Click here to link to the Table of Contents and the model civil jury instructions. The documents are provided in two formats: WordPerfect and PDF (for easy referral to just the Table of Contents, you should save the Table of Contents web page as one of your "favorites").

You may e-mail any comments to Tburnett_comments_juryinstructions@ca3.uscourts.gov. Comments will be provided to the Committee for consideration at a future meeting.

General Instructions for Civil Cases

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1.1 Preliminary Instructions — Introduction; Role of Jury

Model

Now that you have been sworn, I have the following preliminary instructions for your guidance as jurors in this case.

You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give to you.

You and only you will be the judges of the facts. You will have to decide what happened. I play no part in judging the facts. You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be. My role is to be the judge of the law. I make whatever legal decisions have to be made during the course of the trial, and I will explain to you the legal principles that must guide you in your decisions. You must follow that law whether you agree with it or not.

Comment

This instruction is derived from the Bench Book for United States District Court Judges (Federal Judicial Center), and tracks similar pattern instructions in the First Circuit (Criminal 1.01) and Eleventh Circuit (2.1). *See also* Fifth Circuit 1.1. For other versions of this instruction, see Sixth Circuit (Criminal) 1.02; Eighth Circuit 1.01.

The instruction can be modified to be given at the end of the case when the court is about to give final instructions on the applicable law. *See, e.g.*, Seventh Circuit (Criminal) 1.01:

> Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law. You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone. Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them. Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. [You should not be influenced by any person's race, color, religion, national ancestry, or sex.] Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

See also Ninth Circuit 1.1A - 1.1C (instructions on duty of jurors).

1.2 Preliminary Instructions — Description of Case; Summary of Applicable Law

Model

In this case, [plaintiff] claims that [describe claims]; [defendant] denies those claims [and also contends that [describe counterclaims or affirmative defenses]]. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements that [plaintiff] must prove to make [his/her/its] case:

[Summarize elements of the applicable cause of action].

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

This instruction is derived from the pattern instruction used by United States District Courts in Camden. It is similar to pattern instructions in the Eighth Circuit (1.01) and the Ninth Circuit (1.2).

This preliminary instruction concerning the elements in the case can be used together with the applicable substantive instruction for a particular cause of action. It is not necessary at the outset, however, to give a detailed instruction as to the applicable elements, especially in a complex case. But a brief description of the claims, defenses and counterclaims, if any, is likely to aid jury comprehension.

This instruction can be modified to be given at the beginning of voir dire, or in light of what was given at the beginning of voir dire.

1.3 Preliminary Instructions — Conduct of the Jury

Model

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial and until you have heard all of the evidence and retired to the jury room to deliberate, you are not to discuss the case with anyone, not even among yourselves. If anyone should try to talk to you about the case, including a fellow juror, bring it to my attention promptly. There are good reasons for this ban on discussions, the most important being the need for you to keep an open mind throughout the presentation of evidence. I know that many of you use cell phones, smart phones [like Blackberries and iPhones], and other portable electronic devices; laptops, netbooks, and other computers both portable and fixed; and other tools of technology, to access the internet and to communicate with others. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate orally with anyone about the case on your cell phone, smart phone, or portable or fixed computer or device of any kind; or use these devices to communicate electronically by messages or postings of any kind including e-mail, instant messages, text messages, text or instant messaging services [such as Twitter], or through any blog, website, internet chat room, or by way of any other social networking websites or services [including Facebook, MySpace, LinkedIn, and YouTube].

If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk or visit with you, either. [That is why you are asked to wear your juror tags. It shows that you are someone who is not to be approached in any way.]

Second, do not read or listen to anything related to this case that is not admitted into evidence. By that I mean, if there is a newspaper article or radio or television report relating to this case, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own on matters relating to the case or this type of case. Do not do any research on the internet, for example. You are to decide the case upon the evidence presented at trial. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Again, do not reach any conclusion on the claims [or defenses] until all of the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[Finally, if any member of the jury has a friend or family member who is in attendance at this public trial, that visitor must first register with my Clerk because special rules will govern their attendance. You may not discuss any aspect of this trial with the visitor, nor may you permit the

visitor to discuss it with you.]

Comment

This instruction is adapted from the pattern instruction used by United States District Courts in Delaware. For variations on this instruction, see First Circuit (Criminal) 1.07**;** Eighth Circuit 1.05; Ninth Circuit 1.12. See also Montana 1.4 (concluding the instruction with a warning that "[f]ailure to observe these precautions might require the retrial of this case, which would result in a long delay, considerable expense to the courts and the parties and a waste of your time and effort."). Portions of the instruction are drawn from Proposed Model Jury Instructions on the Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management in December 2009. Obviously, the relevant technologies will evolve over time; users of these instructions should insert a list of current examples in the appropriate place in the instructions.

The court should give this instruction on jury conduct after the jurors are sworn and before opening statements. Depending on the circumstances, it may be useful to give this instruction, or some part of it, during the trial as well. *See* Wright & Miller, *Federal Practice and Procedure* § 486 (suggesting that there may be occasion during the trial and at the close of the evidence to remind the jury about how it should conduct itself).

The Committee considered whether to delete the instruction that jurors are not to talk among themselves about the case until deliberations. The Committee notes that Arizona permits pre-deliberation discussions among jurors. But the Third Circuit has declared as follows:

> "It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process." *Waldorf v. Shuta*, 3 F.3d 705, 709 (3d Cir. 1993). Partly to ensure that this right is upheld, "it [has been] a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." [United States v.] *Resko*, 3 F.3d [684] at 688 [(3d Cir. 1993)].

United States v. Bertoli, 40 F.3d 1384, 1393 (3d Cir. 1994).

Premature deliberations present a number of concerns, the most important being that jurors who discuss the case among themselves may harden their positions before all of the evidence is presented and the jury is instructed. Moreover, "[o]nce a juror has expressed views on a particular issue, that juror has a 'stake' in the expressed views and may give undue weight to additional evidence that supports, rather than undercuts, his or her view." *Id.* The Committee therefore concluded that the court should instruct the jurors to refrain from discussing the case among

1 themselves before deliberations.

1.4 Preliminary Instructions — Bench Conferences

Model

During the trial it may be necessary for me to talk with the lawyers out of your hearing by having a bench conference. If that happens, please be patient.

We are not trying to keep important information from you. These conferences are necessary for me to fulfill my responsibility, which is to be sure that evidence is presented to you correctly under the law.

We will, of course, do what we can to keep the number and length of these conferences to a minimum. [While we meet, I will invite you to stand up and stretch and take a short break or perhaps even call a recess if it is a lengthy issue, and permit you to go downstairs for a break.]

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Comment

This instruction is derived from First Circuit (Criminal) 1.05; 8th Circuit 1.03; and former Ninth Circuit 2.2. *Cf.* Ninth Circuit 1.18. For a shortened version of this instruction, see Fifth Circuit 2.7:

> At times during the trial it may be necessary for me to talk with the lawyers here at the bench out of your hearing, or by calling a recess. We meet because often during a trial something comes up that doesn't involve the jury.

1.5 Preliminary Instructions — Evidence

Model

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;
2. Documents and other things received as exhibits;
3. Any facts that are stipulated--that is, formally agreed to by the parties; and
[4. Any facts that are judicially noticed--that is, facts I say you must accept as true even without other evidence.]

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;
2. Objections by lawyers.
3. Any testimony I tell you to disregard; and
4. Anything you may see or hear about this case outside the courtroom.

You must make your decision based only on the evidence that you see and hear in court. Do not let rumors, suspicions, or anything else that you may see or hear outside of court influence your decision in any way.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

There are rules that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence. You should not be influenced by the fact that an objection is made. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe that evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

Also, certain testimony or other evidence may be ordered struck from the record and you will be instructed to disregard this evidence. Do not consider any testimony or other evidence that gets struck or excluded. Do not speculate about what a witness might have said or what an exhibit might

have shown.

Comment

This instruction is derived from the Bench Book for United States District Judges (Section 6.05); First Circuit (Criminal) 1.05; Eighth Circuit 1.02; and former Ninth Circuit 1.4. *Cf.* Ninth Circuit 1.7. The third and fourth paragraphs of the instruction are specifically derived from the instruction used by District Judges in Delaware.

This instruction is to be given at the outset of the case, as well as, or in place of, an instruction at the end of the case. The instruction can be given at the end of the case simply by changing the verbs to the past tense.

1.6 Preliminary Instructions – Direct and Circumstantial Evidence

Model

Option 1:

Do not be concerned about whether evidence is "direct evidence" or "circumstantial evidence." You should consider and weigh all of the evidence that is presented to you. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

Option 2:

There are two types of evidence that you may use in reaching your verdict. One type of evidence is called "direct evidence." An example of "direct evidence" is when a witness testifies about something that the witness knows through his own senses — something the witness has seen, felt, touched or heard or did. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining. Another form of direct evidence is an exhibit where the fact to be proved is its existence or current condition.

The other type of evidence is circumstantial evidence. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

You should consider both kinds of evidence that are presented to you. The law makes no distinction in the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

Comment

Option 1 is derived from Fifth Circuit (Criminal) 1.07 (Alternative A). It can be used by those judges who do not wish to say anything about the distinction between direct and circumstantial evidence, but yet might be concerned that jurors would have preconceived notions about these terms.

Option 2 is derived from former Ninth Circuit 3.6. *Cf.* Ninth Circuit 1.9. The instruction does not attempt to provide a definition of "direct" evidence. The definitions given in some instructions simply repeat the word "direct". Other instructions on direct evidence are

underinclusive, as they refer only to witness testimony, whereas an exhibit can be direct evidence of a fact. The example given in the instruction should be sufficient to give jurors a clear idea of "direct" evidence.

1.7 Preliminary Instructions — Credibility of Witnesses

Model

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. "Credibility" means whether a witness is worthy of belief. You may believe everything a witness says or only part of it or none of it. In deciding what to believe, you may consider a number of factors, including the following:

(1) the opportunity and ability of the witness to see or hear or know the things the witness testifies to;
(2) the quality of the witness's understanding and memory;
(3) the witness's manner while testifying;
(4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice;
(5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence;
(6) how reasonable the witness's testimony is when considered in the light of other evidence that you believe; and
(7) any other factors that bear on believability.

[The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.]

Comment

This instruction is derived from First Circuit (Criminal) 1.06 and former Ninth Circuit 1.8. *Cf.* Ninth Circuit 1.11. For variations, see Sixth Circuit (Criminal) 1.07; Seventh Circuit (Criminal) 1.03.

This instruction can be given both at the beginning of the case and at the close of the evidence. For an example of an instruction given at the end of the case, see Eighth Circuit 3.03.

The bracketed material at the end of the instruction may be given usefully at the end of a case in which witnesses on one side outnumber the other. *See* Instruction 3.2 (Number of Witnesses).

1.8 Preliminary Instructions — Jury Questions for Witnesses

Model

Option 1:

Only the lawyers and I are allowed to ask questions of witnesses. You are not permitted to ask questions of witnesses.

Option 2:

You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.

If so, you will write your question on a piece of paper, and hand it to my Deputy Clerk. Do not discuss your question with any other juror. I will review your question with counsel at sidebar and determine whether the question is appropriate under the rules of evidence. If so, I will ask your question, though I might put it in my own words. If the question is not permitted by the rules of evidence, it will not be asked, and you should not draw any conclusions about the fact that your question was not asked. Following your questions, if any, the attorneys may ask additional questions. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.

Comment

The trial judge has discretion to permit or to disallow questions from the jury. Option 1 is for judges who want explicitly to disallow jury questions. See Ninth Circuit 1.15 (comment) ("Whether to allow jurors to ask questions is a subject debated among judges."). Option 2 (derived from the instruction given by District Judges in Camden) is for judges who want to tell jurors explicitly that they may submit questions to be asked of witnesses. Some judges, however, may not want to give an explicit instruction allowing or disallowing jury questions, but may wish instead to wait and see if jurors inquire about asking questions, and then rule on whether to allow questions.

In *United States v. Hernandez*, 176 F.3d 719, 723 (3d Cir. 1999), the Third Circuit "approved of the practice [of permitting juror questions] so long as it is done in a manner that insures the fairness of the proceedings, the primacy of the court's stewardship, and the rights of the accused." The court in *Hernandez* also held that, if the trial judge allows jury questions, the court should follow a procedure for questions to prevent jury misconduct. *Id.* at 726 (warning that "the judge should ask

any juror-generated questions, and he or she should do so only after allowing attorneys to raise any objection out of the hearing of the jury"). The court also noted that "properly structured juror questioning in a civil trial poses even fewer" risks than in a criminal trial. *Id.*

The Third Circuit recognized in *Hernandez* that there are arguments for and against allowing jurors to submit questions for witnesses. The best argument in favor of jury questioning is that it helps jurors clarify factual confusions and understand as much of the facts and issues as possible so that they can reach an appropriate verdict. On the other hand, allowing jurors to ask questions may risk turning them into advocates and compromising their neutrality. *See United States v. Bush*, 47 F.3d 511 (2d Cir. 1995). In this regard, it is not appropriate to allow jurors to ask questions that appear to suggest a view about the merits of the case.

1.9 Preliminary Instructions — Note-Taking By Jurors

Option 1:

If you wish, you may take notes during the presentation of evidence, the summations of attorneys at the conclusion of the evidence, and during my instructions to you on the law. My Courtroom deputy will arrange for pens, pencils, and paper. Remember that your notes are for your own personal use -- they are not to be given or read to anyone else.

As you see, we have a court reporter here who will be transcribing the testimony during the course of the trial. But you should not assume that the transcripts will be available for your review during your deliberations. Nor should you consider notes that you or fellow jurors may take as a kind of written transcript. Instead, as you listen to the testimony, keep in mind that you will be relying on your recollection of that testimony during your deliberations. Here are some other specific points to keep in mind about note taking:

1. Note-taking is permitted, not required. Each of you may take notes. No one is required to take notes.

2. Be brief. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships. Overuse of note-taking may be distracting. You must determine the credibility of witnesses; so you must observe the demeanor and appearance of each person on the witness stand. Note-taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made an observation.

3. Do not use your notes, or any other juror's notes, as authority to persuade fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. As I mentioned earlier, your notes are not official transcripts. They are not evidence, and they are by no means a complete outline of the proceedings or a list of the highlights in the trial. They are valuable, if at all, only as a way to refresh your memory. Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case. You therefore are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial. Notes are not to be used in place of the evidence.

4. Do not take your notes away from court. I repeat, at the end of each day, please leave your notes in the jury room. [Describe logistics of storing and securing notes, for example: "If you do take notes, take them with you each time you leave the courtroom and please leave them in the jury room when you leave at night. At the conclusion of the case, after you have used your notes in deliberations, a court officer will collect and destroy them, to protect the secrecy of your deliberations."]

Option 2:

As you see, we have a court reporter here who will be transcribing the testimony during the course of the trial. But you should not assume that the transcripts will be available for your review during your deliberations. You must pay close attention to the testimony as it is given.

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying and the witness's manner while testifying. One of the reasons for having a number of persons on the Jury is to gain the advantage of your individual and collective memories so that you can then deliberate together at the end of the trial and reach agreement on the facts. While some of you might feel comfortable taking notes, other members of the Jury may not feel as comfortable and may not wish to do so. Notes might be given too much weight over memories, especially the memories of those who do not take notes. So, for those reasons, I ask that you not take notes during the trial.

Comment

Option 1 is derived from the instruction used by District Courts in Delaware. Slight variations are found in First Circuit (Criminal) 1.08 and Eleventh Circuit (Criminal) 3.1. For other variations, see Fifth Circuit 2.21 and Eighth Circuit 1.04.

Option 2 is derived from Eleventh Circuit (Criminal) 3.2. For a slight variation, see Fifth Circuit (Criminal) 1.02.

In *United States v. Maclean,* 578 F.2d 64 (3d Cir. 1978), the court held that the trial judge has discretion to allow jurors to take notes. It stated that if note-taking is permitted, jurors must be instructed that the notes are only aids to memory, that they are not conclusive, and they are not to be given precedence over a juror's independent recollection of the facts. *See also* American Bar Association, Civil Trial Practice Standards (2007) (court ordinarily should permit jurors to take notes, but should also give a cautionary instruction that notetaking is not required and that notes are not to be used in place of the evidence).

The instruction notes that the jurors should not assume that a transcript of testimony will be available to them during deliberations. It does not say absolutely that transcripts will not be provided. This instruction is in accordance with *United States v. Bertoli,* 40 F.3d 1384 (3d Cir. 1994), where the court held that when the trial court decides to provide testimony to the jury during deliberations, it has discretion to do so by providing a transcript. *See generally* Comment 3.3.

1.10 Preliminary Instructions — Preponderance of the Evidence

Model

This is a civil case. [Plaintiff] is the party [who/that] brought this lawsuit. [Defendant] is the party against [whom/which] the lawsuit was filed. [Plaintiff] has the burden of proving [his/her/its] case by what is called the preponderance of the evidence. That means [plaintiff] has to prove to you, in light of all the evidence, that what [he/she/it] claims is more likely so than not so. To say it differently: if you were to put the evidence favorable to [plaintiff] and the evidence favorable to [defendant] on opposite sides of the scales, [plaintiff] would have to make the scales tip somewhat on [his/her/its] side. If [plaintiff] fails to meet this burden, the verdict must be for [defendant]. If you find after considering all the evidence that a claim or fact is more likely so than not so, then the claim or fact has been proved by a preponderance of the evidence.

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

[On certain issues, called affirmative defenses, [defendant] has the burden of proving the elements of the defense by a preponderance of the evidence. I will instruct you on the facts that will be necessary for you to find on this affirmative defense. An affirmative defense is proven if you find, after considering all evidence in the case, that [defendant] has succeeded in proving that the required facts are more likely so than not so.]

[[Defendant] has also brought claims for relief against [plaintiff], called counterclaims. On these claims, [defendant] has the same burden of proof as has [plaintiff] on [his/her/its] claims.]

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard of proof and it applies only to criminal cases. It does not apply in civil cases such as this. So you should put it out of your mind.

Comment

This instruction is derived from the following sources: pattern instruction used by District Judges in Camden; pattern instruction used by District Judges in Delaware; Fifth Circuit 3.1 (second paragraph); and Eighth Circuit 3.04.

It is advisable to give this instruction at both the beginning of the case and at the close of the evidence.

It is important that the jury be made aware that the preponderance standard requires an analysis and weighing of all of the evidence presented by both sides. *See United States v. Montague,* 40 F.3d 1251, 1254-55 (D.C. Cir. 1994):

> Often, under a preponderance-of-the-evidence standard, it is assumed that the trier of fact piles up the evidence arguably on the defendant's side and determines which pile is greater. . . . In fact, a more accurate notion of the preponderance-of-the-evidence standard is "evidence which as a whole shows that the fact sought to be proved is more probable than not."

1.11 Preliminary Instructions — Clear and Convincing Evidence

Model

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction that the allegations sought to be proved by the evidence are true. Clear and convincing evidence involves a higher degree of persuasion than is necessary to meet the preponderance of the evidence standard. But it does not require proof beyond a reasonable doubt, the standard applied in criminal cases.

Comment

This instruction is derived from Fifth Circuit 2.14. For a variation, see Ninth Circuit 1.4.

The clear and convincing evidence standard has been described as an intermediate standard of proof. *See Cruzan v. Missouri Dep't of Health,* 497 U.S. 261, 285 n.11 (1990). It is used to protect especially important interests in a limited number of federal cases.

1.12 Preliminary Instructions — Description of Trial Proceedings

Model

The trial will proceed in the following manner:

First, attorney(s) for [plaintiff(s)] will make an opening statement to you. Next, attorney(s) for [defendant(s)] may make an opening statement. What is said in the opening statements is not evidence, but is simply an outline to help you understand what each party expects the evidence to show. [A party is not required to make an opening statement.]

After [Before] the attorneys have made their opening statements, [I will instruct you on the applicable law and] then each party is given an opportunity to present its evidence.

[Plaintiff] goes first because [plaintiff(s)] [has/have] the burden of proof. [Plaintiff(s)] will present witnesses whom counsel for [defendant(s)] may cross-examine, and [plaintiff(s)] may also present evidence. Following [plaintiffs'] case, [defendant(s)] may present evidence. Counsel for [plaintiff(s)] may cross-examine witnesses for the defense. [After the parties' main case is presented, they may be permitted to present what is called rebuttal evidence.]

After all the evidence has been presented, [I will instruct you on the law and then] the attorneys will present to you closing arguments to summarize and interpret the evidence in a way that is helpful to their clients' positions. As with opening statements, closing arguments are not evidence. [Once the closing arguments are completed, I will then instruct you on the law.] After that you will retire to the jury room to deliberate on your verdict in this case.

[At this point the court may wish to inform the jury of the scheduling and length of the trial, and other logistical information.]

Comment

This instruction is derived from Fifth Circuit 1.1; Eighth Circuit 1.06; and former Ninth Circuit 1.12. *Cf.* Ninth Circuit 1.19.

Bracketed material allows options to the court on when to give instructions on the law. It is recommended that instructions on the law be given at various points in the trial in order to aid jury comprehension.

2.1 General Instructions For Use During Trial — Impeachment of Witness's Character for Truthfulness

Model

You [are about to hear] [have heard] evidence that [name of witness], a witness, [e.g., has been convicted of a felony, committed forgery on a prior occasion, etc.]. You may use that evidence only to help you decide whether to believe the testimony of the witness and to determine how much weight to give it. That evidence does not mean that the witness engaged in any conduct alleged in this case, and you must not use that evidence as any proof that the witness engaged in that conduct.

Comment

This instruction is derived from Eighth Circuit 2.09 and former Ninth Circuit 3.12. *Cf.* Ninth Circuit 2.8. For variations, see Fifth Circuit 2.17 (covering prior convictions only).

The bracketed alternative allows this instruction to be given not only at the time of testimony but also at the close of the evidence. The instruction is intended to cover the admission of bad acts and convictions under Federal Rules of Evidence 608 and 609.

2.2 General Instructions For Use During Trial — Judicial Notice

Model

The rules of evidence permit the judge to accept facts that cannot reasonably be disputed. This is called judicial notice. I have decided to accept as proved the fact that [state the fact that the court has judicially noticed], even though no evidence has been introduced to prove this fact. You must accept this fact as true for purposes of this case.

Comment

The instruction is derived from former Ninth Circuit 2.5. *Cf.* Ninth Circuit 2.3. For variations, see Fifth Circuit 2.4 and Eighth Circuit 2.04.

An instruction on judicial notice should be given at the time that notice is taken. It may also be given at the time the jury is charged at the close of the evidence.

Fed.R.Evid. 201(g) provides that in a civil case, "the court shall instruct the jury to accept as conclusive any fact judicially noticed." In contrast, in a criminal case, the jury must be instructed that "it may, but is not required to, accept as conclusive any fact judicially noticed." *Id.*

2.3 General Instructions For Use During Trial — Stipulation of Testimony

Model

The parties have agreed that if [witness's name] were called as a witness, [he/she] would testify that [state the stipulated testimony]. This testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if [name of witness] had been present to testify. You must accept the fact that [name of witness] would have given that testimony. However, it is for you to determine the effect or weight to be given to that testimony.

Comment

The instruction is derived from Fifth Circuit 2.2, Eighth Circuit 2.02, and former Ninth Circuit 2.3. *Cf.* Ninth Circuit 2.1. The last two sentences are derived from New Mexico Criminal Instruction § 14-113.

When the stipulation is to what a witness would testify to if called, it is error to instruct the jury that it is to consider the stipulated testimony as true. *United States v. Benally,* 756 F.2d 773 (10th Cir. 1985). See Instruction 2.4 if the stipulation is as to an issue of fact.

2.4 General Instructions For Use During Trial — Stipulation of Fact

Model

The [parties] have agreed that [set forth stipulated fact or facts] [is/are] true. [The parties have stipulated that certain facts are true, and those stipulations have been read to you during this trial.] You must therefore treat [this fact] [these facts] as having been proved for the purposes of this case.

Comment

The instruction is derived from Fifth Circuit 2.3 and Eighth Circuit 2.03. For a variation, see Ninth Circuit 2.2 (using "should" rather than "must"). The bracketed material concerning stipulated facts previously read to the jury can be used when the stipulations are too numerous to recount.

This instruction could be applied to matters admitted by way of pleading or a request for admission, as well as to facts stipulated during the trial. If a stipulation or admission is as to a matter of fact, the jury is to be instructed that it must consider the fact as true. *Compare* Instruction 2.3 (stipulation as to what testimony would be if given).

2.5 General Instructions For Use During Trial — Use of Deposition

Model

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

The deposition of [name of witness], which was taken on [date], is about to be [has been] presented to you [by a video] [by reading the transcript]. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

Comment

The instruction is derived from former Ninth Circuit 2.6. *Cf.* Ninth Circuit 2.4. For a variation, see Fifth Circuit 2.23.

This instruction should be given when deposition testimony is admissible and offered as substantive evidence. *See* Fed.R.Evid. 804(b)(1), 801(d)(2); Fed.R.Civ.P. 32(a). It should be given before the testimony is read to the jury. The instruction can be modified to be given at the beginning of the trial, as well as when the evidence is presented.

This instruction is not appropriate if answers are being used for impeachment only.

If more than one deposition is read into evidence or otherwise presented during the trial, the jury may be reminded of how depositions are taken. But it is not necessary to repeat the entire instruction.

2.6 General Instructions For Use During Trial — Use of Interrogatories

Model

You will now hear [have heard] answers that [name of party] gave in response to written questions submitted by the other side. The written questions are called "interrogatories." The written answers were given in writing and under oath, before the trial.

You must consider [name of party]'s answers to interrogatories in the same manner as if the answers were made from the witness stand.

Comment

The instruction is derived from former Ninth Circuit 2.13. *Cf.* Ninth Circuit 2.10.

This instruction should be used before the interrogatories are read to the jury. It can be modified to be given again at the close of the evidence. The instruction is not appropriate if the answers to the interrogatories are used for impeachment only. *See* Fed.R.Civ.P. 33.

This instruction should not be used for requests for admission under Fed.R.Civ.P. 36. The effect of a request for admission is conclusive as to the fact admitted.

2.7 General Instructions For Use During Trial — Charts and Summaries in Evidence

Model

[Name of party] has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

Comment

The instruction is derived from Sand et al., *Modern Federal Jury Instructions*, No. 74-11 (2004). "[C]harts and summaries are powerful visual displays for which some judicial explanation is required. Such an instruction will ensure that they are not given improper consideration by the jury." *Id.*; *compare* Instruction 2.8 (providing a limiting instruction when charts and summaries are not evidence).

For a variation, see Ninth Circuit 2.13 ("Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.").

2.8 General Instructions For Use During Trial — Charts and Summaries Not Admitted in Evidence

Model

Certain charts and summaries that have not been received in evidence have been shown to you in order to help explain or illustrate the contents of books, records, documents, testimony, or other evidence in the case. [Describe the charts and summaries that have not been admitted.] These charts and summaries are not themselves proof of any facts. They are not binding on you in any way. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the evidence.

Comment

The instruction is derived from former Ninth Circuit 3.9. *Cf.* Ninth Circuit 2.12.

This instruction is applicable to pedagogical devices and illustrations. Use of this material is governed by Rule 611(a) of the Federal Rules of Evidence, and not by Rule 1006 (which applies to summaries of admissible evidence where that evidence is too voluminous to be examined conveniently in court). *See United States v. DeBoer,* 966 F.2d 1066, 1069 (6th Cir. 1992) (summaries of already admitted evidence are permissible "so long as an appropriate limiting instruction informs the jury that 'the chart is not itself evidence but is only an aid in evaluating the evidence'"). If a chart or summary is used only to illustrate or explain evidence already admitted, then it is not itself evidence, and it may not be sent to the jury room.

It is suggested that this instruction be given both at the time the summary is used and at the end of the case. *See, e.g., United States v. Ray,* 370 F.3d 1039, 1047 n.8 (10th Cir. 2004) (suggesting that the court repeat the limiting instruction "in writing at the trial's conclusion"), *vacated on other grounds*, 543 U.S. 1109 (2005).

2.9 General Instructions For Use During Trial — Striking Evidence

Model

I have ordered that [describe the evidence] be struck from the record and I am instructing you that you must disregard that information [testimony]. That means that when you are deciding the case, you must not consider that information [testimony] in any way.

Comment

The instruction is derived from former Ninth Circuit 1.7. *Cf.* Ninth Circuit 1.10. It can also be altered to be given as part of a general instruction on evidence at the beginning of the case. *See* Instruction 1.5. The instruction is to be given when the evidence is struck, and not at the end of the case, as it could be counterproductive to describe the evidence that has been struck at that later point.

2.10 General Instructions For Use During Trial — Evidence Admitted for a Limited Purpose

Model

You [have heard] [will now hear] evidence that was received for [a] particular limited purpose[s]. [This evidence can be considered by you as evidence that (describe limited purpose)]. It may not be used for any other purpose. [For example, you cannot use it as proof that (discuss specific prohibited purpose)].

Comment

The instruction is derived from Fifth Circuit 2.15, Eighth Circuit 2.08B, and former Ninth Circuit 1.5. *Cf.* Ninth Circuit 1.8.

This instruction can be modified slightly to be given again at the close of the evidence. It is preferable to give a limited use instruction at the time the evidence is introduced and also at the close of the evidence; but in the end the timing of a limiting use instruction is a matter of trial court discretion. *See, e.g., Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.,* 630 F.2d 250 (5th Cir. 1980) (although generally more effective at the time the evidence is presented, the court did not abuse its discretion by giving the instruction only as part of the final instructions to the jury).

The Third Circuit has expressed a preference for an instruction that tells the jury both how the evidence can be used and how it must not be used. *See Government of Virgin Islands v. Mujahid,* 990 F.2d 111 (3d Cir. 1993) (trial judge should tell the jury that a guilty plea of a coconspirator can be used for impeachment of the coconspirator but cannot be used as proof of the defendant's guilt). *See also United States v. Lee*, 612 F.3d 170, 191 & n.25 (3d Cir. 2010) (discussing Third Circuit Model Criminal Jury Instruction 4.29 and "encourag[ing] district court judges to delineate the specific grounds for admissibility of 404(b) evidence, even if the entire 404(b) litany has already been recounted").

Instruction 2.10 can be used in multiple party cases where evidence is admissible against one party but not another (e.g., a statement by an agent that is admissible against the agent but not the principal).

See Instruction 1.5, including a reference to limited use instructions as part of a general instruction on evidence to be given at the beginning of the case.

2.11 General Instructions For Use During Trial — Opinion Testimony

Model

You have heard [will hear] testimony containing opinions from [name of witness]. In weighing this opinion testimony, you may consider [his/her] qualifications, the reasons for [his/her] opinions, and the reliability of the information supporting those opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. The opinion of [name of witness] should receive whatever weight and credit, if any, you think appropriate, given all the other evidence in the case.

In deciding whether to accept or rely upon the opinion of [name of witness], you may consider any bias that [name of witness] may have, including any bias that may arise from evidence that [name of witness] has been or will be paid for reviewing the case and testifying [or from evidence that [name of witness] testifies regularly and makes a large portion of [his/her] income from testifying in court].

Comment

This instruction is derived from Fifth Circuit 2.19 and former Ninth Circuit 3.7. *Cf.* Ninth Circuit 2.11. For a variation, see Eleventh Circuit 5.2 (adding: "When a witness has been or will be paid for reviewing and testifying concerning the evidence, you may consider the possibility of bias and should view with caution the testimony of such a witness where court testimony is given with regularity and represents a significant portion of the witness' income.").

The instruction avoids labeling the witness as an "expert." If the court refrains from designating the witness as an "expert" this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and will protect against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994). *See* Advisory Committee Note to Federal Rule of Evidence 702 (2000) (cautioning against instructing the jury that the witness is an "expert").

The bracketed material can be used to give the instruction before the expert testifies. For example, the instruction could be given as part of the initial instruction on matters of evidence. *See* Instructions 1.5—1.7.

2.12 General Instructions For Use During Trial — Foreign Language Testimony or Audio Recording

Model

You are about to hear [testimony of a witness who will be testifying in] [an audio recording in] [language used]. The evidence you are to consider is only that provided through the official court [interpreters] [translators]. Although some of you may know the language used, it is important that all jurors consider the same evidence. So you must base your decision on the evidence presented in the English [interpretation] [translation]. You must disregard any different meaning.

[In this case there is a dispute over the translation of certain statements in a foreign language. It is for you to determine which, if either, translation is accurate.]

Comment

The Ninth Circuit has separate instructions for foreign language testimony and foreign language recordings. The model combines them and provides alternatives in brackets. See Ninth Circuit 2.6 and 2.7.

The instruction concerning recordings is appropriate only if the accuracy of the translation is not at issue. *See also* Instruction 2.13 on transcriptions of recordings.

2.13 General Instructions For Use During Trial — Transcript of Audio-Recorded Conversation

Model

At this time you are going hear conversations that were recorded. This is proper evidence for you to consider. Please listen to it very carefully. I am going to allow you to have a transcript of the recording [prepared by _____] to help you identify speakers and as a guide to help you listen to the recording. If you believe at any point that the transcript says something different from what you hear on the recording, remember it is the recording that is the evidence, not the transcript. Any time there is a variation between the recording and the transcript, you must be guided solely by what you hear on the recording and not by what you see in the transcript.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the recording. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the recording. It is what you hear on the recording that is evidence, not the transcripts.]

Comment

The instruction is derived from former Ninth Circuit 2.7. *Cf.* Ninth Circuit 2.5.

This instruction can be modified to be given sometime after the recording is heard, e.g., at the close of the case. See Sixth Circuit (Criminal) § 7.17:

> You have heard some tape recordings that were received in evidence, and you were given some written transcripts of the tapes. Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The tapes themselves are the evidence. If you noticed any differences between what you heard on the tapes and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the tapes, you must ignore the transcripts as far as those parts are concerned.

2.14 General Instructions For Use During Trial — Recess Admonition

Model

We are about to take [our first] [a] recess [and I remind you of the instruction I gave you earlier]. During this recess and any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, do not tell your fellow jurors but tell me about it immediately. [Do not read, watch or listen to any news reports of the trial, or conduct any research or investigation, including on the Internet. Remember that I told you not to use any electronic tools to communicate with anyone about the case or to do research relating to the case.] Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to [identify court personnel] to give to me.

[I will not repeat these admonitions each time we recess or adjourn, but you will be reminded of them on occasion.]

Comment

The instruction is derived from Fifth Circuit 2.1, Eighth Circuit 2.01 and former Ninth Circuit 2.1. *Cf.* Ninth Circuit 1.12.

Jurors should be reminded that they have duties and responsibilities even when not in court. See, e.g., *United States v. Williams,* 635 F.2d 744 (8th Cir. 1980) (it is essential to a fair trial that the jury be cautioned as to what conduct is permissible when not in court; an instruction is particularly necessary before the jury separates at night when they will converse with friends and relatives or possibly encounter trial publicity).

This instruction may be modified to be given at the beginning of the trial, as well as before a recess. *See also* Instruction 1.3 (providing similar admonitions as part of a broader instruction at the beginning of the case).

3.1 General Instructions For Use At End of Trial — Deliberations

Model

When you retire to the jury room to deliberate, you may take with you [these instructions] [your notes] [and] the exhibits that the Court has admitted into evidence. You should select one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if, under the appropriate burden of proof, the parties have established their claims. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

As jurors, you have a duty to consult with each other and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after a full and impartial consideration of all of the evidence with your fellow jurors. Listen to each other carefully. In the course of your deliberations, you should feel free to re-examine your own views and to change your opinion based upon the evidence. But you should not give up your honest convictions about the evidence just because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

When you start deliberating, do not talk to the jury officer, to me or to anyone but each other about the case. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a cell phone, smart phone [like Blackberries or iPhones], or computer of any kind; the internet, any internet service, or any text or instant messaging service [like Twitter]; or any internet chat room, blog, website, or social networking service [such as Facebook, MySpace, LinkedIn, or YouTube], to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

If you have any questions or messages for me, you must write them down on a piece of paper,

have the foreperson sign them, and give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take some time to get back to you.

One more thing about messages. Never write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that a certain number is voting one way or another. Your votes should stay secret until you are finished.

Your verdict must represent the considered judgment of each juror. In order for you as a jury to return a verdict, each juror must agree to the verdict. Your verdict must be unanimous.

A form of verdict has been prepared for you. It has a series of questions for you to answer. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will fill it in, and have your foreperson date and sign the form. You will then return to the courtroom and your foreperson will give your verdict. Unless I direct you otherwise, do not reveal your answers until you are discharged. After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so.

Once again, I want to remind you that nothing about my instructions and nothing about the form of verdict is intended to suggest or convey in any way or manner what I think your verdict should be. It is your sole and exclusive duty and responsibility to determine the verdict.

Comment

The instruction is derived from Fifth Circuit 2.11 and 2.12, Eighth Circuit 3.06, former Ninth Circuit 4.1, and the instruction used in the District of Delaware. *Cf.* Ninth Circuit 3.1.

The portion of the instruction concerning electronic media is drawn from Proposed Model Jury Instructions on the Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management in December 2009. Obviously, the relevant technologies will evolve over time; users of these instructions should insert a list of current examples in the appropriate place in the instructions.

The part of the instruction concerning unanimity may be altered if the parties consent to a non-unanimous verdict. *See* Fed.R.Civ.P. 48.

3.2 General Instructions For Use At End of Trial — Number of Witnesses

Model

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

Comment

See Instruction 1.7, where this instruction is included as an alternative to be given as part of a general instruction on credibility of witnesses at the beginning of the case.

This instruction is not to be given routinely, but it might be given, on request, when there is a disproportionate number of witnesses on one side of the case.

3.3 General Instructions For Use At End of Trial — Read-Backs of Trial Testimony

Model

At your request, I have decided to have [a transcript of] [describe the testimony] read [provided] to you in order to assist you in your deliberations. I remind you that you must focus on all of the testimony and evidence presented at the trial. You may not give undue weight to the testimony that is read back to you [provided to you].

Comment

The instruction contains a bracketed alternative for allowing the jury to receive a transcript of the testimony that the jurors request to re-hear. On allowing read-backs and transcripts of testimony, *see United States v. Bertoli*, 40 F.3d 1384, 1400 (3d Cir. 1994), where the court stated that two concerns may arise when a jury requests a read-back of testimony:

> (1) such requests may slow the trial when the requested testimony is lengthy; (2) if read only a portion of testimony, the jury may give undue weight to that portion.

The *Bertoli* court held, however, that "unless a trial court's refusal to read back testimony is supported by one of these two concerns, a trial judge abuses his discretion by denying the [jury's] request." *Id.* (internal quotation marks omitted). *See, e.g.*, *United States v. Shabazz*, 564 F.3d 280, 285 (3d Cir. 2009) (it was error to deny jury's request for read-back of testimony that "ran no longer than 25 minutes" and "was not peripheral, as [the witness] was both the only witness to link Shabazz directly to the robbery who was not testifying in connection with a plea agreement and the only one who expressed some uncertainty about his identification"). The *Bertoli* court further held that a trial court is within its discretion in providing a transcript of the requested testimony. The *Bertoli* court suggested that any transcript or read-back should be accompanied by an instruction "to focus on the entire testimony and evidence." *Bertoli*, 40 F.3d at 1401.

3.4 General Instructions For Use At End of Trial — Deadlock

Model

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so consistent with your individual judgments. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you must be open to their opinions. You should not be influenced to vote a certain way, however, by the single fact that a majority of the jurors, or any of them, will vote in a certain way. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinions of the other jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that those views are wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to reexamine your own views.

Remember that you are not partisans; you are judges — judges of the facts. Your only interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

If you should fail to agree on a verdict, the case is left open and must be resolved at a later time. There is no reason to think that another trial would be conducted in a better way or that a different jury would decide it any better. Any future jury must be selected in the same manner and from the same source as you.

We try cases to dispose of them and to reach a common conclusion if it is consistent with the conscience of each member of the jury. I suggest that, in deliberating, you each recognize that you are not infallible, that you listen to the opinions of the other jurors and that you do so carefully with a view to reaching a common conclusion, if you can. You may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberations.

Comment

The instruction is derived from Eighth Circuit 3.07 and former Ninth Circuit 4.6. *Cf.* Ninth Circuit 3.5. *See also* Third Circuit (Criminal) Instruction 9.05.

An instruction encouraging a deadlocked jury to reach a verdict should be given with great caution. Such an instruction was approved in *Allen v. United States,* 164 U.S. 492 (1896). But "Allen" charges often have been criticized as coercive and as an unwarranted intrusion upon the province of the jury.

Note that the model instruction does not specifically encourage those jurors in the minority to reconsider their views or distrust their judgment. An instruction to that effect has been declared to be prohibited in the Third Circuit. *See United States v. Fioravanti,* 412 F.2d 407, 418 (3d Cir. 1969) ("in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his. Such an instruction will be deemed error, normally reversible error."). While it has been held that the prohibition on instructions targeted at the minority of jurors is limited to criminal cases, *see Cary v. Allegheny Techs., Inc.,* 267 F.Supp.2d 442 (W.D.Pa. 2003), the danger of coercion in such a charge cautions against its use even in civil cases. In concluding that a modified *Allen* charge was "proper[]" in the context of a particular civil case, the Court of Appeals noted that the charge in question "does not speak specifically to minority jurors." *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 940 & n.32 (3d Cir. 1990).

Courts have also disapproved of statements telling a deadlocked jury that it must reach a decision or "instruct[ing] a deadlocked jury to consider the burdens and expense to the government of a new trial." *United States v. Brennan*, 326 F.3d 176, 193 (3d Cir. 2003) (collecting cases). On the latter point, the Court of Appeals has explained that "a charge is unduly coercive when the trial court not only states that a new trial will result, but goes further and unduly emphasizes the consequences, i.e., time, toil, or expense, that will accompany a failure to arrive at an unanimous verdict." *United States v. Jackson*, 443 F.3d 293, 298 (3d Cir. 2006) (rejecting challenge to trial judge's statement that "the case will have to be retried in front of another jury" and reasoning that "any undue coercion created in this case by the brief mention of a new trial was mitigated by" the trial judge's emphasis on "the government's burden of proof [and] the jurors' responsibility to consider honestly the evidence" and the trial judge's directive that jurors should not "surrender [their] beliefs for the sake of expediency").

Instructions for Civil Rights Claims Under Section 1983

Numbering of Section 1983 Instructions

4.1 Section 1983 Introductory Instruction

4.2 Section 1983 – Burden of Proof

4.3 Section 1983 – Elements of Claim

4.4 Section 1983 – Action under Color of State Law

- 4.4.1 Section 1983 – Action under Color of State Law Is Not in Dispute
- 4.4.2 Section 1983 – Determining When an Official Acted under Color of State Law
- 4.4.3 Section 1983 – Determining Whether a Private Person Conspired with a State Official

4.5 Section 1983 – Deprivation of a Federal Right

4.6 Section 1983 – Liability in Connection with the Actions of Another

- 4.6.1 Section 1983 – Supervisory Officials
- 4.6.2 Section 1983 – Non-Supervisory Officials – Failure to Intervene
- 4.6.3 Section 1983 – Municipalities – General Instruction
- 4.6.4 Section 1983 – Municipalities – Statute, Ordinance or Regulation
- 4.6.5 Section 1983 – Municipalities – Choice by Policymaking Official
- 4.6.6 Section 1983 – Municipalities – Custom
- 4.6.7 Section 1983 – Municipalities – Liability Through Inadequate Training or Supervision
- 4.6.8 Section 1983 – Municipalities – Liability Through Inadequate Screening

4.7 Section 1983 – Affirmative Defenses

4.7.1 Conduct Not Covered by Absolute Immunity

4.7.2 Qualified Immunity

4.7.3 Release-Dismissal Agreement

4.8 Section 1983 – Damages

4.8.1 Compensatory Damages

4.8.2 Nominal Damages

4.8.3 Punitive Damages

4.9 Section 1983 – Excessive Force (Including Some Types of Deadly Force) – Stop, Arrest, or Other "Seizure"

4.9.1 Section 1983 – Instruction for *Garner*-Type Deadly Force Cases – Stop, Arrest, or Other "Seizure"

4.10 Section 1983 – Excessive Force – Convicted Prisoner

4.11 Section 1983 – Conditions of Confinement – Convicted Prisoner

4.11.1 Section 1983 – Denial of Adequate Medical Care

4.11.2 Section 1983 – Failure to Protect from Suicidal Action

4.11.3 Section 1983 – Failure to Protect from Attack

4.12 Section 1983 – Unlawful Seizure

4.12.1 Section 1983 – Unlawful Seizure – *Terry* Stop and Frisk

4.12.2 Section 1983 – Unlawful Seizure – Arrest – Probable Cause

4.12.3 Section 1983 – Unlawful Seizure – Warrant Application

4.13 Section 1983 – Malicious Prosecution

4.13.1 Section 1983 – Burdens of Proof in Civil and Criminal Cases

4.14 Section 1983 – State-created Danger

4.15 Section 1983 – High-Speed Chase

4.16 Section 1983 – Duty to Protect Child in Foster Care

4.1 Section 1983 Introductory Instruction

Model

[Plaintiff][1] is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal [constitutional] [statutory] rights under color of state law.[2]

[1] Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

[2] In these instructions, references to action under color of state law are meant to include action under color of territorial law. *See, e.g.*, *Eddy v. Virgin Islands Water & Power Auth.*, 955 F. Supp. 468, 476 (D.V.I. 1997) ("The net effect of the Supreme Court decisions interpreting 42 U.S.C. § 1983, including *Will* [*v. Michigan Department of State Police*, 491 U.S. 58 (1989),] and *Ngiraingas* [*v. Sanchez*, 495 U.S. 182 (1990)], is to treat the territories and their officials and employees the same as states and their officials and employees."), *reconsidered on other grounds*, 961 F. Supp. 113 (D.V.I. 1997).

4.2 Section 1983 – Burden of Proof

Model

[Provide Instruction 1.10 on burden of proof, modified (if necessary) as discussed in the Comment below.]

Comment

The plaintiff bears the burden of proof on the elements of a Section 1983 claim. *See, e.g.*, *Groman v. Township of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995). The court can use Instruction 1.10 to apprise the jury of this burden.

Where there is a jury question on the issue of qualified immunity, some additional instruction on burdens may occasionally be necessary.

Although the defendant has the burden of pleading the defense of qualified immunity, *see Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Thomas v. Independence Tp.*, 463 F.3d 285, 293 (3d Cir. 2006), the Supreme Court has not definitively established who bears the burden of proof with respect to that defense, *see, e.g., Gomez*, 446 U.S. at 642 (Rehnquist, J., concurring) (construing the opinion of the Court "to leave open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity").

The Third Circuit has stated that the defendant bears the burden of proof on qualified immunity. *See, e.g.*, *Kopec v. Tate*, 361 F.3d 772, 776 (3d Cir. 2004) (defendant has burden to establish entitlement to qualified immunity); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) (same); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (same); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989) (same); *Ryan v. Burlington County*, N.J., 860 F.2d 1199, 1204 n.9 (3d Cir. 1988) (same). However, some other Third Circuit opinions suggest that the burden of proof regarding qualified immunity may vary with the element in question.[3] For example, the court has stated that "[w]here a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. . . . Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the 'objective reasonableness' of the defendant's belief in the lawfulness of his actions." *Sherwood*

[3] As discussed below (see Comment 4.7.2), the qualified immunity analysis poses three questions: (1) whether the defendant violated a constitutional right; (2) whether the right was clearly established; and (3) whether it would have been clear to a reasonable official, under the circumstances, that the conduct was unlawful. The issue of evidentiary burdens of proof implicates only the first and third questions.

v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997); *see also Hynson By and Through Hynson v. City of Chester*, 827 F.2d 932, 935 (3d Cir. 1987) ("Although the officials claiming qualified immunity have the burden of pleading and proof . . . , a plaintiff who seeks damages for violation of constitutional rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.").

A distinction between the burden of proof as to the constitutional violation and the burden of proof as to objective reasonableness makes sense in the light of the structure of Section 1983 litigation. To prove her claim, the plaintiff must prove the existence of a constitutional violation; qualified immunity becomes relevant only if the plaintiff carries that burden. Accordingly, the plaintiff should bear the burden of proving the existence of a constitutional violation in connection with the qualified immunity issue as well. However, it would accord with decisions such as *Kopec* (and it would not contravene decisions such as *Sherwood*) to place the burden on the defendant to prove that a reasonable officer would not have known, under the circumstances, that the conduct was illegal.[4]

As noted in Comment 4.7.2, a jury question concerning qualified immunity will arise only when there are material questions of historical fact. The court should submit the questions of historical fact to the jury by means of special interrogatories; the court can then resolve the question of qualified immunity by reference to the jury's determination of the historical facts. Many questions of historical fact may be relevant both to the existence of a constitutional violation and to the question of objective reasonableness; as to those questions, the court should instruct the jury that the plaintiff has the burden of proof. Other questions of historical fact, however, may be relevant only to the question of objective reasonableness; as to those questions, if any, the court should instruct the jury that the defendant has the burden of proof.

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[4] There is language in *Estate of Smith v. Marasco*, 430 F.3d 140 (3d Cir. 2005), which may be perceived as being in tension with *Kopec*'s statement that the defendant has the burden of proof on qualified immunity. In *Marasco* the Court of Appeals held the defendants were entitled to qualified immunity on the plaintiffs' state-created danger claim because the court "conclude[d] that the Smiths cannot show that a reasonable officer would have recognized that his conduct was 'conscience-shocking.'" *Id.* at 156. While this language can be read as contemplating that the plaintiffs have a burden of persuasion, it should be noted that the court was not focusing on a factual dispute but rather on the clarity of the caselaw at the time of the relevant events. *See id.* at 154 (stressing that the relevant question was "whether the law, as it existed in 1999, gave the troopers 'fair warning' that their actions were unconstitutional") (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

4.3 Section 1983 – Elements of Claim

Model

[Plaintiff] must prove both of the following elements by a preponderance of the evidence:

First: [Defendant] acted under color of state law.

Second: While acting under color of state law, [defendant] deprived [plaintiff] of a federal [constitutional right] [statutory right].

I will now give you more details on action under color of state law, after which I will tell you the elements [plaintiff] must prove to establish the violation of [his/her] federal [constitutional right] [statutory right].

Comment

"By the plain terms of § 1983, two–and only two–allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also, e.g.*, *Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995) ("A prima facie case under § 1983 requires a plaintiff to demonstrate: (1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law.").

Some authorities include in the elements instruction a statement that the plaintiff must prove that the defendant's acts or omissions were intentional. *See, e.g.*, Ninth Circuit Civil Instruction 11.1. It is not clear, however, that the elements instruction is the best place to address the defendant's state of mind. "Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right. . . . In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997) (quoting *Daniels v. Williams*, 474 U.S. 327, 330 (1986)); *see also Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994) (noting that "section 1983 does not include any *mens rea* requirement in its text, but the Supreme Court has plainly read into it a state of mind requirement specific to the particular federal right underlying a § 1983 claim"). Because the *mens rea* requirement will depend on the nature of the constitutional violation, the better course is to address the requirement in the instructions on the specific violation(s) at issue in the case.

Some authorities include, as a third element, a requirement that the defendant caused the plaintiff's damages. *See, e.g.*, Fifth Circuit Civil Instruction 10.1; Eleventh Circuit Civil Instruction 2.2. It is true that the plaintiff cannot recover compensatory damages without showing that the

defendant's violation of the plaintiff's federal rights caused those damages. *See* Instruction 4.8.1, *infra*. It would be misleading, however, to consider this an element of the plaintiff's claim: If the plaintiff proves that the defendant, acting under color of state law, violated the plaintiff's federal right, then the plaintiff is entitled to an award of nominal damages even if the plaintiff cannot prove actual damages. *See infra* Instruction 4.8.2.

If the Section 1983 claim asserts a conspiracy to deprive the plaintiff of civil rights,[5] additional instructions will be necessary. *See, e.g.*, *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 254 (3d Cir. 1999) ("In order to prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law conspired to deprive him of a federally protected right."); *Marchese v. Umstead*, 110 F.Supp.2d 361, 371 (E.D. Pa. 2000) ("To state a section 1983 conspiracy claim, a plaintiff must allege: (1) the existence of a conspiracy involving state action; and (2) a depravation [*sic*] of civil rights in furtherance of the conspiracy by a party to the conspiracy."); *see also* Avery, Rudovsky & Blum,[6] Instructions 12:31, 12:32, 12:33, & 12:43 (providing suggested instructions regarding a Section 1983 conspiracy claim).

[5] Such a claim should be distinguished from the use of evidence of a conspiracy in order to establish that a private individual acted under color of state law. *See infra* Instruction 4.4.3.

[6] MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION §§ 12:31, 12:32, 12:33, & 12:43 (updated Oct. 2005) (available on Westlaw in the POLICEMISC database).

4.4 Section 1983 – Action under Color of State Law

Model

The first element of [plaintiff's] claim is that [defendant] acted under color of state law. This means that [plaintiff] must show that [defendant] was using power that [he/she] possessed by virtue of state law.

A person can act under color of state law even if the act violates state law. The question is whether the person was clothed with the authority of the state, by which I mean using or misusing the authority of the state.

By "state law," I mean any statute, ordinance, regulation, custom or usage of any state. And when I use the term "state," I am including any political subdivisions of the state, such as a county or municipality, and also any state, county or municipal agencies.

Comment

Whenever possible, the court should rule on the record whether the conduct of the defendant constituted action under color of state law. In such cases, the court can use Instruction 4.4.1 to instruct the jury that this element of the plaintiff's claim is not in dispute.

In cases involving material disputes of fact concerning action under color of state law, the court should tailor the instructions on this element to the nature of the theory by which the plaintiff is attempting to show action under color of state law. This comment provides an overview of some theories that can establish such action; Instructions 4.4.2 and 4.4.3 provide models of instructions for use with two such theories.

"[C]onduct satisfying the state-action requirement of the Fourteenth Amendment satisfies [Section 1983's] requirement of action under color of state law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982).[7] "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach '"merely private conduct, no matter how discriminatory or wrongful."'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))). Liability under Section 1983 "attaches only to those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191

[7] *See also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001) ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes.").

(1988) (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).[8]

The inquiry into the question of action under color of state law "is fact-specific." *Groman v. Township of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995). "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Tarkanian*, 488 U.S. at 192. Circumstances that can underpin a finding of state action include the following:

- A finding of "'a sufficiently close nexus between the state and the challenged action of the [private] entity so that the action of the latter may fairly be treated as that of the State itself.'"[9]

- A finding that "the State create[d] the legal framework governing the conduct."[10]

- A finding that the government "delegate[d] its authority to the private actor."[11]

- A finding that the government "knowingly accept[ed] the benefits derived from unconstitutional behavior."[12]

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[8] *Compare Citizens for Health v. Leavitt*, 428 F.3d 167, 182 (3d Cir. 2005) (holding that a federal regulation that "authoriz[ed] conduct that was already legally permissible" – and that did not preempt state laws regulating such conduct more strictly – did not meet the "state action requirement").

[9] *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 524 (3d Cir. 1994) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

[10] *Tarkanian*, 488 U.S. at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)).

[11] *Id.* (citing *West v. Atkins*, 487 U.S. 42 (1988)); *see also Reichley v. Pennsylvania Dept. of Agriculture*, 427 F.3d 236, 245 (3d Cir. 2005) (holding that trade association's "involvement and cooperation with the Commonwealth's efforts to contain and combat" avian influenza did not show requisite delegation of authority to the trade association).

[12] *Tarkanian*, 488 U.S. at 192 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

- A finding that "the private party has acted with the help of or in concert with state officials."[13] For an instruction on private action in concert with state officials, see Instruction 4.4.3.

- A finding that the action "'result[ed] from the State's exercise of "coercive power."'"[14]

- A finding that "'the State provide[d] "significant encouragement, either overt or covert."'"[15]

- A finding that "'a nominally private entity . . . is controlled by an "agency of the State."'"[16]

- A finding that "'a nominally private entity . . . has been delegated a public function by the State.'"[17]

- A finding that "'a nominally private entity . . . is "entwined with governmental policies,"

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[13] *McKeesport Hosp.*, 24 F.3d at 524. The Court of Appeals has explained that Supreme Court caselaw concerning "joint action or action in concert suggests that some sort of common purpose or intent must be shown.... [A] private citizen acting at the orders of a police officer is not generally acting in a willful manner, especially when that citizen has no self-interest in taking the action.... [W]illful participation ... means voluntary, uncoerced participation." *Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 195-96 (3d Cir. 2005).

[14] *Benn v. Universal Health System, Inc.*, 371 F.3d 165, 171 (3d Cir. 2004) (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982))).

[15] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296 (quoting *Blum*, 457 U.S. at 1004)).

[16] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296 (quoting *Pennsylvania v. Bd. of Dir. of City Trusts of Philadelphia*, 353 U.S. 230, 231 (1957) (per curiam))).

[17] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296); *compare Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005) (holding "that foster parents in Pennsylvania are not state actors for purposes of liability under § 1983"); *Max v. Republican Committee of Lancaster County*, 587 F.3d 198, 199, 203 (3d Cir. 2009) (holding that, under the circumstances, a political committee, its affiliate and certain of its officials were not acting as state actors when they allegedly sought to chill the speech of plaintiff – a committeewoman for the political committee – in connection with the Republican primary election).

or [that] government is "entwined in [its] management or control."'"[18]

The fact that a defendant was pursuing a private goal does not preclude a finding that the defendant acted under color of state law. *See Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (noting, in a case involving a question of "state action" for purposes of the Fourteenth Amendment, that "[w]henever a private actor's conduct is deemed 'fairly attributable' to the government, it is likely that private motives will have animated the actor's decision").

[18] *Benn*, 371 F.3d at 171 (quoting *Brentwood*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966))).

4.4.1 Section 1983 – Action under Color of State Law – Action under Color of State Law Is Not in Dispute

Model

Version A (government official):

Because [defendant] was an official of [the state of ___] [the county of ___] [the city of ___] at the relevant time, I instruct you that [he/she] was acting under color of state law. In other words, this element of [plaintiff's] claim is not in dispute, and you must find that this element has been established.

Version B (private individual):

Although [defendant] is a private individual and not a state official, I instruct you that the relationship between [defendant] and the state was sufficiently close that [he/she] was acting under color of state law. In other words, this element of [plaintiff's] claim is not in dispute, and you must find that this element has been established.

4.4.2 Section 1983 – Action under Color of State Law – Determining When an Official Acted under Color of State Law

Model

[Defendant] is an official of [the state of _____] [the county of _____] [the city of _____]. However, [defendant] alleges that during the events at issue in this lawsuit, [defendant] was acting as a private individual, rather than acting under color of state law.

For an act to be under color of state law, the person doing the act must have been doing it while clothed with the authority of the state, by which I mean using or misusing the authority of the state. You should consider the nature of the act, and the circumstances under which it occurred, to determine whether it was under color of state law.

The circumstances that you should consider include:

- *[Using bullet points, list any factors discussed in the Comment below, and any other relevant factors, that are warranted by the evidence.]*

You must consider all of the circumstances and determine whether [plaintiff] has proved, by a preponderance of the evidence, that [defendant] acted under color of state law.

Comment

"[S]tate employment is generally sufficient to render the defendant a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 n.18 (1982).[19] In some cases, however, a government employee defendant may claim not to have acted under color of state law. Instruction 4.4.2 directs the jury to determine, based on the circumstances, whether such a defendant was acting under color of state law.[20]

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[19] Special problems may arise if the public employee in question has a professional obligation to someone other than the government. *Compare, e.g.*, *West v. Atkins*, 487 U.S. 42, 43, 54 (1988) (holding that "a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law,' within the meaning of 42 U.S.C. § 1983, when he treats an inmate") *with Polk County v. Dodson*, 454 U.S. 312, 317 n.4 (1981) ("[A] public defender does not act under color of state law when performing the traditional functions of counsel to a criminal defendant.").

[20] For an instruction concerning the contention that a private defendant acted under color of state law by conspiring with a state official, see Instruction 4.4.3.

Various factors may contribute to the conclusion concerning the presence or absence of action under color of state law.[21] The court should list any relevant factors in Instruction 4.4.2. In the case of a police officer defendant, factors could include:

- Whether the defendant was on duty.[22] This factor is relevant but not determinative. An off-duty officer who purports to exercise official authority acts under color of state law.[23] Conversely, an officer who is pursuing purely private motives, in an interaction unconnected with his or her official duties, and who does not purport to exercise official authority does not act under color of state law.[24]

- Whether police department regulations provide that officers are on duty at all times.[25]

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[21] *Compare, e.g.*, *Barna v. City of Perth Amboy*, 42 F.3d 809, 816-17 (3d Cir. 1994) (off-duty, non-uniformed officers with police-issue weapons did not act under color of law in altercation with brother-in-law of one of the officers; officers were outside the geographic scope of their jurisdiction, and altercation started when officer accused his brother-in-law of hitting his sister, after which officer's partner joined the fight, after which both officers tried to leave) *with Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981) (police officer acted under color of law in altercation that began with a dispute over a traffic incident; "he was on duty as a member of the Allentown Police force, dressed in a police academy windbreaker and . . . he investigated the Blacks' vehicle because he thought the driver was either intoxicated or in need of help"); *see also Paul v. Davis*, 424 U.S. 693, 717 (1976) (Brennan, J., joined by Marshall, J., and in relevant part by White, J., dissenting) ("[A]n off-duty policeman's discipline of his own children, for example, would not constitute conduct 'under color of' law.").

[22] "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50.

[23] "[O]ff-duty police officers who flash a badge or otherwise purport to exercise official authority generally act under color of law." *Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 24 (3d Cir. 1997).

[24] "[N]ot all torts committed by state employees constitute state action, even if committed while on duty. For instance, a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not act under color of law." *Bonenberger*, 132 F.3d at 24.

[25] *See Torres v. Cruz*, 1995 WL 373006, at *4 (D.N.J. Aug. 24, 1992) (holding that it was relevant to question of action under color of state law that police manual "states that although the officers will be assigned active duty hours, 'all members shall be considered on duty at all times and shall act promptly, at any time, their services are required or requested'").

- Whether the defendant was acting for work-related reasons. However, the fact that a defendant acts for personal reasons does not necessarily prevent a finding that the defendant is acting under color of state law. A defendant who pursues a personal goal, but who uses governmental authority to do so, acts under under color of state law.[26]

- Whether the defendant's actions were related to his or her job as a police officer.[27]

- Whether the events took place within the geographic area covered by the defendant's police department.[28]

- Whether the defendant identified himself or herself as a police officer.[29]

- Whether the defendant was wearing police clothing.[30]

- Whether the defendant showed a badge.[31]

- Whether the defendant used or was carrying a weapon issued by the police department.[32]

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[26] *See Basista v. Weir*, 340 F.2d 74, 80-81 (3d Cir. 1965) ("Assuming arguendo that Scalese's actions were in fact motivated by personal animosity that does not and cannot place him or his acts outside the scope of Section 1983 if he vented his ill feeling towards Basista ... under color of a policeman's badge.").

[27] "Manifestations of . . . pretended [official] authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations." *Barna v. City of Perth Amboy*, 42 F.3d 809, 816 (3d Cir. 1994).

[28] *See id.* at 816-17.

[29] *See Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

[30] *See Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999).

[31] *See Bonenberger*, 132 F.3d at 24.

[32] "While a police-officer's use of a state-issue weapon in the pursuit of private activities will have 'furthered' the § 1983 violation in a literal sense, courts generally require additional indicia of state authority to conclude that the officer acted under color of state law." *Barna*, 42 F.3d at 817; *see also id.* at 818 (holding that "the unauthorized use of a police-issue nightstick is simply not enough to color this clearly personal family dispute with the imprimatur of state authority").

- Whether the defendant used a police car or other police equipment.[33]

- Whether the defendant used his or her official position to exert influence or physical control over the plaintiff.

- Whether the defendant purported to place someone under arrest.[34]

In a case involving a non-police officer defendant, factors could include:

- Whether the defendant was on duty.[35] This factor is relevant but not determinative. An off-duty official who purports to exercise official authority acts under color of state law.[36] Conversely, an official who is pursuing purely private motives, in an interaction unconnected with his or her official duties, and who does not purport to exercise official authority does not act under color of state law.[37]

- Whether the defendant was acting for work-related reasons. However, the fact that a defendant acts for personal reasons does not necessarily prevent a finding that the defendant is acting under color of state law. A defendant who pursues a personal goal, but who uses governmental authority to do so, acts under under color of state law.[38]

- Whether the defendant's actions were related to his or her job as a government official.[39]

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[33] *Rodriguez v. City of Paterson*, 1995 WL 363710, at *3 (D.N.J. June 13, 1995) (fact that defendant was equipped with police radio was relevant to question of action under color of state law).

[34] *See Griffin*, 378 U.S. at 135 (holding that the defendant, "in ordering the petitioners to leave the park and in arresting and instituting prosecutions against them–purported to exercise the authority of a deputy sheriff. He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park"); *Abraham*, 183 F.3d at 287 ("[E]ven though Raso was working off duty as a security guard, she was acting under color of state law: she was wearing a police uniform, ordered Abraham repeatedly to stop, and sought to arrest him.").

[35] *West*, 487 U.S. at 50.

[36] *Bonenberger*, 132 F.3d at 24.

[37] *Bonenberger*, 132 F.3d at 24.

[38] *Basista*, 340 F.2d at 80-81.

[39] *Barna v. City of Perth Amboy*, 42 F.3d 809, 816 (3d Cir. 1994).

- Whether the events took place within the geographic area covered by the defendant's department.[40]

- Whether the defendant identified himself or herself as a government official.[41]

- Whether the defendant was wearing official clothing.[42]

- Whether the defendant showed a badge.[43]

- Whether the defendant used his or her official position to exert influence over the plaintiff.

[40] *See id.* at 816-17.

[41] *See Griffin*, 378 U.S. at 135.

[42] *See Abraham*, 183 F.3d at 287.

[43] *See Bonenberger*, 132 F.3d at 24.

4.4.3 Section 1983 – Action under Color of State Law – Determining Whether a Private Person Conspired with a State Official

Model

[Defendant] is not a state official. However, [plaintiff] alleges that [defendant] acted under color of state law by conspiring with one or more state officials to deprive [plaintiff] of a federal right.

A conspiracy is an agreement between two or more people to do something illegal. A person who is not a state official acts under color of state law when [he/she] enters into a conspiracy, involving one or more state officials, to do an act that deprives a person of federal [constitutional] [statutory] rights.

To find a conspiracy in this case, you must find that [plaintiff] has proved both of the following by a preponderance of the evidence:

First: [Defendant] agreed in some manner with [Official Roe and/or another participant in the conspiracy with Roe] to do an act that deprived [plaintiff] of [describe federal constitutional or statutory right].

Second: [Defendant] or a co-conspirator engaged in at least one act in furtherance of the conspiracy.

As I mentioned, the first thing that [plaintiff] must show in order to prove a conspiracy is that [defendant] and [Official Roe and/or another participant in the conspiracy with Roe] agreed in some manner to do an act that deprived [plaintiff] of [describe federal constitutional or statutory right].

Mere similarity of conduct among various persons, or the fact that they may have associated with each other, or may have discussed some common aims or interests, is not necessarily proof of a conspiracy. To prove a conspiracy, [plaintiff] must show that members of the conspiracy came to a mutual understanding to do the act that violated [plaintiff's] [describe right]. The agreement can be either express or implied. [Plaintiff] can prove the agreement by presenting testimony from a witness who heard [defendant] and [Official Roe and/or another participant in the conspiracy with Roe] discussing the agreement; but [plaintiff] can also prove the agreement without such testimony, by presenting evidence of circumstances from which the agreement can be inferred. In other words, if you infer from the sequence of events that it is more likely than not that [defendant] and [Official Roe and/or another participant in the conspiracy with Roe] agreed to do an act that deprived [plaintiff] of [describe right], then [plaintiff] has proved the existence of the agreement.

In order to find an agreement, you must find that there was a jointly accepted plan, and that [defendant] and [state official] [each other conspirator] knew the plan's essential nature and general scope. A person who has no knowledge of a conspiracy, but who happens to act in a way which

furthers some purpose of the conspiracy, does not thereby become a conspirator. However, you need not find that [defendant] knew the exact details of the plan [or the identity of all the participants in it]. One may become a member of a conspiracy without full knowledge of all the details of the conspiracy.

The second thing that [plaintiff] must show in order to prove a conspiracy is that [defendant] or a co-conspirator engaged in at least one act in furtherance of the conspiracy. [In this case, this requirement is satisfied if you find that [defendant] or a co-conspirator did any of the following things: [Describe the acts alleged by the plaintiff].] [In other words, [plaintiff] must prove that [defendant] or a co-conspirator took at least one action to further the goal of the conspiracy.]

Comment

Alternative ways to show that a private person acted under color of state law. It should be noted that demonstrating the existence of a conspiracy is not the only possible way to show that a private individual acted under color of state law. *See supra* Comment 4.4. For example, when a private person is acting, under a contract with the state, to perform a traditional public function, the question may arise whether that person is acting under color of state law. *Cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (discussing "exercise by a private entity of powers traditionally exclusively reserved to the State"); *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (in case involving "employees of a private prison management firm," noting that the Court was not deciding "whether the defendants are liable under § 1983 even though they are employed by a private firm").

Distinct issues concerning action under color of state law also could arise when a private person hires a public official, the public official violates the plaintiff's federal rights, and the plaintiff sues the private person for actions that the private person did not agree upon with the state official, but which the state official performed within the scope of his or her employment by the private person.[44] There is some doubt whether a private entity can be held liable under Section 1983 on a theory of respondeat superior.[45] However, even if respondeat superior liability is unavailable, a

[44] If the private person hires the state official to do the act that constitutes the violation, and the state official agrees to be hired for that purpose, then this constitutes action under color of state law under the conspiracy theory. *See Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998).

[45] *See, e.g.*, *Victory Outreach Center v. Melso*, 371 F.Supp.2d 642, 646 (E.D.Pa. 2004) (noting that "neither the Supreme Court nor the Third Circuit has addressed the issue of whether a private corporation can be held liable for the acts of its employees on a respondeat superior theory" in a Section 1983 case, and holding that respondeat superior liability is unavailable); *Taylor v. Plousis*, 101 F.Supp.2d 255, 263-64 & n.4 (D.N.J. 2000) (holding respondeat superior liability unavailable, but noting "a lingering doubt whether the public policy considerations

private entity should be liable for its employee's violation if a municipal employer would incur Section 1983 liability under similar circumstances.[46] Some of the theories that could establish the private employer's liability–such as deliberate indifference–could establish the private employer's liability based on facts that would not suffice to demonstrate a conspiracy.

Absent evidence that the private party and the official conspired to commit the act that violated the plaintiff's rights, the "color of law" question will focus on whether the private party acts under color of state law *because she employs the state official*.[47] Some indirect light may be shed on this question by *NCAA v. Tarkanian*, 488 U.S. 179 (1988). The dispute in *Tarkanian* arose because the NCAA penalized the University of Nevada, Las Vegas for asserted violations of NCAA rules (including violations by Tarkanian, UNLV's head basketball coach) and threatened further penalties unless UNLV severed its connection with Tarkanian. *See id.* at 180-81. The Court noted that Tarkanian presented the inverse of the "traditional state-action case," *id.* at 192: "[T]he final act challenged by Tarkanian–his suspension–was committed by UNLV" (a state actor), and the dispute focused on whether the NCAA acted under color of state law in directing UNLV to suspend Tarkanian. The Court held that the NCAA did not act under color of state law: "It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." *Id.* at 199. In so holding, the Court rejected the plaintiff's contention that "the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands": As the Court stated, "[w]e are not at all sure this is true, but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." *Id.* at 198-99.

It is possible to distinguish *Tarkanian* from the scenarios mentioned above. In one sense, *Tarkanian* might have presented a more persuasive case of action under color of state law, since the

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underlying the Supreme Court's decision in Monell should apply when a governmental entity chooses to discharge a public obligation by contract with a private corporation"); *Miller v. City of Philadelphia*, 1996 WL 683827, at *3 (E.D.Pa. Nov. 25, 1996) (holding respondeat superior liability unavailable, and stating that "most courts that have addressed the issue have concluded that private corporations cannot be vicariously liable under § 1983").

[46] *Cf. Thomas v. Zinkel*, 155 F. Supp.2d 408, 412 (E.D.Pa. 2001) ("Liability of [local government] entities may not rest on respondeat superior, but rather must be based upon a governmental policy, practice, or custom that caused the injury. . . . The same standard applies to a private corporation, like CPS, that is acting under color of state law.").

[47] This discussion assumes that the state official acts under color of state law when he commits the violation.

NCAA directed UNLV to do the very act that constituted the violation.[48] On the other hand, a person's employment of an off-duty state official might present a more persuasive case in other respects, in the sense that an off-duty police officer might in fact be guided by the private employer's wishes to a greater extent than UNLV would willingly be guided by the NCAA's wishes. Thus, *Tarkanian* may not foreclose the possibility that a private party may act under color of state law when employing a state official, even if the private party does not conspire with the official concerning the act that constitutes a violation of the plaintiff's rights.[49]

Comments on Instruction 4.4.3 regarding conspiracy. "[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting see *[sic]* 'under color' of law for purposes of § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966)); *see also Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998). "[A]n otherwise private person acts 'under color of' state law when engaged in a conspiracy with state officials to deprive another of federal rights." *Tower v. Glover*, 467 U.S. 914, 920 (1984) (citing *Dennis*, 449 U.S. at 27-28); *see also Adickes*, 398 U.S. at 152 ("Although this is a lawsuit against a private party, not the State or one of its officials, . . . petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in The Kress store . . . ."). [50] The existence of a conspiracy can be proved through circumstantial

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[48] The *Tarkanian* majority indicated that the NCAA's directive to UNLV, and the fact that UNLV decided to follow that directive, did not establish that the NCAA and UNLV conspired (for purposes of showing that the NCAA acted under color of state law). *See Tarkanian*, 488 U.S. at 197 n.17.

[49] In *Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984), "two police officers, acting at the request of [a private] company's employee, stripped and searched the plaintiff for stolen goods," *id.* at 79. Because the court in *Cruz* found no indication that the store employee exercised control over the officers, *Cruz* does not address the issue discussed in the text. *See id.* at 81 ("Cruz' allegations depict only a police investigation that happens to follow the course suggested by comments from a complainant.").

[50] *See also Cruz*, 727 F.2d at 81 ("[A] store and its employees cannot be held liable under § 1983 unless: (1) the police have a pre-arranged plan with the store; and (2) under the plan, the police will arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause."); *Max v. Republican Committee of Lancaster County*, 587 F.3d 198, 203 (3d Cir. 2009) ("Even if we accept the premise that poll-workers are state actors while guarding the integrity of an election, the defendants here ... are not the poll-watchers. Defendants here are private parties.... At most, defendants used the poll-workers to obtain information. This is not the same as conspiring to violate Max's First Amendment rights.").

evidence. *See, e.g., Adickes*, 398 U.S. at 158 ("If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service.").[51]

The Third Circuit has suggested that the plaintiff must establish the elements of a civil conspiracy in order to use the existence of the conspiracy to demonstrate state action. *See Melo v. Hafer*, 912 F.2d 628, 638 n.11 (3d Cir. 1990) (addressing plaintiff's action-under-color-of-state-law argument and "assum[ing], without deciding, that the complaint alleges the prerequisites of a civil conspiracy"), *aff'd on other grounds*, 502 U.S. 21 (1991). The *Melo* court cited a Seventh Circuit opinion that provides additional detail on those elements. *See Melo*, 912 F.2d at 638 & n.11 (citing *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980)). *Melo*'s citation to *Hampton* suggests that the plaintiff must show both a conspiracy to violate the plaintiff's federal rights and an overt act in furtherance of the conspiracy that results in such a violation. *See Hampton*, 600 F.2d at 620-21 (discussing agreement and overt act requirements). Of course, in order to find liability under Section 1983, the jury must in any event find a violation of the plaintiff's federal rights; and it will often be the case that the relevant act in violation of the plaintiff's federal rights would necessarily have constituted an action by a co-conspirator in furtherance of the conspiracy. This may explain why the Supreme Court's references to the "conspiracy" test do not emphasize the overt-act-resulting-in-violation requirement. *See, e.g.*, *Adickes*, 398 U.S. at 152.

In appropriate cases, the existence of a conspiracy may also establish that a federal official was acting under color of state law. *See Hindes v. F.D.I.C.*, 137 F.3d 148, 158 (3d Cir. 1998) ("[F]ederal officials are subject to section 1983 liability when sued in their official capacity where they have acted under color of state law, for example in conspiracy with state officials.").

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[51] In *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008), the Court of Appeals upheld the grant of summary judgment dismissing conspiracy claims under 42 U.S.C. §§ 1983 and 1985 because the plaintiffs failed to show the required "meeting of the minds." *See Startzell*, 533 F.3d at 205 ("Philly Pride and the City 'took diametrically opposed positions' regarding how to deal with Appellants' presence at OutFest.... The City rejected Philly Pride's requests to exclude Appellants from attending OutFest; moreover, the police forced the Pink Angels to allow Appellants to enter OutFest under threat of arrest. It was also the vendors' complaints, not requests by Philly Pride, that led the police officers to order Appellants to move toward OutFest's perimeter."). *See also Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 179 (3d Cir. 2010) (holding that plaintiff's proposed amended complaint failed to plead "any facts that plausibly suggest a meeting of the minds" between the defendants and state-court judges who allegedly hoped for future employment with one of the defendants).

4.5 Section 1983 – Deprivation of a Federal Right

Model

[I have already instructed you on the first element of [plaintiff's] claim, which requires [plaintiff] to prove that [defendant] acted under color of state law.]

The second element of [plaintiff's] claim is that [defendant] deprived [him/her] of a federal [constitutional right] [statutory right].

[Insert instructions concerning the relevant constitutional or statutory violation.]

Comment

See below for instructions concerning particular constitutional violations. Instructions 7.0 through 7.5 concern employment discrimination and retaliation claims under Section 1983.

4.6.1 Section 1983 – Liability in Connection with the Actions of Another – Supervisory Officials

Model

[N.B.: Please see the Comment for a discussion of whether and to what extent this model instruction retains validity after Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).]

[Plaintiff] contends that [supervisor's] subordinate, [subordinate], violated [plaintiff's] federal rights, and that [supervisor] should be liable for [subordinate's] conduct. If you find that [subordinate] violated [plaintiff's] federal rights, then you must consider whether [supervisor] caused [subordinate's] conduct.

[Supervisor] is not liable for such a violation simply because [supervisor] is [subordinate's] supervisor. To show that [supervisor] caused [subordinate's] conduct, [plaintiff] must show one of three things:

First: [Supervisor] directed [subordinate] to take the action in question;

Second: [Supervisor] had actual knowledge of [subordinate's] violation of [plaintiff's] rights and [supervisor] acquiesced in that violation; or

Third: [Supervisor], with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the violation.

As I mentioned, the first way for [plaintiff] to show that [supervisor] is liable for [subordinate's] conduct is to show that [supervisor] directed [subordinate] to engage in the conduct. [Plaintiff] need not show that [supervisor] directly, with [his/her] own hands, deprived [plaintiff] of [his/her] rights. The law recognizes that a supervisor can act through others, setting in motion a series of acts by subordinates that the supervisor knows, or reasonably should know, would cause the subordinates to violate the plaintiff's rights. Thus, [plaintiff] can show that [supervisor] caused the conduct if [plaintiff] shows that [subordinate] violated [plaintiff's] rights at [supervisor's] direction.

Alternatively, the second way for [plaintiff] to show that [supervisor] is liable for [subordinate's] conduct is to show that [supervisor] had actual knowledge of [subordinate's] violation of [plaintiff's] rights and that [supervisor] acquiesced in that violation. To "acquiesce" in a violation means to give assent to the violation. Acquiescence does not require a statement of assent, out loud: acquiescence can occur through silent acceptance. If you find that [supervisor] had authority over [subordinate] and that [supervisor] actually knew that [subordinate] was violating [plaintiff's] rights but failed to stop [subordinate] from doing so, you may infer that [supervisor]

acquiesced in [subordinate's] conduct.

Finally, the third way for [plaintiff] to show that [supervisor] is liable for [subordinate's] conduct is to show that [supervisor], with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the conduct. [Plaintiff] alleges that [supervisor] should have [adopted a practice of] [followed the existing policy of] [describe supervisory practice or policy that plaintiff contends supervisor should have adopted or followed].

To prove that [supervisor] is liable for [subordinate's] conduct based on [supervisor's] failure to [adopt that practice] [follow that policy], [plaintiff] must prove all of the following four things by a preponderance of the evidence:

First: [The existing custom and practice without [describe supervisory practice]] [the failure to follow the policy of [describe policy]] created an unreasonable risk of [describe violation].

Second: [Supervisor] was aware that this unreasonable risk existed.

Third: [Supervisor] was deliberately indifferent to that risk.

Fourth: [Subordinate's] [describe violation] resulted from [supervisor's] failure to [adopt [describe supervisory practice]] [follow [describe policy]].

Comment

Note concerning Instruction 4.6.1 and *Ashcroft v. Iqbal*: Instruction 4.6.1 was originally drafted based on Third Circuit law prior to *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Iqbal* involved the request by John Ashcroft and Robert Mueller for review of the denial of their motions to dismiss the claims of Javaid Iqbal, who alleged that Ashcroft and Mueller "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin" in the wake of September 11, 2001. *Iqbal*, 129 S. Ct. at 1942. In *Iqbal*, a closely-divided Court concluded that "vicarious liability is inapplicable to *Bivens* and § 1983 suits" and that therefore "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948. It is not yet clear what *Iqbal*'s implications are for the theories of supervisors' liability that had previously been in use in the Third Circuit.[52]

[52] For cases indicating that some or all of the Third Circuit's supervisory-liability standards survive *Iqbal*, *see, e.g.*, *McKenna v. City of Philadelphia*, 582 F.3d 447, 460-61 (3d Cir. 2009) (upholding grant of judgment as a matter of law to defendants on supervisory liability claims and explaining that "[t]o be liable in this situation, a supervisor must have been involved personally, meaning through personal direction or actual knowledge and acquiescence, in the wrongs alleged"); *Reedy v. Evanson*, 615 F.3d 197, 231 (3d Cir. 2010) (applying the

A theory of liability based on the supervisor's direction to a subordinate to take the action that violates the plaintiff's rights would seem viable after *Iqbal* (subject to a caveat, noted below, concerning levels of scienter); such a theory is reflected in the first of the three alternatives stated in Instruction 4.6.1. The second and third alternatives stated in Instruction 4.6.1, by contrast, may be more broadly affected by *Iqbal*. Versions of those alternative theories – a knowledge-and-acquiescence theory[53] and a deliberate-indifference theory – were invoked by the plaintiff and the dissenters in *Iqbal*; accordingly, the *Iqbal* majority's conclusion that the plaintiff had failed to state a claim, coupled with the majority's statements concerning the non-existence of vicarious liability, might be read to cast some question on the viability of those two alternatives.

However, the scope of *Iqbal*'s holding is subject to dispute. Though dictum in *Iqbal* addresses Section 1983 claims, the holding concerns *Bivens* claims. Though *Iqbal* purports to outlaw "vicarious liability" in both types of cases, it cites *Monell* with approval and indicates no intent to displace existing doctrines of municipal liability (which are, in their conceptual structure, quite similar to the theories of supervisor liability discussed in Instruction 4.6.1 and this Comment).[54] And *Iqbal* itself concerned a type of constitutional violation – discrimination on the basis of race, religion and/or national origin – that requires a showing of "discriminatory purpose";[55] it is possible

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framework set by *Baker v. Monroe Tp.*, 50 F.3d 1186 (3d Cir. 1995), and affirming dismissal of supervisory-liability claim based on lack of evidence "that Mannell directed Evanson to take or not to take any particular action concerning Reedy that would amount to a violation of her constitutional rights"); *Marrakush Soc. v. New Jersey State Police*, 2009 WL 2366132, at *31 (D.N.J. July 30, 2009) ("Personal involvement can be asserted through allegations of facts showing that a defendant directed, had actual knowledge of, or acquiesced in, the deprivation of a plaintiff's constitutional rights.").

[53] *Cf. Bayer v. Monroe County Children and Youth Services*, 577 F.3d 186, 190 n.5 (3d Cir. 2009) ("The [district] court concluded that plaintiffs had created a triable issue 'as to whether Defendant Bahl had personal knowledge regarding the Fourteenth Amendment procedural due process violation.' In light of the Supreme Court's recent decision in [*Iqbal*], it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding Bahl liable with respect to plaintiffs' Fourteenth Amendment claims under § 1983.... We need not resolve this matter here, however.").

[54] *Cf., e.g.*, *Horton v. City of Harrisburg*, 2009 WL 2225386, at *5 (M.D.Pa. July 23, 2009) ("Supervisory liability under § 1983 utilizes the same standard as municipal liability. *See Iqbal* .... Therefore, a supervisor will only be liable for the acts of a subordinate if he fosters a policy or custom that amounts to deliberate indifference towards an individual's constitutional rights.").

[55] *Cf., e.g.*, *Al-Kidd v. Ashcroft*, 580 F.3d 949, 976 n.25 (9th Cir. 2009) ("We need not address ... whether the [*Iqbal*] Court's comments relate solely to discrimination claims which have an intent element, because al-Kidd plausibly pleads 'purpose' rather than just 'knowledge'

to read *Iqbal* as turning upon the notion that, to be liable for a subordinate's constitutional violation, the supervisor must have the same level of scienter as is required to establish the underlying constitutional violation.[56] On that reading, a claim that requires a lesser showing of scienter for the underlying violation – for example, a Fourth Amendment excessive force claim – might have different implications (for purposes of the supervisor's liability) than a claim that requires a showing of purposeful discrimination for the underlying violation.

These questions have yet to be settled. Pending further guidance from the Supreme Court or the court of appeals, the Committee decided to alert readers to these issues without attempting to anticipate the further development of the law in this area. In determining whether to employ some or all portions of Instruction 4.6.1, courts should give due attention to the implications of *Iqbal* for the particular type of claim at issue. The remainder of this Comment discusses Third Circuit law as it stood prior to *Iqbal*.

Discussion of pre-*Iqbal* caselaw

A supervisor incurs Section 1983 liability in connection with the actions of another only if he or she had "personal involvement in the alleged wrongs." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). In the Third Circuit,[57] "[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Id.*; *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 173 (3d Cir. 2005) ("To impose liability on the individual defendants, Plaintiffs must show that each one individually participated in the alleged constitutional violation or approved of it."); *Baker v. Monroe Tp.*, 50 F.3d 1186, 1194 (3d Cir. 1995) (noting that "actual knowledge can be inferred from circumstances other than actual sight"); *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 586 (3d Cir. 2004) (noting that "a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations"); *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) ("To hold a police chief liable under section 1983 for the unconstitutional actions of one of his officers, a plaintiff is required to establish a causal connection between the police chief's actions and the officer's unconstitutional activity."). The model instruction is designed for cases in which the plaintiff does not assert that the supervisor directly participated in the activity; if the plaintiff provides evidence of direct participation, the instruction can be altered to reflect that direct participation by the supervisor is also a basis for liability.

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to impose liability on Ashcroft.").

[56] In cases where the underlying constitutional violation requires a showing of purposeful discrimination, *Iqbal* thus appears to heighten the standard for supervisors' liability even under the first of the three theories described in Instruction 4.6.1.

[57] *See Baker v. Monroe Tp.*, 50 F.3d 1186, 1194 n.5 (3d Cir. 1995) (noting that "other circuits have developed broader standards for supervisory liability under section 1983").

A number of circumstances may bear upon the determination concerning actual knowledge. *See, e.g.*, *Atkinson v. Taylor*, 316 F.3d 257, 271 (3d Cir. 2003) (holding, with respect to commissioner of state department of corrections, that "[t]he scope of his responsibilities are much more narrow than that of a governor or state attorney general, and logically demand more particularized scrutiny of individual complaints").

As to acquiescence, "[w]here a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in (i.e., tacitly assented to or accepted) the subordinate's conduct." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997).

A supervisor with policymaking authority may also, in an appropriate case, be liable based on the failure to adopt a policy.[58] *See A.M. ex rel. J.M.K.*, 372 F.3d at 586 ("Individual defendants who are policymakers may be liable under § 1983 if it is shown that such defendants, 'with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.'") (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir.1989)). The analysis of such a claim appears to track the deliberate indifference analysis employed in the context of municipal liability. *See id.* (holding that summary judgment for the supervisors in their individual capacities was inappropriate, "[g]iven our conclusion that A.M. presented sufficient evidence to present a jury question on" the issue of municipal liability for failure to adopt adequate policies); *Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) ("Although the issue here is one of individual liability rather than of the liability of a political subdivision, we are confident that, absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve."); *see also id.* at 1118 (holding that "a judgment could not properly be entered against Robinson in this case based on supervisory liability absent an identification by Sample of a specific supervisory practice or procedure that Robinson failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstays, (2) Robinson was aware that this unreasonable risk existed, (3) Robinson was indifferent to that risk, and (4) Diecks' failure to assure that Sample's complaint received meaningful consideration resulted from Robinson's failure to employ that supervisory practice or procedure").

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[58] When a supervisor with policymaking authority is sued on a failure-to-train theory, the standard appears to be the same as for municipal liability. *See Gilles v. Davis*, 427 F.3d 197, 207 n.7 (3d Cir. 2005) ("A supervising authority may be liable under § 1983 for failing to train police officers when the failure to train demonstrates deliberate indifference to the constitutional rights of those with whom the officers may come into contact."); *see also infra* Comment 4.6.7 (discussing municipal liability for failure to train).

4.6.2 Section 1983 – Liability in Connection with the Actions of Another – Non-Supervisory Officials – Failure to Intervene

Model

[Plaintiff] contends that [third person] violated [plaintiff's] [specify right] and that [defendant] should be liable for that violation because [defendant] failed to intervene to stop the violation.

[Defendant] is liable for that violation if plaintiff has proven all of the following four things by a preponderance of the evidence:

First: [Third person] violated [plaintiff's] [specify right].

Second: [Defendant] had a duty to intervene. [I instruct you that [police officers] [corrections officers] have a duty to intervene to prevent the use of excessive force by a fellow officer.] [I instruct you that prison guards have a duty to intervene during an attack by an inmate in the prison in which they work.]

Third: [Defendant] had a reasonable opportunity to intervene.

Fourth: [Defendant] failed to intervene.

Comment

A defendant can in appropriate circumstances be held liable for failing to intervene to prevent a constitutional violation, even if the defendant held no supervisory position. *See, e.g.*, *Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002) (holding that "a corrections officer's failure to intervene in a beating can be the basis of liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and simply refused to do so," and that "a corrections officer can not escape liability by relying upon his inferior or non-supervisory rank vis-a-vis the other officers"); *Crawford v. Beard*, 2004 WL 1631400, at *3 (E.D.Pa. July 21, 2004) (holding that to establish failure-to-intervene claim, plaintiff "must prove that: 1) the officers had a duty to intervene, 2) the officers had the opportunity to intervene, and 3) the officers failed to intervene," and that prison guards "have a duty to intervene during an attack by an inmate in the prison in which they work").

4.6.3 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – General Instruction

Model

If you find that [plaintiff] was deprived of [describe federal right], [municipality] is liable for that deprivation if [plaintiff] proves by a preponderance of the evidence that the deprivation resulted from [municipality's] official policy or custom – in other words, that [municipality's] official policy or custom caused the deprivation.

[It is not enough for [plaintiff] to show that [municipality] employed a person who violated [plaintiff's] rights. [Plaintiff] must show that the violation resulted from [municipality's] official policy or custom.] "Official policy or custom" includes any of the following *[include any of the following theories that are warranted by the evidence]*:

- a rule or regulation promulgated, adopted, or ratified by [municipality's] legislative body;

- a policy statement or decision that is officially made by [municipality's] [policy-making official];

- a custom that is a widespread, well-settled practice that constitutes a standard operating procedure of [municipality]; or

- [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. However, [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy] does not count as "official policy or custom" unless the [municipality] is deliberately indifferent to the fact that a violation of [describe the federal right] is a highly predictable consequence of the [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. I will explain this further in a moment.

I will now proceed to give you more details on [each of] the way[s] in which [plaintiff] may try to establish that an official policy or custom of [municipality] caused the deprivation.

Comment

"[M]unicipalities and other local government units [are] included among those persons to whom § 1983 applies." *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978) (overruling in relevant part *Monroe v. Pape*, 365 U.S. 167 (1961)). However, "a

municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691.[59] "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. The Court has elaborated several ways in which a municipality can cause a violation and thus incur liability. See Instructions 4.6.4 - 4.6.8 and accompanying Comments for further details on each theory of liability.

Ordinarily, proof of municipal liability in connection with the actions of ground-level officers will require, inter alia, proof of a constitutional violation by one or more of those officers.[60] *See, e.g.*, *Grazier* ex rel. *White v. City of Philadelphia*, 328 F.3d 120, 124 (3d Cir. 2003) ("There cannot be an 'award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.'") (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam)). In *Fagan v. City of Vineland*, however, the court held that "a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution." *Fagan v. City of Vineland*, 22 F.3d 1283, 1294 (3d Cir. 1994). A later Third Circuit panel suggested that the court erred in *Fagan* when it dispensed with the requirement of an underlying constitutional violation. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 n.13 (3d Cir. 1995) ("It appears that, by focusing almost exclusively on the 'deliberate indifference' prong . . . , the panel opinion did not apply the first prong–establishing an underlying constitutional violation."). It appears that the divergence between *Fagan* and *Mark* reflects a distinction between cases in which the municipality's liability is derivative of the violation(s) by the ground-level officer(s) and cases in which the plaintiff seeks to show that the municipality's conduct itself is unconstitutional: As the court explained in *Grazier*, "We were concerned in *Fagan* that, where the standard for liability is whether state action 'shocks the conscience,' a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience." *Grazier*, 328 F.3d at 124 n.5 (stating that the holding in *Fagan* was "carefully confined . . . to its facts: a substantive due process claim resulting from a police pursuit," and holding that *Fagan* did not apply to "a Fourth Amendment excessive force claim").

In addition to showing the existence of an official policy or custom, plaintiff must prove "that the municipal practice was the proximate cause of the injuries suffered." *Bielevicz v. Dubinon*, 915

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[59] A suit against a municipal policymaking official in her official capacity is treated as a suit against the municipality. *See A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 580 (3d Cir. 2004).

[60] *See, e.g.*, *Startzell v. City of Philadelphia*, 533 F.3d 183, 204 (3d Cir. 2008) ("Because we have found that there was no violation of Appellants' constitutional rights, we need not reach the claim against the City under Monell.").

F.2d 845, 850 (3d Cir. 1990). "To establish the necessary causation, a plaintiff must demonstrate a 'plausible nexus' or 'affirmative link' between the municipality's custom and the specific deprivation of constitutional rights at issue." *Id.* (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); and *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 507 (3d Cir.1985), *overruled on other grounds by DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)); *see also Bielevicz*, 915 F.2d at 851 (holding that "plaintiffs must simply establish a municipal custom coupled with causation–i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury"); *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) ("There must be 'a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.'") (quoting *Brown v. Muhlenberg Township*, 269 F.3d 205, 214 (3d Cir. 2001) (quoting *Canton*, 489 U.S. at 385)). "As long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz*, 915 F.2d at 851. "A sufficiently close causal link between ... a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." *Id.* (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987)); *see also A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 582 (3d Cir. 2004) ("The deficiency of a municipality's training program must be closely related to the plaintiff's ultimate injuries.").

In the case of claims (such as failure-to-train claims) that require proof of deliberate indifference, evidence that shows deliberate indifference will often help to show causation as well. Reflecting on failure-to-train cases, the Court has observed:

> The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice--namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation--that the municipality's indifference led directly to the very consequence that was so predictable.

Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 409-10 (1997).

4.6.4 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Statute, Ordinance or Regulation

Model

In this case, there was a [statute] [ordinance] [regulation] that authorized the action which forms the basis for [plaintiff's] claim. I instruct you to find that [municipality] caused the action at issue.

Comment

It is clear that a municipality's legislative action constitutes government policy. "No one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body–whether or not that body had taken similar action in the past or intended to do so in the future–because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Likewise, if the legislative body delegates authority to a municipal agency or board, an action by that agency or board also constitutes government policy. *See, e.g.*, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 660-61 & n.2 (1978) (describing actions by Department of Social Services and Board of Education of the City of New York); *id.* at 694 (holding that "this case unquestionably involves official policy").

On the other hand, where an ordinance is facially valid, the mere existence of the ordinance itself will not provide a basis for municipal liability for a claim concerning discriminatory enforcement. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 292-94 (3d Cir. 2009).

4.6.5 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Choice by Policymaking Official

Model

The [governing body] of the [municipality] is a policymaking entity whose actions represent a decision by the government itself. The same is true of an official or body to whom the [governing body] has given final policymaking authority: The actions of that official or body represent a decision by the government itself.

Thus, when [governing body] or [policymaking official] make a deliberate choice to follow a course of action, that choice represents an official policy. Through such a policy, the [governing body] or the [policymaking official] may cause a violation of a federal right by:

- directing that the violation occur,
- authorizing the violation, or
- agreeing to a subordinate's decision to engage in the violation.

[The [governing body] or [policymaking official] may also cause a violation through [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy], but only if the [municipality] is deliberately indifferent to the fact that a violation of [describe the federal right] is a highly predictable consequence of the [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. I will instruct you further on this in a moment.]

I instruct you that [name(s) of official(s) and/or governmental bodies] are policymakers whose deliberate choices represent official policy. If you find that such an official policy was the cause of and the moving force behind the violation of [plaintiff's] [specify right], then you have found that [municipality] caused that violation.

Comment

A deliberate choice by an individual government official constitutes government policy if the official has been granted final decision-making authority concerning the relevant area or issue. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996); *see also LaVerdure v. County of Montgomery*, 324 F.3d 123, 125 (3d Cir. 2003) ("Even though Marino himself lacked final policymaking authority that could bind the County, LaVerdure could have demonstrated that the Board delegated him the authority to speak for the Board or acquiesced in his statements."). In this context, "municipal liability under § 1983 attaches where–and only where–a deliberate choice to follow a course of action is made from among various alternatives by the official or officials

responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion); *see also Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) ("In order to ascertain who is a policymaker, 'a court must determine which official has final, unreviewable discretion to make a decision or take action.'") (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir.1990)). "[W]hether a particular official has 'final policymaking authority' is a question of *state law*." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *see also McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997) ("This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.").[61] "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989).

> [T]he trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . , or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.

Id. Not only must the official have final policymaking authority, the official must be considered to be acting as a municipal official rather than a state official in order for municipal liability to attach. *See McMillian*, 520 U.S. at 793 (holding that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties").

Instruction 4.6.5 notes that a policymaker may cause a violation of a federal right by directing that the violation occur, authorizing the violation, or agreeing to a subordinate's decision to engage in the violation. With respect to the third option – agreement to a subordinate's decision – the relevant agreement can sometimes occur after the fact. Thus, for example, the plurality in *Praprotnik* observed that "when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *see*

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[61] *See McGreevy v. Stroup*, 413 F.3d 359, 369 (3d Cir. 2005) (analyzing Pennsylvania law and concluding that "[b]ecause the school superintendent is a final policymaker with regard to ratings, his ratings and/or those of the school principal constitute official government policy").

also Brennan v. Norton, 350 F.3d 399, 427-28 (3d Cir. 2003) (citing *Praprotnik*); *LaVerdure v. County of Montgomery*, 324 F.3d 123, 125 (3d Cir. 2003) ("Even though Marino himself lacked final policymaking authority that could bind the County, LaVerdure could have demonstrated that the Board delegated him the authority to speak for the Board or acquiesced in his statements."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir. 1990) ("The second means of holding the municipality liable is if Tucker knowingly acquiesced to the decisions made at AID."). In an appropriate case, Instruction 4.6.5 may be modified to refer to a policymaker's "agreeing **after the fact** to a subordinate's decision to engage in the violation."

4.6.6 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Custom

Model

[Plaintiff] may prove the existence of an official custom by showing the existence of a practice that is so widespread and well-settled that it constitutes a standard operating procedure of [municipality]. A single action by a lower level employee does not suffice to show an official custom. But a practice may be an official custom if it is so widespread and well-settled as to have the force of law, even if it has not been formally approved. [You may find that such a custom existed if there was a practice that was so well-settled and widespread that the policymaking officials of [municipality] either knew of it or should have known of it.[62] [I instruct you that [*name official(s)*] [is] [are] the policymaking official[s] for [*describe particular subject*].[63]]]

If you find that such an official custom was the cause of and the moving force behind the violation of [plaintiff's] [specify right], then you have found that [municipality] caused that violation.

Comment

Even in the absence of an official policy, a municipality may incur liability if an official custom causes a constitutional tort. *See Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996).[64] "Custom . . . can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990); *see also Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 404 (1997) ("[A]n act performed pursuant to a 'custom'

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[62] In cases where the plaintiff must show deliberate indifference on the part of a policymaking official, this language should be modified accordingly. See Comment.

[63] This language can be used if the plaintiff introduces evidence concerning a specific policymaking official. For a discussion of whether the plaintiff must introduce such evidence, see Comment.

[64] "A § 1983 plaintiff . . . may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state 'custom or usage.'" *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 n.10 (1986) (plurality opinion); *see also Anela v. City of Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986) ("Even if the practices with respect to jail conditions also were followed without formal city action, it appears that they were the norm. The description of the cells revealed a long-standing condition that had become an acceptable standard and practice for the City.").

that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.").

As these statements suggest, evidence of a single incident without more will not suffice to establish the existence of a custom: "A single incident by a lower level employee acting under color of law . . . does not suffice to establish either an official policy or a custom. However, if custom can be established by other means, a single application of the custom suffices to establish that it was done pursuant to official policy and thus to establish the agency's liability." *Fletcher v. O'Donnell*, 867 F.2d 791, 793 (3d Cir. 1989) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (plurality opinion)). For example, plaintiff can present evidence of a pattern of similar incidents and inadequate responses to those incidents in order to demonstrate custom through municipal acquiescence. *See Beck*, 89 F.3d at 972 ("These complaints include the Debold incident, which, although it occurred after Beck's experience, may have evidentiary value for a jury's consideration whether the City and policymakers had a pattern of tacitly approving the use of excessive force.").

The weight of Third Circuit caselaw indicates that the plaintiff must make some showing that a policymaking official knew of the custom and acquiesced in it. Language in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), could be read to contemplate such a requirement, though the *Jett* Court did not have occasion to consider that issue in detail.[65] In a number of

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[65] In *Jett*, the Court remanded for a determination of whether the school district superintendent was a policymaking official for purposes of the plaintiff's claims under 42 U.S.C. § 1981. The Court instructed that on remand Section 1983's municipal-liability standards would govern. *See id.* at 735-36. "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . , or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Id.* at 737 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 485-87 (1986) (White, J., concurring in part and in the judgment)). Though this language suggests an expectation that a custom analysis would depend on a policymaker's knowledge and acquiescence, such a requirement was not the focus of the Court's opinion in *Jett*. Moreover, the *Jett* Court's quotation from Justice White's partial concurrence in *Pembaur* is somewhat puzzling. In *Pembaur* the Court held "that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 480. Because *Pembaur* focused on instances where a policymaker directed the challenged activity, municipal liability under the "custom" theory was not at issue in the case. *See id.* at 481 n.10 (plurality opinion). Justice White's *Pembaur* concurrence does not suggest otherwise; the language quoted by the *Jett* Court constitutes Justice White's explanation of his reasons for agreeing that the policymakers' directives in *Pembaur* could ground municipal liability. Justice White explained:

The city of Cincinnati frankly conceded that forcible entry of third-party property

subsequent cases, the Court of Appeals has read *Jett* to require knowledge and acquiescence. In *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990), the Court of Appeals affirmed the grant of j.n.o.v. in favor of the City on the plaintiffs' Section 1983 claims of sexual harassment by their coworkers and supervisors. The court stressed that to establish municipal liability "it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom." *Id.* at 1480. Thus, "given the jury verdict in favor of [Police Commissioner] Tucker, the lowest level policymaker implicated," j.n.o.v. for the City was warranted. *Id.* at 1480; *see also Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 250 (3d Cir. 2007) (citing *Andrews* with approval). In *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991), a fractured court affirmed a judgment in favor of the mother of a man who committed suicide while detained in a city jail. *See id.* at 1048. Judge Becker, announcing the judgment of the court, viewed *Jett* as holding "that even when a plaintiff alleges that a municipal custom or practice, as opposed to a municipal policy, worked a constitutional deprivation, the plaintiff must both identify officials with ultimate policymaking authority in the area in question and adduce scienter-like evidence – in this case of acquiescence – with respect to them." *Simmons*, 947 F.2d at 1062 (opinion of Becker, J.). Chief Judge Sloviter wrote separately to stress that officials' reckless disregard of conditions of which they should have known should suffice to meet the standard, *see id.* at 1089-91 (Sloviter, C.J., concurring in part and in the judgment), but she did not appear to question the view that some sort of knowledge and acquiescence was required. Citing *Andrews* and *Simmons*, the court in *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995), held that the plaintiffs "must show that a policymaker for the Township authorized policies that led to the violations or permitted practices that were so permanent and well settled as to establish acquiescence," *id.* at 1191.[66] *See also Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996) ("[A]

> to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that respondent county would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

Pembaur, 475 U.S. at 485 (White, J., concurring in part and in the judgment). Thus, the *Jett* Court's quote from Justice White's *Pembaur* opinion further supports the inference that the *Jett* Court did not give sustained attention to the contours of the custom branch of the municipal-liability doctrine.

[66] The *Baker* plaintiffs failed to show that the municipal police officer on the scene was a policymaker and failed to introduce evidence concerning municipal practices, and thus the court held that their claims against the city concerning the use of guns and handcuffs during a search were properly dismissed. *See id.* at 1194; *see also id.* at 1195 (upholding dismissal of illegal search claims against city due to lack of evidence "that Monroe Township expressly or tacitly

prerequisite to establishing [municipal] liability ... is a showing that a policymaker was responsible either for the policy or, through acquiescence, for the custom.").

Though it thus appears that a showing of knowledge and acquiescence is required, a number of cases suggest that actual knowledge need not be proven.[67] Rather, some showing of constructive knowledge may suffice; this view is reflected in the first bracketed sentence in Instruction 4.6.6. For example, the court seemed to approve a constructive-knowledge standard in *Bielevicz v. Dubinon*, 915 F.2d 845 (3d Cir. 1990). Citing *Andrews* and *Jett*, the court stated that the "plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." *Bielevicz*, 914 F.2d at 850.[68] But the *Bielevicz* court took care to note that "[t]his does not mean ... that the responsible decisionmaker must be specifically identified by the plaintiff's evidence. Practices so permanent and well settled as to have the force of law [are] ascribable to municipal decisionmakers." *Id.* (internal quotation marks omitted).[69] The *Bielevicz* court then proceeded to discuss ways of showing that the municipal custom caused the constitutional violation, and explained that policymakers' failure to respond appropriately to known past violations could provide the requisite evidence of causation: "If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury." *Id.* at 851. In *Beck v. City of*

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authorized either of the searches").

[67] In *Andrews*, the court suggested that Police Commissioner Tucker's lack of actual knowledge was significant to the court's holding that the municipal-liability claim failed: "[A]lthough Tucker reviewed the decision made by AID with respect to plaintiffs' complaints, he personally did not observe or acquiesce in any sexual harassment, and he was not convinced that the AID decisions were motivated by sexual animus ...." 895 F.2d at 1481. However, the court also noted that "[t]his is not a case where there was a longstanding practice which was completely ignored by the policymaker who was absolved by the jury," *id.* at 1482 – a caveat that suggests the possibility that in such a case constructive knowledge might play a role in the acquiescence analysis.

[68] *See also Watson v. Abington Tp.*, 478 F.3d 144, 156 (3d Cir. 2007) (citing *Bielevicz* with approval on this point). The *Watson* court's explanation of its rejection of the plaintiff's municipal-liability claim seems compatible with a constructive-knowledge standard. *See Watson*, 478 F.3d at 157 (rejecting a custom-based municipal liability claim because, inter alia, the plaintiffs failed to show "that what happened at the Scoreboard was so widespread that a decisionmaker must have known about it").

[69] See also *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) (quoting *Bielevicz* on this point). Similarly, in *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d Cir. 2003), the court did not pause to identify a specific policymaking official, but rather found a jury question based on "evidence that [Prison Health Services] turned a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights," *id.* at 584.

Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), the court stated that custom can be shown when government officials' practices are "so permanent and well-settled as to virtually constitute law," *id.* (internal quotation marks omitted), and then continued: "Custom . . . may also be established by evidence of knowledge and acquiescence." *Id.*[70] In holding that the plaintiffs were entitled to reach a jury on their claims, the *Beck* court focused on evidence "that the Chief of Police of Pittsburgh and his department knew, or should have known, of Officer Williams's violent behavior in arresting citizens," *id.* at 973 – suggesting that the *Beck* court applied a constructive-knowledge test. Likewise, in *Berg v. County of Allegheny*, 219 F.3d 261 (2000), the court focused on whether municipal policymakers had either actual or constructive knowledge of the practice for issuing warrants. *See id.* at 276 ("We believe it is a more than reasonable inference to suppose that a system responsible for issuing 6,000 warrants a year would be the product of a decision maker's action or acquiescence.").

The *Berg* court stated, however, that where the custom in question does not itself *constitute* the constitutional violation – but rather is alleged to have led to the violation – the plaintiff must additionally meet the deliberate-indifference test set forth in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989):[71] "If ... the policy or custom does not facially violate federal law, causation can be

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[70] This language might be read to suggest that knowledge and acquiescence are merely one option for establishing a municipal custom. Likewise, in *Fletcher v. O'Donnell*, 867 F.2d 791 (3d Cir. 1989), the court, writing a few months before *Jett* was decided, stated that "[c]ustom may be established by proof of knowledge and acquiescence," *Fletcher*, 867 F.2d at 793-94 (citing *Pembaur*, 475 U.S. at 481-82 n.10 (plurality opinion)) – an observation that arguably suggests there may also exist other means of showing custom. As discussed in the text, however, the *Beck* court seemed to focus its analysis on the question of actual or constructive knowledge.

[71] Similarly, when he advocated a "scienter" requirement in *Simmons*, Judge Becker noted that he did not intend "to exclude from the scope of scienter's meaning a municipal policymaker's deliberately indifferent acquiescence in a custom or policy of inadequately training employees, even though 'the need for more or different training is [very] obvious, and the inadequacy [quite] likely to result in the violation of constitutional rights.'" *Simmons*, 947 F.2d at 1061 n.14 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Judge Becker's opinion did not provide details on the application of this standard to the *Simmons* case, because he found that the City had waived "the argument that plaintiff failed to establish the essential 'scienter' element of her case." *Id.* at 1066. Chief Judge Sloviter wrote separately to explain, inter alia, her belief "that Judge Becker's emphasis on production by plaintiff of 'scienter-like evidence' when charging a municipality with deliberate indifference to deprivation of rights may impose on plaintiffs a heavier burden than mandated by the Supreme Court or prior decisions of this court." *Id.* at 1089 (Sloviter, C.J., concurring in part and in the judgment). Chief Judge Sloviter stressed "that liability may be based on the City's (i.e., policymaker's) reckless refusal or failure to take account of facts or circumstances which responsible individuals should have known," *id.* at 1090, and she pointed out that a standard requiring "actual knowledge of the conditions by a municipal policymaker ... would put a premium on blinders," *id.* at 1091.

established only by 'demonstrat[ing] that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences.'" *Berg*, 219 F.3d at 276 (quoting *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997)); *see also Natale v. Camden County Correctional Facility* 318 F.3d 575, 585 (3d Cir. 2003) (finding a jury question on municipal liability because "the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs"). Where a finding of deliberate indifference is required, the first bracketed sentence in Instruction 4.6.6 should be altered accordingly. Cases applying a deliberate-indifference standard for municipal liability often involve allegations of failure to adequately train, supervise or screen, *see, e.g.*, *Montgomery v. De Simone*, 159 F.3d 120, 126-26 (3d Cir. 1998) ("[A] municipality's failure to train police officers only gives rise to a constitutional violation when that failure amounts to deliberate indifference to the rights of persons with whom the police come into contact."). In cases where plaintiff seeks to establish municipal liability for failure to adequately train or supervise a municipal employee, the more specific standards set forth in Instruction 4.6.7 should be employed; Instruction 4.6.8 should be used when the plaintiff asserts municipal liability for failure to screen.

4.6.7 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Liability Through Inadequate Training or Supervision

Model

[Plaintiff] claims that [municipality] adopted a policy of [inadequate training] [inadequate supervision], and that this policy caused the violation of [plaintiff's] [specify right].

In order to hold [municipality] liable for the violation of [plaintiff's] [specify right], you must find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [[Municipality's] training program was inadequate to train its employees to carry out their duties] [[municipality] failed adequately to supervise its employees].

Second: [Municipality's] failure to [adequately train] [adequately supervise] amounted to deliberate indifference to the fact that inaction would obviously result in the violation of [specify right].

Third: [Municipality's] failure to [adequately train] [adequately supervise] proximately caused the violation of [specify right].

In order to find that [municipality's] failure to [adequately train] [adequately supervise] amounted to deliberate indifference, you must find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [Governing body] or [policymaking official] knew that employees would confront a particular situation.

Second: The situation involved a difficult choice, or one that employees had a history of mishandling.

Third: The wrong choice by an employee in that situation will frequently cause a deprivation of [specify right].

In order to find that [municipality's] failure to [adequately train] [adequately supervise] proximately caused the violation of [plaintiff's] federal right, you must find that [plaintiff] has proved by a preponderance of the evidence that [municipality's] deliberate indifference led directly to the deprivation of [plaintiff's] [specify right].

Comment

As noted above, municipal liability can arise from an official policy that authorizes the constitutional tort; such liability can also arise if the constitutional tort is caused by an official policy of inadequate[72] training, supervision or investigation, or by a failure to adopt a needed policy.[73] In the context of claims asserting such "liability through inaction," *Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000), the plaintiff will have to meet the additional hurdle of showing "deliberate indifference" on the part of the municipality.[74] "[L]iability for failure to train subordinate officers will lie only where a constitutional violation results from 'deliberate indifference to the constitutional rights of [the municipality's] inhabitants.'" *Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989)); *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion) (holding that evidence of a single incident of shooting by police could not establish a municipal policy of inadequate training); *Brown v. Muhlenberg Township*, 269 F.3d 205, 216 (3d Cir.2001) (plaintiff "must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to

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[72] As to the adequacy of a municipality's investigation, the Third Circuit has made clear that a policy must be adequate in practice, not merely on paper: "We reject the district court's suggestion that mere Department procedures to receive and investigate complaints shield the City from liability. It is not enough that an investigative process be in place; . . . '[t]he investigative process must be real. It must have some teeth.'" *Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3d Cir. 1996) (quoting plaintiff's reply brief, *Beck v. City of Pittsburgh*, No. 95-3328, 1995 WL 17147608, at *5).

[73] The Third Circuit has held that the failure to adopt a needed policy can result in municipal liability in an appropriate case, and has analyzed that question of municipal liability using the deliberate indifference test. *See Natale v. Camden County Correctional Facility*, 318 F.3d 575, 585 (3d Cir. 2003) ("A reasonable jury could conclude that the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs.").

The Third Circuit has declined to "recognize[] municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons." *Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3d Cir. 2004) ("We decline to [recognize such liability] on the record before us.").

[74] "If . . . the policy or custom does not facially violate federal law, causation can be established only by 'demonstrat[ing] that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences.'" *Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (quoting *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 407 (1997)).

deliberate indifference"); *Woloszyn v. County of Lawrence*, 396 F.3d 314, 324-25 (3d Cir. 2005) (discussing failure-to-train standard in case involving suicide by pre-trial detainee). The deliberate indifference test also applies to claims of "negligent supervision and failure to investigate." *Groman*, 47 F.3d at 637.

Deliberate indifference can be shown by demonstrating that a constitutional violation was sufficiently foreseeable: "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. Inaction in the face of complaints concerning violations can also demonstrate deliberate indifference. *Cf. id.* at 390 n.10 ("It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need."); *see also Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) ("A plaintiff must identify a municipal policy or custom that amounts to deliberate indifference to the rights of people with whom the police come into contact . . . . This typically requires proof of a pattern of underlying constitutional violations . . . . Although it is possible, proving deliberate indifference in the absence of such a pattern is a difficult task."). Thus, for example, evidence of prior complaints and of inadequate procedures for investigating such complaints can suffice to create a jury question concerning municipal liability. *See Beck*, 89 F.3d at 974-76 (reviewing evidence concerning procedures and holding that "Beck presented sufficient evidence from which a reasonable jury could have inferred that the City of Pittsburgh knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers"). The Third Circuit has applied a three-part test to determine whether "a municipality's failure to train or supervise to amount[s] to deliberate indifference": Under this test, "it must be shown that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999).

4.6.8 Section 1983 – Liability in Connection with the Actions of Another – Municipalities – Liability Through Inadequate Screening

Model

[Plaintiff] claims that [municipality] adopted a policy of inadequate screening, and that this policy caused the violation of [plaintiff's] [specify right]. Specifically, [plaintiff] claims that [municipality] should be held liable because [municipality] did not adequately check [employee's] background when hiring [him/her].

[Plaintiff] cannot establish that [municipality] is liable merely by showing that [municipality] hired [employee] and that [employee] violated [plaintiff's] [specify right].

In order to hold [municipality] liable for [employee's] violation of [plaintiff's] [specify right], you must also find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [Municipality] failed to check adequately [employee's] background when hiring [him/her].

Second: [Municipality's] failure to check adequately [employee's] background amounted to deliberate indifference to the risk that a violation of [specify right] would follow the hiring decision.

Third: [Municipality's] failure to check adequately [employee's] background proximately caused the violation of that federal right.

In order to find that [municipality's] failure to check adequately [employee's] background amounted to deliberate indifference, you must find that [plaintiff] has proved by a preponderance of the evidence that:

- adequate scrutiny of [employee's] background would have led a reasonable policymaker to conclude that it was obvious that hiring [employee] would lead to the particular type of [constitutional] [statutory] violation that [plaintiff] alleges, namely [specify constitutional (or statutory) violation].

In order to find that [municipality's] failure to check adequately [employee's] background proximately caused the violation of [plaintiff's] federal right, you must find that [plaintiff] has proved by a preponderance of the evidence that [municipality's] deliberate indifference led directly to the deprivation of [plaintiff's] [specify right].

Comment

Although inadequate screening during the hiring process can form the basis for municipal liability, the Supreme Court has indicated that the deliberate indifference test must be applied stringently in this context.[75] Where the plaintiff claims "that a single facially lawful hiring decision launch[ed] a series of events that ultimately cause[d] a violation of federal rights .... , rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997). In *Brown*, the Court held that the fact that a county sheriff hired his nephew's son as a reserve deputy sheriff without an adequate background check did not establish municipal liability for the reserve deputy sheriff's use of excessive force. The Court indicated that one relevant factor was that the claim focused on a *single* hiring decision:

> Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

Id. at 408-09. The Court also drew a distinction between inadequate training cases and inadequate screening cases:

> The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected

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[75] The Court in *Brown* argued that it was not imposing a heightened test for inadequate screening cases. *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 413 n.1 (1997) ("We do not suggest that a plaintiff in an inadequate screening case must show a higher degree of culpability than the 'deliberate indifference' required in *Canton* . . . ; we need not do so, because, as discussed below, respondent has not made a showing of deliberate indifference here."). However, as discussed in the text of this Comment, the Court's holding and reasoning in *Brown* reflect a stringent application of the deliberate indifference test.

> "deliberate indifference" to the obvious consequence of the policymakers' choice--namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation–that the municipality's indifference led directly to the very consequence that was so predictable.
>
> Where a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

Id. at 409-10. Thus, in the inadequate screening context,

> [a] plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Id. at 411; *see id.* at 412 ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."); *id.* (question is "whether Burns' background made his use of excessive force in making an arrest a plainly obvious consequence of the hiring decision").

Instruction 4.6.8 is designed for use in cases where the plaintiff alleges that the municipality failed adequately to check the prospective employee's background. In some cases, the asserted basis for liability may be, instead, that the municipality checked the prospective employee's background, learned of information indicating the risk that the person would commit the relevant constitutional violation, and nonetheless hired the person. In such cases, Instruction 4.6.8 can be modified as needed to reflect the fact that ignoring known information also can form the basis for an inadequate screening claim.

4.7.1 Section 1983 – Affirmative Defenses – Conduct Not Covered by Absolute Immunity

Model

The defendant in this case is a [prosecutor] [judge] [witness] [legislative body]. [Prosecutors, etc.] are entitled to what is called absolute immunity for all conduct reasonably related to their functions as [prosecutors, etc.]. Thus, you cannot hold [defendant] liable based upon [defendant's] actions in [describe behavior protected by absolute immunity]. Evidence concerning those actions was admitted solely for [a] particular limited purpose[s]. This evidence can be considered by you as evidence that [describe limited purpose]. But you cannot decide that [defendant] violated [plaintiff's] [specify right] based on evidence that [defendant] [describe behavior protected by absolute immunity].

However, [plaintiff] also alleges that [defendant] [describe behavior not covered by absolute immunity]. Absolute immunity does not apply to such conduct, and thus if you find that [defendant] engaged in such conduct, you should consider it in determining [defendant's] liability.

Comment

In most cases, questions of absolute immunity should be resolved by the judge prior to trial. Instruction 4.7.1 will only rarely be necessary; it is designed to address cases in which some, but not all, of the defendant's alleged conduct would be covered by absolute immunity, and in which evidence of the conduct covered by absolute immunity has been admitted for some purpose other than demonstrating liability. In such a case, the jury should determine liability based on the conduct not covered by absolute immunity. Instruction 4.7.1 provides a limiting instruction specifically tailored to this issue; see also General Instruction 2.10 (Evidence Admitted for Limited Purpose).

Prosecutors[76] have absolute immunity from damages claims concerning prosecutorial functions. "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *see also Imbler v. Pachtman*, 424 U.S. 409 (1976); *Burns v. Reed*, 500 U.S. 478, 492 (1991) (holding that a prosecutor's "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing" were "protected by absolute immunity"). Moreover, "supervision or training or information-system management" activities can qualify for absolute immunity – even though such acts are administrative in nature – if the administrative action in

[76] *See Light v. Haws*, 472 F.3d 74, 78 (3d Cir. 2007) (holding that Assistant Counsel for the Pennsylvania Department of Environmental Protection, when "filing actions to enforce compliance with court orders. . . . [,] functions as a prosecutor").

question "is directly connected with the conduct of a trial." *Van De Kamp v. Goldstein*, 129 S. Ct. 855, 861-62 (2009); *see id.* at 858-59 (holding that absolute immunity "extends to claims that the prosecution failed to disclose impeachment material ... due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants"). Absolute immunity does not apply, however, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," *Buckley*, 509 U.S. at 273, or when a prosecutor "provid[es] legal advice to the police," *Burns*, 500 U.S. at 492, 496.[77]

Judges possess absolute immunity from damages liability for "acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).[78] "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they

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[77] *See also Kalina v. Fletcher*, 522 U.S. 118, 120, 131 (1997) (prosecutor lacked absolute immunity from claim asserting that she "ma[de] false statements of fact in an affidavit supporting an application for an arrest warrant," because in so doing she "performed the function of a complaining witness" rather than that of an advocate); *Reitz v. County of Bucks*, 125 F.3d 139, 146 (3d Cir. 1997) (holding that "absolute immunity covers a prosecutor's actions in (1) creating and filing of an in rem complaint; (2) preparing of and applying for the seizure warrant; and (3) participating in ex parte hearing for the issuance of the seizure warrant," but does not cover prosecutor's "conduct with respect to the management and retention of the property after the seizure, hearing, and trial").

In *Odd v. Malone*, 538 F.3d 202 (3d Cir. 2008), "prosecuting attorneys obtained bench warrants to detain material witnesses whose testimony was vital to murder prosecutions. Although the attorneys diligently obtained the warrants, they neglected to keep the courts informed of the progress of the criminal proceedings and the custodial status of the witnesses." *Id*. at 205. The Court of Appeals held that a prosecutor sued "for failing to notify the relevant authorities that the proceedings in which the detained individual was to testify had been continued for nearly four months," *id*., did not qualify for absolute prosecutorial immunity; the court based this holding on the facts of the case, including the fact that the judge who issued the material witness warrant had directed the prosecutor to notify him of any delays in the murder prosecution but the prosecutor had failed to do so. *Id*. at 212-13. The *Odd* court also held (a fortiori) that a different prosecutor sued "for failing to notify the relevant authorities that the material witness remained incarcerated after the case in which he was to testify had been dismissed," *id*. at 205, lacked absolute prosecutorial immunity. *See id.* at 215.

[78] Judges also now possess a statutory immunity from claims for injunctive relief. *See* 42 U.S.C. § 1983 (providing that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable").

dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).[79] Judges do not possess absolute immunity with respect to claims arising from "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Forrester v. White*, 484 U.S. 219, 227 (1988).

State or local legislators enjoy absolute immunity from suits seeking damages or injunctive remedies with respect to legislative acts. *See Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (recognizing absolute immunity in case where state legislators "were acting in a field where legislators traditionally have power to act"); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (unanimous decision) (holding that "local legislators are . . . absolutely immune from suit under § 1983 for their legislative activities").

The Court of Appeals has set forth a two-part test for legislative immunity in suits against local officials: "To be legislative . . . , the act in question must be both substantively and procedurally legislative in nature . . . . An act is substantively legislative if it involves 'policy-making of a general purpose' or 'line-drawing.' . . . It is procedurally legislative if it is undertaken 'by means of established legislative procedures.'" *In re Montgomery County*, 215 F.3d 367, 376 (3d Cir. 2000) (quoting *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996)). Based on the Supreme Court's discussion in *Bogan*,[80] the Court of Appeals has questioned the two-part test's applicability to local officials[81] and has indicated that it does not govern claims against state officials.

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[79] Under the doctrine of "quasi-judicial" immunity, "government actors whose acts are relevantly similar to judging are immune from suit." *Dotzel v. Ashbridge*, 438 F.3d 320, 325 (3d Cir. 2006); *see id.* at 322 (holding that "the members of the Board of Supervisors of Salem Township, Pennsylvania are immune from suits brought against them in their individual capacities relating to their decision to deny an application for a permit for a conditional use"); *id.* at 327 (stressing the need to "closely and carefully examine the functions performed by the board in each case"); *Capogrosso v. Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009) (holding that individual-capacity claims against Director and Disciplinary Counsel for New Jersey Advisory Committee on Judicial Conduct were barred by quasi-judicial immunity).

[80] The *Bogan* Court declined to determine whether a procedurally legislative act by a local official must also be substantively legislative in order to qualify for legislative immunity: "Respondent . . . asks us to look beyond petitioners' formal actions to consider whether the ordinance was legislative in *substance*. We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55.

[81] The Court of Appeals stated (in a case concerning claims against state legislators) that *Bogan*

> casts doubt on the propriety of using any separate test to examine municipal-level

See, e.g., *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 252 (3d Cir. 1998) ("[B]ecause concerns for the separation of powers are often at a minimum at the municipal level, we decline to extend our analysis developed for municipalities to other levels of government."). More recently, however, the Court of Appeals has held that "[r]egardless of the level of government, ... the two-part substance/procedure inquiry is helpful in analyzing whether a non-legislator performing allegedly administrative tasks is entitled to [legislative] immunity." *Baraka v. McGreevey*, 481 F.3d 187, 199 (3d Cir. 2007) (addressing claims against New Jersey Governor and chair of the New Jersey State Council for the Arts).[82]

Police officers who serve as witnesses generally have absolute immunity from claims concerning their testimony. *See Briscoe v. LaHue*, 460 U.S. 325, 345 (1983).[83]

In addition to the immunities recognized by the Supreme Court, there may exist other categories of absolute immunity. *See, e.g., Ernst v. Child and Youth Services of Chester County*, 108

> legislative immunity, *see Bogan*, 523 U.S. at 49 . . . (holding that local legislators are 'likewise' absolutely immune from suit under § 1983), particularly a two-part, substance/procedure test, *id.* at 55 . . . (refusing to require that an act must be 'legislative in substance' as well as of 'formally legislative character' in order to be a legislative act).

Youngblood v. DeWeese, 352 F.3d 836, 841 n.4 (2004); *see also Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328, 339 (3d Cir. 2006) (stating, in a suit against state officials, that the *Bogan* Court "refused to insist that formally legislative acts, such as passing legislation, also be 'legislative in *substance*'").

[82] Prior to *Baraka*, the Court of Appeals had observed in *Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328, 338 (3d Cir. 2006), that cases concerning local officials can be "instructive" in the court's analysis of whether a state official's actions were legislative in nature. *See also id.* at 332 (describing the "functional" test for legislative immunity); *id.* at 340 (holding that firing of state representative's legislative assistant was administrative rather than legislative act). And another post-*Larsen* decision by the Court of Appeals did apply the two-part test to determine whether Pennsylvania Supreme Court justices had legislative immunity from claims arising from the termination of a plaintiff's employment as the Executive Administrator of the First Judicial District of Pennsylvania. *See Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 776-77 (3d Cir. 2000). *Gallas* involved a question of legislative immunity because the plaintiff challenged a Pennsylvania Supreme Court order that eliminated the position of Executive Administrator of the First Judicial District of Pennsylvania. *See id.* at 766.

[83] *Compare Malley v. Briggs*, 475 U.S. 335, 344 (1986) (no absolute immunity for a police officer in connection with claim that his "request for a warrant allegedly caused an unconstitutional arrest").

F.3d 486, 488-89 (3d Cir. 1997) (holding that "child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state are entitled to absolute immunity from suit for all of their actions in preparing for and prosecuting such dependency proceedings").

4.7.2 Section 1983 – Affirmative Defenses – Qualified Immunity

Note: For the reasons explained in the Comment, the jury should not be instructed on qualified immunity. Accordingly, no instruction on this issue is provided.

Comment

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The analysis of qualified immunity involves two questions. One question is whether "the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Another question is whether any such constitutional right was "clearly established,"[84] and in particular, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[85] Id. at 201-02.[86] It will often be useful for the court to address these

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[84] In *Davis v. Scherer*, 468 U.S. 183, 194 (1984), the fact that the defendant's conduct violated a clearly established *state-law* right did not defeat qualified immunity regarding the violation of federal law.

[85] "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Unlawfulness can be apparent "even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *compare Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (emphasizing the need for attention to context in judging whether application of a general principle was clear under the circumstances). "[T]he salient question . . . is whether the state of the law [at the time of the conduct] gave respondents fair warning that their [conduct] was unconstitutional." *Hope*, 536 U.S. at 741; *see also Groh v. Ramirez*, 540 U.S. 551, 564 (2004) ("No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional."); *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law."); *compare Redding*, 129 S. Ct. at 2645 (Stevens, J., joined by Ginsburg, J., dissenting in part) ("[T]he clarity of a well-established right should not depend on whether jurists have misread our precedents.").

questions in the order just stated, but on some occasions it will be preferable to adopt a different ordering; the court has discretion on this matter. *See Pearson v. Callahan*, 129 S. Ct. 808, 818-21 (2009).[87]

Even in a context where the underlying constitutional violation requires a showing of objective unreasonableness, the issue of qualified immunity presents a distinct question. As the Court explained in *Saucier*,

> [t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to

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Explaining its focus on reasonableness under the circumstances, the Court stated in *Saucier* that "[b]ecause 'police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation,' ... the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier*, 533 U.S. at 205 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Conversely, the court of appeals has suggested that qualified immunity analysis can take into account the fact that a defendant had time to deliberate before acting. *See Reedy v. Evanson*, 615 F.3d 197, 224 n.37 (3d Cir. 2010) (in the course of holding that summary judgment on qualified-immunity grounds was inappropriate, noting that "[t]here were no 'split-second' decisions made in this case").

[86] *See also Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998).

[87] For example, the court of appeals has ruled that where the analysis of the federal constitutional claim depends on an underlying question of unsettled state law, the court can go straight to the question of whether the federal constitutional right claimed by the plaintiff was clearly established. As the court explained, the practice of first addressing whether there was a constitutional violation is designed to permit the development of the law by leading courts to define the contours of a constitutional right even in cases where such a right, if it exists, is not clearly established. In the court's view, "the underlying principle of law elaboration is not meaningfully advanced in situations ... when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law." *Egolf v. Witmer*, 526 F.3d 104, 110 (3d Cir. 2008). The *Pearson* Court cited *Egolf* with apparent approval. *See Pearson*, 129 S. Ct. at 819. For a post-*Pearson* case following *Egolf*, see *Montanez v. Thompson*, 603 F.3d 243, 251 (3d Cir. 2010). For a case noting that under *Pearson* "district courts have wide discretion to decide which of the two prongs established in *Saucier* to address first," see *Kelly v. Borough of Carlisle*, 2010 WL 3835209, at *9 n.6 (3d Cir. Oct. 4, 2010).

the immunity defense.

Saucier, 533 U.S. at 205.[88]

Questions relating to qualified immunity should not be put to the jury "routinely"; rather, "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). If there are no disputes concerning the relevant historical facts, then qualified immunity presents a question of law to be resolved by the court.

However, "a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis." *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) ("*Curley I*"); *see also Reitz v. County of Bucks*, 125 F.3d 139, 147 (3d Cir. 1997). Material disputes of historical fact must be resolved by the jury at trial.[89] The question will then arise whether the jury should decide only the questions of historical fact, or whether the jury should also decide the question of objective reasonableness. *See Curley I*, 298 F.3d at 278 (noting that "the federal courts of appeals are divided on the question of whether the judge or jury should decide the ultimate question of objective reasonableness once all the relevant factual issues have been resolved"). Some Third Circuit decisions have suggested that it can be appropriate to permit the jury to decide objective reasonableness as well as the underlying questions of historical fact. *See, e.g.*, *Sharrar v. Felsing*, 128 F.3d 810, 830-31 (3d Cir. 1997) (noting with apparent approval that the court in *Karnes v. Skrutski*, 62 F.3d 485 (3d Cir.1995), "held that a factual dispute relating to qualified immunity must be sent to the jury, and suggested that, at the same time, the jury would decide the issue of objective reasonableness"). On the other hand, the Third Circuit has also noted that the court can "decide the objective reasonableness issue once all the historical facts are no longer in dispute. A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity." *Curley I*, 298 F.3d at 279. And, more recently, the court has suggested that this ultimate question *must* be reserved for the court, not the jury. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004) ("The jury ... determines disputed historical facts material to the qualified immunity question.... District Courts may use special interrogatories to

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[88] The Court of Appeals has distinguished between the underlying excessive-force inquiry and the qualified-immunity inquiry by characterizing the former as a question of fact and the latter as a question of law. *See Curley v. Klem*, 499 F.3d 199, 214 (3d Cir. 2007) ("*Curley II*") ("[W]e think the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified immunity question is whether the officer was reasonably mistaken about the state of the law.").

[89] *See, e.g., Estate of Smith v. Marasco*, 430 F.3d 140, 152-53 (3d Cir. 2005) ("Marcantino ... claimed that he gave Fetterolf no directions. At this stage, however, we must assume that a jury would credit Fetterolf's version. If Marcantino did, in fact, approve the decision to enter the residence as well as the methods employed to do so, he is not entitled to qualified immunity.").

allow juries to perform this function.... The court must make the ultimate determination on the availability of qualified immunity as a matter of law.").[90] Most recently, the court has stated that submitting the ultimate question of qualified immunity to the jury constitutes reversible error: "[W]hether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury.... When a district court submits that question of law to a jury, it commits reversible error." *Curley v. Klem*, 499 F.3d 199, 211 (3d Cir. 2007) ("*Curley II*").[91]

The court, then, should not instruct the jury on qualified immunity.[92] Rather, the court should determine (in consultation with counsel) what the disputed issues of historical fact are. The court should submit interrogatories to the jury on those questions of historical fact. Often, questions of historical fact will be relevant both to the existence of a constitutional violation and to the question of objective reasonableness; as to such questions, the court should instruct the jury that the plaintiff has the burden of proof.[93] (The court may wish to include those interrogatories in the section of the verdict form that concerns the existence of a constitutional violation.) Other questions of historical

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[90] Admittedly, this statement in *Carswell* was dictum: The court in *Carswell* affirmed the district court's grant of judgment as a matter of law at the close of plaintiff's case in chief. *See Carswell*, 381 F.3d at 239, 245. *See also Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 194 n. 12 (3d Cir. 2005) (citing *Carswell* and *Curley I* with approval).

[91] Under *Carswell*'s dictum, in cases where there exist material disputes of historical fact, the best approach is for the jury to answer special interrogatories concerning the historical facts and for the court to determine the question of objective reasonableness consistent with the jury's interrogatory answers. *See Carswell*, 381 F.3d at 242 & n.2; *see also Stephenson v. Doe*, 332 F.3d 68, 80 n.15, 81 (2d Cir. 2003) (noting that the difficult nature of qualified immunity doctrine "inherently makes for confusion," and stating that on remand the trial court should use special interrogatories if jury findings are necessary with respect to issues relating to qualified immunity); *but see Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994) ("[S]ending the factual issues to the jury but reserving to the judge the ultimate 'reasonable officer' determination leads to serious logistical difficulties. Special jury verdicts would unnecessarily complicate easy cases, and might be unworkable in complicated ones.").

[92] Though the *Curley II* court stressed that "that the second step in the *Saucier* analysis, i.e., whether an officer made a reasonable mistake about the legal constraints on police action and is entitled to qualified immunity, is a question of law that is exclusively for the court," it noted in dictum the possibility of using the jury, in an advisory capacity, to determine questions relating to qualified immunity: "When the ultimate question of the objective reasonableness of an officer's behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a jury in an advisory capacity ... but responsibility for answering that ultimate question remains with the court." *Curley II*, 499 F.3d at 211 n.12.

[93] For a further discussion of burdens of proof in this context, *see supra* Comment 4.2.

fact, however, may be relevant only to the question of objective reasonableness; as to those questions, if any, the court should instruct the jury that the defendant has the burden of proof. (The court may wish to include those interrogatories in a separate section of the verdict form, after the sections concerning the prima facie case, and may wish to submit those questions to the jury only if the jury finds for the plaintiff on liability.)

One question that may sometimes arise is whether jury findings on the defendant's subjective intent are relevant to the issue of qualified immunity. Decisions applying *Harlow* and *Harlow's* progeny emphasize that the test for qualified immunity is an objective one, and that the defendant's actual knowledge concerning the legality of the conduct is irrelevant.[94] Admittedly, the reasons given in *Harlow* for rejecting the subjective test carry considerably less weight in the context of a

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[94] *See, e.g.*, *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997) ("[T]he officer's subjective beliefs about the legality of his or her conduct generally 'are irrelevant.'") (quoting *Anderson*, 483 U.S. at 641); *Grant v. City of Pittsburgh*, 98 F.3d 116, 123-24 (3d Cir. 1996) ("It is now widely understood that a public official who knows he or she is violating the constitution nevertheless will be shielded by qualified immunity if a 'reasonable public official' would not have known that his or her actions violated clearly established law.")

Justice Brennan's concurrence in *Harlow*, quoting language from the majority opinion, asserted that the Court's standard "would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know . . . . Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes." *Harlow*, 457 U.S. at 821 (Brennan, J., joined by Marshall & Blackmun, JJ., concurring). The quoted language from the majority opinion, however, appears to refer to cases in which the defendant's conduct in fact violated clearly established law:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow, 457 U.S. at 818-19.

In certain instances reliance on legal advice can constitute such an extraordinary circumstance. The court of appeals has held "that a police officer who relies in good faith on a prosecutor's legal opinion that [an] arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause." *Kelly v. Borough of Carlisle*, 2010 WL 3835209, at *5 (3d Cir. Oct. 4, 2010). However, "a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice." *Id.*

court's immunity decision based on a jury's findings than they do at earlier points in the litigation: The Court stressed its concerns that permitting a subjective test would doom officials to intrusive discovery, *see Harlow*, 457 U.S. at 817 (noting that "[j]udicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues"), and would impede the use of summary judgment to dismiss claims on qualified immunity grounds, *see id.* at 818 (noting that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment"). Obviously, once a claim has reached a jury trial, concerns about discovery and summary judgment are moot. In order to reach the trial stage, the plaintiff must have successfully resisted summary judgment on qualified immunity grounds, based on the application of the objective reasonableness test. And the plaintiff must have done so without the benefit of discovery focused on the official's subjective view of the legality of the conduct. If, at trial, the jury finds that the defendant actually knew the conduct to be illegal, it arguably would not contravene the policies stressed in *Harlow* if the court were to reject qualified immunity based on such a finding. Nonetheless, the courts' continuing emphasis on the notion that the qualified immunity test excludes any element of subjective intent[95] raises the possibility that reliance on the defendant's actual knowledge could be held to be erroneous. As the Court has explained, "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

In some cases, however, the defendant's motivation may be relevant to the plaintiff's claim. *See id.* In such cases, the circumstances relevant to the qualified immunity determination may include the defendant's subjective intent. For example, in a First Amendment retaliation case argued and decided after *Crawford-El*, the Third Circuit explained:

> The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful. . . . In the context of a First Amendment retaliation claim, that

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[95] *See, e.g.*, *Berg v. County of Allegheny*, 219 F.3d 261, 272 (3d Cir. 2000) ("The inquiry [concerning qualified immunity] is an objective one; the arresting officer's subjective beliefs about the existence of probable cause are not relevant."). However, a qualified immunity analysis concerning probable cause will take into account what facts the defendant knew at the relevant time. *See Gilles v. Davis*, 427 F.3d 197, 206 (3d Cir. 2005) ("[W]hether it was reasonable to believe there was probable cause is in part based on the limited information that the arresting officer has at the time."); *see also Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 194 (3d Cir. 2005) (stating in context of a Fourth Amendment claim that qualified immunity analysis "involv[es] consideration of both the law as clearly established at the time of the conduct in question and the information within the officer's possession at that time"); *Blaylock v. City of Philadelphia*, 504 F.3d 405, 411 (3d Cir. 2007) (citing *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991), and *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

> determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory. Even assuming that this could be demonstrated under a certain set of facts, it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations . . . .

Larsen v. Senate of Com. of Pa., 154 F.3d 82, 94 (3d Cir. 1998); *see also Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) ("In cases in which a constitutional violation depends on evidence of a specific intent, 'it can never be objectively reasonable for a government official to act with the intent that is prohibited by law'" (quoting *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001).). In some cases where the plaintiff must meet a stringent test (on the merits) concerning the defendant's state of mind, the jury's finding that the defendant had that state of mind forecloses a defense of qualified immunity.[96] In those cases, the jury's decision on the defendant's state of mind will also determine the qualified immunity question.[97]

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[96] *See Monteiro*, 436 F.3d at 405 ("Perkins-Auguste's argument that she could have conceivably (and constitutionally) ejected Monteiro on the basis of his disruptions is unavailing in the face of a jury verdict concluding that she acted with a motive to suppress Monteiro's speech on the basis of viewpoint.").

Similarly, the Eleventh Circuit noted *Saucier*'s holding that the qualified immunity inquiry is distinct from the merits of the claim, but explained:

> It is different with claims arising from the infliction of excessive force on a prisoner in violation of the Eighth Amendment Cruel and Unusual Punishment Clause. In order to have a valid claim ... the excessive force must have been sadistically and maliciously applied for the very purpose of causing harm. Equally important, it is clearly established that all infliction of excessive force on a prisoner sadistically and maliciously for the very purpose of causing harm and which does cause harm violates the Cruel and Unusual Punishment Clause. So, where this type of constitutional violation is established there is no room for qualified immunity. It is not just that this constitutional tort involves a subjective element, it is that the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution . . . .

Johnson v. Breeden, 280 F.3d 1308, 1321-22 (11th Cir. 2002).

[97] The Third Circuit has held that the showing of subjective deliberate indifference necessary to establish an Eighth Amendment conditions-of-confinement claim necessarily negates the defendant's claim to qualified immunity. *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("Because deliberate indifference under *Farmer* requires actual knowledge or awareness on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent.").

Not all Section 1983 defendants will be entitled to assert a qualified immunity defense. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (holding that "prison guards who are employees of a private prison management firm" are not "entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983"); *Wyatt v. Cole*, 504 U.S. 158, 159 (1992) (holding that "private defendants charged with 42 U.S.C. § 1983 liability for invoking state replevin,

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The Supreme Court's decision in *Saucier* does not necessarily undermine the Third Circuit's reasoning in *Beers-Capitol*. Admittedly, the Third Circuit decided *Beers-Capitol* a week before the Supreme Court decided *Saucier*; but *Saucier*'s holding (concerning Fourth Amendment excessive force claims) followed the earlier holding in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (concerning Fourth Amendment search claims). *Anderson* and *Saucier* can be distinguished from *Beers-Capitol*. Because an official can make a reasonable mistake as to whether a particular action is reasonable, qualified immunity is available even where the contours of the relevant constitutional right depend "upon an assessment of what accommodation between governmental need and individual freedom is reasonable." *Anderson*, 483 U.S. at 644. By contrast, if the relevant constitutional standard requires that the defendant actually knew of an excessive risk (as in the case of an Eighth Amendment violation), qualified immunity seems paradoxical: It is difficult to argue that a reasonable officer in the defendant's shoes could not be expected to know the defendant's conduct was unlawful when the defendant actually knew of the excessive risk.

However, the Supreme Court's subsequent decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), does raise some doubt as to the validity of the Third Circuit's conclusion. In *Hope*, the Court held that the plaintiff's allegations, if true, established an Eighth Amendment conditions-of-confinement claim (because the plaintiff had satisfied the Eighth Amendment deliberate indifference standard), *see id.* at 737, and then proceeded to analyze whether it would have been clear to a reasonable official under the circumstances that the conduct at issue violated a clearly established constitutional right, *see id.* at 739. Although the majority ultimately concluded that the defendants were not entitled to qualified immunity, it did so on the ground that caselaw, a state regulation and a DOJ report should have made it obvious to a reasonable official that the conduct was unconstitutional. *See id.* at 741-42. If a showing of Eighth Amendment deliberate indifference automatically negates a defendant's claim of qualified immunity, then the Court could have relied upon that ground to reverse the grant of summary judgment to the defendants in *Hope*; thus, the fact that the Court instead analyzed the question of qualified immunity without mentioning the possible relevance of the showing of deliberate indifference suggests that the Court did not view that showing as dispositive of the qualified immunity question. On the other hand, the plaintiff in *Hope* apparently did not argue that the showing of deliberate indifference negated the claim of qualified immunity, so it may be that the Court simply did not consider that theory in deciding *Hope*. (In *Whitley v. Albers*, 475 U.S. 312 (1986), the court of appeals had stated that "[a] finding of [Eighth Amendment] deliberate indifference is inconsistent with a finding of ... qualified immunity," *Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984), but the Supreme Court refused to address this contention because the Court reversed the judgment on other grounds, *see* 475 U.S. at 327-28.)

garnishment, and attachment statutes later declared unconstitutional" cannot claim qualified immunity); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 657 (1980) (holding that "municipalities have no immunity from damages liability flowing from their constitutional violations").

The Court has left undecided whether private defendants who cannot claim qualified immunity should be able to claim "good faith" immunity. *See Wyatt*, 504 U.S. at 169 ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability ... could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."); *id.* at 169-75 (Kennedy, J., joined by Scalia, J., concurring) (arguing in favor of a good faith defense); *Richardson*, 521 U.S. at 413 (declining to determine "whether or not . . . private defendants . . . might assert, not immunity, but a special 'good-faith' defense"). Taking up the issue thus left open in *Wyatt*, the Third Circuit has held that "private actors are entitled to a defense of subjective good faith." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994). The discussion in *Jordan* focused on the question in the context of a due process claim arising from a creditor's execution on a judgment. *See id.* at 1276 (explaining that "a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process" would show an absence of good faith). One district court has distinguished *Jordan* on that basis: "To import into Eighth Amendment jurisprudence a defense predicated on the elements of a common law claim for a wrongful seizure of property and the reasonableness of reliance on a facially valid statute is a leap. The good faith defense discussed in *Jordan* has yet to be afforded to other than private individuals who in concert with state officials invoke state law in pursuit of a private objective." *Pearson v. City of Philadelphia*, 1998 WL 721076, at *2 (E.D.Pa. Oct. 15, 1998).

4.7.3 Section 1983 – Affirmative Defenses – Release-Dismissal Agreement

Model

[Defendant] asserts that [plaintiff] agreed to release [plaintiff's] claims against [defendant], in exchange for the dismissal of the criminal charges against [plaintiff]. In order to rely on such a release as a defense against [plaintiff's] claims, [defendant] must prove both of the following things:

First, [defendant] must prove that the prosecutor acted for a valid public purpose when [he/she] sought a release from [plaintiff]. [Defendant] asserts that the prosecutor sought the release because the prosecutor [wanted to protect the complaining witness from having to testify at [defendant's] trial]. I instruct you that [protecting the complaining witness from having to testify at trial] is a valid public purpose; you must decide whether that purpose actually was the prosecutor's purpose in seeking the release. In other words, [defendant] must prove by a preponderance of the evidence that the reason the prosecutor sought the release from [plaintiff] was [to protect the complaining witness from having to testify at trial].

Second, [defendant] must prove [by clear and convincing evidence][98] [by a preponderance of the evidence][99] that [plaintiff] agreed to the release and that [plaintiff's] decision to agree to the release was deliberate, informed and voluntary.[100] To determine whether [plaintiff] made a deliberate, informed and voluntary decision to agree to the release, you should consider all relevant circumstances, including *[list any of the following factors, and any other factors, warranted by the evidence]*:

- The words of the written release that [plaintiff] signed;
- Whether [plaintiff] was in custody at the time [he/she] entered into the release;
- Whether [plaintiff's] background and experience helped [plaintiff] to understand the terms of the release;
- Whether [plaintiff] was represented by a lawyer, and if so, whether [plaintiff's] lawyer wrote the release;

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[98] If the release was oral, the defendant must prove voluntariness by clear and convincing evidence.

[99] The Court of Appeals has not determined the appropriate standard of proof of voluntariness in the case of a written release.

[100] If more than one defendant seeks to assert the release as a defense, the court, if the plaintiff so requests, should require the jury to consider voluntariness with respect to potential claims against each specific defendant. *See Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 526 n.13 (3d Cir. 1996).

- Whether [plaintiff] agreed to the release immediately or whether [plaintiff] took time to think about it;
- Whether [plaintiff] expressed any unwillingness to enter into the release; and
- Whether the terms of the release were clear.

Comment

The validity of release-dismissal agreements waiving potential Section 1983 claims is reviewed on a case-by-case basis. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).[101] To be enforced, the agreement must be "executed voluntarily, free from prosecutorial misconduct and not offensive to the relevant public interest." *Cain v. Darby Borough*, 7 F.3d 377, 380 (3d Cir. 1993) (in banc) (citing *Rumery*).

The defense has the burden of showing voluntariness, *see Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205, 1211 (3d Cir. 1993) (in banc), and if the release was oral rather than written then voluntariness must be proven by clear and convincing evidence, *see Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 534-36 (3d Cir. 1996); *see also Livingstone*, 12 F.3d at 1212-13 (noting reasons why written releases are preferable).[102] The inquiry is fact-specific. *See Livingstone*, 12 F.3d at 1210-11 (listing types of factors relevant to voluntariness). To the extent that the question whether the plaintiff made a "deliberate, informed and voluntary waiver" presents issues of witness credibility concerning the plaintiff's state of mind, the question should be submitted to the jury. *Livingstone*, 12 F.3d at 1215 n.9.

The defense must also show "that upon balance the public interest favors enforcement." *Cain*, 7 F.3d at 381; *see also Livingstone*, 12 F.3d at 1215 (discussing possible public interest rationales for releases); *Livingstone*, 91 F.3d at 527 (noting the "countervailing interest ... in detecting and deterring official misconduct"); *id.* at 528-29 (assessing possible rationales).[103] "The

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[101] "Whereas . . . the validity of a release-dismissal for a section 1983 claim is governed exclusively by federal law . . . , the validity of any purported release of . . . state claims . . . is governed by state law." *Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205, 1209 n.6 (1993) (in banc); *see also Livingstone*, 91 F.3d at 539 (discussing treatment of release-dismissal agreements under Pennsylvania law).

[102] *See also Livingstone*, 91 F.3d at 536 n.34 (declining to "address the appropriate standard of proof for enforcement of a written release-dismissal agreement").

[103] *See also* Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. Pa. L. Rev. 851, 928 (1988) (noting that release-dismissal agreements pose "a substantial cost to first amendment rights, the integrity of the criminal process, and the purposes served by section 1983").

standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the agreement was reached." *Cain*, 7 F.3d at 381. Moreover, "the public interest reason proffered by the prosecutor must be the prosecutor's *actual reason* for seeking the release." *Id.*; *see also Livingstone*, 91 F.3d at 530 n.17. If, instead, "the decision to pursue a prosecution, or the subsequent decision to conclude a release-dismissal agreement, was motivated by a desire to protect public officials from liability," the release should not be enforced. *Livingstone*, 91 F.3d at 533.[104]

"[P]rotecting public officials from civil suits may in some cases provide a valid public interest and justify the enforcement of a release-dismissal agreement." *Cain*, 7 F.3d at 383. But "there must first be a case-specific showing that the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason." *Id.*[105] Whether the claims appeared to be marginal or frivolous should be assessed on the basis of the information that the prosecutor "knew or should have known" at the time. *Livingstone*, 91 F.3d at 532. If the claims did appear marginal or frivolous based on the information that the prosecutor knew and/or should have known, the court should then address "the further question whether enforcement of a release-dismissal agreement in the face of substantial evidence of police misconduct would be compatible with *Rumery* and *Cain*, notwithstanding that the evidence of misconduct was not known, or reasonably knowable, by the prosecutor at the time." *Livingstone*, 91 F.3d at 532.

The objective inquiry (whether there existed a valid public interest in the release) is for the court,[106] but the subjective inquiry (whether that interest was the prosecutor's actual reason) is for the jury. *See Livingstone*, 12 F.3d at 1215. "The party seeking to enforce the release-dismissal agreement bears the burden of proof on both of these elements." *Livingstone*, 91 F.3d at 527.

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[104] "[T]he concept of prosecutorial misconduct is embedded in [the] larger inquiry into whether enforcing the release would advance the public interest." *Cain*, 7 F.3d at 380.

[105] "As a general matter, civil rights claims based on substantial evidence of official misconduct will not be either marginal or frivolous. But this may not be true in every case. For instance, if the official involved would clearly have absolute immunity for the alleged misconduct, then a subsequent civil rights suit might indeed be marginal, whether or not there is substantial evidence that the misconduct occurred." *Livingstone*, 91 F.3d at 530 n.18.

[106] "The process of weighing the evidence of police misconduct against the prosecutor's asserted reasons for concluding a release-dismissal agreement is part of the broad task of balancing the public interests that favor and that disfavor enforcement. That task is one for the court." *Livingstone*, 91 F.3d at 533 n.28.

4.8.1 Section 1983 – Damages – Compensatory Damages

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find [defendant] liable, then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. [Plaintiff] must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. [There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. Plaintiff has the burden of proving compensatory damages by a preponderance of the evidence.

[Plaintiff] claims the following items of damages *[include any of the following – and any other items of damages – that are warranted by the evidence and permitted under the law governing the specific type of claim]*:

- Physical harm to [plaintiff] during and after the events at issue, including ill health, physical pain, disability, disfigurement, or discomfort, and any such physical harm that [plaintiff] is reasonably certain to experience in the future. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.

- Emotional and mental harm to [plaintiff] during and after the events at issue, including fear, humiliation, and mental anguish, and any such emotional and mental harm that

[plaintiff] is reasonably certain to experience in the future.[107]

- The reasonable value of the medical [psychological, hospital, nursing, and similar] care and supplies that [plaintiff] reasonably needed and actually obtained, and the present value[108] of such care and supplies that [plaintiff] is reasonably certain to need in the future.

- The [wages, salary, profits, reasonable value of the working time] that [plaintiff] has lost because of [his/her] inability [diminished ability] to work, and the present value of the [wages, etc.] that [plaintiff] is reasonably certain to lose in the future because of [his/her] inability [diminished ability] to work.

- The reasonable value of property damaged or destroyed.

- The reasonable value of legal services that [plaintiff] reasonably needed and actually obtained to defend and clear [him/her]self.[109]

- The reasonable value of each day of confinement after the time [plaintiff] would have been released if [defendant] had not taken the actions that [plaintiff] alleges.[110]

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[107] "[E]xpert medical evidence is not required to prove emotional distress in section 1983 cases." *Bolden v. Southeastern Pennsylvania Transp. Authority*, 21 F.3d 29, 36 (3d Cir. 1994). However, the plaintiff must present competent evidence showing emotional distress. *See Chainey v. Street*, 523 F.3d 200, 216 (3d Cir. 2008). And in suits filed by prisoners, the court should ensure that the instructions on emotional and mental injury comply with 42 U.S.C. § 1997e(e). *See* Comment.

[108] The Court of Appeals has not discussed whether and how the jury should be instructed concerning the present value of future damages in Section 1983 cases. For instructions concerning present value (and a discussion of relevant issues), see Instruction 5.4.4 and its Comment.

[109] This category of damages is not available for an unreasonable search and seizure. *See Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000), as amended (Jan. 26, 2001) ("Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy–including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.") (quoting *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir.1999)).

[110] *See Sample v. Diecks*, 885 F.2d 1099, 1112 (3d Cir. 1989) (upholding award of compensatory damages for "each day of confinement after the time Sample would have been released if Diecks had fulfilled his duty to Sample").

[Each plaintiff has a duty under the law to "mitigate" his or her damages – that means that the plaintiff must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by the defendant. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [him/her], then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if [he/she] had taken advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *see also Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) ("It is well settled that compensatory damages under § 1983 are governed by general tort-law compensation theory.").[111]

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[111] The Third Circuit has noted the potential relevance of 42 U.S.C. § 1988 to the question of damages in Section 1983 cases. *See Fontroy v. Owens*, 150 F.3d 239, 242 (3d Cir. 1998). The *Fontroy* court relied on the approach set forth by the Supreme Court in a case addressing statute of limitations issues:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."

Fontroy, 150 F.3d at 242-43 (quoting *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (quoting 42 U.S.C. § 1988(a))); *compare* Seth F. Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601, 620 (1985) (arguing that Section 1988's reference to "common law" denotes "general common law," not state common law).

As noted in the text, the Supreme Court has addressed a number of questions relating to the damages available in Section 1983 actions without making Section 1988 the focus of its analysis. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978) (applying the tort principle of compensation in a procedural due process case and stating in passing, in a footnote, that "42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is 'necessary

"[A] Section 1983 plaintiff must demonstrate that the defendant's actions were the proximate cause of the violation of his federally protected right." *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004) (discussing defendants' contentions that their conduct did not "proximately cause[] [the decedent's] death"). The requirement is broadly equivalent to the tort law's concept of proximate cause. *See, e.g*, *Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir. 2000) ("It is axiomatic that '[a] § 1983 action, like its state tort analogs, employs the principle of proximate causation.'") (quoting *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999)). Thus, Instruction 4.8.1 reflects general tort principles concerning causation and compensatory damages.

With respect to future injury, the Eighth Circuit's model instructions require that the plaintiff prove the injury is "reasonably certain" to occur. *See* Eighth Circuit (Civil) Instruction 4.51. Although the Committee is not aware of Third Circuit caselaw directly addressing this issue, some precedents from other circuits do provide support for such a requirement. *See Stengel v. Belcher*, 522 F.2d 438, 445 (6th Cir. 1975) ("The Court properly instructed the jury that Stengel could recover damages only for injury suffered as a proximate result of the shooting, and for future damages which were reasonably certain to occur."), *cert. dismissed*, 429 U.S. 118 (1976); *Henderson v. Sheahan*, 196 F.3d 839, 849 (7th Cir. 1999) ("Damages may not be awarded on the basis of mere conjecture or speculation; a plaintiff must prove that there is a reasonable certainty that the anticipated harm or condition will actually result in order to recover monetary compensation."); *cf. Slicker v. Jackson*, 215 F.3d 1225, 1232 (11th Cir. 2000) ("[A]n award of nominal damages may be appropriate when the plaintiff's injuries have no monetary value or when they are not quantifiable with reasonable certainty."). On the other hand, language in some other opinions suggest that something less than "reasonable certainty," such as "reasonable likelihood," might suffice. *See, e.g., Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 35 (1st Cir. 1991) (in assessing jury's award of damages, taking into account evidence that the plaintiff's "post-traumatic stress syndrome would likely require extensive future medical treatment at appreciable cost"); *Lawson v. Dallas County*, 112 F.Supp.2d 616, 636 (N.D. Tex. 2000) (plaintiff is "entitled to recover compensatory damages for the physical injury, pain and suffering, and mental anguish that he has suffered in the past–and is reasonably likely to suffer in the future–because of the defendants' wrongful conduct"), *aff'd*, 286 F.3d 257 (5th Cir. 2002).

The court should take care not to suggest that the jury could award damages based on "the abstract value of [the] constitutional right." *Stachura*, 477 U.S. at 308. If a constitutional violation has not caused actual damages, nominal damages are the appropriate remedy. *See id.* at 308 n.11; *infra* Instruction 4.8.2. However, "compensatory damages may be awarded once the plaintiff shows actual injury despite the fact the monetary value of the injury is difficult to ascertain." *Brooks v. Andolina*, 826 F.2d 1266, 1269 (3d Cir. 1987).

In a few types of cases, "presumed" damages may be available. "When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish ... presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Stachura*, 477 U.S. at 310-11. However, only a

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to furnish suitable remedies' under § 1983").

"narrow" range of claims will qualify for presumed damages. *Spence v. Board of Educ. of Christina School Dist.*, 806 F.2d 1198, 1200 (3d Cir. 1986) (noting that "[t]he situations alluded to by the *Memphis* Court that would justify presumed damages [involved] defamation and the deprivation of the right to vote").

If warranted by the evidence, the court can instruct the jury to distinguish between damages caused by legal conduct and damages caused by illegal conduct. *Cf. Bennis v. Gable*, 823 F.2d 723, 734 n.14 (3d Cir. 1987) ("Apportionment [of compensatory damages] is appropriate whenever 'a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which that defendant's conduct has been cause in fact.'") (quoting Prosser & Keeton, The Law of Torts, § 52, at 345 (5th ed. 1984)); *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 967 (3d Cir.1975) (reviewing judgment entered after bench trial in case under Labor Management Relations Act and discussing apportionment of damages between legal and illegal conduct), *overruled on other grounds by Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 215 (1979).
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The court should instruct the jury on the categories of compensatory damages that it should consider. Those categories will often parallel the categories of damages available under tort law. "[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." *Carey v. Piphus*, 435 U.S. 247, 257-258 (1978).[112] The *Carey* Court also noted, however, that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Id.* at 259.

The Prison Litigation Reform Act ("PLRA") provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). This provision "requir[es] a less-than-significant-but-more-than-de minimis physical injury as a predicate to allegations of emotional injury." *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003). However, this provision does not bar the award of nominal and punitive damages. *See Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (holding that "[n]either claims seeking nominal damages to vindicate constitutional rights nor claims seeking punitive damages to deter or punish

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[112] Compensatory damages in a Section 1983 case "may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering.'" *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *see also Coleman v. Kaye*, 87 F.3d 1491, 1507 (3d Cir. 1996) (in sex discrimination case, holding that plaintiff could recover damages under Section 1983 for "personal anguish she suffered as a result of being passed over for promotion"); *Chainey v. Street*, 523 F.3d 200, 216 (3d Cir. 2008) (discussing proof of damages for emotional distress).

egregious violations of constitutional rights are claims 'for mental or emotional injury'" within the meaning of Section 1997e(e)).[113] At least one district court has interpreted Section 1997e(e) to preclude the award of damages for emotional injury absent a finding of physical injury. *See Tate v. Dragovich*, 2003 WL 21978141, at *9 (E.D.Pa. 2003) ("Plaintiff was barred from recovering compensatory damages for his alleged emotional and psychological injuries by § 803(d)(e) of the PLRA, which requires that proof of physical injury precede any consideration of mental or emotional harm, 42 U.S.C. § 1997e(e) (2003), and the jury was instructed as such."). In a case within Section 1997e(e)'s ambit,[114] the court should incorporate this consideration into the instructions.[115]

The Third Circuit has held that the district court has discretion to award prejudgment interest in Section 1983 cases. *See Savarese v. Agriss*, 883 F.2d 1194, 1207 (3d Cir. 1989). Accordingly, it appears that the question of prejudgment interest need not be submitted to the jury. *Compare Cordero v. De Jesus-Mendez*, 922 F.2d 11, 13 (1st Cir. 1990) ("[I]n an action brought under 42 U.S.C. § 1983, the issue of prejudgment interest is so closely allied with the issue of damages that federal law dictates that the jury should decide whether to assess it.").

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how

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[113] One court has held that Section 1997e's reference to "mental or emotional injury" does not encompass physical pain. *See Perez v. Jackson*, 2000 WL 893445, at *2 (E.D.Pa. June 30, 2000) ("Physical pain wantonly inflicted in a manner which violates the Eighth Amendment is a sufficient 'physical injury' to permit recovery under § 1983. Plaintiff also has not pled a claim for emotional or mental injury.").

[114] "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

[115] It is not entirely clear that Section 1997e(e) precludes an *award* of damages for emotional injury absent a *jury finding* of physical injury; rather, the statute focuses upon the pretrial stage, by precluding the prisoner from *bringing* an action seeking damages for emotional injury absent a *prior showing* of physical injury. A narrow reading of the statute's language arguably accords with the statutory purpose of decreasing the number of inmate suits and enabling the pretrial dismissal of such suits where only emotional injury is alleged: Under this view, if a plaintiff has survived summary judgment by pointing to evidence that would enable a reasonable jury to find physical injury, it would not offend the statute's purpose to permit the jury to award damages for emotional distress even if the jury did not find physical injury. However, because it is far from clear that this view will ultimately prevail, the safer course may be to incorporate the physical injury requirement into the jury instructions.

much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

4.8.2 Section 1983 – Damages – Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

The Supreme Court has explained that "[b]y making the deprivation of . . . rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). *Carey* involved a procedural due process claim, but the Court indicated that the rationale for nominal damages extended to other types of Section 1983 claims as well: The Court observed, with apparent approval, that "[a] number of lower federal courts have approved the award of nominal damages under § 1983 where deprivations of constitutional rights are not shown to have caused actual injury." *See id.* n.24 (citing cases involving Section 1983 claims for various constitutional violations); *see also Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (explaining that "nominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury"); *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000) (noting "the Supreme Court's clear directive that nominal damages are available for the vindication of a constitutional right absent any proof of actual injury"); *Atkinson v. Taylor*, 316 F.3d 257, 265 n.6 (3d Cir. 2003) ("[E]ven if appellee is unable to establish a right to compensatory damages, he may be entitled to nominal damages.").

An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed,[116] it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory

[116] *Cf. Slicker v. Jackson*, 215 F.3d 1225, 1232 (11th Cir. 2000) ("[N]ominal damages may be appropriate where a jury reasonably concludes that the plaintiff's evidence of injury is not credible.").

damages.[117] In *Pryer v. C.O. 3 Slavic*, the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001). In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." *See id.* at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." *Id.* Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." *Id.* at 454.

[117] *Cf. Brooks v. Andolina*, 826 F.2d 1266, 1269-70 (3d Cir. 1987) (in case tried without a jury, holding that it was error to award only nominal damages because the plaintiff "demonstrated that he suffered actual injury" by testifying "that while in punitive segregation he lost his regular visiting and phone call privileges, his rights to recreation and to use the law library, and his wages from his job").

4.8.3 Section 1983 – Damages – Punitive Damages

Model [118]

In addition to compensatory or nominal damages, you may consider awarding [plaintiff] punitive damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury and so receives nominal rather than compensatory damages.]

You may only award punitive damages if you find that [defendant] [a particular defendant] acted maliciously or wantonly in violating [plaintiff's] federally protected rights. [In this case there are multiple defendants. You must make a separate determination whether each defendant acted maliciously or wantonly.]

- A violation is malicious if it was prompted by ill will or spite towards the plaintiff. A defendant is malicious when [he/she] consciously desires to violate federal rights of which [he/she] is aware, or when [he/she] consciously desires to injure the plaintiff in a manner [he/she] knows to be unlawful. A conscious desire to perform the physical acts that caused plaintiff's injury, or to fail to undertake certain acts, does not by itself establish that a defendant had a conscious desire to violate rights or injure plaintiff unlawfully.

- A violation is wanton if the person committing the violation recklessly or callously disregarded the plaintiff's rights.

If you find that it is more likely than not[119] that [defendant] [a particular defendant] acted

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[118] See Comment for alternative language tailored to Eighth Amendment excessive force claims.

[119] The Court of Appeals has not addressed the question of the appropriate standard of proof for punitive damages with respect to Section 1983 claims, but at least one district court in the Third Circuit has applied the preponderance standard. *See Hopkins v. City of Wilmington*, 615 F.Supp. 1455, 1465 (D. Del. 1985); *cf., e.g., White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 805 (6th Cir. 2004) (en banc) ("[T]he appropriate burden of proof on a claim for punitive damages under Title VII is a preponderance of the evidence . . . ."), *aff'd*, 126 S. Ct. 2405 (2006); *compare Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (noting that "[t]here is much to be said in favor of a State's requiring . . . a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'" for punitive damages, but holding that "the lesser standard prevailing in Alabama–'reasonably satisfied from the evidence'–when buttressed . . . by [other] procedural and substantive protections . . . is constitutionally

maliciously or wantonly in violating [plaintiff's] federal rights, then you may award punitive damages [against that defendant].[120] However, an award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion. But remember that you cannot award punitive damages unless you have found that [defendant] [the defendant in question] acted maliciously or wantonly in violating [plaintiff's] federal rights.

If you have found that [defendant] [the defendant in question] acted maliciously or wantonly in violating [plaintiff's] federal rights, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or wanton violation of the plaintiff's federal rights, or to deter the defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts [he/she] may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter other persons from performing wrongful acts similar to those [defendant] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant] should be punished for [his/her] wrongful conduct toward [plaintiff], and the degree to which an award of one sum or another will deter [defendant] or others from committing similar wrongful acts in the future.

In considering the purposes of punishment and deterrence, you should consider the nature of the defendant's action. For example, you are entitled to consider *[include any of the following that are warranted by the evidence]* [whether a defendant's act was violent or non-violent; whether the defendant's act posed a risk to health or safety; whether the defendant acted in a deliberately deceptive manner; and whether the defendant engaged in repeated misconduct, or a single act.] You should also consider the amount of harm actually caused by the defendant's act, [as well as the harm the defendant's act could have caused][121] and the harm that could result if such acts are not deterred

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sufficient").

[120] Use "a particular defendant" and "against that defendant" in cases involving multiple defendants.

[121] This clause may be most appropriate for cases in which a dangerous act luckily turns out to cause less damage than would have been reasonably expected. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459 (1993) (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J.) (noting a state court's description of an example in which a person shoots into a crowd but fortuitously injures no one).

in the future.

[Bear in mind that when considering whether to use punitive damages to punish [defendant], you should only punish [defendant] for harming [plaintiff], and not for harming people other than [plaintiff]. As I have mentioned, in considering whether to punish [defendant], you should consider the nature of [defendant]'s conduct – in other words, how blameworthy that conduct was. In some cases, evidence that a defendant's conduct harmed other people in addition to the plaintiff can help to show that the defendant's conduct posed a substantial risk of harm to the general public, and so was particularly blameworthy. But if you consider evidence of harm [defendant] caused to people other than [plaintiff], you must make sure to use that evidence only to help you decide how blameworthy the defendant's conduct toward [plaintiff] was. Do not punish [defendant] for harming people other than [plaintiff].][122]

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon the defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant], you may consider the financial resources of [defendant] in fixing the amount of such damages.]

Comment

Punitive damages are not available against municipalities. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

"The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). "A jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).[123] "While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award . . . , its intent standard, at a minimum, required recklessness in its subjective form. The Court referred to a 'subjective consciousness' of a risk of

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[122] Include this paragraph only when appropriate. *See* Comment for a discussion of *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

[123] *See, e.g., Coleman v. Kaye*, 87 F.3d 1491, 1509 (3d Cir. 1996) (in sex discrimination case, holding that "the jury's finding of two acts of intentional discrimination, after having been put on notice of a prior act of discrimination against the same plaintiff, evinces the requisite 'reckless or callous indifference' to [the plaintiff's] federally protected rights"); *Springer v. Henry*, 435 F.3d 268, 281 (3d Cir. 2006) ("A jury may award punitive damages when it finds reckless, callous, intentional or malicious conduct.").

injury or illegality and a "'criminal indifference to civil obligations.'"" *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536 (1999) (discussing *Smith* in the context of a Title VII case).[124]

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed.[125] In performing the substantive due process review of the size of punitive awards, a court must consider three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference between the punitive award "and the civil penalties authorized or imposed in comparable cases." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). The Supreme Court's due process precedents have a dual relevance in Section 1983 cases. First, those precedents presumably govern a court's review of punitive damages awards in Section 1983 cases; there is no reason to think that a different constitutional standard applies to Section 1983 cases[126] (though the *Gore* factors may well apply differently in such cases than they do in cases under state tort law). Second, the concerns elaborated by the Court in the due process cases may also provide some guidance concerning the Court's likely views on the substantive standards that should guide *juries* in Section 1983 cases. Though the Court has not held that juries hearing state-law tort claims must be instructed to consider the *Gore* factors, it is possible that the Court might in the future approve the use of analogous considerations in instructing juries in Section 1983 cases.

The Court's due process decisions, of course, concern the outer limits placed on punitive awards by the Constitution. It is also possible that the Court may in future cases develop subconstitutional principles of federal law that further constrain punitive awards in Section 1983 cases. An example of the application of such principles in a different area of substantive federal law is provided by *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In *Exxon*, the plaintiffs sought compensatory and punitive damages from Exxon Mobil Corp. and its subsidiary arising from the Exxon Valdez oil spill. The jury awarded $ 5 billion in punitive damages against Exxon. *See id.* at 2614. The court of appeals remitted the punitive award to $ 2.5 billion. *See id.* A divided

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[124] *See also Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989) ("[F]or a plaintiff in a section 1983 case to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard.").

[125] *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (holding that "courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards").

[126] *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 (2008) ("The Court's response to outlier punitive damages awards has thus far been confined by [*sic*] claims at the constitutional level, and our cases have announced due process standards that every award must pass.") (citing *State Farm* and *Gore*).

Supreme Court ordered a further reduction of the punitive award to $ 507.5 million on the ground that under the circumstances the appropriate ratio of punitives to compensatories was 1:1. *See id.* at 2634. The *Exxon* Court applied this ratio as a matter of federal "maritime common law," *see id.* at 2626, but the Court's concern with the predictability and consistency of punitive awards, *see id.* at 2627, may apply to Section 1983 cases as well.

However, the particular ratio chosen by the *Exxon* Court is unlikely to constrain all such awards in Section 1983 cases. The *Exxon* Court stressed that based on the jury's findings the conduct in the *Exxon* case involved "no earmarks of exceptional blameworthiness" such as "intentional or malicious conduct" or "behavior driven primarily by desire for gain," and that the case was not one in which the compensatory damage award was small or in which the defendant's conduct was unlikely to be detected. *Id.* at 2633. The *Exxon* Court likewise noted that some areas of law were distinguishable from the *Exxon* case in that those areas implicated a regulatory goal of "induc[ing] private litigation to supplement official enforcement that might fall short if unaided." *See id.* at 2622. These observations suggest why the *Exxon* Court's 1:1 ratio may well not translate to the context of a Section 1983 claim. Moreover, the *Exxon* Court did not state that a ratio such as the one it applied in the *Exxon* case should be included in jury instructions rather than simply being applied by the judge during review of the jury award.[127] However, given the possibility that courts may in the future apply analogous principles in the Section 1983 context, counsel may wish to seek the submission to the jury of interrogatories that elicit the jury's view on relevant factual matters such as whether the conduct qualifying for the punitive award was merely reckless or whether it involved some greater degree of culpability.

The Court's due process precedents indicate a concern that vague jury instructions may increase the risk of arbitrary punitive damages awards. *See State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) ("Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory"). However, as noted above, the Court has not held that due process requires jury instructions to reflect *Gore*'s three-factor approach.[128] To the contrary, the Court has upheld against

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[127] Admittedly, the Court explained that its use of a ratio was preferable to setting a numerical cap on punitive awards because the ratio "leave[s] the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum multiple." *Exxon*, 128 S. Ct. at 2629. However, this statement need not be read to mean that the jury should be instructed to apply the relevant ratio; it can as easily be taken as an observation that by "pegging punitive to compensatory damages" the ratio will incorporate the jury's stated view on the appropriate amount of compensatory damages.

[128] To date, one of the few specific requirements imposed by the Court is that "[a] jury must be instructed . . . that it may not use evidence of out of state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422. This requirement stems from the concern that a state should not impose punitive damages based

a due process challenge an award rendered by a jury that had received instructions that were much less specific. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 n.1 (1991) (quoting jury instruction); *id.* at 43 (O'Connor, J., dissenting) (arguing that "the trial court's instructions in this case provided no meaningful standards to guide the jury's decision to impose punitive damages or to fix the amount"). It is not clear that it would be either feasible or advisable to import all three *Gore* factors into jury instructions on punitive damages in Section 1983 cases.

The first factor–the reprehensibility of the defendant's conduct–may appropriately be included in the instruction. The model instruction lists that consideration among the factors that the jury may consider in determining whether to award punitive damages and in determining the size of such damages. In assessing reprehensibility, a jury can take into account, for instance, whether an offense was violent or nonviolent; whether the offense posed a risk to health or safety; or whether a defendant was deceptive. *See Gore*, 517 U.S. at 576.[129] The jury can also take into account that "repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577.[130]

In considering reprehensibility, the jury can also be instructed to consider the harm actually caused by the defendant's act, as well as the harm the defendant's act could have caused and the

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on a defendant's legal out-of-state conduct; that concern, of course, does not arise in the context of Section 1983 suits.

The Court's decision in *Philip Morris*, 127 S. Ct. 1057 (2007) – which addresses the jury's consideration of harm to third parties – is discussed below.

[129] *See also CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.*, 499 F.3d 184, 190 (3d Cir. 2007) ("In evaluating the degree of Sunrise's reprehensibility in this case, we must consider whether: '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.'") (quoting *Campbell*, 538 U.S. at 419); *Cortez v. Trans Union, LLC*, 617 F.3d 688, 718 n.37 (3d Cir. 2010) (in Fair Credit Reporting Act case, noting in dictum that there was "nothing wrong with a jury focusing on a 'defendant's seeming insensitivity' in deciding how much to award as punitive damages")..

[130] In considering whether the defendant was a recidivist malefactor, the jury should consider only misconduct similar to that directed against the plaintiff. *See State Farm*, 538 U.S. at 424 ("[B]ecause the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.").

harm that could result if such acts are not deterred in the future.[131] However, the Court's decision in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), underscores the need for caution with respect to such an instruction in a case where the jury might consider harm to people other than the plaintiff. If a jury bases a punitive damages award "in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)," that award "amount[s] to a taking of 'property' from the defendant without due process." *Philip Morris*, 127 S. Ct. at 1060. The Court reasoned that permitting a jury to punish the defendant for harm caused to non-plaintiffs would deprive the defendant of the chance to defend itself and would invite standardless speculation by the jury:

> [A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary. For another [thing], to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer--risks of arbitrariness, uncertainty and lack of notice--will be magnified.

Philip Morris, 127 S. Ct. at 1063.

However, the *Philip Morris* Court conceded that "harm to other victims ... is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility": In other words, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible-- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse." *Id.* at 1064. But the Court stressed that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* States[132] must

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[131] *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) (Stevens, J., joined by Rehnquist, C.J., and Blackmun, J.) ("It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.") (emphasis in original).

[132] Philip Morris concerned a state-law claim litigated in state court and thus the Court focused on the limits imposed by the Fourteenth Amendment's Due Process Clause on state governments. Presumably, the Fifth Amendment's Due Process Clause imposes a similar constraint with respect to federal claims litigated in federal court.

ensure "that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* "[W]here the risk of that misunderstanding is a significant one--because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury--a court, upon request, must protect against that risk." *Id.* at 1065.

Accordingly, where evidence or counsel's argument to the jury indicates that the defendant's conduct harmed people other than the plaintiff, *Philip Morris* requires the court – upon request – to ensure that the jury is not confused as to the use it can make of this information in assessing punitive damages. The *Philip Morris* Court did not specify how the trial court should prevent jury confusion on this issue. The penultimate paragraph in Instruction 4.8.3 attempts to explain the distinction between permissible and impermissible uses of information relating to harm to third parties. This paragraph is bracketed to indicate that it should be given only when necessitated by the evidence or argument presented to the jury.

The model does not state that reprehensibility is a prerequisite to the award of punitive damages,[133] because precedent in civil rights cases indicates that the jury can award punitive damages if it finds the defendant maliciously or wantonly violated the plaintiff's rights, without separately finding that the defendant's conduct was egregious. In *Kolstad*, the Supreme Court interpreted a statutory requirement that the jury must find the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual" in order to award punitive damages under Title VII. *See Kolstad*, 527 U.S. at 534 (quoting 42 U.S.C. § 1981a(b)(1)). Reasoning that "[t]he terms 'malice' and 'reckless' ultimately focus on the actor's state of mind," the Court rejected the view "that eligibility for punitive damages can only be described in terms of an employer's 'egregious' misconduct." *Kolstad*, 527 U.S. at 534-35. Since the *Kolstad* Court drew on the *Smith v. Wade* standard in delineating the punitive damages standard under Title VII, *Kolstad*'s reasoning seems equally applicable to the standard for punitive damages under Section 1983. The Third Circuit has applied *Kolstad*'s definition of recklessness to a Section 1983 case, albeit in a non-precedential opinion. *See Whittaker v. Fayette County*, 65 Fed. Appx. 387, 393 (3d Cir. April 9, 2003) (non-precedential opinion); *see also Schall v. Vazquez*, 322 F. Supp. 2d 594, 602 (E.D. Pa. 2004) (in a Section 1983 case, applying *Kolstad*'s holding "that a defendant's state of mind and not the egregious conduct is determinative in awarding punitive damages").

It is far less clear that the jury should be instructed to consider the second *Gore* factor (the

[133] Some sets of model instructions include a reference to "extraordinary misconduct" or equivalent terms. *See* Eighth Circuit (Civil) Instruction 4.53 ("extraordinary misconduct"); Sand Instruction 87-92 ("extreme or outrageous conduct"). One reason for the inclusion of this language may be that the instruction approved in *Smith v. Wade* referred to "extraordinary misconduct." *Smith*, 461 U.S. at 33.

ratio of actual to punitive damages).[134] Though the Court has "decline[d] to impose a bright line ratio which a punitive damages award cannot exceed," it has stated that "in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. However, the analysis is complicated by the possibility that the permissible ratio will vary inversely to the size of the compensatory damages award.[135] *See id.* (stating that "ratios greater than those we have previously upheld may comport with due process" where an especially reprehensible act causes only small damages, and that conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee").[136] Instructing a jury that its punitive damages award must not exceed some multiple of its compensatory damages award might have undesirable effects. Though such a directive might constrain some punitive damages awards, in other cases (where a jury would otherwise be inclined to award only a small amount of punitive damages) calling the jury's attention to a multiple of the compensatory award might anchor the jury's deliberations at a higher figure. In addition, it is possible that a jury that wished to award a particular total sum to a plaintiff might redistribute its award between compensatory and punitive damages in order to comply with the stated ratio.

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[134] It is also unclear how a court would instruct a jury on the third Gore factor in the context of a Section 1983 suit; the model instruction omits any reference to this factor.

[135] Indeed, an inflexible ratio would conflict with the well-established principle that compensatory damages are not a prerequisite for the imposition of punitive damages in civil rights cases. *See Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) ("Punitive damages may . . . be awarded based solely on a constitutional violation, provided the proper showing is made."); *cf. Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir. 2000) (in suit under Fair Housing Act and Civil Rights Act of 1866, noting that "beyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages."); *see also Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) ("Because actions seeking vindication of constitutional rights are more likely to result only in nominal damages, strict proportionality would defeat the ability to award punitive damages at all.").

The Court of Appeals has also suggested that the denominator used by a reviewing court might sometimes be larger than the amount of compensatory damages actually awarded by the jury. *See CGB Occupational*, 499 F.3d at 192 n.4 (citing with apparent approval a case in which the court "measur[ed] $150,000 punitive damages award against $135,000 award in attorney fees and costs, rather than against $2,000 compensatory award" and a case in which the court "consider[ed] expert testimony of potential loss to plaintiffs in the amount of $769,895, in addition to compensatory damages awarded for past harm, as part of ratio's denominator").

[136] *See also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2622 (2008) (noting that "heavier punitive awards have been thought to be justifiable ... when the value of injury and the corresponding compensatory award are small (providing low incentives to sue)").

Due to the complexities and potential downsides of a proportionality instruction, the Committee has not included proportionality language in the model instruction. However, in a case in which the compensatory damages will be substantial (such as a wrongful death case), it may be useful to instruct the jury to consider the relationship between the amount of any punitive award and the amount of harm the defendant caused to the plaintiff.[137] In such a case, instructing the jury to consider that relationship would not unduly confine a punitive award but could help to ensure that any such award is not unconstitutionally excessive.

The Court's due process cases also raise some question about the implications of evidence concerning a defendant's financial resources. The Court has stated that such evidence will not loosen the limits imposed by due process on the size of a punitive award. *See State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").[138] Elsewhere, the Court has noted its concern that evidence of wealth could trigger jury bias: "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994). Although those concerns may be salient

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[137] A jury instructed to consider this ratio should be directed, for this purpose, to consider the harm the defendant caused *the plaintiff*, not harm caused to third parties. *See Philip Morris*, 127 S.Ct. at 1063 (describing the second *Gore* factor as "whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff").

[138] In the same discussion, however, the Court quoted with apparent approval Justice Breyer's concurrence in Gore: "[Wealth] provides an open ended basis for inflating awards when the defendant is wealthy .... That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *State Farm*, 538 U.S. at 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., joined by O'Connor & Souter, JJ., concurring)). Although the *State Farm* Court's quotation of this passage suggests the Court did not consider wealth an impermissible factor in the award of punitive damages, Justice Ginsburg posited that the Court's reasoning might "unsettle" that principle. *See State Farm*, 538 U.S. at 438 n.2 (Ginsburg, J., dissenting).

The Court of Appeals has considered the defendant's wealth as a factor relevant to its due process analysis; the court noted that a rich defendant may be more difficult to deter and that in some cases a rich defendant may engage in litigation misconduct in order to wear down an impecunious plaintiff. *See CGB Occupational*, 499 F.3d at 194 ("What sets this case apart and makes it, we hope, truly unusual is the repeated use of procedural devices to grind an opponent down, without regard for whether those devices advanced any legitimate interest."). The court suggested, however, that a jury might have more difficulty than judges would in assessing litigation misconduct and its possible relevance to a punitive damages analysis. *See id.* at 194 n. 7.

in products liability cases brought against wealthy corporations, in Section 1983 cases, evidence of an individual defendant's financial resources may be more likely to constrain than to inflate a punitive damages award. However, the possibility that a government employer might indemnify an individual defendant complicates the analysis.

"[E]vidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Fact Concerts*, 453 U.S. at 270.[139] If an individual defendant will not be indemnified for an award of punitive damages, it seems clear that evidence of the defendant's financial resources is relevant and admissible on the question of punitive damages. *See Fact Concerts*, 453 U.S. at 269 ("By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, [Section 1983] directly advances the public's interest in preventing repeated constitutional deprivations.").

If the individual defendant will be indemnified, however, the relevance of the individual defendant's limited financial resources becomes more complex. Arguably, there may be an even more pressing need to ensure that jury awards are not inflated. In a partial dissent in *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992), Judge Higginbotham argued that when an individual defendant will be indemnified by his or her government employer, the plaintiff should be required to submit evidence of the individual defendant's net worth in order to obtain punitive damages. *See id.* at 484 (Higginbotham, J., dissenting in part). Judge Higginbotham asserted that without such evidence, a jury might be too inclined to award large punitive damages, to the detriment of innocent taxpayers. *See id.* at 477. Judge Higginbotham's view, however, has not become circuit precedent. An earlier Third Circuit panel had stated that "evidence of [the defendant's] financial status" is not "a prerequisite to the imposition of punitive damages." *Bennis v. Gable*, 823 F.2d 723, 734 n.14 (3d Cir. 1987). Though Judge Higginbotham rejected *Bennis*'s statement as "dicta," *Keenan*, 983 F.2d at 482 (Higginbotham, J., dissenting in part), Judge Becker disagreed, *see id.* at 472 n.12 (footnote by Becker, J.) (describing *Bennis* as "circuit precedent"), and a later district court opinion has taken the view that Judge Higginbotham's approach is not binding, *see Garner v. Meoli*, 19 F. Supp. 2d 378, 392 (E.D.Pa. 1998) (rejecting "defendants argument, based on Judge Higginbotham's dissent in *Keenan* . . . , that a prerequisite to the awarding of punitive damages is evidence of defendants' net worth and that the burden for producing such evidence must be carried by plaintiffs"). Thus, it appears that under current Third Circuit law the plaintiff need not submit evidence of the defendant's net worth in order to obtain punitive damages in a Section 1983 case.[140] Accordingly, the last

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[139] *See Cortez v. Trans Union, LLC*, 617 F.3d 688, 718 n.37 (3d Cir. 2010) (in a Fair Credit Reporting Act case, stating in dictum that "[a] jury can consider the relative wealth of a defendant in deciding what amount is sufficient to inflict the intended punishment").

[140] One commentator has argued that if an indemnified defendant submits evidence of limited personal means, the plaintiff should be permitted to submit evidence that the defendant will be indemnified. *See* Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209,

paragraph of the model is bracketed because it should be omitted in cases where no evidence is presented concerning the defendant's finances.

The definition of "malicious" in Instruction 4.8.3 (with respect to punitive damages) differs from that provided in Instruction 4.10 (with respect to Eighth Amendment excessive force claims). If the jury finds that the defendant acted "maliciously and sadistically, for the purpose of causing harm" (such that the defendant violated the Eighth Amendment by employing excessive force), that finding should also establish that the defendant "acted maliciously or wantonly in violating the plaintiff's federal rights," so that the jury has discretion to award punitive damages. Thus, in an Eighth Amendment excessive force case involving only one claim and one defendant, the Committee suggests that the court substitute the following for the first three paragraphs of Instruction 4.8.3:

> If you have found that [defendant] violated the Eighth Amendment by using force against [plaintiff] maliciously and sadistically, for the purpose of causing harm, then you may consider awarding punitive damages in addition to nominal or compensatory damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like [him/her] from committing such conduct in the future. Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury. However, bear in mind that an award of punitive damages is discretionary; that is, you may decide to award punitive damages, or you may decide not to award them.

However, in Eighth Amendment excessive force cases that also involve other types of claims (or that involve claims against other defendants, such as for failure to intervene), the court should not omit the first three paragraphs of Instruction 4.8.3. Rather, the court should modify the first bullet point in the second paragraph, so that it begins: "● For purposes of considering punitive damages, a violation is malicious if ...."

1247-48 (2001) ("If a defendant introduces evidence of personal financial circumstances in order to persuade the jury to award low punitive damages, when in fact the defendant's punitive damages will be indemnified, failure to inform the jury about indemnification seriously misleads the jury."). The Third Circuit has not addressed this question.

4.9 Section 1983 – Excessive Force (Including Some Types of Deadly Force) – Stop, Arrest, or other "Seizure"

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being [arrested] [stopped by police]. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to [make the arrest] [conduct the stop]. Every person has the constitutional right not to be subjected to excessive force while being [arrested] [stopped by police], even if the [arrest] [stop] is otherwise proper.

In this case, [plaintiff] claims that [defendant] used excessive force when [he/she] [arrested] [stopped] [plaintiff]. In order to establish that [defendant] used excessive force, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] intentionally committed certain acts.

Second: Those acts violated [plaintiff's] Fourth Amendment right not to be subjected to excessive force.

In determining whether [defendant's] acts constituted excessive force, you must ask whether the amount of force [defendant] used was the amount which a reasonable officer would have used in [making the arrest] [conducting the stop] under similar circumstances. You should consider all the relevant facts and circumstances (leading up to the time of the [arrest] [stop]) that [defendant] reasonably believed to be true at the time of the [arrest] [stop]. You should consider those facts and circumstances in order to assess whether there was a need for the application of force, and the relationship between that need for force, if any, and the amount of force applied. The circumstances relevant to this assessment can include *[list any of the following factors, and any other factors, warranted by the evidence]*:

- the severity of the crime at issue;
- whether [plaintiff] posed an immediate threat to the safety of [defendant] or others;
- the possibility that [plaintiff] was armed;
- the possibility that other persons subject to the police action were violent or dangerous;
- whether [plaintiff] was actively resisting arrest or attempting to evade arrest by flight;
- the duration of [defendant's] action;
- the number of persons with whom [defendant] had to contend; and
- whether the physical force applied was of such an extent as to lead to unnecessary injury.

The reasonableness of [defendant's] acts must be judged from the perspective of a reasonable officer on the scene. The law permits the officer to use only that degree of force necessary to [make

the arrest] [conduct the stop]. However, not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If the force [defendant] used was unreasonable, it does not matter whether [defendant] had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

What matters is whether [defendant's] acts were objectively reasonable in light of the facts and circumstances confronting the defendant.

Comment

Applicability of the Fourth Amendment standard for excessive force. Claims of "excessive force in the course of making an arrest, investigatory stop, or other 'seizure'" are analyzed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989). By contrast, claims of excessive force that arise after a criminal defendant has been convicted and sentenced are analyzed under the Eighth Amendment, *see id.* at 392 n.6; *see also Torres v. McLaughlin*, 163 F.3d 169, 174 (3d Cir. 1998) (holding that "post-conviction incarceration cannot be a seizure within the meaning of the Fourth Amendment"). The Supreme Court "ha[s] not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." *Graham*, 490 U.S. at 395 n.10; *compare Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) (holding that the Fourth Amendment objective reasonableness test did not apply to "a pretrial detainee's excessive force claim *arising in the context of a prison disturbance*" (emphasis in original)). "It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, 490 U.S. at 395 n.10.

Because the excessive force standards differ depending on the source of the constitutional protection, it will be necessary to determine which standard ought to apply. The Fourth Amendment excessive force standard attaches at the point of a "seizure." *See Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999) ("To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable."). A "seizure" occurs when a government official has, "by means of physical force or show of authority, . . . in some way restrained [the person's] liberty." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *see also Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000) (per curiam) ("A person is seized for Fourth Amendment purposes only if he is detained by means intentionally applied to terminate his freedom of movement.").

The Fourth Amendment excessive force standard continues to apply during the process of the arrest. In *U.S. v. Johnstone*, the court held that a Fourth Amendment excessive force instruction was proper where "the excessive force committed by Johnstone took place *during* the arrests of Sudziarski, Perez, and Blevins, even if those victims were in handcuffs." *U.S. v. Johnstone*, 107 F.3d 200, 205 (3d Cir. 1997). As the *Johnstone* Court explained,

> a 'seizure' can be a process, a kind of continuum, and is not necessarily a discrete moment of initial restraint. *Graham* shows us that a citizen can remain "free" for Fourth Amendment purposes for some time after he or she is stopped by police and even handcuffed. Hence, pre-trial detention does not necessarily begin the moment that a suspect is not free to leave; rather, the seizure can continue and the Fourth Amendment protection against unreasonable seizures can apply beyond that point.

Johnstone, 107 F.3d at 206-07; *see also id.* at 206 (holding that "Johnstone's assault on Perez in the police station garage, after he had been transported from the scene of the initial beating ... also occurred during the course of Perez's arrest").

The model is designed for cases in which it is not in dispute that the challenged conduct occurred during a "seizure."

The content of the Fourth Amendment standard for excessive force. The Fourth Amendment permits the use of "reasonable" force. *Graham*, 490 U.S. at 396. "[E]ach case alleging excessive force must be evaluated under the totality of the circumstances." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997); *see also Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004) ("While some courts 'freeze the time frame' and consider only the facts and circumstances at the precise moment that excessive force is applied, other courts, including this one, have considered all of the relevant facts and circumstances leading up to the time that the officers allegedly used excessive force."); *Abraham*, 183 F.3d at 291 (expressing "disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure'"); *Curley v. Klem*, 499 F.3d 199, 212 (3d Cir. 2007) ("*Curley II*") (noting with approval the district court's view "that the analysis in this case could not properly be shrunk into the few moments immediately before Klem shot Curley, but instead must be decided in light of all the events which had taken place over the course of the entire evening").[141] Determining reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade

[141] However, the court of appeals has rejected the contention that a lack of probable cause to make an arrest in itself establishes that the force used in making the arrest was excessive. *See Snell v. City of York*, 564 F.3d 659, 672 (3d Cir. 2009) (rejecting plaintiff's argument "that the force applied was excessive solely because probable cause was lacking for his arrest").

arrest by flight." *Graham*, 490 U.S. at 396.[142] Other relevant factors may include "the possibility that the persons subject to the police action are violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004).

Physical injury is relevant but it is not a prerequisite of an excessive force claim. *See Sharrar*, 128 F.3d at 822 ("We do not agree that the absence of physical injury necessarily signifies that the force has not been excessive, although the fact that the physical force applied was of such an extent as to lead to injury is indeed a relevant factor to be considered as part of the totality."); *see also Mellott v. Heemer*, 161 F.3d 117, 123 (3d Cir. 1998) (citing "the lack of any physical injury to the plaintiffs" as one of the factors supporting court's conclusion that force used was objectively reasonable).

In the context of deadly force, the Third Circuit has stated the inquiry thus: "Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?" *Abraham*, 183 F.3d at 289 (citing *Graham* and *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). An instruction is provided below for use in cases where *Garner*'s deadly force analysis is appropriate. *See infra* Instruction 4.9.1. The Supreme Court has cautioned, however, that some uses of deadly force – such as an officer's decision to stop a fleeing driver by ramming the car – are not amenable to *Garner* analysis because their facts differ significantly from those in *Garner*; such cases should receive the more general *Graham* reasonableness analysis. *See Scott v. Harris*, 127 S. Ct. 1769, 1777 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test ... , to the use of a particular type of force in a particular situation.").

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[142] This inquiry should be based on the facts that the officer reasonably believed to be true at the time of the encounter. *See Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back ... the officer would be justified in using more force than in fact was needed."); *Estate of Smith v. Marasco*, 318 F.3d 497, 516-17 (3d Cir. 2003) (analyzing Fourth Amendment excessive force claim based on officers' knowledge or "objectively reasonable belief" concerning relevant facts); *Curley v. Klem*, 298 F.3d 271, 280 (3d Cir. 2002) ("*Curley I*") (holding that, viewed in light most favorable to plaintiff, evidence established excessive force because "under [plaintiff]'s account of events, it was unreasonable for [defendant] to fire at [plaintiff] based on his unfounded, mistaken conclusion that [plaintiff] was the suspect in question"). One ground for finding an officer's belief unreasonable is that a reasonable officer would have taken a step that would have revealed the belief to be erroneous. *See Curley I*, 298 F.3d at 281 (analyzing qualified immunity question based on the assumption "that a reasonable officer in Klem's position would have looked inside the Camry upon arriving at the scene").

Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"; and the decisionmaker must consider "that police officers are often forced to make split second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The defendant's actual "intent or motivation" is irrelevant; what matters is whether the defendant's acts were "'objectively reasonable' in light of the facts and circumstances confronting" the defendant. *Id.* at 397; *see also Estate of Smith v. Marasco*, 318 F.3d 497, 515 (3d Cir. 2003) ("[I]f a use of force is objectively unreasonable, an officer's good faith is irrelevant; likewise, if a use of force is objectively reasonable, any bad faith motivation on the officer's part is immaterial.").[143] (However, evidence that the defendant disliked the plaintiff can be considered when weighing the credibility of the defendant's testimony. *See Graham*, 490 U.S. at 399 n.12.)

Heck v. Humphrey. If a convicted prisoner must show that his or her conviction was erroneous in order to establish a Section 1983 unlawful arrest claim, then the plaintiff cannot proceed with the claim until the conviction has been reversed or otherwise invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 & n.6 (1994) (giving the example of a conviction "for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest").[144] In *Lora-Pena v. F.B.I.*, 529 F.3d 503 (3d Cir. 2008), the court of appeals held that *Heck* did not bar excessive force claims by a plaintiff who had been convicted of assault on a federal officer and resisting arrest; the court reasoned that the plaintiff's "convictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to his own unlawful actions." *Id.* at 506.

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[143] Of course, a defendant will not be liable for using excessive force if she did not intend to commit the acts that constituted the excessive force. Thus, in holding that "the district court erred by instructing the jury as to 'deliberate indifference'" in the context of a Fourth Amendment excessive force claim, the Third Circuit noted that "there is no dispute that Wilson committed intentional acts when he arrested Mosley and used physical force against him. Whether he intended to violate his civil rights in the process is irrelevant." *Mosley v. Wilson*, 102 F.3d 85, 95 (3d Cir. 1996).

[144] *See generally* Comment 4.12 (discussing the implications of *Heck*).

4.9.1 Section 1983 – Instruction for *Garner*-Type Deadly Force Cases – Stop, Arrest, or other "Seizure"

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being [arrested] [stopped by police]. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to [make the arrest] [conduct the stop]. Every person has the constitutional right not to be subjected to excessive force while being [arrested] [stopped by police], even if the [arrest] [stop] is otherwise proper.

In this case, [plaintiff] claims that [defendant] violated [plaintiff's] Fourth Amendment rights by using deadly force against [plaintiff] [plaintiff's decedent].

An officer may not use deadly force to prevent a suspect from escaping unless deadly force is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Also, the officer must give the suspect a warning before using deadly force, if it is feasible under the circumstances to give such a warning.

In order to establish that [defendant] violated the Fourth Amendment by using deadly force, [plaintiff] must prove that [defendant] intentionally committed acts that constituted deadly force against [plaintiff]. If you find that [defendant] [describe nature of deadly force alleged by plaintiff], then you have found that [defendant] used deadly force. In addition, [plaintiff] must prove [at least one of the following things][145]:

- deadly force was not necessary to prevent [plaintiff's] escape; or
- [defendant] did not have probable cause to believe that [plaintiff] posed a significant threat of serious physical injury to [defendant] or others; or
- it would have been feasible for [defendant] to give [plaintiff] a warning before using deadly force, but [defendant] did not do so.

You should consider all the relevant facts and circumstances (leading up to the time of the encounter) that [defendant] reasonably believed to be true at the time of the encounter. The reasonableness of [defendant's] acts must be judged from the perspective of a reasonable officer on the scene. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and

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[145] Include all bullet points that are warranted by the evidence. Include the bracketed language if listing more than one bullet point.

rapidly evolving, about the amount of force that is necessary in a particular situation.

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If the force [defendant] used was unreasonable, it does not matter whether [defendant] had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

Comment

The Fourth Amendment excessive force standard discussed in Comment 4.9, supra, applies to cases arising from the use of deadly force; but such cases have also generated some more specific guidance from the Supreme Court and the Court of Appeals. As discussed in this Comment, in some cases involving the use of deadly force the court should use Instruction 4.9 (and not Instruction 4.9.1), while other cases may parallel the facts of *Tennessee v. Garner*, 471 U.S. 1, 3 (1985), closely enough to warrant the use of Instruction 4.9.1 instead.

The Supreme Court has held that deadly force may not be used "to prevent the escape of an apparently unarmed suspected felon . . . . unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).[146] "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11.

However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Accordingly, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12.

The Court of Appeals has summed up the standard as follows: "Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?" *Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir. 1999) (citing *Graham v. Connor*, 490 U.S. 386 (1989), and *Garner*).

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[146] "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7.

It is important to note that the *Garner* test will not apply to all uses of deadly force. As noted in Comment 4.9, the Supreme Court has cautioned that some types of deadly force – such as an officer's decision to stop a fleeing driver by ramming the car – are not amenable to *Garner* analysis because their facts differ significantly from those in *Garner*; such cases should receive the more general *Graham* reasonableness analysis. *See Scott v. Harris*, 127 S. Ct. 1769, 1777 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test ... , to the use of a particular type of force in a particular situation."). After a detailed analysis of the circumstances of the car chase in *Scott*, the Court concluded on the facts of that case that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, 127 S. Ct. at 1779.

What constitutes deadly force.[147] Although *Garner* concerned a shooting, the Court's reasoning potentially extends to other types of lethal force. *See Garner*, 471 U.S. at 31 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk.").

The Court of Appeals has not provided much guidance on the scope and nature of the term "deadly force."[148] *In re City of Philadelphia Litigation* is the only case in which the Court of Appeals has so far confronted the question of defining deadly force for *Garner* purposes.[149] The

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[147] As noted above, some uses of deadly force will give rise to cases in which a *Garner*-type instruction, such as Instruction 4.9.1, is not appropriate. The remainder of this Comment uses the term "deadly force" to refer to deadly force used under circumstances which render a *Garner*-type instruction appropriate.

[148] For a summary of cases in other circuits, see Avery, Rudovsky & Blum § 2.22 ("The use of instrumentalities other than firearms may constitute the deployment of deadly force. Police cars have been held to be instruments of deadly force. The lower federal courts have split on the question of whether police dogs constitute deadly force.").

[149] *Compare In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3d Cir. 1995) (opinion of Greenberg, J.) (concluding that defendants' actions in dropping explosive on roof of house and allowing ensuing fire to burn did not constitute "deadly force" so as to trigger *Garner* standard), and *id.* at 973 n.1 (opinion of Scirica, J.) ("Although I believe the police may have used deadly force against the MOVE members, that confrontation is readily distinguishable from the situation in *Garner*."), *with id.* at 978 n.1 (opinion of Lewis, J.) ("I believe that *Garner* controls, and under *Garner*, it is clear to me that the deadly force used here was excessive as a matter of law and, therefore, unlawful."). The panel members' debate, in *In re City of Philadelphia Litigation,* over whether *Garner* was the appropriate standard to apply prefigured

extraordinary facts of that case, coupled with the fact that none of the opinions handed down clearly commanded a majority of the panel on the definitional question,[150] render it difficult to distill principles from that case that can be applied more generally. However, at least two members of the panel in *City of Philadelphia* relied upon the Model Penal Code's definition of deadly force "as 'force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm,'"[151] and one district court has since followed the MPC definition, *see Schall v. Vazquez*, 322 F.Supp.2d 594, 600 (E.D.Pa. 2004) (holding that "[p]ointing a loaded gun at another person is a display of deadly force").

In some cases, there may be a jury question as to whether the force employed was "deadly." *See, e.g.*, *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Pa. 1991) (rejecting contention "that the court erred in instructing the jury to determine whether or not the force Officer Effting used was 'deadly'"), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1992). In such cases, it may be necessary to instruct the jury both on deadly force and on excessive force more generally. *See id.* However, if the court can resolve as a matter of law whether the force used was deadly or not, the court should rule on this question and should provide either Instruction 4.9 or Instruction 4.9.1 but not both.

Probable cause to believe suspect dangerous. Probable cause to believe a suspect has committed a burglary does not, "without regard to the other circumstances, automatically justify the use of deadly force." *Garner*, 471 U.S. 21 (stating that "the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous"). The *Garner* Court did not elaborate the range of circumstances that would provide the requisite showing of probable cause to believe the suspect dangerous. *See Garner*, 471 U.S. at 32 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope,

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the Supreme Court's decision, in *Scott v. Harris*, to limit the reach of the *Garner* test.

The Court of Appeals has decided other cases involving use of deadly force, but because those cases involved shootings, *see, e.g.*, *Carswell v. Borough of Homestead*, 381 F.3d 235, 237 (3d Cir. 2004), the court did not have occasion to consider what other types of force could fall within the definition of "deadly force."

[150] The portion of Judge Greenberg's opinion that addressed the definition of deadly force was joined by Judge Scirica, "but only for the limited purpose of agreeing that *Tennessee v. Garner* is inapplicable and that the appropriate inquiry is the reasonableness of the city defendants' acts." *In re City of Philadelphia Litigation*, 49 F.3d at 964-65.

[151] *In re City of Philadelphia Litigation*, 49 F.3d at 966 (opinion of Greenberg, J.) (quoting Model Penal Code § 3.11(2) (1994) and finding no deadly force); *see also id.* at 977 (opinion of Lewis, J.) (quoting same section of MPC and finding deadly force).

will justify the use of deadly force.").[152]

It is clear, however, that the relevant danger can be either to the officer[153] or to a third person.[154] The jury should "determine, after deciding what the real risk . . . was, what was objectively reasonable for an officer in [the defendant]'s position to believe . . . , giving due regard to the pressures of the moment." *Abraham*, 183 F.3d at 294. An officer is not justified in using deadly force at a point in time when there is no longer probable cause to believe the suspect dangerous, even if deadly force would have been justified at an earlier point in time. *See id.* ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect.").[155] Thus, for example, the Court of Appeals cited with approval a Ninth Circuit case holding that "the fact that a suspect attacked an officer, giving the officer reason to use deadly force, did not necessarily justify continuing to use lethal force" at a time when "[t]he officer knew help was on the way, had a number of weapons besides his gun, could see that [the suspect] was unarmed and bleeding from multiple gunshot wounds, and had a number of opportunities to evade him." *Abraham*, 183 F.3d at 295 (discussing *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir.1992)).

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[152] In *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), the Court characterized the choice facing the defendant as "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight," and the Court held that the defendant's decision to shoot did not violate a clearly established right, *see id.* at 200.

Justice Stevens believed the qualified immunity issue in *Brosseau* presented a jury question; as he pointed out, "[r]espondent Haugen had not threatened anyone with a weapon, and petitioner Brosseau did not shoot in order to defend herself. Haugen was not a person who had committed a violent crime; nor was there any reason to believe he would do so if permitted to escape. Indeed, there is nothing in the record to suggest he intended to harm anyone." *Brosseau*, 543 U.S. at 204 (Stevens, J., dissenting) (footnote omitted); *see id.* at 207 n.5 ("The factual issues relate only to the danger that [Haugen] posed while in the act of escaping.").

[153] *See Abraham*, 183 F.3d at 293 (assessing "whether a court can decide on summary judgment that Raso's shooting was objectively reasonable in self-defense").

[154] *See Abraham*, 183 F.3d at 293 ("[T]he undisputed facts are that Abraham had stolen some clothing, resisted arrest, hit or bumped into a car, and was reasonably believed to be intoxicated. Given these facts, a jury could quite reasonably conclude that Abraham did not pose a risk of death or serious bodily injury to others and that Raso could not reasonably believe that he did.").

[155] *Compare id.* at 294-95 ("We can, of course, readily imagine circumstances where a fleeing suspect would have posed such a dire threat to an officer, thereby demonstrating that the suspect posed a serious threat to others, that the officer could justifiably use deadly force to stop the suspect's flight even after the officer escaped harm's way.").

Conduct giving rise to a need for deadly force. In *Grazier v. City of Philadelphia*, then-Chief Judge Becker argued in dissent that "it was an abuse of discretion for the trial judge not to explain to the jury at least the general principle that conduct on the officers' part that unreasonably precipitated the need to use deadly force may provide a basis for holding that the eventual use of deadly force was unreasonable in violation of the Fourth Amendment." *Grazier v. City of Philadelphia*, 328 F.3d 120, 130 (3d Cir. 2003) (Becker, C.J., dissenting) (citing *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir.1993), and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir.1985) (en banc)).[156] The *Grazier* majority, noting that the plaintiffs had not requested that particular charge, reviewed the district court's charge under a plain error standard. *See id.* at 127. The majority found no plain error:

> Our Court has not endorsed the doctrine discussed in *Gilmere* and *Starks* and, in fact, has recognized disagreement among circuit courts on this issue. *See Abraham v. Raso*, 183 F.3d 279, 295-96 (3d Cir.1999). In *Abraham*, we announced that "[w]e will leave for another day how these cases should be reconciled." *Id.* at 296. In this context, the District Court did not abuse its discretion by refusing to instruct the jury on a doctrine that our Circuit has not adopted. As such, plain error of course did not occur.

Grazier, 328 F.3d at 127.

Municipal liability. In discussing municipal liability, the Supreme Court has noted that

> city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

City of Canton, Ohio v. Harris, 489 U.S. 378, 390 n.10 (1989).

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[156] As Chief Judge Becker noted, the facts in *Grazier* included the following: "[T]he defendants were plain-clothes officers, forbidden by Regulations to make traffic stops, and . . . were driving an unmarked car (in a high crime neighborhood) which they pulled perpendicularly in front of plaintiffs' car to make a traffic stop, also in violation of department policy," *Grazier*, 328 F.3d at 131 (Becker, C.J., dissenting) – with the result, according to the plaintiff driver's testimony, that he believed he was being carjacked, *see id.* at 123 (majority opinion). *Compare Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (stating that officers who entered a dwelling unlawfully "would not be liable for harm produced by a 'superseding cause,' . . . . [a]nd they certainly would not be liable for harm that was caused by their non-tortious, as opposed to their tortious, 'conduct,' such as the use of reasonable force to arrest [the plaintiff]").

In some cases, the question may arise whether a municipality can be held liable for failure to equip its officers with an alternative to deadly force. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3d Cir. 2004) ("[W]e have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons. We decline to do so on the record before us."); *compare id.* at 250 (McKee, J., dissenting in relevant part) (arguing that plaintiff had viable claim against municipality based on plaintiff's contention that municipality's "policy of requiring training only in using deadly force and equipping officers only with a lethal weapon, caused Officer Snyder to use lethal force even though he did not think it reasonable or necessary to do so").

4.10 Section 1983 – Excessive Force – Convicted Prisoner

Model

The Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, protects convicted prisoners from malicious and sadistic uses of physical force by prison officials.

In this case, [plaintiff] claims that [defendant] [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove that [defendant] used force against [him/her] maliciously, for the purpose of causing harm, rather than in a good faith effort to maintain or restore discipline. It is not enough to show that, in hindsight, the amount of force seems unreasonable; the plaintiff must show that the defendant used force maliciously, for the purpose of causing harm. When I use the word "maliciously," I mean intentionally injuring another, without just cause or reason, and doing so with excessive cruelty or a delight in cruelty. [Plaintiff] must also prove that [defendant's] use of force caused some [harm] [physical injury][157] to [him/her].

In deciding whether [plaintiff] has proven this claim, you should consider [whether [defendant] used force against [plaintiff],] whether there was a need for the application of force, and the relationship between that need for force, if any, and the amount of force applied. In considering whether there was a need for force, you should consider all the relevant facts and circumstances that [defendant] reasonably believed to be true at the time of the encounter. Such circumstances can include whether [defendant] reasonably perceived a threat to the safety of staff or inmates, and if so, the extent of that threat. In addition, you should consider whether [defendant] made any efforts to temper the severity of the force [he/she] used.

You should also consider [whether [plaintiff] was physically injured and the extent of such injury] [the extent of [plaintiff's] injuries]. But a use of force can violate the Eighth Amendment even if it does not cause significant injury. Although the extent of any injuries to [plaintiff] may help you assess whether a use of force was legitimate, a malicious and sadistic use of force violates the Eighth Amendment even if it produces no significant physical injury.

Comment

Applicability of the Eighth Amendment standard for excessive force. The Eighth Amendment's "Cruel and Unusual Punishments Clause 'was designed to protect those convicted of

[157] See Comment for a discussion of whether harm (and physical injury in particular), constitutes an element of this claim.

crimes,' . . . and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)). It appears that the Eighth Amendment technically does not apply to a convicted prisoner until after the prisoner has been sentenced. *See Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (stating in dictum that the view that "the Eighth Amendment's protections [do] not attach until after conviction and sentence" was "confirmed by *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977)"). However, the Third Circuit has held that "the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992), apply to a pretrial detainee's excessive force claim *arising in the context of a prison disturbance*." *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) (emphasis in original).

Content of the Eighth Amendment standard for excessive force. "The infliction of pain in the course of a prison security measure ... does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable." *Whitley*, 475 U.S. at 319. Rather, "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause," the issue is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).[158] The Court has stressed that prison officials' decisions are entitled to deference; although this deference "does not insulate from review actions taken in bad faith and for no legitimate purpose, . . . it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322.

The factors relevant to the jury's inquiry include "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," *Whitley*, 475 U.S. at 321 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). "But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." *Id. See, e.g.*, *Giles v. Kearney*, 571 F.3d 318, 326, 328-29 (3d Cir. 2009) (if true, testimony that inmate "was kicked in the ribs and punched in the head while restrained on the ground, after he ceased to resist" established Eighth Amendment violation; however, district court did not commit clear error in finding no excessive force with respect to other aspects of guards' interactions with the inmate).

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[158] The Third Circuit has held that, in instructing a jury under *Hudson* and *Whitley*, it is not error to state that the use of force must "shock the conscience." *See Fuentes*, 206 F.3d at 348-49. (Though *Fuentes* involved a claim by a prisoner who had pleaded guilty but had not yet been sentenced, the court held that the applicable excessive force standard was the same as that applied in Eighth Amendment excessive force cases. *See id.* at 339, 347.) The model instruction does not include the "shocks the conscience" language, because–assuming that "shocks the conscience" describes a standard equivalent to that described in *Hudson*–the "shocks the conscience" language is redundant.

In assessing the use of force, "the extent of injury suffered by [the] inmate is one factor," but a plaintiff can establish an Eighth Amendment excessive force claim even without showing "serious injury." *Hudson*, 503 U.S. at 7; *see also Wilkins v. Gaddy*, 130 S. Ct. 1175, 1177, 1178 (2010) (per curiam) (rejecting Fourth Circuit's requirement of "a showing of significant injury in order to state an excessive force claim," and reiterating "*Hudson*'s direction to decide excessive force claims based on the nature of the force rather than the extent of the injury"). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. . . . This is true whether or not significant injury is evident." *Id.* at 9. Although "the Eighth Amendment does not protect an inmate against an objectively *de minimis* use of force, ... *de minimis* injuries do not necessarily establish *de minimis* force." *Smith v. Mensinger*, 293 F.3d 641, 648-49 (3d Cir. 2002). "[T]he degree of injury is relevant for any Eighth Amendment analysis, [but] there is no fixed minimum quantum of injury that a prisoner must prove that he suffered through objective or independent evidence in order to state a claim for wanton and excessive force." *Brooks v. Kyler*, 204 F.3d 102, 104 (3d Cir. 2000). "Although the extent of an injury provides a means of assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows)." *Id.* at 108.

Other sets of model instructions include a requirement that plaintiff suffered harm as a result of the defendant's use of force. *See, e.g.*, 5th Circuit (Civil) Instruction 10.5; 8th Circuit (Civil) Instruction 4.30; 9th Circuit (Civil) Instruction 11.9; 11th Circuit (Civil) 2.3.1; O'Malley Instruction 166.23; Schwartz & Pratt Instruction 11.01.1. The model also includes this requirement, although there does not appear to be Third Circuit caselaw that specifically addresses whether harm in general (as distinct from physical injury) is an element of an Eighth Amendment excessive force claim.[159] Assuming that the plaintiff must prove some harm, proof of physical injury clearly suffices. In the light of the Supreme Court's indication that the Eighth Amendment is designed to protect against torture, *see Hudson*, 503 U.S. at 9, proof of physical pain or intense fear or emotional pain should also suffice, even absent significant physical injury.[160]

42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." As noted in the Comment to Instruction 4.8.1, this statute requires a showing of "more-than-de minimis physical injury as a predicate to

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[159] The instruction given in *Douglas v. Owens*, 50 F.3d 1226 (3d Cir. 1995), did not include harm as an element. *See id.* at 1232 n.13. However, the defendants did not request that harm be included as an element, and did not raise the issue on appeal. Thus, the *Douglas* court may not have had occasion to consider the question.

[160] In *Rhodes v. Robinson*, 612 F.2d 766, 771-72 (3d Cir. 1979), the plaintiff claimed emotional distress as a result of hearing guards beat another inmate; the court refused to "find Rhodes's claim insufficient because it alleges emotional rather than physical harm," but held that the claim failed because the plaintiff could not establish "the requisite state of mind" on the part of the defendants.

allegations of emotional injury." *Mitchell v. Horn*, 318 F.3d 523, 536 (3d Cir. 2003). However, Section 1997e(e) does not preclude the award of nominal and punitive damages. *See Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000). Moreover, it appears that a plaintiff can recover damages for physical pain caused by an Eighth Amendment excessive force violation, without showing physical injury–either because the pain itself counts as physical injury, or because the pain does not count as mental or emotional injury. *See Perez v. Jackson*, 2000 WL 893445, at *2 (E.D. Pa. June 30, 2000). (*Perez*, however, was decided prior to *Mitchell*, and it is unclear whether *Perez*'s holding accords with the Third Circuit's requirement of "more-than-de minimis physical injury.") To the extent that Section 1997e(e) requires some physical injury (other than physical pain) in order to permit recovery of damages for mental or emotional injury, the jury instructions on damages should reflect this requirement.

However, not all Eighth Amendment excessive force claims will fall within the scope of Section 1997e(e). "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

Some sets of model instructions state explicitly that the jury must give deference to prison officials' judgments concerning the appropriateness of force in a given situation. *See* 5th Circuit (Civil) Instruction 10.5; 9th Circuit (Civil) Instruction 11.9; O'Malley Instruction 166.23; Schwartz & Pratt Instruction 11.01.2. However, in *Douglas v. Owens*, 50 F.3d 1226 (3d Cir. 1995), the district court gave an instruction that omitted any explicit mention of deference, *see id.* at 1232 n.13 (quoting instruction), and the Court of Appeals held the instruction "was proper and adequate under the facts of this case" because the district court's reference to "force . . . applied in a good faith effort to maintain or restore discipline" indicated to the jury that the defendants should not necessarily be held liable merely because they used force that "is later determined to have been unnecessary," *id.* at 1233.[161]

[161] In *Douglas*, the defendants "argue[d] that the charge given by the district court [wa]s inadequate because it fail[ed] to convey the notion that 'force is not constitutionally "excessive" just because it turns out to have been unnecessary *in hindsight*.'" *Id.* at 1233. As noted in the text, the court rejected this contention. The model instruction does state that the plaintiff cannot prove an Eighth Amendment violation "merely by showing that, in hindsight, the amount of force seems unreasonable." Though the *Douglas* court held that such language was not required, it did not suggest that the language was inaccurate or misleading.

4.11 Section 1983 – Conditions of Confinement – Convicted Prisoner

N.B.: This section provides instructions on three particular types of conditions-of-confinement claims – denial of adequate medical care, failure to protect from suicidal actions, and failure to protect from attack. Possible models for conditions-of-confinement claims more generally can be found in the list of references to other model instructions. See Appendix Two.

4.11.1 Section 1983 – Conditions of Confinement – Convicted Prisoner – Denial of Adequate Medical Care

Model

Because inmates must rely on prison authorities to treat their serious medical needs, the government has an obligation to provide necessary medical care to them. In this case, [plaintiff] claims that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to a serious medical need on [plaintiff's] part. Specifically, [plaintiff] claims that [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: [Plaintiff] had a serious medical need.

Second: [Defendant] was deliberately indifferent to that serious medical need.

Third: [Defendant's] deliberate indifference caused [harm] [physical injury][162] to [plaintiff].

I will now proceed to give you more details on the first and second of these three requirements.

First, [plaintiff] must show that [he/she] had a serious medical need. A medical need is serious, for example, when *[include any of the following that are warranted by the evidence]*:

- A doctor has decided that the condition needs treatment; or

- The problem is so obvious that non-doctors would easily recognize the need for medical attention; or

- Denying or delaying medical care creates a risk of permanent physical injury; or

- Denying or delaying medical care causes needless pain.

Second, [plaintiff] must show that [defendant] was deliberately indifferent to that serious medical need. [Plaintiff] must show that [defendant] knew of an excessive risk to [plaintiff's] health, and that [defendant] disregarded that risk by failing to take reasonable measures to address it.

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[162] See Comment for a discussion of whether harm (and physical injury in particular), constitutes an element of this claim.

[Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that there was a risk of serious harm to [him/her] and that the risk was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, then you must find that [he/she] was not deliberately indifferent.][163]

There are a number of ways in which a plaintiff can show that a defendant was deliberately indifferent, including the following. Deliberate indifference occurs when: *[include any of the following examples, or others, that are warranted by the evidence]*

- A prison official denies a reasonable request for medical treatment, and the official knows that the denial exposes the inmate to a substantial risk of pain or permanent injury;

- A prison official knows that an inmate needs medical treatment, and intentionally refuses to provide that treatment;

- A prison official knows that an inmate needs medical treatment, and delays the medical treatment for non-medical reasons;

- A prison official knows that an inmate needs medical treatment, and imposes arbitrary and burdensome procedures that result in delay or denial of the treatment;

- A prison official knows that an inmate needs medical treatment, and refuses to provide that treatment unless the inmate is willing and able to pay for it;

- A prison official refuses to let an inmate see a doctor capable of evaluating the need for treatment of an inmate's serious medical need;

- A prison official persists in a particular course of treatment even though the official knows that the treatment is causing pain and creating a risk of permanent injury.

[In this case, [plaintiff] was under medical supervision. Thus, to show that [defendant], a non-medical official, was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was reason to believe that the medical staff were mistreating (or not treating) [plaintiff].]

[Mere errors in medical judgment do not show deliberate indifference. Thus, a plaintiff cannot prove that a doctor was deliberately indifferent merely by showing that the doctor chose a course of treatment that another doctor disagreed with. [However, a doctor is deliberately indifferent if [he/she] knows what the appropriate treatment is and decides not to provide it for some non-medical reason.] [However, a doctor is deliberately indifferent by arbitrarily interfering with a

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[163] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment.

treatment, if the doctor knows that the treatment has worked for the inmate in the past and that another doctor prescribed that specific course of treatment for the inmate based on a judgment that other treatments would not work or would be harmful.]]

Comment

Applicability of the Eighth Amendment standard for denial of adequate medical care. The Eighth Amendment applies only to convicted prisoners,[164] *see, e.g., Whitley v. Albers*, 475 U.S. 312, 318 (1986), and it appears that the Amendment does not apply to a convicted prisoner until after the prisoner has been sentenced, *see Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (dictum).[165] Instruction 4.11 reflects the Eighth Amendment standard concerning the denial of medical care.

The Eighth Amendment standard may be more difficult for plaintiffs to meet than the standard that applies to claims regarding treatment of pretrial detainees or of prisoners who have been convicted but not yet sentenced. Although "the contours of a state's due process obligations to [pretrial] detainees with respect to medical care have not been defined by the Supreme Court. . . . , it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment." *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 584 (3d Cir. 2004); *see City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983) (stating that the "due process rights of a person [injured while being apprehended by police] are at least as great as the Eighth Amendment protections available to a convicted prisoner"); *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners . . . it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.").

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[164] *Betts v. New Castle Youth Development Center*, 621 F.3d 249 (3d Cir. 2010), applied Eighth Amendment standards to a claim arising from injuries to a youth who had been "adjudicated delinquent" and "had been committed to ... a maximum security program for serious [juvenile] offenders," *id.* at 252, 256 n.8.

[165] Addressing substantive and procedural due process claims arising from placement in restrictive confinement, the Court of Appeals has treated as pretrial detainees two plaintiffs who – during the relevant period – were awaiting resentencing after the vacatur of their death sentences. *See Stevenson v. Carroll*, 495 F.3d 62, 67 (3d Cir. 2007) ("Although both Stevenson and Manley had been convicted at the time of their complaint, they are classified as pretrial detainees for purposes of our constitutional inquiry.... Their initial sentences had been vacated and they were awaiting resentencing at the time of their complaint and for the duration during which they allege they were subjected to due process violations.... The Warden does not contest the status of the appellants as pretrial detainees for purposes of this appeal.").

In *Hubbard v. Taylor*, a nonmedical conditions-of-confinement case, the Third Circuit held that the district court committed reversible error by analyzing the pretrial detainee plaintiffs' claims under Eighth Amendment standards. *Hubbard v. Taylor*, 399 F.3d 150, 166-67 (3d Cir. 2005). The *Hubbard* court stressed that while the Eighth Amendment standards have been taken to establish a floor below which treatment of pretrial detainees cannot sink, those standards do not preclude the application of a more protective due process standard to pretrial detainees under *Bell v. Wolfish*, 441 U.S. 520 (1979). *See Hubbard*, 399 F.3d at 165-66. While *Hubbard* was a nonmedical conditions-of-confinement case, the *Hubbard* court suggested that its analysis would apply to all conditions-of-confinement cases, including those claiming denial of adequate medical care. *See id.* at 166 n. 22.[166]

Content of the Eighth Amendment standard for denial of adequate medical care. Because inmates "must rely on prison authorities to treat [their] medical needs," the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Eighth Amendment claims concerning denial of adequate medical care constitute a subset of claims concerning prison conditions. In order to prove an Eighth Amendment violation arising from the conditions of confinement, the plaintiff must show that the condition was "sufficiently serious," *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), and also that the defendant was "'deliberate[ly] indifferen[t]' to inmate health or safety," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Deliberate indifference to the inmate's serious medical needs violates the Eighth Amendment, "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-05.

As noted, in cases regarding medical care, the first (or objective) prong of the Eighth Amendment test requires that the plaintiff show a serious medical need. A medical condition that "has been diagnosed by a physician as requiring treatment" is a serious medical need. *Atkinson v. Taylor*, 316 F.3d 257, 266 (3d Cir. 2003). So is a medical problem "that is so obvious that a lay

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[166] On some prior occasions, the Third Circuit has indicated that the standard for pretrial detainees is identical to that for convicted prisoners. *See Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) ("Failure to provide medical care to a person in custody can rise to the level of a constitutional violation under § 1983 only if that failure rises to the level of deliberate indifference to that person's serious medical needs."). In other cases, the court has noted, but not decided, the question whether pretrial detainees should receive more protection (under the Due Process Clauses) than convicted prisoners do under the Eighth Amendment. *See, e.g., Kost v. Kozakiewicz*, 1 F.3d 176, 188 n.10 (3d Cir. 1993) ("It appears that no determination has as yet been made regarding how much more protection unconvicted prisoners should receive. The appellants, however, have not raised this issue, and therefore we do not address it."); *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 581 n.5 (3d Cir. 2003); *Woloszyn v. County of Lawrence*, 396 F.3d 314, 320 n.5 (3d Cir. 2005) ("[I]n developing our jurisprudence on pre-trial detainees' suicides we looked to the Eighth Amendment ... because the due process rights of pre-trial detainees are at least as great as the Eighth Amendment rights of convicted and sentenced prisoners").

person would easily recognize the necessity for a doctor's attention." *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (quoting *Pace v. Fauver*, 479 F.Supp. 456, 458 (D.N.J.1979), *aff'd*, 649 F.2d 860 (3d Cir. 1981)). The serious medical need prong is also met in cases where "[n]eedless suffering result[s] from a denial of simple medical care, which does not serve any penological purpose." *Atkinson*, 316 F.3d at 266. Likewise, "where denial or delay causes an inmate to suffer a life long handicap or permanent loss, the medical need is considered serious." *Lanzaro*, 834 F.2d at 347.

As to the second (or subjective) prong of the Eighth Amendment test, mere errors in medical judgment or other negligent behavior do not meet the mens rea requirement. *See Estelle*, 429 U.S. at 107.[167] Rather, the plaintiff must show subjective recklessness on the defendant's part. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.[168] However, the plaintiff "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. In sum, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847.

The plaintiff can use circumstantial evidence to prove subjective recklessness: The jury is entitled to "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842. However, the jury need not draw that inference; "it remains open to the

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[167] By contrast, a plaintiff can prove deliberate indifference by showing that a physician knew what the appropriate treatment was and decided not to provide that treatment for a non-medical reason such as cost-cutting. *See Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993) ("[I]f the inadequate care was a result of an error in medical judgment on Dr. O'Carroll's part, Durmer's claim must fail; but, if the failure to provide adequate care in the form of physical therapy was deliberate, and motivated by non medical factors, then Durmer has a viable claim.").

Similarly, though "mere disagreements over medical judgment do not state Eighth Amendment claims," *White v. Napoleon*, 897 F.2d 103, 110 (3d Cir. 1990), a prison doctor violates the Eighth Amendment when he or she "deliberately and arbitrarily . . . 'interfer[es] with modalities of treatment prescribed by other physicians, including specialists, even though these modalities of treatment ha[ve] proven satisfactory,'" *id.* at 111 (quoting amended complaint).

[168] The subjective "deliberate indifference" standard for Eighth Amendment conditions of confinement claims is distinct from the objective "deliberate indifference" standard for municipal liability through inadequate training, supervision or screening. *See Farmer*, 511 U.S. at 840-41 (distinguishing *City of Canton v. Harris*, 489 U.S. 378 (1989)); *supra* Instruction 4.6.7 cmt. & Instruction 4.6.8 cmt.

officials to prove that they were unaware even of an obvious risk to inmate health or safety." *Id.* at 844. The defendants "might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.*[169]

Two bracketed sentences in the model reflect the fact that a defendant will escape liability if the jury finds that even though the risk was obvious, the defendant was unaware of the risk. A footnote appended to those sentences notes some uncertainty concerning the burden of proof on this point. On the one hand, the *Farmer* Court's references to defendants "prov[ing]" and "show[ing]" lack of awareness suggest that once a plaintiff proves that a risk was obvious, the defendant then has the burden of proving lack of awareness of that obvious risk. On the other hand, the factual issues concerning the risk's obviousness and the defendant's awareness of the risk may be closely entwined, rendering it confusing to present the latter issue as one on which the defendant has the burden of proof. Accordingly, the model does not explicitly address the question of burden of proof concerning that issue.

"[E]ven officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted"; a defendant "who act[ed] reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 844-45.

The Third Circuit has enumerated a number of ways in which a plaintiff could show deliberate indifference. Deliberate indifference exists, for example:

- "[w]here prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury'";[170]

- "where 'knowledge of the need for medical care [is accompanied by the] ... intentional refusal to provide that care'";[171]

- where "necessary medical treatment [i]s ... delayed for non-medical reasons";[172]

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[169] However, a defendant "would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Id.* at 843 n.8.

[170] *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987) (quoting *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir.1976)).

[171] *Id.* (quoting *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir.1985)).

[172] *Id.* (quoting *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir.1985)).

- "where prison officials erect arbitrary and burdensome procedures that 'result[] in interminable delays and outright denials of medical care to suffering inmates'";[173]

- where prison officials "condition provision of needed medical services on the inmate's ability or willingness to pay";[174]

- where prison officials "deny access to [a] physician capable of evaluating the need for ... treatment" of a serious medical need;[175]

- "where the prison official persists in a particular course of treatment 'in the face of resultant pain and risk of permanent injury.'"[176]

When a prisoner is under medical supervision, "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official ... will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference." *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004).

Other sets of model instructions include, as an element of the claim, that the defendant's deliberate indifference to the plaintiff's serious medical need caused harm to the plaintiff. *See, e.g.*, 5th Circuit (Civil) Instruction 10.6; 8th Circuit (Civil) Instruction 4.31; 9th Circuit (Civil) Instruction 11.11. It is somewhat difficult to discern from the caselaw whether harm is a distinct element of an Eighth Amendment denial-of-medical-care claim, because courts often discuss harm (or the prospect of harm) in assessing whether the plaintiff showed a serious medical need.[177] Assuming that the

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[173] *Id.* at 347 (quoting *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir.1977)).

[174] *Id.*; *compare Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997) (rejecting "the plaintiffs' argument that charging inmates for medical care is per se unconstitutional").

[175] *Lanzaro*, 834 F.2d at 347 (quoting *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir.1979)).

[176] *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (quoting *White v. Napoleon*, 897 F.2d 103, 109 (3d Cir. 1990)).

[177] For example, the court in *Brooks v. Kyler*, 204 F.3d 102 (3d Cir. 2000) rejected a medical-needs claim based on the following reasoning:

> Although a deliberate failure to provide medical treatment motivated by non-medical factors can present a constitutional claim, . . . in this case, it is uncontroverted that a nurse passing out medications looked at Brooks's injuries within minutes of the alleged beating, and that Brooks was treated by prison medical staff on the same day. Moreover, he presented no evidence of any harm resulting from a delay in medical treatment. *See*

plaintiff must prove some harm, proof of physical injury clearly suffices. Proof of physical pain should also suffice, even absent other significant physical injury. *Cf. Atkinson*, 316 F.3d at 266 ("Needless suffering resulting from a denial of simple medical care, which does not serve any penological purpose, is inconsistent with contemporary standards of decency and thus violates the Eighth Amendment."). It is less clear whether emotional distress resulting from an increased risk of *future* physical injury gives rise to a damages claim for denial of medical care.

Addressing a claim for injunctive relief, the Supreme Court has held that "the Eighth Amendment protects against future harm to inmates." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). In *Helling*, the Court held that the plaintiff validly stated a claim "by alleging that petitioners have, with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health." *Id.* at 35. The Third Circuit, however, has held that "the *Helling* Court's reasoning concerning injunctive relief does not translate to a claim for monetary relief." *Fontroy v. Owens*, 150 F.3d 239, 243 (3d Cir. 1998). *Fontroy* addressed whether an inmate "can recover damages ... for emotional distress allegedly caused by his exposure to asbestos, even though he presently manifests no physical injury." *Id.* at 240. Reasoning that "[i]n a conditions of confinement case, 'extreme deprivations are required to make out a . . . claim[,]'" *id.* at 244 (quoting *Hudson*, 503 U.S. at 9), the Third Circuit held that "[f]ederal law does not provide inmates, who suffer no present physical injury, a cause of action for damages for emotional distress allegedly caused by exposure to asbestos," *id.* More recently, however, a different Third Circuit panel seemed to depart from *Fontroy* in a case involving an inmate's claim regarding a risk of future injury from environmental tobacco smoke (ETS). In *Atkinson v. Taylor*, 316 F.3d 257, 259-60, 262 (3d Cir. 2003), the plaintiff alleged both current physical symptoms and a risk of future harm from exposure to ETS. The *Atkinson* court distinguished the plaintiff's claim concerning future harm from the claim concerning present physical injury, and analyzed each separately. *See id.* at 262. The panel majority held that the defendants were not entitled to qualified immunity on the plaintiff's future injury claim. *See id.* at 264. In a footnote, the panel majority stated:

> If appellee can produce evidence of future harm, he may be able to recover monetary damages. *See Fontroy*, 150 F.3d at 244. However, the problematic quantification of those future damages is not relevant to the present inquiry concerning whether the underlying constitutional right was clearly established so that a reasonable prison official would know that he subjected appellee to the risk of future harm. Moreover, even if appellee is unable to establish a right to compensatory damages, he may be entitled to nominal damages.

Id. at 265 n.6. While the cited passage from *Fontroy* held that damages are not available for such

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> *Hudson v. McMillian*, 503 U.S. 1, 9 . . . (1992) ("Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are serious.").

Id. at 105 n.4; *see also Lanzaro*, 834 F.2d at 347 ("The seriousness of an inmate's medical need may also be determined by reference to the effect of denying the particular treatment.").

future injury claims, the *Atkinson* majority seemed to suggest that such damages are available (though they may be difficult to quantify), and that in any event nominal damages might be available.[178]

The Supreme Court's more recent decision in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007) (per curiam), may provide additional support for the notion that some damages claims for future harm are cognizable. In *Erickson*, the plaintiff sued for damages and injunctive relief after prison officials terminated his treatment program for a liver condition resulting from hepatitis C. The court of appeals affirmed the dismissal of the complaint, reasoning that the complaint failed to allege a "cognizable ... harm" resulting from the termination of the treatment program. *Erickson*, 127 S. Ct. at 2199. The Supreme Court vacated and remanded, holding that the plaintiff sufficiently alleged harm by asserting that the interruption of his treatment program threatened his life. *See id.* at 2200.[179]

42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." For discussion of this limitation, see the Comments to Instructions 4.8.1 and 4.10. To the extent that Section 1997e(e) requires some physical injury (other than physical pain) in order to permit recovery of damages for mental or emotional injury, the jury instructions on damages should reflect this requirement. However, not all Eighth Amendment denial-of-medical-care claims fall within the scope of Section 1997e(e). "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

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[178] *Atkinson* accords with a pre-*Helling* case, *White v. Napoleon*, 897 F.2d 103 (3d Cir. 1990), in which one of the plaintiffs alleged that a prison doctor's "sadistic and deliberate indifference to his serious medical needs . . . caused him needless anxiety . . . and intentionally and needlessly put him at a substantially increased risk of peptic ulcer," *id.* at 108. Though the plaintiff had not alleged that his physical condition actually worsened as a result of the doctor's conduct, the court held that he had stated an Eighth Amendment claim. In so ruling, the court stated that it was "not prepared to hold that inflicting mental anxiety alone cannot constitute cruel and unusual punishment." *Id.* at 111. The plaintiffs in *White* sought both injunctive and monetary relief, and the court did not resolve whether the plaintiff who suffered mental anxiety and increased risk of future harm (but no present physical injury) could obtain damages. *See id.* at 111 ("What damages, if any, flow from the alleged conduct is an issue for later proceedings.").

[179] The Court explained: "The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life.'... It alleged this medication was withheld 'shortly after' petitioner had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment.... This alone was enough to satisfy Rule 8(a)(2)." *Id.*

4.11.2 Section 1983 – Conditions of Confinement – Convicted Prisoner – Failure to Protect from Suicidal Action

Model

Because inmates must rely on prison authorities to treat their serious medical needs, the government has an obligation to provide necessary medical care to them. If an inmate is particularly vulnerable to suicide, that is a serious medical need. In this case, [plaintiff] claims that [decedent] was particularly vulnerable to suicide and that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to that vulnerability.

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove the following three things by a preponderance of the evidence:

First: [Decedent] was particularly vulnerable to suicide. [Plaintiff] must show that there was a strong likelihood that [decedent] would attempt suicide.

Second: [Defendant] was deliberately indifferent to that vulnerability.

Third: [Decedent] [would have survived] [would have suffered less harm] if [defendant] had not been deliberately indifferent.

I will now give you more details on the second of these three elements. To show that [defendant] was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was a strong likelihood that [decedent] would attempt suicide, and that [defendant] disregarded that risk by failing to take reasonable measures to address it.

[Plaintiff] must show that [defendant] actually knew of the risk. [If a prison official knew of facts that [he/she] strongly suspected to be true, and those facts indicated a substantial risk of serious harm to an inmate, the official cannot escape liability merely because [he/she] refused to take the opportunity to confirm those facts. But keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for [plaintiff] to show that a reasonable person would have known, or that [defendant] should have known, of the risk to [plaintiff]. [Plaintiff] must show that [defendant] actually knew of the risk.]

If [plaintiff] proves that the risk of a suicide attempt by [decedent] was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, then you must find that [he/she] was not deliberately

indifferent.][180]

Comment

A Section 1983 claim arising from a prisoner's suicide (or attempted suicide) falls within the general category of claims concerning denial of medical care. *See, e.g.*, *Woloszyn v. County of Lawrence*, 396 F.3d 314, 320 (3d Cir. 2005) ("A particular vulnerability to suicide represents a serious medical need."). For an overview of the Eighth Amendment standard for denial of adequate medical care, see Comment 4.11.1, *supra*. A specific instruction is provided here for suicide cases because the Court of Appeals has articulated a distinct framework for analyzing such claims.

Vulnerability to suicide. The plaintiff must show that the decedent "had a 'particular vulnerability to suicide.'" *Woloszyn*, 396 F.3d at 319 (quoting *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1023 (3d Cir. 1991)). "[T]here must be a strong likelihood, rather than a mere possibility, that self-inflicted harm will occur." *Woloszyn*, 396 F.3d at 320 (quoting *Colburn*, 946 F.2d at 1024).

Deliberate indifference. The plaintiff in a case involving a convicted prisoner's suicide must meet the *Farmer* test for subjective deliberate indifference. Admittedly, in the context of claims concerning pretrial detainees' suicides, the Court of Appeals stated an objective, rather than a subjective, test: "[A] plaintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability." *Woloszyn*, 396 F.3d at 319 (quoting *Colburn*, 946 F.2d at 1023). However, claims regarding convicted prisoners sound in the Eighth Amendment, and plaintiffs in such cases must show subjective deliberate indifference. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 192 n.2 (3d Cir. 2001) (applying *Farmer* in case arising from convicted prisoner's suicide); *see also* Comments 4.11.1 & 4.11.3. The model instruction is designed for use in Eighth Amendment cases and it employs the *Farmer* standard.

Claims regarding pretrial detainees are substantive due process claims, and it is not clear whether such claims should be analyzed under *Farmer*'s stringent Eighth Amendment test. *See* Comment 4.11.1 (noting that the substantive due process test for claims concerning treatment of pretrial detainees may be less rigorous than the Eighth Amendment test for claims concerning treatment of convicted prisoners); *see also Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 380 n.6 (E.D.Pa. 1998) ("The Eighth Amendment's cruel and unusual punishments clause–which underpins the subjective 'criminal recklessness' standard articulated in *Farmer*–seems rather remote from the values appropriate for determining the due process rights of those who, although in

[180] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

detention, have not been convicted of any crime."). Because the plaintiff in *Woloszyn* failed to present evidence establishing the first element (particular vulnerability to suicide), the Court of Appeals did not have occasion to decide whether *Farmer*'s subjective deliberate indifference test should apply to claims concerning pretrial detainees' suicides. *See Woloszyn*, 396 F.3d at 321.[181]

Under the *Farmer* deliberate indifference standard, even "officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844.

Causation. Although the standard stated in *Woloszyn* does not explicitly include an element of causation, district court opinions have applied a causation test. *See, e.g.*, *Foster v. City of Philadelphia*, 2004 WL 225041, at *7 (E.D.Pa. 2004) ("[B]ecause Massey's failure to act consistent with Police Department Directives on High-Risk Suicide Detainees (requiring communication of suicidal tendencies to the supervisor and all other police officials coming into contact with the detainee) could be found to be found to be a factor contributing to Foster's suicide attempt, Plaintiff has made the requisite causal nexus."); *id.* at *8 ("Because a reasonable jury could find that Foster's suicide attempt could have been prevented had Moore monitored Foster more closely, Plaintiff has made the requisite causal nexus."); *Owens*, 6 F. Supp. 2d at 382-83 ("Because the omissions complained of could be found to have been among the factors resulting in the non-deliverance of the pass [to see a psychiatrist] at a time contemporaneous to the last sighting of Gaudreau alive, plaintiffs have made a showing of the requisite causal nexus."). Including the element of causation seems appropriate; as the Court of Appeals stated regarding claims of failure to protect from attack, "to survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir. 1997).

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[181] In a non-precedential opinion, the Court of Appeals had cited the *Farmer* subjective deliberate indifference standard while affirming the dismissal of a claim concerning a pretrial detainee's suicide attempt. *See Serafin v. City of Johnstown*, 53 Fed.Appx. 211, *214 (3d Cir. 2002) (non-precedential opinion); *compare id.* n.2 (noting that "[t]he due process rights of pretrial detainees are at least as great as those of a convicted prisoner"). In a more recent non-precedential opinion, the Court of Appeals cited pre-*Farmer* caselaw for the proposition that pretrial detainee suicide claims require a showing of "reckless indifference," *Schuenemann v. U.S.*, 2006 WL 408404, at *2 (3d Cir. Feb. 23, 2006) (non-precedential opinion) (quoting *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1024 (3d Cir. 1991)), but then stated that *Woloszyn* "suggested that [the reckless indifference standard] is similar to the 'deliberate indifference' standard applied to a claim brought under the Eighth Amendment," *Schuenemann*, 2006 WL 408404, at *2 (citing *Woloszyn*, 396 F.3d at 321).

4.11.3 Section 1983 – Conditions of Confinement – Convicted Prisoner – Failure to Protect from Attack

Model

Prison officials have a duty to protect inmates from violence at the hands of other prisoners. In this case, [plaintiff] claims that [defendant] violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to a substantial risk of serious harm to [[plaintiff] or [decedent]].[182] Specifically, [plaintiff] claims that [briefly describe plaintiff's allegations].

In order to establish [his/her] claim for violation of the Eighth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: There was a substantial risk of serious harm to [plaintiff] – namely, a substantial risk that [plaintiff] would be attacked by another inmate.

Second: [Defendant] was deliberately indifferent to that risk.

Third: [Plaintiff] [would have survived] [would have suffered less harm][183] if [defendant] had not been deliberately indifferent.

I will now proceed to give you more details on the second of these three requirements. To show deliberate indifference, [plaintiff] must show that [defendant] knew of a substantial risk that [plaintiff] would be attacked, and that [defendant] disregarded that risk by failing to take reasonable measures to deal with it.

[Plaintiff] must show that [defendant] actually knew of the risk. [Plaintiff need not prove that [defendant] knew precisely which inmate would attack [plaintiff], so long as [plaintiff] shows that [defendant] knew there was an obvious, substantial risk to [plaintiff's] safety.]

[If a prison official knew of facts that [he/she] strongly suspected to be true, and those facts indicated a substantial risk of serious harm to an inmate, the official cannot escape liability merely because [he/she] refused to take the opportunity to confirm those facts. But keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for [plaintiff] to show that a reasonable person would have known, or that [defendant] should have known, of the

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[182] If the plaintiff's claim concerns a fatal attack on an inmate, the name of the decedent (rather than the plaintiff's name) should be inserted in appropriate places in this instruction.

[183] For a discussion of whether physical injury is an element of this claim, see the Comment to this Instruction, below, and the Comments to Instructions 4.8.1 and 4.10.

risk to [plaintiff]. [Plaintiff] must show that [defendant] actually knew of the risk.]

If [plaintiff] proves that there was a risk of serious harm to [him/her] and that the risk was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk, then you must find that [he/she] was not deliberately indifferent.][184]

Comment

Applicability of the Eighth Amendment standard for failure to protect from attack. As noted above (see Comment 4.11.1), the Eighth Amendment applies to claims by convicted prisoners. Failure-to-protect claims by arrestees or pretrial detainees proceed under a substantive due process theory, and it is not clear whether the substantive due process standard is as exacting for plaintiffs as the Eighth Amendment standard. In any event, substantive due process failure-to-protect claims clearly can succeed by meeting the Eighth Amendment standards.[185]

Content of the Eighth Amendment standard for failure to protect from attack. "'[P]rison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.'" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).[186] "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

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[184] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

[185] *See, e.g., Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 456 (3d Cir. 1996) (vacating dismissal of claim concerning alleged police failure to protect arrestee from attack by third party, on the grounds that plaintiff "is certainly entitled to the level of protection provided by the Eighth Amendment"); *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 587 (3d Cir. 2004) (reversing grant of summary judgment to child care workers, and applying Eighth Amendment standard to claim that those workers failed to protect juvenile detainee from attack); *id.* at 587 n.4 (noting that the substantive due process standard has "not been defined" but that "detainees are entitled to no less protection than a convicted prisoner").

[186] "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' ... having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

Eighth Amendment claims concerning failure to protect from attack constitute a subset of claims concerning prison conditions. In order to prove an Eighth Amendment violation arising from the conditions of confinement, the plaintiff must show that the condition was "sufficiently serious," *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), and also that the defendant was "'deliberate[ly] indifferen[t]' to inmate health or safety," *Farmer*, 511 U.S. at 834. The plaintiff must also show causation. *See Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir. 1997).

First element: substantial risk of serious harm. The first (or objective) prong of the Eighth Amendment test requires that the plaintiff show "that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834.

Second element: deliberate indifference. Regarding the second (or subjective) prong of the Eighth Amendment test, the plaintiff must show subjective recklessness on the defendant's part. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.[187] However, the plaintiff "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. In sum, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847.

The plaintiff can use circumstantial evidence to prove subjective recklessness: The jury is entitled to "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842.[188] For example, if the "plaintiff presents evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual

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[187] The subjective "deliberate indifference" standard for Eighth Amendment conditions of confinement claims is distinct from the objective "deliberate indifference" standard for municipal liability through inadequate training, supervision or screening. *See Farmer*, 511 U.S. at 840-41 (distinguishing *City of Canton v. Harris*, 489 U.S. 378 (1989)); *supra* Instruction 4.6.7 cmt. & Instruction 4.6.8 cmt.

[188] The fact that the plaintiff did not notify the defendant in advance concerning the risk of attack does not preclude a finding of subjective recklessness. *See Farmer*, 511 U.S. at 848; *Hamilton v. Leavy*, 117 F.3d 742, 747 (3d Cir. 1997).

knowledge of the risk.'" *Id.* at 842-43 (quoting respondents' brief).[189]

Even if the plaintiff does present circumstantial evidence supporting an inference of subjective recklessness, "it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety." *Id.* at 844. The defendants "might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.*

However, a defendant "would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist (as when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation . . .)." *Id.* at 843 n.8.[190]

Likewise, it is not a valid defense that "that, while [the defendant] was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 843. As the Court explained, "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Id.*

Even "officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted"; a defendant "who act[ed] reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 844-45.[191]

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[189] *See also Hamilton v. Leavy*, 117 F.3d 742, 748 (3d Cir. 1997) (holding that such evidence precluded summary judgment for defendant). As the Court of Appeals has stated the standard, "using circumstantial evidence to prove deliberate indifference requires more than evidence that the defendants should have recognized the excessive risk and responded to it; it requires evidence that the defendant must have recognized the excessive risk and ignored it." *Beers-Capitol v. Whetzel*, 256 F.3d 120, 138 (3d Cir. 2001).

[190] After noting this issue, the Court continued: "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." *Farmer*, 511 U.S. at 843 n.8.

[191] *See also Beers-Capitol*, 256 F.3d at 133 ("[A] defendant can rebut a prima facie demonstration of deliberate indifference either by establishing that he did not have the requisite level of knowledge or awareness of the risk, or that, although he did know of the risk, he took

Third element: causation. As noted above, the plaintiff must show causation. *See Hamilton*, 117 F.3d at 746 ("[T]o survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation.").

42 U.S.C. § 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." For discussion of this limitation, see the Comments to Instructions 4.8.1 and 4.10. To the extent that Section 1997e(e) requires some physical injury (other than physical pain) in order to permit recovery of damages for mental or emotional injury, the jury instructions on damages should reflect this requirement. However, not all Eighth Amendment claims fall within the scope of Section 1997e(e). "[T]he applicability of the personal injury requirement of 42 U.S.C. § 1997e(e) turns on the plaintiff's status as a prisoner, not at the time of the incident, but when the lawsuit is filed." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 314 (3d Cir. 2001) (en banc).

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reasonable steps to prevent the harm from occurring.").

Even if a defendant initially makes a recommendation that constitutes a reasonable response to the risk to the inmate, the defendant may be liable if she fails to take additional reasonable steps when that recommendation is rejected. For example, in *Hamilton v. Leavy*, the Court of Appeals held that the reasonableness of a prison "Multi-Disciplinary Team" (MDT)'s initial recommendation of protective custody did not warrant the grant of summary judgment in favor of the MDT members, because "while it appears that the MDT defendants acted reasonably in following the internal prison procedures by recommending to the CICC that Hamilton be placed in protective custody, the reasonableness of their actions following the rejection of that recommendation remains a question." *Hamilton*, 117 F.3d at 748.

4.12 Section 1983 – Unlawful Seizure

Model

The Fourth Amendment to the United States Constitution protects persons from being subjected to unreasonable seizures by the police. A law enforcement official may only seize a person (for example, by stopping or arresting the person) if there is appropriate justification to do so.

In this case, [plaintiff] claims that [defendant] subjected [plaintiff] to an unreasonable [stop] [arrest], in violation of the Fourth Amendment. To establish this claim, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: [Defendant] intentionally [describe the acts plaintiff alleges led to or constituted the seizure].

Second: Those acts subjected [plaintiff] to a "seizure."

Third: The "seizure" was unreasonable.

I will now give you more details on what constitutes a "seizure" and on how to decide whether a seizure is reasonable.

[Add appropriate instructions concerning the relevant type[s] of seizure[s]. See infra Instructions 4.12.1 - 4.12.3.]

Comment

A Section 1983 claim for unlawful arrest or unlawful imprisonment must be based upon a claim of constitutional violation. *See Baker v. McCollan*, 443 U.S. 137, 146 (1979) (requiring a showing of a federal constitutional violation, on the ground that the state-law tort of "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official"). Ordinarily, the relevant constitutional provision will be the Fourth Amendment. *See, e.g., Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000) ("[T]he constitutionality of arrests by state officials is governed by the Fourth Amendment rather than due process analysis."); *see also id.* (noting "the possibility that some false arrest claims might be subject to a due process analysis"); *Groman v. Township of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995) ("[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.").

Instruction 4.12 sets forth the opening paragraphs of an instruction on Fourth Amendment unlawful seizure, and this Comment addresses a number of issues that may be relevant to such an instruction. Instructions 4.12.1 - 4.12.3 provide more specific language that can be added to the

instruction as appropriate.

The Court of Appeals has set forth "a three-step process" for assessing Fourth Amendment false arrest claims: First, the plaintiff must show that he or she "was seized for Fourth Amendment purposes"; second, the plaintiff must show that this seizure was "unreasonable" under the Fourth Amendment; and third, the plaintiff must show that the defendant in question should be held liable for the violation. *Berg*, 219 F.3d at 269.[192]

Types of "seizures." Obviously, an arrest constitutes a seizure; but measures short of arrest also count as seizures for Fourth Amendment purposes. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *see also id.* at 19 n.16 (seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen").[193] For instance,

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[192] As to the third step of this test, the simplest case is presented by a defendant who intentionally seized the plaintiff. Such a defendant should be held liable if the seizure was unreasonable and the defendant lacks qualified immunity.

A more complicated question arises when a defendant intends that another person be seized, but a fellow officer, acting on that defendant's directions, seizes the plaintiff instead. The Court of Appeals has suggested that a claim may be stated against such a defendant if the plaintiff can show deliberate indifference. *See Berg*, 219 F.3d at 274 ("Where a defendant does not intentionally cause the plaintiff to be seized, but is nonetheless responsible for the seizure, it may be that a due process 'deliberate indifference' rather than a Fourth Amendment analysis is appropriate.").

This Comment focuses on the first two steps of the inquiry – seizure and unreasonableness.

[193] "[A] Fourth Amendment seizure . . . [occurs] only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original). "A seizure occurs even when an unintended person is the object of detention, so long as the means of detention are intentionally applied to that person." *Berg*, 219 F.3d at 269. "For example, if a police officer fires his gun at a fleeing robbery suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure. . . . If, on the other hand, the officer fires his gun directly at the innocent bystander in the mistaken belief that the bystander is the robber, then a Fourth Amendment seizure has occurred." *Id.*

An officer's attempt to stop a suspect through a show of authority does not constitute a seizure if the attempt is unsuccessful. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority" (emphasis in original).). *See also United States v. Waterman*, 569 F.3d 144, at 146 (3d Cir. 2009) (officers' drawing their guns did not count as "physical force" within the meaning of *Hodari D.*); *United States v. Smith*, 575 F.3d 308, 311, 316 (3d Cir. 2009) (after officer asked Smith to place his hands on patrol car's hood so that officers "could 'speak with him further,'"

"[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' . . . ." *Whren v. United States*, 517 U.S. 806, 809 (1996).[194] "A seizure does not occur every time a police officer approaches someone to ask a few questions. Such consensual encounters are important tools of law enforcement and need not be based on any suspicion of wrongdoing." *Johnson v. Campbell*, 332 F.3d 199, 205 (3d Cir. 2003). However, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., joined by Rehnquist, J.). The Supreme Court has subsequently refined this test; it now asks "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *United States v. Drayton*, 536 U.S. 194, 202 (2002) (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)); *see also Drayton*, 536 U.S. at 202 (noting that "[t]he reasonable person test . . . is objective and 'presupposes an *innocent* person'" (quoting *Bostick*, 501 U.S. at 438)).[195]

As discussed below, the degree of justification required to render a seizure reasonable under the Fourth Amendment varies with the nature and scope of the seizure. "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).[196]

Justification of seizure based upon "reasonable suspicion." See Comment 4.12.1 for a discussion of *Terry* stops.

Smith's two steps toward the car, prior to fleeing, did not "manifest submission" under the circumstances).

[194] *See also Brendlin v. California*, 127 S. Ct. 2400, 2406-07 (2007) (holding that "during a traffic stop an officer seizes everyone in the vehicle, not just the driver").

[195] Citing *Drayton*, the Court of Appeals has rejected the view that a seizure should be presumed when officers approach a person for questioning based on a tip. *See United States v. Crandell*, 554 F.3d 79, 85 (3d Cir. 2009) ("The subjective intent underlying an officer's approach does not affect the seizure analysis.... [A] seizure does not occur simply because an officer approaches an individual ... to ask questions.... Therefore, a tip police received that motivates their encounter with an individual merely serves to color the backstory at this stage.").

[196] "The validity of the arrest is not dependent on whether the suspect actually committed any crime, and 'the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant.'" *Johnson*, 332 F.3d at 211 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979)).

Justification of seizure based upon execution of a search warrant. "Under *Michigan v. Summers*, 452 U.S. 692 (1981), during execution of a search warrant, police can detain the occupant of the house they have a warrant to search. This is reasonable to protect the police, to prevent flight, and generally to avoid dangerous confusion." *Baker v. Monroe Tp.*, 50 F.3d 1186, 1191 (3d Cir. 1995); *see also Muehler v. Mena*, 125 S.Ct. 1465, 1472 (2005) (holding that, under the circumstances, officers' detention of house resident in handcuffs during execution of search warrant on house "did not violate the Fourth Amendment"); *id.* (opinion of Kennedy, J.) (concurring, but stressing the need to "ensure that police handcuffing during searches becomes neither routine nor unduly prolonged"); *Los Angeles County v. Rettele*, 127 S.Ct. 1989, 1991, 1993 (2007) (per curiam) (holding that officers searching house under valid warrant did not violate the Fourth Amendment rights of innocent residents whom they forced to stand naked for one to two minutes, because one suspect was known to have a firearm and the residents' bedding could have contained weapons); *United States v. Allen*, 618 F.3d 404, 409-10 (3d Cir. 2010) (finding detention constitutional under *Rettele* where, inter alia, "the police ... were executing a valid search warrant for evidence at a bar located in a high-crime area, where patrons were known to carry firearms, and where several firearm-related crimes had recently been committed" and "the detention ... was just long enough for the police to ensure their safety and collect the evidence they sought"). "Although *Summers* itself only pertains to a resident of the house under warrant, it follows that the police may stop people coming to or going from the house if police need to ascertain whether they live there." *Baker*, 50 F.3d at 1192.

Justification of seizure based upon "probable cause." See Comment 4.12.2 for a discussion of probable cause.

Arrests upon warrant. See Comment 4.12.3 for a discussion of claims arising from an arrest upon a warrant.

Arrests without a warrant. See Comment 4.12.2 for a discussion of claims arising from warrantless arrests.

Holding the plaintiff after arrest. The Court of Appeals has observed that the law "is not entirely settled" as to whether a police officer can be liable under Section 1983 for failing to try to secure the plaintiff's release when exculpatory evidence comes to light after a lawful arrest. *Wilson v. Russo*, 212 F.3d 781, 792 (3d Cir. 2000) (citing *Brady v. Dill*, 187 F.3d 104, 112 (1st Cir. 1999); *id.* at 117-125 (Pollak, D.J., concurring); *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986)); *compare Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir. 1997) ("Continuing to hold an individual in handcuffs once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment.").

The *Heck v. Humphrey* bar. If a convicted prisoner must show that his or her conviction was

erroneous in order to establish the Section 1983 unlawful arrest claim,[197] then the plaintiff cannot proceed with the claim until the conviction has been reversed or otherwise invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 & n.6 (1994) (giving the example of a conviction "for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest").[198] However, the *Heck* impediment is only triggered once there is a criminal conviction. *See Wallace v. Kato*, 127 S.Ct. 1091, 1097-98 (2007) (holding that "the *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has not been ... invalidated,' that is to say, an 'outstanding criminal judgment.'"). Notably, *Heck* bars a plaintiff from pressing a claim but does not toll the running of the limitations period. *See Wallace*, 127 S. Ct. at 1099. Under *Wallace*, a false arrest claim accrues at the time of the false arrest, and the limitations period runs from the point when the plaintiff is no longer detained without legal process. *Wallace*, 127 S. Ct. at 1096 ("Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held pursuant to such process--when, for example, he is bound over by a magistrate or arraigned on charges.").

Relationship to malicious prosecution claims. The common law tort of false arrest covers the time up to the issuance of process, whereas the common law tort of malicious prosecution would cover subsequent events. *See Heck*, 512 U.S. at 484; *Wallace*, 127 S. Ct. at 1096; *see also Montgomery*, 159 F.3d at 126 ("A claim for false arrest, unlike a claim for malicious prosecution, covers damages only for the time of detention until the issuance of process or arraignment, and not more."); *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2000), as amended (Jan. 26, 2001) ("[F]alse arrest does not permit damages incurred after an indictment."). Regarding malicious prosecution claims, see Instruction 4.13.

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[197] The Third Circuit has reasoned that "[b]ecause a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest . . . claims for false arrest and false imprisonment are not the type of claims contemplated by the Court in *Heck* which necessarily implicate the validity of a conviction or sentence." *Montgomery v. De Simone*, 159 F.3d 120, 126 n.5 (3d Cir. 1998); *but see Gibson v. Superintendent of NJ Dept. of Law and Public Safety - Division of State Police*, 411 F.3d 427, 450-51 (3d Cir. 2005) ("*Heck* does not set forth a categorical rule that all Fourth Amendment claims accrue at the time of the violation. This Court's determination that the plaintiff's false arrest claim in *Montgomery* qualified as an exception to the *Heck* deferral rule, and thus accrued on the night of the arrest, does not mandate a blanket rule that all false arrest claims accrue at the time of the arrest."). *Cf. Rose v. Bartle*, 871 F.2d 331, 350-51 (3d Cir. 1989) (expressing doubt concerning the holding of another Circuit that "conviction is a complete defense to a section 1983 action for false arrest").

[198] It is unclear whether this bar also applies to persons no longer in custody. *See infra* Comment to Instruction 4.13.

4.12.1 Section 1983 – Unlawful Seizure – *Terry* Stop and Frisk

Model

A "seizure" occurs when a police officer restrains a person in some way, either by means of physical force or by a show of authority that the person obeys. Of course, a seizure does not occur every time a police officer approaches someone to ask a few questions. Such consensual encounters are important tools of law enforcement and need not be based on any suspicion of wrongdoing. However, an initially consensual encounter with a police officer can turn into a seizure, if, in view of all the circumstances, a reasonable person would have believed that [he/she] was not free to end the encounter. If a reasonable person, under the circumstances, would have believed that [he/she] was not free to end the encounter, then at that point the encounter has turned into a "stop" that counts as a "seizure" for purposes of the Fourth Amendment.

If you find that [plaintiff] has proved by a preponderance of the evidence that such a stop occurred, then you must decide whether the stop was justified by "reasonable suspicion."

The Fourth Amendment requires that any seizure must be reasonable. In order to "stop" a person, the officer must have a "reasonable suspicion" that the person has committed, is committing, or is about to commit a crime. There must be specific facts that, taken together with the rational inferences from those facts, reasonably warrant the stop. [[Plaintiff] has the burden of proving that [defendant] lacked "reasonable suspicion" for the stop.][199] In deciding this issue, you should consider all the facts available to [defendant] at the moment of the stop. You should consider all the events that occurred leading up to the stop, and decide whether those events, viewed from the standpoint of a reasonable police officer, amount to reasonable suspicion. [Keep in mind that a police officer may reasonably draw conclusions, based on his or her training and experience, that might not occur to an untrained person.][200]

[Define the relevant crime[s].]

[When an officer is investigating a person at close range and the officer is justified in believing that the person is armed and dangerous to the officer or others, the officer may conduct a limited protective search for concealed weapons. But the search must be limited to that which is necessary to discover such weapons.]

The length of the stop must be proportionate to the reasonable suspicion that gave rise to the

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[199] See Comment for a discussion of the burden of proof regarding "reasonable suspicion."

[200] This sentence may be included if there is relevant evidence of the officer's training and/or experience.

stop (and any information developed during the stop). Ultimately, unless the stop yields information that provides probable cause to arrest the person, the officer must let the person go. [I will shortly explain more about the concept of "probable cause."] There is no set rule about the length of time that a person may be detained before the seizure becomes a full-scale arrest. [Rather, you must consider whether the length of the seizure was reasonable. In assessing the length of the seizure, you should take into account whether the police were diligent in pursuing their investigation, or whether they caused undue delay that lengthened the seizure.][201]

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If [defendant's] actions constituted an unreasonable seizure, it does not matter whether [defendant] had good motivations. And an officer's improper motive is irrelevant to the question whether the objective facts available to the officer at the time gave rise to reasonable suspicion.

Comment

"[C]ertain investigative stops by police officers [a]re permissible without probable cause, as long as 'in justifying the particular intrusion [into Fourth Amendment rights] the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Karnes v. Skrutski*, 62 F.3d 485, 492 (3d Cir. 1995) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *Adams v. Williams*, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."); *U.S. v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006) (holding "that the *Terry* reasonable suspicion standard applies to routine traffic stops"); *see also Baker v. Monroe Tp.*, 50 F.3d 1186, 1192 (3d Cir. 1995) ("[T]he need to ascertain the Bakers' identity, the need to protect them from stray gunfire, and the need to clear the area of approach for the police to be able to operate efficiently all made it reasonable to get the Bakers down on the ground for a few crucial minutes.").[202]

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[201] If a more detailed discussion of this issue is desired, language from the second paragraph of Instruction 4.12.2 can be added here.

[202] In addition, "'[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons." *Adams*, 407 U.S. at 146 (quoting *Terry*, 392 U.S. at 24). To fall within this principle, such a search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26. As the Supreme Court more recently explained:

[I]n a traffic-stop setting, the first *Terry* condition – a lawful investigatory stop –

Such stops require "reasonable suspicion," which is assessed by reference to the "totality of the circumstances." *Karnes*, 62 F.3d at 495; *see also Terry*, 392 U.S. at 21-22 (analysis considers "the facts available to the officer at the moment of the seizure"); *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003) (holding that "officers may rely on a trustworthy second hand report, if that report includes facts that give rise to particularized suspicion").[203] "Based upon that whole picture the

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> is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

Arizona v. Johnson, 129 S. Ct. 781, 784 (2009).

If during such a search the officer detects "nonthreatening contraband," the officer may seize that contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). As the Court of Appeals has summarized the test:

> Assuming that an officer is authorized to conduct a *Terry* search at all, he is authorized to assure himself that a suspect has no weapons. He is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon. If, before that point, the officer develops probable cause to believe, given his training and experience, that an object is contraband, he may lawfully perform a more intrusive search. If, indeed, he discovers contraband, the officer may seize it, and it will be admissible against the suspect. If, however, the officer "goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." *Dickerson*, 508 U.S. at 373.

United States v. Yamba, 506 F.3d 251, 259 (3d Cir. 2007).

[203] Where the basis for the officer's suspicion is an anonymous tip, corroboration is important. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . , 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)). *Cf. United States v. Mathurin*, 561 F.3d 170, 176 (3d Cir. 2009) ("We need not undertake the established legal methods for testing the reliability of this tip because a tip from one federal law enforcement agency to another implies a degree of expertise and a shared purpose in stopping illegal activity, because the agency's identity is known."). Nonetheless, "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide

detaining officers must have a particularized and objective basis for suspecting," *U.S. v. Cortez*, 449 U.S. 411, 417 (1981), that the specific person they stop "has committed, is committing, or is about to commit a crime," *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).[204] Reasonable suspicion can arise from "an officer's observation of entirely legal acts, where the acts, when viewed through the lens of a police officer's experience and combined with other circumstances, [lead] to an articulable belief that a crime [is] about to be committed." *Johnson*, 332 F.3d at 207.[205] The test is an objective one; "subjective good faith" does not suffice to justify a stop. *Terry*, 392 U.S. at 22.[206]

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reasonable suspicion to make the investigatory stop.'" *J.L.*, 529 U.S. at 270 (quoting *White*, 496 U.S. at 327); *see also United States v. Silveus*, 542 F.3d 993, 1000 (3d Cir. 2008) (reasonable suspicion rested in large part on anonymous tip that "appeared to be reliable, given that it was corroborated by the agents' prior knowledge").

In *United States v. Torres*, 534 F.3d 207 (3d Cir. 2008), the Court of Appeals based its finding of reasonable suspicion on the information provided by a taxi driver's 911 call; the court noted that this call constituted a tip by "an innominate (i.e., unidentified) informant who could be found if his tip proved false rather than an anonymous (i.e., unidentifiable) tipster who could lead the police astray without fear of accountability." As the court summarized the evidence: "[T]he informant provided a detailed account of the crime he had witnessed seconds earlier, gave a clear account of the weapon and the vehicle used by Torres, and specified his own occupation, the kind and color of the car he was driving, and the name of his employer. The veracity and detail of this information were enhanced by the fact that the informant continued to follow Torres, providing a stream of information meant to assist officers in the field." *Id.* at 213. *See also United States v. Johnson*, 592 F.3d 442, 449-50 (3d Cir. 2010) (reasonable suspicion existed based on non-anonymous 911 call reporting a shooting and providing details – some of which matched police observations – regarding vehicle containing persons involved in the shooting).

[204] The court of appeals has held that the requisite reasonable suspicion focuses on the elements of the crime and not on an affirmative defense. *See United States v. Gatlin*, 613 F.3d 374, 377-79 (3d Cir. 2010) (rejecting defendant's argument – that officers lacked reasonable suspicion because they did not know "whether he was licensed to carry a concealed weapon" – on the ground that under Delaware law possession of a license is an affirmative defense).

[205] As the Court explained in *Cortez*, "The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions inferences and deductions that might well elude an untrained person." *Cortez*, 449 U.S. at 418.

[206] An officer's misunderstanding of the law does not necessarily render a traffic stop unreasonable. As the Court of Appeals has explained:

In situations where an objective review of the record evidence establishes

The scope of the ensuing stop[207] and questioning must be proportionate to the reasonable suspicion, and unless that inquiry yields probable cause the officers must then let the person go. *See Berkemer*, 468 U.S. at 439-40. "[T]here is no per se rule about the length of time a suspect may be detained before the detention becomes a full-scale arrest"; rather, "the court must examine the reasonableness of the detention." *Baker*, 50 F.3d at 1192 (holding that "a detention of fifteen minutes time to identify and release a fairly large group of people during a drug raid" is not "unreasonable"). "[I]n assessing the effect of the length of the detention," the Court "take[s] into account whether the police diligently pursue their investigation." *U.S. v. Place*, 462 U.S. 696, 709 (1983).

As noted in the Comment to Instruction 4.12.2, in the case of a warrantless arrest, Third Circuit caselaw divides as to the burden of proof regarding probable cause. By contrast, the caselaw does not appear to have addressed the burden of proof regarding reasonable suspicion in the case of a *Terry* stop; but one district court decision concerning an analogous issue suggests that the burden would be on the plaintiff. *See Armington v. School Dist. of Philadelphia*, 767 F. Supp. 661, 667 (E.D.Pa.) (in Section 1983 case involving school district's order that bus driver undergo urinalysis, holding that the bus driver plaintiff "has the burden of proving that defendant lacked reasonable suspicion"), *aff'd without opinion*, 941 F.2d 1200 (3d Cir. 1991).

> reasonable grounds to conclude that the stopped individual has in fact violated the traffic-code provision cited by the officer, the stop is constitutional even if the officer is mistaken about the scope of activities actually proscribed by the cited traffic-code provision. Therefore an officer's Fourth Amendment burden of production is to (1) identify the ordinance or statute that he believed had been violated, and (2) provide specific, articulable facts that support an objective determination of whether any officer could have possessed reasonable suspicion of the alleged infraction. As long as both prongs are met, an officer's subjective understanding of the law at issue would not be relevant to the court's determination.

Delfin-Colina, 464 F.3d at 399-400.

[207] *See also Johnson*, 592 F.3d at 452, 453 (given that officers "reasonably suspected that the taxi's occupants had been involved in a physical altercation and shooting just minutes before," it was not unreasonable for officers to "surround[] the vehicle, dr[a]w their weapons, shout[] at the taxicab's occupants, and subsequently handcuff" them).

4.12.2 Section 1983 – Unlawful Seizure – Arrest – Probable Cause

Model

An arrest is a "seizure," and the Fourth Amendment prohibits police officers from arresting a person unless there is probable cause to do so.

[In this case, [plaintiff] claims that [defendant] arrested [him/her], but [defendant] argues that [he/she] merely stopped [plaintiff] briefly and that this stop did not rise to the level of an arrest. You must decide whether the encounter between [plaintiff] and [defendant] was merely a stop, or whether at some point it became an arrest. In deciding whether an arrest occurred, you should consider all the relevant circumstances. Relevant circumstances can include, for example, the length of the interaction; whether [defendant] was diligent in pursuing the investigation, or whether [he/she] caused undue delay that lengthened the seizure; whether [defendant] pointed a gun at [plaintiff]; whether [defendant] physically touched [plaintiff]; whether [defendant] used handcuffs on [plaintiff]; whether [defendant] moved [plaintiff] to a police facility; and whether [defendant] stated that [he/she] was placing [plaintiff] under arrest. Relevant circumstances also include whether [defendant] had reason to be concerned about safety.][208]

[If you find that an arrest occurred, then][209] you must decide whether [[defendant] has proved by a preponderance of the evidence that the arrest was justified by probable cause] [[plaintiff] has proved by a preponderance of the evidence that [defendant] lacked probable cause to arrest [plaintiff]].[210]

To determine whether probable cause existed, you should consider whether the facts and circumstances available to [defendant] would warrant a prudent officer in believing that [plaintiff] had committed or was committing a crime.

[Define the relevant crime[s].] [Under [the relevant] law, the offense of [name offense] is a misdemeanor, not a felony. This means that because [defendant] did not have a warrant for the arrest, [defendant] could only arrest [plaintiff] for [name offense] if [plaintiff] committed [name

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[208] Include this paragraph only if the defendant disputes that an arrest occurred.

[209] Include this phrase only if the defendant disputes that an arrest occurred.

[210] In the case of a warrantless arrest, some Third Circuit caselaw supports the view that the defendant has the burden of proof as to probable cause, but other Third Circuit precedent indicates the contrary. *See* Instruction 4.12.2 cmt. Accordingly, the model includes alternative language concerning the burden on this issue.

offense] in [defendant's] presence.][211]

[In this case the state prosecutor decided not to prosecute the criminal charge against [plaintiff]. The decision whether to prosecute is within the prosecutor's discretion, and he or she may choose not to prosecute a charge for any reason. Thus, the decision not to prosecute [plaintiff] does not establish that [defendant] lacked probable cause to arrest [plaintiff]. You must determine whether [defendant] had probable cause based upon the facts and circumstances known to [defendant] at the time of the arrest, not what happened afterwards.]

Probable cause requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. The standard of probable cause represents a balance between the individual's right to liberty and the government's duty to control crime. Because police officers often confront ambiguous situations, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable officers.

[As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant's] actual motivation is irrelevant. If [defendant's] actions constituted an unreasonable seizure, it does not matter whether [defendant] had good motivations. And an officer's improper motive is irrelevant to the question whether the objective facts available to the officer at the time gave rise to probable cause.][212]

Comment

Justification of seizure based upon "probable cause." "The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause." *Rogers v. Powell*, 120 F.3d 446, 452 (3d Cir. 1997); *see also Patzig v. O'Neil*, 577 F.2d 841, 848 (3d Cir. 1978) ("Clearly, an arrest without probable cause is a constitutional violation actionable under s 1983.").[213]

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[211] Third Circuit caselaw has not clearly settled whether warrantless arrests for misdemeanors committed outside the officer's presence are permitted by the Fourth Amendment. *See* Comment.

[212] If Instruction 4.12.3 (concerning warrant applications) will be given, it may be advisable to revise or omit this paragraph, because, as stated in Instruction 4.12.3, the jury will be directed to consider whether the defendant made deliberately or recklessly false statements or omissions.

[213] Sometimes there may be a dispute as to whether the defendant in fact subjected the plaintiff to an arrest rather than merely a lesser type of seizure. "There is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest. . . . But use of guns and handcuffs must be justified by the circumstances . . . ." *Baker*, 50 F.3d at 1193. (The use of guns or handcuffs can in some circumstances give rise to an excessive force claim. *See id.*; *see also*

The standard of probable cause "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Id.* at 112 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).[214] There must exist "facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" *Gerstein*, 420 U.S. at 111 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "Probable cause to arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt." *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482-83 (3d Cir. 1995). The analysis is a pragmatic one and should be based upon common sense.[215]

Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004).)

Whether the seizure rises to the level of an arrest (so as to require probable cause) depends on the circumstances. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (per curiam) (holding that arrest occurred in case where defendant "was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned"); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (holding that detention was "in important respects indistinguishable from a traditional arrest" where suspect was "taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room," was "never informed that he was 'free to go,'" and "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody").

[214] In *United States v. Sed*, 601 F.3d 224 (3d Cir. 2010), the fact that an arrest by Pennsylvania State Police occurred in Ohio and violated Ohio state law did not establish a Fourth Amendment violation. *See id.* at 228. Rather, the Court of Appeals analyzed the totality of the circumstances – which included the fact that the arrest occurred less than 100 yards from the Pennsylvania border – and concluded that the seizure was reasonable because the failure to wait until the suspects entered Pennsylvania "was nothing more than an honest mistake and a *de minimis* one at that." *Id.* at 229.

[215] Discussing the issuance of search warrants, the Court has held:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

"Improper motive . . . is irrelevant to the question whether the *objective* facts available to the officers at the time reasonably could have led the officers to conclude that [the person] was committing an offense." *Estate of Smith v. Marasco*, 318 F.3d 497, 514 (3d Cir. 2003); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) (rejecting the "argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); *Mosley v. Wilson*, 102 F.3d 85, 94-95 (3d Cir. 1996).[216]

"In a § 1983 action the issue of whether there was probable cause to make an arrest is usually a question for the jury...." *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997); *see also Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir. 1984) (same), *overruled on other grounds by Anderson v. Creighton*, 483 U.S. 635 (1987); *Snell v. City of York*, 564 F.3d 659, 671-72 (3d Cir. 2009) ("Clarification of the specific factual scenario must precede the probable cause inquiry. We conclude that determining these facts was properly the job of the jury ....").[217]

The Court of Appeals has suggested that "the burden of proof as to the existence of probable cause may well fall upon the defendant, once the plaintiff has shown an arrest and confinement without warrant." *Patzig*, 577 F.2d at 849 n.9; *see also Losch v. Borough of Parkesburg*, 736 F.2d 903, 909 (3d Cir. 1984) (in case involving malicious prosecution claim, stating that "defendants bear the burden at trial of proving the defense of good faith and probable cause"); *compare* Comment 4.13 (discussing burden of proof regarding probable cause element of malicious prosecution claims).[218] The *Patzig* court based this observation partly on the burden-shifting scheme at common

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Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980)).

[216] Thus, for example, the fact that an officer was motivated by race would not render an otherwise proper arrest violative of the Fourth Amendment, though it would raise Equal Protection issues. *See Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); *cf. Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 425 (3d Cir. 2003) (noting that "selective prosecution may constitute illegal discrimination even if the prosecution is otherwise warranted"); *Gibson v. Superintendent of NJ Dept. of Law and Public Safety - Division of State Police*, 411 F.3d 427, 441 (3d Cir. 2005) (permitting racially selective law enforcement claim to proceed).

[217] "[T]he common law presumption raised by a magistrate's prior finding that probable cause exists does not apply to section 1983 actions." *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 789 (3d Cir. 2000).

[218] By contrast, another Circuit has shifted the burden of production but not the burden of proof:

Although the plaintiff bears the burden of proof on the issue of unlawful arrest,

law, and partly on the Supreme Court's reasoning in *Pierson v. Ray*, 386 U.S. 547 (1967). *See Patzig*, 577 F.2d at 849 n.9 (noting that the *Pierson* Court "spoke of good faith and probable cause as defenses to a [Section] 1983 action for unconstitutional arrest").[219] Some years after deciding *Patzig* and *Losch*–and without citing either case–the Court of Appeals decided *Edwards v. City of Philadelphia*, 860 F.2d 568 (3d Cir. 1988). In *Edwards*, the Court of Appeals addressed the burden of proof on an excessive force claim arising from a warrantless arrest. *See id.* at 570-71. The *Edwards* plaintiff "concede[d] that the burden to negate probable cause in making the arrest [fell] to him," *id.* at 571, and the Court of Appeals proceeded on that assumption, holding that the plaintiff "ha[d] not demonstrated that" probable cause was absent, *id.* at 571 n.2. The Court of Appeals further held that the plaintiff had the burden of proving that the force employed was excessive: Analyzing excessive force in the course of an arrest as a deprivation of due process, the court explained that "[t]he occurrence of that deprivation . . . is the first element of the § 1983 claim and,

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> she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant.

Dubner v. City and County of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001); *see also Davis v. Rodriguez*, 364 F.3d 424, 433 n.8 (2d Cir. 2004) (noting circuit split as to "which side carries the burden regarding probable cause" with respect to Section 1983 false arrest claims).

[219] *Pierson* is distinguishable from a typical Fourth Amendment false arrest case. In *Pierson*, clergy members attempting to use a segregated bus terminal in Jackson, Mississippi were arrested by city police and charged with misdemeanors under a state statute. *See Pierson*, 386 U.S. at 549. (The state statute was later held unconstitutional as applied to a similar situation, because it was used to enforce race discrimination in a facility used for interstate transportation. *See id.* at 550 n.4.) The core of the plaintiffs' claims in *Pierson*, then, was that the arrests were motivated by a desire to enforce segregation. *See id.* at 557 (noting plaintiffs' claim that "the police officers arrested them solely for attempting to use the 'White Only' waiting room"). That the Court placed the burden on the defendant officers to prove good faith and probable cause in *Pierson*, then, may not conclusively establish that defendants have a similar burden in run-of-the-mill Fourth Amendment false arrest cases.

In addition, under current law, an officer's subjective good faith generally is relevant neither to the arrest's compliance with the Fourth Amendment nor to the question of qualified immunity. However, the court of appeals has held "that a police officer who relies in good faith on a prosecutor's legal opinion that [an] arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause." *Kelly v. Borough of Carlisle*, 2010 WL 3835209, at *5 (3d Cir. Oct. 4, 2010). The plaintiff "may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice." *Id.*

accordingly, proving it is part of the plaintiff's burden." *Id.* at 573. In *Iafrate v. Globosits*, 1989 WL 14062 (E.D.Pa. Feb. 22, 1989), another excessive force case stemming from a warrantless arrest, the court relied on *Edwards* to hold that the "plaintiff must show that the officer lacked probable cause to effect the arrest, or that the force used was excessive," *id.* at *3. It is not clear, accordingly, which party has the burden of proof as to probable cause for a warrantless arrest.

The Committee has noted a similar question, concerning burden of proof, with respect to the lack-of-probable cause element in claims for malicious prosecution. *See infra* Comment 4.13. Unlike Instruction 4.12.2 – which provides two alternative formulations, one with the burden on the plaintiff and one with the burden on the defendant – Instruction 4.13 places the burden on the plaintiff. The reason for the difference between the approaches taken in the two instructions is that while recent Third Circuit cases have held that malicious prosecution plaintiffs have the burden of proving lack of probable cause, the caselaw in the context of false arrest claims – as noted above – is more equivocal.

When the facts alleged to constitute probable cause include an informant's tip, the presence or absence of probable cause should be determined by assessing the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (assessing probable cause in the context of a judge's issuance of a search warrant). The decisionmaker should consider "all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* at 234. Indicia of reliability can include the fact that an informant has been accurate in the past, or that the informant's account is first-hand and highly detailed, or that the informant is known to be an honest private citizen, or that the police acquire independent confirmation of some of the details stated in the informant's tip. *See id.* at 233-34, 241-44.[220] By contrast, an informant's "wholly conclusory statement"–bereft of any supporting detail–would not provide an appropriate basis for a finding of probable cause. *See id.* at 239.

The probable cause analysis in cases of eyewitness identification is fact-specific. The Court of Appeals has stated that "a positive identification by a victim witness, without more, would usually be sufficient to establish probable cause," but that might not be true if, for example, there is "[i]ndependent exculpatory evidence or substantial evidence of the witness's own unreliability that is known by the arresting officers." *Wilson v. Russo*, 212 F.3d 781, 790 (3d Cir. 2000); *id.* at 797 (Pollak, D.J., concurring in part and dissenting in part) (stating that "the court's rejection of a per se rule is surely correct"); *compare id.* at 793 (Garth, J., concurring) ("Inconsistent or contradictory evidence . . . cannot render invalid . . . a positive identification by an eyewitness who either a police officer or magistrate deemed to be reliable."); *see also Sharrar*, 128 F.3d at 818 ("When a police officer has received a reliable identification by a victim of his or her attacker, the police have probable cause to arrest.").

"The legality of a seizure based solely on statements issued by fellow officers depends on

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[220] For a decision applying the *Gates* test to an application for a search warrant, see *United States v. Stearn*, 597 F.3d 540, 555-56 (3d Cir. 2010).

whether the officers who *issued* the statements possessed the requisite basis to seize the suspect." *Rogers v. Powell*, 120 F.3d 446, 453 (3d Cir. 1997). However, "where a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." *Id.* at 455; *see also Capone v. Marinelli*, 868 F.2d 102, 105 (3d Cir. 1989). As soon as the officer learns of the error, though, the officer must release the prisoner: "Continuing to hold an individual in handcuffs once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment." *Rogers*, 120 F.3d at 456.

If an officer otherwise had probable cause to believe that a suspect had violated a criminal statute, the presence of probable cause ordinarily will not be negated by the fact that the statute is later held unconstitutional. *See Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979) (noting "the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws").[221] However, if the officer erroneously believed particular conduct was criminal when in fact it was not, the presence of probable cause to believe the suspect had committed that conduct would not provide probable cause to arrest. *See Johnson v. Campbell*, 332 F.3d 199, 214 (3d Cir. 2003) ("[W]hat Campbell believed Johnson had done - speak profane words in public - is not a crime, therefore Campbell could not have had probable cause to believe a crime was being committed.").[222]

"Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146,

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[221] Similarly, the fact that the charges are later dismissed as time-barred does not show that the officer lacked probable cause to make the arrest. "A police officer has limited training in the law and requiring him to explore the ramifications of the statute of limitations affirmative defense is too heavy a burden." *Sands v. McCormick*, 502 F.3d 263, 269 (3d Cir. 2007). (The *Sands* court noted that "the dates of the offenses were disclosed in the affidavit of probable cause that was submitted to the magistrate," and that "[t]here is no indication that the magistrate had any hesitancy about issuing the arrest warrant."). *See also Holman v. City of York*, 564 F.3d 225, 231 (3d Cir. 2009) ("We do not endorse the District Court's statement that affirmative defenses are 'not a relevant consideration' – as we have never so held – but we do conclude that, here, the defense of necessity need not have been considered in the assessment of probable cause for arrest for trespass at the scene."). *Cf. United States v. Gatlin*, 613 F.3d 374, 377-79 (3d Cir. 2010) (rejecting defendant's argument – that officers lacked reasonable suspicion because they did not know "whether he was licensed to carry a concealed weapon" – on the ground that under Delaware law possession of a license is an affirmative defense).

[222] The *Johnson* court noted the possibility that an officer might raise a qualified immunity defense regarding such a situation, but did not decide the question because the officer in *Johnson* had not argued qualified immunity. *See Johnson*, 332 F.3d at 214.

152 (2004).[223] The relevant question is whether those facts provided probable cause to arrest for any crime, whether or not that crime was the stated reason for the arrest: The court should not confine the inquiry to the facts "bearing upon the offense actually invoked at the time of arrest," and should not require that "the offense supported by these known facts . . . be 'closely related' to the offense that the officer invoked" at the time of the arrest. *Id.* at 153.[224]

Warrantless arrests. "A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).[225] "[T]he

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[223] *See also Gilles v. Davis*, 427 F.3d 197, 206 (3d Cir. 2005) (stating, with respect to qualified immunity analysis, that "whether it was reasonable to believe there was probable cause is in part based on the limited information that the arresting officer has at the time").

[224] *Cf. United States v. Prandy-Binett*, 995 F.2d 1069, 1073-74 (D.C. Cir. 1993) ("It is simply not the law that officers must be aware of the *specific* crime an individual is likely committing... It is enough that they have probable cause to believe the defendant has committed one or the other of several offenses, even though they cannot be sure which one.").

If an officer arrested the plaintiff on two charges and had probable cause to arrest the plaintiff on one charge, but not on another, the plaintiff cannot recover for the arrest on the latter charge if the arrest on the latter charge resulted in no additional harm to the plaintiff. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 790 n.7 (3d Cir. 2000) (so holding, but noting that "a different conclusion may be warranted if the additional charge results in longer detention, higher bail, or some other added disability").

[225] "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). The *Atwater* Court expressly left open whether the misdemeanor must have been committed in the officer's presence. *See Atwater*, 532 U.S. at 341 n.11 ("We need not, and thus do not, speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests.").

In *United States v. Myers*, the Court of Appeals decided a suppression issue based in part upon an officer's failure to comply with a state-law provision that authorized warrantless arrest "only if the offense is committed in the presence of the arresting officer or when specifically authorized by statute." *U.S. v. Myers*, 308 F.3d 251, 256 (3d Cir. 2002) (alternative holding). In *United States v. Laville*, 480 F.3d 187 (3d Cir. 2007), the Court of Appeals held "that the unlawfulness of an arrest under state or local law does not make the arrest unreasonable *per se* under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest." *Laville*, 480 F.3d at 196; *see also id.* at 192 (explaining that *Myers* "made it quite clear ... that the validity of an arrest under state law is at most a factor that a court may consider in assessing the broader question of probable cause"). More recently, the Supreme Court has made clear that the Fourth Amendment

Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *DeFillippo*, 443 U.S. at 36. "The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *Id.*

"Although police may make a warrantless arrest in a public place if they have probable cause to believe the suspect is a felon, 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'" *Sharrar*, 128 F.3d at 819 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). "The government bears the burden of proving that exigent circumstances existed." *Sharrar*, 128 F.3d at 820. "[A] warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence . . . , or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989) (quoted with general approval in *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)).[226] "A court makes the determination of whether there were exigent circumstances by reviewing the facts and reasonably discoverable information available to the officers at the time they took their actions and in making this determination considers the totality of the circumstances facing them." *Marasco*, 318 F.3d at 518.

Requirement of a prompt determination of probable cause after a warrantless arrest. The government "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 420 U.S. at 125. Based on the balance between the government's "interest in protecting public safety" and the harm that detention can inflict on the individual, the Supreme Court has held "that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 56 (1991). If the judicial determination is provided within 48 hours of arrest, the burden is on the prisoner to show that the length of the delay, though less than 48 hours, was nonetheless unreasonable. *See McLaughlin*, 500 U.S. at 56 (listing possible bases for a finding of unreasonableness). By contrast,

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analysis is unaffected by state-law restrictions on the circumstances under which a warrantless arrest may be made for a crime committed in an officer's presence: "[W]arrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and ... while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections." *Virginia v. Moore*, 128 S.Ct. 1598, 1607 (2008).

[226] "[L]aw enforcement officers 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) (per curiam) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). *See also Marasco*, 318 F.3d at 518 (exigent circumstances exist "if the safety of either law enforcement or the general public is threatened").

if the delay extends longer than 48 hours, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

4.12.3 Section 1983 – Unlawful Seizure – Arrest – Warrant Application

Model

In this case, prior to arresting [plaintiff], [defendant] obtained a warrant authorizing the arrest. [Plaintiff] asserts that [defendant] obtained the warrant by [making false statements] [means of omissions that created a falsehood] in the warrant affidavit.

To show that the arrest pursuant to this warrant violated the Fourth Amendment, [plaintiff] must prove each of the following three things by a preponderance of the evidence:

First: In the warrant affidavit, [defendant] made false statements, or omissions that created a falsehood.

Second: [Defendant] made those false statements or omissions either deliberately, or with a reckless disregard for the truth.

Third: Those false statements or omissions were material, or necessary, to the finding of probable cause for the arrest warrant.

Omissions are made with reckless disregard for the truth when an officer omits facts that are so obvious that any reasonable person would know that a judge would want to know those facts. Assertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what [he/she] is asserting. It is not enough for [plaintiff] to prove that [defendant] was negligent or that [defendant] made an innocent mistake.

To determine whether any misstatements or omissions were material, you must subtract the misstatements from the warrant affidavit, and add the facts that were omitted, and then determine whether the warrant affidavit, with these corrections, would establish probable cause.

Comment

The Supreme Court's discussion in *Wallace v. Kato*, 127 S.Ct. 1091 (2007), indicates that unlawful seizure claims based upon an arrest made pursuant to a warrant are analogous to the tort of malicious prosecution rather than to the tort of false arrest. In *Wallace*, the Court held that the tort of false imprisonment provided "the proper analogy" to the plaintiff's Fourth Amendment claim because the claim arose "from respondents' detention of petitioner *without legal process* in January 1994. They did not have a warrant for his arrest." *Wallace*, 127 S.Ct. at 1095. The *Wallace* Court explained that once legal process is provided, the tort of false imprisonment ends and any subsequent detention implicates the tort of malicious prosecution. *See id.* at 1096. The *Wallace* Court did not, however, indicate how this classification would affect the elements of a claim for unlawful seizure pursuant to a warrant. *See id.* at 1096 n.2 ("We have never explored the contours of a Fourth

Amendment malicious-prosecution suit under § 1983, *see Albright v. Oliver*, 510 U.S. 266, 270-271, 275 (1994) (plurality opinion), and we do not do so here."). Malicious prosecution claims in general are discussed below in Comment 4.13.

If the officer making an affidavit in support of an arrest warrant application includes "a false statement knowingly and intentionally, or with reckless disregard for the truth," and if, without that false statement, the application would not suffice to establish probable cause, then the warrant is invalid. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).[227] "This does not mean . . . that every fact recited in the warrant affidavit [must] necessarily [be] correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." *Id.* at 165. "[A] plaintiff may succeed in a § 1983 action for false arrest made pursuant to a warrant if the plaintiff shows, by a preponderance of the evidence: (1) that the police officer 'knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant;' and (2) that 'such statements or omissions are material, or necessary, to the finding of probable cause.'" *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000) (quoting *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir.1997)); *see also Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 789 (3d Cir. 2000).[228]

"Proof of negligence or innocent mistake is insufficient." *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993); *see Franks*, 438 U.S. at 171. In addition, when a government affiant includes information provided by another government agency pursuant to a court order, the *Franks* standard becomes harder to meet because "government agents should generally be able to presume that information received from a sister governmental agency is accurate." *U.S. v. Yusuf*, 461 F.3d 374, 378 (3d Cir. 2006).[229] On the other hand, "the police cannot insulate a deliberate falsehood from a

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[227] A modified version of this instruction could be used with respect to search warrants.

[228] In *Wilson*, the plaintiff contended "that even if the statements are not material, he should at least get nominal damages for [the defendant's] failure to provide the judge with exculpatory information," but the court refused to address this argument because it was not timely raised. *See Wilson*, 212 F.3d at 789 n.6.

[229] The *Yusuf* court held that when information provided by a sister government agency under court order turns out to be false,

> [t]o demonstrate that a government official acted recklessly in relying upon such information, a defendant must first show that the information would have put a reasonable official on notice that further investigation was required. If so, a defendant may establish that the officer acted recklessly by submitting evidence: (1) of a systemic failure on the agency's part to produce accurate information upon request; or (2) that the officer's particular investigation into possibly inaccurate information should have given the officer an obvious reason to doubt the accuracy

Franks inquiry simply by laundering the falsehood through an unwitting affiant who is ignorant of the falsehood." *U.S. v. Shields*, 458 F.3d 269, 276 (3d Cir. 2006).[230]

Shields and *Yusuf* might at first glance seem to be in tension, but they can be reconciled by focusing on whether each case involved a danger that government investigators colluded to launder a falsehood through an unwitting government affiant. In *Yusuf*, the problem with the federal government's warrant application stemmed from erroneous information provided by the Virgin Islands Bureau of Internal Revenue, which produced the information pursuant to a court order rather than as part of a program of cooperation with the federal authorities. The Court of Appeals stressed that

> VIBIR did not disclose United's tax records voluntarily, but rather was required to do so because of an independent court order. This fact is important, as it detracts from any possible allegations that VIBIR and the FBI colluded to produce false information in the affidavit. Nor did VIBIR initiate the investigation with the FBI, which helps allay concerns that VIBIR deliberately provided false information to the FBI to cover up bad faith or improper motive.

461 F.3d at 387; *see also id.* at 396 (emphasizing the need to avoid "invit[ing] collusion among different agencies to insulate deliberate misstatements").

The reckless disregard standard applies differently to omissions than to affirmative statements: "(1) omissions are made with reckless disregard for the truth when an officer recklessly

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of the information.

Yusuf, 461 F.3d at 378. The Court of Appeals noted that this alternative holding was ultimately "inconsequential" to the outcome of the case, because even if the affidavit were reformulated to exclude the challenged portions, "[t]he reformulated affidavit clearly establishes probable cause to authorize the search warrants." *Id.* at 388.

[230] In *Shields*, an undercover FBI agent subscribed to a website in the course of his investigation of online child pornography. *See Shields*, 458 F.3d at 270-71. That agent distributed to other agents a template containing information for use in prosecuting child pornography cases; the template asserted that all those who joined the website in question were automatically subscribed to a particular email list, by means of which child pornography was distributed. *See id.* at 271-72. A second FBI agent incorporated this assertion into an affidavit in support of a search warrant application in connection with his investigation of Shields. *See id.* at 272-73. It was subsequently discovered that the assertion concerning automatic subscription was false. *See id.* at 274-75. The *Shields* court, however, rejected Shields' challenge to the warrant, because the court held that the affidavit "even purged of the offending material supports a finding of probable cause," *id.* at 277; thus, *Shields*' discussion of laundering a falsehood through an unwitting affiant is dictum.

omits facts that any reasonable person would know that a judge would want to know; and (2) assertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what he or she is asserting." *Wilson*, 212 F.3d at 783; *see also Lippay*, 996 F.2d at 1501 (to show reckless disregard, plaintiff must prove that defendant "made the statements in his affidavits 'with [a] high degree of awareness of their probable falsity'" (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964))). "To determine the materiality of the misstatements and omissions," the decisionmaker must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the 'corrected' warrant affidavit would establish probable cause." *Wilson*, 212 F.3d at 789 (quoting *Sherwood*, 113 F.3d at 400); *see also Reedy v. Evanson*, 615 F.3d 197, 211-23 (3d Cir. 2010) (applying this test).

"[A] mistakenly issued or executed warrant cannot provide probable cause for an arrest," even if the arrest is carried out by an officer other than the one who obtained the warrant. *Berg v. County of Allegheny*, 219 F.3d 261, 270 (3d Cir. 2000). As the Supreme Court has explained, although "police officers called upon to aid other officers in executing arrest warrants are entitled to assume" that the warrant application contained a showing of probable cause, "[w]here . . . the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Whiteley v. Warden*, 401 U.S. 560, 568 (1971); *see also Berg*, 219 F.3d at 270 (quoting *Whiteley*).

However, qualified immunity may protect an officer who relied on the existence of a warrant. *See Malley v. Briggs*, 475 U.S. 335, 343 (1986). An officer who obtained a warrant "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341.[231] Thus, the qualified immunity question "is whether a reasonably well trained officer in [the defendant's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345.[232] Similarly, if an officer makes an arrest based upon a warrant obtained by another officer, qualified immunity will protect the arresting officer if he acted "based on an objectively reasonable

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[231] *Cf. Kelly v. Borough of Carlisle*, 2010 WL 3835209, at *5 (3d Cir. Oct. 4, 2010). (holding that "a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause," but that "a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice").

[232] The Court of Appeals has held that if that if the reckless disregard standard (discussed above) is met then the defendant is foreclosed from establishing qualified immunity: "If a police officer submits an affidavit containing statements he knows to be false or would know are false if he had not recklessly disregarded the truth, the officer obviously failed to observe a right that was clearly established." *Lippay*, 996 F.2d at 1504. For a discussion of related considerations, see Comment 4.7.2.

belief that" the warrant was valid; but "an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances." *Berg*, 219 F.3d at 273.

In *Malley*, the trial court had ruled that "the act of the judge in issuing the arrest warrants for respondents broke the causal chain between petitioner's filing of a complaint and respondents' arrest." *Malley*, 475 U.S. at 339. Although the defendants did not press this argument before the Supreme Court, the Court noted in a footnote its rejection of the rationale:

> It should be clear . . . that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of § 1983. As we stated in Monroe v. Pape, 365 U.S. 167, 187 . . . (1961), § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.

Malley, 475 U.S. at 345 n.7. The Court of Appeals has given this language a narrow interpretation:

> To the extent that the common law recognized the causal link between a complaint and the ensuing arrest, it was in the situation where "misdirection" by omission or commission perpetuated the original wrongful behavior. . . . If, however, there had been an independent exercise of judicial review, that judicial action was a superseding cause that by its intervention prevented the original actor from being liable for the harm. . . . Thus, the cryptic reference to the common law in *Malley*' s footnote 7 would appear to preclude judicial action as a superseding cause only in the situation in which the information, submitted to the judge, was deceptive.

Egervary v. Young, 366 F.3d 238, 248 (3d Cir. 2004).

Egervary's interpretation of *Malley*'s dictum is questionable, because the Supreme Court's description of the defendants' conduct in *Malley* includes no suggestion that they submitted deceptive information. In addition, more recent precedent confirms that an officer can be liable for executing a defective search warrant, even where there was no allegation of deception in the warrant application. In *Groh v. Ramirez*, the defendant executed a search pursuant to a warrant that "failed to identify any of the items that petitioner intended to seize" (though the warrant application had described those items with particularity). *Groh v. Ramirez*, 540 U.S. 551, 554 (2004). The lack of particularity rendered the warrant "plainly invalid." *Id.* at 557. The Court rejected the defendant's "argument that any constitutional error was committed by the Magistrate, not petitioner," explaining that the defendant "did not alert the Magistrate to the defect in the warrant that petitioner had drafted, and we therefore cannot know whether the Magistrate was aware of the scope of the search he was authorizing. Nor would it have been reasonable for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.* at 561 n.4. Having held it "incumbent on the officer executing a search warrant to ensure the search is lawfully authorized

and lawfully conducted," *id.* at 563, the Court denied the defendant qualified immunity because "even a cursory reading of the warrant in this case–perhaps just a simple glance–would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal," *id.* at 564.

Thus, though *Egervary* seems to indicate that the supervening cause doctrine applies when an officer obtains a warrant (unless the warrant application contains misleading information), *Egervary*'s approach appears to be in some tension with Supreme Court precedent.[233] In any event, Instruction 4.12.3 is designed for use in cases where the plaintiff asserts that the warrant application contained material falsehoods or omissions.

Unlike a person arrested without a warrant, "a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Baker v. McCollan*, 443 U.S. 137, 143 (1979); *see id.* at 145 (assuming, "*arguendo*, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process,'" but holding that "a detention of three days over a New Year's weekend does not and could not amount to such a deprivation").

[233] An additional Court of Appeals decision, though, seemed to rely on a magistrate's review of a warrant application as evidence that the officer did not err in seeking the warrant: In *Sands v. McCormick*, 502 F.3d 263 (3d Cir. 2007), when the court held that the later dismissal of a charge as time-barred does not show that the officer lacked probable cause to obtain an arrest warrant, the court also noted that "the dates of the offenses were disclosed in the affidavit of probable cause that was submitted to the magistrate," and that "[t]here is no indication that the magistrate had any hesitancy about issuing the arrest warrant." *See id*. at 269-70.

4.13 Section 1983 – Malicious Prosecution

Model

[Plaintiff] claims that [defendant] violated [plaintiff's] Fourth Amendment rights by initiating the prosecution of [plaintiff] for [describe crime[s]].

To establish this claim of malicious prosecution, [plaintiff] must prove the following [five] things by a preponderance of the evidence:

First: [Defendant] initiated the criminal proceeding against [plaintiff].

Second: [Defendant] lacked probable cause to initiate the proceeding.[234]

Third: The criminal proceeding ended in [plaintiff's] favor.

Fourth: [Defendant] acted maliciously or for a purpose other than bringing [plaintiff] to justice.

Fifth: As a consequence of the proceeding, [plaintiff] suffered a significant deprivation of liberty.[235]

[In this case, the first, third and fifth of these issues are not in dispute: [Defendant] admits that [he/she] initiated the criminal proceeding; and I instruct you that the criminal proceeding ended in [plaintiff's] favor and that [plaintiff] suffered a deprivation of liberty consistent with the concept of seizure.][236]

As to the second element of [plaintiff's] malicious prosecution claim, [plaintiff] must prove that [defendant] lacked probable cause to initiate the proceeding. To determine whether probable cause existed, you should consider whether the facts and circumstances available to [defendant] would warrant a prudent person in believing that [plaintiff] had committed the crime of [name the crime]. [Define the relevant crime under state law.]

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[234] See Comment for a discussion of the burden of proof with respect to this element.

[235] If this element of the claim is disputed, the court may wish to give examples of deprivations of liberty that would rise to the level of a seizure. *See* Comment (discussing *Gallo v. City of Philadelphia*, 161 F.3d 217 (3d Cir. 1998), and *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3d Cir. 2005)).

[236] The defendant's initiation of the proceeding will often be undisputed. If possible, the court should rule as a matter of law on the questions of favorable termination and of seizure.

[[Defendant] has pointed out that [plaintiff] was indicted by a grand jury. The indictment establishes that there was probable cause to initiate the proceeding unless [plaintiff] proves by a preponderance of the evidence that the indictment was obtained by fraud, perjury or other corrupt means.]

As to the fourth element of the malicious prosecution claim, [plaintiff] must prove that in initiating the proceeding, [defendant] acted out of spite, or that [defendant] did not [himself/herself] believe that the proceeding was proper, or that [defendant] initiated the proceeding for a purpose unrelated to bringing [plaintiff] to justice.

[Even if you find that [plaintiff] has proven the elements of [plaintiff's] malicious prosecution claim, [defendant] asserts that [he/she] is not liable on this claim because [plaintiff] was in fact guilty of the offense with which [he/she] was charged. The fact that [plaintiff] was acquitted in the prior criminal case does not bar [defendant] from trying to prove that [plaintiff] was in fact guilty of the offense; a verdict of not guilty in a criminal case only establishes that the government failed to prove guilt beyond a reasonable doubt. If you find that [defendant] has proven by a preponderance of the evidence that [plaintiff] was actually guilty of the offense, then [defendant] is not liable on [plaintiff's] malicious prosecution claim.]

Comment

Third Circuit law concerning Section 1983 claims for malicious prosecution is not entirely clear. Prior to the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994), the Court of Appeals held that the common law elements of malicious prosecution were both necessary and sufficient to state a Section 1983 claim. Post-*Albright*, those elements are not sufficient, but they are still necessary.

The pre-Albright test. Before 1994, plaintiffs in the Third Circuit could "bring malicious prosecution claims under § 1983 by alleging the common law elements of the tort." *Donahue v. Gavin*, 280 F.3d 371, 379 (3d Cir. 2002) (citing *Lee v. Mihalich*, 847 F.2d 66, 69-70 (3d Cir. 1988)); *see also Albright*, 510 U.S. at 270 n.4 (plurality opinion) (stating that among the federal courts of appeals, "[t]he most expansive approach is exemplified by the Third Circuit, which holds that the elements of a malicious prosecution action under § 1983 are the same as the common-law tort of malicious prosecution"). Typically, a plaintiff was required to prove "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." *Donahue*, 280 F.3d at 379 (stating test determined by reference to Pennsylvania law); *see also Lippay v. Christos*, 996 F.2d 1490, 1503 (3d Cir. 1993) (discussing malice element with reference to Pennsylvania law); *Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989). The Court of Appeals "assumed that by proving a violation of the common law tort, the plaintiff proved a violation of substantive due process that would support a § 1983 claim for malicious prosecution suit." *Donahue*, 280 F.3d at 379.

Albright v. Oliver. In *Albright*, the plaintiff surrendered to authorities after a warrant was issued for his arrest; he was released on bail, and the charge was later dismissed because it failed to set forth a crime under state law. *See Albright*, 510 U.S. at 268 (plurality opinion). Albright sued under Section 1983, asserting a "substantive due process [right] . . . to be free from criminal prosecution except upon probable cause." *Id.* at 269. A fractured Court affirmed the dismissal of Albright's claim. Writing for a four-Justice plurality, Chief Justice Rehnquist explained that "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged." *Id.* at 271. The plurality reasoned that in the field of criminal procedure, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).[237] While conceding that not all the "required incidents of a fundamentally fair trial" flow from the Bill of Rights, the plurality argued that any such incidents not covered by a Bill of Rights provision would arise as a matter of procedural, not substantive, due process. *See Albright*, 510 U.S. at 273 n.6.

Justice Kennedy, joined by Justice Thomas, concurred in the judgment. He agreed that a claim for arrest without probable cause should be analyzed under the Fourth Amendment. However, Justice Kennedy noted that Albright's claim focused on malicious prosecution, not unlawful arrest, and he argued that the Court should extend the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), to govern claims like Albright's: Because the relevant state "provides a tort remedy for malicious prosecution," Justice Kennedy asserted that Albright's claim should not be cognizable under Section 1983. *Albright*, 510 U.S. at 285 (Kennedy, J., joined by Thomas, J., concurring in the judgment).

Justice Souter also concurred in the judgment. Though he did not believe that the existence of a relevant Bill of Rights provision necessarily precluded a due process claim, he argued that the Court should exercise "restraint" in recognizing such a due process right: It should not do so absent a substantial violation not redressable under a specific Bill of Rights provision. *Albright*, 510 U.S. at 286, 288-89 (Souter, J., concurring in the judgment).

Justice Stevens, joined by Justice Blackmun, dissented, arguing that "the initiation of a criminal prosecution ... [is] a deprivation of liberty," and that the process required prior to such a deprivation includes a justifiable finding of probable cause. *See id.* at 295-97, 300 (Stevens, J., joined by Blackmun, J., dissenting).

The *Albright* plurality explicitly left open the possibility that a Fourth Amendment violation could ground a malicious prosecution claim. *See id.* at 275 ("[W]e express no view as to whether

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[237] Justice Scalia concurred in the plurality opinion; as he explained, he both disagrees with the notion of substantive due process and takes the view that the Court's precedents recognizing substantive due process rights do not extend to situations addressed by provisions in the Bill of Rights. *See Albright*, 510 U.S. at 275-76 (Scalia, J., concurring). Justice Ginsburg also concurred in the plurality opinion. *See id.* at 276 (Ginsburg, J., concurring).

petitioner's claim would succeed under the Fourth Amendment."). Also, because Albright did not assert a procedural due process claim, *see id.* at 271, *Albright* appears to leave open the possibility that such a violation could provide the basis for a malicious prosecution claim.

Post-Albright cases. The Court of Appeals, while recognizing "that *Albright* commands that claims governed by explicit constitutional text may not be grounded in substantive due process," has noted that malicious prosecution claims may be grounded in "police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit text of the Constitution." *Torres v. McLaughlin*, 163 F.3d 169, 172-73 (3d Cir. 1998).[238] Instruction 4.13 is designed for use in cases where the plaintiff premises the malicious prosecution claim on a Fourth Amendment violation; adjustment would be necessary in cases premised on other constitutional violations.

Where the malicious prosecution claim sounds in the Fourth Amendment, the plaintiff "must show 'some deprivation of liberty consistent with the concept of "seizure."'" *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) (quoting *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). In *Gallo*, the court found a seizure where the plaintiff "had to post a $10,000 bond, he had to attend all court hearings including his trial and arraignment, he was required to contact Pretrial Services on a weekly basis, and he was prohibited from traveling outside New Jersey and Pennsylvania." *Gallo*, 161 F.3d at 222; compare *DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005) (acknowledging that "[p]retrial custody and some onerous types of pretrial, non custodial restrictions constitute a Fourth Amendment seizure," but holding that plaintiffs' "attendance at trial did not qualify as a Fourth Amendment seizure").[239] The plaintiff also must show that the seizure was unreasonable under the Fourth Amendment; in the malicious prosecution context, that requirement typically will be equivalent to the traditional common law element of lack of probable cause, discussed below.

The law has not developed uniformly, in recent years, on the applicability of the common law elements of malicious prosecution. Five months after *Albright*, in *Heck v. Humphrey*, the Court

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[238] A plaintiff can state a claim by alleging that the defendant initiated the malicious prosecution in retaliation for the plaintiff's exercise of First Amendment rights. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 798 (3d Cir. 2000) (holding school district superintendent not entitled to qualified immunity on plaintiff's claim "that [the superintendent], and through him the District, maliciously prosecuted Merkle in retaliation for her protected First Amendment activities"); *see also Losch v. Borough of Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983."). In a First Amendment retaliatory-prosecution claim, the plaintiff must plead and prove lack of probable cause (among other elements). *See Hartman v. Moore*, 126 S. Ct. 1695, 1707 (2006).

[239] "Although Fourth Amendment seizure principles may in some circumstances have implications in the period between arrest and trial, . . . posttrial incarceration does not qualify as a Fourth Amendment seizure." *Torres*, 163 F.3d at 174.

shaped the contours of a Section 1983 claim for unconstitutional conviction in part by reference to the common law tort's requirement of favorable termination. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994). However, four Justices, concurring in the judgment, denied that the common law elements should apply to the constitutional tort. *See id.* at 494 (Souter, J., joined by Blackmun, Stevens, & O'Connor, JJ., concurring in the judgment) (arguing for example that a plaintiff–who had been convicted on the basis of a confession that had been coerced by police officers who had probable cause to believe the plaintiff was guilty–should not be barred from bringing a Section 1983 unconstitutional conviction claim for failure to show a lack of probable cause); *cf. Hartman v. Moore*, 126 S. Ct. 1695, 1702 (2006) (noting in a First Amendment retaliatory-prosecution case that "the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts").

In a post-*Heck* case, the Court of Appeals rejected the contention that a Section 1983 claim alleging "unconstitutional conviction and imprisonment on murder charges" does not accrue until there is "a judicial finding of actual innocence"; the court relied partly on the rationale that *Heck* "should not be read to incorporate all of the common law of malicious prosecution into the federal law governing civil rights cases of this kind." *Smith v. Holtz*, 87 F.3d 108, 110, 113-14 (3d Cir. 1996).[240] Similarly, the Court of Appeals noted in *Gallo* that

> by suggesting that malicious prosecution in and of itself is not a harm, *Albright* also suggests that a plaintiff would not need to prove all of the common law elements of the tort in order to recover in federal court. For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice.

Gallo, 161 F.3d at 222 n.6.

However, in other post-*Albright* cases the Court of Appeals has stated that Section 1983 plaintiffs must establish not only a specific constitutional violation but also the common-law elements for malicious prosecution:[241]

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[240] The *Smith* court also stated that "[a]ctual innocence is not required for a common law favorable termination." *Smith*, 87 F.3d at 113 (citing Restatement of the Law of Torts §§ 659, 660 (1938)).

[241] The Court of Appeals applied the common-law elements in *Hilfirty v. Shipman*, 91 F.3d 573, 579 (3d Cir. 1996) ("In order to state a prima facie case for a section 1983 claim of malicious prosecution, the plaintiff must establish the elements of the common law tort as it has developed over time."). However, the *Hilfirty* court did not mention *Albright*, so *Hilfirty* does not shed light on the test that should apply post-*Albright*. *But see Nawrocki v. Tp. of Coolbaugh*, 34 Fed. Appx. 832, 837 (3d Cir. April 8, 2002) (nonprecedential opinion) (citing *Hilfirty* for the proposition that "*Albright* left standing" the requirement that Section 1983 plaintiffs establish the common-law elements).

> [A] plaintiff must show that: (1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

Camiolo v. State Farm Fire & Cas. Co., 334 F.3d 345, 362-63 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003)); *see also DiBella v. Borough of Beachwood*, 407 F.3d 599, 601 (3d Cir. 2005).[242]

In 2009, the en banc Court of Appeals approved the approach that requires the plaintiff to establish the common law elements. *See Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009). Thus, the discussion that follows considers each element in turn.

Initiation. Though post-*Albright* Third Circuit Court of Appeals cases have not focused on this element, it seems appropriate to require the plaintiff to establish that the defendant was involved in initiating the prosecution.

Where the relevant law enforcement policy is not to file charges unless the alleged crime victim so requests and not to drop those charges without the alleged victim's permission, and where

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In *Merkle v. Upper Dublin School Dist.*, the Court of Appeals held that the district court had erred in failing to require proof of a Bill of Rights violation, but the *Merkle* majority did not appear to take issue with the district court's assumption that the plaintiff must establish the common law malicious prosecution elements. *See Merkle*, 211 F.3d at 792; *see also id.* at 794 ("We believe that whether these defendants' actions against Merkle were retaliatory is, for purposes of summary judgment, influenced by the strength of Merkle's claim against them for common law malicious prosecution."). With respect to the common law elements, the district court had held that the plaintiff had failed to show a lack of probable cause; the Court of Appeals majority disagreed, finding evidence of a lack of probable cause and of malicious intent. *See Merkle*, 211 F.3d at 791, 795-96.

[242] In a nonprecedential opinion, the Court of Appeals has questioned *Marasco*'s statement: "Given that the twenty-three page opinion in *Marasco* contains but a one-paragraph discussion of the plaintiff's claim under § 1983, our quote may merely be *dictum*, still leaving uncertain what is required." *Backof v. New Jersey State Police*, 92 Fed. Appx. 852, 858 (3d Cir. Feb. 13, 2004). However, as to the lack-of-probable-cause requirement, *Marasco*'s statement is a holding. *See Marasco*, 318 F.3d at 522 ("Because initiation of the proceeding without probable cause is an essential element of a malicious prosecution claim, summary judgment in favor of the defendants was appropriate on this claim."). *Camiolo*'s holding, as well, concerned the lack-of-probable-cause element. *See Camiolo*, 334 F.3d at 363 ("Because Camiolo did not demonstrate that he was prosecuted without probable cause, the District Court appropriately concluded that his § 1983 malicious prosecution claim could not survive summary judgment.").

the alleged victim acted under color of state law, the alleged victim can be sued for malicious prosecution under Section 1983 if the requisite elements are present. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 791 (3d Cir. 2000) (holding that "the School Defendants, not just the Police Defendants, are responsible for Merkle's prosecution"); *see also Gallo*, 161 F.3d at 220 n.2 ("Decisions have 'recognized that a § 1983 malicious prosecution claim might be maintained against one who furnished false information to, or concealed material information from, prosecuting authorities'" (quoting 1A Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation, § 3.20, at 316 (3d ed. 1997).).

Favorable termination. Post-*Albright*, the Court of Appeals has continued to require malicious prosecution plaintiffs to show favorable termination. *See Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002) (citing *Heck*, 512 U.S. at 484 and noting that "*Heck* was decided [soon] after *Albright*").

In *Donahue* the court held that entry of a *nolle prosequi* only counts as a favorable termination when the circumstances of the entry indicate the plaintiff's innocence. *See Donahue*, 280 F.3d at 383 (citing Restatement (Second) of Torts §§ 659 & 660 (1976)); *see also Hilfirty v. Shipman*, 91 F.3d 573, 575 (3d Cir. 1996) ("Because we find that Miller neither compromised with the prosecution to obtain her grant of nolle prosequi nor formally accepted the nolle prosequi in exchange for a release of future civil claims, we conclude that the underlying proceeding terminated in her favor."). Resolution of a criminal case under Pennsylvania's Accelerated Rehabilitation Disposition program "is not a favorable termination under *Heck*." *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005).[243]

"[T]he favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole. Rather ... , upon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged." *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (en banc); *see also id.* at 189 (holding on the specific facts of the case that plaintiff's "acquittal on the aggravated assault and public intoxication charges cannot be divorced from his simultaneous conviction for disorderly conduct when all three charges arose from the same course of conduct"). The *Kossler* majority stressed the fact-intensive nature of this inquiry and left "for another day the establishment of universal contours of when a criminal proceeding which includes both an acquittal (or dismissal) and a conviction constitutes a termination in the plaintiff's favor." *Id.* at 192.

Lack of probable cause. "Under § 1983, false arrest, false imprisonment, and malicious prosecution claims require a showing that the arrest, physical restraint, or prosecution was initiated

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[243] The relevant claim in *Gilles* asserted a First Amendment violation and did not sound in malicious prosecution, *see Gilles*, 427 F.3d at 203, but the Court of Appeals found *Heck*'s reasoning "equally applicable" to the First Amendment claim and thus applied *Heck*'s favorable-termination requirement, *id.* at 209.

without probable cause." *Pulice v. Enciso*, 39 Fed. Appx. 692, 696 (3d Cir. July 17, 2002) (nonprecedential opinion); *see also Wright v. City of Philadelphia*, 409 F.3d 595, 604 (3d Cir. 2005) ("Wright bases her malicious prosecution claim on alleged Fourth Amendment violations arising from her arrest and prosecution. To prevail on this claim, she must show that the officers lacked probable cause to arrest her.").

In some cases, a finding of probable cause for one among multiple charges will foreclose a malicious prosecution claim with respect to any of the charges. Thus, in *Wright*, the decision that there was probable cause to arrest the plaintiff for criminal trespass "dispose[d] of her malicious prosecution claims with respect to all of the charges brought against her, including the burglary." *Wright*, 409 F.3d at 604. But *Wright* does not "'insulate' law enforcement officers from liability for malicious prosecution in all cases in which they had probable cause for the arrest of the plaintiff on any one charge." *Johnson v. Knorr*, 477 F.3d 75, 83 (3d Cir. 2007). Otherwise, "an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges which would support a high bail or a lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses." *Johnson*, 477 F.3d at 84 (quoting *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir.1991)). Under *Johnson*, the court must analyze probable cause with respect to each charge that was brought against the plaintiff. *See id.* at 85. *Johnson* distinguished *Wright* by scrutinizing the duration and nature of the defendants' alleged conduct: In *Wright*, the defendants' "involvement apparently ended at the time of the arrest," whereas the plaintiff in *Johnson* alleged that the defendant's involvement "lasted beyond the issuing of an affidavit of probable cause for his arrest and the arrest itself" and that the defendant "intentionally and fraudulently fabricated the charges against him," leading to the prosecution. *Johnson*, 477 F.3d at 84. If a plaintiff establishes that the facts of the case warrant application of *Johnson*'s rule rather than *Wright*'s,[244] it apparently is still open to the defendant to argue that "the prosecution for the additional charges for which there might not have been probable cause in no way resulted in additional restrictions on [the plaintiff's] liberty beyond those attributable to the prosecution on the ... charges for which there was probable cause." *Id.* at 86.

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[244] In *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008), the Court of Appeals concluded that the district court properly held on summary judgment that there was probable cause to arrest the plaintiffs for disorderly conduct. On this basis the panel majority affirmed the grant of summary judgment dismissing Fourth Amendment claims for false arrest and malicious prosecution. In a footnote, the Court of Appeals stated that it "need not address whether there was probable cause with respect to the remaining charges – failure to disperse and obstructing a public passage – for the establishment of probable cause as to any one charge is sufficient to defeat Appellants' Fourth Amendment claims. *Cf. Johnson*, 477 F.3d at 82 n. 9, 84-85 (applying this rule to malicious prosecution claim only where the circumstances leading to the arrest and prosecution are intertwined)." *Startzell*, 533 F.3d at 204 n.14. *See also Reedy v. Evanson*, 615 F.3d 197, 211 (3d Cir. 2010) (in case involving, inter alia, unlawful seizure, false imprisonment and malicious prosecution claims, stating in dictum that "[p]robable cause need only exist as to [one of the] offense[s] that could be charged under the circumstances" (quoting *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994))).

The en banc Court of Appeals has "note[d] the considerable tension that exists between our treatment of the probable cause element in *Johnson* and our treatment of that element in the earlier case of *Wright*." *Kossler*, 564 F.3d at 193. Though the *Kossler* court noted that if *Wright* and *Johnson* were "in unavoidable conflict" the earlier of the two precedents would control, *Kossler*, 564 F.3d at 194 n.8, the *Kossler* court did not conclude that such an unavoidable conflict exists. Rather, the *Kossler* court indicated that courts should, when necessary, "wrestle" with the question of which precedent – *Wright* or *Johnson* – governs in a given case, bearing in mind the "fact-intensive" nature of the inquiry. *Kossler*, 564 F.3d at 194.

"[T]he question of probable cause in a section 1983 damage suit is one for the jury." *Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998) (discussing Section 1983 claim for malicious prosecution). In *Losch v. Borough of Parkesburg*, 736 F.2d 903, 909 (3d Cir. 1984), the Court of Appeals stated that "defendants bear the burden at trial of proving the defense of good faith and probable cause" with respect to a malicious prosecution claim. However, cases such as *DiBella*, *Camiolo* and *Marasco* (none of which cites *Losch*) list the absence of probable cause as an element of the malicious prosecution claim, and thus indicate that the plaintiff has the burden of proof on that element. *See, e.g.*, *Camiolo*, 334 F.3d at 363 (holding that malicious prosecution claim was properly dismissed due to plaintiff's inability to show lack of probable cause); *Marasco*, 318 F.3d at 522 ("Because initiation of the proceeding without probable cause is an essential element of a malicious prosecution claim, summary judgment in favor of the defendants was appropriate on this claim."). More recently, the Court of Appeals has stated explicitly that the malicious prosecution plaintiff has the burden to show lack of probable cause. See *Johnson*, 477 F.3d at 86 ("[O]n the remand Johnson will have the burden to 'show that the criminal action was begun without probable cause for charging the crime the first place.' *Hartman v. Moore* ... , 126 S.Ct. 1695, 1702 (2006)."). Accordingly, Instruction 4.13 assigns to the plaintiff the burden of proving the absence of probable cause. *Compare* Comment 4.12.2 (discussing burden of proof as to probable cause with respect to false arrest claims stemming from warrantless arrests).

"[A] grand jury indictment or presentment constitutes prima facie evidence of probable cause to prosecute, but . . . this prima facie evidence may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means." *Camiolo*, 334 F.3d at 363 (quoting *Rose*, 871 F.2d at 353);[245] *compare Montgomery*, 159 F.3d at 125 (holding "that the Restatement's rule that an

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[245] The defendant might also argue that a grand jury indictment breaks the chain of causation. The Court of Appeals has explained the concept of superseding causes:

> [I]n situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions. . . . However, ... where . . . the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be

overturned municipal conviction presumptively establish[es] probable cause contravenes the policies underlying the Civil Rights Act and therefore does not apply to a section 1983 malicious prosecution action").

Where a claim exists against a complaining witness for that person's role in the alleged malicious prosecution of the plaintiff, the factfinder should perform a separate probable cause inquiry concerning the complaining witness. *See Merkle*, 211 F.3d at 794 ("As instigators of the arrest ... it is possible that the District and Brown were in possession of additional information, not provided to Detective Hahn, that would negate any probable cause they may otherwise have had to prosecute Merkle.").

Malice or other improper purpose. It might be argued that a showing of malice should not be required where the plaintiff's Section 1983 claim is premised on a Fourth Amendment violation. *See Brooks v. City of Winston-Salem*, N.C., 85 F.3d 178, 184 n.5 (4th Cir. 1996) (noting that "the reasonableness of a seizure under the Fourth Amendment should be analyzed from an objective perspective" and thus that "the subjective state of mind of the defendant, whether good faith or ill will, is irrelevant in this context"). However, the Third Circuit Court of Appeals has listed malice as an element of Section 1983 malicious prosecution claims premised on Fourth Amendment violations. *See Camiolo*, 334 F.3d at 362-63; *Marasco*, 318 F.3d at 521.[246]

Pre-*Albright* caselaw defined the malice element "as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). Following Pennsylvania law, the Court of Appeals held in another pre-*Albright* case that "[m]alice may be inferred from the absence of probable cause." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993); *cf. Trabal v.*

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held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability.

Egervary v. Young, 366 F.3d 238, 250-51 (3d Cir. 2004). Though *Egervary* involved a judge's decision, rather than a grand jury's, the rationale of *Egervary* seems equally applicable to the grand jury context. (For a discussion of the possibility that Supreme Court precedents may limit the application of the superseding cause principle with respect to the issuance of warrants, see *supra* Instruction 4.12 cmt.) In any event, assuming that the supervening cause doctrine applies to grand jury indictments, its net effect seems similar to that of the lack-of-probable-cause requirement: Where a grand jury has indicted the plaintiff, the plaintiff must present evidence that the indictment was obtained through misrepresentations or other corrupt means.

[246] Admittedly, both *Marasco* and *Camiolo* were decided based upon the lack-of-probable-cause element, so the statements in those cases concerning malice do not constitute holdings. But more recently the court of appeals affirmed the dismissal of a Section 1983 malicious prosecution claim based on "insufficient evidence of malice." *McKenna v. City of Philadelphia*, 582 F.3d 447, 461-62 (3d Cir. 2009).

Wells Fargo Armored Service Corp., 269 F.3d 243, 248 (3d Cir. 2001) (applying New Jersey law in a malicious prosecution case arising in diversity).

The *Heck v. Humphrey* bar. A convicted prisoner cannot proceed with a Section 1983 claim challenging the constitutionality of the conviction pursuant to which the plaintiff is in custody, unless the conviction has been reversed or otherwise invalidated.[247] *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).[248] Four Justices, concurring in the judgment, argued that this favorable-termination requirement should not apply to plaintiffs who are not in custody. *See id.* at 503 (Souter, J., joined by Blackmun, Stevens, & O'Connor, JJ., concurring in the judgment). The *Heck* majority rejected that argument, albeit in dicta. *See id.* at 490 n.10. Four years later, in *Spencer v. Kemna*, five Justices stated that *Heck*'s requirement of favorable termination does not apply when a plaintiff is out of custody.[249] The Court of Appeals, however, has indicated that it is not at liberty to follow the

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[247] The Court of Appeals has indicated that the *Heck* bar is conceptually distinct from the favorable-termination element of a Section 1983 claim. *See Kossler*, 564 F.3d at 190 n.6 (stating that the court did "not need to apply *Heck*'s test in the present case" because the plaintiff had in any event failed to establish the common law element of favorable termination).

[248] *See also Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002) ("[W]henever the challenge ultimately attacks the 'core of habeas' --the validity of the continued conviction or the fact or length of the sentence--a challenge, however denominated and regardless of the relief sought, must be brought by way of a habeas corpus petition."); *Torres v. Fauver*, 292 F.3d 141, 143 (3d Cir. 2002) ("[T]he favorable termination rule does not apply to claims that implicate only the conditions, and not the fact or duration, of a prisoner's incarceration.").

The Third Circuit had previously reasoned that the *Heck* rationale extends to pending prosecutions: "[A] claim that, if successful, would necessarily imply the invalidity of a conviction on a pending criminal charge is not cognizable under § 1983." *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996). However, the Supreme Court more recently rejected the assertion "that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside." *Wallace v. Kato*, 127 S.Ct. 1091, 1098 (2007). Under *Wallace*, prior to the defendant's actual conviction *Heck* bars neither the accrual of a claim nor the running of the limitations period. Rather, "[i]f a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.... If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit." *Wallace*, 127 S. Ct. at 1098.

[249] *See Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg & Breyer, JJ., concurring) ("[A] former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being

suggestion made by those Justices.[250]

Plaintiff's guilt as a defense. "Even if the plaintiff in malicious prosecution can show that the defendant acted maliciously and without probable cause in instituting a prosecution, it is always open to the defendant to escape liability by showing in the malicious prosecution suit itself that the plaintiff was in fact guilty of the offense with which he was charged." *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2000), as amended (Jan. 26, 2001) (quoting W. Keeton et al., Prosser & Keeton on the Law of Torts 885 (5th ed. 1984) (citing Restatement (Second) of Torts § 657 (1977))). "This requirement can bar recovery even when the plaintiff was acquitted in the prior criminal proceedings, for a verdict of not guilty only establishes that there was not proof beyond a reasonable doubt." *Hector*, 235 F.3d at 156. It appears that the defendant would have the burden of proof on this issue by a preponderance of the evidence. *See* Restatement (Second) of Torts § 657 cmt. b.[251]

Limits on types of damages. The plaintiff's choice of constitutional violation upon which to ground the malicious prosecution claim may limit the types of damages available. In particular, "damages for post-conviction injuries are not within the purview of the Fourth Amendment."

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bound to satisfy a favorable termination requirement that it would be impossible as a matter of law for him to satisfy."); *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983.").

[250] The Court of Appeals explained:

> We recognize that concurring and dissenting opinions in Spencer v. Kemna ... question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute.... But these opinions do not affect our conclusion that *Heck* applies to Petit's claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court's admonition "to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.'" *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 3 (1st Cir. 1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)); *see Randell v. Johnson*, 227 F.3d 300, 301- 02 (5th Cir. 2000).

Gilles v. Davis, 427 F.3d 197, 209-10 (3d Cir. 2005).

[251] However, in a nonprecedential opinion, the Court of Appeals has read *Hector* to assign the burden of proof on this issue to the plaintiff. *See Steele v. City of Erie*, 113 Fed. Appx. 456, 459 (3d Cir. Oct. 20, 2004) ("In *Hector* . . . , we held that a plaintiff claiming malicious prosecution must prove *actual* innocence as an element of his *prima facie* case.").

Donahue, 280 F.3d at 382. Thus, a plaintiff who premises a malicious prosecution claim on a seizure in violation of the Fourth Amendment must "distinguish between damages that may have been caused by that 'seizure'"–which are recoverable on that claim–and "damages that are the result of his trial, conviction and sentence"–which are not. *Id.*; *see also DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005) ("[T]he Fourth Amendment does not extend beyond the period of pretrial restrictions.").

Section 1983 claim for abuse of process. Prior to *Albright*, the Court of Appeals recognized a Section 1983 claim for abuse of process. "In contrast to a section 1983 claim for malicious prosecution, a section 1983 claim for malicious abuse of process lies where 'prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law.'" *Rose*, 871 F.2d at 350 n.17 (quoting *Jennings v. Shuman*, 567 F.2d 1213, 1217 (3d Cir.1977)). Favorable termination is not an element of a Section 1983 abuse of process claim. *See Rose*, 871 F.2d at 351. Nor is a lack of probable cause. *See Jennings*, 567 F.2d at 1219. "To prove abuse of process, plaintiffs must prove three elements: (1) an abuse or perversion of process already initiated (2) with some unlawful or ulterior purpose, and (3) harm to the plaintiffs as a result." *Godshalk v. Borough of Bangor*, 2004 WL 999546, at *13 (E.D. Pa. May 5, 2004).

It seems clear that, post-*Albright*, the plaintiff must establish a constitutional violation (not sounding in substantive due process) in order to prevail on a Section 1983 claim for abuse of process. It may be possible for the plaintiff to satisfy this requirement by showing a violation of procedural due process. *See Jennings*, 567 F.2d at 1220 ("An abuse of process is by definition a denial of procedural due process.");[252] *Godshalk*, 2004 WL 999546, at *13 (accepting argument that abuse of process can constitute denial of procedural due process).

Section 1983 claim for conspiracy to prosecute maliciously. The Court of Appeals has recognized a Section 1983 claim for conspiracy to engage in a malicious prosecution. *See Rose*, 871 F.2d at 352 (reversing district court's dismissal of malicious prosecution conspiracy claims).

[252] The abuse of process alleged by the plaintiff in Jennings involved the use of the prosecution as leverage for an extortion scheme. *Jennings*, 567 F.2d at 1220 ("The goal of that conspiracy was extortion, to be accomplished by bringing a prosecution against him without probable cause and for an improper purpose.").

4.13.1 Section 1983 – Burdens of Proof in Civil and Criminal Cases

Model

As you know, [plaintiff's] claims in this case relate to [his/her] [arrest] [prosecution] for the crime of [describe crime].

[At various points in a criminal case,] the government must meet certain requirements in order to [stop, arrest, and ultimately] convict a person for a crime. It is important to distinguish between those requirements and the requirements of proof in this civil case.

[In order to "stop" a person, a police officer must have a "reasonable suspicion" that the person they stop has committed, is committing, or is about to commit a crime. There must be specific facts that, taken together with the rational inferences from those facts, reasonably warrant the stop.]

[In order to arrest a person, the police must have probable cause to believe the person committed a crime. Probable cause requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. The standard of probable cause represents a balance between the individual's right to liberty and the government's duty to control crime. Because police officers often confront ambiguous situations, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable officers.]

In order for a jury to convict a person of a crime, the government must prove the person's guilt beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves the jury firmly convinced of the defendant's guilt. If a jury in a criminal case thinks there is a real possibility that the defendant is not guilty, the jury must give the defendant the benefit of the doubt and find [him/her] not guilty.

[Thus, the fact that the jury found [plaintiff] not guilty in the criminal trial does not necessarily indicate that the jury in the criminal trial found [plaintiff] innocent; it indicates only that the government failed to prove [plaintiff] guilty beyond a reasonable doubt.]

[The existence of probable cause to make an arrest is evaluated in light of the facts and circumstances available to the police officer at the time. And probable cause is a less demanding standard than guilt beyond a reasonable doubt. Thus, the fact that the jury found [plaintiff] not guilty in the criminal trial does not indicate whether or not the police had probable cause to arrest [plaintiff].]

[Unlike the prior criminal trial, this is a civil case. [Plaintiff] has the burden of proving [his/her] case by the preponderance of the evidence. That means [plaintiff] has to prove to you, in light of all the evidence, that what [he/she] claims is more likely so than not so. In other words, if you were to put the evidence favorable to [plaintiff] and the evidence favorable to [defendant] on

opposite sides of the scales, [plaintiff] would have to make the scales tip somewhat on [his/her] side. If [plaintiff] fails to meet this burden, the verdict must be for [defendant]. Notice that the preponderance-of-the-evidence standard, which [plaintiff] must meet in this case, is not as hard to meet as the beyond-a-reasonable-doubt standard, which the government must meet in a criminal case.]

Comment

When this instruction is given, the last sentence of General Instruction 1.10 should be omitted.

4.14 Section 1983 – State-created Danger

Model

[Plaintiff] claims that [he/she] was injured as a result of [describe alleged conduct of defendant official or officials]. Under the Due Process Clause of the Fourteenth Amendment, state officials may not deprive an individual of life, liberty, or property without due process of law. The Due Process Clause generally does not require the state and its officials to protect individuals from harms [caused by persons who are not acting on behalf of the government][253] [that the government did not cause][254]. However, the Due Process Clause does prohibit state officials from engaging in conduct that renders an individual more vulnerable to such harms.

In this case, [plaintiff] claims that [defendant] rendered [him/her] more vulnerable to harm by [describe the particular conduct]. To establish this claim, [plaintiff] must prove all of the following four things by a preponderance of the evidence:

First: [The harm to [plaintiff]] [describe harm to plaintiff] was a foreseeable and fairly direct result of [defendant's] conduct.

Second: [Defendant] acted with [conscious disregard of a great risk of serious harm] [deliberate indifference].[255]

Third: There was some type of relationship between [defendant] and [plaintiff] that distinguished [plaintiff] from the public at large.

Fourth: [Defendant's] action made [plaintiff] more vulnerable to [describe the harm].

The first of these four elements requires [plaintiff] to show that [the harm to [plaintiff]] [describe harm to plaintiff] was a foreseeable and fairly direct result of [defendant's] conduct. This element includes two related concepts: foreseeability and directness. Foreseeability concerns whether [defendant] should have foreseen [the harm at issue] [that [describe harm]]. Directness concerns whether it is possible to draw a direct enough connection between [defendant's] conduct and [the harm at issue] [describe harm]. To consider the question of directness, you should look at the chain of events that led to [the harm at issue] [describe harm], and you should consider where

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[253] Use this phrase if the plaintiff claims harm from a third party.

[254] Use this phrase if the plaintiff claims harm from a source other than an individual (e.g., from a medical problem).

[255] Select the appropriate level of culpability. See Comment for a discussion of this element.

[defendant's] conduct fits within that chain of events, and whether that conduct can be said to be a fairly direct cause of [the harm at issue] [describe harm]. In appropriate cases, the sufficient directness requirement can be met even if some other action or event comes between the defendant's conduct and the harm to the plaintiff.

[[For cases in which the requisite level of culpability is subjective deliberate indifference:][256] The second of these four elements requires [plaintiff] to show that [defendant] acted with deliberate indifference. To show that [defendant] was deliberately indifferent, [plaintiff] must show that [defendant] knew that there was a strong likelihood of harm to [plaintiff], and that [defendant] disregarded that risk by failing to take reasonable measures to address it. [Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that the risk of harm was obvious, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk,[257] then you must find that [he/she] was not deliberately indifferent.]]

[For cases in which the requisite level of culpability is objective deliberate indifference, see Comment for discussion of the second element.]

[[For cases in which the requisite level of culpability is gross negligence or arbitrariness that shocks the conscience:][258] The second of these four elements requires [plaintiff] to show that [defendant] acted with conscious disregard of a great risk of serious harm. It is not enough to show that [defendant] was careless or reckless. On the other hand, [plaintiff] need not show that [defendant] acted with the purpose of causing harm. Rather, [plaintiff] must show that [defendant] knew there was a great risk of serious harm, and that [defendant] consciously disregarded that risk.]

The third of these four elements requires [plaintiff] to show that there was some type of relationship between [defendant] and [plaintiff] that distinguished [plaintiff] from the public at large. It is not enough to show that [defendant's] conduct created a risk to the general public. Instead, [plaintiff] must show that [defendant's] conduct created a foreseeable risk to [plaintiff] [a definable

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[256] This option can be used if the court concludes that the requisite level of culpability is subjective deliberate indifference. If the court concludes that the appropriate standard is objective deliberate indifference, a different formulation would be necessary. The Court of Appeals has not yet determined definitively which standard is appropriate in state-created danger cases. See Comment.

[257] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

[258] This option is designed for use in cases where the requisite level of culpability is gross negligence or arbitrariness that shocks the conscience. *See* Comment (discussing the explanation of this standard provided in *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002)).

group of people including [plaintiff]][259].

Comment

To recover on a theory of state-created danger,[260] "a plaintiff must prove four elements: (1) the harm ultimately caused was foreseeable and fairly direct;" (2) the defendant possessed the requisite degree of culpable intent; "(3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed" for harm to occur. *Estate of Smith v. Marasco*, 318 F.3d 497, 506 (3d Cir. 2003).

These elements appear to overlap significantly. Though each element is discussed more fully below, the following rough summary may help to demonstrate the overlap: The first element, obviously, focuses on foreseeability. The second element, culpable intent, is formulated by weighing both the foreseeability of the harm and the defendant's opportunity to reflect on that risk of harm. The third element, the relationship between the state and the plaintiff, is designed to eliminate claims arising merely from a risk to the public at large; this element focuses on whether the plaintiff is a member of a discrete group whom the defendant subjected to a foreseeable risk. The fourth element again returns to the question of foreseeability and risk, this time by asking whether the defendant subjected the plaintiff to an increased risk of harm. The overlap among these elements shows their interconnected nature; but by elaborating this four-part test for liability, the Court of Appeals has indicated that each of the four elements adds something important to the analysis. The model therefore enumerates each element and attempts to explain its significance in terms that distinguish it from the others.

The first element. "The first element . . . requires that the harm ultimately caused was a foreseeable and a fairly direct result of the state's actions." *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 908 (3d Cir. 1997) (holding "that defendants . . . could not have foreseen that allowing construction workers to use an unlocked back entrance for access to the school building would result in the murderous act of a mentally unstable third party, and that the tragic harm which ultimately befell Diane Morse was too attenuated from defendants' actions to support liability"). Though the concepts of foreseeability and directness may largely overlap, they do express somewhat distinct concepts, both of which presumably should be conveyed to the jury.

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[259] Use the second of these options in cases where the plaintiff claims that the defendant's conduct created a risk to a group of which plaintiff was a member. In such cases, it may be advisable to explain what "a definable group of people" means in the context of the case.

[260] Citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the court of appeals held in *Betts v. New Castle Youth Development Center*, 621 F.3d 249 (3d Cir. 2010), that a plaintiff could not pursue a state-created danger claim based on the same facts as his Eighth Amendment claim, *see id.* at 260-61 ("Because these allegations fit squarely within the Eighth Amendment's prohibition on cruel and unusual punishment, we hold that the more-specific-provision rule forecloses Betts's substantive due process claims").

Foreseeability, of course, concerns whether the defendant should have foreseen the harm at issue. *See, e.g., Marasco*, 318 F.3d at 508 ("[T]he Smiths have presented sufficient evidence to allow a jury to find that at least some of the officers were aware of Smith's condition and should have foreseen that he might flee and suffer adverse medical consequences when SERT was activated."); *Phillips v. County of Allegheny*, 515 F.3d 224, 237 (3d Cir. 2008) ("We have never held that to establish foreseeability, a plaintiff must allege that the person who caused the harm had a 'history of violence.' Indeed, these types of cases often come from unexpected or impulsive actions which ultimately cause serious harm.").

Directness concerns whether the chain of causation is too attenuated for liability to attach. For example, in *Morse*, the Court of Appeals held both that the defendants could not have foreseen that leaving a back door unlocked would result in the murder of someone in the school building (i.e., that foreseeability was lacking), and that "[t]he causation, if any, is too attenuated" (i.e., that the harm was not a direct enough result of the defendant's actions). *Compare Phillips*, 515 F.3d at 240 (holding this element met where complaint's allegations justified the inference "that Michalski used the time, access and information given to him by the defendants to plan an assault on Mark Phillips and Ferderbar").

The second element. Prior to 1998, the Court of Appeals held that "[t]he second prong . . . asks whether the state actor acted with willful disregard for or deliberate indifference to plaintiff's safety." *Morse*, 132 F.3d at 910. "In other words, the state's actions must evince a willingness to ignore a foreseeable danger or risk." *Id.* In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court held that a "shocks-the-conscience test" governs substantive due process claims arising from high-speed chases, and that in the context of a high-speed chase that test requires "a purpose to cause harm." *Id.* at 854. The Court of Appeals has since made clear that state-created danger claims require "a degree of culpability that shocks the conscience." *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006).[261]

However, "the precise degree of wrongfulness required to reach the conscience-shocking

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[261] *See also Marasco*, 318 F.3d at 507 (noting that *Miller v. City of Philadelphia*, 174 F.3d 368, 374-75 (3d Cir.1999) "suggested that the 'shocks the conscience' standard [applies] to all substantive due process cases"); *Schieber v. City of Philadelphia*, 320 F.3d 409, 419 (3d Cir. 2003) (opinion of Stapleton, J.) ("[N]egligence is not enough to shock the conscience under any circumstances. . . . [M]ore culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure. Moreover, the same is true to the extent the responsibilities of the state actors require a judgment between competing, legitimate interests."); *id.* at 423 (reversing denial of summary judgment to police officers sued by parents who alleged their daughter was murdered after officers responded to 911 call but failed to enter daughter's apartment, "[b]ecause the record would not support a finding of more than negligence on the part of" the officers); *see also id.* at 423 (Nygaard, J., concurring) (stating that he did "not disagree with [Judge Stapleton's] analysis as far as it goes" but that the crux of the case was the plaintiff's failure to show an affirmative act on the part of the police).

level depends on the circumstances of a particular case." *Marasco*, 318 F.3d at 508. "The level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006); *see also, e.g.*, *Walter v. Pike County, Pa.*, 544 F.3d 182, 192-93 (3d Cir. 2008). "For example, in the custodial situation of a prison, where forethought about an inmate's welfare is possible, deliberate indifference to a prisoner's medical needs may be sufficiently shocking, while '[a] much higher fault standard is proper when a government official is acting instantaneously and making pressured decisions without the ability to fully consider the risks.'" *Marasco*, 318 F.3d at 508 (quoting *Miller*, 174 F.3d at 375). Between the deliberate indifference standard (appropriate to controlled environments where deliberation is practicable)[262] and the purpose to cause harm standard (applied to high-speed chases) is an intermediate standard–"arbitrariness"–that governs in instances that present neither the urgency of a high-speed chase nor a full opportunity for deliberate response.[263] *See Miller*, 174 F.3d at 375-77 & n.7 (where "a social worker act[ed] to separate parent and child," requiring "evidence of acts . . . that rose to a level of arbitrariness that shocks the conscience"); *see id.* at 375-76 (stating the applicable standard as "exceed[ing] both negligence and deliberate indifference, and reach[ing] a level of gross negligence or arbitrariness that indeed 'shocks the conscience'").[264]

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[262] In *Phillips*, Michalski was suspended and then fired from his job as a 911 dispatcher. After his suspension, two of his former dispatcher colleagues gave him information that would help him to locate Phillips (Michalski's ex-girlfriend's new boyfriend). After being fired, Michalski told his former colleagues that he had nothing to live for and that his ex-girlfriend and Phillips would "pay for putting him in his present situation." The dispatchers failed to contact Phillips, the ex-girlfriend, or the police departments of the areas in which those two people were located. Michalski then shot and killed his ex-girlfriend, her sister, and Phillips. *Phillips*, 515 F.3d at 228-29. The court of appeals held that the deliberate indifference standard applied to the dispatchers because they "had no information which would have placed them in a 'hyperpressurized environment.'" *Id.* at 241.

[263] Dictum in *Ye v. United States*, 484 F.3d 634 (3d Cir. 2007), briefly discusses some but not all of the points along this spectrum. *See id.* at 638 n.2 (discussing "intent-to-harm," "gross negligence," and "gross recklessness" standards, but omitting to mention deliberate-indifference standard).

[264] Subsequently, however, in *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (en banc), the Court of Appeals held that a family services worker's alleged failure to investigate in connection with a foster care placement "should be judged under the deliberate indifference standard," *id.* at 811.

Neither *Nicini* nor *Miller* was a state-created danger case (*Nicini* proceeded on a "special relationship" theory, while the plaintiff in *Miller* alleged that a social worker pursued a child abuse investigation without probable cause). But both *Nicini* and *Miller* involved substantive due process claims and the Court of Appeals applied the *Lewis* framework in both cases. For further discussion of the "special relationship" theory, see *infra* Instruction 4.16.

In other words, "except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience." *Marasco*, 318 F.3d at 509.[265] In *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 66 (3d Cir. 2002), the Court of Appeals provided some detail on the nature of this standard.[266] Specifically, the Court of Appeals held that the plaintiff must prove "that the defendant[paramedics] consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck." *Ziccardi*, 288 F.3d at 66; *see also Sanford*, 456 F.3d at 310 (holding that "the relevant question is whether the officer consciously disregarded a great risk of harm").[267]

In *Kaucher v. County of Bucks*, 455 F.3d 418 (3d Cir. 2006), the Court of Appeals noted uncertainty whether the deliberate-indifference test that applies under the *Lewis* substantive due

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[265] For example, the Court of Appeals has held that emergency medical technicians "who responded to an emergency in an apartment where a middle-aged man was experiencing a seizure" would be held to have violated substantive due process only if they "consciously disregard[ed] a substantial risk that [the man] would be seriously harmed by their actions." *Rivas v. City of Passaic*, 365 F.3d 181, 184, 196 (3d Cir. 2004); *see id.* at 196 (stating that this test would be met if the EMTs had falsely told police officers that the man was violent and had failed to tell the police officers that the man was suffering a seizure); *cf. Brown v. Commonwealth of Pennsylvania*, 318 F.3d 473, 481 (3d Cir. 2003) (holding that "EMTs who attempted to arrive at the scene of the incident as rapidly as they could" did not behave in a way that shocks the conscience).

[266] *See id.* at 66 n.6 (observing that the phrase 'gross negligence or arbitrariness that shocks the conscience' "is not well suited for th[e] purpose" of conveying the nature of the standard). Though *Ziccardi* is technically not a "state-created danger" case because the plaintiff alleged that the *Ziccardi* defendants injured the plaintiff themselves, rather than creating the danger of injury, *Ziccardi* applied the teachings of *Lewis* and is thus instructive here. *See Ziccardi*, 288 F.3d at 64; *see also Estate of Smith v. Marasco*, 430 F.3d 140, 154 n.10 (3d Cir. 2005) ("We think that the definition adopted in *Ziccardi* is useful in assessing [state-created danger] claims.").

[267] Despite stating the standard as one involving conscious disregard, the *Sanford* court also noted in the next sentence – and apparently with respect to the same point on the shocks-the-conscience spectrum – that "it is possible that actual knowledge of the risk may not be necessary where the risk is 'obvious.'" *Sanford*, 456 F.3d at 310. Earlier in its opinion (as mentioned in the footnote following this one), the *Sanford* court discussed a similar point in connection with the deliberate indifference standard, *see id.* at 309 & n.13.

process framework is an objective or a subjective test, see id. at 428 n.5.[268] The Court observed that the Eighth Amendment deliberate-indifference test is subjective, *see id.* at 427, but that the deliberate-indifference test for municipal liability is objective, *see id.* at 428 n.5. The *Kaucher* Court "recognize[d] strong arguments weighing in favor of both standards," but declined to decide the question because the plaintiff's claim failed under either standard. *Id.*[269]

In *Walter v. Pike County*, 544 F.3d 182 (3d Cir. 2008), the Court of Appeals considered claims arising from the July 2002 murder of a man who was pressing charges against the murderer for sexually assaulting the victim's daughters. The plaintiffs' claims focused on two sets of law enforcement actions: first, law enforcement officials' August 2001 actions in involving the father in the perpetrator's arrest on the sexual assault charges, and second, the officials' failure to warn the father of the perpetrator's subsequent menacing behavior (in the summer and perhaps the spring of 2002) toward the police chief who arrested him. In holding that the plaintiffs' state-created danger claims failed, the Court of Appeals disaggregated the defendants' actions at the time of the arrest from the defendants' state of mind when they later failed to warn the victim about the perpetrator's menacing behavior. The Court of Appeals held that (1) at the time of the arrest in 2001 the defendants lacked the requisite culpable state of mind, and (2) at the time of the subsequent failure to warn in 2002 the defendants may have had a culpable state of mind but they took no affirmative act that would ground a state-created danger claim. *See id.* at 192-96. Under *Walter*, it appears that some state-created danger claims may fail because the culpable state of mind occurs too long after the affirmative act.

The third element. The third element requires "a relationship between the state and the

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[268] *See also Sanford*, 456 F.3d at 309 & n.13 (noting "the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known," but "leav[ing] to another day the question whether actual knowledge is required to meet the culpability requirement in state-created danger cases").

[269] The plaintiffs in *Kaucher* were a corrections officer and his spouse, both of whom contracted drug-resistant Staphylococcus aureus infections. The Court of Appeals upheld the dismissal of the plaintiffs' substantive due process claims, on the ground that the evidence would not permit a reasonable jury to find deliberate indifference on the part of the defendants. *See id.* at 431. The *Kaucher* court, relying on *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), for the proposition "that the Constitution does not guarantee public employees a safe working environment," *Kaucher*, 455 F.3d at 424, distinguished claims by corrections employees from prisoner claims. Noting a recent verdict in favor of inmates who had contracted staph infections, the Court of Appeals observed that the inmates had presented evidence of conditions that "did not affect corrections officers, who were free to seek outside medical treatment, who did not live in the jail, and who received detailed instructions on infectious disease prevention in the jail's standard operating procedures." *Id.* at 429 n.6. More generally, the Court of Appeals noted "well recognized differences between the duties owed to prisoners and the duties owed to employees and others whose liberty is not restricted." *Id.* at 430.

person injured . . . during which the state places the victim in danger of a foreseeable injury." *Kneipp v. Tedder*, 95 F.3d 1199, 1209 (3d Cir. 1996) (holding that jury could find third element met where defendant, "exercising his powers as a police officer, placed [the plaintiff] in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold weather").[270] This element excludes cases "where the state actor creates only a threat to the general population." *Morse*, 132 F.3d at 913 (citing *Martinez v. California*, 444 U.S. 277, 285 (1980)); *see also Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995) ("When the alleged unlawful act is a policy directed at the public at large–namely a failure to protect the public by failing adequately to screen applicants for membership in a volunteer fire company"–the requisite relationship is absent). However, the Court of Appeals has suggested that the plaintiff need not always show that injury to the specific plaintiff was foreseeable–i.e., that "in certain situations, [a plaintiff may] bring a state-created danger claim if the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions." *Morse*, 132 F.3d at 913 (dictum).[271] "The primary focus when making this determination is foreseeability." *Id.*

The fourth element. "The final element . . . is whether the state actor used its authority to create an opportunity which otherwise would not have existed for the specific harm to occur," *Morse*, 132 F.3d at 914, or, in other words, "whether, but for the defendants' actions, the plaintiff would have been in a less harmful position," *Marasco*, 318 F.3d at 510.[272] In *Morse*, the Court of Appeals reasoned that "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more

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[270] *See also Rivas*, 365 F.3d at 197 ("If the jury credits ... testimony that [the police] were told by the EMTs that Mr. Rivas physically assaulted Rodriguez but were not given any information about his medical condition, it is foreseeable that Mr. Rivas would be among the 'discrete class' of persons placed in harm's way as a result of [the EMTs'] actions.").

[271] *See also Marasco*, 318 F.3d at 507 ("In *Morse* we held that the third requirement–a relationship between the state and the plaintiff–ultimately depends on whether the plaintiff was a foreseeable victim, either individually or as part of a discrete class of foreseeable victims."); *Bright*, 443 F.3d at 281 (third element requires "a relationship between the state and the plaintiff ... such that 'the plaintiff was a foreseeable victim of the defendant's acts,' or a 'member of a discrete class of persons subjected to the potential harm brought about by the state's actions,' as opposed to a member of the public in general").

[272] *See also Rivas*, 365 F.3d at 197 ("A reasonable factfinder could conclude that the EMTs' decision to call for police backup and then (1) inform the officers on their arrival that Mr. Rivas had assaulted [an EMT], (2) not advise the officers about Mr. Rivas's medical condition, and (3) abandon control over the situation, when taken together, created an opportunity for harm that would not have otherwise existed.").

appropriately characterized as an affirmative act or an omission." *Morse*, 132 F.3d at 915.[273] More recently, however, the Court of Appeals has required a "showing that state authority was affirmatively exercised," on the theory that "[i]t is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." *Bright*, 443 F.3d at 282.[274] The panel majority in *Bright* stressed that the fourth element requires an affirmative act on the defendant's part. *See id.*[275] Moreover, in *Kaucher*, the Court of Appeals noted that "a specific and deliberate exercise of state authority, while necessary to satisfy the fourth element of the test, is not sufficient. There must be a direct causal relationship between the affirmative act of the state and plaintiff's harm. Only then will the affirmative act render the plaintiff 'more vulnerable to danger than had the state not acted at all.'" *Kaucher*, 455 F.3d at 432 (quoting *Bright*, 443 F.3d at 281).[276]

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[273] *Compare Kneipp*, 95 F.3d at 1210 (concluding that a reasonable jury could find the fourth element satisfied where "[t]he affirmative acts of the police officers ... created a dangerous situation").

[274] *See also Burella v. City of Philadelphia*, 501 F.3d 134, 146 (3d Cir. 2007) ("Jill Burella cannot succeed on her state-created danger claim because she fails to allege any facts that would show that the officers *affirmatively* exercised their authority in a way that rendered her more vulnerable to her husband's abuse.... As in *Bright*, Jill Burella does not allege any facts that would establish that the officers did anything other than fail to act."); *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 255-56 (3d Cir. 2007) (following *Bright*); *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) (same).

[275] The dissent in *Bright*, by contrast, argued that the fourth element can be satisfied by combining an action with subsequent omissions. *See Bright*, 443 F.3d at 290 (Nygaard, J., dissenting) ("The conduct alleged here, when taken together, contains both an initial act–the confrontation between the parole officer and Koschalk–and then an omission–the parole officer's abdication of his responsibility to take action on a clear parole violation.").

[276] *See Phillips*, 515 F.3d at 236 (following *Kaucher*). The requirement of a causal relationship between the affirmative act and the plaintiff's harm appears to have been the dispositive problem for a state-created danger claim dismissed in *Bennett v. City of Philadelphia*, 499 F.3d 281 (3d Cir. 2007). In *Bennett*, the Bennett family was placed under the Philadelphia Department of Human Services' supervision because the mother posed a serious risk of harm to her children. Some three years later, DHS successfully petitioned the family court to discharge its supervision of the family based on its contention that it could not locate the family. Some three years after that, DHS received a hotline report that the man with whom the Bennett children then lived beat them; but whatever actions were taken by the DHS worker assigned to investigate that report failed to prevent one of the Bennett children from being beaten to death three days after the hotline report. The surviving children based their state-created danger claim against DHS on the argument "that the closing of their dependency case rendered them more vulnerable to harm by their mother and acquaintances because closing the case effectively prevented a private source of aid, the Child Advocate, from looking for the children." *Bennett*, 499 F.3d at

The Court of Appeals has summarized the fourth element's requirements thus: "The three necessary conditions to satisfy the fourth element of a state-created danger claim are that: (1) a state actor exercised his or her authority,[277] (2) the state actor took an affirmative action, and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all." *Ye v. United States*, 484 F.3d 634, 639 (3d Cir. 2007). In *Ye*, the plaintiff presented evidence that despite the plaintiff's cardiac symptoms the defendant, a government-employed physician, told him there was nothing to worry about; that due to this assurance, he and his family failed to seek timely emergency medical care; and that due to that failure, he suffered permanent physical harm. *See id.* at 635-36. The Court of Appeals indicated that this evidence would justify a reasonable jury in finding that the fourth element's first and third sub-elements were met – i.e., that the physician was exercising state authority, *see id.* at 639-40, and that but for the physician's assurance that he was fine, the plaintiff would have sought emergency treatment, *see id.* at 642-43. But the Court of Appeals held that no reasonable jury could find for the plaintiff on the second sub-element – the "affirmative action" requirement – because "a mere assurance cannot form the basis of a state-created danger claim." *Id.* at 640. The *Ye* Court, noting that the state-created danger doctrine is an outgrowth of the Supreme Court's discussion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), relied on language in *DeShaney* stating that "[i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *Ye*, 484 F.3d at 640-41 (quoting *DeShaney*, 489 U.S. at 200). The Court of Appeals reasoned that just as an assurance that someone will be arrested does not meet the affirmative-act requirement, see *Bright*, 443 F.3d at 284, neither does a doctor's assurance that the patient is fine, *see Ye*, 484 F.3d at 641-42.

The *Ye* court recognized that the *DeShaney* opinion focused much of its attention on the "special relationship" theory of liability (as distinct from a state-created danger theory), *see Ye*, 484 F.3d at 641, which raises some question as to whether the "deprivation of liberty" concept should provide the template for judging all state-created danger claims. Perhaps for this reason, the *Ye*

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289. The court upheld the grant of summary judgment to the defendants, reasoning that "DHS' case closure did not prevent the Child Advocacy Unit from searching for the children," and thus that "Appellants failed to demonstrate a material issue of fact that the City used its authority to create an opportunity for the Bennett sisters to be abused that would not have existed absent DHS intervention." *Id.*

[277] Having set forth the first sub-element (requiring exercise of government authority), the *Ye* Court acknowledged that this sub-element merely duplicates the "state action" requirement for all Section 1983 claims (see supra Instructions 4.4 through 4.4.3): The court rejected the defendant's contention "that there exists an independent requirement that the 'authority' exercised must be peculiarly within the province of the state," and explained that "[t]he 'authority' language is simply a reflection of the 'state actor' requirement for all § 1983 claims." *Id.* at 640.

Court noted that "[t]he act that invades a plaintiff's personal liberty may not always be a restraint, as in the special-relationship context." *Ye*, 484 F.3d at 641 n.4. *See, e.g.*, *Phillips*, 515 F.3d at 229, 243 (holding that complaint properly alleged state-created danger claim where it alleged that 911 dispatchers gave their co-worker confidential information that enabled him to locate and kill his ex-girlfriend's current boyfriend).

See the discussion of the second element, above, for a summary of *Walter v. Pike County*, 544 F.3d 182 (3d Cir. 2008), in which the plaintiffs' claims failed because the defendants' affirmative acts occurred at a time when the defendants did not (yet) have the requisite culpable state of mind.

4.15 Section 1983 – High-Speed Chase

Model

[Plaintiff] claims that [defendant] violated [plaintiff's] Fourteenth Amendment rights by [describe the high-speed chase].

To establish this claim, [plaintiff] must prove both of the following things by a preponderance of the evidence:

First: [Defendant] [describe [plaintiff's] allegations concerning the high-speed chase].

Second: [Defendant] acted for the purpose of causing harm unrelated to the goal of [apprehending [plaintiff]] [doing [his/her] job as a law enforcement officer]. It is not enough for [plaintiff] to show that [defendant] was careless or even reckless in pursuing [plaintiff]. [Plaintiff] must prove that [defendant] acted for the purpose of causing harm unrelated to the valid goal of pursuing [plaintiff].

Comment

"[H]igh speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998).[278] "[I]n a high speed

[278] Such claims will be governed by substantive due process rather than Fourth Amendment standards, because there is no "seizure" for Fourth Amendment purposes either during a high-speed chase or even when the police accidentally crash into a suspect. *See Lewis*, 523 U.S. at 843-44; compare infra note [xxx] (discussing possibility that seizure might result from use of force during high-speed chase). By contrast, when police "s[eek] to stop [a suspect] by means of a roadblock and succeed[] in doing so[,] [t]hat is enough to constitute a 'seizure' within the meaning of the Fourth Amendment," and the seizure will be evaluated under the Fourth Amendment reasonableness standard. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989); *see also Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) (noting that law enforcement officer defendant did not dispute "that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a [Fourth Amendment] 'seizure'").

Prior to the Supreme Court's decision in *Lewis*, the Court of Appeals had already applied the "shocks the conscience" standard to police pursuit claims. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1308-09 (3d Cir. 1994) (en banc). Because *Lewis* provides a more specific articulation of the "shocks the conscience" standard as applied to police pursuit cases, the model instruction follows *Lewis*.

automobile chase aimed at apprehending a suspected offender .... only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.* at 836. The *Lewis* Court rejected a less demanding standard (such as deliberate indifference) because it reasoned that the decision whether to pursue a high-speed chase had to be made swiftly and required police to weigh competing concerns: "on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders." *Id.* at 853. Based on the conclusion that "the officer's instinct was to do his job as a law enforcement officer, not to induce [the motorcycle driver's] lawlessness, or to terrorize, cause harm, or kill," the Court found no substantive due process violation in *Lewis*. *Id.* at 855.

Courts should not "second guess a police officer's decision to initiate pursuit of a suspect so long as the officers were acting 'in the service of a legitimate governmental objective,'" such as "to apprehend one fleeing the police officers' legitimate investigation of suspicious behavior." *Davis v. Township of Hillside*, 190 F.3d 167, 170 (3d Cir. 1999) (quoting *Lewis*, 523 U.S. at 846). In *Davis*, the plaintiff asserted that a police car chasing a suspect bumped the suspect's car, causing the suspect to hit his head and pass out, which caused the suspect's car to collide with other cars, one of which hit and injured the plaintiff (a bystander). *See id.* at 169. Finding no "evidence from which a jury could infer a purpose to cause harm unrelated to the legitimate object of the chase," the Court of Appeals affirmed the grant of summary judgment to the defendants. *Id.* Judge McKee concurred but wrote separately to note that "if the record supported a finding that police gratuitously rammed [the suspect's] car, and if plaintiff properly alleged that they did so to injure or terrorize [the suspect], liability could still attach under *Lewis*." *Id.* at 172-73 (McKee, J., concurring); *see also id.* at 173 ("I do not read the majority opinion as holding that police can use any amount of force during a high speed chase no matter how tenuously the force is related to the legitimate law enforcement objective of arresting the fleeing suspect.").[279]

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[279] In at least some instances, the use of force by police during a high-speed chase could effect a seizure so as to trigger the application of Fourth Amendment standards. In explaining that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*," *Brower*, 489 U.S. at 597, the Court gave the following example:

> [I]n the hypothetical situation that concerned the Court of Appeals[,] [t]he pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means–his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

Id.; *see also Scott v. Harris*, 127 S. Ct. 1769, 1777-79 (2007) (using Fourth Amendment

4.16 Section 1983 – Duty to Protect Child in Foster Care

Model

When the state places a child in foster care, the state has entered into a special relationship with that child and this relationship gives rise to a duty under the Fourteenth Amendment to the United States Constitution. [Plaintiff] claims that [defendant] violated [his/her] duty by placing [[plaintiff] [child]][280] in foster care with John and Jane Doe. [The parties agree that] [Plaintiff claims that] *[describe abuse of plaintiff while in foster care]*.

To establish this claim, [plaintiff] must prove both of the following things by a preponderance of the evidence:

First: [Defendant] acted with deliberate indifference when [he/she] placed [plaintiff] in the Does' foster home.

Second: [Plaintiff] was harmed by that placement.

I will now proceed to give you more details on the first of these two requirements.

[Deliberate indifference means that [defendant] knew of a substantial risk that [Mr. Doe] [Ms. Doe] would abuse [plaintiff], and that [defendant] disregarded that risk. [Plaintiff] must show that [defendant] actually knew of the risk. If [defendant] knew of facts that [he/she] strongly suspected to be true, and those facts indicated a substantial risk that [Mr. Doe] [Ms. Doe] would abuse [plaintiff], [defendant] cannot escape liability merely because [he/she] refused to take the opportunity to confirm those facts. But keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for [plaintiff] to show that a reasonable person would have known, or that [defendant] should have known, of the risk to [plaintiff]. [Plaintiff] must show that [defendant] actually knew of the risk. If [plaintiff] proves that there was an obvious risk of abuse, you are entitled to infer from the obviousness of the risk that [defendant] knew of the risk. [However, [defendant] claims that even if there was an obvious risk, [he/she] was unaware of that risk. If you find that [defendant] was unaware of the risk,[281] then you must find that [he/she] was not

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excessive force analysis to assess claim arising from county deputy's decision to ram fleeing suspect's car with his bumper in order to end the chase).

[280] If the plaintiff is someone other than the child, then the child's name (rather than the plaintiff's name) should be inserted in appropriate places in this instruction.

[281] It is unclear who has the burden of proof with respect to a defendant's claim of lack of awareness of an obvious risk. *See* Comment 4.11.1.

deliberately indifferent.]][282]

Comment

"[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983." *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc).

The culpability requirement in such a "special relationship" case is governed by the framework set forth in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *See Nicini*, 212 F.3d at 809.[283] Under that framework, the plaintiff must show that the defendant's conduct "shocked the conscience"; the precise level of culpability required will vary depending on the circumstances, and especially on the availability (or not) of the opportunity for the defendant to deliberate before acting. *See id.* at 810. In *Nicini*, the Court of Appeals applied a "deliberate indifference" standard. *See id.* at 811 ("In the context of this case . . . Cyrus's actions in investigating the Morra home should be judged under the deliberate indifference standard.").[284] The *Nicini* court did not, however, decide

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[282] This paragraph provides a subjective definition of "deliberate indifference," drawn from the Eighth Amendment standard discussed in *Farmer v. Brennan*, 511 U.S. 825 (1994). As discussed in the Comment, Third Circuit precedent leaves open the possibility that a plaintiff could establish liability for failure to protect a child in foster care under an objective deliberate indifference standard. If the objective standard applies, then this paragraph must be redrafted accordingly.

[283] Some district court decisions within the Third Circuit have recognized an alternative theory of liability: Under the "'professional judgment' standard . . . . , defendants could be held liable if their actions were 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.'" *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367, 372 (E.D. Pa. 1994) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982))). The Court of Appeals in *Nicini* declined to "decide whether, consistent with *Lewis*, [the professional judgment] standard could be applied to" substantive due process claims for failure to protect a child in foster care. *Nicini*, 212 F.3d at 811 n. 9.

[284] *Compare Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (3d Cir. 1999) ("[A] social worker acting to separate parent and child . . . . rarely will have the luxury of proceeding in a deliberate fashion . . . . As a result, . . . the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience.'").

whether this "deliberate indifference" standard should follow the subjective "deliberate indifference" standard applied to prisoners' Eighth Amendment claims, *see Nicini*, 212 F.3d at 811 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)),[285] or whether a defendant's "failure to act in light of a risk of which the official should have known, as opposed to failure to act in light of an actually known risk, constitutes deliberately indifferent conduct in this setting," because under either standard the court held the plaintiff's claim should fail, *see Nicini*, 212 F.3d at 812 (holding that defendant's conduct "amounted, at most, to negligence").

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[285] For a discussion of this standard, see the Comment to Instruction 4.11, supra.

A number of circuits have adopted a subjective standard. *See, e.g.*, *Hernandez ex rel. Hernandez v. Texas Dept. of Protective and Regulatory Services*, 380 F.3d 872, 882 (5th Cir. 2004) ("[T]he central inquiry for a determination of deliberate indifference must be whether the state social workers were aware of facts from which the inference could be drawn, that placing children in the Clauds foster home created a substantial risk of danger."); *Lewis v. Anderson*, 308 F.3d 768, 775-76 (7th Cir. 2002) ("If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under K.H. the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely."); *Ray v. Foltz*, 370 F.3d 1079, 1083-84 (11th Cir. 2004) (issue is whether "defendants had actual knowledge or deliberately failed to learn of the serious risk to R.M. of the sort of injuries he ultimately sustained").

Instructions for Employment Discrimination Claims Under Title VII

Numbering of Title VII Instructions

5.0 Title VII Introductory Instruction

5.1 Elements of a Title VII Claim

5.1.1 Disparate Treatment — Mixed-Motive

5.1.2 Disparate Treatment — Pretext

5.1.3 Harassment — Quid Pro Quo

5.1.4 Harassment — Hostile Work Environment — Tangible Employment Action

5.1.5 Harassment — Hostile Work Environment — No Tangible Employment Action

5.1.6 Disparate Impact

5.1.7 Retaliation

5.2 Title VII Definitions

5.2.1 Hostile or Abusive Work Environment

5.2.2 Constructive Discharge

5.3 Title VII Defenses

5.3.1 Bona Fide Occupational Qualification

5.3.2 Bona Fide Seniority System

5.4 Title VII Damages

5.4.1 Compensatory Damages — General Instruction

5.4.2 Punitive Damages

5.4.3 Back Pay — For Advisory or Stipulated Jury

5.4.4 Front Pay — For Advisory or Stipulated Jury

5.4.5 Nominal Damages

5.0 Title VII Introductory Instruction

Model

In this case the Plaintiff _____ makes a claim under a Federal Civil Rights statute that prohibits employers from discriminating against an employee [prospective employee] in the terms and conditions of employment because of the employee's race, color, religion, sex, or national origin.

More specifically, [plaintiff] claims that [he/she] was [describe the employment action at issue] by the defendant _____ because of [plaintiff's] [protected status].

[Defendant] denies that [plaintiff] was discriminated against in any way. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

Note on the Relationship Between Title VII Actions and Actions Brought Under the Equal Pay Act

A claim for sex-based wage discrimination can potentially be brought under either the Equal Pay Act, or Title VII, or both. There are some similarities, and some important differences, between a claim under the Equal Pay Act and a Title VII action for sex-based wage discrimination.

The most important similarity between the two actions is that the affirmative defenses set forth in the Equal Pay Act — (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; and (iv) a differential based on any other factor other than sex — are applicable to Title VII actions for sex-based wage discrimination. This was made clear by the Bennett Amendment to Title VII. See the discussion in *County of Washington v. Gunther*, 452 U.S. 161 (1981).

The most important differences between the two actions are:

1. The Equal Pay Act does not require proof of intent to discriminate. The plaintiff recovers under the Equal Pay Act by proving that she received lower pay for substantially equal work. In contrast, Title VII claims for disparate treatment require proof of an intent to discriminate. *See* Lewis

and Norman, *Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). But Title VII does not require the plaintiff to prove the EPA statutory requirements of "equal work" and "similar working conditions".

In *Gunther, supra,* the Supreme Court explained the importance of retaining Title VII recovery as an alternative to recovery under the Equal Pay Act:

> Under petitioners' reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief -- no matter how egregious the discrimination might be -- unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Moreover, to cite an example arising from a recent case, *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioners' interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

452 U.S. at 178-179.

2. Title VII's burden-shifting scheme (see Instructions 5.1.1, 5.1.2) differs from the burdens of proof applicable to an action under the Equal Pay Act. The difference was explained by the Third Circuit in *Stanziale v. Jargowsky,* 200 F.3d 101, 107-108 (3d Cir. 2000), a case in which the plaintiff brought claims under Title VII, the ADEA, and the Equal Pay Act:

> Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm. The plaintiff must first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing "equal work"--work of substantially equal skill, effort and responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1413-14 (3rd Cir. 1989). The burden of persuasion then shifts to the employer to demonstrate the applicability of one of the four affirmative defenses specified in the Act. Thus, the employer's burden in an Equal Pay Act claim -- being one of ultimate persuasion -- differs significantly from its burden in an ADEA [or Title VII] claim.

Because the employer bears the burden of proof at trial, in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense "so clearly that no rational jury could find to the contrary." *Delaware Dept. of Health*, 865 F.2d at 1414.

The employer's burden is significantly different in defending an Equal Pay Act claim for an additional reason. The Equal Pay Act prohibits differential pay for men and women when performing equal work "*except where such payment is made pursuant to*" one of the four affirmative defenses. 29 U.S.C. § 206(d)(1) (emphasis added). We read the highlighted language of the statute as requiring that the employer submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity. See also *Delaware Dept. of Health*, 865 F.2d at 1415 (stating that "the correct inquiry was . . . whether, viewing the evidence most favorably to the [plaintiff], a jury could *only* conclude that the pay discrepancy resulted from" one of the affirmative defenses (emphasis added)). Thus, unlike an ADEA or Title VII claim, where an employer need not prove that the proffered legitimate nondiscriminatory reasons actually motivated the salary decision, in an Equal Pay Act claim, an employer must submit evidence from which a reasonable factfinder could conclude that the proffered reasons actually motivated the wage disparity.

3. The Equal Pay Act exempts certain specific industries from its coverage, including certain fishing and agricultural businesses. *See* 29 U.S.C. § 213. These industries are not, however, exempt from Title VII.

4. In contrast to Title VII, the Equal Pay Act has no coverage threshold defined in terms of the employer's number of employees.

5. The statute of limitations for backpay relief is longer under the EPA. As stated in Lewis and Norman, *Employment Discrimination Law and Practice* § 7.20 (2d ed. 2001):

> An EPA action is governed by the FLSA [Fair Labor Standards Act] statute of limitations. The FLSA provides a two year statute of limitations for filing, three years in the case of a "willful" violation. These statutes of limitation compare favorably from the plaintiff's perspective with the 180-day or 300-day administrative filing deadlines of Title VII.

Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. § 2000e-5(e), can include "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." *Id.* § 2000e-5(e)(3)(A); *see Mikula v. Allegheny*

County, 583 F.3d 181, 185-86 (3d Cir. 2009) (applying Section 2000e-5(e)(3)(A)).[1] This amendment brings the accrual date for a Title VII claim more in line with the EPA mechanism, in which an EPA claim arises each time the employee receives lower pay than male employees doing substantially similar work.

6. "The Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts." *County of Washington v. Gunther,* 452 U.S. 161, 175, n.14 (1981).

Where the plaintiff claims that wage discrimination is a violation of both Title VII and the Equal Pay Act, it will be necessary to give two sets of instructions, with the exception that the affirmative defenses provided by the Equal Pay Act (see Instructions 11.2.1-11.2.4) will be applicable to both claims. If a claim for sex-based wage discrimination is brought under Title VII only, then these Title VII instructions should be used, with the proviso that where sufficient evidence is presented, the defendant is entitled to an instruction on the affirmative defenses set forth in the Equal Pay Act. See Instructions 11.2.1-11.2.4 for instructions on those affirmative defenses.

Religious Organizations

Title VII allows religious organizations to hire and employ employees on the basis of their religious beliefs. 42 U.S.C. § 2000e-1(a) (Title VII claim for religious discrimination cannot be brought against a "religious corporation, association, educational institution or society"). In *Leboon v. Lancaster Jewish Community Center Assoc.,* 503 F.3d 217, 226 (3d Cir. 2007), the court listed the following factors as pertinent to whether a particular organization is within Title VII's exemption for religious organizations:

> Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

In *Leboon,* the court found the defendant, a Jewish Community Center, to be "primarily a religious organization" because it identified itself as such; it relied on coreligionists for financial support; area rabbis were involved in management decisions; and board meetings began with Biblical readings and

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[1] *See also Noel v. Boeing Co.*, 2010 WL 3817090, at *6 (3d Cir. 2010) (holding that Section 2000e-5(e)(3)(A) "does not apply to failure-to-promote claims").

"remained acutely conscious of the Jewish character of the organization." The fact that the Center engaged in secular activities as well was not dispositive. Id. at 229-30. Accordingly the plaintiff, an evangelical Christian who was fired from her position as bookkeeper, could not recover under Title VII on grounds of religious discrimination.

By its terms, Title VII does not confer upon religious organizations the right to discriminate against employees on the basis of race, sex, and national origin. But with respect to hiring decisions involving clergy, the Third Circuit has followed other circuits in establishing a "ministerial exception" to Title VII. *Petruska v. Gannon University,* 462 F.3d 294 (3d Cir. 2006). The *Petruska* Court explained the ministerial exception as follows:

> Every one of our sister circuits to consider the issue has concluded that application of Title VII to a minister-church relationship would violate — or would risk violating — the First Amendment and, accordingly, has recognized some form of the ministerial exception. To the extent that a claim involves the church's selection of clergy — in other words, its choice as to who will perform particular spiritual functions — most of these circuits have held that the exception bars any inquiry into a religious organization's underlying motive for the contested employment decision. . . . Because we conclude that a federal court's resolution of a minister's Title VII discrimination or retaliation claim would infringe upon First Amendment protections, we now join these courts in adopting the exception. . . .
>
> The ministerial exception, as we conceive it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions.

462 F.3d at 303-307 (footnotes omitted). As applied to the facts of *Petruska*, the court held that the ministerial exception barred sexual harassment and retaliation claims based on a religious school's decisions to restructure its ministry — decisions which resulted in the plaintiff being effectively demoted. These were decisions "about who would perform spiritual functions and about how those functions would be divided." 462 F.3d at 307-8.

Title VII Excludes RFRA Claims for Job-Related Federal Religious Discrimination:

In *Francis v. Mineta,* 505 F.3d 266, 270-71 (3d Cir. 2007), an employee attempted to bring an employment discrimination action under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4. (The employee had failed to exhaust administrative remedies with the EEOC, so Title VII was unavailable to him.) The court held that "nothing in RFRA alters the exclusive nature of Title VII with regard to employees' claims of religion-based employment discrimination." The court relied on the legislative history of RFRA, which demonstrated that "Congress did not intend RFRA to create a vehicle for allowing religious accommodation claims in the context of federal employment to do an end run around the legislative scheme of Title VII.."

Title VII Protection of Pregnancy:

In *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008), the plaintiff alleged that she was fired for having an abortion. She claimed protection under Title VII, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). The question of first impression in the Circuit was whether Title VII protects women who have elected to terminate their pregnancies. The court noted that the basic principle of the Pregnancy Discrimination Act "is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." Id. at 364. The court relied on EEOC guidelines and the legislative history of the Pregnancy Discrimination Act to hold that "an employer may not discriminate against a woman employee because she has exercised her right to have an abortion." Id. at 365. The court held that for an employee to establish a *prima facie* case of pregnancy discrimination, she must show 1) that she was pregnant and that the employer knew it; 2) that she was qualified for her job; 3) that she suffered an adverse employment decision; and 4) that there was a "nexus" between her pregnancy or pregnancy-related decision and the adverse employment decision. Id. at 365.

On the subject of pension accrual rules that predated the enactment of the Pregnancy Discrimination Act, see *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1968 (2009) ("Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA.").

Interaction between disparate impact and disparate treatment principles

Concerning the interaction between disparate-impact and disparate-treatment principles under Title VII, *see Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (holding that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action," but also noting that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race").

Discrimination involving gender stereotypes

For a discussion of Title VII claims based on gender stereotyping, see *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) ("[I]t is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes.... Because both scenarios are plausible, the case presents a question of fact for the jury....").

5.1.1 Elements of a Title VII Claim— Disparate Treatment — Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] [protected status] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [plaintiff's protected status] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [protected status] was a "motivating factor" if [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:

If you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled to damages. [Plaintiff] is not entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [protected class] had played no role in the employment decision.**]**

Comment

The Supreme Court has ruled that direct evidence is not required for a plaintiff to prove that discrimination was a motivating factor in a "mixed-motive" case, i.e., a case in which an employer had both legitimate and illegitimate reasons for making a job decision. *Desert Palace Inc. v. Costa,* 539 U.S. 90 (2003). The *Desert Palace* Court concluded that in order to be entitled to a mixed-motive instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." Id. at 95-96 (internal quotation omitted). The mixed-motive instruction above — including the instruction on the affirmative defense — tracks the instructions approved in *Desert Palace*.

While direct evidence is not required to make out a mixed motive case, it is nonetheless true that the distinction between "mixed-motive" cases and "pretext" cases is often determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this may be sufficient to show that the defendant's activity was motivated at least in part by animus toward a protected class, and therefore a "mixed-motive" instruction is warranted. If the evidence of discrimination is only circumstantial, then the defendant can argue that there was no animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 5.1.2 should be given. *See generally Stackhouse v. Pennsylvania State Police,* 2006 WL 680871 at *4 (M.D.Pa. 2006) ("A pretext theory of discrimination is typically presented by way of circumstantial evidence, from which the finder of fact may infer the falsity of the employer's explanation to show bias. A mixed-motive theory of discrimination, however, is usually put forth by presenting evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.") (internal citations and quotations omitted).

On the proper use of a mixed-motive instruction — and the continuing viability of the mixed-motive/pretext distinction — see Matthew Scott and Russell Chapman, *Much Ado About Nothing — Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Discrimination Cases To Mixed-Motive*, 36 St. Mary's L.J. 395 (2005):

> Thus, a case properly analyzed under [42 U.S.C.] § 2000e-2(a) (what some commentators refer to as pretext cases) involves the plaintiff alleging an improper motive for the defendant's conduct, while the defendant disavows that motive and professes only a non-discriminatory motive. On the other hand, a true mixed motive case under [42 U.S.C.] § 2000e-2(m) involves either a defendant who . . . *admits* to a partially discriminatory reason for its actions, while also claiming it would have taken the same action were it not for the illegitimate rationale or . . . [there is] otherwise credible evidence to support such a finding.
>
> The rationale for the distinction . . . is simple. When the defendant renounces any illegal motive, it puts the plaintiff to a higher standard of proof that the challenged

> employment action was taken *because of* the plaintiff's race/color/religion/sex/national origin. But, the plaintiff, if successful, is entitled to the full panoply of damages under § 2000e-5. . . .
>
> At the same time, where the defendant is contrite and admits an improper motive (something no jury will take lightly), or there is evidence to support such a finding, the defendant's liability risk is reduced to declaratory relief, attorneys' fees and costs if the defendant proves it would have taken the same action even without considering the protected trait. The quid pro quo for this reduced financial risk is the lesser standard of liability (the challenged employment action need only be a motivating factor).

Thus, the distinction between mixed-motive and pretext cases is retained after *Desert Palace*. The Third Circuit has indicated that it retains that distinction. *See, e.g., Makky v. Chertoff,* 541 F.3d 205, 215 (3d Cir. 2008) ("A Title VII plaintiff may state a claim for discrimination under either the pretext theory set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or the mixed-motive theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), under which a plaintiff may show that an employment decision was made based on both legitimate and illegitimate reasons."). *See also Hanes v. Columbia Gas of Pennsylvania Nisource Co.,* 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit "adheres to a distinction between 'pretext' cases, in which the employee asserts that the employer's justification for an adverse action is false, and 'mixed-motives' cases, in which the employee asserts that both legitimate and illegitimate motivations played a role in the action"; "determinative factor" analysis applies to the former and "motivating factor" analysis applies to the latter).

Whether to give a mixed-motive or a pretext instruction (or both) is a question of law for the court. *Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1097-98 (3d Cir.1995). *See also Urban v. Beyer Corp. Pharmaceutical Div.,* 2006 WL 3289946 (D.N.J. 2006) (analyzing discrimination claim first under mixed-motive theory and then under pretext theory).

"Same Decision" Affirmative Defense in Mixed-Motive Cases

Where the plaintiff has shown intentional discrimination in a mixed motive case, the defendant can still avoid liability for money damages by demonstrating by a preponderance of the evidence that the same decision would have been made even in the absence of the impermissible motivating factor. If the defendant establishes this defense, the plaintiff is then entitled only to declaratory and injunctive relief, attorney's fees and costs. Orders of reinstatement, as well as the substitutes of back and front pay, are prohibited if a same decision defense is proven. 42 U.S.C. §2000e-5(g)(2)(B).

Failure to Rehire as an Adverse Employment Action

In *Wilkerson v. New Media Tech. Charter School, Inc.,* 522 F.3d 315, 320 (3d Cir. 2008), the court held that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII." The Instruction accordingly contains a bracketed alternative for failure to renew an employment arrangement as an adverse employment action.

Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for Employment

In *Makky v. Chertoff,* 541 F.3d 205, 215 (3d Cir. 2008), the court held that "a mixed-motive plaintiff has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain." The court noted that "[i]n this respect at least, requirements under *Price Waterhouse* do not differ from those of *McDonnell Douglas*." The *Makky* court emphasized that the requirement of an objective qualification was minimal and would arise only in specific and limited fact situations where the plaintiff "does not possess the objective baseline qualifications to do his/her job will not be entitled to avoid dismissal." The court explained the minimal qualification requirement as follows:

> This involves inquiry only into the bare minimum requirement necessary to perform the job at issue. *Typically, this minimum requirement will take the form of some type of licensing requirement, such as a medical, law, or pilot's license, or an analogous requirement measured by an external or independent body rather than the court or the jury.* * * * We caution that we are not imposing a requirement that mixed-motive plaintiffs show that they were subjectively qualified for their jobs, i.e., performed their jobs well. Rather, we speak only in terms of an absolute minimum requirement of qualification, best characterized in those circumstances that require a license or a similar prerequisite in order to perform the job.

Id. (Emphasis added.)

The *Makky* court held that the determination of whether a plaintiff had obtained an objective qualification for employment is a question of fact. But it would be extremely rare for the court to have to instruct the jury on whether the plaintiff has met an objective job requirement within the meaning of *Makky*. The examples given by the court are in the nature of licenses or certifications by an external body — in the vast majority of cases, the parties will not dispute whether the license or certification was issued. (In *Makky,* the requirement was that the employee have a security clearance, and he could not contest that his clearance was denied.) In the rare case in which the existence of an objective externally-imposed qualification raises a question of fact, the court will need to add a third element to the basic instruction. For example:

Third: [Plaintiff] was [properly licensed] [met the requirements of an independent body that set minimum requirements for [plaintiff's] job].

5.1.2 Elements of a Title VII Claim – Disparate Treatment — Pretext

Model

In this case [plaintiff] is alleging that [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a determinative factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] [protected status] was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff's] [protected status], the [adverse employment action] would not have occurred.

Comment

On the distinction between mixed-motive and pretext cases (and the continuing viability of that distinction), see the Commentary to Instruction 5.1.1.

The McDonnell Douglas Burden-Shifting Test

The Instruction does not charge the jury on the complex burden-shifting formula established for pretext cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas* formula a plaintiff who proves a prima facie case of discriminatory treatment raises a presumption of intentional discrimination. The defendant then has the burden of production, not persuasion, to rebut the presumption of discrimination by articulating a nondiscriminatory reason for its actions. If the defendant does articulate a nondiscriminatory reason, the plaintiff must prove intentional discrimination by demonstrating that the defendant's proffered reason was a pretext, hiding the real discriminatory motive.

In *Smith v. Borough of Wilkinsburg,* 147 F.3d 272, 280 (3d Cir. 1998), the Third Circuit declared that "the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision." The court also stated, however, that "[t]his does not mean that the instruction should include the technical aspects of the *McDonnell Douglas* burden shifting, a charge reviewed as unduly confusing and irrelevant for a jury." The court concluded as follows:

> Without a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

In *Pivirotto v. Innovative Systems, Inc.,* 191 F.3d 344, 347 n.1 (3d Cir. 1999), the Third Circuit gave extensive guidance on the place of the *McDonnell Douglas* test in jury instructions:

> The short of it is that judges should remember that their audience is composed of jurors and not law students. Instructions that explain the subtleties of the *McDonnell Douglas* framework are generally inappropriate when jurors are being asked to determine whether intentional discrimination has occurred. To be sure, a jury instruction that contains elements of the *McDonnell Douglas* framework may sometimes be required. For example, it has been suggested that "in the rare case when the employer has not articulated a legitimate nondiscriminatory reason, the jury must decide any disputed elements of the prima facie case

and is instructed to render a verdict for the plaintiff if those elements are proved." *Ryther* [*v. KARE 11*], 108 F.3d at 849 n.14 (Loken, J., for majority of en banc court). But though elements of the framework may comprise part of the instruction, judges should present them in a manner that is free of legalistic jargon. In most cases, of course, determinations concerning a prima facie case will remain the exclusive domain of the trial judge.

On proof of intentional discrimination, see *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-1067 (3d Cir. 1996) ("[T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.").

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993), the Supreme Court stated that a plaintiff in a Title VII case always bears the burden of proving whether the defendant intentionally discriminated against the plaintiff. The instruction follows the ruling in *Hicks*.

Determinative Factor

The reference in the instruction to a "determinative factor" is taken from *Watson v. SEPTA,* 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is "determinative factor", while the appropriate term in mixed-motive cases is "motivating factor"). *See also LeBoon v. Lancaster Jewish Community Ctr.,* 503 F.3d 217, 232 n.8 (3d Cir. 2007) (in a pretext case, the plaintiff must show that the prohibited intent was a "*determinative factor*" for the job action) (emphasis in original); *Atkinson v. Lafayette College,* 460 F.3d 447, 455 (3d Cir. 2006) ("Faced with legitimate, non-discriminatory reasons for Lafayette College's actions, the burden of proof rested with Atkinson to demonstrate that the reasons proffered were pretextual and that gender was a determinative factor in the decisions."); *Hanes v. Columbia Gas of Pennsylvania Nisource Co.,* 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit "adheres to a distinction between 'pretext' cases, in which the employee asserts that the employer's justification for an adverse action is false, and 'mixed-motives' cases, in which the employee asserts that both legitimate and illegitimate motivations played a role in the action"; "determinative factor" analysis applies to the former and "motivating factor" analysis applies to the latter).

The plaintiff need not prove that the plaintiff's protected status was the only factor in the challenged employment decision, but the plaintiff must prove that the protected status was a determinative factor. For example, if the employer fires women who steal office supplies but not men who steal office supplies, then the women's gender is a determinative factor in the firing even though there is another factor (stealing office supplies) which if applied uniformly might have justified the challenged employment decision. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

Pretext

The Third Circuit described standards for proof of pretext in *Doe v. C.A.R.S. Protection Plus, Inc.* 527 F.3d 358, 370 (3d Cir. 2008):

> In order to show pretext, a plaintiff must submit evidence which (1) casts doubt upon the legitimate reason proffered by the employer such that a fact-finder could reasonably conclude that the reason was a fabrication; or (2) would allow the fact-finder to infer that discrimination was more likely than not a motivating or determinative cause of the employee's termination. See *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); *Chauhan v. M. Alfieri Co., Inc*., 897 F.2d 123, 128 (3d Cir. 1990). Put another way, to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact-finder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, that the proffered reason is a pretext).

The *Doe* court's reference to "a motivating *or* determinative cause" in the pretext test seems to indicate that the two terms are interchangeable. But they are not, because a factor might "motivate" conduct and yet not be the "determinative" cause of the conduct — proof that the factor was determinative is thus a more difficult burden. The very distinction between pretext and mixed-motive cases is that in the former the plaintiff must show that discrimination is the "determinative" factor for the job action, while in the latter former the plaintiff need only prove that discrimination is a "motivating" (i.e., one among others) factor. *See, e.g., Stackhouse v. Pennsylvania State Police,* 2006 WL 680871 at *4 (M.D.Pa. 2006) ("Whether a case is classified as one of pretext or mixed-motive has important consequences on the burden that a plaintiff has at trial, and hence on the instructions given to the jury"; "determinative factor" analysis applies to the former and "motivating factor" analysis applies to the latter) (citing *Watson v. SEPTA,* 207 F.3d 207, 214-15 & n. 5 (3d Cir. 2000)). Accordingly, the instruction on pretext follows the standards set forth in *Doe* and *Fuentes,* with the exception that it uses only the term "determinative" and not the term "motivating."

Business Judgment

On the "business judgment" portion of the instruction, see *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991), where the court stated that "[b]arring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." The *Billet* court noted that "[a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision. Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid management decision." The *Billet* court cited favorably the First Circuit's decision in *Loeb v. Textron, Inc*., 600 F.2d 1003, 1012 n. 6 (1st Cir.1979), where the court stated that "[w]hile an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination."

Failure to Rehire as an Adverse Employment Action

In *Wilkerson v. New Media Tech. Charter School, Inc.,* 522 F.3d 315, 320 (3d Cir. 2008), the court held that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII." The Instruction accordingly contains a bracketed alternative for failure to renew an employment arrangement as an adverse employment action.

Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for Employment

In *Makky v. Chertoff,* 541 F.3d 205, 215 (3d Cir. 2008), the court declared that in both pretext and mixed-motive cases, a plaintiff "has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain." The court explained the minimal qualification requirement as a narrow one best expressed as "circumstances that require a license or a similar prerequisite in order to perform the job."

It would be extremely rare for the court to have to instruct the jury on whether the plaintiff has met an objective job requirement within the meaning of *Makky*. The examples given by the court are in the nature of licenses or certifications by an external body — in the vast majority of cases, the parties will not dispute whether the license or certification was issued. In the rare case in which the existence of an objective externally-imposed qualification raises a question of fact, the court will need to add a third element to the basic instruction. For example:

> Third: [Plaintiff] was [properly licensed] [met the requirements of an independent body that set minimum requirements for [plaintiff's] job].

5.1.3 Elements of a Title VII Claim — Harassment — Quid Pro Quo

Model

[Plaintiff] alleges that [his/her] supervisor [name of supervisor], subjected [him/her] to harassment. It is for you to decide whether [employer] is liable to [plaintiff] for the actions of [supervisor].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe activity] by [supervisor], because of [plaintiff's] [sex] [race] [religion] [national origin];

Second: [Supervisor's] conduct was not welcomed by [plaintiff];

Third: [Plaintiff's] submission to [supervisor's] conduct was an express or implied condition for receiving a job benefit or avoiding a job detriment;[2]

Fourth: [Plaintiff] was subjected to an adverse "tangible employment action"; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits; and

Fifth: [Plaintiff's] [rejection of] [failure to submit to] [supervisor's] conduct was a motivating factor in the decision to [describe the alleged tangible employment action].

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

[When a jury question is raised as to whether the harassing employee is the plaintiff's supervisor, the following instruction may be given:

[Defendant] is liable for any discriminatory harassment the plaintiff has proven if the plaintiff also proves by a preponderance of the evidence that [name of person] is a supervisor. A supervisor is one who had the power to hire, fire, demote, transfer, or discipline [plaintiff], to set work

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[2] This third element in the Instruction may require modification in some cases. See the Comment's discussion of *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282 (3d Cir. 2000), *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and 29 C.F.R. § 1604.11(a)(2).

schedules and pay rates, or to make other decisions that would affect the terms and conditions of [plaintiff's] employment, whether exercised alone or in connection with others.**]**

Comment

Instructions 5.1.3 through 5.1.5 address claims for harassment in violation of Title VII. A plaintiff asserting such a claim must show discrimination and must also establish the employer's liability for that discrimination.[3] The framework applicable to those two questions will vary depending on the specifics of the case.

The Supreme Court has declared that the "quid pro quo" and "hostile work environment" labels are not controlling for purposes of establishing employer liability. But the two terms do provide a basic demarcation for the kinds of harassment actions that are brought under Title VII. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 750 (1998) ("The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility. . . . The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.") In other words, these terms retain significance with respect to the first inquiry (showing discrimination) rather than the second (determining employer liability).

Showing discrimination. One way to show discrimination is through what is known as a "quid pro quo" claim; Instruction 5.1.3 provides a model for instructions on such a claim. Another way to show discrimination is through what is termed a "hostile work environment" claim; Instructions 5.1.4 and 5.1.5 provide models for instructions on such claims.

Instruction 5.1.3's third element is appropriate for use in quid pro quo cases where the supervisor expressly or impliedly conditioned a job benefit (or avoidance of a job detriment) on the plaintiff's submission to supervisor's conduct at the time of the conduct. "However, [Third Circuit] law contains no requirement that the plaintiff show that the employer implicitly or explicitly threatened retaliation when making the advance." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282 (3d Cir. 2000). So long as the plaintiff shows "that his or her response to unwelcome advances was subsequently used as a basis for a decision about compensation, etc. ...., the plaintiff need not show that submission was linked to compensation, etc. at or before the time when the advances occurred." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *See also* 29 C.F.R. § 1604.11(a)(2). In a case where the plaintiff rests the quid pro quo claim on the argument that the plaintiff's response was subsequently used as a basis for a decision concerning a job benefit

[3] A supervisor cannot be liable under Title VII for acts of harassment. *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) (concluding "that Congress did not intend to hold individual employees liable under Title VII").

or detriment, the third element in the model instruction should be revised or omitted.

Employer liability. Where an employee suffers an adverse tangible employment action as a result of a supervisor's discriminatory harassment, the employer is strictly liable for the supervisor's conduct. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment"); *Faragher v. City of Boca Raton,* 524 U.S. 775, 790 (1998) (stating that "there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown").

By contrast, when no adverse tangible employment action occurred, the employer has an affirmative defense:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765.

Instruction 5.1.3 is designed for use in cases that involve a tangible employment action. The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It should be noted that the failure to renew an employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII"). As discussed below, it is possible that a plaintiff might frame a case as a quid pro quo case even though it does not involve evidence of an adverse tangible employment action; in such instances, the *Ellerth / Faragher* affirmative defense will be available. See Instruction 5.1.5 for an instruction on that affirmative defense.

Unfulfilled threats. In some instances, a supervisor might threaten an adverse employment action but fail to act on the threat after the plaintiff rejects the supervisor's advances. In such a scenario, it is necessary to consider the implications for both the question of discrimination and the question of employer liability. On the question of discrimination, because such a claim "involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." *Ellerth*, 524 U.S. at 754. And on the question of

employer liability, because such a claim involves no tangible employment action, the *Ellerth / Faragher* affirmative defense will be available. In sum, such a case should be analyzed under the framework set forth in Instruction and Comment 5.1.5.

Submission to demands. In other instances, a supervisor's threat of an adverse employment action might succeed in securing the plaintiff's submission to the supervisor's demand and the supervisor might therefore take no adverse tangible employment action of a sort that would be reflected in the official records of the employer. On the question of proving discrimination, it is not entirely clear whether Third Circuit caselaw would require a "hostile environment" analysis in such a case. The *Robinson* court suggested in dictum that in

> cases in which an employee is told beforehand that his or her compensation or some other term, condition, or privilege of employment will be affected by his or her response to the unwelcome sexual advances .... , a quid pro quo violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At that point, the employee has been subjected to discrimination because of sex.... Whether the employee thereafter submits to or rebuffs the advances, a violation has nevertheless occurred.

Robinson, 120 F.3d at 1297. This aspect of *Robinson* is no longer good law with respect to cases in which the plaintiff rebuffs the supervisor's advances and no adverse tangible employment action occurs; as noted above, under *Ellerth* a plaintiff in such a case would need to meet the hostile environment standard for proving discrimination. What is less clear is whether the same is true for cases in which the plaintiff submits to the supervisor's advances. Neither *Ellerth* nor *Faragher* was such a case and those cases do not directly illuminate the question.

Similarly, on the question of employer liability *Ellerth* and *Faragher* do not directly address whether the *Ellerth / Faragher* affirmative defense would be available in such a case. The Second and Ninth Circuits have answered this question in the negative. The Second Circuit concluded that when a supervisor conditions an employee's continued employment on the employee's submission to the supervisor's sexual demands and the employee submits, this "classic quid pro quo" constitutes a tangible employment action that deprives the employer of the affirmative defense. *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002). In such a situation, the *Jin* court reasoned, it is the supervisor's "empowerment ... as an agent who could make economic decisions affecting employees under his control that enable[s] him to force [the employee] to submit." *Id.; see also id.* at 98 (stating that supervisor's "use of his supervisory authority to require [plaintiff's] submission was, for Title VII purposes, the act of the employer"). The Ninth Circuit has followed *Jin*, concluding that "a 'tangible employment action' occurs when the supervisor threatens the employee with discharge and, in order to avoid the threatened action, the employee complies with the supervisor's demands." *Holly D. v. California Institute of Technology*, 339 F.3d 1158, 1167 (9th Cir. 2003).

Though the Third Circuit cited *Jin*'s reasoning with approval in *Suders v. Easton*, 325 F.3d

432 (3d Cir. 2003), it is unclear whether this fact supports or undermines *Jin*'s persuasiveness in this circuit. On the one hand, in *Suders* the court of appeals endorsed *Jin*'s rationale: "in quid pro quo cases where a victimized employee submits to a supervisor's demands for sexual favors in return for job benefits, such as continued employment.... the more sensible approach ... is to recognize that, by his or her actions, a supervisor invokes the official authority of the enterprise." *Suders*, 325 F.3d at 458-59. But the *Suders* court did so in the course of holding that "a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*,"325 F.3d at 435 – a point on which the Supreme Court reversed, *see Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004) (holding that in order to count as a tangible employment action the constructive discharge must result from "an employer-sanctioned adverse action").

It could be argued that *Jin* and *Holly D.* rest in tension with *Ellerth*, *Faragher* and *Suders*, given that when the plaintiff submits to a supervisor's demand and no tangible employment action of an official nature is taken the supervisor's acts are not as readily attributable to the company, *see Ellerth*, 524 U.S. at 762 (stressing that tangible employment actions are usually documented, may be subject to review by the employer, and may require the employer's approval); *see also Lutkewitte v. Gonzales*, 436 F.3d 248, 263 (D.C. Cir. 2006) (Brown, J., concurring in judgment) (arguing that the panel majority should have rejected *Jin* and *Holly D*. rather than avoiding the question, and reasoning that "the unavailability of the affirmative defense in cases where a tangible employment action has taken place is premised largely on the notice (constructive or otherwise) that such an action gives to the employer-notice that the delegated authority is being used to discriminate against an employee"). *But see Jin*, 310 F.3d at 98 ("though a tangible employment action 'in most cases is documented in official company records, and *may* be subject to review by higher level supervisors,' the Supreme Court did not require such conditions in all cases.") (quoting, with added emphasis, *Ellerth*, 524 U.S. at 762).

If the court concludes that it is appropriate to follow the approach taken in *Jin* and *Holly D*. – a question that, as noted above, appears to be unsettled – then the court should consider whether to refer only to a 'tangible employment action' rather than an 'adverse tangible employment action.' *See Jin*, 310 F.3d at 101 (holding that it was error to "use[] the phrase 'tangible adverse action' instead of 'tangible employment action'" and that such error was "especially significant in the context of this case, where we hold that an employer is liable when a supervisor grants a tangible job benefit to an employee based on the employee's submission to sexual demands").

Definition of "supervisor." In *Jackson v. T & N Van Service*, 86 F. Supp. 2d 497, 501 (E.D. Pa. 2000), the court provided this guidance on whether a harassing employee is a "supervisor" so that the employer can be found liable for a hostile work environment/tangible employment action claim:

> Although the Supreme Court has not specifically defined the term supervisor for purposes of determining an employer's liability for a hostile work environment, the Court has described the power to supervise as "to hire and fire, and to set work schedules and pay rates." *Faragher,* 524 U.S. at 803; see also *Gentner v. Cheyney University of Pennsylvania*, No. CIV. A. 94-7443, 1999 WL 820864, *18 (E.D.Pa. Oct.14, 1999) (charging jury to

consider same factors in determining whether individual was plaintiff's supervisor). Plaintiff has the burden of proof to show that Larose, Felton and Larosa were his supervisors. *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3d Cir.1990).

5.1.4 Elements of a Title VII Action — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [protected status].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is a [membership in a protected class].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's protected class] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Sixth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Seventh: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of [protected class] harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

Comment

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 5.2.1.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[4] Instruction 5.2.2 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases. In *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue." As ADA damages are coextensive with Title VII damages — see the Comment to Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII hostile work environment cases.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It should be noted that the failure to renew an employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII").

Liability for Non-Supervisors

Respondeat superior liability for harassment by non-supervisory employees exists only where the employer "knew or should have known about the harassment, but failed to take prompt and adequate remedial action." *Jensen v. Potter,* 435 F.3d 444, 453 (3d Cir. 2006) (internal quotations omitted).[5] *See also Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual

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[4] Instruction 5.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 5.1.5 should be used instead. *See* Comment 5.1.5 (discussing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 150 (2004).

[5] "[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action." *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009).

> harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

The court of appeals has drawn upon agency principles for guidance on the definition of "management level" personnel:

> [A]n employee's knowledge of allegations of coworker sexual harassment may typically be imputed to the employer in two circumstances: first, where the employee is sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee's general managerial duties. In this case, the employee usually has the authority to act on behalf of the employer to stop the harassment, for example, by disciplining employees or by changing their employment status or work assignments....
>
> Second, an employee's knowledge of sexual harassment will be imputed to the employer where the employee is specifically employed to deal with sexual harassment. Typically such an employee will be part of the employer's human resources, personnel, or employee relations group or department. Often an employer will designate a human resources manager as a point person for receiving complaints of harassment. In this circumstance, employee knowledge is imputed to the employer based on the specific mandate from the employer to respond to and report on sexual harassment.

Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 107-08 (3d Cir. 2009).

For a case in which a jury question was raised as to whether the employer's efforts to remedy a non-supervisor's harassment were prompt and adequate, *see Andreoli v. Gates,* 482 F.3d 641, 648 (3d Cir. 2007) (Rehabilitation Act) (employee had to speak to five supervisors in order to elicit any response from management about the non-supervisor's acts of harassment, and even then the employer took five months to move the employee to a different shift; no attempts were made to discipline or instruct the harassing employee).

Characteristics of a Hostile Work Environment

In sexual harassment cases, examples of conduct warranting a finding of a hostile work environment include verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments

or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. See *Harris v. Forklift Systems*, Inc., 510 U.S. 17, 21 (1993) ("discriminatory intimidation, ridicule, and insult"); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for sexual favors, fondling, following plaintiff into women's restroom, and supervisor's exposing himself).

The Third Circuit has described the standards for a hostile work environment claim, as applied to sex discrimination, in *Weston v. Pennsylvania,* 251 F.3d 420, 425-426 (3d Cir. 2001):

> Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. . . . In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).
>
> In *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993), the Supreme Court clarified the elements of a discrimination claim resulting from a hostile work environment. In order to fall within the purview of Title VII, the conduct in question must be severe and pervasive enough to create an "objectively hostile or abusive work environment--an environment that a reasonable person would find hostile--and an environment the victim-employee subjectively perceives as abusive or hostile." In determining whether an environment is hostile or abusive, we must look at numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance."

Title VII protects only against harassment based on discrimination against a protected class. It is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80-81 (1998). "Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief."*Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006).

Severe or Pervasive Activity

The terms "severe or pervasive" set forth in the instruction are in accord with Supreme Court case law and provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) ("The disjunctive phrasing means that 'severity' and 'pervasiveness' are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.") (quoting 2 C.Sullivan et. al., *Employment Discrimination Law and Practice* 455 (3d ed. 2002).

Subjective and Objective Components

The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

Hostile Work Environment That Pre-exists the Plaintiff's Employment

The instruction refers to harassing "conduct" that "was motivated by the fact that [plaintiff] is a [membership in a protected class]." This language is broad enough to cover the situation where the plaintiff is the first member of a protected class to enter the work environment, and the working conditions pre-existed the plaintiff's employment. In this situation, the "conduct" is the refusal to change an environment that is hostile to members of the plaintiff's class. The court may wish to modify the instruction so that it refers specifically to the failure to correct a pre-existing environment.

Harassment as Retaliation for Protected Activity

In *Jensen v. Potter,* 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation provision of Title VII "can be offended by harassment that is severe or pervasive enough to create a hostile work environment." The *Jensen* court also declared that "our usual hostile work environment framework applies equally to Jensen's claim of retaliatory harassment." But subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White,* 548 U.S.53, 68 (2006), set forth a legal standard for determining retaliation that appears to be less rigorous than the standard for determining a hostile work environment. The Court in *White* declared that a plaintiff has a cause of action for retaliation under Title VII if the employer's actions in response to protected activity "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." After *White*, the Title VII retaliation provision can be offended by any activity of the employer — whether harassment or some other action — that satisfies the *White* standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

Religious Discrimination

Employees subject to a hostile work environment on the basis of their religion are entitled to recovery under Title VII, pursuant to the same legal standards applied to sex discrimination. *See Abramson v. William Paterson College*, 260 F.3d 265, 277 n.5 (3d Cir. 2001) ("We have yet to address a hostile work environment claim based on religion. However, Title VII has been construed under our case law to support claims of a hostile work environment with respect to other categories (i.e., sex, race, national origin). We see no reason to treat Abramson's hostile work environment claim any differently, given Title VII's language.").

5.1.5 Elements of a Title VII Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [protected status].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is a [membership in a protected class].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's protected class] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

[For use when the alleged harassment is by non-supervisory employees:

Sixth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of [protected class] harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

If any of the above elements has not been proved by a preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim. If you find that the elements have been proved, then you must consider [employer's] affirmative defense. I will instruct you now on the elements of that affirmative defense.

You must find for [defendant] if you find that [defendant] has proved both of the following elements by a preponderance of the evidence:

First: [Defendant] exercised reasonable care to prevent harassment in the workplace on the basis of [protected status], and also exercised reasonable care to promptly correct any harassing behavior that does occur.

Second: [Plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [defendant].

Proof of the four following facts will be enough to establish the first element that I just referred to, concerning prevention and correction of harassment:

1. [Defendant] had established an explicit policy against harassment in the workplace on the basis of [protected status].

2. That policy was fully communicated to its employees.

3. That policy provided a reasonable way for [plaintiff] to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed to take advantage of a corrective opportunity.

Comment

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 5.2.1.

This instruction is to be used in discriminatory harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth,* 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990).[6] *See also Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

The court of appeals has drawn upon agency principles for guidance on the definition of "management level" personnel:

> [A]n employee's knowledge of allegations of coworker sexual harassment may typically be imputed to the employer in two circumstances: first, where the employee is sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee's general managerial duties. In this case, the employee usually has the authority to act on behalf of the employer to stop the harassment, for example, by disciplining employees or by changing their employment status or work assignments....
>
> Second, an employee's knowledge of sexual harassment will be imputed to the employer where the employee is specifically employed to deal with sexual harassment. Typically such an employee will be part of the employer's human resources, personnel, or employee relations group or department. Often an employer will designate a human resources manager as a point person for receiving complaints of harassment. In this circumstance, employee knowledge is imputed to the employer based on the specific mandate from the employer to respond to and report on sexual harassment.

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[6] "[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action." *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 (3d Cir. 2009).

Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 107-08 (3d Cir. 2009).

Characteristics of a Hostile Work Environment

In sexual harassment cases, examples of conduct warranting a finding of a hostile work environment include verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993) (discriminatory intimidation, ridicule and insult); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for sexual favors, fondling, following plaintiff into women's restroom, and supervisor's exposing himself). Instruction 5.2.1 provides a full instruction if the court wishes to provide guidance on what is a hostile work environment.

The Third Circuit has described the standards for a hostile work environment claim, as applied to sex discrimination, in *Weston v. Pennsylvania,* 251 F.3d 420, 425-426 (3d Cir. 2001):

> Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. . . . In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).

> In *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993), the Supreme Court clarified the elements of a discrimination claim resulting from a hostile work environment. In order to fall within the purview of Title VII, the conduct in question must be severe and pervasive enough to create an "objectively hostile or abusive work environment--an environment that a reasonable person would find hostile--and an environment the victim-employee subjectively perceives as abusive or hostile." In determining whether an environment is hostile or abusive, we must look at numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." The Supreme Court recently reaffirmed *Harris'* "severe and pervasive" test in *Faragher v. City of Boca Raton,* 524 U.S. 775, 783 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998).

Title VII protects only against harassment based on discrimination against a protected class. It is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80-81 (1998). "Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief."*Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006).

Severe or Pervasive Activity

The terms "severe or pervasive" set forth in the instruction are in accord with Supreme Court case law and provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) ("The disjunctive phrasing means that 'severity' and 'pervasiveness' are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.") (quoting 2 C.Sullivan et. al., *Employment Discrimination Law and Practice* 455 (3d ed. 2002).

Objective and Subjective Components

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

Affirmative Defense Where Constructive Discharge Is Not Based on an Official Act

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 138-40 (2004), the Court considered the relationship between constructive discharge brought about by supervisor harassment and the affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that "an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment." The Court reasoned as follows:

> [W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer. As those leading decisions indicate, official directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control. See *Ellerth*, 524 U.S., at 762. Absent "an official act of the enterprise," ibid., as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force. And as *Ellerth* and *Faragher* further point out, an official act reflected in company records--a demotion or a reduction in compensation, for example--shows "beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage. See *Ellerth*, 524 U.S., at 760. Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation . . . is less certain. That uncertainty, our precedent establishes . . . justifies affording the employer the chance to establish, through the

Ellerth/Faragher affirmative defense, that it should not be held vicariously liable.

. . .

Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

Hostile Work Environment That Precedes the Plaintiff's Employment

The instruction refers to harassing "conduct" that "was motivated by the fact that [plaintiff] is a [membership in a protected class]." This language is broad enough to cover the situation where the plaintiff is the first member of a protected class to enter the work environment, and the working conditions pre-existed the plaintiff's employment. In this situation, the "conduct" is the refusal to change an environment that is hostile to members of the plaintiff's class. The judge may wish to modify the instruction so that it refers specifically to the failure to correct a pre-existing environment.

Harassment as Retaliation for Protected Activity

In *Jensen v. Potter,* 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation provision of Title VII "can be offended by harassment that is severe or pervasive enough to create a hostile work environment." The *Jensen* court also declared that "our usual hostile work environment framework applies equally to Jensen's claim of retaliatory harassment." But subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White,* 548 U.S. 53, 68 (2006), set forth a legal standard for determining retaliation that appears to be less rigorous than the standard for determining a hostile work environment. The Court in *White* declared that a plaintiff has a cause of action for retaliation under Title VII if the employer's actions in response to protected activity "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." After *White*, the Title VII retaliation provision can be offended by any activity of the employer — whether harassment or some other action — that satisfies the *White* standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

Back Pay

In *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue." As ADA damages are coextensive with Title VII damages — see the Comment to Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII hostile work environment cases. Thus, back pay will not be available in an action in which Instruction 5.1.5 is

given, because the plaintiff has not raised a jury question on a tangible employment action.

5.1.6 Elements of a Title VII Claim — Disparate Impact

No Instruction

Comment

Distinction Between Disparate Impact and Disparate Treatment; *Elements of Disparate Treatment Claim*

The distinction between disparate impact and disparate treatment claims is described in *E.E.O.C. v. Metal Service Co.,* 892 F.2d 341, 347-348 (3d Cir. 1990):

> A violation of Title VII can be shown in two separate and distinct ways. *See generally Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988). First, a Title VII plaintiff can utilize the disparate impact theory of discrimination. A disparate impact violation is made out when an employer is shown to have used a specific employment practice, neutral on its face but causing a substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (like the analytical proof structure under the disparate treatment theory, the burden of showing disparate impact always remains with the plaintiff and the employer has only the burden of production, on the issue of business justification, once a prima facie case has been established). No proof of intentional discrimination is necessary.
>
> Alternatively, the Title VII plaintiff can argue a disparate treatment theory of discrimination. . . . A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion under Title VII. Unlike the disparate impact theory, proof of the employer's discriminatory motive is critical under this analysis.

No instruction is provided on disparate impact claims, because a right to jury trial is not provided under Title VII for such claims. The basic remedies provision of Title VII, 42 U.S.C.A. § 1981a(a)(1), provides as follows:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination *(not an employment practice that is unlawful because of its disparate impact)* prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)], from

the respondent. (emphasis added).

See also Seventh Circuit Pattern Jury Instructions 3.08 (no instruction provided for disparate impact claims under Title VII); *Pollard v. Wawa Food Market,* 366 F.Supp.2d 247, 254 (E.D.Pa. 2005)("Because Pollard proceeds under a disparate impact theory, and not under a theory of intentional discrimination, if successful on her Title VII claim she would be entitled only to equitable relief. 42 U.S.C. §1981a(a)(1). She therefore is not entitled to a jury trial on that claim.").

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims are cognizable under the Age Discrimination in Employment Act. The ADEA provides a right to jury trial in such claims. *See* 29 U.S.C. § 626(c)(2) ("[A] person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action."). Where an ADEA disparate impact claim is tried together with a Title VII disparate impact claim, the parties or the court may decide to refer the Title VII claim to the jury. In that case, the instruction provided for ADEA disparate impact claims (see Instruction 8.1.5) can be modified to apply to the Title VII claim. Care must be taken, however, to instruct separately on the Title VII disparate impact claim, as the substantive standards of recovery under Title VII in disparate impact cases are broader than those applicable to the ADEA. See the Comment to Instruction 8.1.5 for a more complete discussion.

5.1.7 Elements of a Title VII Claim — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [describe activity protected by Title VII].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a good faith belief that [plaintiff's] [or someone else's] right to be free from discrimination on the basis of [protected status] was violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [employer's] action followed shortly after [employer] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

Comment

Title VII protects employees and former employees who attempt to exercise the rights guaranteed by the Act against retaliation by employers. 42 U.S.C.A. § 2000e-3(a) is the anti-retaliation provision of Title VII, and it provides as follows:

> **§ 2000e-3. Other unlawful employment practices**
>
> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Protected Activities

Activities protected from retaliation under Title VII include the following: 1) opposing any practice made unlawful by Title VII; 2) making a charge of employment discrimination; 3) testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Title VII. Id. *See also Glanzman v. Metropolitan Management Corp.,* 391 F.3d 506 (3d Cir. 2004) (if plaintiff were fired for being a possible witness in an employment discrimination action, this would be unlawful retaliation) (ADEA); *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1299 (3d Cir. 1997) (filing EEOC complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White,* 548 U.S. 53 (2006); *Kachmar v. Sungard Data Sys., Inc.,* 109 F.3d 173, 177 (3d Cir. 1997) (advocating salary increases for women employees, to compensate them equally with males, was protected activity); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) ("protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct"). The question of whether a particular activity is "protected" from retaliation is a question of law; whether the plaintiff engaged in that activity is a question of fact for the jury. A plaintiff "need not prove the merits of the underlying discrimination complaint." Id.

Informal complaints and protests can constitute protected activity. "Opposition to discrimination can take the form of informal protests of discriminatory employment practices, including making complaints to management. To determine if retaliation plaintiffs sufficiently opposed discrimination, we look to the message being conveyed rather than the means of conveyance." *Moore v. City of Philadelphia,* 461 F.3d 331, 343 (3d Cir. 2006) (citations omitted).

In *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty., Tennessee*, 129 S. Ct. 846, 851 (2009), the Court held that the antiretaliation provision's "opposition" clause does not require the employee to initiate a complaint. The provision also protects an employee who speaks out about discrimination by answering questions during an employer's internal investigation. The

Court declared that there is "no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

In *Slagle v. County of Clarion,* 435 F.3d 262 (3d Cir. 2006), the court held that Title VII does not protect against retaliation for filing a claim that is facially invalid. The employee's claim in *Slagle* was facially invalid because it failed even to allege any conduct that was prohibited by Title VII. In finding the making of that complaint to be unprotected activity, the *Slagle* court noted that Title VII requires "only that the plaintiff file a formal complaint that alleges one or more prohibited grounds in order to be protected under Title VII. But we cannot dispense with the requirement that the plaintiff allege prohibited grounds." 435 F.3d at 267. The court took pains to note, however, that Title VII sets a "low bar" for employees seeking protection from retaliation. It elaborated as follows:

> A plaintiff need only allege discrimination on the basis of race, color, religion, sex, or national origin to be protected from retaliatory discharge under Title VII. Protection is not lost merely because an employee is mistaken on the merits of his or her claim. . . . All that is required is that plaintiff allege in the charge that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex, or national origin, in any manner. Slagle did not do so, and therefore he cannot assert a claim for retaliation for filing that charge.

435 F. 3d at 268.

In *Curay-Cramer v. Ursuline Academy,* 450 F.3d 130, 135 (3d Cir. 2006), the court held that general protest on public issues does not constitute protected activity. To be protected under Title VII, the employee's activity must be directed to the employer's alleged illegal employment practice; it must "identify the employer and the practice — if not specifically, at least by context." In *Curay-Cramer*, the plaintiff alleged that her employer retaliated against her after she signed a pro-choice advertisement, thus advocating a position on a public issue that her employer opposed. But because the advertisement did not mention her employer or refer to any employment practice, the plaintiff's actions did not constitute protected activity.

The *Curay-Cramer* court further held that the plaintiff could not elevate her claim by protesting her employer's decision to fire her for signing the advertisement. The court noted that "an employee may not insulate herself from termination by covering herself with the cloak of Title VII's opposition protections *after* committing non-protected conduct that was the basis of the decision to terminate." The court reasoned that "[i]f subsequent conduct could prevent an employer from following up on an earlier decision to terminate, employers would be placed in a judicial straight-jacket not contemplated by Congress."

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 548 U.S. 53, 68 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
>
> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders,* 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be

immaterial in some situations is material in others.

> Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

548 U.S. at 68 (some citations omitted). The instruction follows the guidelines of the Supreme Court's decision in *White*. For applications of the *White* standard, *see Moore v. City of Philadelphia,* 461 F.3d 331, 348 (3d Cir. 2006) (finding that a transfer of a police officer from a district where he had earned goodwill and established good relations with the community could constitute actionable retaliation, because it "is the kind of action that might dissuade a police officer from making or supporting a charge of unlawful discrimination within his squad."); Id. at 352 (aggressive enforcement of sick-check policy "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.").

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 548 U.S. 53, 61-62 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action.

> The language of the substantive provision differs from that of the anti-retaliation provision in important ways. Section 703(a) sets forth Title VII's core anti-discrimination provision in the following terms:
>
> > "It shall be 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 compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or
> >
> > "(2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a)

(emphasis added).

Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:

> "It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a) (emphasis added).

The underscored words in the substantive provision -- "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" -- explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing.

The *White* Court explained the rationale for providing broader protection in the retaliation provision than is provided in the basic discrimination provision of Title VII:

> There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800-801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.
>
> To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments," *id.*, at 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668, would be achieved were all employment-related discrimination miraculously eliminated.
>
> But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. See, *e.g.*, *Rochon* v. *Gonzales*, 438 F.3d at 1213 (FBI retaliation against employee "took the form of the FBI's refusal,

> contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife"); *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "maintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

548 U.S. at 63-64 (emphasis in original)

Accordingly, the instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995) (requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her"). *See also Moore v. City of Philadelphia,* 461 F.3d 331, 341 (3d Cir. 2006) (observing that the *White* decision rejected Third Circuit law that limited recovery for retaliation to those actions that altered the employee's compensation or terms and conditions of employment).

Membership In Protected Class Not Required

An employee need not be a member of a protected class to be subject to actionable retaliation under Title VII. For example, a white employee who complains about discrimination against black employees, and is subject to retaliation for those complaints, is protected by the Title VII anti-retaliation provision. *See Moore v. City of Philadelphia, 461* F.3d 331, 342 (3d Cir. 2006) ("Title VII's whistleblower protection is not limited to those who blow the whistle on their own mistreatment or on the mistreatment of their own race, sex, or other protected class.")

Causation

For a helpful discussion on the importance of the time period between the plaintiff's protected activity and the action challenged as retaliatory, as well as other factors that might be relevant to a finding of causation, *see Marra v. Philadelphia Housing Authority,* 497 F.3d 286, 302 (3d Cir. 2007) (a case involving a claim of retaliation under the Pennsylvania Human Relations Act, which the court found to be subject to the same standards of substantive law as an action for retaliation under Title VII) :

> We have recognized that.a plaintiff may rely on a "broad array of evidence" to demonstrate a causal link between his protected activity and the adverse action taken against him. *Farrell* [v. Planters Lifesavers Co., 206 F.3d 271, 284 (3d Cir. 2000)]. In certain narrow circumstances, an "unusually suggestive" proximity in time between the protected activity and the adverse action may be sufficient, on its own, to establish the requisite causal

connection. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997); see *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989) (discharge of plaintiff two days after filing EEOC complaint found to be sufficient, under the circumstances, to establish causation). Conversely, however, "[t]he mere passage of time is not legally conclusive proof against retaliation." *Robinson v. Southeastern Pa. Transp. Auth.,* 982 F.2d 892, 894 (3d Cir. 1993) (citation omitted); see also *Kachmar v. SunGard Data Sys., Inc.,* 109 F.3d 173, 178 (3d Cir. 1997) ("It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn."). Where the time between the protected activity and adverse action is not so close as to be unusually suggestive of a causal connection standing alone, courts may look to the intervening period for demonstrative proof, such as actual antagonistic conduct or animus against the employee, *see, e.g., Woodson* [v. Scott Paper Co., 109 F.3d 913, 921 (3d Cir. 1997)] (finding sufficient causal connection based on "pattern of antagonism" during intervening two-year period between protected activity and adverse action), or other types of circumstantial evidence, such as inconsistent reasons given by the employer for terminating the employee or the employer's treatment of other employees, that give rise to an inference of causation when considered as a whole. *Farrell*, 206 F.3d at 280-81.

The *Marra* court noted that the time period relevant to causation is that between the date of the employee's protected activity and the date on which the employer made the decision to take adverse action. In *Marra* the employer made the decision to terminate the plaintiff five months after the protected activity, but the employee was not officially terminated until several months later. The court held that the relevant time period ran to when the decision to terminate was made. 497 F.3d at 286.

The *Marra* court also emphasized that in assessing causation, the cumulative effect of the employer's conduct must be evaluated: "it matters not whether each piece of evidence of antagonistic conduct is alone sufficient to support an inference of causation, so long as the evidence permits such an inference when considered collectively." 497 F.3d at 303.

For other Third Circuit cases evaluating the causative connection between protected activity and an adverse employment decision, *see Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006) (noting that temporal proximity and a pattern of antagonism "are not the exclusive ways to show causation" and that the element of causation in retaliation cases "is highly context-specific"); *Moore v. City of Philadelphia*, 461 F.3d 331, 352 (3d Cir. 2006) (employee was subject to three sick-checks in his first five months of medical leave; after filing a lawsuit alleging discrimination, he was subject to sick-checks every other day; the "striking difference" in the application of the sick-check policy "would support an inference that the more aggressive enforcement "was caused by retaliatory animus."); *Leboon v. Lancaster Jewish Community Center Ass'n,* 503 F.3d 217, 233 (3d Cir. 2007) ("Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity, a gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment.").

Retaliation Against Perceived Protected Activity

In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), an ADA case, the court declared that the retaliation provision in Title VII protected an employee against retaliation for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. For the fairly unusual case in which the employer is alleged to have retaliated for perceived rather than actual protected activity, the instruction can be modified consistently with the court's directive in *Fogleman.*

Determinative Effect

Instruction 5.1.7 requires the plaintiff to show that the plaintiff's protected activity had a "determinative effect" on the allegedly retaliatory activity. This is the standard typically used in Title VII pretext cases outside the context of retaliation. *See* Comment 5.1.2. Title VII claims that do not involve retaliation can alternatively proceed on a mixed-motive theory subject to the affirmative defense stated in 42 U.S.C. § 2000e-5(g)(2)(B), *see* Comment 5.1.1, but Section 2000e-5(g)(2)(B)'s framework does not apply to Title VII retaliation claims, *see Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997).

However, a distinction between pretext and mixed-motive cases has been recognized as relevant for both Title VII retaliation claims and ADA retaliation claims: "[W]e analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII.... This framework will vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed motives' suit." *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. *See Woodson*, 109 F.3d at 935 (holding that it was error, in a case that proceeded on a "pretext" theory, not to use the "determinative effect" language). The court of appeals has indicated that the *Price Waterhouse* mixed-motive standard can be appropriate in Title VII retaliation cases if warranted by the evidence. *See Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 516 (3d Cir. 1997) (concluding after careful analysis of the evidence "that the district court did not err in charging the jury with a pretext instruction because the plaintiffs did not produce sufficient 'direct' evidence of retaliatory animus to require a mixed motives burden shifting charge").[7]

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The Gross Court reasoned that it had never held that the *Price Waterhouse* mixed-motive

[7] The *Walden* court's analysis of *what kind of evidence* is required to warrant a mixed-motive framework may no longer be entirely current. *See* Comment 5.1.1 (discussing treatment of analogous question concerning statutory burden-shifting framework in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003)).

framework applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at Section 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. The Committee has not attempted to determine what, if any, implications *Gross* has for Title VII retaliation claims, but the Committee suggests that users of these instructions should consider that question.

5.2.1 Title VII Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

• The total physical environment of [plaintiff's] work area.

• The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.

• The reasonable expectations of [plaintiff] upon entering the environment.

• The frequency of the offensive conduct.

• The severity of the conduct.

• The effect of the working environment on [plaintiff's] mental and emotional well-being.

• Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.

• Whether the conduct was pervasive.

• Whether the conduct was directed toward [plaintiff].

• Whether the conduct was physically threatening or humiliating.

• Whether the conduct was merely a tasteless remark.

• Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [plaintiff's membership in a protected class]. The harassing conduct may,

but need not be [sexual/racial, etc.] in nature. Rather, its defining characteristic is that the harassment complained of is linked to the victim's [protected status]. The key question is whether [plaintiff], as a [member of protected class], was subjected to harsh employment conditions to which [those outside the protected class] were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable [member of protected class] in the same position. That is, you must determine whether a reasonable [member of protected class] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable [member of protected class]. The reasonable [member of protected class] is simply one of normal sensitivity and emotional make-up.

Comment

This instruction can be used to provide the jury more guidance for determining whether a hostile work environment exists in a claim for harassment under Title VII. See Instructions 5.1.4 and 5.1.5 for instructions on harassment claims.

In *Bonenberger v. Plymouth Twp*., 132 F.3d 20, 25 (3d Cir. 1997), the Third Circuit set forth the following requirements for proving a hostile work environment claim in a sex discrimination case under Title VII:

> (1) the employee suffered intentional discrimination because of [his or her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.

Instruction 5.2.1 is similar to the instruction approved (with respect to claims under the New Jersey Law Against Discrimination) in *Hurley v. Atlantic City Police Dept*., 174 F.3d 95, 115-17 (3d Cir. 1999).

The Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S.75, 80 (1998), noted that an employer is not liable under Title VII for a workplace environment that is harsh for all employees; generalized harassment is not prohibited by Title VII. *See also Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006) ("Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief.")

The pattern instruction follows *Faragher v. City of Boca Raton,* 524 U.S. 775, 778 (1998), in which the Court stated that "isolated incidents (unless extremely serious) will not amount to

discriminatory changes of the terms and conditions of employment."

5.2.2 Title VII Definitions — Constructive Discharge

Model

In this case, to show that [he/she] was subjected to an adverse "tangible employment action," [plaintiff] claims that [he/she] was forced to resign due to [name's] discriminatory conduct. Such a forced resignation, if proven, is called a "constructive discharge." To prove that [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

Comment

This instruction can be used when the plaintiff was not fired, but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into either Instruction 5.1.3 (with respect to the instruction's fourth element) or Instruction 5.1.4 (with respect to the instruction's sixth element). If, instead, the plaintiff claims that she was constructively discharged based on a supervisor's or co-worker's adverse action or actions that were not sanctioned by the employer, the constructive discharge would not count as a tangible adverse employment action (for the purposes of determining whether the employer may assert an *Ellerth / Faragher* affirmative defense). *See* Comment 5.1.5. *See also Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment.").

In *Suders*, the Court explained that "[u]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *See also Clowes v. Allegheny Valley Hospital,* 991 F.2d 1159 (3d Cir. 1993) (ADEA claim) (close supervision of the employee was not enough to constitute a constructive discharge).

5.3.1 Title VII Defenses — Bona Fide Occupational Qualification

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [his/her] [protected status], then you must consider [defendant's] defense that its action was based on a bona fide occupational qualification.

To avoid liability for intentional discrimination on the basis of this contention, [defendant] must prove both of the following elements by a preponderance of the evidence:

First: The occupational qualification relied upon by [defendant] is reasonably necessary for the normal operation of [defendant's] business.

Second: [Defendant] either had reasonable cause to believe that all or substantially all persons [in the protected class] would be unable to perform the job safely and efficiently, or that it was impossible or highly impractical to consider the necessary qualifications of each [person in the protected class]. [Defendant's] belief should be evaluated in light of all the circumstances in the case, to determine whether it has a reasonable basis in fact.

If you find that [defendant] has proved these two elements by a preponderance of the evidence, then you must find for [defendant].

Comment

In some cases, an employer may defend a disparate treatment claim by proving that the discriminatory treatment is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular enterprise. 42 U.S.C.A. § 2000e-2(e)(1) provides as follows:

> (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise…

See, e.g., *United Auto. Workers v. Johnson Controls, Inc.,* 499 U.S. 187, 204 (1991) (sex was not

BFOQ where employer adopted policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding OSHA standards); *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (gender was BFOQ for correctional counselor position where sex offenders were scattered throughout prison's facilities). The *Johnson Controls* Court held that the burden of persuasion in establishing the BFOQ defense rests with the defendant. 499 U.S. at 200.

Under Title VII, a BFOQ may relate only to religion, sex or national origin. 42 U.S.C.A. § 2000e-2(e)(1). There is no BFOQ defense in racial discrimination cases. 42 U.S.C.A. § 2000e-2(e)(1). *See Ferrill v. Parker Group*, 168 F.3d 468, 475 (11th Cir.1999) (no BFOQ defense to race-matched telemarketing or polling).

The Third Circuit, in *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996), analyzed the BFOQ defense, in the context of a gender discrimination case, as follows:

> Under the BFOQ defense, overt gender-based discrimination can be countenanced if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise [.]" 42 U.S.C. § 2000e-2(e)(1). The BFOQ defense is written narrowly, and the Supreme Court has read it narrowly. See *Johnson Controls*, 499 U.S. at 201. The Supreme Court has interpreted this provision to mean that discrimination is permissible only if those aspects of a job that allegedly require discrimination fall within the " 'essence' of the particular business." Id. at 206. Alternatively, the Supreme Court has stated that sex discrimination "is valid only when the essence of the business operation would be undermined" if the business eliminated its discriminatory policy. *Dothard v. Rawlinson,* 433 U.S. 321, 332 (1977).
>
> The employer has the burden of establishing the BFOQ defense. *Johnson Controls*, 499 U.S. at 200. The employer must have a "basis in fact" for its belief that no members of one sex could perform the job in question. *Dothard*, 433 U.S. at 335. However, appraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used. See id. (relying on expert testimony, not statistical evidence, to determine BFOQ defense); *Torres v. Wisconsin Dep't Health and Social Servs*., 859 F.2d 1523, 1531-32 (7th Cir.1988) (in establishing a BFOQ defense, defendants need not produce objective evidence, but rather employer's action should be evaluated on basis of totality of circumstances as contained in the record). The employer must also demonstrate that it "could not reasonably arrange job responsibilities in a way to minimize a clash between the privacy interests of the [patients], and the non-discriminatory principle of Title VII." *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.1980).

See also *Lanning v. SEPTA,* 181 F.3d 478, 500 (3d Cir. 1999) (under the defense of bona fide occupational qualification, "'the greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications....'", quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)).

5.3.2 Title VII Defenses — Bona Fide Seniority System

No Instruction

Comment

In contrast to a bona fide occupational qualification, which is an affirmative defense, the treatment of an employer's alleged bona fide seniority system is simply one aspect of the plaintiff's burden of proving intentional discrimination in a Title VII case.[8] In *Lorance v. AT & T Technologies, Inc*., 490 U.S. 900, 908-09 (1989), *superseded by statute on other grounds*, Pub. L. No. 102-166, Title I, § 112, 105 Stat. 1079, codified as amended at 42 U.S.C. § 2000e-5(e)(2), the Court emphasized that the plaintiff has the burden of proving intentional discrimination and held that, as applied to seniority systems, the plaintiff must prove that the seniority system is a means of intentional discrimination. Thus the existence of a bona fide seniority system is not an affirmative defense; rather it is simply an aspect of the plaintiff's burden of proving discrimination. The *Lorance* Court specifically distinguished seniority systems from bona fide occupational qualifications, a defense on which the defendant does have the burden. *See also Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1417 (3d Cir. 1991) (stating that petitioning employees "were required to allege that either the creation or the operation of the seniority system was the result of intentional discrimination"); *Green v. USX Corp.,* 896 F.2d 801, 806 (3d Cir. 1990) (noting that proof of disparate treatment, not simply disparate impact, is required to invalidate a seniority system under Title VII). Accordingly, no instruction is included for any affirmative defense for a bona fide seniority system.

[8] *See* 42 U.S.C. § 2000e-2(h); *see also AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009) (applying § 2000e-2(h)).

5.4.1 Title VII Damages — Compensatory Damages — General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] intentionally discriminated against [plaintiff] by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. [Plaintiff] must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions [or omissions] actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had continued in employment with [defendant]. These elements of recovery of wages that [plaintiff] would have received from [defendant] are called "back pay" and "front pay". [Under the applicable law, the determination of "back pay" and "front pay" is for the court.] ["Back pay" and "front pay" are to be awarded separately under instructions that I will soon give you, and any amounts for "back pay"and "front pay" are to be entered separately on the verdict form.]

You may award damages for monetary losses that [plaintiff] may suffer in the future as a result of [defendant's] [allegedly unlawful act or omission]. [For example, you may award damages for loss of earnings resulting from any harm to [plaintiff's] reputation that was suffered as a result of [defendant's] [allegedly unlawful act or omission]. Where a victim of discrimination has been terminated by an employer, and has sued that employer for discrimination, [he/she] may find it more difficult to be employed in the future, or may have to take a job that pays less than if the discrimination had not occurred. That element of damages is distinct from the amount of wages [plaintiff] would have earned in the future from [defendant] if [he/she] had retained the job.]

As I instructed you previously, [plaintiff] has the burden of proving damages by a preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy as circumstances permit.

[You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her] damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [him/her], then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if [he/she] had taken advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

Title VII distinguishes between disparate treatment and disparate impact discrimination and allows recovery of compensatory damages only to those who suffered intentional discrimination. 42 U.S.C.A. § 1981a(a)(1).

Cap on Damages

The Civil Rights Act of 1991 (42 U.S.C. § 1981a) provides for compensatory damages and a right to jury trial for disparate treatment violations. But it also imposes a statutory limit on the amount of compensatory damages that can be awarded. See 42 U.S.C. § 1981a(b)(3):

> **Limitations**. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 300,000.

42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of compensatory damages.

No Right to Jury Trial for Back Pay and Front Pay

Back pay and front pay are equitable remedies that are to be distinguished from the compensatory damages to be determined by the jury under Title VII. See the Comments to Instructions 5.4.3 & 5.4.4. Compensatory damages may include lost future earnings over and above the front pay award. For example, the plaintiff may recover the diminution in expected earnings in all future jobs due to reputational or other injuries, above any front pay award. The court in *Williams v. Pharmacia, Inc.,* 137 F.3d 944, 953-54 (7th Cir. 1998), described the difference between the equitable remedy of front pay and compensatory damages for loss of future earnings in the following passage:

> Front pay in this case compensated Williams for the immediate effects of Pharmacia's unlawful termination of her employment. The front pay award approximated the benefit Williams would have received had she been able to return to her old job. The district court appropriately limited the duration of Williams's front pay award to one year because she

would have lost her position by that time in any event because of the merger with Upjohn.

The lost future earnings award, in contrast, compensates Williams for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of Pharmacia's discrimination. Even if reinstatement had been feasible in this case, Williams would still have been entitled to compensation for her lost future earnings. As the district court explained:

> Reinstatement (and therefore front pay) . . . does not and cannot erase that the victim of discrimination has been terminated by an employer, has sued that employer for discrimination, and the subsequent decrease in the employee's attractiveness to other employers into the future, leading to further loss in time or level of experience. Reinstatement does not revise an employee's resume or erase all forward-looking aspects of the injury caused by the discriminatory conduct.
>
> A reinstated employee whose reputation and future prospects have been damaged may be effectively locked in to his or her current employer. Such an employee cannot change jobs readily to pursue higher wages and is more likely to remain unemployed if the current employer goes out of business or subsequently terminates the employee for legitimate reasons. These effects of discrimination diminish the employee's lifetime expected earnings. Even if Williams had been able to return to her old job, the jury could find that Williams suffered injury to her future earning capacity even during her period of reinstatement. Thus, there is no overlap between the lost future earnings award and the front pay award.

The *Williams* court emphasized the importance of distinguishing front pay from lost future earnings, in order to avoid double-counting.

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

The pattern instruction contains bracketed material that would instruct the jury not to award back pay or front pay. The jury may, however, enter an award of back pay and front pay as advisory, or by consent of the parties. In those circumstances, the court should refer to instructions 5.4.3 for back pay and 5.4.4 for front pay. In many cases it is commonplace for back pay issues to be

submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the court's determination without reference to the jury.

Damages for Pain and Suffering

In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir. 1988), the Court held that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering damages without first presenting evidence of actual injury. The court stated that "[t]he justifications that support presumed damages in defamation cases do not apply in § 1981 and Title VII cases. Damages do not follow of course in § 1981 and Title VII cases and are easier to prove when they do."

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

5.4.2 Title VII Damages — Punitive Damages

Model

[Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to [plaintiff's] federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and so receives nominal rather than compensatory damages.]

An award of punitive damages is permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

[For use where the defendant raises a jury question on good-faith attempt to comply with the law:

But even if you make a finding that there has been an act of discrimination with malice or reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant] proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law, by adopting policies and procedures designed to prevent unlawful discrimination such as that suffered by [plaintiff].**]**

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied [and that [defendant] has not proved that it made a good-faith attempt to comply with the law], then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts it may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to those [defendant] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of

punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant] should be punished for its wrongful conduct, and the degree to which an award of one sum or another will deter [defendant] or others from committing similar wrongful acts in the future.

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon the defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant], you may consider the financial resources of [defendant] in fixing the amount of those damages.]

Comment

42 U.S.C.A. § 1981a(b)(1) provides that "[a] complaining party may recover punitive damages under this section [Title VII] against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Punitive damages are available only in cases of intentional discrimination, i.e., cases that do not rely on the disparate impact theory of discrimination.

In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme Court held that plaintiffs are not required to show egregious or outrageous discrimination in order to recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean, however, that proof of intentional discrimination is not enough in itself to justify an award of punitive damages, because the statute suggests a congressional intent to authorize punitive awards "in only a subset of cases involving intentional discrimination." Therefore, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Kolstad*, 527 U.S. at 536. The Court further held that an employer may be held liable for a punitive damage award for the intentionally discriminatory conduct of its employee only if the employee served the employer in a managerial capacity and committed the intentional discrimination at issue while acting in the scope of employment, and the employer did not engage in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether an employee is in a managerial capacity, a court should review the type of authority that the employer has given to the employee and the amount of discretion that the employee has in what is done and how it is accomplished. Id., 527 U.S. at 543.

Affirmative Defense to Punitive Damages for Good-Faith Attempt to Comply With the Law

The Court in *Kolstad* established an employer's good faith as a defense to punitive damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff's proof for

punitive damages. The instruction sets out the employer's good faith attempt to comply with anti-discrimination law as an affirmative defense. The issue has not yet been decided in the Third Circuit, but the weight of authority in the other circuits establishes that the defendant has the burden of showing a good-faith attempt to comply with laws prohibiting discrimination. *See Medcalf v. Trustees of University of Pennsylvania,* 71 Fed. Appx. 924, 933 n.3 (3d Cir. 2003) (noting that "the Third Circuit has not addressed the issue of whether the good faith compliance standard set out in *Kolstad* is an affirmative defense for which the defendant bears the burden of proof, or whether the plaintiff must disprove the defendant's good faith compliance with Title VII by a preponderance of the evidence"; but also noting that "[a] number of other circuits have determined that the defense is an affirmative one"); *Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000) ("The defendant . . . is responsible for showing good faith efforts to comply with the requirements of Title VII"); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001) (referring to the defense as an affirmative defense that "requires an employer to establish both that it had an antidiscrimination policy and made good faith effort to enforce it"); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001) ("Even if the plaintiff establishes that the employer's managerial agents recklessly disregarded his federally protected rights while acting within the scope of their employment, the employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement an antidiscrimination policy."); *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 931 (8th Cir. 2004) ("A corporation may avoid punitive damages by showing that it made good faith efforts to comply with Title VII after the discriminatory conduct."); *Passantino v. Johnson & Johnson Consumer Prods., Inc.,* 212 F.3d 493, 516 (9th Cir. 2000) (under *Kolstad,* defendants may "establish an affirmative defense to punitive damages liability when they have a bona fide policy against discrimination, regardless of whether or not the prohibited activity engaged in by their managerial employees involved a tangible employment action."); *Davey v. Lockheed Martin Corp*., 301 F.3d 1204, 1208 (10th Cir. 2002) (under *Kolstad*, "even if the plaintiff establishes that the employer's managerial employees recklessly disregarded federally-protected rights while acting within the scope of employment, punitive damages will not be awarded if the employer shows that it engaged in good faith efforts to comply with Title VII.").

Caps on Punitive Damages

Punitive damages are subject to caps in Title VII actions. See 42 U.S.C. § 1981a(b)(3). But 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of punitive damages.

Due Process Limitations

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed. In performing the substantive due process review of the size of punitive awards, a court must consider three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference between the punitive award "and the civil penalties authorized or imposed in comparable cases." *BMW of*

North America, Inc. v. Gore, 517 U.S. 559, 575 (1996).

For a complete discussion of the applicability of the *Gore* factors to a jury instruction on punitive damages, see the Comment to Instruction 4.8.3.

5.4.3 Title VII Damages – Back Pay— For Advisory or Stipulated Jury

Model

If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff], then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You may award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's] intentional discrimination.

[*[Alternative One – for use when plaintiff does not seek back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period:]* Back pay damages, if any, apply from the time [plaintiff] was [describe employment action] until the date of your verdict. [However, federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. Therefore the back pay award in this case must be determined only for the period between [specify dates]].**]**

[*[Alternative Two – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge:]* In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period but two years or less before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.**]**

[*[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge:]* In this

case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period and more than two years before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [date two years prior to filing date of charge (hereafter "two-year date")] until the date of your verdict. In that case, back pay applies from [two-year date] rather than [prior date] because federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.**]**

You must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award back pay, you are instructed to deduct from the back pay figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of back pay.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of back pay to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

Title VII authorizes a back pay award as a remedy for intentional discrimination. 42 U.S.C. § 2000e-5(g)(1). See *Loeffler v. Frank,* 486 U.S. 549, 558 (1988) (the back pay award authorized by Title VII "is a manifestation of Congress' intent to make persons whole for injuries suffered through past discrimination."). Title VII provides a presumption in favor of a back pay award once liability has been found. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Back Pay Is an Equitable Remedy

An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim for back pay. *See* 42 U.S.C. §1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e5(g)]."); 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . *or any other* equitable relief as the court deems appropriate) (emphasis added). *See also Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir. 2009) (explaining in Title VII case that "back pay and front pay are equitable remedies to be determined by the court"); *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 316 (3d Cir. 2006) (relying on the statutory language of Title VII, which applies to damages recovery under the ADA, the court holds in an ADA action that "back pay remains an equitable remedy to be awarded within the discretion of the court"); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (noting that front pay and back pay are equitable remedies not subject to the Title VII cap on compensatory damages).

An instruction on back pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may agree to a jury determination on back pay, in which case this instruction would also be appropriate. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the court's determination without reference to the jury. Instruction 5.4.1, on compensatory damages,

instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

Computation of Back Pay

The appropriate standard for measuring a back pay award under Title VII is "to take the difference between the actual wages earned and the wages the individual would have earned in the position that, but for discrimination, the individual would have attained." *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1119-20 (3d Cir. 1988). For a discussion of the limits on use of lay witness testimony to establish back pay and front pay calculations, see *Donlin*, 581 F.3d at 81-83. For a discussion of the use of comparators to establish what the plaintiff would have earned as an employee of the defendant, see *id.* at 90.

42 U.S.C. § 2000e-5(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." The court of appeals has explained that "[t]his constitutes a limit on liability, not a statute of limitations, and has been interpreted as a cap on the amount of back pay that may be awarded under Title VII." *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it was plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set the relevant limit under the circumstances of the case). *See id.* Accordingly, when the facts of the case make Section 2000e-5's cap relevant, the court should instruct the jury on it.

Section 2000e-5's current framework for computing a back pay award for Title VII pay discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Ledbetter asserted a Title VII pay discrimination claim; specifically, she claimed that she received disparate pay during the charge filing period as a result of intentional discrimination in pay decisions prior to the charge filing period. A closely divided Court held this claim untimely: "A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 628. Finding, inter alia, that the *Ledbetter* decision "significantly impairs statutory protections against discrimination in compensation .... by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress," and that the decision "ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended," Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA). Pub. L. No. 111-2, § 2, January 29, 2009, 123 Stat. 5. The LLFPA added the following provisions to 42 U.S.C. § 2000e-5(e):

> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory

compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

Under this framework, the specific instructions on back pay calculation will vary depending on (a) whether the plaintiff asserts a pay-discrimination claim;[9] (b) if so, whether the plaintiff asserts not only an unlawful act within the charge filing period but also a similar or related unlawful action prior to the charge filing period; and (c) if so, whether the similar or related prior action fell more than two years prior to the filing of the charge.

Alternative One in the model instruction is suggested for use when the plaintiff does not seek back pay from periods earlier than the date of the unlawful employment practice that provides the basis for the plaintiff's claim.[10] Alternative Two in the model is suggested for use when the plaintiff alleges pay discrimination and seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge; in that situation, the two-year limit need not be mentioned. Alternative Three in the model is suggested for use when the plaintiff alleges pay discrimination and seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge.

In *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1983), the court held that unemployment benefits should not be deducted from a Title VII back pay award. That holding is reflected in the instruction.

Mitigation

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[9] *See Noel v. Boeing Co.*, 2010 WL 3817090, at *6 (3d Cir. 2010) (holding that the LLFPA "does not apply to failure-to-promote claims").

[10] Ordinarily, the bracketed language in Alternative One concerning the two-year limit will be unnecessary: Because the charge filing periods (180 or 300 days) are shorter than two years, a timely charge will fall less than two years after the unlawful practice. The bracketed language is provided for use in cases where that is not true – for instance, where the plaintiff's charge was untimely but the defendant waived its timeliness defense.

On the question of mitigation that would reduce an award of back pay, see *Booker v. Taylor Milk Co.,* 64 F.3d 860, 864 (3d Cir.1995):

> A successful claimant's duty to mitigate damages is found in Title VII: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1); see *Ellis v. Ringgold Sch. Dist*., 832 F.2d 27, 29 (3d Cir. 1987). Although the statutory duty to mitigate damages is placed on a Title VII plaintiff, the employer has the burden of proving a failure to mitigate. See *Anastasio v. Schering Corp*., 838 F.2d 701, 707-08 (3d Cir. 1988). To meet its burden, an employer must demonstrate that 1) substantially equivalent work was available, and 2) the Title VII claimant did not exercise reasonable diligence to obtain the employment.
>
> . . .
>
> The reasonableness of a Title VII claimant's diligence should be evaluated in light of the individual characteristics of the claimant and the job market. See *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992). Generally, a plaintiff may satisfy the "reasonable diligence" requirement by demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing, and available to accept employment. . . .
>
> The duty of a successful Title VII claimant to mitigate damages is not met by using reasonable diligence to obtain any employment. Rather, the claimant must use reasonable diligence to obtain substantially equivalent employment. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982). Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, and status as the position from which the Title VII claimant has been discriminatorily terminated.

In *Booker,* the court rejected the defendant's argument that *any* failure to mitigate damages must result in a forfeiture of *all* back pay. The court noted that "the plain language of section 2000e-5 shows that amounts that could have been earned with reasonable diligence should be used to reduce or decrease a back pay award, not to wholly cut off the right to any back pay. See 42 U.S.C. §2000e-5(g)(1)." The court further reasoned that the "no-mitigation-no back pay" argument is inconsistent with the "make whole" purpose underlying Title VII. 64 F.3d at 865.

The court of appeals has cited with approval decisions stating that "only unjustified refusals to find or accept other employment are penalized." *Donlin*, 581 F.3d at 89. Thus, for example, "the employee is not required to accept employment which is located an unreasonable distance from her home." *Id.*; *see also id.* at 89 & n.13 (plaintiff's choice – after her dismissal – of lower-paying job did not constitute a failure to mitigate because additional cost of commuting would have offset any additional earnings from alternative higher-paying job).

After-Acquired Evidence of Employee Misconduct

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court held that if an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability. However, the employer in such a circumstance does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful discharge to the date the new information was discovered." 513 U.S. at 362. See also *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that "after-acquired evidence may be used to limit the remedies available to a plaintiff where the employer can first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing that it would have made the same employment decision when it became aware of the post-decision evidence of the employee's misconduct.

5.4.4 Title VII Damages — Front Pay — For Advisory or Stipulated Jury

Model

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. You must make this reduction because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. So you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future. **]**

Comment

There is no right to jury trial under Title VII for a claim for front pay. See *Pollard v. E. I. du*

Pont de Nemours & Co., 532 U.S. 843 (2001) (holding that front pay under Title VII is not an element of compensatory damages). In *Pollard* the Court reasoned that the Civil Rights Act of 1991 expanded the remedies available in Title VII actions to include legal remedies and provided a right to jury trial on those remedies. Therefore, remedies that were cognizable under Title VII before the Civil Rights Act of 1991 must be treated as equitable remedies. Any doubt on the question is answered by the Civil Rights Act itself: 42 U.S.C. § 1981a(a)(1) provides that, in intentional discrimination cases brought under Title VII, "the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of [§ 1981a], *in addition to any relief* authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent." *See also Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir. 2009) (explaining in Title VII case that "back pay and front pay are equitable remedies to be determined by the court").

An instruction on front pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may agree to a jury determination on front pay, in which case this instruction would also be appropriate. Instruction 5.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

Front pay is considered a remedy that substitutes for reinstatement, and is awarded when reinstatement is not viable under the circumstances. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc*., 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy").

"[T]here will often be uncertainty concerning how long the front-pay period should be, and the evidence adduced at trial will rarely point to a single, certain number of weeks, months, or years. More likely, the evidence will support a range of reasonable front-pay periods. Within this range, the district court should decide which award is most appropriate to make the claimant whole." *Donlin*, 581 F.3d at 87.

In *Monessen S.R. Co. v. Morgan,* 486 U.S. 330, 339 (1988), the Court held that "damages awarded in suits governed by federal law should be reduced to present value." (Citing *St. Louis Southwestern R. Co. v. Dickerson,* 470 U.S. 409, 412 (1985)). The "self-evident" reason is that "a given sum of money in hand is worth more than the like sum of money payable in the future." The Court concluded that a "failure to instruct the jury that present value is the proper measure of a damages award is error." Id. Accordingly, the instruction requires the jury to reduce the award of front pay to present value. It should be noted that where damages are determined under state law, a present value instruction may not be required under the law of certain states. See, e.g., *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset" method, under which no reduction is necessary to determine present value, as the value of future income streams is likely to be offset by inflation).

5.4.5 Title VII Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

Nominal damages may be awarded under Title VII. *See, e.g., Bailey v. Runyon*, 220 F.3d 879, 882 (8th Cir. 2000) (nominal damages are appropriately awarded where a Title VII violation is proved even though no actual damages are shown). *See generally*, Availability of Nominal Damages in Action Under Title VII of Civil Rights Act of 1964, 143 A.L.R.Fed. 269 (1998). An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." Id. at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." Id. Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." Id. at 454.

Nominal damages may not exceed one dollar. See *Mayberry v. Robinson,* 427 F.Supp. 297, 314 (M.D.Pa.1977) ("It is clear that the rule of law in the Third Circuit is that nominal damages may not exceed $1.00.") (citing *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 830 (3d Cir.1976)).

Instructions For Race Discrimination Claims Under 42 U.S.C § 1981

Numbering of Section 1981 Instructions

6.0 Section 1981 Introductory Instruction

6.1 Elements of a Section 1981 Claim

- 6.1.1 Disparate Treatment — Mixed-Motive
- 6.1.2 Disparate Treatment — Pretext
- 6.1.3 Harassment — Hostile Work Environment — Tangible Employment Action
- 6.1.4 Harassment — Hostile Work Environment — No Tangible Employment Action
- 6.1.5 Disparate Impact
- 6.1.6 Retaliation
- 6.1.7 Municipal Liability — No Instruction

6.2 Section 1981 Definitions

- 6.2.1 Race
- 6.2.2 Hostile or Abusive Work Environment
- 6.2.3 Constructive Discharge

6.3 Section 1981 Defenses

- 6.3.1 Bona Fide Occupational Qualification
- 6.3.2 Bona Fide Seniority System

6.4 Section 1981 Damages

6.4.1 Compensatory Damages — General Instruction

6.4.2 Punitive Damages

6.4.3 Back Pay — For Advisory or Stipulated Jury

6.4.4 Front Pay — For Advisory or Stipulated Jury

6.4.5 Nominal Damages

6.0 Section 1981 Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Federal Civil Rights statute that prohibits discrimination against [an employee] [an applicant for employment] because of the person's race.

Specifically, [plaintiff] claims that [he/she] was [describe the employment action at issue] by defendant[s] _____ because of [plaintiff's] race.

[Defendant] denies that [plaintiff] was discriminated against in any way. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts. It prohibits racial discrimination against whites as well as nonwhites. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976) (Section 1981 was intended to "proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race"). In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court held that Section 1981 regulated private conduct as well as governmental action.[1]

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court restricted the application of Section 1981 to claims arising out of the formation of the contract. But the Civil

[1] Though Section 1981 regulates both public and private action, the Court of Appeals has held that Section 1981 does not provide a *remedy* for a government actor's violation of its terms. *See McGovern v. City of Philadelphia*, 554 F.3d 114, 122 (3d Cir. 2009) ("[N]o implied private right of action exists against state actors under 42 U.S.C. § 1981."). *See generally* Comment 6.1.7 (discussing *McGovern*). A claim against a government actor for a violation of Section 1981 can in appropriate circumstances be brought under 42 U.S.C. § 1983. For discussion of Section 1983 claims, see generally Chapter 4.

Rights Act of 1991 legislatively overruled the Supreme Court's decision in *Patterson*, providing that the clause "to make and enforce contracts" in Section 1981 "includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "[A] plaintiff cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce.'" *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479-80 (2006).

The protections afforded by Section 1981 may in many cases overlap with those of Title VII. But the standards and protections of the two provisions are not identical. For example, a Section 1981 plaintiff does not have to fulfill various prerequisites, including the completion of the EEOC administrative process, before bringing a court action. Also, Title VII applies only to employers with 15 or more employees, whereas Section 1981 imposes no such limitation. Employees cannot be sued under Title VII, but they can be sued under Section 1981. On the other hand, Title VII protects against discrimination on the basis of sex, creed or color as well as race, while Section 1981 prohibits racial discrimination only. Title VII and Section 1981 are subject to different limitations periods as well. See *Cardenas v. Massey*, 269 F.3d 251, 266 (3d Cir. 2001).

For ease of reference, these pattern instructions provide a separate set of instructions specifically applicable to Section 1981 claims. But where both Section 1981 and Title VII are both applicable, and the instructions for both provisions are substantively identical, there is no need to give two sets of instructions. In such cases, these Section 1981 instructions can be used because the claim will have to be one sounding in race discrimination. The Comment will note if a Section 1981 instruction is substantively identical to a Title VII instruction.

6.1.1 Elements of a Section 1981 Claim— Disparate Treatment —Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] race was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] race was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] race was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] race was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] race played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] race was a "motivating factor" if [his/her] race played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:

If you find in [plaintiff's] favor with respect to each of the facts that [plaintiff] must prove, you must then decide whether [defendant] has shown that [defendant] would have made the same decision with respect to [plaintiff's] employment even if there had been no racially discriminatory motive. Your verdict must be for [defendant] if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] race had played no role in the employment decision.**]**

Comment

At the outset, it should be noted that in the context of another statutory scheme the Supreme Court has criticized the "mixed motive" and "pretext" frameworks for employment discrimination cases. In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of the Title VII mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court's analysis centered on the language of the ADEA, and the ADEA's language differs from that in Section 1981, so it is unclear whether the Court would be inclined to disapprove the use of a mixed-motive framework in Section 1981 cases. In *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009), the parties agreed that *Gross* had no application to the Section 1981 claim in that case, and the panel therefore did not have occasion to decide the issue. *See id.* at 182 n.5 (majority opinion) (noting that it was unnecessary to decide the question but also suggesting that *Gross* was distinguishable because "Section 1981 ... does not include the 'because of' language used in the ADEA" and "use of the *Price Waterhouse* framework makes sense in light of section 1981's text"); *id.* at 185 (Jordan, J., concurring) ("[C]ontrary to dicta in footnote five of the Majority Opinion, the Supreme Court's decision in *Gross* ... may well have an impact on our precedent concerning the analytical approach to be taken in employment discrimination cases under § 1981."). More recently, the court of appeals stated in *Anderson v. Wachovia Mortgage Corp.*, 621 F.3d 261 (3d Cir. 2010), that "both the direct evidence test introduced by *Price Waterhouse v. Hopkins* ... and the burden-shifting framework introduced by *McDonnell Douglas Corp. v. Green* ... may be used to determine whether an employer has discriminated against a plaintiff in violation of § 1981," *id.* at 267-68; the *Anderson* court ruled, however, that the plaintiffs' evidence did not qualify their case for application of the *Price Waterhouse* test, *see id.* at 269. These instructions were constructed on the assumption that the mixed-motive and pretext frameworks apply in Section 1981 cases.

The distinction between "mixed-motive" cases and "pretext" cases is generally determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant's activity was motivated at least in part by racial animus, and therefore a "mixed-motive" instruction is given. If the evidence of discrimination is only circumstantial, then defendant can argue that there was no racial animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 6.1.2 should be given. *See generally Fakete v. Aetna, Inc.,* 308 F.3d 335 (3d Cir. 2002) (using "direct evidence" to describe "mixed-motive" cases and noting that pretext cases arise when the plaintiff presents only indirect or circumstantial evidence of discrimination); *Glanzman v. Metropolitan Management Corp.,* 391 F.3d 506 (3d Cir. 2004) (same); *Anderson*, 621 F.3d at 269 (holding the *Price Waterhouse* framework inapplicable to plaintiffs' Section 1981 discriminatory-lending claims because plaintiffs had failed to point to "direct evidence of discrimination").[2]

[2] *Glanzman* and *Fakete* were ADEA cases and their application of the *Price Waterhouse* mixed-motive framework to ADEA cases has, as noted above, been overruled by *Gross*.

Same Decision Defense

In *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), the court of appeals rejected a plaintiff's challenge to the jury instructions on her race discrimination claims under Section 1981 and Section 1983. Reasoning that "Title VII and sections 1981 and 1983 all require a showing of 'but for' causation," the court of appeals refused to credit the plaintiff's contention that she "need only show that race was a 'substantial' or 'motivating' factor" in the defendant's decision." *Id.* at 914-15. The *Lewis* court's reasoning, however, did not appear to foreclose the possibility of a burden-shifting framework in Section 1981 cases. Responding to the plaintiff's reliance on *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), the panel majority observed:

> In *Mt. Healthy* ... Justice Rehnquist specifically rejected the proposition that, under § 1983, it was enough to show that protected constitutional activity was a "substantial factor" leading to the challenged action. *Id.* at 285, 97 S.Ct. at 575. *Mt. Healthy* merely found that, after an initial showing that protected activity was a "substantial" or "motivating factor," the burden shifted to defendants to show that the same action would have occurred even in the absence of such activity. *Id.* at 287, 97 S.Ct. at 576. It therefore did not deviate from the requirement of "but for" causation; rather, its only effect was to allocate and specify burdens of proof.

Lewis, 725 F.2d at 916.

Because the court of appeals has indicated that the approach to Section 1981 claims generally follows that taken with respect to Title VII claims, *see, e.g.*, *Schurr v. Resorts Intern. Hotel, Inc.*, 196 F.3d 486, 499 (3d Cir. 1999), it can be argued that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), setting a mixed-motive framework for Title VII discrimination claims, also set in place a framework for Section 1981 claims. But complications arise from the fact that the Price Waterhouse framework has been altered – for Title VII discrimination claims – by legislation enacted in 1991. Specifically, Section 107 of the Civil Rights Act of 1991 (42 U.S.C. § 2000e-5(g)(2)(B)) changed the law on "mixed-motive" liability in Title VII actions. Previously, a defendant could escape liability by proving the "same decision" would have been made even without a discriminatory motive. The Civil Rights Act of 1991 provides that a "same decision" defense precludes an award for money damages, but not liability.

The Eleventh Circuit has held that the change wrought by the Civil Rights Act of 1991 does not apply to Section 1981 actions. *Mabra v. United Food & Comm. Workers Union No. 1996,* 176 F.3d 1357, 1358 (11th Cir. 1999). The Court parsed the 1991 Act and concluded that while Congress had amended the mixed-motive provisions in Title VII, it had not amended them in Section 1981:

> Enacted as part of the Civil Rights Act of 1991 ("1991 Act"), the mixed-motive amendments specifically add two provisions to the text of Title VII; they make no amendment or addition to § 1981. See Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)). In contrast, the portion

of the 1991 Act amending § 1981 by adding two new subsections to the text of that statute makes no mention of any change in the mixed-motive analysis in § 1981 cases. Id. at 1071-72.

The amendments to Section 1981 that were added by the 1991 Act and cited by the *Mabra* court were:

> (b) For purposes of this section, 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 contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The Eleventh Circuit pattern instruction accordingly provides that if the jury finds that the same decision would have been made, the jury must find for the defendant. See Eleventh Circuit Pattern Jury Instruction 1.3.1.

The Third Circuit follows the Eleventh Circuit approach. *See Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009) ("[A]lthough the Civil Rights Act of 1991 amended section 1981 in other ways, it did not make the mixed-motive amendments described above applicable to section 1981 actions. Therefore, *Price Waterhouse*, and not the 1991 amendments to Title VII, controls the instant case, and Craftmatic has a complete defense to liability if it would have made the same decision without consideration of Brown's race."). Accordingly, the pattern instruction sets forth the "same decision" defense as one that precludes liability, and thus differentiates it from the "same decision" defense in Title VII actions.

6.1.2 Elements of a Section 1981 Claim— Disparate Treatment— Pretext

Model

In this case [plaintiff] is alleging that [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] race was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] race was a determinative factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] race was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff 's] race, the [adverse employment action] would not have occurred.

Comment

This instruction is to be used when the plaintiff's proof of discrimination is circumstantial rather than direct. See the Comment to Instruction 6.1.1. The instruction is substantively identical to the pretext instruction given for Title VII cases. See Instruction 5.1.2.[3] Where the plaintiff seeks recovery under both Title VII and Section 1981, this instruction may be given for both causes of action.

Discriminatory intent is required to support a claim under Section 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (holding that Section 1981 requires discriminatory intent and that the burden-shifting framework set by *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), applies to Section 1981 claims). *See also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 135 (3d Cir. 1985) (Section 1981 requires a showing of intent to discriminate on the basis of race); *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir.1996) ("[A] facially neutral policy does not violate equal protection solely because of disproportionate effects" because Section 1981 provides a cause of action "for intentional discrimination only.").

If the plaintiff establishes a prima facie case of discrimination,[4] the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506–07 (1992). *See also Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509 (3d Cir.1993) (pretext turns on the qualifications and criteria identified by the employer, not the categories the plaintiff considers important). If the defendant meets this burden, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for race discrimination, or in some other way prove it is more likely than not that race motivated the employer. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). The plaintiff retains the ultimate burden of persuading the jury

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[3] Instruction 5.1.2's first element includes a bracketed alternative for failure to renew an employment arrangement as an adverse employment action. That alternative is based on *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008). *Wilkerson* involved a Title VII retaliation claim rather than a Section 1981 claim; thus, it does not provide direct authority for the inclusion of such an alternative in Instruction 6.1.2.

[4] The court of appeals has adapted the prima facie case as follows for the purpose of a Section 1981 discriminatory-lending claim:

> [The] plaintiff must show (1) that he belongs to a protected class, (2) that he applied and was qualified for credit that was available from the defendant, (3) that his application was denied or that its approval was made subject to unreasonable or overly burdensome conditions, and (4) that some additional evidence exists that establishes a causal nexus between the harm suffered and the plaintiff's membership in a protected class, from which a reasonable juror could infer, in light of common experience, that the defendant acted with discriminatory intent.

Anderson v. Wachovia Mortgage Corp., 621 F.3d 261, 275 (3d Cir. 2010).

of intentional discrimination. The factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-67 (3d Cir.1996) (en banc).

In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 279 (3d Cir.1998), the court held that the question of whether the defendant has met its intermediate burden of production under the *McDonnell Douglas* test is a "threshold matter to be decided by the judge."

For further commentary on the standards applicable to pretext cases, see the Comment to Instruction 5.1.2.

6.1.3 Elements of a Section 1981 Claim — Harassment —Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] race. [Defendant(s)] [is/are] liable for racial harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is [race].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's race] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Sixth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use with respect to the employer when the alleged harassment is by non-supervisory employees:

However, as to [employer], because [names of alleged harassers] are not supervisors, you must also determine whether [employer] is responsible under the law for those acts. For [employer] to be liable for the acts of harassment of non-supervisor employees, [plaintiff] must prove by a preponderance of the evidence that management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of racial harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

Comment

The standards for a hostile work environment claim are identical under Title VII and Section 1981. *See, e.g., Verdin v. Weeks Marine Inc*., 124 Fed. Appx. 92, 95 (3d Cir. 2005) ("Regarding Verdin's hostile work environment claim, the same standard used under Title VII applies under Section 1981. *See McKenna v. Pac. Rail Serv*., 32 F.3d 820, 826 n. 3 (3d Cir.1994)."); *Ocasio v. Lehigh Valley Family Health Center,* 92 Fed.Appx. 876, 879-80 (3d Cir. 2004) ("As amended by the 1991 Civil Rights Act, § 1981 now encompasses hostile work environment claims, and we apply the same standards as in a similar Title VII claim.").

However, while the standards of liability are identical, there is a major difference in the coverage of the two provisions. Under Title VII, only employers can be liable for discrimination in employment. In contrast, Section 1981 prohibits individuals, including other employees, from racial discrimination against an employee. See *Cardenas v. Massey,* 269 F.3d 251, 268 (3d Cir. 2001) ("Although claims against individual supervisors are not permitted under Title VII, this court has found individual liability under § 1981 when [the defendants] intentionally cause an infringement of rights protected by Section 1981, regardless of whether the [employer] may also be held liable."); *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir. 1986) ("employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable"). Accordingly, the instruction modifies the instruction used for Title VII hostile work environment claims, to specify that individual employees can be liable for acts of racial harassment. See Instruction 5.1.4.

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 6.2.2.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[5] Instruction 6.2.3 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

Liability for Non-Supervisors

Respondeat superior liability for discriminatory harassment by non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take

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[5] Instruction 6.1.3 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 6.1.4 should be used instead. *See* Comment 6.1.4 (discussing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 150 (2004).

prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990). See also *Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of . . . harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

For a discussion of the definition of "management level personnel" in a Title VII case, see Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir. 2009)).

Severe or Pervasive Activity

The terms "severe or pervasive" set forth in the instruction are in accord with Supreme Court case law and provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) ("The disjunctive phrasing means that 'severity' and 'pervasiveness' are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.") (quoting 2 C.Sullivan et. al., *Employment Discrimination Law and Practice* 455 (3d ed. 2002).

Subjective and Objective Components

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

Hostile Work Environment That Pre-exists the Plaintiff's Employment

The instruction refers to harassing "conduct" that "was motivated by the fact that [plaintiff] is a [plaintiff's race]." This language is broad enough to cover the situation where the plaintiff is the first member of the plaintiff's race to enter the work environment, and the working conditions pre-existed the plaintiff's employment. In this situation, the "conduct" is the refusal to change an environment that is hostile to member of the plaintiff's race. The court may wish to modify the instruction so that it refers specifically to the failure to correct a pre-existing environment.

Quid Pro Quo Claims

These Section 1981 instructions do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and Section 1981 applies to racial discrimination only. Where a Section 1981 claim is raised on quid pro quo grounds, the court can use Instruction 5.1.3, with the proviso that it must be modified if the supervisor is also being sued for individual liability.

6.1.4 Elements of a Section 1981 Claim— Harassment — Hostile Work Environment — No Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] race.

[Defendant(s)] [is/are] liable for racial harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [names] conduct was not welcomed by [plaintiff].

Third: [names] conduct was motivated by the fact that [plaintiff] is [race].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's race] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

[For use when the alleged harassment is by non-supervisory employees:

However, as to [employer], because [names of harassers] are not supervisors, you must also determine whether [employer] is responsible under the law for those acts. For [employer] to be liable for the acts of harassment of non-supervisor employees, plaintiff must prove by a preponderance of the evidence that management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of racial harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

If any of the above elements has not been proved by a preponderance of the evidence, your verdict must be for [defendant(s)] and you need not proceed further in considering this claim. If you find that the elements have been proved, then you must consider [employer's] affirmative defense. I will instruct you now on the elements of that affirmative defense.

With respect to [employer] you must find for [employer] if you find that [employer] has

proved both of the following elements by a preponderance of the evidence:

First: That [employer] exercised reasonable care to prevent racial harassment in the workplace, and also exercised reasonable care to promptly correct the harassing behavior that does occur.

Second: That [plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [employer].

Proof of the following facts will be enough to establish the first element that I just referred to, concerning prevention and correction of harassment:

1. [Employer] had established an explicit policy against harassment in the workplace on the basis of race.

2. That policy was fully communicated to its employees.

3. That policy provided a reasonable way for [plaintiff] to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure provided by [employer] will ordinarily be enough to establish that [plaintiff] unreasonably failed to take advantage of a corrective opportunity.

The defense of having an effective procedure for handling racial discrimination complaints is available to the employer only. It has nothing to do with the individual liability of employees for acts of racial discrimination.

Comment

As discussed in the Comment to 6.1.3, the Third Circuit as well as other courts have held that the standards for a hostile work environment claim are identical under Title VII and Section 1981. However, as also discussed in that Comment, Section 1981 prohibits individuals, including employees, from engaging in acts of racial discrimination. Therefore this instruction modifies the instruction used for Title VII hostile work environment claims, to specify that individual employees can be liable for acts of racial discrimination in creating a hostile work environment. See Instruction 5.1.5.

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 6.2.2.

This instruction is to be used in racial harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth,* 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998). *See Swinton v. Potomac Corp*., 270 F.3d 794, 817 (9th Cir. 2001) (holding that the *Faragher/Ellerth* defense applies to Section 1981 actions in the same manner as in Title VII actions).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990). *See also* Comment 6.1.3 (discussing *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999), and *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009)).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 138-41 (2004), the Court considered the relationship between constructive discharge brought about by supervisor harassment and the affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that "an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."

6.1.5 Elements of a Section 1981 Claim — Disparate Impact

No Instruction

Comment

Section 1981 requires proof of intentional discrimination. Thus, there is no cause of action for disparate impact under section 1981. *See, e.g., Pollard v. Wawa Food Market*, 366 F. Supp.2d 247, 252 (E.D.Pa. 2005) (concluding that disparate impact claims "are not actionable under section 1981" because section 1981 requires proof of discriminatory motive, and disparate impact claims do not).

6.1.6 Elements of a Section 1981 Claim — Retaliation

Model

[Plaintiff] claims that [defendant(s)] discriminated against [him/her] because of [plaintiff's] [describe protected activity].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [describe activity protected by Section 1981].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a good faith belief that [plaintiff's] [or someone else's] right to be free from racial discrimination was violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant(s)] action followed shortly after [defendant(s)] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

Comment

Unlike Title VII, Section 1981 does not contain a specific statutory provision prohibiting retaliation. But the Supreme Court has held that retaliation claims are cognizable under Section 1981 despite the absence of specific statutory language. *CBOCS West, Inc. v. Humphries,* 128 S.Ct. 1951 (2008). And the Third Circuit has held that the legal standards for a retaliation claim under Section 1981 are the same as those applicable to a Title VII retaliation claim. *See, e.g., Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001); *Khair v. Campbell Soup Co.*, 893 F. Supp. 316, 335-36 (D.N.J. 1995) (noting that with respect to retaliation claims, "The Civil Rights Act of 1991 extended § 1981 to the reaches of Title VII.").

Where the plaintiff seeks recovery under both Title VII and Section 1981 for retaliation, this instruction may be given for both causes of action. It should be noted, however, that a claim under Section 1981 can be brought against an individual as well as the employer. Therefore a plaintiff might bring a retaliation claim not only against the employer but also against the employee who took the allegedly retaliatory action. It would then be appropriate to instruct the jury that while it can impose liability on the individual under Section 1981, it cannot do so under Title VII.

The most common activities protected from retaliation under Section 1981 and Title VII are: 1) opposing unlawful discrimination; 2) making a charge of employment discrimination; 3) testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Section 1981. See the discussion of protected activity in the Comment to Instruction 5.1.7. *See also Glanzman v. Metropolitan Management Corp.,* 391 F.3d 506 (3d Cir. 2004) (if plaintiff were fired for being a possible witness in an employment discrimination action, this would be unlawful retaliation) (ADEA); *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1299 (3d Cir. 1997) (filing discrimination complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White,* 126 S.Ct. 2405 (2006); *Kachmar v. Sungard Data Sys., Inc.,* 109 F.3d 173, 177 (3rd Cir. 1997) (advocating equal treatment was protected activity); *Aman v. Cort Furniture*, 85 F.3d 1074, 1085 (3d Cir. 1989) ("protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct"). The question of whether a particular activity is "protected" from retaliation is a question of law; whether the plaintiff engaged in that activity is a question of fact for the jury.

Determinative effect

Instruction 6.1.6 requires the plaintiff to show that the plaintiff's protected activity had a determinative effect on the allegedly retaliatory activity. This is the standard typically used in Section 1981 pretext cases outside the context of retaliation. See Instruction 6.1.2; *see also Estate of Oliva* ex rel. *McHugh v. New Jersey*, 2010 WL 1757297, at *7 (3d Cir. May 4, 2010) (applying the pretext framework to Section 1981 retaliation claims). It appears that Section 1981 cases that do not involve retaliation can alternatively proceed on a mixed-motive theory subject to a same-decision affirmative defense. See Comment 6.1.1. In the absence of precedential opinions from the court of appeals addressing the question, it is difficult to predict whether such a mixed-motive framework would be available for Section 1981 retaliation claims. *Compare Solomon*

v. Philadelphia Newspapers, Inc., 2009 WL 215340, at *2 (3d Cir. 2009) (unpublished opinion) (Section 1981 retaliation claim requires proof that retaliatory animus had a determinative effect), *with Evans v. Port Authority Trans-Hudson Corp.*, 2006 WL 408391, 5 (3d Cir. 2006) (unpublished opinion) ("Among the elements that a plaintiff must establish in order to prevail on a retaliation claim under § 1981 is that the protected activity was a substantial or motivating factor in the alleged retaliatory action." (Internal quotation marks omitted.)).

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2415 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court in *White* also held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. Because the standards for retaliation claims under Section 1981 have been equated to those applicable to Title VII, the instruction is written to comply with the standard for actionable retaliation in *White*. For a more complete discussion of *White*, see the Comment to Instruction 5.1.7.

6.1.7 Elements of a Section 1981 Claim — Municipal Liability — No Instruction

Comment

Section 1981 applies against employers acting under color of State law. See 42 U.S.C. § 1981(c). Where a government employee brings a claim of racial discrimination in employment, there can be an overlap of Section 1981 and Section 1983 protections. In *Jett v. Dallas Indep. School Dist*., 491 U.S. 701, 731 (1989), the Supreme Court held that the remedial provisions of Section 1983 constituted the exclusive federal remedy for violations of rights enumerated in Section 1981 for actions under color of State law. The Civil Rights Act of 1991 amended Section 1981 after the decision in *Jett*, however; and the circuits have split over whether that Act established an independent private cause of action under Section 1981 against employers acting under color of state law for acts of racial discrimination. *See, e.g.*, *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996) (Civil Rights Act of 1991 restored a private right of action under Section 1981 for racial discrimination in employment under color of state law); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir.1995) (section 1983 continues as the exclusive federal remedy for rights guaranteed in section 1981 by state actors); *Johnson v. City of Fort Lauderdale*, 114 F.3d 1089 (11th Cir.1997) (following Fourth Circuit view).

The Third Circuit has "join[ed] five of [its] sister circuits in holding that no implied private right of action exists against state actors under 42 U.S.C. § 1981." *McGovern v. City of Philadelphia*, 554 F.3d 114, 122 (3d Cir. 2009).[6] Accordingly, no municipal-liability instruction is provided here. A claim against a government actor for a violation of Section 1981 can in appropriate circumstances be brought under 42 U.S.C. § 1983. For discussion of Section 1983 claims, see generally Chapter 4.

[6] As the quote in the text indicates, the *McGovern* court described its determination on this point as a holding. The *McGovern* court also noted another ground for its resolution of the case: "Even if we were to recognize a cause of action under § 1981, McGovern's claim against the City was appropriately dismissed for an independent reason: he did not allege that the discrimination he suffered was pursuant to an official policy or custom of the City." *McGovern*, 554 F.3d at 121.

6.2.1 Section 1981 Definitions — Race

Model

You must determine whether the discrimination, if any, was based on race, as it is only racial discrimination that is prohibited by this statute under which [plaintiff] seeks relief. The parties dispute whether [plaintiff] is a member of a "race" entitled to the protections of the statute. You are instructed that the statute is intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended to forbid, even if it would not be classified as racial in terms of modern usage or scientific theory.

Comment

42 U.S.C. § 1981 prohibits racial discrimination. In *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609-10 (1987), the Court considered whether a person of Arab descent was entitled to the protections of Section 1981. Defendants argued that the plaintiff was a Caucasian as that term is commonly understood in modern usage. But the Court found that the question of race had to be determined by reference to a different time period, i.e., the 19th Century, when Section 1981 was enacted. "Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law." Id. The Court elaborated on the proper inquiry as follows:

> In the middle years of the 19th century, dictionaries commonly referred to race as a "continued series of descendants from a parent who is called the stock," N. Webster, An American Dictionary of the English Language 666 (New York 1830) (emphasis in original), "the lineage of a family," 2 N. Webster, A Dictionary of the English Language 411 (New Haven 1841), or "descendants of a common ancestor," J. Donald, Chambers' Etymological Dictionary of the English Language 415 (London 1871). . . . It was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races, 8 The Century Dictionary and Cyclopedia 4926 (1911), or to race as involving divisions of mankind based upon different physical characteristics. Webster's Collegiate Dictionary 794 (3d ed. 1916). Even so, modern dictionaries still include among the definitions of race "a family, tribe, people, or nation belonging to the same stock." Webster's Third New International Dictionary 1870 (1971); Webster's Ninth New Collegiate Dictionary 969 (1986).
>
> Encyclopedias of the 19th century also described race in terms of ethnic groups, which is a narrower concept of race than petitioners urge. Encyclopedia Americana in 1858, for example, referred to various races such as Finns, vol. 5, p. 123, gypsies, 6 id., at 123, Basques, 1 id., at 602, and Hebrews, 6 id., at 209. The 1863 version of the New American

> Cyclopaedia divided the Arabs into a number of subsidiary races, vol. 1, p. 739; represented the Hebrews as of the Semitic race, 9 id., at 27, and identified numerous other groups as constituting races, including Swedes, 15 id., at 216, Norwegians, 12 id., at 410, Germans, 8 id., at 200, Greeks, 8 id., at 438, Finns, 7 id., at 513, Italians, 9 id., at 644-645 (referring to mixture of different races), Spanish, 14 id., at 804, Mongolians, 11 id., at 651, Russians, 14 id., at 226, and the like. The Ninth edition of the Encyclopedia Britannica also referred to Arabs, vol. 2, p. 245 (1878), Jews, 13 id., at 685 (1881), and other ethnic groups such as Germans, 10 id., at 473 (1879), Hungarians, 12 id., at 365 (1880), and Greeks, 11 id., at 83 (1880), as separate races.
>
> These dictionary and encyclopedic sources are somewhat diverse, but it is clear that they do not support the claim that for the purposes of § 1981, Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race. We would expect the legislative history of § 1981 . . . to reflect this common understanding, which it surely does. The debates are replete with references to the Scandinavian races, Cong. Globe, 39th Cong., 1st Sess., 499 (1866) (remarks of Sen. Cowan), as well as the Chinese, id., at 523 (remarks of Sen. Davis), Latin, id., at 238 (remarks of Rep. Kasson during debate of home rule for the District of Columbia), Spanish, id., at 251 (remarks of Sen. Davis during debate of District of Columbia suffrage), and Anglo-Saxon races, id., at 542 (remarks of Rep. Dawson). Jews, ibid., Mexicans, see ibid. (remarks of Rep. Dawson), blacks, passim, and Mongolians, id., at 498 (remarks of Sen. Cowan), were similarly categorized. Gypsies were referred to as a race. Ibid. (remarks of Sen. Cowan). Likewise, the Germans. . . .
>
> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. The Court of Appeals was thus quite right in holding that § 1981, "at a minimum," reaches discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens." It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

Note that Section 1981 does not prohibit racial discrimination that is solely on the basis of location of birth (as distinct from ethnic or genetic characteristics). *See Bennun v. Rutgers State Univ.*, 941 F.2d 154, 172 (3d Cir. 1991) ("Section 1981 does not mention national origin"); *King v. Township of E. Lampeter*, 17 F. Supp. 2d 394, 417 (E.D. Pa. 1998) (holding that disparate treatment on the basis of national origin was not within the scope of Section 1981). While the line between race and national origin may in some cases be vague, it must be remembered that the Court in *St. Francis College* intended that the term "race" be applied broadly. Thus, in *Schouten v. CSX Transp., Inc.*, 58 F.Supp.2d 614, 617-18 (E.D. Pa. 1999), the court declared that "for purposes of Section

1981, race is to be interpreted broadly and may encompass ancestry or ethnic characteristics."

6.2.2 Section 1981 Definitions — Hostile or Abusive Work Environment Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

• The total physical environment of [plaintiff's] work area.

• The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.

• The reasonable expectations of [plaintiff] upon entering the environment.

• The frequency of the offensive conduct.

• The severity of the conduct.

• The effect of the working environment on [plaintiff's] mental and emotional well-being.

• Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.

• Whether the conduct was pervasive.

• Whether the conduct was directed toward [plaintiff].

• Whether the conduct was physically threatening or humiliating.

• Whether the conduct was merely a tasteless remark.

• Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [race]. The harassing conduct may, but need not be racially-based in nature. Rather, its defining characteristic is that the harassment complained of was linked to [plaintiff's] [race]. The key question is whether [plaintiff], as a [plaintiff's race], was subjected to harsh employment conditions to which [those other than members of the plaintiff's race] were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable [member of plaintiff's race] in the same position. That is, you must determine whether a reasonable [member of plaintiff's race] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable [member of plaintiff's race]. The reasonable [member of plaintiff's race] is simply one of normal sensitivity and emotional make-up.

Comment

This instruction can be used if the court wishes to provide a more detailed instruction on what constitutes a hostile work environment than those set forth in Instructions 6.1.3 and 6.1.4. This instruction is substantively identical to the definition of hostile work environment in Title VII cases. See Instruction 5.2.1. The standards for a hostile work environment claim are identical under Title VII and Section 1981. *See, e.g., Verdin v. Weeks Marine Inc*., 124 Fed.Appx. 92, 94 (3d Cir. 2005) ("Regarding Verdin's hostile work environment claim, the same standard used under Title VII applies under Section 1981."); *Ocasio v. Lehigh Valley Family Health Center,* 92 Fed.Appx. 876, 879-80 (3d Cir. 2004): ("As amended by the 1991 Civil Rights Act, § 1981 now encompasses hostile work environment claims, and we apply the same standards as in a similar Title VII claim."). Where the plaintiff seeks recovery under both Title VII and Section 1981, this instruction may be given for both causes of action.

For further commentary on the definition of a hostile work environment, see Instruction 5.2.1.

6.2.3 Section 1981 Definitions — Constructive Discharge

Model

In this case, to show that [he/she] was subjected to an adverse "tangible employment action," [plaintiff] claims that [he/she] was forced to resign due to [name's] racially discriminatory conduct. Such a forced resignation, if proven, is called a "constructive discharge." To prove that [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

Comment

The court of appeals has applied its Title VII constructive-discharge precedent in the context of Section 1981 claims. *See Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 412 (3d Cir. 1999) (citing *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984)). Accordingly, this instruction is substantively identical to the constructive discharge instruction for Title VII actions. *See* Instruction 5.2.2.

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into Instruction 6.1.3 (with respect to the instruction's sixth element). Assuming that the Title VII framework concerning employer liability for harassment applies to Section 1981 actions, the employer's ability to assert an *Ellerth / Faragher* affirmative defense in a constructive discharge case will depend on whether the constructive discharge resulted from actions that were sanctioned by the employer. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the Ellerth/ Faragher affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."); *see also* Comment 5.1.5.

6.3.1 Section 1981 Defenses — Bona Fide Occupational Qualification

No Instruction

Comment

There is no BFOQ defense in racial discrimination cases. 42 U.S.C.A. § 2000e-2(e)(1). *See Ferrill v. Parker Group*, 168 F.3d 468, 475 (11th Cir.1999) (no BFOQ defense to race-matched telemarketing or polling).

6.3.2 Section 1981 Defenses — Bona Fide Seniority System

No Instruction

Comment

Title VII provides that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ." 42 U. S. C. § 2000e-2(h). In *Lorance v. AT & T Technologies, Inc*., 490 U.S. 900, 908-09 (1989), *superseded by statute on other grounds*, Pub. L. No. 102-166, Title I, § 112, 105 Stat. 1079, codified as amended at 42 U.S.C. § 2000e-5(e)(2), the Court stated that the plaintiff has the burden of proving intentional discrimination and held that, as applied to seniority systems, the plaintiff must prove that the seniority system is a means of intentional discrimination. Thus the existence of a bona fide seniority system is not an affirmative defense; rather it is simply an aspect of the plaintiff's burden of proving discrimination. The standards for proving intentional discrimination are the same for Title VII and Section 1981. *See Gunby v. Pennsylvania Electric Co.,* 840 F.2d 1108 (3d Cir. 1988). Accordingly, no instruction is included for any affirmative defense for a bona fide seniority system.

6.4.1 Section 1981 Damages — Compensatory Damages — General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] intentionally discriminated against [plaintiff] by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. Plaintiff must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions [or omissions] actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act caused [plaintiff's] injury, you need not find that [defendant's] act was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had continued in employment with [defendant]. These elements of recovery of wages that [plaintiff] would have received from [defendant] are called "back pay" and "front pay". [Under the applicable law, the determination of "back pay" and "front pay" is for the court.] ["Back pay" and "front pay" are to be awarded separately under instructions that I will soon give you, and any amounts for "back pay"and "front pay" are to be entered separately on the verdict form.]

You may award damages for monetary losses that [plaintiff] may suffer in the future as a result of [defendant's] [allegedly unlawful act or omission]. [For example, you may award damages for loss of earnings resulting from any harm to [plaintiff's] reputation that was suffered as a result of [defendant's] [allegedly unlawful act or omission]. Where a victim of discrimination has been terminated by an employer, and has sued that employer for discrimination, [he/she] may find it more difficult to be employed in the future, or she may have to take a job that pays less than if the discrimination had not occurred. That element of damages is distinct from the amount of wages [plaintiff] would have earned in the future from [defendant] if [he/she] had retained her job.]

As I instructed you previously, [plaintiff] has the burden of proving damages by a preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy as circumstances permit.

[You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her] damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [him/her], then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if [he/she] had taken advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

Compensatory damages are recoverable under Section 1981. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (individual who establishes a cause of action under Section 1981 is entitled to both equitable and legal relief, including compensatory, and under certain circumstances, punitive damages).

Compensatory damages may include emotional distress and humiliation as well as out-of-pocket costs. *See, e.g.*, *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir.1988) ("General compensatory damages are available under §1981, and such damages may include compensation for emotional pain and suffering."). "The plaintiff must present evidence of actual injury, however, before recovering compensatory damages for mental distress." Id.

There is a right to jury trial for compensatory damages under Section 1981. *Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984). However, compensatory damages are to be distinguished from awards of front pay and back pay, which constitute equitable relief. Id. (noting that a claim for back pay is one for equitable relief, but that the plaintiff nonetheless had a right to jury trial on his claims for compensatory damages). Where claims for back pay and front pay are brought with claims for compensatory damages, the trial court may wish to use the jury as an adviser on the amount to be awarded for back pay or front pay; alternatively, the parties may wish to stipulate that the jury's determination of back pay and front pay will be binding. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or is to be left to the court's determination without reference to the jury.

For further comment on compensatory damages, see the Comment to Instruction 5.4.1.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

6.4.2 Section 1981 Damages — Punitive Damages

Model

[Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to [plaintiff's] federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and so receives nominal rather than compensatory damages.]

For Individual Defendant:

[An award of punitive damages is permissible against [name(s) of individual defendant(s)] in this case only if you find by a preponderance of the evidence that [name(s) of individual defendant(s)] personally acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.]

For Employer-Defendant:

[However, punitive damages cannot be imposed on an employer where its employees acted contrary to the employer's own good faith efforts to comply with the law by implementing policies and procedures designed to prevent unlawful discrimination in the workplace.

An award of punitive damages against [employer] is therefore permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

[For use where the defendant-employer raises a jury question on good-faith attempt to comply with the law:

But even if you make a finding that there has been an act of discrimination with malice or reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant-employer] proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law, by adopting policies and procedures designed to prevent unlawful discrimination such as that suffered by [plaintiff].**]**

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied [and that [employer-defendant] has not proved that it made a good-faith attempt to comply with the law] then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant(s)]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant(s)] from again performing any wrongful acts that may have been performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to those [defendant(s)] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant(s)] should be punished for the wrongful conduct at issue in this case, and the degree to which an award of one sum or another will deter [defendant(s)] or others from committing similar wrongful acts in the future.

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon a defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant(s)], you may consider the financial resources of [defendant(s)] in fixing the amount of those damages.]

Comment

In *Johnson v. Railway Express Agency, Inc*., 421 U.S. 454, 460 (1975), the Supreme Court held that a plaintiff in a Section 1981 action is entitled to punitive damages "under certain circumstances." Unlike Title VII, which places caps on punitive damage awards, there is no such statutory cap for Section 1981 actions.

In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme Court held that plaintiffs are not required to show egregious or outrageous discrimination in order to recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean, however, that proof of intentional discrimination is not enough in itself to justify an award of punitive damages, because the statute suggests a congressional intent to authorize punitive awards "in only a subset of cases involving intentional discrimination." Therefore, "an employer must at least

discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Kolstad*, 527 U.S. at 536. The Court further held that an employer may be held liable for a punitive damage award for the intentionally discriminatory conduct of its employee only if the employee served the employer in a managerial capacity, committed the intentional discrimination at issue while acting in the scope of employment, and the employer did not engage in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether an employee is in a managerial capacity, a court should review the type of authority that the employer has given to the employee and the amount of discretion that the employee has in what is done and how it is accomplished. Id., 527 U.S. at 543.

The *Kolstad* decision construed a 1991 amendment to Title VII that made punitive damages available in Title VII actions for the first time. Thus it is not explicitly applicable to Section 1981 actions, as to which punitive damages have always been available. Nonetheless, the analysis in *Kolstad* seems readily applicable to discrimination claims brought under Section 1981. As with Title VII, the plaintiff should do something more than prove race discrimination to justify punitive damages; otherwise every violation of Section 1981 would automatically qualify for a punitive damages award. Similarly, punitive damages in a Section 1981 action should not be found against an employer solely on the basis of respondeat superior.

Accordingly, the pattern instruction incorporates the *Kolstad* standards in the same fashion as the instruction for Title VII actions. *See* Instruction 5.4.2. *See also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1048 (8th Cir.2002) (holding that the *Kolstad* standards apply to an award of punitive damages under Section 1981); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (stating that "any case law construing the punitive damages standard set forth in § 1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim"); *Swinton v. Potomac Corp*., 270 F.3d 794, 817 (9th Cir.2001) (applying *Kolstad* in a Section 1981 action and affirming a punitive damages award of $1,000,000 against an employer, where highly offensive language was directed at the plaintiff, coupled by the abject failure of the employer to combat the harassment).

However, the instruction differs in one important respect from that to be employed in Title VII cases: it takes account of the possibility that an employee might be subject to punitive damages under Section 1981. In contrast, only employers can be liable under Title VII. Unlike employers, employees would not be entitled to a defense for good faith attempt to comply with federal law.

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed. In performing the substantive due process review of the size of punitive awards, a court must consider three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference between the punitive award "and the civil penalties authorized or imposed in comparable cases." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

For a complete discussion of the applicability of the *Gore* factors to a jury instruction on punitive damages, see the Comment to Instruction 4.8.3.

6.4.3 Section 1981 Damages — Back Pay— For Advisory or Stipulated Jury

Model

If you find that [defendant-employer] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff], then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You may award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's] intentional discrimination.

Back pay damages, if any, apply from the time [plaintiff] was [describe adverse employment action] until the date of your verdict.

You must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award back pay, you are instructed to deduct from the back pay figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of back pay.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant-employer] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of back pay to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

Back pay awards are available against an employer under Section 1981. *See Johnson v. Ry Express Agency, Inc.,* 421 U.S. 454, 459 (1975). A backpay award under Section 1981 is not restricted to the two years specified for backpay recovery under Title VII. Id.

An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim for back pay. *See Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984) (noting that a claim for back pay is one for equitable relief, but that the plaintiff nonetheless had a right to jury trial on his claims for compensatory damages); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (noting that front pay and back pay are equitable remedies).

An instruction on back pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may stipulate to a jury determination on back pay, in which case this instruction would also be appropriate. Instruction 6.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

For further commentary on back pay, see the Comment to Instruction 5.4.3.

6.4.4 Section 1981 Damages — Front Pay — For Advisory or Stipulated Jury

Model

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant-employer] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. The reason you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. So you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant-employer] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future. **]**

Comment

An award of front pay is an equitable remedy, as it provides a substitute for reinstatement. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy"). Thus there is no right to a jury trial for a claim for front pay.

An instruction on front pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may stipulate to a jury determination on front pay, in which case this instruction would also be appropriate. *See Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823, 832 (3d Cir.1994) (upholding a jury's determination of the amount of front pay due the plaintiff in a Section 1983 employment action). Instruction 6.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

In *Monessen S.R. Co. v. Morgan,* 486 U.S. 330, 339 (1988), the Court held that "damages awarded in suits governed by federal law should be reduced to present value." (Citing *St. Louis Southwestern R. Co. v. Dickerson,* 470 U.S. 409, 412 (1985).) The "self-evident" reason is that "a given sum of money in hand is worth more than the like sum of money payable in the future." The Court concluded that a "failure to instruct the jury that present value is the proper measure of a damages award is error." Id. Accordingly, the instruction requires the jury to reduce the award of front pay to present value. It should be noted that where damages are determined under state law, a present value instruction may not be required under the law of certain states. *See, e.g., Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset" method, under which no reduction is necessary to determine present value, as the value of future income streams is likely to be offset by inflation).

6.4.5 Section 1981 Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

Nominal damages may be awarded under Section 1981. *See Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1259 (6th Cir.1985) (award of nominal damages proper in absence of absent proof of compensable injury) An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." *See id.* at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." Id. Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." Id. at 454.

Nominal damages may not exceed one dollar. *See Mayberry v. Robinson,* 427 F. Supp. 297, 314 (M.D.Pa.1977) ("It is clear that the rule of law in the Third Circuit is that nominal damages may not exceed $1.00.") (citing *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 830 (3d Cir.1976)).

Instructions Regarding Section 1983 Employment Claims

Numbering of Section 1983 Employment Instructions

7.0 Section 1983 Employment Discrimination

7.1 Section 1983 Employment Discrimination – Mixed Motive

7.2 Section 1983 Employment Discrimination – Pretext

7.3 Section 1983 Employment Discrimination – Harassment

7.4 Section 1983 Employment – Retaliation – First Amendment

7.5 Section 1983 – Employment – Damages

7.0 Section 1983 Employment Discrimination

Comment

Chapter 7 discusses employment discrimination claims brought by public employees under Section 1983. Instructions 7.1 and 7.2 and Comment 7.3 address Equal Protection claims concerning discrimination based upon plaintiff's membership in a protected class.[1] Instruction 7.4 addresses First Amendment retaliation claims. Comment 7.5 concerns damages.

Comparison of Section 1983 employment discrimination and Title VII employment discrimination claims. A Section 1983 employment discrimination claim may be similar in many respects to a Title VII disparate treatment claim. Thus, some of the Title VII instructions may be adapted for use with respect to Section 1983 employment discrimination claims. This comment compares and contrasts the two causes of action; more specific comparisons concerning particular types of claims are drawn in the comments that follow.

Section 1983 requires action under color of state law. Title VII applies to both private and public employers.[2] By contrast, Section 1983 applies only to defendants who acted under color of state law.[3] *See, e.g., Krynicky v. University of Pittsburgh*, 742 F.2d 94, 103 (3d Cir. 1984) (holding that University of Pittsburgh and Temple University acted under color of state law); *see also supra* Comment 4.4.

An equal protection claim under Section 1983 requires intentional discrimination. Title VII authorizes claims for disparate impact. *See* Comment 5.1.6. The Section 1983 employment

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[1] The Supreme Court has held that a public employee's equal protection claim cannot be based upon a "class-of-one" theory – i.e., a public employee cannot "state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class." *Engquist v. Oregon Department of Agriculture*, 128 S.Ct. 2146, 2148-2149, 2157 (2008).

[2] *See* 42 U.S.C. § 2000e(b) (defining "employer" to include – subject to certain exceptions – "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person"); *id.* § 2000e(a) (defining "person" to include "governments, governmental agencies, [and] political subdivisions"); id. § 2000e(h) (defining "industry affecting commerce" to include "any governmental industry, business, or activity").

[3] Some plaintiffs asserting intentional race discrimination may also bring a claim under 42 U.S.C. § 1981, which applies to both private and public employers. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) (noting that "the Court has construed [Section 1981] to forbid all 'racial' discrimination in the making of private as well as public contracts").

discrimination claims addressed in this comment rest on a violation of the Equal Protection Clause,[4] which requires a showing of intentional discrimination. *See, e.g., Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) ("To prevail on her § 1983 equal protection claim, Robinson was required to prove that she was subjected to 'purposeful discrimination' because of her sex."), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). Thus, disparate impact claims are not actionable under Section 1983. However, evidence of disparate impact may help a Section 1983 plaintiff to show purposeful discrimination.

Section 1983 claims against individual defendants. In contrast to Title VII, which does not provide a cause of action against individual employees,[5] Section 1983 may provide a cause of action for unconstitutional employment discrimination by an individual, so long as the plaintiff shows that the defendant acted under color of state law. *See Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788, 796 (2009) ("The Equal Protection Clause reaches only state actors, but § 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities.").

The plaintiff can make this showing by proving that the defendant was the plaintiff's supervisor, or by proving that the defendant exercised de facto supervisory authority over the plaintiff.[6] *See Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 23 (3d Cir. 1997) ("There is simply no plausible justification for distinguishing between abuse of state authority by one who holds the formal title of supervisor, on the one hand, and abuse of state authority by one who bears no such title but whose regular duties nonetheless include a virtually identical supervisory role, on the other."). To establish a Section 1983 claim against a supervisor based on the activity of a subordinate, the plaintiff must also satisfy the requirements for supervisory liability under Section 1983. *See supra* Comment 4.6.1.

Qualified immunity, when applicable, provides a defense to Section 1983 claims against state

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[4] Plaintiffs bringing Section 1983 employment claims could also assert violations of other constitutional protections. *See, e.g.*, *Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1306-07 (3d Cir. 1993) (affirming dismissal of procedural due process claim because plaintiff did not have property interest in employment).

[5] *See supra* Comment 5.1.3.

[6] For a discussion of caselaw from other circuits concerning the possible liability of non-supervisory co-workers for equal protection violations arising from sexual harassment, see Cheryl L. Anderson, *"Nothing Personal:" Individual Liability under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 92-98 (1998) (arguing that non-supervisory co-workers can violate equal protection by "us[ing] their position with a government employer as an opportunity to engage in severe and pervasive harassment of fellow employees"); *see also infra* Comment 7.3 .

and local officials sued in their individual capacities.[7] *See supra* Comment 4.7.2; *see also* Comment 4.7.1 (concerning absolute immunity).

Section 1983 claims against municipal defendants. A Section 1983 employment discrimination claim against a municipal defendant requires a showing that the violation of plaintiff's constitutional rights resulted from a municipal policy or custom. *See, e.g., Andrews*, 895 F.2d at 1480; *see supra* Comments 4.6.3 - 4.6.8. This test differs from Title VII's test for respondeat superior liability. *See supra* Comments 5.1.3 - 5.1.5.

Section 1983 does not provide a claim against the state. State governments are not "persons" who can be sued under Section 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989).[8] By contrast, Title VII authorizes claims against state governments. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (rejecting state sovereign immunity defense to Title VII claim on the ground that Congress can validly abrogate state sovereign immunity when legislating pursuant to Section 5 of the Fourteenth Amendment).[9]

Section 1983 does not require employment discrimination plaintiffs to exhaust administrative remedies. In order to assert a Title VII employment discrimination claim, the plaintiff must first exhaust administrative remedies. *See, e.g., Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997) ("In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations."). There is no such exhaustion requirement for a Section 1983 employment discrimination claim.[10]

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[7] As noted above, a Section 1983 employment discrimination plaintiff must show intentional discrimination in order to establish an equal protection violation. For discussion of whether a defendant who intended to discriminate can receive the benefit of qualified immunity, *see Andrews*, 895 F.2d at 1480 ("Liciardello and Doyle objectively should have known the applicable legal standard, and thus are not protected by qualified immunity in treating, or allowing their subordinates to treat, female employees differently on the basis of gender in their work environment."); *see also supra* Comment 4.7.2 (discussing analogous questions).

[8] Similarly, Section 1983 does not provide a cause of action against state officials in their official capacities. *See Will*, 491 U.S. at 71.

[9] Reasoning that *Fitzpatrick*'s holding does not foreclose inquiry into whether Title VII is a valid exercise of Congress's Section 5 enforcement powers, the Seventh Circuit considered that question and concluded that "the 1972 Act validly abrogated the States' Eleventh Amendment immunity with respect to Title VII disparate treatment claims." *Nanda v. Board of Trustees of University of Illinois*, 303 F.3d 817, 831 (7th Cir. 2002).

[10] Nor is the Section 1983 employment discrimination plaintiff required to exhaust state administrative remedies before suing. *See Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

Section 1983 has a more generous limitations period than Title VII. As noted above, a person wishing to sue under Title VII must present the claim to the relevant agency within strict time limits. By contrast, the limitations period for a Section 1983 equal protection claim is borrowed from the relevant state statute of limitations for personal injury suits, *see Wilson v. Garcia*, 471 U.S. 261, 280 (1985), and is likely to be considerably longer.

Section 1983 employment discrimination remedies differ from Title VII remedies. Statutory caps apply to compensatory and punitive damages awards under Title VII. *See supra* Comments 5.4.1, 5.4.2. No such caps apply to Section 1983 employment discrimination claims. There may also be differences in the allocation of tasks between judge and jury concerning matters such as front pay and back pay. *Compare* Comments 5.4.3 and 5.4.4 (discussing back pay and front pay under Title VII) *with* Comment 7.5 (discussing back pay and front pay under Section 1983).

Title VII does not preempt employment discrimination claims under Section 1983. The Court of Appeals has rejected the contention that Title VII preempts Section 1983 remedies for employment discrimination. *See, e.g., Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1079 (3d Cir. 1990) ("[T]he comprehensive scheme provided in Title VII does not preempt section 1983, and . . . discrimination claims may be brought under either statute, or both.").[11] Although *Bradley* predated the Civil Rights Act of 1991,[12] district courts within the Third Circuit have continued to apply *Bradley* since 1991. *See, e.g., Bair v. City of Atlantic City*, 100 F. Supp. 2d 262, 266 (D.N.J. 2000) ("The vast majority of courts, including the Third Circuit, hold that claims under Section 1983 and Title VII are not necessarily mutually exclusive; if the right which a plaintiff claims was violated is constitutionally based, and also a right protected by Title VII, a plaintiff may bring either a Title VII claim or a Section 1983 claim, or both."). *Cf. Fitzgerald*, 129 S. Ct. at 797 (holding that Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. § 1681(a), does not displace claims under Section 1983 for equal protection violations arising from gender discrimination in schools).

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[11] *Compare Price v. Delaware Dept. of Correction*, 40 F.Supp.2d 544, 558 (D. Del. 1999) ("A claim of retaliation cannot be the sole basis for a § 1983 claim where there is no violation of the Constitution or federal law, other than the retaliation provision of Title VII.").

As to *Bivens* claims by federal employees, *see Brown v. General Services Administration*, 425 U.S. 820, 835 (1976) (holding that Title VII was the exclusive avenue for employment discrimination claims by federal employees in the competitive service); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (holding that personal staff member of Member of Congress could bring *Bivens* claim for employment discrimination); RICHARD H. FALLON, JR., ET AL., THE FEDERAL COURTS & THE FEDERAL SYSTEM 816 n.4 (5th ed. 2003) (asking whether Congress's extension of Title VII remedies to House and Senate employees should preclude the remedy recognized in *Davis*).

[12] The Civil Rights Act of 1991 amended Title VII in a number of ways; among other changes, it authorized compensatory and punitive damages for intentional discrimination claims and provided a right to a jury trial on such claims, *see* P.L. 102-166, November 21, 1991, § 102, 105 Stat. 1071, 1072-74.

The usefulness of special interrogatories. When the plaintiff asserts claims against multiple defendants, or when the plaintiff asserts both Title VII claims and Section 1983 equal protection claims, the court should take care to distinguish the differing liability requirements; in this regard, it may also be useful to employ special interrogatories. *Cf. Gierlinger v. New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994) ("Since separate theories of liability with different standards of individual involvement were presented to a jury, it would have been better practice and aided appellate review had the trial court made use of special interrogatories on the liability issues.").

7.1 Section 1983 Employment Discrimination – Mixed Motive

Model

The Fourteenth Amendment to the United States Constitution protects persons from being subjected to discrimination, by persons acting under color of state law, on the basis of [describe protected class, e.g., sex]. In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff].

In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] [protected class] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [plaintiff's protected class] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [protected status] was a "motivating factor" if [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:

However, if you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must consider [defendant's] "same decision" defense. If [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [protected class] had played no role in the employment decision, then your verdict must be for [defendant] on this claim.**]**

Comment

In mixed-motive cases where the defendant establishes a "same decision" defense, the defendant is not liable under Section 1983 for a constitutional violation. *See, e.g., Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (in a First Amendment retaliation case, holding that "[t]he constitutional principle at stake is sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct"). By contrast, the establishment of a "same decision" defense will not shield a defendant from all Title VII liability in a mixed-motive employment discrimination case; rather, it will narrow the remedies awarded.[13] Instruction 7.1's treatment of the "same decision" defense accordingly differs from the treatment of that defense in Instruction 5.1.1 (mixed-motive instruction for Title VII employment discrimination claims).

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the *Price Waterhouse* mixed-motive framework applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at Section 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. The decision in *Gross* does not appear to affect employment discrimination claims founded on the Equal Protection Clause and brought under Section 1983. Although the Court has not explicitly held that juries in Section 1983 Equal Protection employment-discrimination cases should be instructed according to the *Mount Healthy* burden-shifting framework, that framework accords with the Court's general approach to Equal Protection claims. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 n.21 (1977) (holding in the context of a bench trial on an Equal Protection claim of race discrimination in zoning that "[p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would .... have

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[13] *See* 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); *id.* § 2000e-5(g)(2)(B) (limiting remedies under Section 2000e-2(m), in a case where the defendant "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," to declaratory relief, certain injunctive relief, and certain attorney's fees and costs).

Although the Court of Appeals has not discussed whether a similar approach should be applied to Section 1983 claims, at least one other Circuit has ruled that it should not. *See Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1084 & n.5 (11th Cir. 1996) (contrasting Title VII claims with Section 1983 claims and noting that "with regard to employment discrimination claims brought pursuant to 42 U.S.C. § 1983, [the 'same decision'] defense effects a total avoidance of liability").

shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered"); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 269 (1989) (O'Connor, J., concurring in the judgment) ("[W]here a public employee brings a 'disparate treatment' claim under 42 U.S.C. § 1983 and the Equal Protection Clause the employee is entitled to the favorable evidentiary framework of *Arlington Heights*.").

The instruction given above is designed for use with respect to a claim against an individual official who took an adverse employment action against the plaintiff. Such claims will not present a difficult question concerning supervisory liability: If the defendant is proven to have taken the adverse employment action, then clearly the defendant meets the requirements for imposing supervisory liability, on the ground that the defendant had authority over the plaintiff and personally participated in the adverse action. If the plaintiff also asserts a claim against the supervisor of a person who took the adverse employment action, then the instruction should be augmented to present the question of supervisory liability to the jury. *See supra* Instruction 4.6.1. If the plaintiff is asserting a claim against a municipal defendant, the instruction should be augmented to present the jury with the question of municipal liability. *See supra* Instructions 4.6.3 - 4.6.8.

7.2 Section 1983 Employment Discrimination – Pretext

Model

The Fourteenth Amendment to the United States Constitution protects persons from being subjected to discrimination, by persons acting under color of state law, on the basis of [describe protected class, e.g., sex]. In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff].

In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a determinative factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question defendant's managerial judgment. You cannot find intentional discrimination simply because you disagree with the managerial judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] [protected status] was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff's] [protected status], the [adverse employment action] would not have occurred.

Comment

The *McDonnell Douglas* framework applies to Section 1983 employment discrimination claims. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (assuming "that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983"); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 432 (3d Cir. 1997) ("Our application of the *McDonnell Douglas-Burdine* framework is applicable to Stewart's allegation of racial discrimination under 42 U.S.C. §§ 1981 and 1983."); *McKenna v. Pacific Rail Service*, 32 F.3d 820, 826 n.3 (3d Cir. 1994) ("Although *McDonnell Douglas* itself involved [Title VII claims], the shifting burden analysis with which the case name is now synonymous also has been applied in section 1983 cases . . . ."); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 & n.5 (3d Cir. 1983) .

Instruction 7.2 largely mirrors Instruction 5.1.2 (Title VII pretext instruction). Instruction 7.2's discussion of pretext substitutes the term "managerial judgment" for "business judgment," because the latter might seem incongruous in an instruction concerning a government entity.

The instruction given above is designed for use with respect to a claim against an individual official who took an adverse employment action against the plaintiff. Such claims will not present a difficult question concerning supervisory liability: If the defendant is proven to have taken the adverse employment action, then the defendant meets the requirements for imposing supervisory liability, on the ground that the defendant had authority over the plaintiff and personally participated in the adverse action. If the plaintiff also asserts a claim against the supervisor of a person who took the adverse employment action, then the instruction should be augmented to present the question of supervisory liability to the jury. *See supra* Instruction 4.6.1. If the plaintiff is asserting a claim against a municipal defendant, the instruction should be augmented to present the jury with the question of municipal liability. *See supra* Instructions 4.6.3 - 4.6.8.

7.3 Section 1983 Employment Discrimination – Harassment

No Instruction

Comment

The Court of Appeals has made clear that sexual harassment can give rise to an equal protection claim. It has also indicated that the elements of such a claim are not identical to those of a Title VII harassment claim (at least if the claim proceeds on a hostile environment theory). It has not, however, specified precisely the elements of an equal protection claim for hostile environment sexual harassment. This Comment discusses principles that can be drawn from relevant Third Circuit cases.

Discriminatory intent. As noted above, equal protection claims require a showing of discriminatory intent. Sexual harassment claims can meet that requirement. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478-79 (3d Cir. 1990) (upholding verdict for plaintiff on sexual harassment claims against city employees, based on conclusion that evidence supported finding of purposeful discrimination); *cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (stating in Title VII case that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (en banc) (in assessing retaliation claim, explaining that "[t]he harassment [reported by the plaintiff] was a form of gender discrimination since Fusaro presumably would not have behaved in the same manner toward a supplicant male spouse of a female employee.").[14]

The requirement of action under color of state law. To establish a Section 1983 claim against an alleged harasser, the plaintiff must show that the defendant acted under color of state law. The Court of Appeals has suggested that this requires the defendant to have some measure of control or authority over the plaintiff. *See Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 24 (3d Cir. 1997) ("Under these circumstances La Penta's role within the departmental structure afforded him sufficient authority over Bonenberger to satisfy the color of law requirement of section 1983.").[15]

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[14] *See also Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986) ("Sexual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the fourteenth amendment."); Cheryl L. Anderson, *"Nothing Personal:" Individual Liability under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 80 (1998) (citing *Meritor Savings Bank* as support for argument that sex harassment can satisfy the intentional discrimination requirement for equal protection claims).

[15] The *Bonenberger* court noted that "a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official

However, the Court of Appeals has made clear that this requirement can be met even if the defendant is not the plaintiff's formal supervisor: "A state employee may, under certain circumstances, wield considerable control over a subordinate whose work he regularly supervises, even if he does not hire, fire, or issue regular evaluations of her work." *Bonenberger*, 132 F.3d at 23.

Quid pro quo claims where adverse employment action follows. There appear to be commonalities between Title VII and Section 1983 quid pro quo claims where adverse employment action follows. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296-99 & n.14 (3d Cir. 1997) (discussing merits of Title VII quid pro quo claim at length and briefly stating in footnote that "our discussion in this section applies equally to" a Section 1983 quid pro quo claim by the plaintiff), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The instruction for such a Section 1983 claim would probably be quite similar, in most respects, to Instruction 5.1.3.[16]

As noted above, a Section 1983 plaintiff must show that the defendant acted under color of state law. The plaintiff can make that showing by demonstrating that the defendant exercised authority over the plaintiff. If the plaintiff shows that the defendant took an adverse employment action[17] against the plaintiff, that evidence should also establish that the defendant acted under color of state law.[18]

Hostile environment claims. The Court of Appeals has indicated that the elements of a hostile work environment claim under Section 1983 are not identical to those of a claim under Title

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duties does not act under color of law." *Bonenberger*, 132 F.3d at 24. It could be argued that when a co-worker who lacks even de facto supervisory authority over the plaintiff takes advantage of the plaintiff's presence in the workplace in order to subject the plaintiff to harassment, the harassment is connected with the defendant's execution of official duties in the sense that those duties provide the defendant with an otherwise unavailable opportunity to harass. However, the *Bonenberger* court's emphasis on whether the defendant had "control" or "authority" over the plaintiff, *see id.* at 23-24, suggests that the Court of Appeals would not necessarily embrace this expansive an interpretation of action under color of state law.

[16] Obviously, the prefatory language would be different, and the instruction would need to take account of the relevant theories of supervisory and municipal liability (*see supra* Instructions 4.6.1, 4.6.3 - 4.6.8).

[17] *Cf.* Instruction 5.1.3 (defining "tangible employment action" for purposes of Title VII harassment claims).

[18] *Cf. Bonenberger*, 132 F.3d at 28 ("Title VII *quid pro quo* sexual harassment generally requires that the harasser have authority to carry out the *quid pro quo* offer or threat.").

VII.[19] In *Andrews v. City of Philadelphia*, the court enumerated five elements "for a sexually hostile work environment [claim] under Title VII: (1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." *Andrews*, 895 F.2d at 1482. The Section 1983 claim in *Andrews* had been tried to a jury while the Title VII claim had not, and the court was faced with the question of what effect the jury determinations on the Section 1983 claims should have on the court's resolution of the Title VII claims. The court stated:

> Section 1983 and Title VII claims are complex actions with different elements. Proof of some of these elements, particularly discrimination based upon sex and subjective harm is identical, and thus the court should be bound by the jury's determination on these issues. Other elements, particularly the objective element of the Title VII claim, are uniquely Title VII elements, and although the judge's decision here may be affected by certain findings of the jury, they are ultimately a decision of the court.

Andrews, 895 F.2d at 1483 n.4. *Andrews*, then, made clear that the elements of hostile environment claims under Title VII and under the Equal Protection Clause are not identical. But *Andrews* did not specify the elements of the latter type of claim. Moreover, *Andrews* cannot currently be taken as an authoritative statement of Title VII hostile-environment law,[20] and it is unclear how an equal protection hostile environment claim should be affected, if at all, by later developments in sexual harassment law under Title VII. The paragraphs that follow, however, attempt to draw together

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[19] Some other courts have noted differences as well. For example, the Seventh Circuit Court of Appeals has stated that on an equal protection claim "the ultimate inquiry is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the conditions of the victim's employment." *Bohen*, 799 F.2d at 1187; *see also Ascolese v. Southeastern Pennsylvania Transp. Authority*, 902 F. Supp. 533, 547 (E.D. Pa. 1995) ("Because the analysis under section 1983 focuses on intentional discrimination, it differs from that under Title VII, in which the focus is on whether or not the sexual harassment altered the conditions of the victim's employment.") (citing *Bohen*).

On the other hand, some courts have indicated that the elements of Section 1983 sexual harassment claims mirror those of claims brought under Title VII. *See, e.g., Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003) (applying elements of Title VII claim to Section 1983 harassment claim); *cf. Ascolese*, 902 F. Supp. at 548 (drawing upon Title VII caselaw concerning sexual harassment in order to address Section 1983 sexual harassment claim, while acknowledging that the Title VII precedent "does not apply directly").

[20] Thus, for example, instead of applying the *Andrews* "pervasive and regular" test, more recent Third Circuit caselaw recognizes that courts analyzing Title VII hostile-environment claims should look to whether the conduct in question was "severe or pervasive." See Comment 5.1.4.

existing Third Circuit doctrine on equal protection hostile environment claims.

As noted above, a defendant who subjects a plaintiff to harassment on the basis of a protected characteristic is guilty of intentional discrimination. If that defendant acted under color of state law, then he or she violated the Equal Protection Clause and may be liable under Section 1983.[21] In addition, the normal rules of supervisory and municipal liability apply in order to determine whether the harasser's supervisor and/or municipal employer are liable under Section 1983 for the harasser's equal protection violation.[22]

A subtler question arises if the harasser did not act under color of state law. As noted above, the Court of Appeals has indicated that a co-worker who lacks any control or authority over the plaintiff does not act under color of state law.[23] In such a case, the harasser apparently would not have committed an equal protection violation, which would mean that the harasser's supervisor (or the municipal employer) could be held liable under Section 1983 only if the supervisor defendant (or the municipal defendant) committed an equal protection violation. That raises the question of what level of action or indifference suffices to show intent to discriminate on the part of the supervisor or the municipality.

A plaintiff can show an equal protection violation by a supervisor who fails properly to address harassment by the plaintiff's co-workers, if the supervisor acted with intent to discriminate. For example, in *Andrews*, evidence justifying findings that one plaintiff's supervisor was aware of sexual harassment by the plaintiff's "male colleagues" and that the supervisor's failure "to investigate the source of the problem implicitly encouraged squad members to continue in their abuse" of the plaintiff provided an alternate ground for upholding the verdict for the plaintiff on the

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[21] *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (holding that jury verdict for plaintiff on Section 1983 equal protection claim against plaintiff's supervisor could be sustained on the ground that the supervisor "personally participated in" the sexual harassment of the plaintiff).

[22] *See, e.g., Bonenberger*, 132 F.3d at 25 (applying municipal liability doctrine in case involving alleged harassment by officer with de facto supervisory authority); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) (in case involving alleged harassment by plaintiff's supervisor, applying supervisory liability doctrines to claims against police chief and assistant police chief).

[23] *See Zelinski v. Pennsylvania State Police*, 108 Fed. Appx. 700, 703 (3d Cir. 2004) (non-precedential opinion) (holding that defendant did not act under color of law when committing alleged harassment because he had neither formal nor de facto supervisory authority over plaintiff).

By contrast, the conclusion that the alleged harasser did not act under color of state law would not preclude Title VII liability for the employer. *See, e.g., Zelinski*, 108 Fed.Appx. at 704 (holding that district court should not have granted summary judgment dismissing Title VII harassment claim).

Section 1983 equal protection claim against her supervisor. *Andrews*, 895 F.2d at 1479. Similarly, the *Andrews* court sustained the jury verdict for the plaintiffs on their Section 1983 equal protection claims against the commanding officer of their division, based on evidence that would support a finding that he "acquiesced in the sexual discrimination against" the plaintiffs. *Id.* The Court of Appeals reasoned:

> There is evidence that Liciardello was aware of the problems concerning foul language and pornographic materials but did nothing to stop them. The language and the pictures were so offensive and regular that they could not have gone unnoticed by the man who was ultimately responsible for the conduct of the Division. He took no measures to investigate the missing case problems which Conn and Andrews, but none of the male officers, suffered. Additionally, he provided an important insight to his personal "boys will be boys attitude" toward sex-based harassment when he cautioned Conn, "You have to expect this working with the guys."

Andrews, 895 F.2d at 1479.

Thus, it would seem that an equal protection claim under Section 1983 arises if the harassment that gives rise to a hostile environment claim is (1) committed or caused by one with formal or de facto supervisory authority or (2) improperly addressed by one with formal or de facto supervisory authority under circumstances that show that the supervisory individual had an intent to discriminate. Similarly, it would seem that a municipal employer can be liable on the theory that it directly encouraged harassment of the plaintiff, or on the theory that it did not do enough to prevent the harassment.[24]

[24] *See Bohen*, 799 F.2d at 1187 ("[A] plaintiff can make an ultimate showing of sex discrimination either by showing that sexual harassment that is attributable to the employer under § 1983 amounted to intentional sex discrimination or by showing that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amounted to intentional discrimination."); *cf. Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 447 (D.N.J. 1992) (holding that "a reasonable jury might find that the risk of sexual harassment in the workplace is so obvious that an employer's failure to take action to prevent or stop it from occurring--even in the absence of actual knowledge of its occurrence--constitutes deliberate indifference, where the employer has also failed to take any steps to encourage the reporting of such incidents").

7.4 Employment Discrimination – Retaliation – First Amendment

Model

The First Amendment to the United States Constitution gives persons a right to [freedom of speech] [petition the Government for a redress of grievances].[25] Government employees have a limited right to engage in free speech on matters of public importance, and government employers must not retaliate against their employees for exercising this right. In this case [plaintiff] claims that [describe alleged protected activity], and that [defendant] retaliated against [plaintiff] by [describe alleged retaliation].[26]

It is my duty to instruct you on whether [plaintiff] engaged in activity that was protected by the First Amendment. In this case, I instruct you that the following activity was protected by the First Amendment:

- [Describe specifically the plaintiff's protected activity]. In the rest of this instruction, I will refer to these events as "[plaintiff's] protected activity."

In order for [plaintiff] to recover on this claim against [defendant], [plaintiff] must prove both of the following by a preponderance of the evidence:

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[25] As noted in the Comment, a First Amendment retaliation claim can be grounded on the Petition Clause instead of, or in addition to, the Free Speech Clause.

[26] The instruction given in the text assumes that there are no material disputes of historical fact that must be resolved before the court determines whether the plaintiff engaged in protected activity. Such questions may include, for example, what the plaintiff said, and in what context; and whether the defendant believed that the plaintiff had made the relevant statement. (Whether the defendant actually believed a certain set of facts concerning the plaintiff's protected activity appears to be a fact question for the jury. However, the reasonableness of the defendant's belief seems to be a question of law for the court. *See* Comment.)

If such factual disputes exist, it may be necessary to segment the jury's deliberations, as follows:

First, the court could instruct the jury on the factual questions relevant to the protected-activity determination. E.g.: It is your task to resolve the following disputes of fact: [Describe factual disputes that must be resolved in order for the court to determine whether plaintiff engaged in protected activity.] The verdict form includes places where you will write your answers to these questions.

Once the jury returns its answers concerning those fact questions, the court can determine the protected-activity question and can instruct the jury on the remaining prongs of the claim (as shown in the text).

Thus instructed, the jury can resume its deliberations and determine the claim.

First: [Defendant] [failed to promote] [terminated] [constructively discharged][27] [plaintiff]; and

Second: [Plaintiff's] protected activity was a motivating factor in [defendant's] decision.

In showing that [plaintiff's] protected activity was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] protected activity was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] protected activity played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant]. [Plaintiff] could make this showing in a number of ways. The timing of events can be relevant, for example if [defendant's] action followed very shortly after [defendant] became aware of [plaintiff's] protected activity. However, a more extended passage of time does not necessarily rule out a finding that [plaintiff's] protected activity was a motivating factor. For instance, you may also consider any antagonism shown toward [plaintiff] or any change in demeanor toward [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:

However, [defendant] argues that [he/she] would have made the same decision to [describe adverse action] whether or not [plaintiff] had engaged in the protected activity. If [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] protected activity had played no role in the employment decision, then your verdict must be for [defendant] on this claim.**]**

Comment

Structure of test. The Court of Appeals applies "a well-established three-step test to evaluate a public employee's claim of retaliation for engaging in activity protected under the First Amendment." *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005).[28] "First, the employee must show that the activity is in fact protected." *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). "Second, the employee must show that the protected activity 'was a substantial factor in the alleged retaliatory action.'" *Id.* (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). "Third, the employer may defeat the employee's claim by demonstrating that the same adverse action would have taken place in the absence of the protected conduct." *Id.*

Comparison with Title VII. A plaintiff may have a valid Title VII retaliation claim but not a valid First Amendment retaliation claim. *See, e.g., Zelinski v. Pennsylvania State Police*, 108 Fed.

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[27] The examples given in the text do not exhaust the range of possible acts that can give rise to a retaliation claim; but the acts must, in the aggregate, be more than de minimis. *See* Comment.

[28] *See also Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006).

Appx. 700, 707-08 (3d Cir. 2004) (non-precedential opinion) (vacating grant of summary judgment dismissing Title VII retaliation claim, but affirming grant of summary judgment dismissing First Amendment retaliation claim). The disparity arises because the definitions of 'protected activity' differ depending on whether the claim is asserted under Title VII or under the First Amendment.

However, assuming that protected activity has been established, the causation analysis for a First Amendment claim is similar to that for a Title VII retaliation claim.[29] *See Brennan v. Norton*, 350 F.3d 399, 420 (3d Cir. 2003) (stating, in the retaliation context, that "[t]he causation required to establish a claim under § 1983 is identical to that required under Title VII").[30] Thus, the model diverges from Instruction 5.1.7 on the question of protected activity, but is similar to Instruction 5.1.7 on the questions of causation.[31]

First element: protected activity. To be protected under the First Amendment, speech by a government employee "must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to '"the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."'" *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Ed.*

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[29] *Compare Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) ("The elements of a retaliation claim under 42 U.S.C. § 1983 predicated on the First Amendment and under the Rehabilitation Act are the same.").

[30] The *Brennan* court's statement to this effect should not be taken to assimilate First Amendment retaliation claims to Title VII claims more generally. *See Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000) ("First Amendment retaliation cases are not governed by Title VII's burden-shifting analysis, but rather by [the] *Mount Healthy* framework. In that case, the Supreme Court made it crystal clear that an employee may not recover in a dual-motives case if the employer shows that it would have taken the same action even absent the protected speech.").

In fact, though *Brennan* terms the causation analyses for First Amendment retaliation and Title VII retaliation "identical," the Court of Appeals on other occasions has used distinct tests for each. In *Azzaro*, for example, the Court of Appeals stated the prima facie case on a Title VII claim thus: "(1) [the plaintiff] engaged in a protected activity; (2) she was discharged after or contemporaneously with that activity; and (3) there was a causal link between the protected activity and the firing." *Azzaro v. County of Allegheny*, 110 F.3d 968, 973 (3d Cir. 1997) (en banc). By contrast, the First Amendment retaliation analysis was stated as follows: the court first was to ask "whether [plaintiff's reports] were protected by the First Amendment," and next was to ask "whether those reports were a motivating factor in the decision to discharge Azzaro and whether Azzaro would have been discharged for other reasons even in the absence of those reports." *Id.* at 975.

[31] Instruction 7.4 is not identical to Instruction 5.1.7 on causation; Instruction 7.4 follows the test set forth in the First Amendment retaliation cases.

of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568 (1968))).[32]

Moreover, in order to be protected by the First Amendment, the plaintiff's statement ordinarily[33] must not be made pursuant to the plaintiff's job responsibilities[34] as a government

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[32] It should be noted that the First Amendment right to petition can provide an alternative means for an employee to establish the first element of the retaliation test. "In this circuit, any lawsuit brought by an employee against a public employer qualifies as a protected 'petition' under the First Amendment so long as it is not 'sham litigation.'" *Hill*, 411 F.3d at 126 (quoting *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994)).

> Although a plaintiff alleging retaliation for protected speech under § 1983 must ordinarily establish that his/her speech was a matter of public concern to qualify for the protections of the First Amendment's guarantee of free expression, the same is not true where the speech itself constitutes the plaintiff's lawsuit. . . . On the contrary, a plaintiff need only show that his/her lawsuit was not frivolous in order to make out a prima facie claim for retaliation under the Petition Clause.

Brennan v. Norton, 350 F.3d 399, 417 (3d Cir. 2003); *see also Foraker v. Chaffinch*, 501 F.3d 231, 237 (3d Cir. 2007) ("[Defendants'] argument ... that because *Garcetti v. Ceballos* ... bars plaintiffs' claims as speech, it also bars them as petitions is inaccurate – petitions are not synonymous with speech for purposes of constitutional analysis"); *but see id.* at 247 (Greenberg, J., concurring) (arguing that the plaintiffs' Petition Clause claim should be rejected, under *Ceballos*, because the plaintiffs' submitted their complaints up the chain of command pursuant to their official duties).

[33] The Supreme Court has noted "some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006). In *Ceballos*, which involved a deputy district attorney who sued the County of Los Angeles, and also certain of his supervisors in the Los Angeles District Attorney's Office, the Court found it unnecessary to determine whether its analysis in *Ceballos* "would apply in the same manner to a case involving speech related to scholarship or teaching." *Id. Cf. Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008) ("If *Garcetti* applied to this case, Borden's speech would not be protected as it was made pursuant to his official duties as a coach of the EBHS football team and not as an ordinary citizen. However, even if *Garcetti* does not apply in the educational context, Borden's conduct is not on a matter of public concern for the reasons just described.").

The Court of Appeals has noted that "[t]he full implications of the Supreme Court's statements in *Garcetti* regarding 'speech related to scholarship or teaching' are not clear.... As a result, federal circuit courts differ over whether (and, if so, when) to apply *Garcetti*'s official-duty test to academic instructors." *Gorum v. Sessoms*, 561 F.3d 179, 186 n.6 (3d Cir. 2009). The plaintiff in *Gorum* was dismissed from his tenured position as a university professor;

employee: A closely divided Court held in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960.[35] The Court of Appeals has since held that

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the plaintiff, challenging the defendant's explanation that he was dismissed for doctoring student grades, asserted instead that the dismissal was retaliatory. On appeal the plaintiff pointed to his service as an advisor to a student in connection with a disciplinary proceeding and his involvement in the rescission of an invitation to the university president to speak at a fraternity prayer breakfast. The *Gorum* court held that neither of these incidents involved citizen speech; rather, under *Ceballos*, these activities were undertaken pursuant to the plaintiff's duties. The court noted: "In determining that Gorum did not speak as a citizen.... we apply the official duty test because Gorum's actions so clearly were not 'speech related to scholarship or teaching,' ... and because we believe that such a determination here does not 'imperil First Amendment protection of academic freedom in public colleges and universities.'" *Gorum*, 561 F.3d at 186 (quoting *Ceballos*, 547 U.S. at 425, and Justice Souter's dissent in *Ceballos*, id. at 438).

[34] The Court has not "articulate[d] a comprehensive framework for defining the scope of an employee's duties," but it has stressed that "[t]he proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Ceballos*, 126 S. Ct. at 1961-62.

[35] The Court of Appeals has summed up the post-*Ceballos* test thus:

> A public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have "an adequate justification for treating the employee differently from any other member of the general public" as a result of the statement he made. . . . A public employee does not speak "as a citizen" when he makes a statement "pursuant to [his] official duties."

Hill v. Borough of Kutztown, 455 F.3d 225, 241-42 (3d Cir. 2006). In *Hill*, the Court distinguished between retaliation based upon the plaintiff borough manager's reporting of harassing behavior and retaliation based upon the plaintiff's advocacy of a telecommunications project. Retaliation based on the reporting was not actionable, because reporting harassment formed part of the borough manager's duties. However, the claim of retaliation based on the plaintiff's advocacy of the telecommunications project should not have been dismissed at the 12(b)(6) stage, because the complaint could be read to allege that the plaintiff was speaking as a citizen rather than as part of his official duties. *See id.* at 242.

For another decision applying *Ceballos*, see *Foraker v. Chaffinch*,501 F.3d 231, 241-42 (3d Cir. 2007) ("Reporting problems at the firing range was among the tasks that Price and

when testifying truthfully in court proceedings, a public employee speaks as a citizen even if the court testimony stemmed from the employee's official duties in an investigation: "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee. That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008).

Before applying the *Connick* / *Pickering* test, the court must first determine the content of the relevant speech. In *Waters v. Churchill*, the Supreme Court addressed whether the analysis should proceed based upon "what the government employer thought was said, or . . . what the trier of fact ultimately determines to have been said." *Waters*, 511 U.S. at 664 (plurality opinion). The plurality rejected the latter test, because it reasoned that such a test "would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court." *Id*. at 676. But the plurality also rejected the notion that "the court must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions." *Id*. at 677. Rather, the plurality concluded that "courts [should] look to the facts as the employer *reasonably* found them to be." *Id*. at 677 (emphasis in original).[36]

Warren were paid to perform. Their positions in the DSP required them to report up the chain of command, and their positions as instructors who regularly used and performed light maintenance on the equipment at the range on a daily basis put any environmental concerns there within the scope of their routine operations."); *see also id.* at 250 (Pollak, D.J., concurring) ("Less clear is that the statements Price and Warren made to the State Auditor--statements ordered to be made to a high state official beyond the chain of state police command--were part of their employment duties.... But, given the statements Price and Warren had made to their senior officers, it was not clear error for the District Court to find that the directive to Price and Warren to aid the State Auditor's inquiry broadened the scope of their employment duties.").

[36] However, it is important to note that if the plaintiff did not in fact engage in constitutionally protected activity, but the employer retaliates in the mistaken belief that the plaintiff did engage in such activity, the plaintiff does not have a First Amendment retaliation claim. "Plaintiffs in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected, and, therefore, only if there actually was *conduct*." *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 495 (3d Cir. 2002) (emphasis in original) (noting that other courts have also concluded that "there can be no First Amendment claim when there is no speech by the plaintiff"); *see also Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997) ("[I]n the absence of speech, or, at the extreme, intended speech, there has been no constitutional violation cognizable under section 1983 based on an asserted 'bad motive' on the part of defendant."). *Compare Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3d Cir. 2002) (upholding retaliation claim under the Americans with Disabilities Act on "a perception theory of discrimination," on the ground that the relevant statutory language "focus[es] on the employer's subjective reasons for taking adverse action against an employee, so it matters not

The plurality's approach struck a middle course between the approaches favored by the remaining Justices. Three Justices in *Waters* would have rejected the requirement that the employer's belief concerning the content of the speech be reasonable. *See Waters*, 511 U.S. at 686 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment). The other two Justices, by contrast, would have focused upon what the trier of fact ultimately determined the plaintiff had actually said (regardless of what the employer believed). *See id.* at 696 (Stevens, J., joined by Blackmun, J., dissenting). Thus, as Justice Souter pointed out in his concurrence, the approach taken by the *Waters* plurality appears to be the one that courts should follow, because an approach favoring greater liability than the plurality's would contravene the approaches taken by a majority of Justices, while an approach favoring narrower liability would also contravene the approaches of a majority (albeit a different majority) of Justices.[37]

The *Waters* plurality did not explicitly address the question of who should determine what the employer reasonably believed.[38] However, the plurality's application of its test is indicative: it

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whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter").

[37] As Justice Souter explained:

> Though Justice O'CONNOR's opinion speaks for just four Members of the Court, the reasonableness test it sets out is clearly the one that lower courts should apply. A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable (assuming the absence of pretext), see ante, at 1890-1891 (plurality opinion); post, at 1893-1896 (SCALIA, J., concurring in judgment); and a majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech Clause, see ante, at 1888-1890 (plurality opinion); post, at 1898-1900 (STEVENS, J., dissenting); see also post, at 1899, n. 4 (STEVENS, J., dissenting) ("Justice O'CONNOR appropriately rejects [Justice SCALIA's] position, at least for those instances in which the employer unreasonably believes an incorrect report concerning speech that was in fact protected and disciplines an employee based upon that misunderstanding. I, of course, agree with Justice O'CONNOR that discipline in such circumstances violates the First Amendment").

Waters, 511 U.S. at 685 (Souter, J., concurring).

[38] The plurality framed the question thus: "Should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?" *Waters*, 511 U.S. at 668. As noted in the text, the plurality's answer is that the court should apply the *Connick* test to the speech as the employer reasonably found it to be; but the plurality did not explain who should determine any disputes of material fact as to what the employer actually believed.

stated that "if petitioners really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been entirely reasonable." *Waters*, 511 U.S. at 679-80. The plurality's willingness to analyze the reasonableness of the employer's belief indicates that the plurality viewed the reasonableness of the belief as a question of law for the court. However, where there are material and disputed questions of historical fact – concerning the steps taken to investigate, or concerning whether the employer actually believed the relevant version of the employee's speech – those questions presumably would be for the trier of fact.[39]

Whether the plaintiff's statements were protected by the First Amendment is a question of law for the court. *See Azzaro v. County of Allegheny*, 110 F.3d 968, 975 (3d Cir. 1997) (en banc) ("We must first inquire whether Azzaro's reports to Fox and Sirabella were protected by the First Amendment. This is a question of law.").[40] Three conditions must be met in order for the plaintiff's statements to be protected. "First, the employee's [expressive] conduct must address a 'matter of public concern,' which is to be determined by the 'content, form, and context of a given statement, as revealed by the whole record.'" *Azzaro*, 110 F.3d at 976 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).[41] Second, the employee's expressive conduct must not have been part of the

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[39] The Court of Appeals "ha[s] often noted that the first prong of the First Amendment retaliation test presents questions of law for the court." *Hill*, 411 F.3d at 127. *See also Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir. 2004) ("[T]he first factor is a question of law."); *Baldassare v. State of N.J.*, 250 F.3d 188, 195 (3d Cir. 2001) (stating that whether speech is on matter of public concern and whether *Pickering* balancing test is met "are questions of law for the court"); *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005) (same); *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 885 (3d Cir. 1997) ("Determining whether Green's appearance is protected activity under Pickering is an issue of law for the court to decide."). Such statements, however, appear to focus on the point that application of the *Connell / Pickering* tests is a matter of law for the court – not on the question of who should determine any underlying disputes of historical fact.

[40] The underlying historical facts, if disputed, would presumably present a jury question.

[41] *See, e.g.*, *Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 171 (3d Cir. 2008) (holding that football coach's bowing his head and kneeling during student prayer "occur in private settings, namely at an invitation-only dinner and in a closed locker room," and thus that the coach's expressive conduct did not concern "matters of public concern triggering protection of his right, as a public employee, to freedom of speech"); *Gorum v. Sessoms*, 561 F.3d 179, 187 (3d Cir. 2009) (professor's assistance to student in connection with disciplinary proceeding was not speech on matter of public concern but, rather, "related to the personal grievance of one student").

A statement that, taken alone, concerns a matter of public concern might not receive First Amendment protection if the context of the statement leads the court to conclude that the government's interest outweighs the public value of the statement. For example, in *Miller v.*

employee's job duties. *See supra* (discussing *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). Third, "the value of that expression must outweigh 'the government's interest in the effective and efficient fulfillment of its responsibilities to the public.'" *Azzaro*, 110 F.3d at 976 (quoting *Connick*, 461 U.S. at 150).

A report of sexual harassment by a government official can constitute speech on a matter of public concern. In *Azzaro*, the plaintiff (a county employee) reported to her supervisor and to the County Director of Administration "an incident of sexual harassment by an assistant to the [County] Commissioner which occurred in the Commissioner's office during the course of an appointment Azzaro had made, in her capacity as the spouse of an employee, to plead for her husband's job." *Azzaro*, 110 F.3d at 978. Reasoning that the plaintiff's reports "brought to light actual wrongdoing on the part of one exercising public authority that would be relevant to the electorate's evaluation of the performance of the office of an elected official," the en banc majority held that the reports "should be regarded as a matter of public concern unless something in their form or context deprived them of their value to the process of self-governance." *Id.* at 978-79. Under *Azzaro*, some reports of sexual harassment by a government employee clearly will constitute speech on matters of public concern; but it may not be the case that all such speech meets that test. *See id.* at 978 n.4 (suggesting that in "a situation in which a public employee has filed a complaint about an isolated incident of what he or she perceived to be inappropriate conduct on the part of a non-supervisory co-worker," the report "would presumably be less important to an evaluation of the performance of the public office involved than the situation now before us"); *see id.* at 981 (Becker, J., joined by Scirica, Roth & Alito, JJ., concurring) ("It seems to me that there will be many complaints of sexual harassment, about more aggravated conduct than that described in footnote 4 of the opinion, which will not qualify as matters of public concern.").

If the court concludes that the plaintiff's speech addressed a matter of public concern and that the plaintiff was not speaking pursuant to his or her job responsibilities, then the court must proceed to balance "the public employee's interest in speaking about a matter of public concern and

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Clinton County, 544 F.3d 542 (3d Cir. 2008), a state court judge fired a probation officer after the officer wrote a letter to the judge criticizing the way the probation office was run. That criticism clearly addressed a matter of public concern. But the court, focusing on the fact that the bulk of the plaintiff's letter asserted "private grievances" concerning the plaintiff's supervisor and working conditions, held that "[t]he personal context in which Miller's letter arose, in addition to the tangential connection between the issues of public concern and the overall thrust of the letter so minimizes any public concern in the subject of her expression as to tip the First Amendment balance in favor of her employer." *Miller*, 544 F.3d at 550-51. The court noted, however, that it did not "suggest that speech which is otherwise public in nature can be sanctioned merely because it arises in the context of personal dissatisfaction or a personal grievance.... It is not the grinding of the proverbial axe that removes the protection of the First Amendment, it is the private nature of the employee's speech." *Id*. at 551 n.6.

the value to the community of her being free to speak on such matters"[42] against "the government's interest as an employer in promoting the efficiency of the services it performs through its employees."[43] *Id.* at 980 (citing, inter alia, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)); *see also Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir. 2003) (explaining that the court should "consider the nature of the relationship between the employee and the employer as well as any disruption the employee's speech may cause, including the impact of the speech on the employer's ability to

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[42] *See also Baldassare v. State of N.J.*, 250 F.3d 188, 198 (3d Cir. 2001) ("[T]he public's interest in exposing potential wrongdoing by public employees is especially powerful.").

[43] In a 1994 decision, the Court of Appeals indicated that such balancing should occur only if the employer concedes that the speech played a factor in the dismissal:

> [A] public employer may dismiss an employee for speech addressing a matter of public concern if the state's interest, as an employer, in promoting the efficiency of its operations outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. This balancing test comes into play only if the public employer concedes that it dismissed an employee because of the employee's protected speech but contends that it was justified in doing so. Rutgers denies that it dismissed San Filippo for his protected activities; accordingly, the balancing test has no application in the case at bar.

San Filippo v. Bongiovanni, 30 F.3d 424, 434 n.11 (3d Cir. 1994).

However, in at least one subsequent case the Court of Appeals performed the balancing analysis even though the defendant disputed whether the speech was a motivating factor. *See Azzaro*, 110 F.3d at 980 (performing balancing analysis); *id.* at 981 (finding "a material dispute of fact as to whether [plaintiff's] reports were a motivating factor in the discharge decision").

Another permutation arises if the plaintiff-employee claims that the adverse action was motivated by a particular speech incident, and the defendant-employer responds that the adverse action was instead motivated by another speech incident. For example, in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), a hearing officer had found that the plaintiff police officer had violated departmental rules by, inter alia, making inappropriate comments about women in the presence of subordinate officers. *See id.* at 221. The police officer sued, asserting that the discipline to which he was subjected (based on this finding) was harsher than it would otherwise have been because of his participation (including trial testimony) in a prior police investigation. *See id.* at 219-20. "Where a plaintiff claims that the stated grounds for his/her discipline were a pretext for the discipline imposed, the court does not apply the *Pickering* balancing test solely to the speech that defendants claim motivated the disciplinary action ... such as Reilly's violation of department regulations here. Rather, the court considers all of the speech that the plaintiff alleges is protected ... such as Reilly's testimony at the Munoz trial." *Reilly*, 532 F.3d at 232.

maintain discipline and relationships in the work place").[44]

Second element: substantial factor.[45] The plaintiff must show a "causal link" between the protected speech and the adverse employment action. *See, e.g., Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003); *see also Azzaro*, 110 F.3d at 981 (reversing summary judgment dismissing First Amendment retaliation claim, because there existed "a material dispute of fact as to whether [plaintiff's] reports were a motivating factor in the discharge decision").

The adverse action must be more than *de minimis*. *See McKee v. Hart*, 436 F.3d 165,170 (3d Cir. 2006) ("[N]ot every critical comment–or series of comments–made by an employer to an employee provides a basis for a colorable allegation that the employee has been deprived of his or her constitutional rights."). However, "a plaintiff may be able to establish liability under § 1983 based upon a continuing course of conduct even though some or all of the conduct complained of would be *de minimis* by itself or if viewed in isolation." *Brennan v. Norton*, 350 F.3d 399, 419 n.16 (3d Cir. 2003); *see also Suppan v. Dadonna*, 203 F.3d 228, 234 (3d Cir. 2000) ("[A] trier of fact could determine that a violation of the First Amendment occurred at the time of the rankings on the promotion lists and that some relief is appropriate even if plaintiffs cannot prove a causal connection between the rankings and the failure to promote."). In cases where the parties dispute whether an actionable adverse action occurred, the factfinder must determine whether "the alleged retaliatory conduct was sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights." *Suppan*, 203 F.3d at 235 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)); *see also O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006); *Thomas v. Independence Tp.*, 463 F.3d 285, 296 (3d Cir. 2006).[46]

"[F]or protected conduct to be a substantial or motivating factor in a decision, the decisionmakers must be aware of the protected conduct." *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 493 (3d Cir. 2002). If the plaintiff shows that the decisionmaker was aware of the protected conduct, then the plaintiff may use the temporal proximity between that knowledge and the adverse employment action to argue causation. "[A] suggestive temporal proximity between the protected activity and the alleged retaliatory action can be probative of causation," *Thomas*, 351 F.3d at 114, but "[e]ven if timing alone could ever be sufficient to establish a causal link, . . . the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before

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[44] In *Azzaro*, noting the "substantial public interest in Azzaro's revelations" and the "negligible" nature of any countervailing government interest, the Court of Appeals held that "the *Pickering* balance falls in Azzaro's favor." *Azzaro*, 110 F.3d at 980.

[45] The "substantial factor" and "same decision" inquiries "present[] question[s] of fact for the jury." *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005).

[46] In *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007), the Court of Appeals listed the ordinary-firmness standard as an element of the claim, stating that the plaintiff must show "(2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights."

a causal link will be inferred." *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir. 2003) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)).[47]

In *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007) – a case involving retaliation claims under both the First Amendment and the Rehabilitation Act – the Court of Appeals noted three options for proving causation:

> To establish the requisite causal connection a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link.... In the absence of that proof the plaintiff must show [(3)] that from the "evidence gleaned from the record as a whole" the trier of the fact should infer causation.

Id. at 267.[48]

Affirmative defense: same decision. As noted above, the second element requires the plaintiff to demonstrate that "the protected activity was a substantial or motivating factor for the adverse action." *Fultz v. Dunn*, 165 F.3d 215, 218 (3d Cir. 1998). If the plaintiff makes this showing, "the defendant can escape liability by showing that . . . he would have taken the same action absent the protected activity." *Fultz*, 165 F.3d at 218.[49] The defendant has the burden of proof on this third prong of the test. *See Hill*, 411 F.3d at 126 n.11 ("[T]he defendant bears the burdens of proof and persuasion on the third prong.").[50] In other words, "the defendant[], in proving 'same decision,' must prove that the protected conduct was *not* the but-for cause." *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000).

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[47] *Compare San Filippo*, 30 F.3d at 444 ("Although a dismissal that occurs years after protected activity might not ordinarily support an inference of retaliation, where, as here, a plaintiff engages in subsequent protected activity and the plaintiff is dismissed shortly after the final episode of such protected activity, a fact-finder may reasonably infer that it was the aggregate of the protected activities that led to retaliatory dismissal.").

[48] The *Lauren W.* court noted that "[a] court must be diligent in enforcing these causation requirements because otherwise a public actor cognizant of the possibility that litigation might be filed against him, particularly in his individual capacity, could be chilled from taking action that he deemed appropriate and, in fact, was appropriate." *Lauren W.*, 480 F.3d at 267.

[49] "'[S]ubstantial factor" does not mean 'dominant' or 'primary' factor. . . . Thus, even if a plaintiff shows that activity protected by the First Amendment was a 'substantial factor' in her termination, the defendant may show that some other factor unrelated to the protected activity was the but-for cause of the termination." *Hill*, 411 F.3d at 126 n.11.

[50] Thus, the Court of Appeals has termed the same-decision assertion an "affirmative defense." *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000).

7.5 Section 1983 – Employment – Damages

Comment

Instruction 4.8.1 provides a general instruction concerning compensatory damages in Section 1983 cases;[51] though the Comment to Instruction 4.8.1 sets forth principles that govern employment claims under Section 1983, that instruction will require tailoring to the particularities of employment litigation. One set of questions that may arise relates to back pay and front pay. It is clear that a Section 1983 employment discrimination plaintiff can recover back pay and front pay in appropriate cases. What is less clear is the division of labor between judge and jury on these questions.[52]

Framework for analysis. The Supreme Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), provides an overarching framework for analyzing the right to a jury trial in Section 1983 cases.[53] In *Del Monte Dunes*, the Court held that "a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *Del Monte Dunes*, 526 U.S. at 709.[54] Specifically, the Court held that there is a Seventh Amendment right[55] to a jury determination of the question of liability in a Section 1983 suit seeking damages reflecting just compensation for a regulatory taking. *See id.* at 721. As the Court explained, "[e]ven

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[51] *See also* Instructions 4.8.2 (nominal damages) and 4.8.3 (punitive damages).

[52] For discussion of similar issues with respect to Title VII claims, see the Comments to Instructions 5.4.3 and 5.4.4.

[53] Back pay and front pay remedies for Title VII claims are governed by other statutes and precedents. *See* Comment 5.4.3 (discussing Title VII back pay awards in light of 42 U.S.C. §1981(b)(2), 42 U.S.C. § 2000e-5(g)(1), and *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001)); Comment 5.4.4 (discussing Title VII front pay awards in light of 42 U.S.C. § 1981a(a)(1) and *Pollard*).

[54] Justice Scalia would have held that all Section 1983 claims for damages carry a Seventh Amendment jury right. *See id.* at 723 (Scalia, J., concurring in part and in the judgment). However, both the plurality and the dissent were willing to scrutinize specific types of constitutional damages claims brought under Section 1983 to discern whether the particular type of claim triggered a jury right. *See id.* at 711-12 (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Thomas, JJ.) (noting doubts as to whether claim-specific analysis was appropriate but engaging in that analysis anyway); *id.* at 751-52 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring in part and dissenting in part) (rejecting Justice Scalia's proposed approach). None of the Justices, though, questioned the notion that a Section 1983 damages claim that was tort-like in nature and that sought legal relief should carry a right to a jury trial. *See, e.g., id.* at 709 (majority opinion); *id.* at 751 (concurrence/dissent).

[55] *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ….").

when viewed as a simple suit for just compensation, . . . Del Monte Dunes' action sought essentially legal relief." *Id.* at 710. The Court relied on "the 'general rule' that monetary relief is legal," *id.* (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (quoting *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990))), and on the view that "[j]ust compensation . . . differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, 'the question is what has the owner lost, not what has the taker gained,'" *id.* (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)).

Once a court determines that a Section 1983 suit seeks legal relief – thus triggering the right to a jury – the court must next ascertain "whether the particular issues" in question are "proper for determination by the jury." *Del Monte Dunes*, 526 U.S. at 718 (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)).[56] The court should first "look to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718. "Where history does not provide a clear answer," the court should "look to precedent and functional considerations." *Id.*

Back pay. If back pay is seen as a form of compensatory damages (measured in terms of lost wages), then it could be argued that there should be a right to a jury on Section 1983 claims for back pay. *See* DAN B. DOBBS, 2 LAW OF REMEDIES § 6.10(5), at 233 (2d ed. 1993). This view, however, is far from universally accepted, *see id.* at 231 ("The courts of appeal have taken at least five different positions about the right of jury trial in back pay claims under §§ 1981 and 1983."), and the Third Circuit caselaw is inconclusive.

The Court of Appeals has suggested that an award of back pay under Section 1983 ordinarily is an equitable remedy concerning which there is no right to a jury. *See Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984) ("[A]lthough the request for back pay under section 1983 seeks only equitable relief . . . , a claim for compensatory and punitive damages is a legal claim entitling the plaintiff to a jury trial.").[57] Thus, for example, in *Savarese v. Agriss*, the Court of Appeals (in

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[56] As noted above, the relevant issue in *Del Monte Dunes* was one of liability. When the question at hand concerns which decisionmaker (judge or jury) should decide a remedies question, the analysis seems likely to turn principally on whether the remedy is equitable or legal in nature.

[57] The *Laskaris* court cited *Gurmankin v. Costanzo*, 626 F.2d 1115, 1122-23 (3d Cir. 1980) as support for this proposition. *Gurmankin*, however, did not concern the right to a jury trial. In *Gurmankin*, the Court of Appeals held that the trial judge's denial of back pay (after a bench trial) constituted an abuse of discretion. *See id.* at 1124-25. As support for the view that "backpay [is] an integral aspect of equitable relief to be awarded in a suit brought under section 1983 against a school district," *id.* at 1122, the Court of Appeals cited *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970). *Harkless*, by contrast, did concern the jury issue: the *Harkless* court held that "a claim for back pay presented in an

vacating and remanding for a redetermination of damages and back pay) indicated that the question of compensatory damages was for the jury while the question of back pay was for the trial judge. *See Savarese v. Agriss*, 883 F.2d 1194, 1206 (3d Cir. 1989) ("[W]e will vacate both Savarese's compensatory damage award and the equitable award of back pay for Savarese and remand to the district court for a new trial on compensatory damages and a recalculation of back pay by the district judge.").

On at least one occasion, however, the Court of Appeals has appeared to contemplate a procedure by which both back pay and front pay were submitted to the jury.[58] In *Squires v. Bonser*,

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equitable action for reinstatement authorized by § 1983 is not for jury consideration nor are the factual issues which form the basis of the claim for reinstatement." *Harkless*, 427 F.2d at 324; *see also Johnson v. Chapel Hill Independent School Dist.*, 853 F.2d 375, 383 (5th Cir. 1988) ("A back pay award under Title VII is considered equitable rather than legal in nature, and its character does not change simply because the award is made pursuant to § 1981 or § 1983.").

Like the Fifth Circuit, the Fourth Circuit has held that back pay is for the court, not the jury, to determine. *See Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 n.8 (4th Cir. 1966) ("[T]he hospital moved to have the question of back pay determined by a jury. But the claim is not one for damages; it is an integral part of the equitable remedy of reinstatement, and should be determined by the court.").

The First Circuit has taken the opposite view:

> In tort actions for personal injury tried to a jury, lost wages are invariably treated as being part of compensatory damages. . . . [T]he determination of back pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury.
>
> In addition to the seventh amendment implication, there is also a sound practical reason for having the jury factor in back pay when determining compensatory damages. Submission of the issue of back pay to the jury as a factor to be considered in its award of compensatory damages eliminates the inevitable overlap between compensatory damages and back pay. In most cases of an alleged unconstitutional firing, there will be evidence of the employee's pay. To expect a jury to ignore this is unrealistic, especially where it may constitute the major item of compensatory damages.

Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989). However, the *Santiago-Negron* court specified that "[w]here only reinstatement and back pay are requested or if they are the only issues, in addition to liability, remaining in the case then both reinstatement and back pay shall be for the court." *Id.*

[58] In addition, caselaw suggests that back pay may not be an equitable remedy when sought from an individual defendant. In a Section 1983 case that focused on official immunity, rather than on the right to a jury, the Court of Appeals stated that "[a]s to backpay and attorneys fees . . . a recovery against individual defendants would be in the nature of damages, rather than

the Court of Appeals held that the district court abused its discretion in denying reinstatement. *Squires v. Bonser*, 54 F.3d 168, 176 (3d Cir. 1995). Because an order granting reinstatement would render an award of front pay inappropriate, the court remanded for a new trial on compensatory damages. *See id.* at 177. The court's discussion evinced an assumption that the compensatory damages determination would include back pay. *See id.* at 176 n.15 (noting that in the previous trial the trial judge instructed the jury that the "[p]laintiff is entitled to be compensated for any wages that you find that he lost up to this date, or any wages that you find that he may lose in the future"); *id.* at 176 n.16 ("[A]sking the jury for a lump-sum award which includes front-pay when the plaintiff also seeks reinstatement. . . . wastes judicial resources in that if reinstatement is awarded a retrial is then required to parcel out the damages into component parts (i.e., front-pay versus back-pay).").

If the back pay issue is submitted to the jury,[59] the court could draft an instruction on that issue by making appropriate adaptations to Instruction 5.4.3 (concerning back pay under Title VII).

Front pay. Reinstatement is preferred over front pay.[60] The determination concerning reinstatement is for the district court.[61] If the district court determines that reinstatement is appropriate, then the district court should award reinstatement and should not permit the award of front pay.

Where an award of front pay is warranted, it may be the case that the amount of front pay

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as a part of the equitable remedy of reinstatement." *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 43 (3d Cir. 1974), *judgment vacated on other grounds*, 421 U.S. 983 (1975); *see also Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 n.7 (1st Cir. 1988) ("To say that an 'individual capacity' defendant is liable for 'back pay' is a misnomer; he may be liable for compensatory damages in the same amount (plaintiff's lost wages), but such liability must first hurdle any applicable immunity defense.")

[59] Even if there is no right to a jury determination on back pay, the court could submit the issue by stipulation of the parties or for an advisory verdict.

[60] "[A] denial of reinstatement is unwarranted unless grounded in a rationale which is harmonious with the legislative goals of providing plaintiffs make-whole relief and deterring employers from unconstitutional conduct." *Squires*, 54 F.3d at 172. "[R]einstatement is the preferred remedy to cover the loss of future earnings. . . . However, reinstatement is not the exclusive remedy, because it is not always feasible. . . . When reinstatement is not appropriate, front pay is the alternate remedy." *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 831 (3d Cir. 1994), *opinion amended by order* (3d Cir. 1995).

[61] "Reinstatement is an equitable remedy available in unconstitutional discharge cases arising under § 1983. . . . The decision whether to award reinstatement thus lies within the discretion of the district court." *Squires*, 54 F.3d at 171 (citing *Versarge v. Township of Clinton, New Jersey*, 984 F.2d 1359, 1368 (3d Cir. 1993)).

should be determined by the jury,[62] though here, too, the Third Circuit caselaw is inconclusive.[63] In the context of the Age Discrimination in Employment Act, the Court of Appeals has treated the amount of front pay as a question for the jury. *See Maxfield v. Sinclair Intern.*, 766 F.2d 788, 796 (3d Cir. 1985) ("Since reinstatement is an equitable remedy, it is the district court that should decide whether reinstatement is feasible. . . . Of course the amount of damages available as front pay is a jury question."). The *Maxfield* court's reasoning suggests that front pay should be viewed as a legal remedy,[64] and thus that in Section 1983 cases where the court holds that front pay is appropriate the amount should be determined by the jury. Assuming that the amount of front pay is to be determined by the jury in cases where front pay is warranted, where the issue of reinstatement is

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[62] In *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823 (3d Cir. 1994), *opinion amended by order* (3d Cir. 1995), the Court of Appeals held that the district court did not abuse its discretion in rejecting the remedy of reinstatement. *See id.* at 832. The district court had submitted the issue of front pay to the jury, and the Court of Appeals upheld the jury's award against an excessiveness challenge. *See id.* at 833.

The Court of Appeals' treatment of front pay in the context of sovereign immunity also provides oblique support for the view that front pay may properly be included within the scope of compensatory damages. In *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996), the plaintiffs sought to cast their Section 1983 claim for front pay as an equitable claim, in order to avoid state sovereign immunity, *see id.* at 698. The Court of Appeals rejected this contention, holding "that 'front pay' relief, under the circumstances of this case, would provide nothing more than compensatory damages which would have to be paid from the Commonwealth's coffers." *Id.*

[63] A number of decisions from other circuits suggest that front pay in Section 1983 cases presents a question for the judge. *See, e.g.*, *Johnson v. Chapel Hill Independent School Dist.*, 853 F.2d 375, 383 (5th Cir. 1988) ("A front pay award . . . must be viewed as essentially equitable in nature."); *Biondo v. City of Chicago*, 382 F.3d 680, 683, 690 (7th Cir. 2004) (noting that front pay was "equitable relief" awarded by the district court); *Ballard v. Muskogee Regional Medical Center*, 238 F.3d 1250, 1253 (10th Cir. 2001) ("An award of front pay for claims under § 1983 is an equitable remedy; thus, the district court has discretion to decide whether such an award is appropriate."); *see also Grantham v. Trickey*, 21 F.3d 289, 296 n.5 (8th Cir. 1994) ("When reinstatement is not feasible, the court may grant front pay as an alternative equitable remedy.").

In the First Circuit "[a]wards of front pay . . . are generally entrusted to the district judge's discretion." *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 380 (1st Cir. 2004). However, the *Johnson* court noted "some dispute . . . as to whether a jury should make calculations, if disputed, for purposes of the award." *Id.* at 380 n.8.

[64] The treatment of front pay under Title VII is not determinative in this regard. *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 & n.4 (2002) (holding that plaintiffs' claim for restitution sought legal relief and thus was not cognizable under ERISA, and rejecting contrary argument founded upon characterization of back pay as equitable relief under Title VII because "Title VII has nothing to do with this case").

contested it seems advisable to submit the front pay issue to the jury along with other elements of compensatory damages.[65] However, to ensure that the resulting award can be adjusted where necessary, the court should require the jury to itemize how much of the compensatory damages award is attributable to front pay and how much to other items.[66]

If the front pay issue is submitted to the jury,[67] the court could draft an instruction on that issue by making appropriate adaptations to Instruction 5.4.4 (concerning front pay under Title VII).

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[65] Two reasons argue in favor of this approach: The trial judge may not have decided whether reinstatement is appropriate (prior to the submission of the case to the jury), and the trial judge's determination on reinstatement is subject to appellate review (albeit for abuse of discretion).

[66] The Court of Appeals has stated:

> [W]e discourage the practice of asking the jury for a lump-sum award which includes front-pay when the plaintiff also seeks reinstatement. Such a procedure wastes judicial resources in that if reinstatement is awarded a retrial is then required to parcel out the damages into component parts (i.e., front-pay versus back-pay). Accordingly, we believe the preferable course for a plaintiff seeking the equitable remedy of reinstatement is for such a plaintiff to ask for a jury interrogatory concerning the amount of damages attributable to front-pay in order to avoid a double recovery. In the future, we may require such a practice in order to preserve a claim for reinstatement.

Squires, 54 F.3d at 176 n.16.

[67] Even if there is no right to a jury determination on front pay, the court could submit the issue by stipulation of the parties or for an advisory verdict.

Instructions For Claims Under the Age Discrimination In Employment Act

Numbering of ADEA Instructions

8.0 ADEA Introductory Instruction

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8.1.1 Disparate Treatment

8.1.2 Harassment — Hostile Work Environment — Tangible Employment Action

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8.4 ADEA Damages

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8.4.5 Nominal Damages

8.0 ADEA Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Federal Civil Rights statute that prohibits age discrimination against [an employee] [an applicant for employment], if that person is 40 years of age or older. This statute is known as the Age Discrimination in Employment Act or "ADEA."

Specifically, [plaintiff] claims that [he/she] was [denied employment] [describe the employment action at issue] by the defendant _____ because of [plaintiff's] age.

[Defendant] denies that [plaintiff] was discriminated against because of [his/her] age. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

Neither Title VII nor Section 1981 prohibits employers from discriminating on grounds of age. In the Age Discrimination in Employment Act of 1967, however, Congress provided protection for employees over the age of 40 who are the victims of discrimination because of age. The central provision of the ADEA is 29 U.S.C. § 623, which provides in part as follows:

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer--
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this Act.

In *Hill v. Borough of Kutztown,* 455 F.3d 225, 247 (3d Cir. 2006), the Third Circuit set forth the basic elements of an ADEA claim as follows:

> To state a claim for age discrimination under the ADEA, a plaintiff must allege that (1) he is over forty, (2) he is qualified for the position in question, (3) he suffered from an adverse employment decision, and (4) his replacement was sufficiently younger to permit a reasonable inference of age discrimination.

The *Hill* court found that these standards were met where the 42-year-old plaintiff alleged that he was constructively discharged from his job, for which he was qualified, and replaced by a person who was 27. The court noted that "[c]onstructive discharge is an adverse employment decision that may form the basis of an ADEA claim." Id. at 247 n. 32.

Relationship Between the Coverage of the ADEA and Title VII

The ADEA is patterned after Title VII, with the exception of the provisions on damages, which are patterned after the Fair Labor Standards Act. In some instances the legal standards for determining discrimination under the ADEA are the same as those applicable to Title VII. For example, in *Thurston v. TWA,* 469 U.S. 111, 121 (1985), the Court applied Title VII precedent to conclude in an ADEA case that an employer may not apportion a benefit in a discriminatory way even if it could have withheld the benefit in question altogether; the *Thurston* Court stated that this principle "applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.' *Lorillard v. Pons*, supra, [434 U.S. 575] at 584 [1978]." The *Thurston* Court also noted that "[s]everal Courts of Appeals have recognized the similarity between the two statutes. In *Hodgson v. First Federal Savings & Loan Assn*., 455 F.2d 818, 820 (1972), for example, the United States Court of Appeals for the Fifth Circuit stated that with 'a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964.'"

Prior to June 2009 a number of courts had applied Title VII's distinction between pretext and mixed-motive cases to the ADEA context. For instance, in *Massarsky v. General Motors Corp*., 706 F.2d 111, 116-17 (3d Cir. 1983), the Third Circuit noted that "because in many respects the provisions of the ADEA parallel those of Title VII, many courts have adapted to issues of age discrimination the principles of law applicable to cases arising under Title VII of the Civil Rights Act." The Court in *Massarsky* held that the delineation between "mixed motive" and "pretext cases"— also known as a delineation between "direct" and "indirect" evidence of discrimination — that had been developed under Title VII, was also applicable to ADEA claims. *See also Miller v. Cigna Corp.,* 47 F.3d 586 (3d Cir. 1995) (en banc) (confirming that the "mixed motive"/ "pretext" dichotomy found in Title VII disparate treatment cases is also applicable in ADEA disparate treatment cases); *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 725 n.5 (3d Cir. 1995) ("We generally rely on both ADEA cases and cases arising under Title VII . . . because Title VII and the ADEA have been given parallel constructions due to their similarities in purpose and structure."). But in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of the Title VII mixed-motive framework for ADEA cases. Thus, unlike Chapter 5 – which

provides separate instructions for "pretext" cases and "mixed-motive" cases – Chapter 8 provides only one instruction for disparate treatment, because in all ADEA cases the plaintiff always retains the burden to prove that age discrimination was the but-for cause of the adverse employment action. *See* Comment 8.1.1.

There are a number of other important differences in the legal standards of ADEA and Title VII. One example is that punitive damages are not available under the ADEA, as the statute provides a substitute of "liquidated" (double) damages for "willful" violations. This difference and all others will be noted in the commentary to the individual ADEA instructions.

Admissibility of Evidence of Other Acts of Age Discrimination

In *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S.Ct. 1140 (2007), the Court provided guidance on how a trial court should treat evidence of "other acts" of age discrimination. The plaintiff argued that her employer had a company-wide policy discriminating against age, and proffered a number of instances in which other age-protected employees had suffered adverse job determinations. The trial court excluded this evidence on the ground that none of the instances involved the plaintiff's immediate supervisors. The court of appeals took this as a ruling that "me-too" evidence was never relevant, i.e., as a *per se* rule of exclusion.

The Supreme Court agreed with the court of appeals that a *per se* rule of admissibility or inadmissibility of other acts of discrimination is not permissible, given that Fed.R.Evid. 403 requires the trial court to balance the probative value of evidence against the dangers of prejudice, confusion and delay. But the Court found it "not entirely clear" that the trial court in this case had in fact excluded the evidence under a *per se* rule. It remanded the case to allow the trial court "to conduct the relevant inquiry under the appropriate standard." The Court noted that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case" and that "[a]pplying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry."

8.1.1 Elements of an ADEA Claim— Disparate Treatment

Model

In this case [plaintiff] is alleging that [describe alleged treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] age was a determinative factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] age was a determinative factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

[For use where plaintiff claims replacement by a younger employee:

In this case [plaintiff] is claiming that [he/she] was replaced by a younger employee [name]. It is not necessary for [plaintiff's] replacement to be under 40 years of age. The question is whether [name of replacement employee] is substantially younger than [plaintiff].**]**

[For use in a reduction in force case:

In this case, [plaintiff] was laid off from [his/her] job as part of a reduction in force. [Plaintiff] need not show that he was replaced in [his/her] position by a younger employee. But [plaintiff] must show that [he/she] was laid off from a position for which [he/she] was qualified, and that substantially younger employers were treated more favorably.**]**

Concluding instruction:

Ultimately, you must decide whether [plaintiff] has proven that [his/her] age was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for the plaintiff 's age, the [adverse employment action] would not have occurred.

In deciding whether age was a determinative factor, you must be careful to distinguish age from other factors that are not dependent on age. [For example, if [defendant's] action was based on [plaintiff's] seniority, this is not an age-dependent decision. A person's seniority is based on time with the employer, and this is not the same factor as the person's age. Thus, an employer does not violate the ADEA just by interfering with an older employee's benefits that would have vested by virtue of the employee's years of service.]

Comment

"To establish a disparate-treatment claim under the plain language of the ADEA, ... a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009). Under *Gross*, the "mixed motive" burden-shifting instruction that courts apply to some Title VII cases under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is unavailable in ADEA cases. Thus, this chapter contains no analogue to Instruction 5.1.1.

Instruction 8.1.1 is modeled on Instruction 5.1.2's language concerning Title VII pretext cases. The *Gross* Court stated that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 ... (1973), utilized in Title VII cases is appropriate in the ADEA context,"*see Gross*, 129 S. C. at 2349 n.2. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964 ... , also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the *McDonnell Douglas* framework is fully applicable here."). The court of appeals has "conclude[d] that the but-for causation standard required by *Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases." *Smith v. City of Allentown*, 589 F.3d 684, 691 (3d Cir. 2009).

Miller v. Cigna Corp., 47 F.3d 586 (3d Cir. 1995) (en banc), was decided under the assumption that ADEA mixed-motive cases were governed by a framework distinct from that governing ADEA pretext cases. Obviously, that assumption is no longer good law after *Gross*, but the *Miller* court's discussion of the appropriate instruction for an ADEA pretext case remains instructive:

> A plaintiff in an ADEA case who does not qualify for a burden shifting instruction under *Price Waterhouse* [i.e., a "mixed-motive" case] has the burden of persuading the trier of fact by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process.

Miller, 47 F.3d at 596-97 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). The court in *Miller* reversed a verdict for the defendant because the trial judge instructed the jury that age must be the "sole cause" of the employer's decision. That standard was too stringent; instead, in a pretext case, "plaintiff must prove by a preponderance of the evidence that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process."

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993) (Title VII case). "The legitimacy of the employer's proffered business justification will be affected both by the duties and responsibilities of the employee's position and the nature of the justification. Concomitantly, the significance of variations among an individual's personnel evaluations may well depend upon the nature of the employee's responsibilities; a more exacting standard of performance may have to be applied to positions of greater responsibility." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 (3d Cir. 1988) (ADEA case).

If the defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for age discrimination, or in some other way prove it more likely than not that age motivated the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (Title VII case). The plaintiff retains the ultimate burden of proving intentional discrimination. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (en banc) ("Under the ADEA, the ultimate burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer's decision. The plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision."). The factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). The employer's proffered reason can be shown to be pretextual by circumstantial as well as direct evidence. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (en banc) (ADEA case). "To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997) (ADEA case). *See also Tomasso v. Boeing Co.*, 445 F.3d 702, 707 (3d Cir. 2006) (ADEA case) (noting that the employee "need not always offer evidence sufficient to discredit all

of the rationales advanced by the employer" because "the rejection of some explanations may so undermine the employer's credibility as to enable a rational factfinder to disbelieve the remaining rationales, even where the employee fails to produce evidence particular to those rationales.").

Seniority Distinct From Age

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), the Court held that the ADEA does not prohibit discrimination on the basis of an employee's seniority, as distinct from age. In *Hazen*, the employer fired the employee to prevent him from vesting in the pension plan. The Court found that the employer's action was not prohibited by the ADEA. The Court reasoned as follows:

> [T]he ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.
>
> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. . . . On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, *see* 29 U. S. C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."
>
> . . .
>
> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly. . . . Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

See also Kentucky Retirement Systems v. EEOC, 128 S. Ct. 2361, 2370 (2008) ("Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA,

must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status."). The pattern instruction advises the jury to distinguish between age-related discrimination and discrimination on other grounds that might correlate with age.

Substantially Younger Replacement

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Court rejected the argument that an ADEA plaintiff in a discharge case must show that he was replaced by someone under 40. Under *O'Connor*, the question is whether the employer relied on age in making the challenged decision, not on whether the employer chose someone outside the protected class. The Court added, however, that an inference of age discrimination "cannot be drawn from the replacement of one worker with another insignificantly younger." 517 U.S. at 313. *See also Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792-93 (3d Cir. 1985) ("The probative value of the age of the replacement will depend on the circumstances of the case. Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may be circumstantial evidence that gives rise to that inference. [citing cases] If the difference in ages of the two employees were insignificant, the district court would likely find that the evidence was insufficient to permit an inference of discrimination.").

On the question of what is a substantial difference in age, *see, e.g.*, *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995) (noting that no particular age difference must be shown; citing cases holding that a five year difference was sufficient, and other case law indicating that a one year difference was insufficient to support an inference of age discrimination).

Discrimination on the Basis of Relative Youth

ADEA liability does not lie when a member of the protected class suffers discrimination because she is too young. In *General Dynamics Land Systems, Inc., v. Cline*, 540 U.S. 581 (2004), the employer retained health care benefits only for current employers who were older than 50. This meant that employees within the protected age class of 40-50 were disentitled. The Court rejected an ADEA claim, relying on legislative history indicating that Congress intended to protect older workers only; it did not prohibit favoring the old over the young. In sum, "ADEA protects only relatively older workers (over 40) from discrimination favoring relatively younger ones (of any age)." Lewis & Norman, *Employment Discrimination Law and Practice* 428 (2d ed. 2004).

Reduction in Force

On the standards for proving age discrimination in reduction in force cases, *see, e.g.*, *Tomasso v. Boeing Co.*, 445 F.3d 702, 706 n.4 (3d Cir. 2006):

> Ordinarily, to make out a prima facie case [of age discrimination] the plaintiff must show . . . that he was replaced by a sufficiently younger person to create an inference of age discrimination. *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002). However, where an employee is terminated during a RIF, the [disputed question] becomes whether the employer retained employees who do not belong to the protected class.

See also Dreyer v. ARCO Chemical Co., 801 F.2d 651, 653 (3d Cir. 1986) (noting that in reduction of force cases "it is often impracticable to require a plaintiff whose job has been eliminated to show replacement" and so the question becomes whether the plaintiff was laid off from a job for which he was qualified while substantially younger employees were treated more favorably), *overruled on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993); *Anderson v. CONRAIL*, 297 F.3d 242 (3d Cir. 2002) (in a reduction in force case, the plaintiff must show that a similarly situated substantially younger employee was retained).

8.1.2 Elements of an ADEA Claim — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] age.

[Employer] is liable for the actions of [names] in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is [age over 40].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable person of [plaintiff's age]'s reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Sixth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Seventh: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of age harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

Comment

Courts have held that the ADEA prohibits harassment on the basis of age (when the plaintiff is 40 years of age or older) though there is no Third Circuit case law on the subject. *See, e.g.,*

Montgomery v. John Deere & Co., 169 F.3d 556 (8th Cir. 1999) (asking an employee when he is going to retire can sometimes be so unnecessary and excessive as to constitute evidence of discriminatory harassment); *Peecock v. Northwestern Nat'l Ins. Group,* 156 F.3d 1231 (6th Cir. 1998) (unpublished opinion) ("In order to prove a prima facie case of a hostile work environment, a plaintiff must show: 1) that the employee is 40 years or older; 2) the employee was subjected to harassment either through words or actions, based on age; 3) the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile or offensive work environment ; and 4) the existence of some basis for liability on the part of the employer."); *Burns v. AAF-McQuay, Inc.,* 166 F.3d 292 (4th Cir. 1999) (same standard); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.,* 117 F.3d 1244 (11th Cir. 1997) (upholding a verdict on a claim of hostile work environment under the ADEA).

This instruction is substantively identical to Instruction 5.1.4, covering hostile work environment claims with a tangible employment action under Title VII. Like Title VII — and unlike Section 1981 — the ADEA regulates employers only, and not individual employees. Therefore, the instruction is written in terms of employer liability for the acts of its employees.

Respondeat superior liability for harassment by non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990).

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 8.2.1.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[1] Instruction 8.2.2 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases.

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[1] As Comment 8.1.3 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding "that an employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment." Assuming that the same approach applies in ADEA cases, Instruction 8.1.2 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 8.1.3 should be used instead.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

These ADEA instructions on harassment do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and the ADEA applies to age discrimination only. If an ADEA claim is ever raised on quid pro quo grounds, the court can modify Instruction 5.1.3 for that occasion.

For further commentary on hostile work environment claims, see the Comment to Instruction 5.1.4.

8.1.3 Elements of an ADEA Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] age.

[Employer] is liable for the actions of [names] in [plaintiff's] claim of discriminatory harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is [age over 40].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable person of [plaintiff's age]'s reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

[For use when the alleged harassment is by non-supervisory employees:

Sixth: Management level employees knew, or should have known, of the abusive conduct. You can find that management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of age harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

If any of the above elements has not been proved by a preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim. If you find that the elements have been proved, then you must consider [employer's] affirmative defense. I will instruct you now on the elements of that affirmative defense.

You must find for [defendant] if you find that [defendant] has proved both of the following elements by a preponderance of the evidence:

First: That [defendant] exercised reasonable care to prevent harassment in the workplace on the basis of age, and also exercised reasonable care to promptly correct any harassing behavior that does occur.

Second: That [plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [defendant].

Proof of the following facts will be enough to establish the first element that I just referred to, concerning prevention and correction of harassment:

1. [Defendant] had established an explicit policy against harassment in the workplace on the basis of age.

2. That policy was fully communicated to its employees.

3. That policy provided a reasonable way for [plaintiff] to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed to take advantage of a corrective opportunity.

Comment

As discussed in the Commentary to Instruction 8.1.3, courts have held that the ADEA protects against harassment on the basis of age, though the Third Circuit has not yet decided the question.

This instruction is substantively identical to Instruction 5.1.5, covering hostile work environment claims with no tangible employment action under Title VII. Like Title VII — and unlike Section 1981 — the ADEA regulates employers only, and not individual employees. Therefore, the instruction is written in terms of employer liability for the acts of its employees.

This instruction is to be used in discriminatory harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth,* 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990).

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 8.2.1.

These ADEA instructions on harassment do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and the ADEA applies to age discrimination only. If an ADEA claim is ever raised on quid pro quo grounds, the court can modify Instruction 5.1.3 for that occasion.

For further commentary on hostile work environment claims, see Instructions 5.1.4 and 5.1.5.

8.1.4 Elements of an ADEA Claim–Disparate Impact

Model

In this case, [plaintiff] claims that [defendant], by [describe employment practice], has caused an adverse, disproportionate impact on persons 40 years of age or older. The parties agree that [defendant's] conduct is neutral on its face, but [plaintiff] contends that in fact people 40 and older have been treated more harshly by [defendant]. This is what is known in the law as "disparate impact."

To find a disparate impact, you do not need to consider whether [defendant] intended to discriminate against persons 40 and older. You must focus on the consequences or results of specific employment practices.

To recover on [his/her] claim of disparate impact, [plaintiff] must prove both of the following by a preponderance of the evidence.

First: [Defendant] has engaged in a specific employment practice or practices that caused [defendant] to [fail to hire] [fail to promote] [demote] [terminate] [constructively discharge][plaintiff] because [plaintiff] was [40 or older].

Second: [Defendant's] [describe employment practice] had a significantly disproportionate adverse impact on persons 40 years of age or older.

Note that it is not enough for [plaintiff] to prove that workers 40 and older have suffered a disparate impact. Nor is it enough to allege that some generalized policy is responsible for a disparate impact. Instead, [plaintiff] must prove that a specific employment practice or practices caused the disproportionate adverse impact on persons 40 years of age or older.

[Affirmative Defense:

[Defendant] contends that [describe employment practice] was based on reasonable factors other than age. [Defendant] has the burden of proving both of the following elements by a preponderance of the evidence:

First: The [employment practice] [selection criterion] is job-related for the positions in question.

Second: The [employment practice] [selection criterion] is justified by business necessity.

If you find that [plaintiff] has proved each of the elements on which [he/she] has the burden of proof, your verdict should be for [plaintiff], unless you also find that [defendant] has proved this affirmative defense, in which event your verdict should be for [defendant].**]**

Comment

In *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 726 (3d Cir. 1995), the court explained the distinction between "disparate impact" and "disparate treatment" claims:

> A policy can be discriminatory because of its treatment of or impact on employees. In a disparate treatment case, the employer simply treats some people less favorably because of their [protected status]. On the other hand, disparate impact liability involves employment activities that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. (Citations omitted).

In *Smith v. City of Jackson,* 544 U.S. 228 (2005), the Court held that the ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), which announced a disparate impact theory of recovery in Title VII cases. The Court observed, however, that the disparate impact ground of recovery in the ADEA is narrower than that provided in Title VII, in two respects. First, the ADEA permits a disparate impact "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Second, the 1991 amendment to Title VII modified the Supreme Court's holding in *Ward's Cove Packing v. Atonio,* 490 U.S. 642 (1989), in which the Court narrowly construed the employer's exposure to disparate-impact liability under Title VII. Because the 1991 amendment did not affect the ADEA, it follows that the standards of *Ward's Cove* remain applicable to disparate impact actions under the ADEA. Under *Ward's Cove*, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Smith v. Jackson,* 544 U.S. at 235 (emphasis in original). The instruction reflects both of these limitations on disparate impact recovery in ADEA cases.

Unlike Title VII, the ADEA provides a right to jury trial for all claims covered by the Act, including, now, disparate impact claims. See 29 U.S.C. § 626(c)(2) ("[A] person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action.").

Affirmative Defense for Reasonable Factors Other Than Age

In *Meacham v. Knolls Atomic Power Laboratory,* 128 S.Ct. 2395 (2008), the Court held that in a disparate-impact case, the employer has the burden of production of proving that its employment decision was made on the basis of reasonable factors other than age. The Instruction accordingly sets forth reasonable factors other than age as an affirmative defense.

8.1.5 Elements of an ADEA Claim — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [describe activity protected by the ADEA].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a good faith belief that [plaintiff's] [or someone else's] rights under the Age Discrimination in Employment Act were violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

Comment

The ADEA provides a cause of action for retaliation:

> (d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

29 U.S.C. § 623(d). This section applies to protect employees in the private sector; the ADEA provision covering federal employees, *see* 29 U.S.C. §633a(a), does not contain an explicit provision on retaliation. However, the Supreme Court in *Gomez-Perez v. Potter,* 128 S.Ct. 1931, 1943 (2008), held "that § 633a(a) prohibits retaliation against a federal employee who complains of age discrimination."

The substantive standards for a retaliation claim under the ADEA are generally the same as those applied to Title VII retaliation claims. Lewis and Norman, *Employment Discrimination* 453 (2d ed. 2004) ("Section 623(d) of ADEA provides protection against retaliation in the same terms as § 704(a) of Title VII.").

Protected Activity

The most common activities protected from retaliation under the ADEA and Title VII are: 1) opposing or complaining about discrimination; 2) making a charge of employment discrimination; 3) testifying, assisting or participating in any manner in an investigation, proceeding or hearing under under the ADEA. See the discussion of protected activity in the Comment to Instruction 5.1.7. *See also Fasold v. Justice,* 409 F.3d 178, 188 (3d Cir. 2005) (filing a complaint with the EEOC is protected activity); *Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506 (3d Cir. 2004) (if plaintiff were fired for being a possible witness in an employment discrimination action brought under the ADEA, this would be unlawful retaliation); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (filing discrimination complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White,* 126 S.Ct. 2405 (2006); *Kachmar v. Sungard Data Sys., Inc.,* 109 F.3d 173, 177 (3rd Cir. 1997) (advocating equal treatment was protected activity); *Aman v. Cort Furniture*, 85 F.3d 1074, 1085 (3d Cir. 1989) ("protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct"). The question of whether a particular activity is "protected" from retaliation is a question of law; whether the plaintiff engaged in that activity is a question of fact for the jury.

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2415 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker

from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
>
> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders,* 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.
>
> Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively

capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

126 S.Ct. at 2415 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively identical to the ADEA provision on retaliation, supra. This instruction therefore follows the guidelines of the Supreme Court's decision in *White*.

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2413 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any* discrimination by an employer in response to protected activity.

Because the ADEA anti-retaliation provision is substantively identical to the Title VII provision construed in *White* — it broadly prohibits discrimination without reference to employment-related decisions — this instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her").

It should be noted, however, that damages for emotional distress and pain and suffering are not recoverable under the ADEA. *Rogers v. Exxon Research and Engineering Co.,* 550 F.2d 834, 842 (3d Cir. 1977) (relying on legislative history tying recovery under the ADEA to that provided by the Fair Labor Standards Act, and not Title VII; holding that "damages for pain and suffering or emotional distress cannot properly be awarded in ADEA cases"), *overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc). So, to the extent that retaliatory activity is not job-related, it is probably less likely to be compensable under the ADEA than it is under Title VII. For further discussion of *White*, see the Comment to Instruction 5.1.7.

Determinative Effect

As discussed in Comment 8.1.1, the Supreme Court has held with respect to non-retaliation ADEA claims that the plaintiff must prove but-for causation (and thus that a mixed-motive burden-shifting framework is unavailable). *See Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2351 (2009). Although the *Gross* Court was interpreting 29 U.S.C. § 636(a), its reasoning

seems equally applicable to 29 U.S.C. § 636(d) (the ADEA's anti-retaliation provision). Accordingly, Instruction 8.1.5 requires the plaintiff to prove that the plaintiff's protected activity had a determinative effect on the defendant's retaliatory activity.

Employer's Attitude Toward Employee

On the relevance of an employer's attitude toward an employee who engaged in protected activity, see *Fasold v. Justice,* 409 F.3d 178, 190 (3d Cir. 2005) (reversing a grant of summary judgment for an employer on an ADEA retaliation claim and noting that "we cannot discount the possibility that [the supervisor's] irritation with Fasold's pending administrative claims influenced the calculus [the supervisor] made in his decision to deny the Level II grievance.").

Retaliation Against Perceived Protected Activity

In *Fogleman v. Mercy Hospital, Inc.,* 283 F.3d 561, 562 (3d Cir. 2002), an ADA case, the court declared that the retaliation provisions in the ADEA protected an employee against retaliation for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. If the fairly unusual case arises in which the employer is alleged to have retaliated for perceived rather than actual protected activity, then the instruction can be modified consistently with the court's directive in *Fogleman.*

8.2.1 ADEA Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

• The total physical environment of [plaintiff's] work area.

• The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.

• The reasonable expectations of [plaintiff] upon entering the environment.

• The frequency of the offensive conduct.

• The severity of the conduct.

• The effect of the working environment on [plaintiff's] mental and emotional well-being.

• Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.

• Whether the conduct was pervasive.

• Whether the conduct was directed toward [plaintiff].

• Whether the conduct was physically threatening or humiliating.

• Whether the conduct was merely a tasteless remark.

• Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [his/her] age. The harassing conduct may, but need not be age-based in nature. Rather, its defining characteristic is that the harassment complained of was linked to

[plaintiff's] age. The key question is whether [plaintiff], as a person of [plaintiff's age] was subjected to harsh employment conditions to which substantially younger employees were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable person of [plaintiff's age] in the same position. That is, you must determine whether a reasonable person of [plaintiff's age] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable person of [plaintiff's age]. The reasonable person of [plaintiff's age] is simply one of normal sensitivity and emotional make-up.

Comment

This instruction can be used if the court wishes to provide a more detailed instruction on what constitutes a hostile work environment than those set forth in Instructions 8.1.3 and 8.1.4. This instruction is substantively identical to the definition of hostile work environment in Title VII cases. See Instruction 5.2.1.

8.2.2 ADEA Definitions — Constructive Discharge

Model

In this case, to show that [he/she] was subjected to an adverse "tangible employment action," [plaintiff] claims that [he/she] was forced to resign due to conduct that discriminated against [him/her] on the basis of [plaintiff's] age. Such a forced resignation, if proven, is called a "constructive discharge." To prove that [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

Comment

In ADEA cases (as in Title VII cases, see Comment 5.2.2), courts in the Third Circuit "employ an objective test to determine whether an employee can recover on a claim of constructive discharge.... Specifically, a court must determine 'whether a reasonable jury could find that the [employer] permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign.'" *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d Cir. 2001). Instruction 8.2.2 is substantively identical to the constructive discharge instruction for Title VII actions. See Instruction 5.2.2.

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into Instruction 8.1.2 (with respect to the instruction's sixth element). Assuming that the Title VII framework concerning employer liability for harassment applies to ADEA actions, the employer's ability to assert an *Ellerth / Faragher* affirmative defense in a constructive discharge case will depend on whether the constructive discharge resulted from actions that were sanctioned by the employer. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."); *see also* Comment 5.1.5.

8.3.1 ADEA Defenses — Bona Fide Occupational Qualification

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [his/her] age, then you must consider [defendant's] defense that its age limitation is a bona fide occupational qualification.

In order to avoid liability for intentional discrimination on the basis of this contention, [defendant] must prove both of the following elements by a preponderance of the evidence:

First: That the occupational qualification relied upon by [defendant] is reasonably necessary for the normal operation of [defendant's] business.

Second: That [defendant] either had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform the job safely and efficiently, or that it was impossible or highly impractical to consider the necessary qualifications of each older employee. [Defendant's] belief should be evaluated in light of all the circumstances in the case, to determine whether it has a reasonable basis in fact.

If you find that [defendant] has proved these two elements by a preponderance of the evidence, then you must find for [defendant].

Comment

Section 4(f)(1) of the ADEA provides that it is not unlawful for an employer to take an action otherwise prohibited by the Act if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 629(f)(1). This language is identical to that provided in Title VII. Accordingly, the instruction is substantively identical to Instruction 5.3.1, which covers the BFOQ defense in Title VII cases.

In *Western Airlines v. Criswell,* 472 U.S. 400, 410 (1985), the Court declared that the BFOQ defense is an "extremely narrow" exception; it held that the defense did not justify the employer's plan to retire members of commercial airline flight crews when they reached 60 years of age. The *Criswell* Court described the BFOQ defense applicable in ADEA actions in the following passage:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it

with less discriminatory impact.

The *Criswell* Court made it clear that the BFOQ defense is an affirmative defense; the burden of establishing its elements is on the defendant.

8.3.2 ADEA Defenses — Bona Fide Seniority System

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [plaintiff's] age, then you must consider [defendant's] defense that it was applying the terms of a good faith seniority system. An employer can lawfully use a seniority system in making employment decisions unless the seniority rules were designed and used to discriminate against older workers. Put another way, if the seniority rules are legitimate and not designed to discriminate, then the rules are lawful and can be used to make employment decisions.

To establish the defense of a good faith seniority system, [defendant] must prove both of the following by a preponderance of the evidence:

First: That the seniority system used the length of service of employees, and not the age of the employees, as the primary basis for giving available job opportunities to its workers.

Second: That [defendant's] [challenged employment action] was consistent with its seniority system.

If you find that [defendant] has proved these two elements by a preponderance of the evidence, then you must find for [defendant].

Comment

The ADEA permits disparate treatment "to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2)(A). Thus the seniority system will be invalid if it is dependent on age rather than seniority. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 616 (1993) (rejecting a claim of age discrimination where the challenged employment practice was the product of a bona fide seniority system). *See also Dalton v. Mercer County Board of Educ*., 887 F.2d 490, 492 (4th Cir.1989) (choosing an applicant with the most seniority pursuant to a bona fide statutory seniority system is not a violation of ADEA).

The Supreme Court has held that challenges to the effects of bona fide seniority systems may not be based upon assertions of disparate impact; rather, a plaintiff must prove intentional discrimination. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 352-56 (1977). *See also Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir.1995) (challenges of age discrimination to bona fide seniority systems must rest upon claim of disparate treatment rather than disparate impact).

8.3.3 ADEA Defenses — Waiver

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [plaintiff's] age, then you must consider the defense alleged by [defendant] that [plaintiff] knowingly and voluntarily consented to a waiver of [plaintiff's] ADEA claims.

Federal law permits [plaintiff] to waive ADEA rights provided that, at a minimum, [defendant] proves by a preponderance of the evidence that the following safeguards are met:

1. The waiver is part of an agreement between [plaintiff] and [defendant] that is written in a way that is intended to be understood by [plaintiff] or by the average individual eligible to participate;

2. The waiver specifically refers to rights or claims arising out of the Age Discrimination in Employment Act;

3. [Plaintiff] did not waive rights or claims that may arise after the date the waiver was executed;

4. [Plaintiff] waived rights under the ADEA in exchange for something of value beyond that to which [he/she] was already entitled; and

5. [Plaintiff] was advised in writing to consult an attorney before executing the waiver agreement.

[In this case, [plaintiff] has presented evidence challenging the validity of this waiver. Specifically [describe plaintiff's evidence challenging waiver]. It is for you to determine whether or not the waiver was knowing and voluntary. In doing so, you must consider all the circumstances surrounding the signing of the waiver. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff's] waiver of ADEA rights was knowing and voluntary. The fact that the agreement complies with the minimum standards of Federal law does not necessarily mean that the waiver was knowing and voluntary.]

Comment

The Older Workers Benefit Protection Act (OWBPA) permits workers to sign releases of ADEA claims, provided the waiver is knowing and voluntary and the minimum standards of the OWBPA are met. 29 U.S.C.A. § 626(f)(1). The proponent of the release has the burden to prove that the minimum statutory requirements for the release have been satisfied. *See Ruehl v. Viacom, Inc.,* 500 F.3d 375, 381 (3d Cir. 2007) (waiver invalid where employer could not establish that the

employee was provided the necessary information required by the OWBPA: "Having the employee *say* he was informed in writing — when he was not — does not satisfy the OWBPA requirements.") (emphasis in original). The minimum statutory requirements for a valid waiver are as follows:

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under [the ADEA];
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult an attorney prior to executing the agreement.

29 U.S.C. § 626(f)(1). *See* Lewis and Norman, *Employment Discrimination* 456-57 (2d ed. 2004) for a discussion of the statutory requirements.

The statutory factors are minimum requirements. *See Wastak v. Lehigh Valley Health Network,* 342 F.3d 281, 295, n.8 (3d Cir. 2003) (noting that the OWBPA establishes "a floor, not a ceiling"). Whether a waiver is knowing and voluntary is determined by a totality of the circumstances. *See Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1229 (10th Cir.1999) (noting that the statutory factors governing a waiver under OWBPA are minimum requirements, and holding that non-statutory factors such as fraud and duress may render an ADEA waiver not knowing and voluntary); *Griffin v. Kraft General Foods, Inc*., 62 F.3d 368, 373-74 (11th Cir.1995) (validity of waiver of ADEA claims must be determined under the totality of the circumstances). But if the waiver agreement on its face meets the minimum statutory requirements of OWBPA, the issue of whether or not the plaintiff has given a knowing and voluntary consent to a waiver of ADEA claims will only reach the jury if the plaintiff has come forward with specific evidence sufficient to raise a question as to the validity of the waiver. The court in *Pierce v. Atchison Topeka & Santa Fe Ry.*, 110 F.3d 431, 438 (7th Cir.1997), explained why the plaintiff has a burden of production when contending that a release conforming with the statute was not knowing and voluntary:

> To place upon the employer the burden of demonstrating that an otherwise unambiguous release of claims was not signed knowingly and voluntarily risks undermining the usefulness of waivers by clouding them in uncertainty. This danger is compounded by the difficulty of demonstrating that someone's actions were knowing and voluntary, an assumption about human behavior which the law typically indulges as a matter of faith.

> This line of reasoning has force. . . . [W]e believe that the concerns it reflects are adequately addressed by placing the burden of production, rather than the burden of proof, on the party who . . . seeks to invalidate a waiver of federal rights. Such a rule does not mean that a claim that a release was not executed knowingly and voluntarily will necessarily reach a jury. The plaintiff must come forward with specific evidence sufficient to raise a question as to the validity of the release . . . . A bald assertion of misrepresentation by the employer, standing alone, is legally insufficient. Moreover, certain factors, such as the participation of an attorney in negotiating the release, will give rise to a presumption that the waiver was knowing and voluntary. As for the difficulty of establishing that an employee did not act knowingly and voluntarily, a burden which some have likened to "proving a negative," we believe that this difficulty is minimized by requiring the employee to produce specific evidence of factors that vitiated his consent to the release.

The court in *Pierce* emphasized—as does the instruction—that while the plaintiff has a burden of production when the release conforms to minimum statutory requirements, it is the defendant's burden to prove that the release was knowing and voluntary once the plaintiff's burden of production is met.

An employer who obtains a waiver through a nonconforming release cannot defeat an ADEA claim simply because the plaintiff did not tender back the consideration paid in exchange for the waiver. *Oubre v. Entergy Operations, Inc*., 522 U.S. 422, 427-28 (1998).

8.4.1 ADEA Damages — General Compensatory Damages

No Instruction

Comment

General compensatory damages, such as for pain and suffering, are not recoverable in ADEA actions. *Rogers v. Exxon Research and Engineering Co.,* 550 F.2d 834, 842 (3d Cir. 1977) (relying on legislative history tying recovery under the ADEA to that provided by the Fair Labor Standards Act, and not Title VII; holding that "damages for pain and suffering or emotional distress cannot properly be awarded in ADEA cases"), *overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc); *Haskell v. Kaman Corp.,* 743 F.2d 113, 120-21 (2d Cir. 1984) ("plaintiffs are not entitled to recovery for emotional distress in ADEA actions").

The ADEA mandates an award for back pay and liquidated damages, and permits an award for front pay. See Instructions 8.4.2 - 8.4.4 for instructions covering these awards.

8.4.2. ADEA Damages — Back Pay

Model

If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff], then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's] intentional discrimination.

Back pay damages, if any, apply from the time [plaintiff] was [describe adverse employment action] until the date of your verdict.

You must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award back pay, you are instructed to deduct from the back pay figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of back pay.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of back pay to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information.**]**

Comment

Back pay awards are mandatory under the ADEA after a finding of discrimination; the ADEA incorporates damages provisions from the Fair Labor Standards Act providing that back pay "shall" be awarded. Accordingly, while back pay is an equitable remedy under some statutes (such as Title VII), back pay is a damages remedy under the ADEA, and therefore the parties have a right to a jury trial on questions of back pay. *See Lorillard v. Pons,* 434 U.S. 575, 584 (1978) (noting that the ADEA incorporates the FLSA provision that employers "shall be liable" for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion, and holding that in a private action under the ADEA a trial by jury is available where sought by one of the parties); *Anastasio v. Schering Corp.,* 838 F.2d 701 (3d Cir. 1988) (distinguishing the ADEA, where back pay is a mandatory element of damages, from the discretionary back pay remedy in Title VII).

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court held that if an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability. However, the employer in such a circumstance does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful discharge to the date the new information was discovered." 513 U.S. at 362. *See also Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that "after-acquired evidence may be used to limit the remedies available to a plaintiff where the employer can first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing that it would have made the same employment decision when it became aware of the post-decision evidence of the employee's misconduct.

Under the ADEA, collateral benefits such as unemployment compensation, pension benefits and social security benefits are not to be deducted from a back pay award. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.,* 789 F.2d 253 (3d Cir. 1986) (unemployment compensation is not to be deducted from a back pay award in an ADEA action); *Maxfield v. Sinclair Int'l,* 766 F.2d 788 (3d Cir. 1985) (social security benefits cannot be offset as an award of backpay is a mandatory element of damages under the ADEA). In contrast, courts have held that the ADEA does require interim earnings to be deducted from back pay awards. Id. The instruction reflects these legal standards.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

8.4.3. ADEA Damages — Liquidated Damages

Model

If you find that [plaintiff] is entitled to recover damages for lost wages or benefits, you must determine if [defendant's] conduct was willful. If you find that [defendant] willfully violated the law, then you must award plaintiff double the amount of damages for lost wages and benefits that you have found. [Plaintiff] has the burden of proving willfulness by a preponderance of the evidence.

You must find [defendant's] violation of the ADEA to be willful if [defendant] knew or showed reckless disregard for whether the [challenged action] was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard as to whether its conduct was prohibited by the law, then [defendant's] conduct was not willful and you cannot award double the amount of damages for lost wages and benefits.

Comment

Punitive damages are not available under the ADEA. *Rogers v. Exxon Research and Engineering Co.,* 550 F.2d 834, 842 (3d Cir. 1977), *overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc). 29 U.S.C. § 626(b) instead incorporates the liquidated damages provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b). The statute provides that doubling of damages is mandatory if there is a finding that the defendant willfully violated the law. *Cf. Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F.Supp.2d 838, 841 (E.D.Pa. 2001) (holding that punitive damages are available for claims of retaliation under the Equal Pay Act and Fair Labor Standards Act, and distinguishing ADEA actions, where punitive damages are not available for any claim).

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985), the Court held that willfulness must be found under the ADEA if the employer either knew or showed reckless disregard of the fact that its conduct was prohibited by the statute. The challenged action in *Thurston* was the company-wide implementation of a policy that was found to violate the ADEA. The Court held that a willful violation could not be found under the circumstances, as the company had sought advice of counsel in advance of the implementation of the policy, and was told that the policy would not violate the ADEA.

The Third Circuit held after *Thurston* that a stricter standard of willfulness must be applied to discrete acts (as opposed to policies) found to violate the ADEA. The court in *Dreyer v. ARCO Chem. Co.,* 801 F.2d 651, 656-57 (1986) explained as follows:

> Many cases since *Thurston* have extracted from it the dual "knew or showed reckless disregard" test of willfulness to all claimed violations of the ADEA. However, there is a distinction between cases where the employer action that is claimed to violate the ADEA consists of adoption of a policy, as in *Thurston*, and cases where the employer action consists of a decision directed at an individual, such as termination or demotion. The "knew or reckless disregard" standard is particularly apt in the former situation . . . In such a situation, it is meaningful to inquire whether the employer knew that the action was in violation of the Act or whether it acted in reckless disregard of the prohibitions of the ADEA.
>
> . . .
>
> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.

Four years after *Dreyer*, the Supreme Court decided *Hazen Paper Co., v. Biggins,* 507 U.S. 604 (1993). Unlike *Thurston, Hazen Paper* involved a discrete action against a single employee. In analyzing the possibility of liquidated damages in such a case, the *Hazen* Court rejected any requirement that the defendant's action must be "outrageous" before liquidated damages can be imposed. It adhered to the *Thurston "*knowing/reckless disregard" test of willfulness for all acts of intentional age discrimination. Addressing the concern that liquidated damages would be automatic in all cases in which a discrete act was found to be intentional age discrimination, the Court declared as follows:

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons, see, e. g., § 623(f)(2) (exemption for bona fide seniority systems and employee benefit plans); § 631(c) (exemption for bona fide executives and high policymakers). If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.
>
> Nor do we see how the instant case can be distinguished from *Thurston* . . . The only distinction between *Thurston* and the case before us is the existence of formal discrimination. Age entered into the employment decision there through a formal and publicized policy, and not as an undisclosed factor motivating the employer on an ad hoc basis, which is what respondent alleges occurred here. But surely an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut against imposing a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages.

> We therefore reaffirm that the *Thurston* definition of "willful" -- that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute -- applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision.

507 U.S. at 616. Accordingly, the instruction does not include any requirement that the defendant's conduct must have been outrageous. *See Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1099, n2 (3d Cir. 1995) (noting that the Third Circuit's "outrageousness" requirement in *Dreyer* had been effectively overruled by *Hazen*).

The amount of damages to be doubled under the ADEA liquidated damages provision does not include front pay. *Blum v. Witco Chem. Corp.,* 829 F.2d 367, 373 (3d Cir. 1987) (noting that a front pay award "is the monetary equivalent of the equitable remedy of reinstatement" and therefore is not part of the "wages" that are to be doubled under the terms of the statute).

Liquidated damages are of course not available in disparate impact cases, as liquidated damages are premised on a knowing or reckless disregard of the law. In contrast, disparate impact liability is not dependent on a knowing or intentional violation.

In *Potence v. Hazleton Area School District,* 357 F.3d 366 (3d Cir. 2004), the court held that the ADEA authorizes the imposition of liquidated damages against government employers who engage in willful age discrimination.

8.4.4. ADEA Damages — Front Pay

Model

You may determine and award separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. The reason you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. So you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future.**]**

Comment

Front pay may be awarded if reinstatement is not possible. In *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 795-96 (3d Cir. 1985), the court rejected the defendant's argument that an award of front

pay is not permitted in an ADEA action, and discussed the role of a front pay award in the following passage:

> Although this court has not yet spoken on whether an award of future lost earnings is precluded by the ADEA, . . . the line of cases we find most persuasive allows such an award. As Judge Weinfeld wrote in *Koyen v. Consolidated Edison Co. of New York*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983), "To deny [authority to grant front pay] would defeat a purpose of the Act to make a victim of discrimination 'whole' and to restore him to the economic position he would have occupied but for the unlawful conduct of his employer."
>
> Moreover, it is significant that whereas the FLSA has no provision for future damages, when Congress enacted the ADEA it added the following provision to the remedies taken from the FLSA:
>
> > In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section.
>
> 29 U.S.C. § 626(b). The inclusion of equitable relief strengthens the conclusion that Congress intended victims of age discrimination to be made whole by restoring them to the position they would have been in had the discrimination never occurred.
>
> Front pay, an award for future earnings, is sometimes needed to achieve that purpose. Ordinarily, an employee would be made whole by a backpay award coupled with an order for reinstatement. Reinstatement is the preferred remedy to avoid future lost earnings, but reinstatement may not be feasible in all cases. There may be no position available at the time of judgment or the relationship between the parties may have been so damaged by animosity that reinstatement is impracticable. In such circumstances, the remedial purpose of the statute would be thwarted and plaintiff would suffer irreparable harm if front pay were not available as an alternate remedy to reinstatement. Since reinstatement is an equitable remedy, it is the district court that should decide whether reinstatement is feasible. *Of course the amount of damages available as front pay is a jury question.* (Emphasis added).

Because front pay is essentially an equitable remedy in lieu of reinstatement, the plaintiff's entitlement to front pay is an issue for the court, not the jury. But in *Maxfield, supra,* the court declared that once the court finds that reinstatement is not feasible, it is for the jury to determine the amount of "damages" available as front pay. Thus, it appears in the Third Circuit that the parties have the right to a jury trial to determine the amount of front pay — though this is not the case in actions brought under Title VII or Section 1981.

8.4.5 ADEA Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he] suffered no compensable injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no compensable injury occurred.

However, if you find compensable injury, you must award damages for lost wages or benefits (as I instructed you), rather than nominal damages.

Comment

There is no Third Circuit case law on the availability of nominal damages in an ADEA case. But it appears that an award of nominal damages in an ADEA action might be justified in an extraordinary case, and so a pattern instruction is provided. The Eighth Circuit Committee Comment on a nominal damage instruction in an ADEA case opines that "[n]ominal damages normally are not appropriate in ADEA cases" and explains as follows:

> Recoverable damages in ADEA cases normally are limited to lost wages and benefits and in most ADEA cases, it will be undisputed that the plaintiff has some actual damages. Although case law does not clearly authorize this remedy in age discrimination cases, a nominal damage instruction may be considered in appropriate cases, and Model Instruction 5.02B, supra, should be used. Most cases that allow nominal damages just assume they are permissible without much discussion of the issue. *See e.g.*, *Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1438 (D. Kan. 1987) (ADEA); *Graefenhain v. Pabst Brewing Co.*, 670 F. Supp. 1415, 1416 (E.D. Wis. 1987) (ADEA).

Instructions for Employment Claims Under the Americans With Disabilities Act

Numbering of ADA Instructions

9.0 ADA Employment Claims – Introductory Instruction

9.1 Elements of an ADA Claim

- 9.1.1 Disparate Treatment — Mixed-Motive
- 9.1.2 Disparate Treatment — Pretext
- 9.1.3 Reasonable Accommodation
- 9.1.4 Harassment — Hostile Work Environment — Tangible Employment Action
- 9.1.5 Harassment — Hostile Work Environment — No Tangible Employment Action
- 9.1.6 Disparate Impact
- 9.1.7 Retaliation

9.2 ADA Definitions

- 9.2.1 Disability
- 9.2.2 Qualified Individual
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9.3 ADA Defenses

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9.4 ADA Damages

9.4.1 Compensatory Damages — General Instruction

9.4.2 Punitive Damages

9.4.3 Back Pay — For Advisory or Stipulated Jury

9.4.4 Front Pay — For Advisory or Stipulated Jury

9.4.5 Nominal Damages

9.0 ADA Employment Claims—Introductory Instruction

Model

In this case the Plaintiff _____ makes a claim based on a federal law known as the Americans with Disabilities Act, which will be referred to in these instructions as the ADA.

Under the ADA, an employer may not deprive a person with a disability of an employment opportunity because of that disability, if that person is able, with reasonable accommodation if necessary, to perform the essential functions of the job. Terms such as "disability", "qualified individual" and "reasonable accommodations" are defined by the ADA and I will instruct you on the meaning of those terms.

[Plaintiff's] claim under the ADA is that [he/she] was [describe the employment action at issue] by the defendant _____ because of [plaintiff's] [describe alleged disability].

[Defendant] denies [plaintiff's] claims. Further, [defendant] asserts that [describe any affirmative defenses].

As you listen to these instructions, please keep in mind that many of the terms I will use, and you will need to apply, have a special meaning under the ADA. So please remember to consider the specific definitions I give you, rather than using your own opinion of what these terms mean.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

"Congress enacted the ADA in 1990 in an effort to prevent otherwise qualified individuals from being discriminated against in employment based on a disability." *Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 579 (3d Cir. 1998). The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

42 U.S.C. § 12111(8).[1] An entity discriminates against an individual on the basis of disability when, inter alia, it does "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] entity." 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodations may include, inter alia, "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

"In order to make out a prima facie case of disability discrimination under the ADA, [the plaintiff] must establish that she (1) has a 'disability,' (2) is a 'qualified individual,' and (3) has suffered an adverse employment action because of that disability." *Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 611 (3d Cir. 2006).

The EEOC has provided interpretive guidance on the test for determining whether a person is a qualified individual. That guidance was drafted prior to the 2008 amendments to the ADA, *see* ADA Amendments Act of 2008, Pub. L. No. 110-325, Sept. 25, 2008, 122 Stat. 3553, and it therefore uses outdated terminology ("qualified individuals with disabilities"), but the two-step framework set forth in the guidance may still be pertinent. "The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. ....The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. .... The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision." 29 C.F.R. Pt. 1630, App.

The ADA, Public Accommodations and Public Services

Title I of the ADA covers claims made by employees or applicants for disparate treatment, failure to make reasonable accommodations, and retaliation against protected activity. Titles II and III cover public accommodations and public services for persons with disabilities. These instructions are intended to cover only those cases arising under the employment provisions of the ADA. For a discussion and application of the standards governing actions under Titles II and III of the ADA, *see Bowers v. National Collegiate Athletic Assoc.,* 475 F.3d 524 (3d Cir. 2007).

[1] Section 12111(8) continues: "For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

The Rehabilitation Act

Federal employers and employers who receive federal funding are subject to the Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The substantive standards for a claim under the Rehabilitation Act are in many respects identical to those governing a claim under the ADA. *See, e.g., Wishkin v. Potter,* 476 F.3d 180, 184 (3d Cir. 2007) ("The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers receiving federal funding."); *Bragdon v. Abbott,* 524 U.S. 624 (1998) (determination of "disability" is the same under the ADA and the Rehabilitation Act); *Conneen v. MBNA America Bank, N.A.,* 334 F.3d 318, 330 (3d Cir. 2003) (Rehabilitation Act cases apply "with equal force" to the ADA); *Deane v. Pocono Medical Center,* 142 F.3d 138 (3d Cir. 1998) (en banc) (analysis of "reasonable accommodation" is the same under the ADA and the Rehabilitation Act). These ADA instructions can therefore be applied, and modified if necessary, to a claim brought under the Rehabilitation Act.

The ADA's association provision

Chapter 9 does not include an instruction specifically dealing with claims under 42 U.S.C. § 12112(b)(4), which defines "discriminat[ion] against a qualified individual on the basis of disability" to include "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." For a discussion of such claims, see *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 510-11 (3d Cir. 2009).

9.1.1 Elements of an ADA Claim— Disparate Treatment — Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [disability] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA.

Second: [Plaintiff] is a "qualified individual" able to perform the essential functions of [specify the job or position sought].

Third: [Plaintiff's] [disability] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights under the ADA.

In showing that [plaintiff's] [disability] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [disability] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [the disability] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [disability] was a "motivating factor" if [his/her] [disability] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

[For use where defendant sets forth a "same decision" affirmative defense:

If you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled to damages. [Plaintiff] is not entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [disability] had played no role in the employment decision.**]**

Comment

The Third Circuit has held that disparate treatment discrimination cases under the ADA are governed by the same standards applicable to Title VII actions. *See, e..g., Shaner v. Synthes,* 204 F.3d 494, 500 (3d Cir. 2000); *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir. 1995). *See also Raytheon Co. v. Hernandez,* 540 U.S. 44, 50, n.3 (2003) (noting that all of the courts of appeals have applied the Title VII standards to disparate treatment cases under the ADA). These ADA instructions accordingly follow the "mixed-motive"/ "pretext" delineation employed in Title VII actions.

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. The Committee has not attempted to determine what, if any, implications *Gross* has for ADA claims, but the Committee suggests that users of these instructions should consider that question.

The distinction between "mixed-motive" cases and "pretext" cases is generally determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant's activity was motivated at least in part by discriminatory animus, and therefore a "mixed-motive" instruction is given. If the evidence of discrimination is only circumstantial, then defendant can argue that there was no discriminatory animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 9.1.2 should be given. *See generally Fakete v. Aetna, Inc.,* 308 F.3d 335 (3d Cir. 2002) (using "direct evidence" to describe "mixed-motive" cases and noting that pretext cases arise when the plaintiff presents only indirect or

circumstantial evidence of discrimination).[2]

The Third Circuit explained the applicability of a "mixed-motive" instruction in ADA cases in *Buchsbaum v. University Physicians Plan,* 55 Fed Appx. 40, 43 (3d Cir. 2002).[3] It noted that the "typical" case is considered under the *McDonnell-Douglas* burden-shifting analysis, but stated that

> the "mixed motive" analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), may be applied instead if the plaintiff has produced "direct evidence" of the employer's discriminatory animus. Under a *Price-Waterhouse* "mixed motive" analysis, where there is strong evidence of an employer's discriminatory animus, the burden of proof shifts from the plaintiff to the employer to prove that its motives for the employment action were "mixed" that is, while some motives were discriminatory, the employer had legitimate non-discriminatory motives as well which would have resulted in the adverse employment action. Thus, we have described the "direct evidence" that the employee must produce . . . to warrant a "mixed motives" analysis as "so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case to shift the burden of production. . . . The risk of non-persuasion [is] shifted to the defendant who . . . must persuade the factfinder that . . . it would have made the same employment decision regardless of its discriminatory animus." *Armbruster v. Unisys Corp*., 32 F.3d 768, 778 (3d Cir. 1994). Such direct evidence "requires 'conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.'" *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995) (quoting *Griffiths v. CIGNA Corp*., 988 F.2d 457, 470 (3d Cir. 1993)).

Statutory Definitions

The ADA employs complicated and sometimes counterintuitive statutory definitions for many of the important terms that govern a disparate treatment action. Instructions for these statutory definitions are set forth at 9.2.1-2. They are not included in the body of the "mixed-motives" instruction because not all of them will ordinarily be in dispute in a particular case, and including

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[2] *Fakete* was an ADEA case and has been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). However, *Fakete*'s discussion of the distinction between mixed-motive and pretext cases may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply. *Cf.* Comment 5.1.1 (discussing treatment of analogous question concerning statutory burden-shifting framework in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003)).

[3] The portion of *Buchsbaum* quoted in the text cites *Armbruster* and *Starceski* – two ADEA cases. To the extent that *Armbruster* and *Starceski* approved the use of *Price Waterhouse* burden-shifting for ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). But *Buchsbaum*'s discussion may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply.

all of them would unduly complicate the basic instruction.

"Same Decision" Instruction

Under Title VII, if the plaintiff proves intentional discrimination in a "mixed-motives" case, the defendant can still avoid liability for money damages by demonstrating by a preponderance of the evidence that the same decision would have been made even in the absence of the impermissible motivating factor. If the defendant establishes this defense, the plaintiff is then entitled only to declaratory and injunctive relief, attorney's fees and costs. Orders of reinstatement, as well as the substitutes of back and front pay, are prohibited if a same decision defense is proven. 42 U.S.C. §2000e-(5)(g)(2)(B). The ADA explicitly relies on the enforcement tools and remedies described in 42 U.S.C. §2000e-(5). See 42 U.S.C. § 12117(a). Therefore, a plaintiff in a "mixed-motives" case under the ADA is not entitled to damages if the defendant proves that the adverse employment action would have been made even if disability had not been a motivating factor. But Instruction 9.1.1 is premised on the assumption that the "same decision" defense is not a complete defense as it is in cases where the *Price Waterhouse* burden-shifting framework applies. *Compare, e.g.*, Instruction and Comment 6.1.1 (discussing the use of the *Price Waterhouse* burden-shifting framework in Section 1981 cases).

Direct Threat

The ADA provides a defense if the employment or accommodation of an otherwise qualified, disabled individual would pose a "direct threat" to the individual or to others. The "direct threat" affirmative defense is applicable both to disparate treatment claims and reasonable accommodation claims. *See Chevron U.S.A. Inc. v. Echazabal,* 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the "direct threat" affirmative defense.

9.1.2 Elements of an ADA Claim – Disparate Treatment — Pretext

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [disability] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA.

Second: [Plaintiff] is a "qualified individual" able to perform the essential functions of [specify the job or position sought].

Third: [Plaintiff's] disability was a determinative factor in [defendant's] decision [describe action] [plaintiff].

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights under the ADA. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the

business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] [disability] was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff 's] [disability], the [adverse employment action] would not have occurred.

Comment

This instruction is to be used when the plaintiff's proof of discrimination on the basis of a disability is circumstantial rather than direct. The Third Circuit has held that disparate treatment discrimination cases under the ADA are governed by the same standards applicable to Title VII actions. *See, e.g., Shaner v. Synthes,* 204 F.3d 494, 500 (3d Cir. 2000) ("We have indicated that the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), applies to ADA disparate treatment and retaliation claims. *See Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir. 1995)"). *See also Raytheon Co. v. Hernandez,* 540 U.S. 44, 50, n.3 (2003) (noting that all of the courts of appeals have applied the Title VII standards to disparate treatment cases under the ADA). Accordingly this instruction tracks the instruction for "pretext" cases in Title VII actions. See Instruction 5.1.2.

The proposed instruction does not charge the jury on the complex burden-shifting formula established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas* formula a plaintiff who proves a prima facie case of discriminatory treatment raises a presumption of intentional discrimination. The defendant then has the burden of production, not persuasion, to rebut the presumption of discrimination by articulating a nondiscriminatory reason for its actions. If the defendant does articulate a nondiscriminatory reason, the plaintiff must prove intentional discrimination by demonstrating that the defendant's proffered reason was a pretext, hiding the real discriminatory motive.

In *Smith v. Borough of Wilkinsburg,* 147 F.3d 272, 280 (3d Cir. 1998), the Third Circuit declared that "the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision." The court also stated, however, that "[t]his does not mean that the instruction should include the technical aspects of the *McDonnell Douglas* burden shifting, a charge reviewed as unduly confusing and irrelevant for a jury." The court concluded as follows:

Without a charge on pretext, the course of the jury's deliberations will depend on whether the

> jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

See also Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 347 n.1 (3d Cir. 1999), where the Third Circuit gave extensive guidance on the place of the *McDonnell Douglas* test in jury instructions:

> The short of it is that judges should remember that their audience is composed of jurors and not law students. Instructions that explain the subtleties of the *McDonnell Douglas* framework are generally inappropriate when jurors are being asked to determine whether intentional discrimination has occurred. To be sure, a jury instruction that contains elements of the *McDonnell Douglas* framework may sometimes be required. For example, it has been suggested that "in the rare case when the employer has not articulated a legitimate nondiscriminatory reason, the jury must decide any disputed elements of the prima facie case and is instructed to render a verdict for the plaintiff if those elements are proved." *Ryther* [*v. KARE 11*], 108 F.3d at 849 n.14 (Loken, J., for majority of en banc court). But though elements of the framework may comprise part of the instruction, judges should present them in a manner that is free of legalistic jargon. In most cases, of course, determinations concerning a prima facie case will remain the exclusive domain of the trial judge.

On proof of intentional discrimination, *see Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-1067 (3d Cir. 1996) ("[T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.") . On pretext, *see Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (pretext may be shown by "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [defendant's] proffered legitimate reasons for its action that a reasonable [person] could rationally find them 'unworthy of credence,' and hence infer 'that the [defendant] did not act for [the asserted] non-discriminatory reasons").

Business Judgment

On the "business judgment" portion of the instruction, *see Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991), where the court stated that "[b]arring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." The *Billet* court noted that "[a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision. Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid management decision." The *Billet* court cited favorably the First Circuit's decision in *Loeb v. Textron, Inc*., 600 F.2d 1003, 1012 n. 6 (1st Cir. 1979), where the court stated that "[w]hile an employer's judgment or

course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination."

Determinative Factor

The reference in the instruction to a "determinative factor" is taken from *Watson v. SEPTA,* 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is "determinative factor", while the appropriate term in mixed-motive cases is "motivating factor").

Statutory Definitions

The ADA employs complicated and sometimes counterintuitive statutory definitions for many of the important terms that govern a disparate treatment action. Instructions for these statutory definitions are set forth at 9.2.1-2. They are not included in the body of the "pretext" instruction because not all of them will ordinarily be in dispute in a particular case, and including all of them would unduly complicate the basic instruction.

Direct Threat

The ADA provides a defense if the employment or accommodation of an otherwise qualified, disabled individual would pose a "direct threat" to the individual or to others. The "direct threat" affirmative defense is applicable both to disparate treatment claims and reasonable accommodation claims. *See Chevron U.S.A. Inc. v. Echazabal,* 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the "direct threat" affirmative defense.

9.1.3 Elements of an ADA Claim — Reasonable Accommodation

Model

In this case [plaintiff] claims that [defendant] failed to provide a reasonable accommodation for [plaintiff]. The ADA provides that an employer may not deny employment opportunities to a qualified individual with a disability if that denial is based on the need of the employer to make reasonable accommodations to that individual's disability.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA.

Second: [Plaintiff] is a "qualified individual" able to perform the essential functions of [specify the job or position sought].

Third: [Defendant] was informed of the need for an accommodation of [plaintiff] due to a disability. [Note that there is no requirement that a request be made for a particular or specific accommodation; it is enough to satisfy this element that [defendant] was informed of [plaintiff's] basic need for an accommodation.]

Fourth: Providing [specify the accommodation(s) in dispute in the case] would have been reasonable, meaning that the costs of that accommodation would not have clearly exceeded its benefits.

Fifth: [Defendant] failed to provide [specify the accommodation(s) in dispute in the case] or any other reasonable accommodation.

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

[In deciding whether [plaintiff] was denied a reasonable accommodation, you must keep in mind that [defendant] is not obligated to provide a specific accommodation simply because it was requested by [plaintiff]. [Plaintiff] may not insist on a particular accommodation if another reasonable accommodation was offered. The question is whether [defendant] failed to provide any reasonable accommodation of [plaintiff's] disability.]

Under the ADA, a reasonable accommodation may include, but is not limited to, the

following:

[Set forth any of the following that are supported by the evidence:

1. Modifying or adjusting a job application process to enable a qualified applicant with a disability to be considered for the position;

2. Making existing facilities used by employees readily accessible to and usable by [plaintiff];

3. Job restructuring;

4. Part-time or modified work schedule;

5. Reassignment to a vacant position for which [plaintiff] is qualified;

6. Acquisition or modifications of examinations, training manuals or policies;

7. Provision of qualified readers or interpreters; and

8. Other similar accommodations for individuals with [plaintiff's] disability.]

Note, however, that a "reasonable accommodation" does not require [defendant] to do any of the following:

[Set forth any of the following that are raised by the evidence:

1. Change or eliminate any essential function of employment;

2. Shift any essential function of employment to other employees;

3. Create a new position for [plaintiff];

4. Promote [plaintiff];

5. Reduce productivity standards; or

6. Make an accommodation that conflicts with an established [seniority system] [other neutral employment policy], unless [plaintiff] proves by a preponderance of the evidence that "special circumstances" make an exception reasonable. For example, an exception might be reasonable (and so "special circumstances" would exist) if exceptions were often made to the policy. Another example might be where the policy already contains its own exceptions so that, under the circumstances, one more exception is not significant.]

[On the other hand, [defendant's] accommodation is not "reasonable" under the ADA if [plaintiff] was forced to change to a less favorable job and a reasonable accommodation could have been made that would have allowed [plaintiff] to perform the essential functions of the job that [he/she] already had. [Nor is an accommodation to a new position reasonable if [plaintiff] is not qualified to perform the essential functions of that position.]]

[For use where a jury question is raised about the interactive process:

The intent of the ADA is that there be an interactive process between the employer and the employee [applicant] in order to determine whether there is a reasonable accommodation that would allow the employee [applicant] to perform the essential functions of a job. Both the employer and the employee [applicant] must cooperate in this interactive process in good faith, once the employer has been informed of the employee's [applicant's] request for a reasonable accommodation.

Neither party can win this case simply because the other did not cooperate in an interactive process. But you may consider whether a party cooperated in this process in good faith in evaluating the merit of that party's claim that a reasonable accommodation did or did not exist. **]**

[For use where a previous accommodation has been provided:

The fact that [defendant] may have offered certain accommodations to an employee or employees in the past does not mean that the same accommodations must be forever extended to [plaintiff] or that those accommodations are necessarily reasonable under the ADA. Otherwise, an employer would be reluctant to offer benefits or concessions to disabled employees for fear that, by once providing the benefit or concession, the employer would forever be required to provide that accommodation. Thus, the fact that an accommodation that [plaintiff] argues for has been provided by [defendant] in the past to [plaintiff], or to another disabled employee, might be relevant but does not necessarily mean that the particular accommodation is a reasonable one in this case. Instead, you must determine its reasonableness under all the evidence in the case.**]**

[For use when there is a jury question on "undue hardship":

If you find that [plaintiff] has proved the four elements I have described to you by a preponderance of the evidence, then you must consider [defendant's] defense. [Defendant] contends that providing an accommodation would cause an undue hardship on the operation of [defendant's] business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if it would cause an "undue hardship" to its business. An "undue hardship" is something so costly or so disruptive that it would fundamentally change the way that [defendant] runs its business.

Defendant must prove to you by a preponderance of the evidence that [describe

accommodation] would be an "undue hardship." In deciding this issue, you should consider the following factors:

1. The nature and cost of the accommodation.

2. [Defendant's] overall financial resources. This might include the size of its business, the number of people it employs, and the types of facilities it runs.

3. The financial resources of the facility where the accommodation would be made. This might include the number of people who work there and the impact that the accommodation would have on its operations and costs.

4. The way that [defendant] conducts its operations. This might include its workforce structure; the location of its facility where the accommodation would be made compared to [defendant's] other facilities; and the relationship between or among those facilities.

5. The impact of (specify accommodation) on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

[*List any other factors supported by the evidence*.]

If you find that [defendant] has proved by a preponderance of the evidence that [specify accommodation] would be an undue hardship, then you must find for [defendant].**]**

Comment

The basics of an action for reasonable accommodation under the ADA were set forth by the Third Circuit in *Skerski v. Time Warner Cable Co.,* 257 F.3d 273 (3d Cir. 2001).

> [A] disabled employee may establish a prima facie case under the ADA if s/he shows that s/he can perform the essential functions of the job with reasonable accommodation and that the employer refused to make such an accommodation. According to the ADA, a "reasonable accommodation" includes:
>
> > job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9)(B).

The relevant regulations define reasonable accommodations as "modifications or adjustments

> to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii).

Skerski, 257 F.3d at 284. *See also Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010) ("[U]nder certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable.").

In *Skerski* the employee was a cable worker, and the employer's job description for that position listed climbing poles as one of the job requirements. The employee developed a fear of heights and he was transferred to a warehouse position. The employer argued that this was a reasonable accommodation for the employee's disability, because he would not have to climb in his new position. But the court noted that a transfer to a new position is not a reasonable accommodation if the employee is not qualified to perform the essential functions of that position (and there was evidence, precluding summary judgment, indicating that the plaintiff was not so qualified). It further noted that reassignment "should be considered only when accommodation within the individual's current position would pose an undue hardship." The court relied on the commentary to the pertinent EEOC guideline, which states that "an employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation." The court concluded that there was a triable question of fact as to whether the plaintiff could have been accommodated in his job as a cable worker, by the use of a bucket truck so that he would not have to climb poles. The instruction is written to comport with the standards set forth in *Skerski.*

Allocation of Burdens—Reasonable Accommodation and the Undue Hardship Defense

In *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 670 (3d Cir. 1999), the Third Circuit held that, "on the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits." If the plaintiff satisfies that burden, the defendant then has the burden to demonstrate that the proposed accommodation creates an "undue hardship" for it. 42 U.S.C. § 12112(b)(5)(A). *See Turner v. Hershey Chocolate USA,* 440 F.3d 604, 614 (3d Cir. 2006) ("undue hardship" is an affirmative defense). The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" a series of factors, 42 U.S.C. § 12111(10)(A). The instruction sets forth the list of factors found in the ADA.

The *Walton* court justified its allocation of burdens as follows:

> This distribution of burdens is both fair and efficient. The employee knows whether her disability can be accommodated in a manner that will allow her to successfully perform her job. The employer, however, holds the information necessary to determine whether the proposed accommodation will create an undue burden for it. Thus, the approach simply

places the burden on the party holding the evidence with respect to the particular issue.

The instruction follows the allocation of burdens set forth in *Walton. See also Williams v. Philadelphia Housing Auth*., 380 F.3d 751, 770 (3d Cir. 2004) (in a transfer case, the employee must show "(1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with reasonable accommodation. If the employee meets his burden, the employer must demonstrate that transferring the employee would cause unreasonable hardship.").

For a case in which the employee did not satisfy his burden of showing a reasonable accommodation, *see Gaul v. Lucent Technologies Inc*., 134 F.3d 576, 581 (3d Cir. 1998). The employee had an anxiety disorder, and argued essentially that he could be accommodated by placement with other employees who wouldn't stress him out. The court analyzed this contention in the following passage:

> [W]e conclude that Gaul has failed to satisfy his burden for three reasons. First, Gaul's proposed accommodation would impose a wholly impractical obligation on AT & T or any employer. Indeed, AT & T could never achieve more than temporary compliance because compliance would depend entirely on Gaul's stress level at any given moment. This, in turn, would depend on an infinite number of variables, few of which AT & T controls. Moreover, the term "prolonged and inordinate stress" is not only subject to constant change, it is also subject to tremendous abuse. The only certainty for AT & T would be its obligation to transfer Gaul to another department whenever he becomes "stressed out" by a coworker or supervisor. It is difficult to imagine a more amorphous "standard" to impose on an employer.
>
> Second, Gaul's proposed accommodation would also impose extraordinary administrative burdens on AT &T. In order to reduce Gaul's exposure to coworkers who cause him prolonged and inordinate stress, AT & T supervisors would have to consider, among other things, Gaul's stress level whenever assigning projects to workers or teams, changing work locations, or planning social events. Such considerations would require far too much oversight and are simply not required under law.
>
> Third, by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work. However, nothing in the ADA allows this shift in responsibility. . . .
>
> In sum, Gaul does not meet his burden . . . because his proposed accommodation was unreasonable as a matter of law. Therefore, Gaul is not a "qualified individual" under the ADA, and AT & T's alleged failure to investigate into reasonable accommodation is unimportant.

Preferences

In *US Airways, Inc., v. Barnett,* 535 U.S. 391, 397 (2002), the Court rejected the proposition that an accommodation cannot be reasonable whenever it gives *any* preference to the disabled employee. The Court concluded that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." It elaborated as follows:

> The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.,* preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.
>
> Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. See 42 U.S.C. § 12111(9)(b) (setting forth examples such as "job restructuring," "part-time or modified work schedules," "acquisition or modification of equipment or devices," "and other similar accommodations"). Yet Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption. Nor have the lower courts made any such suggestion.
>
> . . . The simple fact that an accommodation would provide a "preference" -- in the sense that it would permit the worker with a disability to violate a rule that others must obey -- cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."

Seniority Plans and Other Disability-Neutral Employer Rules

While rejecting the notion that preferences were *never* reasonable, the *Barnett* Court recognized that employers have a legitimate interest in preserving seniority programs, and found that the ADA generally does not require an employer to "bump" a more senior employee in favor of a disabled one. The Court found "nothing in the statute that suggests Congress intended to undermine seniority systems in this way. And we consequently conclude that the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to show that the suggested accommodation would not be reasonable. The Court held that if a proposed accommodation would be contrary to a seniority plan, the plaintiff would have the burden of showing "special circumstances" indicating that the accommodation was reasonable. The Court explained as follows:

> The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested "accommodation" is "reasonable" on the particular facts. . . . The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed -- to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make. But we do mean to say that the plaintiff must bear the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case. And to do so, the plaintiff must explain why, in the particular case, an exception to the employer's seniority policy can constitute a "reasonable accommodation" even though in the ordinary case it cannot.

535 U.S. at 404.

The Third Circuit, in *Shapiro v. Township of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002), held that the *Barnett* analysis was applicable any time that a suggested accommodation would conflict with any disability-neutral rule of the employer (in that case a job application requirement). The Court summarized the *Barnett* analysis as follows:

> It therefore appears that the *Barnett* Court has prescribed the following two-step approach for cases in which a requested accommodation in the form of a job reassignment is claimed to violate a disability-neutral rule of the employer. The first step requires the employee to show that the accommodation is a type that is reasonable in the run of cases. The second step varies depending on the outcome of the first step. If the accommodation is shown to be a type of accommodation that is reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case. On the other hand, if the accommodation is not shown to be a type of accommodation that is reasonable in the run of cases, the employee can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.

The Interactive Process

The ADA itself does not specifically provide that the employer has an obligation to engage in an interactive process with the employee to determine whether a reasonable accommodation can be found for the employee's disability. But the Third Circuit has established that good faith participation in an interactive process is an important factor in determining whether a reasonable accommodation exists. The court in *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 772 (3d

Cir. 2004) explained the interactive process requirement as follows:

> [W]e have repeatedly held that an employer has a duty under the ADA to engage in an "interactive process" of communication with an employee requesting an accommodation so that the employer will be able to ascertain whether there is in fact a disability and, if so, the extent thereof, and thereafter be able to assist in identifying reasonable accommodations where appropriate. "The ADA itself does not refer to the interactive process," but does require employers to "make reasonable accommodations" under some circumstances for qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002). With respect to what consists of a "reasonable accommodation," EEOC regulations indicate that,
>
> > to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

See also Jones v. UPS, 214 F.3d 402, 407 (3d Cir. 2000) ("Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.") (quoting 29 C.F.R. Pt. 1630, App. § 1630.9).

An employee can demonstrate that an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in the interactive process by showing that: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith. *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 312 (3d Cir. 1999).

The failure to engage in an interactive process is not sufficient in itself to establish a claim under the ADA, however. *See Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 193 (3d Cir. 2009) (failure to engage in interactive process with an employee who is not a "qualified individual" does not violate ADA). For one thing, a "plaintiff in a disability discrimination case who claims that the defendant engaged in discrimination by failing to make a reasonable accommodation cannot recover without showing that a reasonable accommodation was possible." *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 772 (3d Cir. 2004).

The employer's obligation to engage in an interactive process does not arise until the employer has been informed that the employee is requesting an accommodation. *See Peter v. Lincoln Technical Institute,* 255 F.Supp.2d 417, 437 (E.D.Pa. 2002):

> The employee bears the responsibility of initiating the interactive process by providing notice of her disability and requesting accommodation for it. The employee's request need not be written, nor need it include the magic words "reasonable accommodation," but the notice must nonetheless make clear that the employee wants assistance for his or her disability. Once the employer knows of the disability and the desire for the accommodation, it has the burden of requesting any additional information that it needs, and to engage in the interactive process of designing a reasonable accommodation -- the employer may not in the face of a request for accommodation, simply sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. (citations omitted).

See also Conneen v. MBNA America Bank, N.A., 334 F.3d 318, 332 (3d Cir. 2003) ("MBNA cannot be held liable for failing to read Conneen's tea leaves. Conneen had an obligation to truthfully communicate any need for an accommodation, or to have her doctor do so on her behalf if she was too embarrassed to respond to MBNA's many inquiries into any reason she may have had for continuing to be late.").

It is not necessary that the employee himself or herself notify the employer of a need for accommodation; the question is whether the employer has received fair notice of that need. *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 312 (3d Cir. 1999) (notice was sufficient where it was supplied by a member of the employee's family; the fundamental requirement is that "the employer must know of both the disability and the employee's desire for accommodations for that disability.").

Nor is the plaintiff required to request a particular accommodation; it is enough that the employer is made aware of the basic need for accommodation. *Armstrong v. BurdetteTomlin Memorial Hosp.,* 438 F.3d 240, 248 (3d Cir. 2006) (error to instruct the jury that the plaintiff had the burden of requesting a specific reasonable accommodation "when, in fact, he only had to show he requested an accommodation").

Reasonable Accommodation Requirement as Applied to "Regarded as" Disability

The ADA provides protection for an employee who is erroneously "regarded as" disabled by an employer. (See the Comment to Instruction 9.2.1 for a discussion of "regarded as" disability). Questions have arisen about the relationship between "regarded as" disability and the employer's duty to provide a reasonable accommodation to a qualified disabled employee. In *Williams v. Philadelphia Housing Auth*., 380 F.3d 751, 770 (3d Cir. 2004), the employer argued that it had no obligation to provide a reasonable accommodation to an employee it "regarded as" disabled because there was no job available that would accommodate the perceived disability—that is, the defendant regarded the employee as completely unable to do any job at all. The court described the employer's argument, and rejected it, in the following passage:

> To the extent Williams relies upon a "regarded as" theory of disability, PHA contends that a plaintiff in Williams's position must show that there were vacant, funded positions

> whose essential functions the employee was capable of performing *in the eyes of the employer who misperceived the employee's limitations*. Even if a trier of fact concludes that PHA wrongly perceived Williams's limitations to be so severe as to prevent him from performing any law enforcement job, the "regarded as" claim must, in PHA's view, fail because Williams has been unable to demonstrate the existence of a vacant, funded position at PHA whose functions he was capable of performing in light of its misperception. . . . PHA's argument, if accepted, would make "regarded as" protection meaningless. An employer could simply regard an employee as incapable of performing any work, and an employee's "regarded as" failure to accommodate claim would always fail, under PHA's theory, because the employee would never be able to demonstrate the existence of any vacant, funded positions he or she was capable of performing in the eyes of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not demonstrate during litigation the availability of a position he or she was capable of performing in the eyes of the misperceiving employer. . . .
>
> To meet his litigation burden with respect to both his "actual" and "regarded as" disability claims, Williams need only show (1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with reasonable accommodation. If the employee meets his burden, the employer must demonstrate that transferring the employee would cause unreasonable hardship.

The employer in *Williams* made an alternative argument: that if an employee is "regarded as" but not actually disabled, the employer should have no duty to provide a reasonable accommodation because there is nothing to accommodate. In *Williams*, the plaintiff was a police officer and the employer regarded him as being unable to be around firearms because of a mental impairment. The court analyzed the defendant's argument that it had no duty to provide an accommodation to an employee "regarded as" disabled, and rejected it, in the following passage:

> PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a "windfall" accommodation compared to a similarly situated employee who had not been "regarded as" disabled and would not be entitled under the ADA to any accommodation. The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns - perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from . . . . Accordingly,

Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation

Thus, an employee "regarded as" having a disability is entitled to the same accommodation that he would receive were he actually disabled. *See also Kelly v. Metallics West, Inc.*, 410 F.3d 670, 676 (10th Cir. 2005) ("An employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.").

Direct Threat

The ADA provides a defense if the employment or accommodation of an otherwise qualified, disabled individual would pose a "direct threat" to the individual or to others. The "direct threat" affirmative defense is applicable both to disparate treatment claims and reasonable accommodation claims. *See Chevron U.S.A. Inc. v. Echazabal,* 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the "direct threat" affirmative defense.

Statutory Definitions

The ADA employs complicated and sometimes counterintuitive statutory definitions for many of the important terms that govern a disparate treatment action. Instructions for these statutory definitions are set forth at 9.2.1-2. They are not included in the body of the reasonable accommodations instruction because not all of them will ordinarily be in dispute in a particular case, and including all of them would unduly complicate the basic instruction.

9.1.4 Elements of an ADA Claim — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [disability/request for accommodation].

[Employer] is liable for the actions of [names] in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA;

Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA;

Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Fourth: [names] conduct was not welcomed by [plaintiff].

Fifth: [names] conduct was motivated by the fact that [plaintiff] has a "disability," as defined by the ADA [or sought an accommodation for that disability].

Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of the reaction of a reasonable person with [plaintiff's] disability to [plaintiff's] work environment.

Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Eighth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Ninth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of harassment on grounds of disability [or request for accommodation] in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable

employer would have had to be aware of it.**]**

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

Comment

In *Walton v. Mental Health Assoc. of Southeastern Pennsylvania,* 168 F.3d 661, 666 (3d Cir. 1999), the court considered whether a cause of action for harassment/hostile work environment was cognizable under the ADA. The court's analysis is as follows:

> The Supreme Court has held that language in Title VII that is almost identical to the . . . language in the ADA creates a cause of action for a hostile work environment. See *Patterson v. McLean Credit Union,* 491 U.S. 164, 180 (1989). In addition, we have recognized that:
>
> > in the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose--to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under one statute should inform the standards under the others as well. Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when there is no material difference in the question being addressed.
>
> *Newman v. GHS Osteopathic, Inc*., 60 F.3d 153, 157 (3d Cir. 1995). This framework indicates that a cause of action for harassment exists under the ADA. However, like other courts, we will assume this cause of action without confirming it because Walton did not show that she can state a claim.

The *Walton* court also noted that many courts "have proceeded on the assumption that the ADA creates a cause of action for a hostile work environment but avoided confirming that the claim exists." *See, e.g.*, *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 687-88 (8th Cir. 1998) ("We will assume, without deciding, that such a cause of action exists."); *McConathy v. Dr. Pepper/Seven Up Corp*., 131 F.3d 558, 563 (5th Cir. 1998) (noting that various district courts have assumed the claim's existence and assuming its existence in order to dispense with appeal). District courts in the Third Circuit have also assumed, without deciding, that a claim for harassment exists under the ADA. *See, e.g., Vendetta v. Bell Atlantic Corp.*, 1998 WL 575111 (E.D. Pa. Sep. 8, 1998) (noting that because the Supreme Court has read a cause of action for harassment into Title VII, the same is appropriate under the ADA). There appears to be no reported case holding that a harassment

claim cannot be asserted under the ADA.

Accordingly, instructions are included herein to cover harassment claims under the ADA; these instructions conform to the instructions for harassment claims in Title VII and ADEA actions. *See Walton,* 168 F.3d at 667 ("A claim for harassment based on disability, like one under Title VII, would require a showing that: 1) Walton is a qualified individual with a disability under the ADA; 2) she was subject to unwelcome harassment; 3) the harassment was based on her disability or a request for an accommodation; 4) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and 5) that [the employer] knew or should have known of the harassment and failed to take prompt effective remedial action.").

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 9.2.3.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[4] Instruction 9.2.4 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases. In *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue."

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

Respondeat superior liability for harassment by non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990). *See also Kunin v.*

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[4] As Comment 9.1.5 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding "that an employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment." Assuming that the same approach applies in ADA cases, Instruction 9.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 9.1.5 should be used instead.

Sears Roebuck and Co., 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

For a discussion of the definition of "management level personnel" in a Title VII case, see Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir. 2009)).

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

For further commentary on hostile work environment claims, see Comment 5.1.4.

9.1.5 Elements of an ADA Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [disability/request for accommodation].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA;

Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA;

Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Fourth: [names] conduct was not welcomed by [plaintiff].

Fifth: [names] conduct was motivated by the fact that [plaintiff] has a "disability," as defined by the ADA [or sought an accommodation for that disability].

Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of the reaction of a reasonable person with [plaintiff's] disability to [plaintiff's] work environment.

Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

[For use when the alleged harassment is by non-supervisory employees:

Eighth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of harassment on grounds of disability [or request for accommodation] in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

If any of the above elements has not been proved by a preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim. If you find that the elements have been proved, then you must consider [defendant's] affirmative defense. I will instruct you now on the elements of that affirmative defense.

You must find for [defendant] if you find that [defendant] has proved both of the following elements by a preponderance of the evidence:

First: That [defendant] exercised reasonable care to prevent harassment in the workplace on the basis of a disability [or request for accommodation], and also exercised reasonable care to promptly correct any harassing behavior that does occur.

Second: That [plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [defendant].

Proof of the following facts will be enough to establish the first element that I just referred to, concerning prevention and correction of harassment:

1. [Defendant] had established an explicit policy against harassment in the workplace on the basis of disability [or request for accommodation].

2. That policy was fully communicated to its employees.

3. That policy provided a reasonable way for [plaintiff] to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed to take advantage of a corrective opportunity.

Comment

As discussed in the Comment to Instruction 9.1.4, the Third Circuit has assumed that the ADA provides a cause of action for harassment/hostile work environment, and that such a cause of action (assuming it exists) is to be governed by the same standards applicable to a hostile work environment claim under Title VII. *Walton v. Mental Health Assoc. of Southeastern Pennsylvania,* 168 F.3d 661, 666 (3d Cir. 1999).

This instruction is substantively identical to Instruction 5.1.5, covering hostile work environment claims with no tangible employment action under Title VII. Like Title VII — and unlike Section 1981 — the ADA regulates employers only, and not individual employees. Therefore, the instruction is written in terms of employer liability for the acts of its employees.

This instruction is to be used in discriminatory harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion or constructive discharge, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth,* 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990). *See also Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

For a discussion of the definition of "management level personnel" in a Title VII case, see Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir. 2009)).

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

In *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue."

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 9.2.3.

For further commentary on hostile work environment claims, see Instructions 5.1.4 and 5.1.5.

9.1.6 Elements of an ADA Claim — Disparate Impact

No Instruction

Comment

Disparate impact claims are cognizable under the ADA. *Raytheon Co. v. Hernandez,* 540 U.S. 44, 50 (2003) ("Both disparate-treatment and disparate-impact claims are cognizable under the ADA."). See 42 U.S.C. § 12112(b) (defining "discriminate" to include "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability"). No instruction is provided on disparate impact claims, however, because a right to jury trial is not provided under the ADA for such claims. 42 U.S.C.A. § 1981a(a)(1) provides that in an action brought under 42 U.S.C. § 2000e-5 (Title VII), a plaintiff may recover compensatory and punitive damages, *but not* if the allegation is that an employment practice is unlawful "because of its disparate impact." Thus under Title VII, disparate impact claimants cannot recover damages, and therefore there is no right to jury trial for such claims. *See Pollard v. Wawa Food Market*, 366 F.Supp.2d 247 (E.D.Pa. 2005) (striking a demand for a jury trial on a disparate impact claim brought under Title VII). The same result is mandated for ADA disparate impact claims, because the enforcement provision of the ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment."

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims are cognizable under the Age Discrimination in Employment Act. The ADEA provides a right to jury trial in such claims. See 29 U.S.C. § 626(c)(2) ("[A] person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action.") If an ADEA disparate impact claim is tried together with an ADA disparate impact claim, the parties or the court may decide to refer the ADA claim to the jury. In that case, the instruction provided for ADEA disparate impact claims (see Instruction 8.1.5) can be modified to apply to the ADA claim. Care must be taken, however, to instruct separately on the ADA disparate impact claim, as the substantive standards of recovery under the ADA in disparate impact cases may be different from those applicable to the ADEA. See the Comment to Instruction 8.1.5 for a more complete discussion.

9.1.7 Elements of an ADA Claim — Retaliation[5]

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [a third party's] [describe protected activity].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [a third party] [describe activity protected by the ADA].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [describe conduct], but only that [plaintiff] [a third party] was acting under a good faith belief that [plaintiff's] [or someone else's] right to be [free from discrimination on the basis of a disability] [free to request an accommodation for a disability] was violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

[Plaintiff] can recover for retaliation even if [plaintiff] [a third party] did not have a "disability" within the meaning of the ADA. The question is not whether there was a "disability" but whether [defendant] retaliated for the [describe protected activity of plaintiff/third party].

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[5] Some courts have held that there is no right to jury trial for an ADA retaliation claim. See the Comment to this instruction.

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

Comment

The Right to Jury Trial for ADA Retaliation Claims

At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation under the ADA is limited to equitable relief, and accordingly there is no right to jury trial on an ADA retaliation claim. The court in *Sabbrese v. Lowe's Home Centers, Inc*., 320 F.Supp.2d 311, 331 (W.D.Pa. 2004), considered a defendant's claim that the plaintiff did not have a right to a jury trial on his ADA retaliation claim. The plaintiff argued that because compensatory and punitive damages are available for retaliation actions under Title VII, they likewise are available for an ADA retaliation claim.

The *Sabbrese* court agreed with the defendant, finding persuasive the Seventh Circuit's analysis in *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The *Sabbrese* court's analysis on the jury trial question is as follows:

> The enforcement provision of the ADA is codified at 42 U.S.C. § 12117. That section provides that the available remedies under the ADA are the same as provided in the 1964 Civil Rights Act, 42 U.S.C. § 2000e-4 though e-9. Section 2000e-5(g)(1) of the Civil Rights Act limits the remedies available under that act to equitable relief, including back pay, but does not provide for compensatory or punitive damages. *Kramer,* 355 F.3d at 964. The 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), expanded the remedies available in section 2000e-5(g)(1) to provide for compensatory and punitive damages in certain circumstances. With respect to the ADA, section 1981a(a)(2) provided that a complaining party could recover compensatory and punitive damages for violations of section 102 or section 102(b)(5) of the ADA, codified at 42 U.S.C. § § 12112 and 12112(b)(5). Sections 12112 and 12112(b)(5) deal with an employer's failure to make reasonable accommodations to a qualified employee with a disability [and also to disparate treatment claims], while section 12203 - not listed in section 1981a(a)(2) - establishes retaliation claims under the ADA.
>
> After reviewing the applicable statutes, the United States Court of Appeals for the Seventh Circuit concluded that the plaintiff was precluded from recovering compensatory and punitive damages under her ADA retaliation claim. The court determined that section 1981a(a)(2) permitted recovery of compensatory and punitive damages only for the claims listed in that statute, such as section 12112 of the ADA, and since the section establishing retaliation claims under the ADA (42 U.S.C. § 12203) was not listed, compensatory and punitive damages were unavailable. This court adopts the persuasive rationale of *Kramer* and accordingly holds that compensatory and punitive damages are not available.

After finding that only equitable relief was available for a claim of retaliation under the ADA, the *Sabbrese* court referred to Third Circuit authority to determine that the plaintiff had no right to jury trial on the claim:

> The United States Court of Appeals for the Third Circuit offered guidance with respect to whether the right to a trial by jury exists in *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988). There, the court stated that "in determining a party's right to a jury trial it is the procedural and remedial sections of the statute creating the right which must be examined." Id. at 392. The court concluded that "where the particular remedial section in the statute provides for only equitable remedies then no right to a jury trial exists." Id. The court further cautioned that "within a particular statute a right to a jury might exist as to some of the enforcement sections and not as to others," and that courts must be careful to examine the applicable subsections at issue to determine which remedies are available. Id. *Cox*, thus, requires the court to examine the statutory provisions of the ADA concerning retaliation claims in order to determine the nature of relief that may be awarded. If the court determines that the remedy is "explicitly equitable, then there is no seventh amendment right to a jury." Id. (citing *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974).
>
> As noted above, since compensatory and punitive damages are not available, the sole remedy for plaintiff's retaliation claims pursuant to the ADA is equitable relief. Under the mandate of *Cox,* because plaintiff's sole remedy under his ADA retaliation claim is equitable, plaintiff is not entitled to a jury trial on that claim. Accordingly, defendant's motion to strike [the demand for jury trial] is granted.

The *Sabbrese* court noted that "[n]either the court nor any of the parties were able to locate any decisions in which the United States Court of Appeals for the Third Circuit implicitly upheld an award of compensatory or punitive damages for ADA retaliation claims." It should be noted that courts in other circuits have found that damages (and a right to jury trial) are available in retaliation actions under the ADA. *See, e.g., Foster v. Time Warner Entertainment Co.,* 250 F.3d 1189 (8th Cir. 2001); *Lovejoy-Wilson v. Noco Motor Fuels, Inc.,* 242 F.Supp.2d 236 (W.D.N.Y. 2003) (citing cases).

A pattern instruction for retaliation actions under the ADA is included here for two reasons. First, the Third Circuit has not yet considered whether there is a right to jury trial in ADA retaliation actions, and other courts are in disagreement on the question. Second, even if it is determined that there is no right to jury trial for ADA retaliation claims, the parties or the court may wish to have a jury render an advisory verdict on a plaintiff's ADA retaliation claim. See Fed. R.Civ.P. 39(c). Alternatively, the parties may wish to stipulate to a jury's resolution of a retaliation claim. Use of an advisory or a stipulated jury may especially be useful in cases where a retaliation claim is joined with an ADA disparate treatment or accommodation claim, as there is a right to jury trial for those claims and many of the issues to be decided by the jury for those claims might overlap with the retaliation claim.

The Basics of a Retaliation Claim under the ADA

The ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a). "Thus, it is unlawful for an employer to retaliate against an employee based upon the employee's opposition to anything that is unlawful under the ADA." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003).

Unlike a claim for discrimination, accommodation or harassment, an ADA retaliation claim does not require that a plaintiff show that he or she is "disabled" within the meaning of the ADA. *Shellenberger*, *v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) ("we note that Shellenberger's failure to establish that she was disabled does not prevent her from recovering if she can establish that her employer terminated her because she engaged in activity protected under the ADA."). This is because the text of the ADA retaliation provision protects "any individual" who has opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA. This differs from the scope of the ADA disability discrimination provision, 42 U.S.C. § 12112(a), which may be invoked only by a "qualified individual with a disability."

Protected Activity

Activity protected from retaliation under the ADA includes not only bringing or participating in formal actions to enforce ADA rights, but also informal activity such as requesting an accommodation for a disability. *Shellenberger*, *v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003). The plaintiff must have had a good faith belief in the merits of an accommodation request in order for the activity to be protected against retaliation. *Id.* ("the protection from retaliation afforded under the ADA does not extend to an employee whose request is motivated by something other than a good faith belief that he/she needs an accommodation"). *See also Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 189 (3d Cir. 2010) ("Sulima could not have had a good faith belief that these side effects were anything but temporary, and therefore he could not have had a good faith belief that he was disabled within the meaning of the ADA.").

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2415 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility

code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders,* 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.

Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

126 S.Ct. at 2415 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively identical to the ADA provision on retaliation, supra. This instruction therefore follows the guidelines

of the Supreme Court's decision in *White*.

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2413 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any* discrimination by an employer in response to protected activity.

Because the ADEA anti-retaliation provision is substantively identical to the Title VII provision construed in *White* — it broadly prohibits discrimination without reference to employment-related decisions — this instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. For further discussion of *White*, see the Comment to Instruction 5.1.7.

Time Period Between Protected Activity and the Allegedly Retaliatory Action

On the relevance of the length of time between protected activity and an alleged retaliatory act, *see Williams v. Philadelphia Housing Auth. Police Dept.,* 380 F.3d 751, 757 (3d Cir. 2004), a case involving termination:

> We have held in the ADA retaliation context that "temporal proximity between the protected activity and the termination [can be itself] sufficient to establish a causal link." *Shellenberger*, *v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) (quoting *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir.1997)). However, "the timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred." *Shellenberger*, 318 F.3d at 189 n.9. For example, two days between the protected activity engaged in and the alleged retaliation sufficed in *Jalil v. Avdel Corp*., 873 F.2d 701, 708 (3d Cir.1989), to support an inference of a causal connection between the two. Similarly, in *Shellenberger*, comments made by a supervisor suggesting retaliation ten days before termination, along with other evidence of retaliation, were sufficient to establish a prima facie showing of causation.
>
> Here, over two months elapsed between the time Williams requested a radio room assignment and the time that he was terminated. In cases like this one, "where 'the temporal proximity is not so close as to be unduly suggestive,' we have recognized that 'timing plus other evidence may be an appropriate test. . . .'" *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 513 (3d Cir.

2003)). Williams has, however, put forth no other evidence suggesting that PHA terminated him because he requested a radio room assignment. Moreover, the evidence supporting PHA's alternative explanation is quite compelling. As Williams acknowledges, PHA had granted Williams medical leave on two prior occasions, and there was no indication that PHA would not have done so again had Williams simply [followed company procedures].

Protection Against Retaliation For the Protected Activity of Another Person Under the ADA

In *Fogleman v. Mercy Hospital, Inc.,* 283 F.3d 561, 562 (3d Cir. 2002), the plaintiff was employed in the same facility as his father. His father engaged in protected activity under the ADA, and the plaintiff alleged that the employer retaliated against the plaintiff. The court held that unlike Title VII and the ADEA, the ADA contains a specific provision that prohibits retaliation against third parties, i.e., employees who do not themselves engage in protected activity. 42 U.S.C. § 12203(b) provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

The court read this provision to prohibit retaliation against third parties. The instruction accords with the holding in *Fogleman*.

Perceived Protected Activity

The court in *Fogleman* also held that the ADA protected an employee against retaliation for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. If the fairly unusual case arises in which the employer is alleged to have retaliated for perceived rather than actual protected activity, then the instruction can be modified consistently with the court's directive in *Fogleman.*

"Determinative Effect" Instruction

Instruction 9.1.7 requires the plaintiff to show that the plaintiff's protected activity had a "determinative effect" on the allegedly retaliatory activity. A distinction between pretext and mixed-motive cases has on occasion been recognized as relevant for both Title VII retaliation claims and ADA retaliation claims: "[W]e analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII.... This framework will vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed motives' suit." *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. *See Woodson*, 109 F.3d at 935 (holding

that it was error, in a case that proceeded on a "pretext" theory, not to use the "determinative effect" language). The same is true for ADA retaliation claims. *See Krouse*, 126 F.3d at 501. Writing in an ADA retaliation case that proceeded on a pretext theory, and citing *Woodson* and *Krouse*, the court of appeals stated in *Shaner v. Synthes*, 204 F.3d 494, 501 (3d Cir. 2000), that "[w]e recently have made clear that a plaintiff's ultimate burden in a retaliation case is to convince the factfinder that retaliatory intent had a 'determinative effect' on the employer's decision." *Shaner* does not appear, however, to foreclose the use of a mixed-motive framework in an appropriate case, because the court of appeals has more recently held that an ADA retaliation plaintiff had sufficient evidence to justify the use of such a framework: "The evidentiary framework of Shellenberger's claim will vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed-motives' suit. Shellenberger argues that her evidence was sufficient to survive judgment as a matter of law under either theory, and we agree." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003) (footnote omitted).

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. The Committee has not attempted to determine what, if any, implications *Gross* has for ADA retaliation claims, but users of these instructions may wish to consider that question.

9.2.1 ADA Definitions — Disability

Model

Under the ADA, the term "disability" means a [physical/mental] impairment that "substantially limits" a "major life activity." I will now define some of these terms in more detail. Again, I remind you to consider the specific definitions I give you, and not to use your own opinions as to what these terms mean.

["Physical/Mental Impairment"

The term "physical impairment" means any condition that prevents the body from functioning normally. The term "mental impairment" means any condition that prevents the mind from functioning normally.]

[Major Life Activities

Under the ADA, the term "disability" includes a [physical/mental] impairment that substantially limits a major life activity. Major life activities are activities that are of central importance to everyday life. Major life activities include the operation of major bodily functions. I instruct you that [describe activity] is a major life activity within the meaning of the ADA.]

["Substantially Limiting"

Under the ADA, an impairment "substantially limits" a person's ability to [describe relevant major life activity] if it prevents or restricts him from [relevant activity] compared to the average person in the general population.

To decide if [plaintiff's] [alleged] impairment substantially limits [plaintiff's] ability to [relevant activity], you should consider the nature of the impairment and how severe it is, how long it is expected to last, and its expected long-term impact.

[If you find that [plaintiff's] impairment is a substantial limitation, it does not matter that it can be corrected by the use of such devices as a hearing aid, medication, or prosthetics. [You may, however, consider whether [plaintiff's] eyesight could be corrected by the use of ordinary eyeglasses or contact lenses.]].

Only impairments with a permanent or long-term impact are disabilities under the ADA. Temporary injuries and short-term impairments are not disabilities. [Even so, some disabilities are permanent, but only appear from time to time. For example, if a person has a mental or physical disease that usually is not a problem, but flares up from time to time, that can be a disability if it

would substantially limit a major life activity when active.]

[If you find that [plaintiff's] impairment substantially limits one major life activity, you must find that it is a disability even if it does not limit any other major life activity.]

The name of the impairment or condition is not determinative. What matters is the specific effect of an impairment or condition on the life of [plaintiff].]

[For use when there is a jury question on whether plaintiff is "regarded as" disabled:

The ADA's definition of "disability" includes not only those persons who are actually disabled, but also those who are "regarded as" having a disability by their employer. The reason for this inclusion is to protect employees from being stereotyped by employers as unable to perform certain activities when in fact they are able to do so. [Plaintiff] is "regarded as" disabled within the meaning of the ADA if [he/she] proves any of the following by a preponderance of the evidence: [*Instruct on any alternative supported by the evidence*]

1. [Plaintiff] had a physical or mental impairment that did not substantially limit [his/her] ability to perform [describe activity], but was treated by [defendant] as having an impairment that did so limit [his/her] ability to perform the activity; or

2. [Plaintiff] had an impairment that was substantially limiting in [his/her] ability to perform [describe activity] only because of the attitudes of others toward the impairment; or

3. [Plaintiff] did not have any impairment, but [defendant] treated [him/her] as having an impairment that substantially limited [plaintiff's] ability to perform [describe activity].

Also, [Plaintiff] can meet the requirement of being "regarded as" disabled if [he/she] was discriminated against because of an actual or perceived impairment, even if the impairment was not, or was not perceived to, limit a major life activity."

[However, [plaintiff] cannot be "regarded as" disabled if [his/her] impairment is temporary and minor. Under the ADA, a temporary impairment is one with an actual or expected duration of six months or less.]**]**

[For use when there is a jury question on whether plaintiff has a record of disability:

The ADA definition of "disability" includes not only those persons who persons who are actually disabled, but also those who have a "a record of disability." [Plaintiff] has a "record of

disablity" if [he/she] proves by a preponderance of the evidence that [he/she] has a record of a "physical or mental impairment" that "substantially limited" [his/her] ability to perform a [describe activity], as I have defined those terms for you. [This means that if [plaintiff] had a disability within the meaning of the ADA [but has now recovered] [but that disability is in remission], [he/she] still fits within the statutory definition because [he/she] has a record of disability.**]**

Concluding Instruction:

Please keep in mind that the definition of "disability" is to be construed in favor of broad coverage of individuals. The primary question for you to decide is whether [defendant] has complied with its obligations under the ADA.

Comment

The ADA definition of "disability" is complex for a number of reasons: 1) there are three separate types of disability: "actual", "regarded as", and "record of" disability; 2) the basic definition of "disability" encompasses three separate subdefinitions, for "impairment", "substantially limited" and "major life activity"; 3) perhaps most important, the technical definition of "disability" is likely to be different from the term as it is used in the vernacular by most jurors. In most cases, however, the instruction can be streamlined because not every aspect of the definition will be disputed in the case. For example, ordinarily there will be no jury question on whether what the plaintiff suffers from is an impairment.

ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (P.L. 110-325, 122 Stat. 3555) (the "Act") made a number of changes to the ADA definition of disability, and statutorily overruled some Supreme Court cases that Congress determined had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." The basic thrust of the Act is to make it easier for plaintiffs to prove that they are "disabled" within the meaning of the ADA. For example, section 2(b)(5) of the Act provides that "it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Along the same lines, section 4(a) of the Act provides that the definition of "disability" under the ADA "shall be construed in favor of broad coverage of individuals." The concluding text of the Instruction implements these general provisions of the Act. In addition, the Act makes specific changes to the statutory definition of "disability" that are discussed below in this Comment.

"Impairment"

In *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), the Court determined that an employee with HIV had a physical "impairment" within the meaning of the ADA. The Court noted that the pertinent regulations interpreting the term "impairment" provide as follows:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 CFR § 84.3(j)(2)(i) (1997).

The *Bragdon* Court noted that in issuing these regulations, "HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive." The Court relied on the commentary accompanying the regulations, which "contains a representative list of disorders and conditions constituting physical impairments, including such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." After reviewing these sources, the Court concluded that HIV did constitute an impairment within the meaning of the ADA.

"[S]ide effects from medical treatment may themselves constitute an impairment under the ADA." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 187 (3d Cir. 2010). But in order for such side effects to constitute an impairment, "it is not enough to show just that the potentially disabling medication or course of treatment was prescribed or recommended by a licensed medical professional. Instead ... the medication or course of treatment must be required in the 'prudent judgment of the medical profession,' and there must not be an available alternative that is equally efficacious that lacks similarly disabling side effects." *Id.* (quoting *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1052 (7th Cir. 1997)).

"Substantially Limits"

The Supreme Court has held that for impairment to "substantially limit" a major life activity, it must "significantly restrict" the plaintiff as compared to the general population. The Court in *Toyota Motor Mfg v. Williams,* 534 U.S. 184, 198 (2002), held that to fall within the definition of "substantially limited" the plaintiff "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." But the ADA Amendments Act of 2008 specifically overrules *Toyota* and cases following it. Section (2)(b)(4) and (5) describe the purposes of the Act as follows:

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

Furthermore, section 4(a)(4) of the Act provides that the term "substantially limits" "shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."

Accordingly, the text of the Instruction does not include any restrictions on the term "substantially limits" such as "severe" or "significant"; and the conclusion to the Instruction provides, consistently with Congressional intent, that the statutory definition of "disability" (including the term "substantially limits") is to be construed broadly.[6]

Use of Corrective Devices

In *Sutton v. United Air Lines,* 527 U.S. 471, 482 (1999), the Court held that the existence of a "disability" under the ADA must be determined in light of corrective measures used by the employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court declared that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures– both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." But the ADA Amendments Act of 2008 specifically repudiates the result in *Sutton*.[7]

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[6] In a case involving events that occurred prior to the enactment of the ADA Amendments Act of 2008, the Court of Appeals held that inability to drive at night is relevant to the question whether monocular vision substantially limits the major life activity of seeing. *See Colwell v. Rite Aid Corp.*, 602 F.3d 495, 502 (3d Cir. 2010).

[7] "The resulting statutory section only prohibits the consideration of *ameliorative* mitigatory measures, and does not address potentially negative side effects of medical treatment." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010).

Section (4)(a)(E) of the Act provides that the determination of whether an impairment substantially limits a major life activity "shall be made without regard to the ameliorative effects of mitigating measures such as –

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.

The Act does provide, however, that the "ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity." The text of the Instruction contains a bracketed alternative on corrective devices that comports with the Act.

"Major Life Activity"

The question of whether the plaintiff is substantially limited in performing a "major life activity" is a question for the jury. *Williams v. Philadelphia Housing Auth. Police Dept*., 380 F.3d 751, 7633d Cir. 2004) ("The question of whether an individual is substantially limited in a major life activity is a question of fact."). But whether a certain activity rises to the level of a "major life activity" is usually treated as a legal question. For example, in *Bragdon v. Abbott,* 524 U.S. 624, 637 (1998), the Court held as a matter of law that reproduction is a major life activity within the meaning of the ADA. Similarly the Third Circuit has held that a number of activities constitute major life activities. *See, e.g., Gagliardo v. Connaught Laboratories, Inc.,* 311 F.3d 565, 573 (3d Cir. 2002) (concentrating and remembering are major life activities); *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 305 (3d Cir. 1999) (holding that thinking is a major life activity, as it is "inescapably central to anyone's life"). Accordingly, the instruction does not leave to the jury the determination of whether the plaintiff's claimed impairment is one that affects a major life activity. Rather, the jury must decide whether the plaintiff is substantially limited in performing the major life activity found to be at issue by the court.

An activity need not be related to employment to constitute a "major life activity." Thus in *Bragdon v. Abbott,* 524 U.S. 624, 637 (1998), the Court held that reproduction was a "major life activity" within the meaning of the ADA (and the Rehabilitation Act). The employer argued that Congress intended the ADA only to cover those aspects of a person's life that have a public,

economic, or daily character. But the Court declared that nothing in the ADA's statutory definition "suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major.'"

The ADA Amendments Act of 2008 sets forth a number of activities, and bodily functions, that constitute "major life activities" within the meaning of the ADA. Section 4(a) of the Act provides the following definition of "major life activities":

> (A) In general. * * * major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions. * * * 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.

Work as a Major Life Activity

The Supreme Court has expressed unease with the concept of working as a major life activity under the ADA. In *Sutton v. United Air Lines,* 527 U.S. 471, 492 (1999), the Court noted that "there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of an impairment, from working with others then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." The *Sutton* Court assumed without deciding that working was a major life activity. It declared, however, that if the major life activity at issue is working, then the plaintiff would have to show an inability to work in a "broad range of jobs," rather than a specific job.

The ADA Amendments Act of 2008 specifically lists "working" as a major life activity, and imposes no special showing on "working" as distinct from other life activities. Nothing in the Act requires the plaintiff to proof an inability to perform a broad range of jobs, as had been required by *Sutton*. Moreover, one of the major purposes of the Act is to reject the "holdings" of *Sutton* on the ground that the case "narrowed the broad scope of protection intended to be afforded by the ADA." Accordingly, the Instruction contains no special provision or limitation on proof of working as a major life activity.

"Regarded as" Disabled

The rationale behind "regarded as" disability was described by the Third Circuit in *Deane v. Pocono Medical Center,* 142 F.3d 138, 143 n.5 (3d Cir. 1998) (en banc):

> With the "regarded as" prong, Congress chose to extend the protections of the ADA to individuals who have no actual disability. The primary motivation for the inclusion of misperceptions of disabilities in the statutory definition was that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.

The *Deane* court emphasized that the plaintiff does not need to show that the employer acted with bad intent in regarding the plaintiff as disabled:

> Although the legislative history indicates that Congress was concerned about eliminating society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC's Regulations and Interpretive Guidance make clear that even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (describing, as one example of a "regarded as" disabled employee, an individual with controlled high blood pressure that is not substantially limiting, who nonetheless is reassigned to less strenuous work because of the employer's unsubstantiated fear that the employee will suffer a heart attack). Thus, whether or not PMC was motivated by myth, fear or prejudice is not determinative of Deane's "regarded as" claim.

142 F.3d at 144. Nor is "regarded as" disability dependent on plaintiff having any impairment. The question is not the plaintiff's actual condition, but whatever condition was perceived by the employer. *See Kelly v. Drexel University,* 94 F.3d 102, 108 (3d Cir. 1996) ("Our analysis of this ["regarded as"] claim focuses not on Kelly and his actual abilities but on the reactions and perceptions of the persons interacting or working with him.").

In section 4 of the ADA Amendments Act of 2008, Congress clarified two points about "regarded as" disability:

> 1. A plaintiff meets the requirement of being "regarded as" disabled if she establishes that she has been discriminated against "because of an actual or perceived impairment *whether or not the impairment limits or is perceived to limit a major life activity.*" (emphasis added).

> 2. A plaintiff cannot be "regarded as" disabled if the actual or perceived impairment is "transitory and minor." A "transitory" impairment is defined as one "with an actual or expected duration of 6 months or less."

The text of the Instruction is intended to incorporate these statutory clarifications.

The mere fact that the employer offered an accommodation does not mean that the employee was "regarded as" disabled. *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 773 n.20 (3d Cir. 2004):

> Williams argues, inter alia, that PHA "admitted" he was disabled within the meaning of the ADA by offering him the opportunity to take an unpaid leave of absence, thereby "accommodating" him. We agree with the Sixth and Ninth Circuits, however, that an offer of accommodation does not, by itself, establish that an employer "regarded" an employee as disabled. See *Thornton v. McClatchy Newspapers, Inc*., 261 F.3d 789, 798 (9th Cir. 2001) ("When an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled. A contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation."), clarified in other respects, 292 F.3d 1045 (9th Cir. 2002); *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this ["regarded as"] provision, according to the EEOC, is to reach those cases in which 'myths, fears and stereotypes' affect the employer's treatment of an individual. [An employee] cannot show that this provision applies to him merely by pointing to that portion of the record in which his [employer] admitted that he was aware of [the employee's] medical restrictions and modified [the employee's] responsibilities based on them.").

Reasonable Accommodation Requirement as Applied to "Regarded as" Disability

In *Williams v. Philadelphia Housing Auth*., 380 F.3d 751, 770 (3d Cir. 2004), the employer argued that it had no obligation to provide a reasonable accommodation to an employee it "regarded as" disabled because there was no job available that would accommodate the perceived disability—that is, the defendant regarded the employee as completely unable to do any job at all. The court described the employer's argument, and rejected it, in the following passage:

> To the extent Williams relies upon a "regarded as" theory of disability, PHA contends that a plaintiff in Williams's position must show that there were vacant, funded positions whose essential functions the employee was capable of performing *in the eyes of the employer who misperceived the employee's limitations*. Even if a trier of fact concludes that PHA wrongly perceived Williams's limitations to be so severe as to prevent him from performing any law enforcement job, the "regarded as" claim must, in PHA's view, fail because Williams has been unable to demonstrate the existence of a vacant, funded position at PHA whose functions he was capable of performing in light of its misperception. . . . PHA's argument, if accepted, would make "regarded as" protection meaningless. An employer could simply regard an employee as incapable of performing any work, and an employee's "regarded as" failure to accommodate claim would always fail, under PHA's theory, because the employee would never be able to demonstrate the existence of any vacant, funded positions he or she was capable of performing in the eyes of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not demonstrate during litigation the availability of a position he or she was capable of performing in the eyes of the misperceiving employer. . . .

The employer in *Williams* made an alternative argument: that if an employee is "regarded as" but not actually disabled, the employer should have no duty to provide a reasonable accommodation because there is nothing to accommodate. In *Williams*, the plaintiff was a police officer and the employer regarded him as being unable to be around firearms because of a mental impairment. The court analyzed the defendant's argument that it had no duty to provide an accommodation to an employee "regarded as" disabled, and rejected it, in the following passage:

> PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a "windfall" accommodation compared to a similarly situated employee who had not been "regarded as" disabled and would not be entitled under the ADA to any accommodation. The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns - perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from . . . . Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation

Thus, an employee "regarded as" having a disability is entitled to the same accommodation that he would receive were he actually disabled.

Record of disability

For a discussion of "record of" disability claims, see *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 436-39 (3d Cir. 2009).

9.2.2 ADA Definitions — Qualified Individual

Model

Under the ADA, [plaintiff] must establish that [he/she] was a "qualified individual." This means that [plaintiff] must show that [he/she] had the skill, experience, education, and other requirements for the [describe job] and could do the job's "essential functions", either with or without [describe requested accommodation]. If [plaintiff] cannot establish that [he/she] is qualified to perform the essential functions of [describe job] even with a [describe accommodation], then [plaintiff] is not a qualified individual under the ADA. If [plaintiff] is not a qualified individual within the meaning of the ADA, you must return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of [his/her] disability. The ADA does not require an employer to hire or retain an individual who cannot perform the job with or without an accommodation.

In this case, [plaintiff] claims that [he/she] was able to perform the essential functions of [describe job] [with [describe accommodation]]. [Defendant] contends that [plaintiff] was unable to perform [describe function(s)] and that [this/these] function(s) were essential to the [describe job]. It is [plaintiff's] burden to prove by a preponderance of the evidence that [he/she] was able to perform the essential functions of [describe job]. If [plaintiff] could not perform [describe function] then it is [plaintiff's] burden to show that [describe function], that this was not essential to the [describe job].

In determining whether [plaintiff] could perform the essential functions of [describe job], you should keep in mind that not all job functions are "essential." The term "essential functions" does not include the marginal functions of the position. Essential functions are a job's fundamental duties. In deciding whether [describe function] is essential to [describe job], some factors you may consider include the following:

1) whether the performance of the [describe function] is the reason that the [describe job] exists;

2) the amount of time spent on the job performing [describe function];

3) whether there are a limited number of employees available to do the [describe function];

4) whether [describe function] is highly specialized;

5) whether an employee in the [describe job] is hired for his or her expertise or ability to [describe function];

6) [defendant's] judgment about what functions are essential to the [describe job];

7) written job descriptions for the [describe job] ;

8) the consequences of not requiring an employee to [describe function] in a satisfactory manner;

9) whether others who held the position of [describe job] performed [describe function];

10) the terms of a collective bargaining agreement;

11) [*list any other factors supported by the evidence*.]

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether [describe function] is essential to [describe job].

[In addition to specific job requirements, an employer may have general requirements for all employees. For example, an employer may expect employees to refrain from abusive or threatening conduct toward others, or may require a regular level of attendance. These may be considered essential functions of any job.]

In assessing whether [plaintiff] was qualified to perform the essential functions of [describe job] you should consider [plaintiff's] abilities as they existed at the time when [describe challenged employment action].

Comment

Under the ADA, only a "qualified individual" is entitled to recover for disparate treatment or failure to provide a reasonable accommodation. A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The Third Circuit set forth the basic approach to determining whether a plaintiff is a "qualified individual" in *Deane v. Pocono Medical Center,* 142 F.3d 138, 145-146 (3d Cir. 1998) (en banc):

> [T]he ADA requires [plaintiff] to demonstrate that she is a "qualified individual". The ADA defines this term as an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Interpretive Guidance to the EEOC Regulations divides this inquiry into two prongs. First, a court must determine whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires. See 29 C.F.R. pt. 1630, app. § 1630.2(m). Second, it must determine whether the individual, with or without reasonable

accommodation, can perform the essential functions of the position held or sought. . . .

> Determining whether an individual can, with or without reasonable accommodation, perform the essential functions of the position held or sought, also a two step process, is relatively straightforward. First, a court must consider whether the individual can perform the essential functions of the job without accommodation. If so, the individual is qualified (and, a fortiori, is not entitled to accommodation). If not, then a court must look to whether the individual can perform the essential functions of the job with a reasonable accommodation. If so, the individual is qualified. If not, the individual has failed to set out a necessary element of the prima facie case.

The court in *Deane* emphasized that the plaintiff need not prove the ability to perform *all* the functions of the job requested:

> Section 12111(8) is plain and unambiguous. The first sentence of that section, makes it clear that the phrase "with or without reasonable accommodation" refers directly to "essential functions". Indeed, there is nothing in the sentence, other than "essential functions", to which "with or without reasonable accommodation" could refer. Moreover, nowhere else in the Act does it state that, to be a "qualified individual", an individual must prove his or her ability to perform all of the functions of the job, and nowhere in the Act does it distinguish between actual or perceived disabilities in terms of the threshold showing of qualifications. Therefore, if an individual can perform the essential functions of the job without accommodation as to those functions, regardless of whether the individual can perform the other functions of the job (with or without accommodation), that individual is qualified under the ADA.

142 F.3d at 146-47.

"Essential Functions" of a Job

In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001), the court provided an extensive analysis of the meaning of the term "essential functions" of a job. The plaintiff in *Skerski* was a cable installer technician, and he developed a fear of heights. One of the defendant's arguments was that he was no longer qualified for the position because climbing was one of the "essential functions" of the job of cable installer technician. The trial court agreed with the defendant, finding as a matter of law that climbing was an essential job function, and therefore that plaintiff could not recover because he could not perform that function even with an accommodation. The Third Circuit began its analysis by looking at the relevant agency regulations:

> A job's "essential functions" are defined in 29 C.F.R. § 1630.2(n)(1) as those that are "fundamental," not "marginal." The regulations list several factors for consideration in distinguishing the fundamental job functions from the marginal job functions, including: (1) whether the performance of the function is "the reason the position exists;" (2) whether there

are a "limited number of employees available among whom the performance of that job function can be distributed;" and (3) whether the function is "highly specialized so that the incumbent in the position is hired for his or her expertise." 29 C.F.R. § 1630.2(n)(2). The regulations further set forth a non-exhaustive list of seven examples of evidence that are designed to assist a court in identifying the "essential functions" of a job. They include:

> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the jobs; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

As is apparent, "whether a particular function is essential is a factual determination that must be made on a case by case basis." EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2(n) (2000) [hereafter "EEOC Interpretive Guidance"]. It follows that none of the factors nor any of the evidentiary examples alone are necessarily dispositive.

Applying these standards to the facts, the court found that the district court erred in concluding as a matter of law that climbing was not an essential function for the position of cable installer technician:

> Looking to the three factors included in § 1630.2(n)(2), it is evident that two are not present in this case as installer technicians are not hired solely to climb or even because of their climbing expertise. On the other hand, [there] is evidence to suggest that Time Warner employs a limited number of installer technicians in Skerski's work area-- only 7 or 8, according to Skerski -- and that this small number hampers Time Warner's ability to allow certain technicians to avoid climbing. The significance of this factor is pointed out in the Interpretive Guidance to § 1630.2(n), which explains, "if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance

of those functions by each employee becomes more critical and the options for reorganizing the work become more limited." EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(n).

But this is only one of the three factors. Moreover, consideration of the seven evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature determination on essential functions as at least some of them lean in Skerski's favor. Of course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its own judgment that climbing is essential to the installer technician position. And the written job descriptions, as the District Court noted, "clearly identify climbing as a job requirement." However, describing climbing as a requirement is not necessarily the same as denominating climbing as an essential function. In fact, the job descriptions prepared by both New Channels and Time Warner list various duties and responsibilities under the heading "Essential Functions," but neither identifies climbing as "essential." . . ..

Among the facts and circumstances relevant to each case is, of course, the employee's actual experience as well as that of other employees. See 29 C.F.R. § 1630.2(n)(3)(iv), (vi) and (vii). It is undisputed that from the time Skerski began as an installer technician in 1982 until the time he was diagnosed with his panic disorder in 1993, a significant portion of his job responsibilities required climbing. . . . . However, for the three and a half years after his diagnosis in which he continued to work as an installer technician, Skerski performed virtually no overhead work at all. . . . Skerski testified at his deposition that there always was enough underground work to do, that he always worked 40-hour weeks and even worked enough to earn a couple thousand dollars per year in overtime, and that he had never experienced problems at work because of his panic disorder until Hanning became his supervisor in the fall of 1996. . . .

Skerski argues that his own experience exemplifies that no negative consequences resulted from his failure to perform the climbing function of his job, which is another of the illustrations listed in the regulations. See 29 C.F.R. § 1630.2(n)(3)(iv). However, there is support in the record for Time Warner's contention that Skerski's inability to climb caused it considerable administrative difficulties. . . . . Hanning testified that Skerski's inability to climb "made the routing process extremely cumbersome," because the assignment process had to be done by hand instead of computer. He also claimed that Skerski's inability to climb necessitated the hiring of outside contract labor to meet demand, and that Skerski was not always as busy as he should have been due to his restricted work schedule.

The *Skerski* court found that the relevant factors cut both ways, so that the question of whether climbing was an essential function of the cable installer technician position was a question for the jury:

We do not suggest that the District Court here had no basis for its conclusion that climbing is an essential function of Skerski's position as installer technician or even that, if

> we were the triers of fact, we would not so hold. But upon reviewing the three factors listed in 29 C.F.R. § 1630.2(n)(2) and the seven evidentiary examples provided by 29 C.F.R. § 1630.2(n)(3), it is apparent that a genuine issue of material fact exists as to whether climbing is an essential function of the job of installer technician at Time Warner. Although the employer's judgment and the written job descriptions may warrant some deference, Skerski has put forth considerable evidence that contradicts Time Warner's assertions, particularly the uncontradicted fact that following his 1993 diagnosis he worked for more than three years as an installer technician for Time Warner without ever having to perform over head work.

See also Walton v. Mental Health Assoc. of Southeastern Pennsylvania, 168 F.3d 661, 666 (3d Cir. 1999) (employee's inability to appear in a promotional video because she was obese was not a substantial limitation on essential function of a job; any such appearance would have been only a minor aspect of her job); *Conneen v. MBNA America Bank, N.A.,* 334 F.3d 318, 327 (3d Cir. 2003) (promptness was not an essential function merely because the employer thought it necessary for the employee to set an example for lower-level employees).

The Third Circuit has held that whether a particular function is an "essential function" of a job under the ADA is a question best left for the jury. *Turner v. Hershey Chocolate USA,* 440 F.3d 604, 613 (3d Cir. 2006).

9.2.3 ADA Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

- The total physical environment of [plaintiff's] work area.
- The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.
- The reasonable expectations of [plaintiff] upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on [plaintiff's] mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward [plaintiff].
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [his/her] disability [or request for accommodation]. The harassing conduct may, but need not be specifically directed at [plaintiff's] disability [or request for accommodation]. The key question is whether [plaintiff], as a person with [plaintiff's disability] was subjected to harsh employment conditions to which employees without a disability were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable person with [plaintiff's disability] in the same position. That is, you must determine whether a reasonable person with [plaintiff's disability] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable person with [plaintiff's disability]. The

reasonable person with [plaintiff's disability] is simply one of normal sensitivity and emotional make-up.

Comment

This instruction can be used if the court wishes to provide a more detailed instruction on what constitutes a hostile work environment than those set forth in Instructions 9.1.4 and 9.1.5. This instruction is substantively identical to the definition of hostile work environment in Title VII cases. See Instruction 5.2.1.

9.2.4 ADA Definitions — Constructive Discharge

Model

In this case, to show that [he/she] was subjected to an adverse "tangible employment action," [plaintiff] claims that [he/she] was forced to resign due to conduct that discriminated against [him/her] on the basis of [plaintiff's] disability. Such a forced resignation, if proven, is called a "constructive discharge." To prove that [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

Comment

This instruction is substantively identical to the constructive discharge instruction for Title VII actions. See Instruction 5.2.2. *See also Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 & n.4 (3d Cir. 2006) (discussing constructive discharge in the context of ADA claims).

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into Instruction 9.1.4 (with respect to the instruction's eighth element). If, instead, the plaintiff claims that she was constructively discharged based on a supervisor's or co-worker's adverse action or actions that were not sanctioned by the employer, the constructive discharge would not count as a tangible adverse employment action (for the purposes of determining whether the employer may assert an *Ellerth / Faragher* affirmative defense). *See* Comment 9.1.5. *See also Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment.").

9.3.1 ADA Defenses — Direct Threat

In this case, [defendant] claims that it [describe employment action] [plaintiff] because [plaintiff] would have created a significant risk of substantial harm to [plaintiff] [others in the workplace].

Your verdict must be for [defendant] if [defendant] has proved both of the following by a preponderance of the evidence:

First: [Defendant] [specify actions taken with respect to plaintiff] because [plaintiff] posed a direct threat to the health or safety of [plaintiff] [others in the workplace]; and

Second: This direct threat could not be eliminated by providing a reasonable accommodation, as I have previously defined that term for you.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must have been based on a specific personal assessment of [plaintiff's] ability to safely perform the essential functions of the job. This assessment of [plaintiff's] ability must have been based on either a reasonable medical judgment that relied on the most current medical knowledge, or on the best available objective evidence.

In determining whether [plaintiff] would have created a significant risk of substantial harm, you should consider the following factors:

1) How long any risk would have lasted;

2) The nature of the potential harm and how severe the harm would be if it occurred;

3) The likelihood the harm would have occurred; and

4) Whether the harm would be likely to recur.

Comment

The ADA provides an affirmative defense where accommodation of, hiring or retaining an employee would constitute a "direct threat." 42 U.S.C. § 12113(b). "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C.§ 12111(3). The regulations extend this definition to include a direct threat to the health or safety of the plaintiff as well. In *Chevron U.S.A., Inc., v. Echazabal,* 536 U.S. 73, 79 (2002), the Court upheld those regulations and held that the "direct threat" defense applied to a direct threat of harm to the plaintiff as well as to others. The Court specifically noted that direct

threat is an "affirmative defense" to the ADA qualification standards. Thus a plaintiff does not have the burden of proving that she did not pose a direct threat to the health and safety of herself or others in the workplace.

9.4.1 ADA Damages – Compensatory Damages — General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] violated [plaintiff's] rights under the ADA by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. Plaintiff must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff]'s injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff]'s injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the

compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had continued in employment with [defendant]. These elements of recovery of wages that [plaintiff] would have received from [defendant] are called "back pay" and "front pay". [Under the applicable law, the determination of "back pay" and "front pay" is for the court.] ["Back pay" and "front pay" are to be awarded separately under instructions that I will soon give you, and any amounts for "back pay"and "front pay" are to be entered separately on the verdict form.]

You may award damages for monetary losses that [plaintiff] may suffer in the future as a result of [defendant's] [allegedly unlawful act or omission]. [For example, you may award damages for loss of earnings resulting from any harm to [plaintiff's] reputation that was suffered as a result of [defendant's] [allegedly unlawful act or omission]. Where a victim of discrimination has been terminated by an employer, and has sued that employer for discrimination, [he/she] may find it more difficult to be employed in the future, or may have to take a job that pays less than if the act of discrimination had not occurred. That element of damages is distinct from the amount of wages [plaintiff] would have earned in the future from [defendant] if [he/she] had retained the job.]

As I instructed you previously, [plaintiff] has the burden of proving damages by a preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy as circumstances permit.

[You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her] damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [him/her], then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if [he/she] had taken advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII

actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment." Accordingly, this instruction on compensatory damages is substantively identical to that provided for Title VII actions. See Instruction 5.4.1.

For a discussion of the standards applicable to an award of emotional distress damages under the ADA, *see Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d Cir. 2002) ("To recover emotional damages a plaintiff must show a reasonable probability rather than a mere possibility that damages due to emotional distress were in fact incurred as a result of an unlawful act.").

Back pay and front pay are equitable remedies that are to be distinguished from the compensatory damages to be determined by the jury under Title VII and therefore under the ADA. See the Comments to Instructions 5.4.3 -4. Compensatory damages may include lost future earnings over and above the front pay award. For example, the plaintiff may recover the diminution in expected earnings in all future jobs due to reputational or other injuries, independently of any front pay award. See the Comment to Instruction 5.4.1 for a more complete discussion.

The pattern instruction contains bracketed material that would instruct the jury not to award back pay or front pay. The jury may, however, enter an award of back pay and front pay as advisory, or by consent of the parties. In those circumstances, the court should refer to instructions 9.4.3 for back pay and 9.4.4 for front pay. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the court's determination without reference to the jury.

In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir.1988), the Court held that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering damages without first presenting evidence of actual injury. The court stated that "[t]he justifications that support presumed damages in defamation cases do not apply in § 1981 and Title VII cases. Damages do not follow of course in § 1981 and Title VII cases and are easier to prove when they do." Because ADA damages awards are subject to the same strictures applicable to Title VII, the limitations set forth in *Gunby* apply to recovery of pain and suffering damages under the ADA as well.

Damages in ADA Retaliation Cases

At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation under the ADA is limited to equitable relief. *See Sabbrese v. Lowe's Home Centers, Inc.*, 320 F. Supp.2d 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit's analysis in *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit parsed the 1991 Civil Rights Act and found that while it provided for damages in ADA discrimination and

accommodation cases, it made no similar provision for ADA retaliation cases. The Third Circuit has not decided whether damages are available in ADA retaliation cases. See the discussion in the Comment to Instruction 9.1.7.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

9.4.2 ADA Damages — Punitive Damages

Model

[Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to the plaintiff's federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and so received nominal rather than compensatory damages.]

An award of punitive damages is permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

[For use where the defendant raises a jury question on good-faith attempt to comply with the law:

But even if you make a finding that there has been an act of discrimination with malice or reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant] proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law, by adopting policies and procedures designed to prevent unlawful discrimination such as that suffered by [plaintiff].**]**

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied [and that [defendant] has not proved that it made a good-faith attempt to comply with the law], then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts it may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to

those [defendant] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant] should be punished for its wrongful conduct, and the degree to which an award of one sum or another will deter [defendant] or others from committing similar wrongful acts in the future.

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon the defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant], you may consider the financial resources of [defendant] in fixing the amount of such damages.]

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment." Accordingly, this instruction on punitive damages is substantively identical to that provided for Title VII actions. See Instruction 5.4.2.

42 U.S.C.A. § 1981a(b)(1) provides that "[a] complaining party may recover punitive damages under this section [Title VII] against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Punitive damages are available only in cases of intentional discrimination, i.e., cases that do not rely on the disparate impact theory of discrimination.

In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme Court held that plaintiffs are not required to show egregious or outrageous discrimination in order to recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean, however, that proof of intentional discrimination is not enough in itself to justify an award of punitive damages, because the statute suggests a congressional intent to authorize punitive awards "in only a subset of cases involving intentional discrimination." Therefore, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Kolstad*, 527 U.S. at 536. *See also Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d Cir. 2002) ("Punitive damages are available under the ADA when 'the

complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference.' 42 U.S.C. § 1981a(b)(1) (2000). These terms focus on the employer's state of mind and require that 'an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.'") (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535-36 (1999)).

The *Kolstad* Court further held that an employer may be held liable for a punitive damage award for the intentionally discriminatory conduct of its employee only if the employee served the employer in a managerial capacity, committed the intentional discrimination at issue while acting in the scope of employment, and the employer did not engage in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether an employee is in a managerial capacity, a court should review the type of authority that the employer has given to the employee and the amount of discretion that the employee has in what is done and how it is accomplished. Id., 527 U.S. at 543.

The Court in *Kolstad* established an employer's good faith as a defense to punitive damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff's proof for punitive damages. The instruction sets out the employer's good faith attempt to comply with anti-discrimination law as an affirmative defense. The issue has not yet been decided in the Third Circuit, but the weight of authority in the other circuits establishes that the defendant has the burden of showing a good-faith attempt to comply with laws prohibiting discrimination. *See Medcalf v. Trustees of University of Pennsylvania,* 71 Fed. Appx. 924, 933 n.3 (3d Cir. 2003) (noting that "the Third Circuit has not addressed the issue of whether the good faith compliance standard set out in *Kolstad* is an affirmative defense for which the defendant bears the burden of proof, or whether the plaintiff must disprove the defendant's good faith compliance with Title VII by a preponderance of the evidence"; but also noting that. "[a] number of other circuits have determined that the defense is an affirmative one.").

Punitive damages are subject to caps in ADA actions. See 42 U.S.C. § 1981a (b)(3). But 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of punitive damages.

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed. In performing the substantive due process review of the size of punitive awards, a court must consider three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference between the punitive award "and the civil penalties authorized or imposed in comparable cases." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

For a complete discussion of the applicability of the *Gore* factors to a jury instruction on punitive damages, see the Comment to Instruction 4.8.3.

Damages in ADA Retaliation Cases

At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation under the ADA is limited to equitable relief. *See Sabbrese v. Lowe's Home Centers, Inc*., 320 F. Supp.2d 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit's analysis in *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit parsed the 1991 Civil Rights Act and found that while it provided for damages in ADA discrimination and accommodation cases, it made no similar provision for ADA retaliation cases. The Third Circuit has not decided whether damages are available in ADA retaliation cases. See the discussion in the Comment to Instruction 9.1.7.

9.4.3 ADA Damages — Back Pay— For Advisory or Stipulated Jury

Model

If you find that [defendant] has violated [plaintiff's] rights under the ADA, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You may award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's conduct].

[*[Alternative One – for use when plaintiff does not seek back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period:]* Back pay damages, if any, apply from the time [plaintiff] was [describe employment action] until the date of your verdict. [However, federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. Therefore the back pay award in this case must be determined only for the period between [specify dates]].**]**

[*[Alternative Two – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge:]* In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period but two years or less before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.**]**

[*[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge:]* In this

case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period and more than two years before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [date two years prior to filing date of charge (hereafter "two-year date")] until the date of your verdict. In that case, back pay applies from [two-year date] rather than [prior date] because federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.**]**

You must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award back pay, you are instructed to deduct from the back pay figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of back pay.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of back pay to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment." Accordingly, this instruction on back pay is substantively identical to that provided for Title VII actions. See Instruction 5.4.3.

An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim for back pay. See 42 U.S.C. §1981(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e5(g)]."); 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."). *See also Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 316 (3d Cir. 2006) (relying on the statutory language of Title VII, which applies to damages recovery under the ADA, the court holds in an ADA action that "back pay remains an equitable remedy to be awarded within the discretion of the court"). "[A] district court may, pursuant to its broad equitable powers granted by the ADA, award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create." *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009).

An instruction on back pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may agree to a jury determination on back pay, in which case this instruction would also be appropriate. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the court's determination without reference to the jury. Instruction 5.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

The appropriate standard for measuring a back pay award is "to take the difference between the actual wages earned and the wages the individual would have earned in the position that, but for discrimination, the individual would have attained." *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1119-20 (3d Cir. 1988).

42 U.S.C. § 2000e-5(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." The court of appeals has explained that "[t]his constitutes a limit on liability, not a statute of limitations, and has been interpreted as a cap on the amount of back pay that may be awarded under Title VII." *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it was plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set the relevant limit under the circumstances of the case). *See id.* Accordingly, when the facts of the case make Section 2000e-5's cap relevant, the court should instruct the jury on it.

Section 2000e-5's current framework for computing a back pay award for Title VII pay discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). The effect of the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA), Pub. L. No. 111-2, § 2, January 29, 2009, 123 Stat. 5, which amended 42 U.S.C. § 2000e-5(e), is discussed in Comment 5.4.3.

In *Craig v. Y & Y Snacks, Inc*., 721 F.2d 77, 82 (3d Cir. 1983), the court held that unemployment benefits should not be deducted from a back pay award. That holding is reflected in the instruction.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court held that if an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability. However, the employer in such a circumstance does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful discharge to the date the new information was discovered." 513 U.S. at 362. See also *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that "after-acquired evidence may be used to limit the remedies available to a plaintiff where the employer can first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing that it would have made the same employment decision when it became aware of the post-decision evidence of the employee's misconduct.

9.4.4 ADA Damages – Front Pay — For Advisory or Stipulated Jury

Model

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. The reason you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. Thus you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future.**]**

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the

ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment." Accordingly, this instruction on front pay is substantively identical to that provided for Title VII actions. See Instruction 5.4.4.

There is no right to jury trial under Title VII (or by extension the ADA) for a claim for front pay. *See Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay under Title VII is not an element of compensatory damages). *See also Marinelli v. City of Erie,* 25 F. Supp.2d 674, 675 (W.D.Pa. 1998) ("The ADA provides for all remedies available under Title VII, which includes backpay and front pay or reinstatement. [Front pay relief] is equitable in nature, and thus within the sound discretion of the trial court."), *judgment vacated on other grounds*, 216 F.3d 354 (3d Cir. 2000).

An instruction on front pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may agree to a jury determination on front pay, in which case this instruction would also be appropriate. Instruction 9.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

Front pay is considered a remedy that substitutes for reinstatement, and is awarded when reinstatement is not viable under the circumstances. *See Berndt v. Kaiser Aluminum & Chemical Sales, Inc*., 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy").

In *Monessen S.R. Co. v. Morgan,* 486 U.S. 330, 339 (1988), the Court held that "damages awarded in suits governed by federal law should be reduced to present value." (Citing *St. Louis Southwestern R. Co. v. Dickerson,* 470 U.S. 409, 412 (1985)). The "self-evident" reason is that "a given sum of money in hand is worth more than the like sum of money payable in the future." The Court concluded that a "failure to instruct the jury that present value is the proper measure of a damages award is error." Id. Accordingly, the instruction requires the jury to reduce the award of front pay to present value. It should be noted that where damages are determined under state law, a present value instruction may not be required under the law of certain states. *See, e.g.*, *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset" method, under which no reduction is necessary to determine present value, as the value of future income streams is likely to be offset by inflation).

9.4.5 ADA Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment." Accordingly, this instruction on nominal damages is substantively identical to that provided for Title VII actions. See Instruction 5.4.5.

An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." *See id.* at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." Id. Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." Id. at 454.

Nominal damages may not exceed one dollar. *See Mayberry v. Robinson,* 427 F. Supp. 297, 314 (M.D.Pa.1977) ("It is clear that the rule of law in the Third Circuit is that nominal damages may not exceed $1.00.") (citing *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 830 (3d Cir.1976)).

Instructions For Claims Under the Family and Medical Leave Act

Numbering of FMLA Instructions

10.0 FMLA Introductory Instruction

10.1 Elements of an FMLA Claim

- 10.1.1 Interference With Right to Take Leave
- 10.1.2 Discrimination — Mixed-Motive
- 10.1.3 Discrimination — Pretext
- 10.1.4 Retaliation For Opposing Actions in Violation of FMLA

10.2 FMLA Definitions

- 10.2.1 Serious Health Condition
- 10.2.2 Equivalent Position

10.3 FMLA Defenses

- 10.3.1 Key Employee

10.4 FMLA Damages

- 10.4.1 Back Pay — No Claim of Willful Violation
- 10.4.2 Back Pay — Willful Violation
- 10.4.3 Other Monetary Damages
- 10.4.4 Liquidated Damages
- 10.4.5 Nominal Damages

10.0 FMLA Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Family and Medical Leave Act, a Federal statute that prohibits an employer from interfering with or discriminating against an employee's exercise of the right granted in the Act to a period of unpaid leave [because of a serious health condition] [where necessary to care for a family member with a serious health condition] [because of the birth of a son or daughter] [because of the placement of a son or daughter with the employee for adoption or foster care].

Specifically, [plaintiff] claims that [describe plaintiff's claim of interference, discrimination, retaliation].

[Defendant] denies [describe defenses]. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues that you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., ("FMLA") was enacted to provide leave for workers whose personal or medical circumstances require that they take time off from work in excess of what their employers are willing or able to provide. *Victorelli v. Shadyside Hosp*., 128 F.3d 184, 186 (3d Cir. 1997) (citing 29 C.F.R. § 825.101). The Act is intended "to balance the demands of the workplace with the needs of families ... by establishing a minimum labor standard for leave" that lets employees "take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition." *Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir. 1999) (quoting 29 U.S.C. § 2601(b)(1), (2)).

The FMLA guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a serious medical condition; a family member's serious illness; the arrival of a new son or daughter; or certain exigencies arising out of a family member's service in the armed forces. 29 U.S.C. § 2612(a)(1). During the 12 week leave period, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return,

the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1). The Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of" these rights, § 2615(a)(1); to discriminate against those who exercise their rights under the Act, § 2615(a)(2); and to retaliate against those who file charges, give information, or testify in any inquiry related to an assertion of rights under the Act, § 2615(b). Violators are subject to payment of certain monetary damages and appropriate equitable relief, § 2617(a)(1). The Act provides for liquidated (double) damages where wages or benefits have been denied in violation of the Act, unless the defendant proves to the court that the violation was in good faith.

Special Provisions Concerning Servicemembers

The 2008 amendments to the FMLA added provisions concerning leave relating to service in the armed forces. *See* Pub. L. No. 110-181, Div. A, Title V, § 585, Jan. 28, 2008, 122 Stat. 129. The amendments added to Section 2612(a)'s list of leave entitlements leave "[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." 29 U.S.C. § 2612(a)(1)(E). The amendments also created an entitlement to servicemember family leave: "Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period." *Id.* § 2612(a)(3). And the amendments added a combined leave total where leave is taken under both subsection (a)(1) and subsection (a)(3): "During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period." *Id.* § 2612(a)(4).

These Instructions and Comments were drafted prior to the adoption of the 2008 amendments. The Committee has attempted to indicate places where the 2008 amendments provide a different framework for service-related leaves. When litigating cases involving service-related leaves practitioners should review with care the FMLA's provisions so as to note the special FMLA provisions relating to such leaves.

Employers Covered by the FMLA[1]

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R.

[1] Much of the following analysis of the FMLA is adapted from the Comment to the Eighth Circuit Jury Instructions on FMLA claims, Instruction 5.80.

§ 825.104(d). In addition, the Supreme Court has held that states are employers subject to the FMLA. *Nevada Dep' t of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Employees Eligible for Leave

Not all employees are entitled to leave under the FMLA. Before an employee can take leave under the Act, the following eligibility requirements must be met: he or she must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A). *See Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 504-06 (3d Cir. 2009) (discussing how to calculate the number of hours worked during the relevant period). A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited by the employer to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the employee 's son or daughter or to care for that newborn; 2) for placement of a son or daughter for adoption or foster care, or to care for the child after placement; or 3) or to care for the employee 's parent. 29 C.F.R. § 825.120(a)(3). 29 U.S.C. § 2612(f)(2) sets special provisions concerning servicemember family leaves taken by spouses employed by the same employer.

Family Members Contemplated by the FMLA

Employees are also eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. "Spouse" means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.122(a).

Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c). Persons with "in loco parentis" status under the FMLA include those who had day-to-day responsibility to care for and financially support the employee when the employee was a child. 29 C.F.R. § 825.122(c)(3). "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(c)(1). "Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Id. "Instrumental activities of daily living"include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. Id. "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.122(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. Id.

"Parent" means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term "parent" does

not include parents-in-law unless a parent-in-law meets the in loco parentis definition. 29 C.F.R. § 825.122(b).

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100. The right to take leave under the FMLA applies equally to male and female employees. A father as well as a mother can take family leave for the birth, placement for adoption, or foster care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. 29 C.F.R. § 825.120(a).

For methods of determining the amount of leave, see 29 C.F.R. § 825.200.

What Constitutes a "Serious Health Condition?"

The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). For regulations defining the phrase "serious health condition," see 29 C.F.R. § 825.113.

The Third Circuit has held that conditions such as upset stomach or a minor ulcer could be "serious health conditions" if they meet the regulatory criteria. *See generally Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997) (jury question as to whether peptic ulcer was a serious medical condition, noting that the FMLA is "intended to protect those who are occasionally incapacitated by an on-going medical problem").

Certification of Medical Leave

The FMLA does not require an employee, in the first instance, to provide a medical certification justifying a leave for a serious health condition. But it does allow the employer to demand such a certification. The rules on certification were described by the court in *Shtab v. Greate Bay Hotel and Casino, Inc*., 173 F. Supp.2d 255, 264 (D.N.J. 2001):

> In order to safeguard the interests of employers and prevent abuses by employees, Congress included a provision in the FMLA which entitled employers to request medical certification from an employee requesting leave. 29 U.S.C. § 2613(a). When an employer requests medical certification, it must provide the employee with notice of the consequences of failing to provide the certification. 29 C.F.R. § 825.301(b)(1)(ii). A certification is considered sufficient if it contains: (1) the date on which the serious health condition began; (2) the probable duration of the condition; (3) the medical facts within the knowledge of the health care provider regarding the condition; and (4) if the leave is for the purpose of caring

for a family member, an estimate of the amount of time that the employee will be needed to care for the family member. 29 U.S.C. § 2613(b). "The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.305(d); *Marrero v. Camden County Board of Social Services*, 164 F. Supp. 2d 455, 466 (D.N.J. 2001)("termination is not an appropriate response for an inadequate certification. Section 825.305(d) provides that where an employer finds a certification incomplete, it must give the employee a reasonable opportunity to cure any deficiencies").

The Act provides further protection for employers who doubt the veracity of an employee's leave request. The employer may require, at its own expense, that the employee obtain the opinion of a second health provider chosen or approved by the employer concerning any of the information, i.e., the date of commencement, the probable duration, or the medical facts, in the certification. 29 U.S.C. § 2613 (c); 29 C.F.R. § 825.307(a)(2). If the second opinion does not assuage the employer's suspicions, then the employer may require a third opinion which will be considered final. 29 U.S.C. § 2613 (d); 29 C.F.R. § 825.307(c). If the employee submits a complete certification signed by the health care provider, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, in order to clarify and authenticate the certification. 29 C.F.R. § 825.307 (a)(1). (some citations omitted).

Certification related to active duty or call to active duty

29 U.S.C. § 2613(f) provides: "An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer."

10.1.1 Elements of an FMLA Claim— Interference With Right to Take Leave

Model

[Plaintiff] claims that [defendant] interfered with [his/her] right to take unpaid leave from work under the Family and Medical Leave Act.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].[2]

Second: This condition was a "serious health condition," defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.[3]

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. "Appropriate notice" was given where,

> [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]
>
> [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover, [plaintiff] was not required to give [defendant] a formal written request for anticipated leave. Simple verbal notice is sufficient.] The critical question for determining "appropriate notice"

---

[2] The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member's service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction's discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

[3] If the court wishes to give a more detailed instruction on the term "serious health condition," one is provided in 10.2.1.

is whether the information given to [defendant] was sufficient to reasonably apprise it of [plaintiff's] request to take time off for a serious health condition.

Fourth: [Defendant] interfered with the exercise of [plaintiff's] right to unpaid leave. Under the statute, "interference" can be found in a number of ways, including:

[Include any of the following factors raised by the evidence]

1) terminating employment;

2) refusing to allow an employee to return to his or her job, or to an equivalent position, upon return from leave;[4]

3) ordering an employee not to take leave or discouraging an employee from taking leave; and

4) failing to provide an employee who gives notice of the need for a leave a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.

[However, interference cannot be found simply because [defendant] imposes reporting obligations for employees who are on leave. For example, an employer does not interfere with an employee's right to take leave by establishing a policy requiring all employees to call in to report their whereabouts while on leave. The Family and Medical Leave Act does not prevent employers from ensuring that employees who are on leave do not abuse their leave.]

I instruct you that you do not need to find that [defendant] intentionally interfered with [plaintiff's] right to unpaid leave. The question is not whether [defendant] acted with bad intent, but rather whether [plaintiff] was entitled to a leave and [defendant] interfered with the exercise of that leave.

[Affirmative Defense:

However, your verdict must be for [defendant] if [defendant] proves, by a preponderance of the evidence, that [plaintiff] would have lost [his/her] job even if [he/she] had not taken leave. For example, if [defendant] proves that [plaintiff]'s position was going to be eliminated even if [she/he] would not have been on leave, then you must find for [defendant]**].**

[4] If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

Comment

29 U.S.C. § 2615(a)(1) provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." Claims brought under § 2615(a)(1) are denominated "interference" claims. The court in *Parker v. Hahnemann University Hospital,* 234 F. Supp.2d 478, 483 (D.N.J. 2002), provides helpful background on the gravamen of a claim brought under § 2615(a)(1), distinguishing it from a claim for discrimination brought under § 2615(a)(2):

> The first theory of recovery under the FMLA is the entitlement, or interference, theory. It is based on the prescriptive sections of the FMLA which create substantive rights for eligible employees. Eligible employees are entitled to up to twelve weeks of unpaid leave per year because of a serious health condition, a need to care for a close family member with a serious health condition, or a birth, adoption, or placement in foster care of a child. An employee is also entitled to intermittent leave when medically necessary, 29 U.S.C. § 2612(b), and to return after a qualified absence to the same position or to an equivalent position, 29 U.S.C. § 2614(a)(1). . . .
>
> An employee can allege that an employer has violated the FMLA because she was denied the entitlements due her under the Act. 29 U.S.C. § 2615(a)(1). In such a case, the employee only needs to show she was entitled to benefits under the FMLA and that she was denied them. She does not need to show that the employer treated other employees more or less favorably and the employer cannot justify its action by showing that it did not intend it or it had a legitimate business reason for it. The action is not about discrimination; it is about whether the employer provided its employees the entitlements guaranteed by the FMLA.

See also Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005) (no showing of discrimination is required for an interference, as that claim is made if the employee shows "that he was entitled to benefits under the FMLA and that he was denied them.").

Because the issue in interference claims is not discrimination but interference with an entitlement, courts have found that the plaintiff is not required to prove intentional misconduct. *See, e.g., Williams v. Shenango, Inc.,* 986 F. Supp. 309, 317 (W.D.Pa. 1997) (finding that "a claim under § 2615(a)(1) is governed by a strict liability standard"); *Moorer v. Baptist Memorial Health Care*, 398 F.3d 469, 487 (6th Cir. 2005) ("Because the issue [in an interference claim] is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer."); *Diaz v. Fort Wayne Foundry Corp.,* 131 F.3d 711, 712 (7th Cir. 1997) (noting that an employee alleging interference with an FMLA entitlement is not alleging discrimination and therefore no intent to discriminate need be found).

Affirmative Defense Where Employee Would Have Lost the Job Even if Leave Had Not Been Taken

After taking a qualified leave, the employee is generally entitled to reinstatement in the same or a substantially equivalent job. However, this is not the case if the employee would have lost her

job even if she had not taken leave. As the court put it in *Parker*, supra, "the FMLA does not give the employee on protected leave a bumping right over employees not on leave."

The *Parker* court considered which party had the burden of proof on whether the employee would have lost her job even if she had not taken leave. The court noted that Department of Labor regulations interpreting the FMLA place the burden of proof on the employer. 29 C.F.R. § 825.216(a)(1). The court continued its analysis as follows:

> The Third Circuit has not considered whether this regulation places the burden on the employer. The Tenth Circuit has held that it does and functions like an affirmative defense. *Smith v. Diffee Ford-Lincoln-Mercury*, 298 F.3d 955, 963 (10th Cir. 2002). Under their approach, the plaintiff presents her FMLA case by showing, as explained above, that she was entitled to benefits and denied them. Id. Then, the burden is on the employer to mitigate its liability by proving that she would have lost her job whether or not she took leave. Id. The Seventh Circuit instead found that the regulation leaves the burden on the plaintiff to prove that she was entitled to benefits and denied them even though the defendant presented some evidence indicating that her job would have been terminated if she had not taken leave. *Rice v. Sunrise Express,* 209 F.3d 1008, 1018 (7th Cir.2000). . . It interprets the regulation as only requiring the defendant to come forward with some evidence that the termination would have occurred without the leave.
>
> This Court finds that the better approach is the one followed by the Tenth Circuit which places the burden on the employer. An issue about the burden of proof is a "question of policy and fairness based on experience in the different situations," *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973), and policy, fairness, and experience support the Tenth Circuit's approach. As for policy, the approach upholds the validity and the plain language of the regulation that was promulgated in accordance with standard administrative procedure. As for fairness, the approach places the burden on the party who holds the evidence that is essential to the inquiry, evidence about future plans for a position, discussions at management meetings, and events at the workplace during the employee's FMLA leave. *See Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977) (stating that burdens of proof should "conform with a party's superior access to the proof"). As for experience, other labor statutes also place the burden on the employer to mitigate its liability to pay an employment benefit in certain situations. As a result, this Court will require plaintiff to bear the burden of proving that she was entitled to reinstatement and was denied it, and will require defendants to mitigate their liability by bearing the burden of proving plaintiff's position would have been eliminated even if she had not taken FMLA leave.

234 F. Supp.2d at 487 (footnotes and some citations omitted). Accordingly, the instruction places the burden of proof on the defendant to show that the plaintiff would have lost her job even if she had not taken leave. *See also Throneberry v. McGehee Desha County Hosp.,* 403 F.3d 972 (8th Cir. 2005) (employer has the burden of showing that employee would have been discharged even if she had not taken FMLA leave).

The Meaning of "Interference"

"[F]iring an employee for [making] a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee." *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009).

Courts have held that conduct discouraging employees from taking FMLA leave constitutes interference, even if the employee ends up taking the leave. For example, in *Shtab v. The Greate Bay Hotel and Casino,* 173 F. Supp.2d 255 (D.N.J. 2001), the court found that an employee could establish an interference claim by proving that when he brought up the subject of FMLA leave, the employer tried to persuade him to delay the leave because it was an especially busy period. The plaintiff did not delay the leave, and the defendant argued that there was no ground of recovery for interference because the plaintiff suffered no adverse employment action. But the court disagreed, relying on 29 C.F.R. § 825.220 (b), which defines "interference" as including "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." *See also Williams v. Shenango, Inc.,* 986 F. Supp. 309, 320-21 (W.D. Pa. 1997) (employer's motion for summary judgment denied where "reasonable persons could conclude that the initial denial of leave and the suggestion of rescheduling leave may, in fact, constitute 'interference with' FMLA rights").

The FMLA does not, however, prohibit reasonable attempts by the employer to protect against abuses in taking leave. Thus, in *Callison v. City of Philadelphia,* 430 F.3d 117, 121 (3d Cir. 2005), the employer imposed a requirement on all employees taking sick leave that they "notify the appropriate authority or designee when leaving home and upon return" during working hours. The plaintiff argued that the call-in requirement constituted interference with his FMLA leave, which he interpreted as a right to be "left alone." But the court disagreed, stating that the FMLA does not prevent employers "from ensuring that employees who are on leave from work do not abuse their leave." Bracketed material in the instruction is consistent with the *Callison* decision.

_____Employers are permitted to consider an employee's FMLA absence when allocating performance bonuses. Thus, in *Sommer v. Vanguard Group,* 461 F.3d 397, 401 (3d Cir. 2006), the court held that the employer was not liable for interference under the FMLA when it refused to award the plaintiff a full annual bonus payment under its Partnership Plan, but instead awarded him a payment prorated on the basis of the time he was absent on FMLA leave. Parsing the FMLA regulations, the Court differentiated between a bonus program based upon "production," and a bonus plan dependent upon the absence of an occurrence–such as a bonus for no absences or no injuries. The FMLA permits employers to consider an FMLA absence in assessing productivity; it does not, however, allow an employer to deny benefits that are based on an absence of an occurrence. The *Sommer* Court found that the employer's partnership plan was a performance plan, because awards were contingent on performance of a certain number of hours per year.

Notice Requirements

Both the employee and the employer have notice obligations under the FMLA. These notice obligations are described by the court in *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 527 (D.N.J. 2000):

> The FMLA and its regulations impose corresponding notice requirements on both the employer and employee. The regulations require that covered employers post in conspicuous places on its premises a notice explaining the FMLA's provisions and the procedures for filing complaints of FMLA violations. 29 C.F.R. § 825.300(a). An employer who fails to comply with the posting requirement is estopped from denying an employee FMLA leave based on the employee's failure to supply advance notice of his need for leave. 29 C.F.R. § 825.300(b). The regulations further authorize a civil money penalty limited to $ 100 for each offense against an employer that willfully violates the posting requirement. 29 C.F.R. § 825.300(b).
>
> In addition to the posting requirement, employers must include in all employment handbooks or manuals information concerning employee entitlements and obligations under the FMLA. 29 C.F.R. § 825.301(a)(1). Additionally, once an employee provides notice of a need for FMLA leave, the employer has a duty to provide that employee with "written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." 29 C.F.R. § 825.301(b)(1).
>
> With regard to the notice obligations of employees, such obligations depend on whether the employee's need for leave is foreseeable or unforeseeable. When the necessity for leave is foreseeable based on planned medical treatment, the Act requires that the employee:
>
> > (A) . . . make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or [the employee's] [child], spouse, or parent . . ., as appropriate; and
> >
> > (B) . . . provide the employer with [at least] 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.
>
> 29 U.S.C. § 2612(e)(2). Where it is not possible for an employee to give thirty days notice, the regulations define "as soon as practicable" as requiring "at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." 29 C.F.R. § 825.302(b).
>
> Although the Act is silent as to an employee's notice requirements for unforeseeable leave, the regulations address this issue, providing:

> (a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.
>
> (b) The employee should provide notice to the employer either in person or by telephone . . . . The employee need not expressly assert rights under the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional information through informal means. The employee . . . will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

The *Zawadowicz* Court concluded that the sufficiency of notice is generally a jury question.

As to the employee's notice requirement, the Third Circuit emphasized in *Sarnowski v. Air Brooke Limousine, Inc.,* 510 F.3d 398, 402 (3d Cir. 2007), that it is to be flexibly applied. The court observed that the notice need not be in writing, and that "employees may provide FMLA qualifying notice before knowing the exact dates or duration of the leave they will take." The *Sarnowski* court concluded that the critical question for the employee's attempt to notify is "whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." The Instruction contains language that is consistent with the *Sarnowki* court's liberal interpretation of the FMLA notice requirement.

The 2008 amendments added a special provision concerning notice for leave due to active duty of a family member. *See* 29 U.S.C. § 2612(e)(3).

Consequences of Employer's Failure to Comply With the Notice Requirement

In *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 90 (2002), the Court invalidated a regulation promulgated by the Department of Labor which had provided that if the employer does not give proper notice, the employee's leave could not be counted against the 12-week FMLA period. In that case, the employee took a 30 week leave, and the employer had not given proper notice that the leave would count against her FMLA entitlement. Under the terms of the regulation, this meant that the employee would be entitled to 12 more weeks of leave after the 30 already taken. The Court held that the regulation was beyond the Secretary of Labor's authority, because it was not sufficiently tied to the interests protected by the FMLA:

> The challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice. ... [The regulation] transformed the company's failure to give notice -- along with its refusal to grant her more than 30 weeks of leave -- into an actionable violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to reinstatement and backpay, even though reinstatement could not be said to be "appropriate" in these circumstances and Ragsdale lost no compensation "by reason of" Wolverine's failure to designate her absence as FMLA leave. By mandating these results absent a showing of consequential harm, the regulation worked an end run around important limitations of the statute's remedial scheme.

The Third Circuit has emphasized that the Supreme Court, while invalidating the regulation at issue in *Ragsdale*, did not question the validity of the regulations setting out the FMLA notice requirements. *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004). The *Conoshenti* court noted that the regulations require "employers to provide employees with individualized notice of their FMLA rights and obligations" by designating leave as FMLA-qualifying, and giving notice of the designation to the employee. Moreover, each time the employee requests leave, the employer must, within a reasonable time "provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." (Quoting 29 C.F.R. § 825.301(b)(1), (c)). The plaintiff in *Conoshenti* alleged that the employer's failure to give proper notice under the regulations interfered with his ability to exercise his right to an FMLA leave. Specifically, had he received the proper notice, he would have been able to make an informed decision about structuring his leave and would have structured it, and his plan of recovery, in such a way as to preserve the job protection afforded by the FMLA. The Third Circuit concluded that "this is a viable theory of recovery," and in doing so addressed the defendant's argument that any reliance on the notice provisions in the regulations was prohibited by *Ragsdale*. The court stated that the *Ragsdale* Court "expressly noted that the validity of notice requirements of the regulations themselves was not before it. Accordingly, *Ragsdale* is not dispositive of anything before us."

However, *Ragsdale* did support the court of appeals' more recent conclusion that a prior version of 29 C.F.R. § 825.110(d) – which provided, at the relevant time, that "[i]f the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible" – was invalid. *See Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 507 (3d Cir. 2009) (explaining that this holding was "consistent with the recent amendment to § 825.110, which removed the remedial eligibility provision in light of [*Ragsdale*'s] pronouncement that a remedial eligibility provision in 29 C.F.R. § 825.700 was invalid for similar reasons").

10.1.2 Elements of an FMLA Claim — Discrimination — Mixed-Motive

[Plaintiff] claims that [he/she] was discriminated against for exercising the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] taking leave was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: Plaintiff [or a family member as defined by the Act] had a [specify condition].[5]

Second: This condition was a "serious health condition," defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.[6]

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. "Appropriate notice" was given where,

> [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]
>
> [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover, [plaintiff] was not required to give [defendant] a formal written request for anticipated leave. Simple verbal notice is sufficient.] The critical question for determining "appropriate notice"

---

[5] The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member's service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction's discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

[6] If the court wishes to give a more detailed instruction on the term "serious health condition," one is provided in 10.2.1.

is whether the information given to [defendant] was sufficient to reasonably apprise it of [plaintiff's] request to take time off for a serious health condition.

Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not placed in a substantially equivalent position upon [his/her] return from leave][7] [was terminated after returning from leave] [was demoted after returning from leave].

Fifth: [Plaintiff's] taking leave was a motivating factor in [defendant's] decision [not to reinstate, to terminate, etc.] [plaintiff].

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights.

In showing that [plaintiff's] taking leave was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that the leave was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] taking leave played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

[For use where defendant sets forth a "same decision" affirmative defense:

If you find in [plaintiff's] favor with respect to each of the facts that [plaintiff] must prove, you must then decide whether [defendant] has shown that [defendant] would have made the same decision with respect to [plaintiff's] employment even if there had been no motive to discriminate on the basis of [plaintiff's] having taken leave. Your verdict must be for [defendant] if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] leave had played no role in the employment decision.**]**

Comment

The nature of claims under 29 U.S.C. § 2615(a)(2)

29 U.S.C. § 2615(a)(2) provides that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]." Discrimination claims brought under subsection (a)(2) are also called "retaliation" claims, though they differ from the kind of retaliation claims ordinarily brought under the statutes covering employment discrimination. Claims brought under subsection (a)(2) allege "retaliation" for

[7] If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

the exercise of the right to take unpaid leave under the FMLA. This is distinct from claims of retaliation for actions such as complaining about discrimination, testifying in discrimination proceedings, and the like, which are comparable to the retaliation claims brought under other statutes, such as Title VII. In the Family and Medical Leave Act, those more "traditional" retaliation claims are covered by 29 U.S.C. § 2615(b), which provides that it is unlawful to discriminate against a person who has, e.g., "instituted or caused to be instituted any proceeding, . . . has given, or is about to give, any information in connection with any inquiry or proceeding, . . . or has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under" the FMLA. A separate instruction for these forms of retaliation, analogous to retaliation claims brought under other employment discrimination statutes, is found at 10.1.4.

The court in *Bearley v. Friendly Ice Cream Corp.,* 322 F. Supp.2d 563, 571 (M.D.Pa. 2004), describes the distinction between interference and discrimination/retaliation claims under the FMLA, and the legal standards applicable to the latter claims, as follows:

> Courts have recognized two distinct causes of action under the Family and Medical Leave Act (hereinafter FMLA). First, a plaintiff may pursue recovery under an "interference" theory. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or deny" an employee's rights under the FMLA. Under an interference claim, it is plaintiff's burden to demonstrate that she was entitled to a benefit under the FMLA, but was denied that entitlement. *Parker v. Hahnemann Univ. Hosp.,* 234 F. Supp. 2d 478, 485 (D. N.J. 2002). The FMLA entitles eligible employees to reinstatement at the end of their FMLA leave to the position held before taking leave or an equivalent position. If the plaintiff meets this burden, then it is defendant's burden to demonstrate that she would have been denied reinstatement even if she had not taken FMLA leave.
>
> The second type of recovery under the FMLA is the "retaliation" theory. This claim arises under 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer to discriminate against an employee who has taken FMLA leave. Retaliation claims are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792. To establish a prima facie case of retaliation under the FMLA, a plaintiff must show: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the adverse action and Plaintiff's exercise of her FMLA rights. After establishing a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. If the employer offers a legitimate, nondiscriminatory reason, the burden is shifted back to plaintiff to establish that the employer's reasons are pretextual. (Most citations omitted).

See also Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir. 2005) (noting the distinction between "interference" claims brought under subdivision (a)(1) and "discrimination or retaliation claims" under subdivision (a)(2)); *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009) (noting that "it is not clear whether firing an employee for requesting FMLA leave should be classified as interference with the employee's FMLA rights, retaliation against the employee for

exercising those rights, or both," and concluding that "firing an employee for [making] a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee").

Availability of a mixed-motive framework for FMLA claims

Discrimination/retaliation claims are subject to the basic mixed-motive/pretext delineation applied to employment discrimination claims brought under Title VII. *See generally Wilson v. Lemington Home for the Aged*, 159 F. Supp.2d 186, 195 (W.D.Pa. 2001) ("In analyzing claims made for retaliation under the FMLA, courts look to the legal framework established for Title VII claims. . . . Thus, a plaintiff may prove FMLA retaliation by direct evidence as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-46 (1989), or indirectly through the burden shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)."); *Baltuskonis v. U.S. Airways, Inc*., 60 F. Supp. 2d 445, 448 (E.D. Pa. 1999) (same).

The distinction between "mixed-motive" cases and "pretext" cases is generally determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant's activity was motivated at least in part by discriminatory animus, and therefore this "mixed-motive" instruction should be given. If the evidence of discrimination is only circumstantial, then defendant can argue that there was no discriminatory animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 10.1.3 should be given. *See generally Conoshenti v. Public Service Electric & Gas Co.,* 364 F.3d 135, 147 (3d Cir. 2004) (applying the *Price Waterhouse* framework in an FMLA discrimination case in which direct evidence of discrimination was presented).

The court in *Miller v. Cigna Corp*., 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA case, distinguished "mixed motive" instructions from "pretext" case instructions as follows:

> Only in a "mixed motives" . . . case is the plaintiff entitled to an instruction that he or she need only show that the forbidden motive played a role, i.e., was a "motivating factor." Even then, the instruction must be followed by an explanation that the defendant may escape liability by showing that the challenged action would have been taken in the absence of the forbidden motive. . . . In all other . . . disparate treatment cases, the jury should be instructed that the plaintiff may meet his or her burden only by showing that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process.

See also Starceski v. Westinghouse Electric Corp., 54 F.3d 1089, 1096, n4 (3d Cir. 1995) (ADEA case):

> An employment discrimination case may be advanced on either a pretext or "mixed-motives" theory. In a pretext case, once the employee has made a prima facie showing of

> discrimination, the burden of going forward shifts to the employer who must articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If the employer does produce evidence showing a legitimate, nondiscriminatory reason for the discharge, the burden of production shifts back to the employee who must show that the employer's proffered explanation is incredible. At all times the burden of proof or risk of non-persuasion, including the burden of proving "but for" causation or causation in fact, remains on the employee. In a "mixed-motives" or *Price Waterhouse* case, the employee must produce direct evidence of discrimination, i.e., more direct evidence than is required for the *McDonnell Douglas/Burdine* prima facie case. If the employee does produce direct evidence of discriminatory animus, the employer must then produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision. In short, direct proof of discriminatory animus leaves the employer only an affirmative defense on the question of "but for" cause or cause in fact. (Citations omitted).

To the extent that *Miller* and *Starceski* held that a mixed-motive framework is available in ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the *Price Waterhouse* mixed-motive framework applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. It is not clear what effect, if any, *Gross* will have on existing Third Circuit precedents recognizing a mixed-motive FMLA theory.

"Same Decision" Affirmative Defense

Section 107 of the Civil Rights Act of 1991 (42 U.S.C. §2000e-(5)(g)(2)(B)) changed the law on "mixed-motive" liability in Title VII actions. Previously, a defendant could escape liability by proving the "same decision" would have been made even without a discriminatory motive. The Civil Rights Act of 1991 provides that a "same decision" defense precludes an award for money damages, but not liability.

There is no indication in the FMLA of an intent to incorporate the "same decision" revision of the Civil Rights Act of 1991. The 1991 amendments apply specifically to actions brought under Title VII, and Title VII does not prohibit discrimination for taking unpaid leave. Accordingly, the pattern instruction sets forth the "same decision" defense as one that precludes liability, and thus differentiates it from the "same decision" defense in Title VII mixed-motive actions. See Comment to Eighth Circuit Pattern Jury Instruction 5.82 ("A defendant may avoid liability in an FMLA case if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave.").

Notice Requirements

For a discussion of notice requirements pertinent to FMLA claims, see the commentary to Instruction 10.1.1.

Serious Health Condition

For a discussion of the term "serious health condition" see the commentary to Instruction 10.0.

10.1.3 Elements of an FMLA Claim— Discrimination —Pretext

Model

In this case [plaintiff] is alleging that [he/she] was discriminated against for exercising the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] exercise of the right to take leave was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].[8]

Second: This condition was a "serious health condition", defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.[9]

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. "Appropriate notice" was given where,

> [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]
>
> [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover, [plaintiff] was not required to give [defendant] a formal written request for anticipated leave.

---

[8] The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member's service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction's discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

[9] If the court wishes to give a more detailed instruction on the term "serious health condition," one is provided in 10.2.1.

Simple verbal notice is sufficient.] The critical question for determining "appropriate notice" is whether the information given to [defendant] was sufficient to reasonably apprise it of [plaintiff's] request to take time off for a serious health condition.

Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not placed in a substantially equivalent position upon [his/her] return from leave][10] [was terminated after returning from leave] [was demoted after returning from leave].

Fifth: [Plaintiff's] taking leave was a determinative factor in [defendant's] decision to [describe adverse employment action].

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] taking leave under the Family Medical Leave Act was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff 's] taking leave, the [adverse employment action] would not have occurred.

Comment

[10] If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

This instruction is to be used when the plaintiff's proof of discrimination is circumstantial rather than direct. In *Miller v. Cigna Corp.,* 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA case, the court discussed the proper instruction to be given in a circumstantial evidence/pretext case:

> A plaintiff . . . who does not qualify for a burden shifting instruction under *Price Waterhouse* [i.e., a "mixed-motive" case] has the burden of persuading the trier of fact by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process. (Quoting *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611 (1993)).

(To the extent that *Miller* contemplated the use of the *Price Waterhouse* framework for ADEA claims, it has been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). For a discussion of mixed-motive claims under the FMLA, see Comment 10.1.2.)

The Court in *Miller* reversed a verdict for the defendant because the trial judge instructed the jury that age must be the "sole cause" of the employer's decision. That standard was too stringent; instead, in a pretext case, "plaintiff must prove by a preponderance of the evidence that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." *See Alifano v. Merck & Co., Inc*., 175 F. Supp.2d 792, 794 (E.D.Pa. 2001) (applying the *McDonnell-Douglas* analysis to an FMLA claim).

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). If the defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for discrimination, or in some other way prove it more likely than not that discrimination motivated the employer. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). The plaintiff retains the ultimate burden of proving intentional discrimination. *Chipolini v. Spencer Gifts, Inc.,* 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (ADEA case) ("The burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer's decision. The plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision."). The factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). The employer's proffered reason can be shown to be pretextual by circumstantial as well as direct evidence. *Chipolini v. Spencer Gifts, Inc.,* 814 F.2d 893 (3d Cir. 1987) (en banc). "To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." *Keller v. Orix Credit Alliance, Inc.,* 130 F.3d 1101, 1109 (3d Cir. 1997).

Notice Requirements

For a discussion of notice requirements under the FMLA, see the commentary to Instruction 10.1.1.

Serious Health Condition

For a discussion of the term "serious health condition" see the commentary to Instruction 10.0.

10.1.4 Elements of an FMLA Claim — Retaliation for Opposing Actions in Violation of FMLA

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because [plaintiff] opposed a practice made unlawful by the Family and Medical Leave Act.

In order to prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer[11]] [testified/agreed to testify in a proceeding] asserting rights under the Family and Medical Leave Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Family and Medical Leave Act claim, but only that [he/she] was acting under a good faith belief that [his/her] [or someone else's] rights under the Family and Medical Leave Act were violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proved by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

---

[11] See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Family and Medical Leave Act.

Comment

The FMLA establishes a cause of action for retaliation that is similar to those provided in other employment discrimination statutes. 29 U.S.C. § 2615(b) provides as follows:

> (b) *Interference with proceedings or inquiries.* It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--
>
> has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to [the FMLA.];
>
> has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA]; or
>
> has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].

Subsection (b) provides a cause of action that is separate from 29 U.S.C. § 2615 (a)(2), which is also referred to as a "retaliation" claim, but is different because it seeks recovery for the plaintiff's having exercised the right to unpaid leave. In contrast, the more traditional retaliation claim of subsection (b) is designed to protect those who complain about conduct that is illegal under the FMLA, or who participate in proceedings seeking recovery for illegal activity under the Act. Potentially subsection (b) could protect a person who is not entitled to or never exercised the right to leave, but who complained about or participated in a proceeding to remedy the violation of the FMLA rights of another person. That is not the case with claims under subsection (a)(2), where recovery is limited to those who actually took or tried to take unpaid leave. See Instructions 10.1.2 and 10.1.3 for claims brought under 29 U.S.C. § 2615(a)(2).

The sparse case law under 29 U.S.C. § 2615(b) indicates that it is to be applied in the same way that other employment discrimination statutes treat retaliation claims. *See, e.g, Buie v. Quad/Graphics,* 366 F.3d 496, 503 (7th Cir. 2004) *(*"We evaluate a claim of FMLA retaliation the same way that we would evaluate a claim of retaliation under other employment statutes, such as the ADA or Title VII.").

Protected Activity

The literal terms of 29 U.S.C. § 2615(b) would appear to limit protected conduct to that involved in a formal proceeding — in contrast to the retaliation provisions of other acts (such as Title VII and the ADEA) which protect informal activity in opposition to prohibited practices under the respective statutes, including informal complaints to an employer.

The Third Circuit has not yet decided whether there is a cause of action for retaliation under 29 U.S.C. § 2615(b) when an employee has informally opposed an employer's action on the ground that it violates the FMLA. But case law construing similar language in the retaliation provision of

the Equal Pay Act indicates that such a provision should be construed broadly so that informal complaints constitute protected activity. See the commentary to Instruction 11.1.2. This instruction therefore includes informal complaints as protected activity. See *Sabbrese v. Lowe's Home Centers, Inc*., 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (finding a valid retaliation claim when the plaintiff was discharged after informally complaining to the employer about being disciplined for taking leave).

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2415 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
>
> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders,* 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers,

> but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.
>
> Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

126 S.Ct. at 2415 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively identical to the FMLA provision on retaliation, supra. This instruction therefore follows the guidelines of the Supreme Court's decision in *White*.

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2413 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any* discrimination by an employer in response to protected activity.

Because the FMLA anti-retaliation provision is substantively identical to the Title VII provision construed in *White* — it prohibits not only "discharge" but broadly prohibits "any other discrimination" — this instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her").

It should be noted, however, that damages for emotional distress and pain and suffering are not recoverable under the FMLA. *Lloyd v. Wyoming Valley Health Care Sys*., 994 F. Supp. 288, 291 (M.D. Pa. 1998) . So, to the extent that retaliatory activity is not job-related, it is probably less likely

to be compensable under the ADEA than it is under Title VII. For further discussion of *White*, see the Comment to Instruction 5.1.7.

Determinative Effect

Instruction 10.1.4 requires the plaintiff to show that the plaintiff's protected activity had a "determinative effect" on the allegedly retaliatory activity. A distinction between pretext and mixed-motive cases has on occasion been recognized as relevant for both Title VII retaliation claims and FMLA claims. For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997) (holding that it was error, in a case that proceeded on a "pretext" theory, not to use the "determinative effect" language). Comment 5.1.7 discusses the possibility of applying a mixed-motive framework to Title VII retaliation claims.

It is unclear whether a mixed-motive framework can appropriately apply to FMLA retaliation claims under Section 2615(b). In the context of another statutory scheme the Supreme Court has criticized the use of a "mixed motive" framework for employment discrimination cases. In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e- 5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

Timing

On the relationship between timing and retaliation in FMLA cases, *see, e.g., Sabbrese v. Lowe's Home Centers, Inc*., 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) ("The court finds that plaintiff met the causal link requirement of his prima facie case by presenting evidence that: (1) he was terminated two weeks after he complained to store management; (2) defendant's management officials gave inconsistent explanations about who authorized his firing; and (3) plaintiff was permitted to continue working after allegedly committing a violation so severe that he could have been immediately terminated.").

10.2.1 FMLA Definitions — Serious Health Condition

Model

The phrase "serious health condition," as used in these instructions, means an illness, injury, impairment, or physical or mental condition that involves:

Set forth any of the following that are presented by the evidence:

[Inpatient care. Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities) due to the inpatient care, or any later treatment in connection with the inpatient care];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, and any later treatment or period of incapacity relating to the same condition, that also involves:

[Insert here the relevant requirement. See Comment for a discussion of the requirements for showing incapacity plus treatment.]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic serious health condition. [See Comment for a discussion of the requirements for showing a chronic serious health condition.]];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective. [[The employee or family member] must be under the continuing supervision of a health care provider, even though [the employee or family member] may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or

on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment.]

Comment

This instruction can be used if the court wishes to provide the jury with more detailed information on what constitutes a serious health condition than that set forth in Instructions 10.1.1-10.1.3. The definition of "serious health condition" is currently provided by 29 C.F.R. § 825.113. Although the Committee will endeavor to update this Comment to reflect subsequent changes in the regulations, readers should keep in mind the need to check for any such changes.

The regulations' definition of "serious health condition" is complicated. It should not be necessary to charge the jury on the all the intricacies of the regulation, because counsel should be able to reach agreement concerning which details are in dispute. Accordingly, some portions of Instruction 10.2.1 simply refer to the relevant portions of the regulation, which are set forth in this Comment.

Incapacity plus treatment

29 C.F.R. § 825.115 provides in part:

> A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> (a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> (1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
>
> (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
>
> (3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term "extenuating circumstances" in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

In a case that was controlled by a prior version of the regulations, the Court of Appeals held that "an employee may satisfy her burden of proving three days of incapacitation through a combination of expert medical and lay testimony." *Schaar v. Lehigh Valley Health Services, Inc.*, 598 F.3d 156, 161 (3d Cir. 2010). The Committee has not attempted to determine whether the *Schaar* holding applies with equal force to cases controlled by the current version of the regulations.

Chronic serious health condition

29 C.F.R. § 825.115 provides in part:

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

...

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

Further provision applicable to pregnancy, prenatal care, and chronic serious health conditions

29 C.F.R. § 825.115(f) provides: "Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the

employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness."

Other relevant provisions in 29 C.F.R. § 825.113

29 C.F.R. § 825.113(c) defines "treatment." 29 C.F.R. § 825.113(d) excludes certain conditions from the definition of "serious health condition."

Health care provider

The definitions section of the FMLA (29 U.S.C. §2611(6)) defines "health care provider" as follows:

> 6) *Health care provider.* The term "health care provider" means--
>
> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
>
> (B) any other person determined by the Secretary to be capable of providing health care services.

The relevant regulations concerning persons determined to be capable of providing health care services can be found at 29 C.F.R. § 825.125.

For case law in the Third Circuit construing the term "serious health condition", *see, e.g., Victorelli v. Shadyside Hospital,* 128 F.3d 184, 190 (3d Cir. 1997)("A factfinder may be able reasonably to find that Victorelli suffers from something more severe than a 'minor ulcer' and as such is entitled to FMLA protection."); *Marrero v. Camden County Board of Social Services*, 164 F. Supp.2d 455, 465 (D.N.J. 2001) (concluding that "there is nothing in the statute or regulations that prevents plaintiff's anxiety and depression from qualifying as a serious condition under the Act. Indeed, the regulations expressly recognize the seriousness of mental illness under certain circumstances.").

10.2.2 FMLA Definitions — Equivalent Position

Model

[Defendant] claims that after returning from leave, [plaintiff] was placed in a position that was equivalent to the one that [he/she] had before taking leave. [Plaintiff] claims that the new position was not equivalent to the old one. Under the Family and Medical Leave Act, the new position is equivalent to the old one if it is virtually identical in terms of pay, benefits and working conditions, including privileges, "perks" and status. It must involve the same or substantially similar duties and responsibilities, and require substantially equivalent skill, effort, responsibility, and authority. [Plaintiff] must prove by a preponderance of the evidence that the new position was not equivalent to the old one.

Comment

The court may wish to use this instruction if there is a dispute on whether the plaintiff was restored to an equivalent position. The instruction tracks the language of the FMLA regulations at 29 C.F.R. § 825.215(a). *See also* 29 C.F.R. §§ 825.215(b) - (f) (providing further detail on the subject). For an application of the "equivalent position" test, *see Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 781 (M.D. La. 2004), where the plaintiff, who was employed as the executive in charge of housekeeping at a hotel, was offered the position of executive in charge of food and beverages upon return from FMLA leave. The court noted that courts have interpreted the "equivalent position" standard narrowly; but it concluded that these two positions were equivalent because the salary and benefits were the same, and both positions "involved supervisory duties and both had the same goal and responsibility -- customer service in and maintenance of the Baton Rouge Marriott in a managerial capacity."

10.3.1 FMLA Defense — Key Employee

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that [he/she] was not restored to [his/her] position [or to an equivalent position] after returning from a leave authorized by the Family and Medical Leave Act, you must then consider [defendant's] defense. The Family and Medical Leave Act permits an employer to deny job restoration to a "key employee" when necessary to protect the employer from substantial and grievous economic injury. [Defendant] contends that it had no obligation to restore [plaintiff] to a position because [plaintiff] was a "key employee" and that [describe defendant's action] was necessary to protect [defendant] from substantial and grievous economic injury.

Your verdict must be for [defendant] if [defendant] proves all of the following by a preponderance of the evidence:

First: That [plaintiff] was a "key employee." [Plaintiff] was a "key employee" within the meaning of the Act if [he/she] was a salaried employee who was among the highest paid 10 percent of all the employees employed by [defendant] within 75 miles of [plaintiff's] worksite. The determination of whether [plaintiff] was among the highest paid 10 percent is to be made as of the time [plaintiff] gave notice of the need for leave.

Second: That failing to restore [plaintiff] to [his/her] former job [or an equivalent position] was necessary to prevent substantial and grievous economic injury to the operations of [defendant]. In determining whether or not [defendant's] action was economically justified in this sense, you may consider factors such as whether [plaintiff] was so important to the business that [defendant] could not temporarily do without [plaintiff] and could not replace [plaintiff] on a temporary basis. You may also consider whether the cost of reinstating [plaintiff] after a leave would be substantial.

Third: That [defendant], when it determined that substantial and grievous injury would occur from [plaintiff's] leave, promptly notified [plaintiff] of its intent to deny restoration of [plaintiff's] job, specifying in the notice [defendant's] contention that [plaintiff] was a "key employee" and restoration of [his/her] job after a leave would cause substantial and grievous economic injury to [defendant].

Comment

An employer may deny job restoration to a "key employee" if the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 U.S.C. §

2614(b) provides as follows:

> (b) *Exemption concerning certain highly compensated employees.*
> (1) *Denial of restoration.* An employer may deny restoration . . . if--
> (A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
> (B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and
> (C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.
> (2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

For a general discussion of "key employees," see 29 C.F.R. § 825.217. The phrase "substantial and grievous economic injury" covers actions that threaten the economic viability of the employer or lesser injuries that cause substantial long-term economic injury. But minor inconveniences and costs that the employer would experience in the normal course of doing business do not constitute "substantial and grievous economic injury." 29 C.F.R. § 825.218(c).

For a case applying the term "key employee," *see Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 783 (M.D. La. 2004), where the court granted summary judgment to the employer because the plaintiff was a key employee and the employer had followed the requirements set out in the regulations:

> To deny restoration to a key employee, an employer must determine that restoring the employee to employment will cause substantial and grievous economic injury to the operations of the employer . . . . The regulations do not provide a precise test for the level of hardship or injury to the employer which must be sustained to constitute a substantial and grievous injury. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.
>
> Plaintiff has not presented any evidence to rebut . . . Columbia Sussex's evidence that it would have suffered substantial and grievous economic injury had it reinstated plaintiff to the position of Executive Housekeeper. In fact, the undisputed evidence shows that plaintiff was relied upon as the Executive Housekeeper at the Baton Rouge Marriott to keep the facilities clean and Columbia Sussex's customers happy. In consideration of this reliance, plaintiff was the third highest paid employee at the facility. When plaintiff left, the facility was suffering, and an educated business decision was made to replace plaintiff . . . Defendant had also determined that reinstating plaintiff would cause it substantial and grievous economic injury if it had to pay two Executive Housekeepers $41,000 each.

10.4.1 FMLA Damages — Back Pay — No Claim of Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights not been violated.

You must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than two years before the date the lawsuit was filed] through the date of your verdict.

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of lost wages to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

"[T]he accrual period for backpay [under the FMLA] is limited by the Act's 2-year statute of limitations (extended to three years only for willful violations), §§ 2617(c)(1) and (2)." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 740 (2003). As the *Hibbs* Court noted, the statute of limitations for recovery under the FMLA is two years, but it is extended to three years if the employer's violation was willful. 26 U.S.C. § 2617(c)(2). The standard for "willfulness" is the same as that applied to the liquidated damages provision in the ADEA, and the statute of limitations provision in the Equal Pay Act, i.e., whether the employer "either knew or showed reckless disregard" for the employee's statutory rights. *See Hoffman v. Professional Med Team,* 394 F.3d 414, 417 (6th Cir. 2005) ("the standard for willfulness under the FMLA extended statute of limitations is whether the employer intentionally or recklessly violated the FMLA."). This instruction is to be used when the plaintiff does not present evidence sufficient to create a jury question on whether the defendant acted willfully. See 10.4.2 for an instruction covering a willful violation of the FMLA.

29 U.S.C.§ 2617(a)(1) provides the following damages for an employee against an employer who violates the FMLA:

> Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected (A) for damages equal to--
> (i) the amount of--
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;
>
> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
> (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer . . . proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of [the FMLA], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii),

respectively[.]

Section 2617(a)(1)(B) authorizes the court to award "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."

In accordance with 29 U.S.C.§ 2617(a), the court must double the amount of back pay damages as liquidated damages, unless the defendant persuades the court that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA— in which case the court has the discretion to limit the award to the amount of damages found by the jury.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.2 FMLA Damages — Back Pay– Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights had not been violated.

[***[Alternative One: For use in cases where the plaintiff asserts back-pay claims based on more than one asserted FMLA violation, and some of those violations occurred earlier than two years prior to the commencement of the lawsuit:]*** In this case, [plaintiff] alleges that [defendant] willfully violated the Family and Medical Leave Act. If [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Family and Medical Leave Act was willful, then this will have an effect on the damages that you must award. I will explain this effect in a minute, but first I will provide you more information on what it means for a violation to be "willful."]

[***[Alternative Two: For use in cases where all alleged FMLA violations occurred more than two years prior to the commencement of the suit:]*** In this case, [plaintiff] alleges that [defendant] willfully violated the Family and Medical Leave Act. You may only find for [plaintiff] in this case if [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Family and Medical Leave Act was willful. Let me now give you more information what it means for a violation to be "willful."]

You must find [defendant's] violation of the Family and Medical Leave Act to be willful if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless disregard for whether [describe challenged action] was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not willful.

[***[For use with Alternative One:]*** If you find that [defendant's] violation of the Family and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Family and Medical Leave Act was not willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than two years before the date the lawsuit was filed] through the date of your verdict.]

[***[For use with Alternative Two:]*** If you find that [defendant's] violation of the Family and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Family and Medical Leave Act was not willful, then you must find for [defendant] in this case.]

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of lost wages to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

The Family and Medical Leave Act provides recovery for two years of lost wages and benefits if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation was willful. 26 U.S.C. § 2617(c)(2). The standard for "willfulness" is the same as that applied to the liquidated damages provision in the ADEA, and the statute of limitations provision in the Equal Pay Act, i.e., whether the employer "either knew or showed reckless disregard" for the employee's statutory rights. *See Hoffman v. Professional Med Team,* 394 F.3d 414, 417 (6th Cir. 2005) ("the standard for wilfulness under the FMLA extended statute of limitations is whether the employer intentionally or recklessly violated the FMLA.").

This instruction is to be used when the plaintiff presents evidence sufficient to create a jury question on whether the defendant willfully violated the FMLA. See Instruction 10.4.1 for the instruction to be used when there is insufficient evidence to create a jury question on willfulness but the plaintiff's claims are nonetheless timely.

29 U.S.C.§ 2617(a) provides the following damages for an employee against an employer who violates the FMLA:

> Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected (A) for damages equal to--
> (i) the amount of--
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;
>
> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
> (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer . . . proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of [the FMLA], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively[.]

Section 2617(a)(1)(B) authorizes the court to award "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."

In accordance with 29 U.S.C.§ 2617(a), the court must double the amount of back pay damages as liquidated damages, unless the defendant persuades the court that the violation was in

good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA— in which case the court has the discretion to limit the award to the amount of damages found by the jury.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.3 FMLA Damages — Other Monetary Damages

Model

The Family and Medical Leave Act provides that if an employee is unable to prove that the employer's violation of the Act caused the employee to lose any wages, benefits or other compensation, then that employee may recover other monetary losses sustained as a direct result of the employer's violation of the Act.

So in this case, if you find that [defendant] has violated [plaintiff's] rights under the Act, and yet you also find that [plaintiff] has not proved the loss of any wages, benefits or other compensation as a result of this violation, then you must determine whether [plaintiff] has suffered any other monetary losses as a direct result of the violation. [Other monetary losses may include the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the burden of proving these monetary losses by a preponderance of the evidence.

Under the law, [plaintiff's] recovery for these other monetary damages can be no higher than the amount that [he/she] would have made in wages or salary for a [twelve-week period][12] during her employment. So you must limit your award for these other monetary damages, if any, to that amount. You must also remember that if [plaintiff] has proved damages for lost wages, benefits or other compensation, then you must award those damages only and [plaintiff] may not recover any amount for any other monetary damages suffered as a result of [describe defendant's conduct].

Finally, the Family and Medical Leave Act does not allow [plaintiff] to recover for any mental or emotional distress or pain and suffering that may have been caused by [defendant's] violation of the Act. So I instruct you that you are not to award the plaintiff any damages for emotional distress or pain and suffering.

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Family and Medical Leave Act provides that "in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee [can be recovered by a plaintiff]." 29

[12] N.B.: In cases involving servicemember family leave under 29 U.S.C. § 2612(a)(3), the relevant period is 26 weeks rather than 12 weeks.

U.S.C. §2617(a). An award for these non-wage-related monetary losses is contingent upon the plaintiff's *not* obtaining an award for lost wages. This instruction therefore provides that the jury is to reach the question of monetary losses other than lost wages only if it finds that the plaintiff has not proven damages for lost wages.

The FMLA does not provide for recovery for emotional distress or pain and suffering. *Lloyd v. Wyoming Valley Health Care Sys*., 994 F. Supp. 288, 291 (M.D. Pa. 1998) (reasoning that "the statute itself by including 'actual monetary compensation' as a separate item of damage places a limited definition on 'other compensation'"; concluding that "the plain meaning of the statute is that 'other compensation' means things which arise as a quid pro quo in the employment arrangement, and not damages such as emotional distress which are traditionally an item of compensatory damages"). *See also Coleman v. Potomac Electric Power Co.,* 281 F. Supp.2d 250, 254 (D.D.C. 2003) :

> Recovery under FMLA is "unambiguously limited to actual monetary losses." *Walker v. United Parcel Service, Inc*., 240 F.3d 1268, 1277 (10th Cir. 2001). Other kinds of damages - punitive damages, nominal damages, or damages for emotional distress - are not recoverable. See *Settle v. S.W. Rodgers Co., Inc*., 998 F. Supp. 657, 665-66 (E.D. Va. 1998) (punitive damages and damages for emotional distress); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772-73 & n.1 (M.D.N.C. 2000), aff'd, adopted 127 F. Supp. 2d 770 (M.D.N.C. 2000) (same).

In accordance with 29 U.S.C.§ 2617(a), the court must double the amount of any damages under the FMLA, as liquidated damages, unless the defendant persuades the court that the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA— in which case the court has the discretion to limit the award to the amount of damages found by the jury.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the

disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.4. FMLA Damages — Liquidated Damages

No Instruction

Comment

Punitive damages cannot be recovered under the FMLA. *Zawadowicz v. CVS Corp*., 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that nothing in the FMLA damages provision, 29 U.S.C. § 2617, authorizes an award of punitive damages)*; Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) (same). 29 U.S.C. § 2617 provides for a mandatory award of liquidated (double) damages for any award under the FMLA. No instruction is necessary on liquidated damages, however, because there is no issue for the jury to decide concerning the availability or amount of these damages. The court simply doubles the award of damages found by the jury.

It should be noted that 29 U.S.C. § 2617 provides that if the defendant proves that its conduct was in good faith and that it had reasonable grounds for believing that the act or omission was not a violation of the FMLA, the "court may, in the discretion of the court, reduce the amount of the liability to" the amount of damages found by the jury. No instruction is necessary on good faith, either, because the question of good faith in this circumstance is a question for "the court." The jury has no authority to reduce an award of liquidated damages under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that any question of reducing liquidated damages is for the court). *Compare* Eighth Circuit Civil Instruction 5.86 (providing an instruction on the good faith defense to liquidated damages).

10.4.5 FMLA Damages — Nominal Damages

No Instruction

Comment

Nominal damages are not available under the FMLA. The court in *Walker v. UPS,* 240 F.3d 1268, 1278 (10th Cir. 2003) explained why nominal damages cannot be awarded under the FMLA, in contrast to Title VII, which authorizes an award of nominal damages:

> Because recovery [under the FMLA] is . . . unambiguously limited to actual monetary losses, courts have consistently refused to award FMLA recovery for such other claims as consequential damages (*Nero v. Industrial Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999)) and emotional distress damages (*Lloyd v. Wyoming Valley Health Care Sys., Inc*., 994 F. Supp. 288, 291-92 (M.D. Pa. 1998)). Thus *Cianci v. Pettibone Corp*., 152 F.3d 723, 728-29 (7th Cir. 1998) held that a plaintiff had no claim under the FMLA where the record showed that she suffered no diminution of income and incurred no costs as a result of an alleged FMLA violation.
>
> Invoking an attempted analogy to Title VII precedents, Walker argues that nominal damages should be allowed in FMLA cases because, just as under Title VII, nominal damages would allow plaintiffs whose rights are violated but who do not suffer any compensable damages to vindicate those rights. While it is true that recent cases have rejected the "no harm, no foul" argument in the Title VII context *(see, e.g., Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997)), that was not always so.
>
> Before the 1991 amendments to the Civil Rights Act, nominal damages (as well as damages for pain and suffering or punitive or consequential damages) were not available for Title VII violations, because the statute then provided for equitable and declaratory relief alone. Nominal damages became available only after 42 U.S.C. § 1981a ("Section 1981a," which governs damages recoverable in cases brought under Title VII) was amended to allow for compensatory damages in such actions (nominal damages are generally considered to be compensatory in nature).
>
> Walker's attempted argument by analogy fails because of the critical difference in statutory language between [29 U.S.C.] Section 2617(a)(1) and the amended Section 1981a. In contrast to the latter, . . . Section 2617(a)(1) does not provide for compensatory damages in general, but is instead expressly limited to lost compensation and other actual monetary losses. Because nominal damages are not included in the FMLA's list of recoverable damages, nor can any of the listed damages be reasonably construed to include nominal

> damages, Congress must not have intended nominal damages to be recoverable under the FMLA.
>
> We are obligated to honor that intent and therefore to countenance the award of only those elements of damages that Congress has deemed appropriate to redress violations of the FMLA. Because Walker has admittedly suffered no actual monetary losses as a result of UPS' asserted violation of the FMLA and has no claim for equitable relief, she has no grounds for relief under that statute.

See also Lapham v. Vanguard Cellular Systems, Inc., 102 F. Supp.2d 266, 269 (M.D.Pa. 2000) (while plaintiff had a cause of action for interference, she suffered no wage or other monetary loss, therefore "she cannot obtain relief under the FMLA and her claim must be dismissed."); *Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) ("It is clear that nominal damages are not available under the FMLA because the statutory language of the FMLA specifically limits recovery to actual monetary losses.").

Instructions For Sex Discrimination Claims Under the Equal Pay Act

Numbering of Equal Pay Act Instructions

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Introductory Note to Equal Pay Act Instructions

These Equal Pay Act instructions vary from the pattern established in the previous employment discrimination instructions. This different structure is due to the following circumstances:

1) An Equal Pay Act plaintiff is not required to prove an intent to discriminate, so there is no basis for a mixed-motive or pretext instruction.

2) There is no cause of action for hostile work environment under the Equal Pay Act, because the Act only grants recovery of equal pay for equal work.

3) There is no separate cause of action for disparate treatment under the Equal Pay Act, because the basic cause of action under the Act is one for disparate treatment in pay.

4) There is no need for separate instructions for definitions, because there is only one basic instruction for an Equal Pay Act claim, and the pertinent definitions are included within it.

5) The damages available in a basic Equal Pay Act claim differ from those available under the other employment discrimination statutes, and more importantly differ from the damages available in a retaliation action. Thus, the damage instructions need to be bifurcated into basic Equal Pay Act claims and retaliation claims.

11.0 Equal Pay Act Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Equal Pay Act, a statute that prohibits an employer from paying women less than men for jobs that require substantially equal work.

Specifically, [plaintiff] claims that she was paid less than (a) male employee(s) even though she performed substantially equal work.

[Defendant] claims that [plaintiff's] job was not substantially equal to the jobs performed by the male employee(s). Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

The central provision of the Equal Pay Act is 29 U.S.C. §206(d)(1), which provides as follows:

(d) Prohibition of sex discrimination.

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Supreme Court in *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), described the intent of the Equal Pay Act:

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry--the fact that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages."

The Equal Pay Act was created to prohibit wage discrimination against women. But the language of the statute is broad enough to permit recovery by a male alleging sex-based wage discrimination. *See, e.g., Board of Regents v. Dawes*, 522 F.2d 380 (8th Cir. 1975) (paying women more than men for substantially equal work violates the Equal Pay Act). These instructions are written using the feminine for the plaintiff, as the case law indicates that virtually all of the plaintiffs are women, but it can of course be modified if the plaintiff is male.

Relationship to Title VII

A claim for sex-based wage discrimination can potentially be brought under either the Equal Pay Act, or Title VII, or both. There are some similarities, and some important differences, between a claim under the Equal Pay Act and a Title VII action for sex-based wage discrimination.

The most important similarity between the two actions is that the affirmative defenses set forth in the Equal Pay Act — (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; and (iv) a differential based on any other factor other than sex — are applicable to Title VII actions for sex-based wage discrimination. This was made clear by the Bennett Amendment to Title VII. See the discussion in *County of Washingtion v. Gunther*, 426 U.S. 161 (1981).

The most important differences between the two actions are:

1. The Equal Pay Act does not require proof of intent to discriminate. *EEOC v. Delaware Dept. of Health and Social Services,* 865 F.2d 1408 (3d Cir. 1989). The plaintiff recovers under the Equal Pay Act by proving that she received lower pay for substantially equal work. In contrast, Title VII disparate treatment claims require proof of an intent to discriminate. See Lewis and Norman, *Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). On the other hand, Title VII does not require the plaintiff to prove the Equal Pay Act statutory requirements of "equal work" and "similar working conditions." In *Gunther, supra,* the Supreme Court explained the importance of retaining Title VII recovery as an alternative to recovery under the Equal Pay Act. The *Gunther* Court recognized that under the Bennett Amendment to Title VII, a claim for sex-based wage discrimination is subject to the affirmative defenses of the Equal Pay Act. But the Court held that a Title VII action is not similarly subject to the statutory requirements of showing "equal work," "similar working conditions," etc. The Court found it important to retain the possibility of recovery for intentional sex-based wage discrimination under Title VII:

> Under petitioners' reading of the Bennett Amendment, only those sex-based wage

> discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief -- no matter how egregious the discrimination might be -- unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Moreover . . . if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioners' interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

452 U.S. at 178-79.

2. Title VII's burden-shifting schemes (see Instructions 5.1.1, 5.1.2) differ from the burdens of proof applicable to an action under the Equal Pay Act. The difference was explained by the Third Circuit in *Stanziale v. Jargowsky,* 200 F.3d 101, 107-108 (3d Cir. 2000), a case in which the plaintiff brought claims under Title VII, the ADEA, and the Equal Pay Act:

> Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm. The plaintiff must first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing "equal work"--work of substantially equal skill, effort and responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1413-14 (3rd Cir. 1989). The burden of persuasion then shifts to the employer to demonstrate the applicability of one of the four affirmative defenses specified in the Act. Thus, the employer's burden in an Equal Pay Act claim -- being one of ultimate persuasion -- differs significantly from its burden in an ADEA [or Title VII] claim. Because the employer bears the burden of proof at trial, in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense "so clearly that no rational jury could find to the contrary." *Delaware Dept. of Health*, 865 F.2d at 1414.
>
> The employer's burden is significantly different in defending an Equal Pay Act claim for an additional reason. The Equal Pay Act prohibits differential pay for men and women when performing equal work "*except where such payment is made pursuant to*" one of the four affirmative defenses. 29 U.S.C. § 206(d)(1) (emphasis added). We read the highlighted language of the statute as requiring that the employer submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could

explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity. See also *Delaware Dept. of Health*, 865 F.2d at 1415 (stating that "the correct inquiry was . . . whether, viewing the evidence most favorably to the [plaintiff], a jury could *only* conclude that the pay discrepancy resulted from" one of the affirmative defenses (emphasis added)). Thus, unlike an ADEA or Title VII claim, where an employer need not prove that the proffered legitimate nondiscriminatory reasons actually motivated the salary decision, in an Equal Pay Act claim, an employer must submit evidence from which a reasonable factfinder could conclude that the proffered reasons actually motivated the wage disparity.

3. The Equal Pay Act exempts certain specific industries from its coverage, including some fishing and agricultural businesses. See 29 U.S.C. § 213. These industries are not, however, exempt from Title VII.

4. In contrast to Title VII, the Equal Pay Act has no coverage threshold defined in terms of the employer's number of employees.

5. The Equal Pay Act carries a longer limitations period for back pay than does Title VII. As stated in Lewis and Norman, *Employment Discrimination Law and Practice* § 7.20 (2d ed. 2001):

> An EPA action is governed by the FLSA [Fair Labor Standards Act] statute of limitations. The FLSA provides a two year statute of limitations for filing, three years in the case of a "willful" violation. These statutes of limitation compare favorably from the plaintiff's perspective with the 180-day or 300-day administrative filing deadlines of Title VII.

Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. § 2000e-5(e), can include "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." *Id.* § 2000e-5(e)(3)(A).[1] This amendment brings the accrual date for a Title VII claim more in line with the EPA mechanism, in which an EPA claim arises each time the employee receives lower pay than male employees doing substantially similar work.

6. "The Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts." *County of Washington v. Gunther,* 452 U.S. 161, 175, n.14 (1981).

---

[1] *See Noel v. Boeing Co.*, 2010 WL 3817090, at *6 (3d Cir. 2010) (holding that Section 2000e-5(e)(3)(A) "does not apply to failure-to-promote claims").

Where the plaintiff claims that wage discrimination is a violation of both Title VII and the Equal Pay Act, it will be necessary to give two sets of instructions, with the proviso that the affirmative defenses provided by the Equal Pay Act (see Instructions 11.2.1-11.2.4) will be applicable to both claims.

11.1.1 Basic Elements of an Equal Pay Act Claim

Model

For [plaintiff] to prevail on her claim against [defendant] for violation of the Equal Pay Act, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Defendant] has employed [plaintiff] and (a) male employee(s) in jobs requiring substantially equal skill, effort and responsibility;

Second: the two jobs are performed under similar working conditions; and

Third: [Plaintiff] was paid a lower wage than the male employee(s) doing substantially equal work.

I will now give you further instructions on these three elements. When evaluating whether [plaintiff] has established these three elements, you must keep in mind that [plaintiff] does not have to prove that [defendant] meant to discriminate against [plaintiff] because she was female. In other words, [plaintiff] does not have to prove intent to discriminate.

In determining whether [plaintiff's] job required substantially equal skill, effort, and responsibility as that of the male employee(s), you must compare the jobs and not the individual employees holding those jobs. It is not necessary that the two jobs be identical; the Equal Pay Act requires proof that the performance of the two jobs demands "substantially equal" skill, effort and responsibility. Insignificant, insubstantial, or trivial differences do not matter and may be disregarded. Job classifications, descriptions, or titles are not controlling. It is the actual work or performance requirements of the two jobs that is important.

In evaluating whether the performance requirements of the two jobs are substantially equal, you must consider the "skill," "effort" and "responsibility" required for these jobs. I will now tell you what is meant by these terms, "skill," "effort" and "responsibility."

Skill:

In deciding whether the jobs require substantially equal "skill" you should consider such factors as the level of education, experience, training and ability necessary to meet the performance requirements of the respective jobs. Jobs may require "equal skill" even if one job does not require workers to use these skills as often as another job. Remember also that you are to compare the jobs, not the employees. So the fact that a male employee has a qualification that [plaintiff] does not is relevant only if the particular qualification is necessary or useful for performing the job.

Effort:

In deciding whether the jobs require substantially equal "effort" you should consider the mental, physical and emotional requirements for performing the job. Duties that result in mental or

physical fatigue or emotional stress, as well as factors that alleviate fatigue and stress, should be weighed together in assessing the relative effort involved. "Equal effort" does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort to do the jobs, they require "equal effort." However, if the job of the male employee(s) require(s) additional tasks that consume a significant amount of extra time and effort that would not be expected of [plaintiff], then the jobs do not require substantially equal effort.

Responsibility:

In deciding whether the jobs involve substantially equal "responsibility," you should consider the degree of accountability expected by the employer for a person filling the jobs, as well as the amount of preparation required to perform the job duties. You should also take into account such things as the level of authority delegated to [plaintiff] as compared to the male employee(s), including whether [plaintiff] and the male employee(s) were equally expected to direct the work of others, or to represent [defendant] in dealing with customers or suppliers. Finally, you should consider the consequences to the employer of effective performance in the respective jobs.

You should note that "skill," "effort" and "responsibility" constitute separate tests, each of which must be met in order for the equal pay requirement to apply.

Similar Working Conditions:

With respect to the second element of [plaintiff's] claim, you must find that the jobs are performed under similar working conditions. The conditions need only be similar; they need not be identical. In deciding whether the working conditions of the two jobs are similar, you should consider the surroundings or the environment in which the work is performed — including any hazards or risks, travel, and weather — to which the respective employees may be exposed. [I instruct you, however, that time of day is not relevant to determining whether working conditions are similar. For example, it is not relevant that some employees work the day shift and some the night shift.]

Wage Comparison:

With respect to the third element of [plaintiff's] claim, [plaintiff] must prove that she was paid a lower wage than (a) male employee(s) doing substantially equal work. In determining the respective levels of pay, you are to consider all forms of compensation, whether called wages, salary, profit sharing, expense account, use of company car, gasoline allowance, or some other name. Fringe benefits are also included in the comparison of wages under the Equal Pay Act, as are vacation and holiday pay and overtime pay.

Comment

To establish a violation of the Equal Pay Act, a plaintiff must prove that the defendant paid

her lower wages than were paid to a man or men for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974). The Court in *Corning Glass* stated that the element of similar working conditions "encompasses two subfactors: 'surroundings' and 'hazards.'" It proceeded to describe these two subfactors:

> "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause.

The *Corning* Court held that under this definition the time of day at which employees worked could not be relevant to working conditions. Thus, the fact that male employees worked the night shift and females the day shift did not make the jobs unequal. *See also EEOC v. State of Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1417 (3d Cir. 1989) (rejecting the argument that working conditions are dissimilar if one employee sells products inside a store and another sells the products outside the establishment).

In the leading case of *Brobst v. Columbus Services Intern*., 761 F.2d 148, 151 (3d Cir. 1985), the court provided a number of guidelines for determining whether the plaintiff has met the burden of proving that she was doing "equal work" within the meaning of the Equal Pay Act. It noted that plaintiffs must establish their case "by proving actual job content; by the same token the employer may not rely merely on the job description." Reviewing Third Circuit case law, the *Brobst* court analyzed the "equal work" requirement as follows:

> As our opinions show, the relevant issue is not the name under which the position was classified but what was actually done. See *Usery v. Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.1970).
>
> In *Wheaton Glass*, we explained that Congress did not intend to limit the applicability of the Equal Pay Act to cases involving identical work. In *Allegheny County*, we quoted the applicable regulation stating, "Congress did not intend that inconsequential differences in job content would be a valid excuse for payments of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment." *Allegheny County*, 544 F.2d at 152 (quoting 29 C.F.R. § 800.120 (1974)). Applying that regulation, we held that although beauticians, unlike barbers, used several tools in addition to the basic scissors, clippers and combs "which use requires more effort of performance", this did not support a finding of unequal work. Id. at 152.
>
> All the courts have agreed that the test is whether the work is "substantially equal". When the Supreme Court reversed this court's determination that work on a night shift was

not equal to the same work performed on a day shift, it took a pragmatic approach to the issue of equality, holding that inspection work whether performed during the day or night is "equal work" within the meaning of the Act. *Corning Glass Works v. Brennan*, 417 U.S. at 202-03.

> The crucial finding on the equal work issue is whether the jobs to be compared have a "common core" of tasks, i.e., whether a significant portion of the two jobs is identical. The inquiry then turns to whether the differing or additional tasks make the work substantially different. . . . Given the fact-intensive nature of the inquiry, summary judgment will often be inappropriate.

For other cases in the Third Circuit discussing the concept of "equal work", *see, e.g., Angelo v. Bacharach Instrument Co.,* 555 F.2d 1164, 1172 (3d Cir. 1977) (noting that "mechanical and surface similarities are inadequate to establish the equality of two positions"); *Welde v. Tetley, Inc.,* 864 F. Supp. 440, 442 (M.D.Pa. 1994) (noting that the term "skill" "includes an assessment of such factors as experience, training and ability"; "effort" "refers to the physical or mental exertion needed to perform a job"; "responsibility" "concerns the degree of accountability required in performing a job, with emphasis on the importance of the job obligation"; and that the three terms — skill, effort and responsibility — "constitute separate tests, each of which must be met in order for the equal pay standard to apply").

For a definition of "wages," see 29 C.F.R. § 1620.10:

> Under the EPA, the term "wages" generally includes all payments made to [or on behalf of] an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment. . . . [V]acation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest or other days or hours in excess or outside of the employee's regular days or hours of work are deemed remuneration for employment and therefore wage payments that must be considered in applying the EPA, even though not a part of the employee's "regular rate."

11.1.2 Equal Pay Act — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against her because she opposed a practice made unlawful by the Equal Pay Act.

To prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer[2]] [testified/agreed to testify in a proceeding] asserting rights under the Equal Pay Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Equal Pay Act claim, but only that she was acting under a good faith belief that [her] [or someone else's] rights under the Equal Pay Act were violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

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[2] See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Equal Pay Act.

Comment

29 U.S.C. § 215(a)(3), a provision of the Fair Labor Standards Act, establishes a cause of action for retaliation against employees who assert rights under the Equal Pay Act or the FLSA. Section 215(a)(3) provides that it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding . . ."

Protected Activity

The literal terms of the statute would appear to limit protected conduct to that involved in a formal proceeding — in contrast to the retaliation provisions of other acts (such as Title VII and the ADEA) which protect any act in opposition to prohibited practices under the respective statutes, including informal complaints to an employer.

The Third Circuit has not yet decided whether there is a cause of action for retaliation when an employee has informally opposed an employer's action on the ground that it violates the Equal Pay Act. But several district courts within the Circuit, as well as most of the other Courts of Appeal, have held that Section 215(a)(3) should be construed broadly to protect informal complaints from retaliation. The district court in *Dougherty v. Ciber, Inc.,* 2005 WL 2030473 at *3 (M.D.Pa. 2005), provides this analysis of the statute and the case law:

> The United States Court of Appeals for the Third Circuit has not directly addressed the issue of whether making an informal complaint to an employer constitutes a protected activity under section 215(a)(3). Although some courts have narrowly construed the language of section 215(a)(3), many circuits give effect to the remedial nature of the FLSA by affording broad employee protection through a liberal interpretation of section 215(a)(3). See, e.g., *Valerio v. Putnam Assoc., Inc*., 173 F.3d 35, 42-43 (1st Cir.1999) (finding that "filed any complaint" encompasses more than filings with a government agency such that filing of a complaint with an employer may give rise to a retaliation claim); *Lambert v. Ackerly*, 180 F.3d 997, 1005 (9th Cir.1999) (holding that "filed any complaint" "extends to employees who complain to their employer about an alleged violation of the Act"); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989-90 (6th Cir.1992) (holding that plaintiff's oral complaint to her employer was sufficient to trigger the protection of § 215(a)(3)); *Love v. RE/MAX of Am., Inc*., 738 F.2d 383, 387 (10th Cir.1984) (holding that § 215(a)(3) "also applies to the unofficial assertion rights through complaints at work"); *EEOC v. White & Son Enters*., 881 F.2d 1006, 1011 (11th Cir.1975) (concluding that even though the aggrieved parties did not file a formal complaint with a government agency, "the unofficial complaints expressed by the women to their employer about unequal pay constitute an assertion of rights protected under the [FLSA]").
>
> Similarly, the United States Court of Appeals for the Third Circuit has instructed that the language of the anti-retaliation provision should be construed liberally. *Brock v.*

Richardson, 812 F.2d 121, 123-24 (3d Cir.1987) (holding that the remedial provisions of the Fair Labor Standards Act "must not be interpreted or applied in a narrow, grudging manner")). In *Brock*, an employee was discharged because the employer mistakenly believed that the employee filed a complaint with the Department of Labor. The Third Circuit concluded that the discharge created the "same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations." Id. at 125; see also *Fogarty v. Boles,* 121 F.3d 886, 891 (3d Cir.1997) (holding that because the FLSA is aimed at eliminating an atmosphere of intimidation, the discharge of employees under the mistaken impression that they had participated in protected statutory activity is enough to establish a violation of the Act). The Third Circuit noted that courts have looked to the "animating spirit" of the anti-retaliation provision in "applying it to activities that might have not been explicitly covered by the language" of section 215(a)(3). *Brock*, 812 F.3d at 124. Further, the Court reasoned that the FLSA was designed to encourage employees to report suspected violations and therefore "the key to construing the anti-retaliation provision is the need to prevent employees' fear of economic retaliation for voicing grievances about substandard conditions." Id.

In applying the interpretation announced in *Brock*, several district courts within the Third Circuit have held that informal complaints to employers are protected activities under section 215(a)(3). *See, e.g., Chennisi v. Communications Constr. Group*, 2005 WL 387594, at *2 (E.D.Pa. Feb.17, 2005); *Coyle v. Madden*, No. 03-4433, 2003 WL 22999222 (E.D.Pa. Dec.17, 2003). In concluding that an internal complaint to an employer regarding a violation of the FLSA is a protected activity under § 215(a)(3), one court in the Eastern District reasoned that in order to achieve the "remedial and humanitarian" purpose of the FLSA, it is necessary to make an internal complaint a protected activity. *Chennisi*, 2005 WL 387594, at *2 . Under a narrower construction, informal settlement of complaints would be discouraged, as an employee would be required to take legal action in order to preserve her FLSA rights. Accordingly, this Court agrees that the Third Circuit's liberal interpretation of the phrase "filed any complaint" affords employees who make informal complaints protection under section 215(a)(3).

Accordingly, the instruction lists informal complaints to the employer as one of the activities protected from retaliation by the employer.

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2415 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

We speak of *material* adversity because we believe it is important to separate

significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders,* 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.

Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

126 S.Ct. at 2415 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively identical to the Equal Pay Act provision on retaliation, supra. This instruction therefore follows the guidelines of the Supreme Court's decision in *White*.

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 126 S.Ct. 2405, 2413 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any* discrimination by an employer in response to protected activity.

Because the Equal Pay Act anti-retaliation provision is substantively identical to the Title VII provision construed in *White* — it prohibits not only "discharge" but broadly prohibits "any other discrimination" — this instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her"). For further discussion of *White,* see the Comment to Instruction 5.1.7.

Damages

It is important to note that the damages available for retaliation differ from the damages available for a violation of the Equal Pay Act itself. Under the Equal Pay Act, the plaintiff is entitled to the pay that she should have received for equal work, with that figure doubled as liquidated damages. See Instructions 11.3.1-11.3.2. A cause of action for retaliation does not seek equal pay recovery per se; indeed a person may engage in protected activity by complaining about wage discrimination even if that person is not the victim of the wage discrimination. The damages asserted in a retaliation claim are those suffered by the plaintiff from the retaliatory act. Thus, the damages in a retaliation cause of action are the same as those provided in any other action for damages, e.g., pain and suffering, lost wages, etc. See Instruction 11.3.7.

Determinative Effect

Instruction 11.1.2 requires the plaintiff to show that the plaintiff's protected activity had a "determinative effect" on the allegedly retaliatory activity. This language is similar to that provided in Instruction 5.1.7 for Title VII retaliation claims. In the context of Title VII retaliation claims, courts have in the past recognized a distinction between pretext and mixed-motive cases. For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997) (holding that it was error, in a

case that proceeded on a "pretext" theory, not to use the "determinative effect" language). Comment 5.1.7 discusses the possibility of applying a mixed-motive framework to Title VII retaliation claims.

The court of appeals has not applied a mixed-motive framework to Equal Pay Act retaliation claims, and it is unclear whether such a framework can appropriately apply to such claims. In the context of another statutory scheme the Supreme Court has criticized the use of a "mixed motive" framework for employment discrimination cases. In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at Section 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

11.2.1 Equal Pay Act Defenses — Seniority System

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide seniority system. In order to establish that a seniority system exists, [defendant] must show that it uses a system that gives employees rights and benefits that improve the longer they work for [defendant].

In determining whether [defendant] has demonstrated a bona fide seniority system, you should consider that a valid seniority system ordinarily includes rules that

1. define when the seniority time clock begins ticking;

2. specify how and when a particular person's seniority may be lost;

3. define which time will count toward the accrual of seniority and which will not;

4. specify the types of employment conditions that will be governed by seniority and those that will not.

For [defendant] to successfully demonstrate a bona fide seniority system, [defendant] must regularly consider seniority rather than doing so randomly or on a case-by-case basis, and [defendant] must apply its system uniformly in its decisions.

[[Plaintiff] contends that [defendant's] seniority system was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] seniority system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide seniority system, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

Wage differentials based on a bona fide seniority system do not violate the Equal Pay Act. 29 U.S.C.A. § 206(d)(1). *See, e.g., Strag v. Board of Trustees*, 55 F.3d 943, 948 (4th Cir.1995); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.1995). In order to be relied on as an affirmative dense, the seniority system must be applied fairly among all employees unless there are defined exceptions that

are known and understood by the employees. *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.1995) (if seniority system is to be relied upon as affirmative defense, employer must be able to identify standards for measuring seniority that are systematically applied and observed).

The instruction provides for the possibility that the plaintiff will introduce evidence that the defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer intended to discriminate. Such a showing, however, may be used to establish that an employer's reliance on an affirmative defense is merely a pretext for discrimination." The court favorably cited the opinion in *Maxwell v. City of Tucson,* 803 F.2d 444, 446 (9th Cir. 1986), which stated that "the appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer's stated purpose as well as its other practices."

Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay. *See Stanziale v. Jargowsky,* 200 F.3d 101, 107-08 (3d Cir. 2000) ("Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School,* 136 Fed. Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that a factor other than sex caused them to set the salaries that they did" and giving no indication that the plaintiff has the burden of proving pretext by a preponderance of the evidence).[3] Accordingly, the instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

[3]At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley,* 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the plaintiff.

11.2.2 Equal Pay Act Defenses — Merit System

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide merit system.

In order to establish the existence of a bona fide merit system, [defendant] must show an organized and structured procedure under which employees are systematically evaluated according to established standards that are designed to determine the relative merits of the employees. To be a bona fide merit system, the system must reward persons because they performed better; the reward must not be based upon their positions, but upon their personal performance. In order to be valid, [defendant] must inform its employees of the existence of the merit system, either by writing or in some other way, and it must not be based upon gender.

[[Plaintiff] contends that [defendant's] merit system was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] merit system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide merit system, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

A merit system is an affirmative defense under the Equal Pay Act. 29 U.S.C.A. § 206(d)(2). A merit system is an organized, structured procedure under which employees are evaluated systematically according to predetermined criteria. *Ryduchowski v. Port Authority*, 203 F.3d 135, 142-43 (2d Cir. 2000). An employer must show that its merit system is administered, if not formally, at least systematically and objectively. *Maxwell v. City of Tucson,* 803 F.2d 444, 447 (9th Cir.1986). The mere existence of a written set of job descriptions, regularly evaluated, does not constitute a "merit system" where there is no organized means of advancement or reward for merit. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 345-46 (7th Cir.1988).

The existence of the merit system must be communicated to the affected employees. *Ryduchowski v. Port Authority,* 203 F.3d 135, 143 (2d Cir. 2000) (employees must be aware of merit system and merit system must not be gender-based); *EEOC v. Whitin Machine Works*, 635 F.2d 1095, 1098 n.6 (4th Cir.1980) (defendant's burden of establishing a merit system was not met where defendant maintained no written guidelines and had "failed to communicate the essential

components of the putative sex neutral pay system to its employees").

The instruction provides for the possibility that the plaintiff will introduce evidence that the defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer intended to discriminate. Such a showing, however, may be used to establish that an employer's reliance on an affirmative defense is merely a pretext for discrimination." The court favorably cited the opinion in *Maxwell v. City of Tucson,* 803 F.2d 444, 446 (9th Cir. 1986), which stated that "the appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer's stated purpose as well as its other practices."

Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay. *See Stanziale v. Jargowsky,* 200 F.3d 101, 107-08 (3d Cir. 2000) ("Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School,* 136 Fed. Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that a factor other than sex caused them to set the salaries that they did" and giving no indication that the plaintiff has the burden of proving pretext by a preponderance of the evidence).[4] Accordingly, the instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

[4]At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley,* 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.2.3 Equal Pay Act Defenses — System Measuring Earnings By Quantity or Quality

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide system that measures employee earnings by quantity or quality of the work.

In order to prove the existence of a bona fide system measuring quantity or quality, [defendant] must show that such a system is in place and has been applied regularly and consistently. A valid system under this exception measures the employee's earnings by the quantity or quality of each employee's production.

The quantity test refers to equal dollar per unit compensation rates. [Defendant] is not liable for wage discrimination if it has implemented a system under which two employees receive the same pay rate but one receives more total compensation because that employee produces more.

The quality test refers to increased compensation for higher quality products. [Defendant] is not liable for wage discrimination if it regularly rewards employees of both sexes equally for producing higher quality products through compensation incentives.

[[Plaintiff] contends that [defendant's] system of measuring quantity or quality was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide system tying wages to quantity or quality, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

The Equal Pay Act provides an affirmative defense if the employer has a system under which a comparable employee receives more total compensation because he produces more value for the employer. 29 U.S.C.A. § 206(d)(3). Thus, in *Hodgson v. Robert Hall Clothes, Inc.,* 473 F.2d 589 (3d Cir. 1973), the court held that an affirmative defense for unequal pay had been established where one clothing department in a store was more profitable than another.

The instruction provides for the possibility that the plaintiff will introduce evidence that the defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer intended to discriminate. Such a showing, however, may be used to establish that an employer's reliance on an affirmative defense is merely a pretext for discrimination." The court favorably cited the opinion in *Maxwell v. City of Tucson,* 803 F.2d 444, 446 (9th Cir. 1986), which stated that "the appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer's stated purpose as well as its other practices."

Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay. *See Stanziale v. Jargowsky,* 200 F.3d 101, 107-08 (3d Cir. 2000) ("Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School,* 136 Fed. Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that a factor other than sex caused them to set the salaries that they did" and giving no indication that the plaintiff has the burden of proving pretext by a preponderance of the evidence).[5] Accordingly, the instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

[5]At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley,* 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.2.4 Equal Pay Act Defenses — Factor Other Than Sex

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a factor other than sex. Specifically, [defendant] claims that the difference in pay is attributable to [employee's education] [employee's experience] [training programs in which employees participate] [any other factor other than sex on which defendant has presented sufficient evidence to raise a jury question]. To establish that this defense, [defendant] must prove that [plaintiff's] sex played no part in the difference in wages.

[[Plaintiff] contends that [defendant's] explanation for the difference in pay is only a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] explanation is valid or instead is a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of [describe defendant's explanation], your verdict must be for [defendant]. However, if you determine that [defendant] has failed to prove that the difference in pay was caused by this factor other than sex, you must decide in favor of [plaintiff].

Comment

29 U.S.C.A. § 206(d) provides for a catch-all affirmative defense: plaintiff is not entitled to recovery of equal pay if the defendant can prove that the disparity in pay was due to a factor other than sex. The Third Circuit has held that in order for the defendant to meet its burden, it must show "that the proffered reasons actually motivated the wage disparity." *Stanziale v. Jargowsky,* 200 F.3d 101, 107-08 (3d Cir. 2000).

A "factor other than sex" can be found when the pay disparity "results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." *Glenn v. General Motors Corp.,* 841 F.2d 1567, 1571 (11th Cir. 1988). An employer does not establish an affirmative defense by claiming that "market forces" justify a disparity in pay for equal work, i.e., that men had to be paid higher because otherwise they would not have taken the job. *Corning Glass Works v. Brennan,* 417 U.S. 188, 205 (1974); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991).

Education

Differences in education may justify differences in wages, but only where the education is relevant to successful performance of the job. See 29 C.F.R. § 1620.15 ("Possession of a skill not needed to meet requirements of the job cannot be considered in making a determination regarding equality of skill."). *See, e.g., Glunt v. GES Exposition Services, Inc*., 123 F. Supp.2d 847, 860-61 (D.Md. 2000) (additional formal education is a bona fide reason under the Equal Pay Act for paying different wages; however, the defense is applicable only when superior formal education is actually relevant and necessary to the job in question); *Bullock v. Pizza Hut, Inc*., 429 F. Supp. 424, 430 (M.D.La.1977) (fact that one male manager had three years of college did not justify disparity between his salary and female plaintiffs with better performance records absent showing that a college education was a prerequisite to employment as manager or that employer derived any great benefit from manager having such qualifications).

Experience:

Less experience can be a legitimate factor other than sex for lower pay. *See, e.g., EEOC v. New York Times Broadcasting Service, Inc*., 542 F.2d 356, 359-60 (6th Cir.1976) (evidence that starting salaries paid to new employees bore direct relationship to prior broadcast experience was sufficient to show that discrepancy in pay was not based on considerations of sex); *Stanley v. University of Southern California*, 178 F.3d 1069, 1075 (9th Cir.1999) (male coach had coached Olympic team, written book on basketball, and had 14 years more experience than the plaintiff, the coach of the women's basketball team).

Training Program:

Wage differentials arising because one worker is participating in a bona fide training program have been found to be based on a factor other than sex. *See, e.g., Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648, 654 (5th Cir.1969). A training program must have substance and significance independent of the trainee's regular job. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1047 (5th Cir. 1973) (training program coterminous with "man's work" cannot qualify as a factor other than sex).

Pretext:

The instruction provides for the possibility that the plaintiff will introduce evidence that the defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer intended to discriminate. Such a showing, however, may be used to establish that an employer's reliance on an affirmative defense is merely a pretext for discrimination." The court favorably cited the opinion in *Maxwell v. City of Tucson,* 803 F.2d 444, 446 (9th Cir. 1986), which stated that "the appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer's stated purpose as well as its other practices."

Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate

reason for the discrepancy in pay. *See Stanziale v. Jargowsky,* 200 F.3d 101, 107-08 (3d Cir. 2000) ("Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School,* 136 Fed. Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that a factor other than sex caused them to set the salaries that they did" and giving no indication that the plaintiff has the burden of proving pretext by a preponderance of the evidence).[6] Accordingly, the instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

[6]At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley,* 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.3.1 Equal Pay Act Damages — General Compensatory Damages

No Instruction

Comment

29 U.S.C. § 216(b) provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and "an additional equal amount as liquidated damages." There is no statutory authority for an award of damages such as for emotional distress, pain and suffering, or lost opportunity. Accordingly, no instruction is provided.

It should be noted, however, that general compensatory damages are available if the cause of action is for retaliation rather than unequal pay. A damages instruction for retaliation is provided *infra*. See Instruction 11.3.7.

11.3.2 Equal Pay Act Damages — Back Pay — Non-Willful Violations

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she was paid less than [name(s) of male employee(s)] for performing substantially equal work, [and if you find that [defendant] has failed to show that the wage differential was based on a permissible factor on which I previously instructed you] then you must award damages to [plaintiff]. [Plaintiff] has the burden of proving the amount of those damages by a preponderance of the evidence.

[*Instruct as follows if the plaintiff's pay is compared to a single male employee:*

You must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.**]**

[*Instruct as follows if the plaintiff's pay is compared to more than one male employee:*

You must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.**]**

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Equal Pay Act provides recovery for two years of wage differential if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation is willful. 29 U.S.C. § 255(a). This instruction is to be used when the plaintiff does not present evidence sufficient to create a jury question on whether the defendant acted willfully. See 11.3.3 for an instruction covering a willful violation of the Equal Pay Act.

Where the plaintiff compares her salary to more than one male employee, most courts have held that the proper amount of damages is the difference between the plaintiff's pay and the average amount of pay earned by the male comparables as a group. *See, e.g., Melanson v. Rantoul,* 536 F. Supp. 271 (D.R.I. 1982); *Bullock v. Pizza Hut, Inc.,* 429 F. Supp. 424, 431 (M.D. La. 1977) (stating that applying averages "best serves the interest of justice"). At least one court, however, has held that damages should be assessed by comparing the plaintiff's wages "to the highest male salary being paid for the job at the time of performance." *Grimes v. Athens Newspaper, Inc.,* 604 F. Supp. 1166, 1168 (M.D.Ga. 1985). There appears to be no Third Circuit case law on this point.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

11.3.3 Equal Pay Act Damages — Back Pay — Willful Violations

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she was paid less than [name(s) of male employee(s)] for performing substantially equal work, [and if you find that [defendant] has failed to show that the wage differential was based on a permissible factor on which I previously instructed you] then you must award damages to [plaintiff]. [Plaintiff] has the burden of proving the amount of those damages by a preponderance of the evidence.

In this case, [plaintiff] alleges that [defendant] willfully violated the Equal Pay Act. If [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Equal Pay Act was willful, then this will have an effect on the damages that you must award. I will explain this effect in a minute, but first I will provide you more information on what it means to be a "willful" violation.

You must find [defendant's] violation of the Equal Pay Act to be willful if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless disregard for whether [plaintiff's] underpayment was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not willful.

[*Instruct as follows if the plaintiff's pay is compared to a single male employee:*

If you find that [defendant's] violation was willful, then you must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Equal Pay Act was not willful, then you must award [plaintiff] the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to damages for an extra year if she proves that [defendant's] violation was willful.**]**

[*Instruct as follows if the plaintiff's pay is compared to more than one male employee:*

If you find that [defendant's] violation was willful, then you must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both

wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Equal Pay Act was not willful, then you must award [plaintiff] the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to damages for an extra year if she proves that [defendant's] violation was willful.**]**

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Equal Pay Act provides recovery for two years of wage differential if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation was willful. 29 U.S.C. § 255(a). This instruction is to be used when the plaintiff presents evidence sufficient to create a jury question on whether the defendant acted willfully. See Instruction 11.3.2 for the instruction to be used when there is insufficient evidence to create a jury question on willfulness.

In *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988), the Court held that the standard for "willfulness" under the Equal Pay Act is the same as the standard for "willfulness" required for an award of liquidated damages under the ADEA. That standard is met if the employer "either knew or showed reckless disregard" for the matter of whether its conduct violated the law. This instruction accordingly uses that definition of "willfulness." *See EEOC v. State of Delaware Dept. of Health and Social Services,* 865 F.2d 1408, 1419 (3d Cir. 1989) (affirming a jury verdict on willfulness, and an award for a third year of damages, where the jury could have found that a personnel director "must have entertained a strong suspicion of an Equal Pay Act violation which, with the most cursory investigation, would have led to actual knowledge."). *See also Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985) (adopting the standard of "either knew or showed reckless disregard" for determination of "willfulness" under the liquidated damages provision of the ADEA).

Where the plaintiff compares her salary to more than one male employee, most courts have held that the proper amount of damages is the difference between the plaintiff's salary and the average amount of salary earned by the male comparables as a group. *See Melanson v. Rantoul,* 536 F. Supp. 271 (D.R.I. 1982); *Bullock v. Pizza Hut, Inc.,* 429 F. Supp. 424, 431 (M.D. La. 1977) (stating that applying averages "best serves the interest of justice"). At least one court, however, has

held that damages should be assessed by comparing the plaintiff's wages "to the highest male salary being paid for the job at the time of performance." *Grimes v. Athens Newspaper, Inc.,* 604 F. Supp. 1166, 1168 (M.D.Ga. 1985). There appears to be no Third Circuit case law on this point.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

11.3.4 Equal Pay Act Damages — Liquidated Damages

No Instruction

Comment

29 U.S.C. § 216 provides for an automatic doubling of back pay damages awarded for a violation of the Equal Pay Act. No instruction is necessary on liquidated damages, because there is no issue for the jury to decide concerning the availability or amount of liquidated damages. The court simply doubles the award of back pay damages found by the jury.

It should be noted that 29 U.S.C. § 260 provides that "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 he had reasonable grounds for believing that his act or omission was not a violation of the [Equal Pay Act], the court may, in its sound discretion" reduce the award of liquidated damages (but not the underlying damages award). No instruction is necessary on good faith, either, because the question of good faith in this circumstance is a question for "the court." The jury has no authority to reduce an award of liquidated damages under the Equal Pay Act. *See, e.g., Glenn v. General Motors Corp.,* 841 F.2d 1567, 1573 (11th Cir. 1988) ("An employer may avoid the mandatory nature of an award of liquidated damages if the court chooses not to make an award where the employer shows its actions were in good faith and shows it has reasonable grounds for believing that those actions did not violate the Equal Pay Act."); *Reich v. Tiller Helicopter Services, Inc*., 8 F.3d 1018, 1031 (5th Cir.1993) (question of "good faith under 29 U.S.C.A. § 260 is an issue that the court must resolve").

11.3.5 Equal Pay Act Damages — Front Pay

No Instruction

Comment

Front pay is a substitute remedy when reinstatement is not feasible. See the commentary to Instruction 8.4.4. An Equal Pay Act claim does not involve the plaintiff's discharge. Accordingly, front pay cannot be awarded under the Equal Pay Act. See 29 U.S.C. § 216(b), which provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and "an additional equal amount as liquidated damages" with no mention of front pay.

11.3.6 Equal Pay Act Damages — Nominal Damages

No Instruction

Comment

The gravamen of an Equal Pay Act claim (as distinct from a retaliation claim under the Equal Pay Act) is that the plaintiff was paid less than male employees for equal work. Therefore it would seem impossible for a jury to find that the defendant violated the plaintiff's rights under the Equal Pay Act and yet the plaintiff is entitled only to nominal damages. Accordingly, no instruction is included.

11.3.7 Equal Pay Act Damages — Damages for Retaliation

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she suffered an adverse employment action as a result of [describe protected activity] then you must determine the amount of damages suffered by [plaintiff] as a result of [defendant's] retaliation. Damages for retaliation are distinct from any damages [plaintiff] may be entitled to for having been paid a lower wage than male employees for equal work. [Plaintiff] has the burden of proving damages from the retaliation by a preponderance of the evidence.

The following are the kinds of damages that the law may allow a plaintiff to recover when an employer retaliates against the plaintiff for engaging in protected activity under the Equal Pay Act:

1. Compensatory damages.

2. Nominal damages.

3. Punitive damages.

Not all of these damages are necessarily available in any single action. Remember that [plaintiff] has the burden of proving by a preponderance of the evidence that she is entitled to any of the damages that the law makes potentially available to her for an act of retaliation.

I will now instruct you on each of the kinds of damages that are potentially recoverable by [plaintiff] for an act of retaliation.

Compensatory damages:

If you find [defendant] liable for retaliation, then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate her for any injury she actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the retaliation had not occurred.

[Plaintiff] must show that the damage she claimed would not have occurred without [defendant's] retaliation. [Plaintiff] must also show that [defendant's] act of retaliation played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act of retaliation. [There can be more than one cause of an injury. To find that [defendant's] retaliation caused [plaintiff]'s injury, you need not find

that [defendant's] act was the nearest cause, either in time or space. However, if [plaintiff's] claimed injury was caused by a later, independent event that intervened between [defendant's] act of retaliation and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

[Plaintiff] claims the following items of damages *[include any of the following that are warranted by the evidence]*:

- Physical harm to [plaintiff] during and after the events at issue, including ill health, physical pain, disability, or discomfort, and any such physical harm that [plaintiff] is reasonably certain to experience in the future. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.

- Emotional and mental harm to [plaintiff] during and after the events at issue, including humiliation, and mental anguish, and any such emotional and mental harm that [plaintiff] is reasonably certain to experience in the future.

- The reasonable value of the medical [psychological, hospital, nursing, and similar] care and supplies that [plaintiff] reasonably needed and actually obtained, and the reasonable value of such care and supplies that [plaintiff] is reasonably certain to need in the future.

- The [wages, salary, profits, reasonable value of the working time] that [plaintiff] has lost because of [defendant's] retaliation, and the [wages, etc.] that [plaintiff] is reasonably certain to lose in the future because of that retaliation. [7]

As I instructed you previously, [plaintiff] has the burden of proving damages by a preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of her losses with mathematical precision; it requires only as much definiteness and accuracy as circumstances permit.

[You are instructed that [plaintiff] has a duty under the law to "mitigate" her damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by [defendant]. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to her, then you must reduce the amount of [plaintiff's] damages by the amount that could have been reasonably obtained if she had taken

[7] If the court orders the plaintiff's reinstatement, then the instruction on future lost wages should not be given.

advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Nominal Damages:

If you return a verdict for [plaintiff] on her retaliation claim, but [plaintiff] has failed to prove actual injury resulting from the act of retaliation and therefore is not entitled to compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if she suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Punitive Damages:

[Plaintiff] claims that [defendant's] act of retaliation was done with malice or reckless indifference to [plaintiff's] federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and so received nominal rather than compensatory damages.]

An award of punitive damages is permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference in retaliating against [plaintiff] after she [describe protected activity]. An action is with malice if a person knows that it violates the federal law prohibiting retaliation and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

[For use where the defendant raises a jury question on good-faith attempt to comply with the law:

But even if you make a finding that there has been an act of retaliation with malice or reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant]

proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law, by adopting policies and procedures designed to prevent unlawful retaliation such as that suffered by [plaintiff].**]**

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied [and that [defendant] has not proved that it made a good-faith attempt to comply with the law], then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts it may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to those [defendant] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant] should be punished for its wrongful conduct, and the degree to which an award of one sum or another will deter [defendant] or others from committing similar wrongful acts in the future.

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon the defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant], you may consider the financial resources of [defendant] in fixing the amount of those damages.]

Comment

29 U.S.C. § 216(b) provides for the following recovery for a violation of the anti-retaliation provision of the Equal Pay Act (or the Fair Labor Standards Act):

> "such legal or equitable relief as may be appropriate to effectuate the purposes of [the anti-retaliation provision] including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."

The instruction authorizes the jury to award all of the damages generally awarded for an injury at common law. Any other remedies, such as reinstatement or promotion, are equitable

remedies left for the court. *See generally Brock v. Richardson,* 812 F.2d 121, 123 (3d Cir. 1987) (stating that the anti-retaliation provision is to be "liberally interpreted" and affirming an award of back pay).

In *Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F. Supp.2d 838, 841 (E.D.Pa. 2001), the court held that punitive damages could be awarded for a violation of the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215, which applies to the Equal Pay Act as well. The court noted that section 216 "authorizes 'legal' relief, a term commonly understood to include compensatory and punitive damages." *See also Travis v. Gary Community Mental Health Center*, 921 F.2d 108, 112 (7th Cir. 1990) ("Compensation for emotional distress, and punitive damages, are appropriate for intentional torts such as retaliatory discharge.").

If the jury awards lost wages for retaliation, it is for the court to double the amount as liquidated damages, subject to reduction by the court if the defendant proves that the violation was in good faith. See the Comment to Instruction 11.3.4.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook,* 938 F.2d 1048, 1051 (9th Cir. 1991)).

Appendix One:

Integrated Instruction and Special Verdict Form – Section 1983 Claim – Excessive Force (Stop, Arrest, or other "Seizure")

Instructions

Section 1983

[Plaintiff] is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal [constitutional] [statutory] rights under color of state law.

Elements of Claim

[Plaintiff] must prove both of the following elements by a preponderance of the evidence:

First: [Defendant] acted under color of state law.

Second: While acting under color of state law, [defendant] deprived [plaintiff] of a federal [constitutional right] [statutory right].

I will now give you more details on action under color of state law, after which I will tell you the elements [plaintiff] must prove to establish the violation of [his/her] federal [constitutional right] [statutory right].

Action Under Color of State Law

The first element of [plaintiff]'s claim is that [defendant] acted under color of state law. This means that [plaintiff] must show that [defendant] was using power that [he/she] possessed by virtue of state law.

A person can act under color of state law even if the act violates state law. The question is whether the person was clothed with the authority of the state, by which I mean using or misusing the authority of the state.

By "state law," I mean any statute, ordinance, regulation, custom or usage of any state. And when I use the term "state," I am including any political subdivisions of the state, such as a county or municipality, and also any state, county or municipal agencies.

[Insert appropriate instruction on action under color of state law. See Instructions 4.4.1 through 4.4.3.]

Deprivation of a Federal Right

[I have already instructed you on the first element of [plaintiff]'s claim, which requires [plaintiff] to prove that [defendant] acted under color of state law.]

The second element of [plaintiff]'s claim is that [defendant] deprived [him/her] of a federal [constitutional right] [statutory right].

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being [arrested] [stopped by police]. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to [make the arrest] [conduct the stop]. Every person has the constitutional right not to be subjected to excessive force while being [arrested] [stopped by police], even if the [arrest] [stop] is otherwise proper.

In this case, [plaintiff] claims that [defendant] used excessive force when [he/she] [arrested] [stopped] [plaintiff]. In order to establish that [defendant] used excessive force, [plaintiff] must prove both of the following things by a preponderance of the evidence:

First: [Defendant] intentionally committed certain acts.

Second: Those acts violated [plaintiff]'s Fourth Amendment right not to be subjected to excessive force.

In determining whether [defendant]'s acts constituted excessive force, you must ask whether the amount of force [defendant] used was the amount which a reasonable officer would have used in [making the arrest] [conducting the stop] under similar circumstances. You should consider all the relevant facts and circumstances (leading up to the time of the [arrest] [stop]) that [defendant] reasonably believed to be true at the time of the [arrest] [stop]. You should consider those facts and circumstances in order to assess whether there was a need for the application of force, and the relationship between that need for force, if any, and the amount of force applied. The circumstances relevant to this assessment can include *[list any of the following factors, and any other factors, warranted by the evidence]*:

- the severity of the crime at issue;
- whether [plaintiff] posed an immediate threat to the safety of [defendant] or others;
- the possibility that [plaintiff] was armed;
- the possibility that other persons subject to the police action were violent or dangerous;
- whether [plaintiff] was actively resisting arrest or attempting to evade arrest by flight;
- the duration of [defendant]'s action;

- the number of persons with whom [defendant] had to contend; and
- whether the physical force applied was of such an extent as to lead to unnecessary injury.

The reasonableness of [defendant]'s acts must be judged from the perspective of a reasonable officer on the scene. The law permits the officer to use only that degree of force necessary to [make the arrest] [conduct the stop]. However, not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

As I told you earlier, [plaintiff] must prove that [defendant] intended to commit the acts in question; but apart from that requirement, [defendant]'s actual motivation is irrelevant. If the force [defendant] used was unreasonable, it does not matter whether [defendant] had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

What matters is whether [defendant]'s acts were objectively reasonable in light of the facts and circumstances confronting the defendant.

[Liability in Connection with the Actions of Another]

[If the case involves a claim that a defendant is liable for the actions of another, insert appropriate instruction here. See Instruction 4.6.1 (supervisory liability); Instruction 4.6.2 (liability for failure to intervene); Instructions 4.6.3 through 4.6.8 (municipal liability).]

Damages

[Insert appropriate instructions on damages here. See Instructions 4.8.1 through 4.8.3.]

Instructions Concerning Verdict Form

A verdict form has been prepared for your convenience. I will review this form with you now, and afterwards you will take it with you to the jury room.

[Form of special verdict read]

In order for you as a jury to answer a question, each juror must agree to the answer. In other words, your answers to each question must be unanimous. Your foreperson will write the unanimous answer of the jury in the space provided after each question, and will date and sign the form of special verdict when completed.

Nothing said in the verdict form is meant to suggest what your verdict should be. You alone have the responsibility for deciding the verdict.

Verdict Form

We, the jury, unanimously find the following by a preponderance of the evidence:

(1) Did [defendant] act under color of state law?

Answer: Yes _____ No _____

IF YOU ANSWERED "YES" TO PART 1, PROCEED TO PART 2. OTHERWISE, PLEASE STOP.

(2) Did [defendant] intentionally commit an act, under color of state law, that violated [plaintiff]'s Fourth Amendment right not to be subjected to excessive force?

Answer: Yes _____ No _____

IF YOU ANSWERED "YES" TO PART 2, PROCEED TO PART 3. OTHERWISE, PLEASE STOP.

(3) Did [defendant]'s act, described in Part (2) above, cause injury to [plaintiff]?

Answer: Yes _____ No _____

IF YOU ANSWERED "YES" TO PART 3, PROCEED TO PART (4)(A), AND SKIP PART (4)(B).

IF YOU ANSWERED "NO" TO PART 3, SKIP PART 4(A) AND PROCEED TO PART 4(B).

(4)(A) Please state the amount that will fairly compensate [plaintiff] for any injury [he/she] actually sustained as a result of [defendant]'s conduct.

Answer: $ _____
(Fill in Dollar Figure)

(4)(B) Because we answered "No" to Part 3, [plaintiff] is awarded nominal damages in the amount of $ 1.00.

AFTER ANSWERING PART 4, PROCEED TO PART 5.

(5)(A) Did [defendant] act maliciously or wantonly in violating [plaintiff]'s rights?

Answer: Yes _____ No _____

IF YOU ANSWERED "YES" TO PART (5)(A), PROCEED TO PART (5)(B). OTHERWISE, PLEASE STOP.

(5)(B) Do you award punitive damages against [defendant]?

Answer: Yes _____ No _____

If yes, in what amount?

Answer: $ _____
(Fill in Dollar Figure)

SO SAY WE ALL, this ___ day of _____, 200[].

_____
Foreperson

Appendix Two: Instructions Covered in Other Sets

As noted previously, the Committee chose the topics for its substantive instructions (concerning Section 1983 claims and employment-related claims) because those topics frequently arise in cases litigated within the Third Circuit. The index that follows lists model instructions from other sources that cover other topics. At the end of this Appendix is a statistical summary showing the frequency with which various types of claims result in completed jury trials in district courts within the Third Circuit.

Instructions for Use in Other Federal Circuits

- 1st Circuit (Criminal) (1997) (available online at http://www.med.uscourts.gov/practices/crimjuryinstrs.htm, and on Westlaw in the FED-JICRIM database)

  - *See also* Judge Hornby's Updated Revisions to the Pattern Criminal Jury Instructions for the District Courts of the First Circuit (2009), available at http://www.med.uscourts.gov/practices/crimjuryinstrs.htm, and Judge Hornby's Draft Civil Instructions, available at http://www.med.uscourts.gov/practices/civjuryinstrs.htm

- 5th Circuit (2006) (available online at http://www.lb5.uscourts.gov/juryinstructions/, and on Westlaw in the FED-JICIV database)

- 6th Circuit (Criminal) (2005, updated 2007) (available online at http://www.ca6.uscourts.gov/internet/crim_jury_insts.htm, and on Westlaw in the FED-JICRIM database)

- 7th Circuit (2005) (available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pattern_jury_instr.html, and on Westlaw in the FED-JICIV database)

  - Existing instructions include Pattern Civil Jury Instructions; Pattern Criminal Jury Instructions; Pattern Federal Employer Liability Act and Similar Statutes Instructions; and Pattern Patent Law Jury Instructions.

  - Proposed instructions include Proposed Trademark Pattern Civil Jury Instructions; Proposed Pattern Copyright Jury Instructions; and Proposed Family and Medical Leave Act Pattern Jury Instructions.

- 8th Circuit (2007) (available online at

http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm, and on Westlaw in the FED-JICIV database)

- Proposed Model Civil Jury Instructions (2008) also available at http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm

- 9th Circuit (2007, updated March 2009) (available online at http://207.41.19.15/web/sdocuments.nsf/civ and on Westlaw in the FED-JICIV database)

- 10th Circuit (Criminal) (2005) (available online at http://www.ca10.uscourts.gov/clerk/rulesandforms.php and on Westlaw in the FED-JICRIM database)

- 11th Circuit (2005) (available online at http://www.ca11.uscourts.gov/documents/pdfs/civjury.pdf, and on Westlaw in the FED-JICIV database)

Instructions from States within the Third Circuit

- Delaware (available on Westlaw in the DE-JICIV database)

- New Jersey (available online at http://www.judiciary.state.nj.us/civil/civindx.htm, and on Westlaw in the NJ-JICIV database)

- Pennsylvania (available on Westlaw in the PA-JICIV database)

Instructions from Other Sources

- American Bar Association (ABA):

  - Model Jury Instructions in Civil Antitrust Cases (2005)
  - Model Jury Instructions: Patent Litigation (2005)
  - Model Jury Instructions: Securities Litigation (1996)

- American Intellectual Property Law Association, Model Patent Jury Instructions (2005, updated 2008) (available online at http://www.aipla.org/Template.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=10448)

- Michael Avery, David Rudovsky & Karen M. Blum, Police Misconduct: Law and Litigation (3d ed. 2004) (available on Westlaw in the POLICEMISC database)

- Federal Circuit Bar Association, Model Patent Jury Instructions (updated 2008) (available online at www.fedcirbar.org)

- Kevin F. O'Malley, Jay E. Grenig, & William C. Lee, Federal Jury Practice and Instructions – Civil (2006 & Supp. 2009) (available on Westlaw in the FED-JICIV database)

- Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions – Civil (looseleaf, updated through 2007) (available on Lexis in the Matthew Bender library)

- Martin A. Schwartz & George C. Pratt, 4 Section 1983 Litigation: Jury Instructions (looseleaf, updated through 2007)

Instructions That Pertain to Federal Claims and Are Not Covered in Third Circuit Models

- Admiralty
    - 5th Cir. – 4.1 - 4.13
    - 8th Cir. – 8.10 - 8.90
    - 9th Cir. – 7.1 - 7.12
    - 11th Cir. – Federal Claims 6.1 & 6.2
    - O'Malley, Grenig & Lee – Chapter 156
    - Sand – Chapter 90

- Antitrust
    - 5th Cir. – 6.1 & 6.2
    - 11th Cir. – Federal Claims 3.1 & 3.2
    - ABA, Model Jury Instructions in Civil Antitrust Cases
    - O'Malley, Grenig & Lee – Chapter 150
    - Sand – Chapters 79 - 81

- Bankruptcy
    - O'Malley, Grenig & Lee – Chapter 164

- Civil Rights – Education Discrimination

- O'Malley, Grenig & Lee – Chapter 177

- Civil Rights – First Amendment – Libel

  - Sand – Chapter 91

- Civil Rights – Housing Discrimination

  - O'Malley, Grenig & Lee – Chapter 169
  - Sand – 87-37 - 87-64A

- Civil Rights – Section 1983 Claims

  - Conditions of Confinement

    - 5th Cir. – 10.7
    - 7th Cir. – 7.10
    - O'Malley, Grenig & Lee – 166.22
    - Schwartz & Pratt – 11.02.1 - 11.02.5

  - Denial of Access to Courts

    - 7th Cir. – 8.01 - 8.03
    - 11th Cir. – Federal Claims 2.1
    - O'Malley, Grenig & Lee – 166.24

  - Law Enforcement – Other Violations

    - Excessive Bail

      - Schwartz & Pratt – 9.04

    - Failure to Produce Exculpatory Evidence

      - Avery, Rudovsky & Blum – 12.29 - 12.30
      - Schwartz & Pratt – 9.01

    - Manufactured, Coerced, or False Evidence

      - Avery, Rudovsky & Blum – 12.25 - 12.28
      - Schwartz & Pratt – 9.02

  - Plaintiff's Status

- Schwartz & Pratt – 3.04.1 - 3.04.3

- Prisoner – Disciplinary Sanctions

  - Schwartz & Pratt – 11.04.1 - 11.04.3

- Prisoner – Retaliation

  - 7th Cir. – 6.02 & 6.03
  - 11th Cir. – Federal Claims 2.1

- Procedural Due Process

  - O'Malley, Grenig & Lee – 168.80 - 168.151
  - Schwartz & Pratt – 6.01.1 - 6.01.4

- Regulatory Takings

  - Schwartz & Pratt – 6.03.1

- Substantive Due Process

  - Schwartz & Pratt – 6.02.1 - 6.02.5

- Unreasonable Search

  - 9th Cir. – 9.11 - 9.15
  - Avery, Rudovsky & Blum – 12.15 - 12.19
  - O'Malley, Grenig & Lee – 165.22
  - Sand – 87-74B

- Civil Rights – Section 1985 Conspiracy Claims

  - O'Malley, Grenig & Lee – Chapter 167
  - Sand – 87-100 - 87-111

- Damages

  - 5th Cir. – 2.22 (cautionary instruction); 15.1 - 15.15
  - 9th Cir. – 5.1 - 5.6
  - 11th Cir. – Supplemental Damages 1.1 - 6.1
  - Schwartz & Pratt – Chapter 18

- Defenses
  - Miscellaneous
    - O'Malley, Grenig & Lee – 107.01 - 107.04
  - Statute of Limitations
    - 5th Cir. – 14.1
- Eminent Domain
  - 5th Cir. – 13.3
  - 11th Cir. – Federal Claims 9.1
  - O'Malley, Grenig & Lee – Chapter 154
- Evidence
  - Admissions in Pleadings
    - O'Malley, Grenig & Lee – 101.46
  - Credibility of Witnesses
    - 1st Cir. (Criminal) – 1.06, 3.06
    - 6th Cir. (Criminal) – 1.07
    - 10th Cir. (Criminal) – 1.08
    - O'Malley, Grenig & Lee – 105.01 - 105.12
  - Cross-Examination of Character Witness
    - 8th Cir. – 2.07
  - Demonstrative Evidence
    - 5th Cir. – 2.8
  - Fingerprints
    - O'Malley, Grenig & Lee – 104.51
  - Habit or Routine Practice Evidence

- Sand – 74-6

- Handwriting

  - O'Malley, Grenig & Lee – 104.52

- Impeachment by Inconsistent Statements

  - 1st Cir. (Criminal) – 2.02
  - 5th Cir. – 2.16
  - 6th Cir. (Criminal) – 7.04
  - 10th Cir. (Criminal) – 1.10
  - 11th Cir. – Federal Claims 4.1
  - O'Malley, Grenig & Lee – 105.04

- Inferences and Presumptions

  - O'Malley, Grenig & Lee – 104.20 - 104.27

- Oral Statements or Admissions

  - O'Malley, Grenig & Lee – 104.53

- Pleadings

  - O'Malley, Grenig & Lee – 103.32

- Requests for Admission

  - Sand – 74-15

- Similar Acts

  - 1st Cir. (Criminal) – 2.05
  - 5th Cir. – 2.10
  - 10th Cir. (Criminal) – 1.30
  - Sand – 74-6 - 74-8.1

- Statements by Patient to Doctor

  - Sand – 74-10

- Stipulations at Pretrial Conference

  - 1st Cir. (Criminal) – 2.01
  - O'Malley, Grenig & Lee – 101.47

- View of Location Permitted

  - O'Malley, Grenig & Lee – 102.26

- General Instructions

- Common Counsel

  - Sand – 71-8

- Judge's Comments on Evidence

  - O'Malley, Grenig & Lee – 102.73

- Judge's Questions to Witnesses

  - O'Malley, Grenig & Lee – 101.30, 102.72

- Missing Witness

  - 1st Cir. (Criminal) – 2.11
  - 5th Cir. – 2.9
  - O'Malley, Grenig & Lee – 104.25

- No Transcript Available to the Jury

  - 9th Cir. – 1.13

- Previous Trial

  - 1st Cir. (Criminal) – 1.03
  - 8th Cir. – 2.06
  - Federal Judicial Center Pattern Instruction 14
  - Sand 71-11

- Publicity During Trial

  - O'Malley, Grenig & Lee – 102.12

- Reprimand of Counsel for Misconduct

  - O'Malley, Grenig & Lee – 102.70
  - Sand – 71-7

- Sequestration

  - O'Malley, Grenig & Lee – 101.12

- Sympathy

  - Sand – 71-10

- Tests and Experiments

  - 9th Cir. – 2.9

- Verdict

  - O'Malley, Grenig & Lee – 106.01 - 106.16

- Withdrawal of Claim

  - 8th Cir. – 2.11 & 3.05
  - O'Malley, Grenig & Lee – 102.60

- Intellectual Property

  - Copyright

    - 9th Cir. – 17.0 - 17.27
    - O'Malley, Grenig & Lee – Chapter 160
    - Sand – Chapter 86B

  - Patent

    - 5th Cir. – 9.1 - 9.11
    - 7th Circuit Pattern Patent Law Jury Instructions
    - 11th Cir. – Federal Claims 8.1
    - American Intellectual Property Law Association, Model Patent Jury Instructions
    - ABA, Model Jury Instructions: Patent Litigation

- Federal Circuit Bar Association
- O'Malley, Grenig & Lee: Chapter 158
- Sand: Chapters 81 & 86

- Trademark

  - 9th Cir. – 15.0 - 15.27
  - O'Malley, Grenig & Lee – Chapter 159
  - Sand – Chapter 86A

- Labor & Employment

  - Employee's Claims Against Employer and Union

    - 5th Cir. – 11.3
    - 9th Cir. – 13.1 & 13.2
    - 11th Cir. – Federal Claims 1.9.1
    - O'Malley, Grenig & Lee – 157.80 - 157.140

  - Employer's Claim against Union

    - O'Malley, Grenig & Lee – 157.01 - 157.71

  - Fair Labor Standards Act

    - 5th Cir. – 11.1
    - 11th Cir. – Federal Claims 1.7.1
    - O'Malley, Grenig & Lee – Chapter 175

- Miscellaneous Statutory Actions

  - Automobile Dealers Day-in-Court Act

    - 5th Cir. – 13.1
    - 11th Cir. – Federal Claims 11.1
    - O'Malley, Grenig & Lee – Chapter 151

  - Emergency Medical Treatment And Active Labor Act

    - O'Malley, Grenig & Lee – Chapter 176

  - Fair Credit Reporting Act

- O'Malley, Grenig & Lee – Chapter 153

- False Claims Act

- O'Malley, Grenig & Lee – Chapter 178

- Interstate Land Sales Full Disclosure Act

- 5th Cir. – 13.4
- 11th Cir. – Federal Claims 13.1

- Odometer Fraud

- 5th Cir. – 13.2
- 8th Cir. – 6.01 & 6.51
- 11th Cir. – Federal Claims 12.1

- Petroleum Marketing Practices Act

- O'Malley, Grenig & Lee – Chapter 152

- Party Status

- All Persons Equal Before the Law

- O'Malley, Grenig & Lee – 103.11 & 103.12

- Corporation as Party

- 5th Cir. – 2.13
- 11th Cir. – Basic 2.2
- Sand – 72-1
- O'Malley, Grenig & Lee – 103.12

- Government as Party

- 11th Cir. – Basic 2.3

- Multiple Parties

- 5th Cir. – 2.5
- 6th Cir. (Criminal) – 2.01B-D
- 8th Cir – 2.08A

- 9th Cir. – 3.11
- 10th Cir. (Criminal) – 1.21 - 1.22
- O'Malley, Grenig & Lee – 102.41, 103.10, 103.13, 103.14

- Railroad Employees

  - Federal Employers' Liability Act

    - 5th Cir. – 5.1
    - 8th Cir. – 7.01 - 7.11
    - 9th Cir. – 6.1 - 6.7
    - 11th Cir. – Federal Claims 7.1
    - O'Malley, Grenig & Lee – 155.01 - 155.74
    - Sand – Chapter 89

  - Federal Safety Appliance Act

    - 5th Cir. – 5.2
    - 8th Cir. – 7.05
    - O'Malley, Grenig & Lee – 155.80 - 155.151

- RICO

  - 5th Cir. – 8.1
  - 10th Cir. (Criminal) – 2.74 - 2.76
  - 11th Cir. – Federal Claims 5.1
  - O'Malley, Grenig & Lee – Chapter 161
  - Sand – Chapter 84

- Securities

  - 5th Cir. – 7.1
  - 9th Cir. – 18.0 - 18.9
  - 11th Cir. – Federal Claims 4.1 - 4.3
  - ABA, Model Jury Instructions: Securities Litigation
  - O'Malley, Grenig & Lee – Chapter 162
  - Sand – Chapters 82 & 83

- Tax Refunds

  - 5th Cir. – 12.1 - 12.7
  - 9th Cir. – 8.1 & 8.2
  - 11th Cir. – Federal Claims 10.1 - 10.6

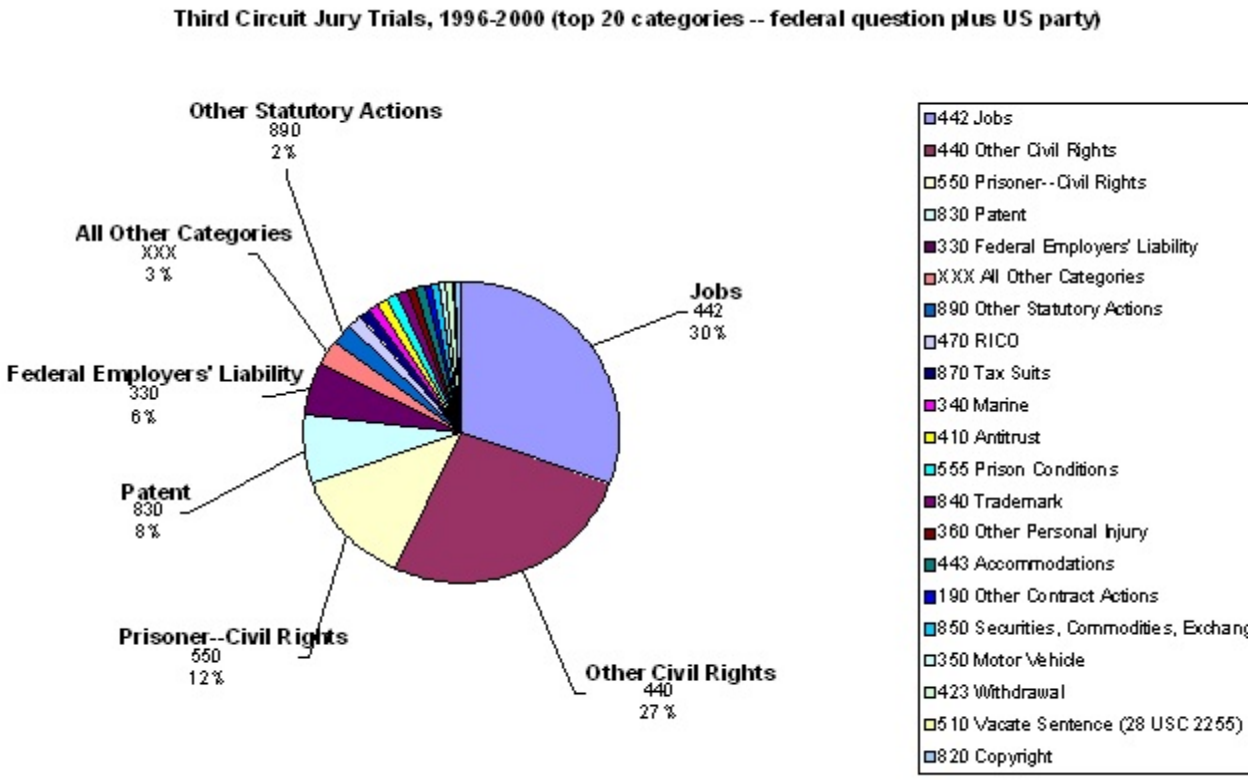
- O'Malley, Grenig & Lee – Chapter 163

- Vicarious Liability

  - 9th Cir. – 4.1 - 4.17
  - 11th Cir. – Federal Claims 1.10.4.1 - 1.10.5.2
  - O'Malley, Grenig & Lee – Chapter 108

Statistical Summary

As a rough method of estimating the relative frequency of different types of claims in jury trials within the Third Circuit, the following data may be useful. These data were obtained by searching the database maintained at http://teddy.law.cornell.edu:8090/questtr7900.htm; the database contains data "gathered by the Administrative Office of the United States Courts,



assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research," *see id.* The search included "all" case categories, with any of three bases of jurisdiction ("US defendant," "US plaintiff," or "federal question"). (The search's limitation on bases of jurisdiction was intended to eliminate diversity cases, which presumably would typically involve state-law claims.) The search was limited to completed jury trials, within the Third Circuit, that terminated during the years 1996 - 2000. (For a discussion of the year variable, see http://teddy.law.cornell.edu:8090/year.htm.) The case categories were defined by reference to the category selected on the Civil Cover Sheet (available online at http://www.uscourts.gov/forms/JS044.pdf). *See* Fifth ICPSR Edition (Ann Arbor, MI: Inter-university Consortium for Political and Social Research, 1993), available online at http://teddy.law.cornell.edu:8090/codebook.htm.

Appendix Three: Discussions of Jury Instructions and Decisionmaking

The following materials discuss various aspects of jury instructions and decisionmaking.

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Dennis J. Devine et al., *Jury Decision Making*, 7 Psychol. Pub. Pol'y & L. 622 (2001).

Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & Pol'y 47 (2007).

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