FIFTH CIRCUIT LABOR AND EMPLOYMENT LAW PATTERN JURY CHARGES

Submitted to the Hon. Martin L.C. Feldman, United States District Judge for the Eastern District of Louisiana, Chair, the Committee on Pattern Jury Instructions, Fifth Circuit District Judges Association

By the Fifth Circuit Labor and Employment Law Pattern Jury Charge Advisory Committee

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Matthew R. Scott, Chair
Ford & Harrison LLP
1601 Elm Street, Suite 4450
Dallas, Texas 75201
214-256-4706 / 214-256-4701 (Facsimile)
mscott@fordharrison.com

Thomas L. Case
Bell Nunnally & Martin LLP
3232 McKinney Avenue, Suite 1400
Dallas, Texas 75204
214-740-1422 / 214-740-1499 (Facsimile)
tomc@bellnunnally.com

John W. Griffin, Jr.
Marek, Griffin & Knaupp L.L.P.
203 North Liberty
Victoria, Texas 77901
361-573-5500 / 361-573-5040 (Facsimile)
jwg@lawmgk.com

Margaret A. Harris
Butler & Harris
1007 Heights Boulevard
Houston, Texas 77008
713-526-5677 / 713-526-5691 (Facsimile)
margie@butlerharris.com

Linda Ottinger Headley
Littler Mendelson
1301 McKinney Street, Suite 1900
Houston, Texas 77010
713-652-4772 / 713-951-9212 (Facsimile)
lheadley@littler.com

John V. Jansonius
Akin Gump Strauss Hauer & Feld LLP
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75201
214-969-4770 / 214-969-4343 (Facsimile)
jjansonius@akingump.com

Hon. Kenneth H. Molberg
95th Judicial District Court
600 Commerce Street, Box 640
Dallas, Texas 75202
214-653-6603 / 214-653-7991 (Facsimile)
kmolberg@dallascourts.org

INTRODUCTION

The work below represents more than seven years of effort to provide, to the courts and practitioners within the Fifth Circuit's jurisdiction, jury charges for use in employment cases. What started as a nearly solo effort turned into a committee effort, the Fifth Circuit Labor and Employment Law Pattern Jury Charge Advisory Committee (Committee).[1] This Committee's product is below.

As the original direction from the Honorable Martin L.C. Feldman, United States District Judge for the Eastern District of Louisiana, and Chair of the Committee on Pattern Jury Instructions, Fifth Circuit District Judges Association (Association) required, these charges are the Committee's best effort at unbiased, party-neutral charges. Where there were serious disagreements regarding the law in the Fifth Circuit, the Committee attempted to discuss the disagreements in the footnotes.

It is our hope these pattern jury charges will assist the district courts and practitioners alike in preparing jury instructions and questions that are easy to understand, and will allow juries to render proper verdicts in employment cases.

EXPLANATORY GUIDE

In many cases, the Committee has inserted Committee Notes in footnote form to explain, among other things, proper uses of a particular aspect of a charge, to explain Committee thought processes, or to highlight disagreement among Committee members. Additionally, the Introductory Statements are provided in the body of the document and are designed to highlight developments in the law as well as still-developing issues. The Committee believes the Introductory Statements are beneficial for the courts in understanding the arguments on both sides. Finally, the Committee did not use typical short citation form because, should portions of the charges be cut-and-pasted into different documents, an unlinked "*id.*" citation would be confusing.

THE CAUSATION QUESTION

A. "Because Of"

Throughout the process of developing these charges, the issue that caused the most spirited deliberations among the Committee members was the proper articulation of the causation standard.[2] Because the law appears to be uncomfortably unsettled following the Supreme

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[1] The Committee members were: Matthew R. Scott, Chair; Thomas L. Case; John W. Griffin, Jr.; Margaret A. Harris; Linda Ottinger Headley; John V. Jansonius; and Kenneth H. Molberg. Mr. Jansonius participated in the deliberative process but was a non-voting member.

[2] *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Hernandez v. HCH Miller Park Joint Venture*, 418 F.3d 732 (7th Cir. 2005); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004); *Machinchick v. PB Power, Inc.*, 398 F.3d 345 (5th Cir. 2005); *Montemayor v. City of San Antonio*, 276 F.3d 687 (5th Cir. 2001); *Hines v. Grand Casino of La.*, 358 F. Supp. 2d 533 (W.D. La. 2005); *Warren v. Terex Corp.*, 328 F. Supp. 2d 641 (N.D. Miss. 2004); *see also* Jaclyn Borcherding, *Deserting* McDonnell Douglas? Desert Palace, Inc. v. Costa, 57 BAYLOR L. REV. 243 (2005);

Court's decision in *Desert Palace, Inc. v. Costa*,[3] the Committee has not articulated a causation standard other than the one found in each of the major employment laws. That language is: Was the challenged employment action taken "***because of***" the plaintiff's protected trait?

B. A Short History on Causation

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Title VII),[4] makes it an "unlawful employment practice" to discriminate against an individual "*because of*" such individual's race, color, religion, sex, or national origin.[5] Less than a decade after Title VII's passage, the Supreme Court decided *McDonnell Douglas Corp. v. Green*,[6] which established the familiar three-part burden-shifting framework by which a plaintiff may show circumstantially that a prohibited factor caused the adverse employment action at issue. First, the plaintiff must present evidence of his or her prima facie case. If done, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. Once articulated, the plaintiff must then prove the reason given was merely a pretext, that is, that the defendant's reason was not the real reason for its action.[7] In such a case—often called a "pretext case"—the burden of persuasion never leaves the plaintiff.[8]

In cases where direct evidence of discrimination is presented, the *McDonnell Douglas* analysis has been held inapplicable.[9] Once direct evidence of discrimination is produced, the burden of proof shifts to the defendant to justify its conduct, usually by proving that it would have taken the same action without regard to an unlawful motive.[10]

Stephen Z. Chertkof, *Jury Instructions II: Statutory Discrimination Claims The Plaintiff's Perspective*, SK055 ALI-ABA 431 (2005); Michael Abbot, *A Swing And A Miss: The U.S. Supreme Court's Attempt To Resolve The Confusion Over The Proper Evidentiary Burden For Employment Discrimination Litigation In* Costa v. Desert Palace, 30 J. CORP. L. 573 (2005); George M. Strickler, Jr., *Current Developments In Employment Law*, SK013 ALI-ABA 367 (2004); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (Civil Cases) (1999); MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT (May 2005); FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT (2005).

[3] 539 U.S. 90 (2003).

[4] 42 U.S.C. §§ 2000e to 2000e-17.

[5] 42 U.S.C. § 2000e-2.

[6] 411 U.S. 792 (1973).

[7] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (such a showing "is probative of intentional discrimination"); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003).

[8] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

[9] *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Portis v. First Nat'l Bank*, 34 F.3d 325, 328 (5th Cir. 1994).

[10] *See, e.g., Guillory v. St. Landry Parish Police Jury,* 802 F.2d 822, 824 (5th Cir. 1986).

Against this background, the Supreme Court decided *Price Waterhouse v. Hopkins.*[11] There, the Court first applied what is known as the "mixed motives"-"same action" analysis to a Title VII case.[12] *Price Waterhouse* held that where both legitimate and illegitimate considerations motivated the challenged employment action, a defendant would nevertheless escape liability if it proved that the legitimate factors, "standing alone," would have caused the same result.[13] The same-action defense has been characterized as an affirmative defense.[14] No opinion commanded a majority in *Price Waterhouse*, but Justice O'Connor's concurrence was accepted by many of the lower courts to support the view that the mixed motives framework applied, and the burden of proof on the issue of causation shifted to the defendant, only when direct evidence of discrimination was presented by the plaintiff.[15]

Shortly after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991 (the 1991 Act). The 1991 Act made two important changes to Title VII. First, the Act explicitly provided the right to recover compensatory and punitive damages, and the right to a jury trial if seeking such damages.[16] Second, Congress passed the 1991 Act "'in large part [as] a response to a series of decisions of [the U.S. Supreme] Court interpreting the Civil Rights Acts of 1866 and 1964."[17] One of those decisions was *Price Waterhouse*.

The 1991 Act refined and codified at least some of the standards applicable to "mixed motives" cases brought under Title VII.[18] While recognizing that a plaintiff may prevail where

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[11] 490 U.S. 228 (1989).

[12] The mixed motives analysis as brought forward into *Price Waterhouse* and Title VII finds its origins in the constitutional tort (first amendment) case of *Mt. Healthy City School Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

[13] *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252 (1989) ("An employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. . . . The employer . . . must show that its legitimate reason, standing alone, would have induced it to make the same decision.").

[14] *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93, 101 (2003).

[15] A number of these cases are cited in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).

[16] 42 U.S.C. § 1981a(a)-(c).

[17] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

[18] 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, 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.

2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

he or she demonstrates that an impermissible consideration is a motivating factor in the challenged employment action, even though permissible factors also motivated the action, the 1991 Act rejected the "same action" component of *Price Waterhouse* as a defense to liability.[19] Instead, the Act treats it as "a limited affirmative defense that does not absolve [the defendant] of liability, but restricts the remedies available to a plaintiff."[20]

The Supreme Court's 2003 opinion in *Desert Palace, Inc. v. Costa*[21] rejected the view that to obtain a mixed motives jury instruction a plaintiff is required to present direct evidence of discrimination.[22] According to the Court, Justice O'Connor's reasoning in *Price Waterhouse* was undone by the statute,[23] a determination with which Justice O'Connor expressly agreed in her *Desert Palace* concurrence.[24] Although *Desert Palace* makes it clear that the "motivating factor" standard applies to Title VII discrimination cases brought under § 2000e-2(m), the case did not address when, if ever, the 2(m) "motivating factor" language applies outside of the mixed motives context.[25] Certain circuits take the position that *Desert Palace's* "motivating factor" language applies in *all* Title VII disparate treatment cases, whether called "pretext cases" or "mixed motives" cases.[26] Other circuits have found that the phrase "motivating factor" applies only in mixed motives cases.[27]

(i) may grant declaratory relief, injunctive relief (except as provided for in clause (ii)), and attorneys' fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

[19] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (citing 42 U.S.C. § 2000e-2(m) and 42 U.S.C. § 2000e-5(g)(2)(B)).

[20] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

[21] 539 U.S. 90, 92 (2003).

[22] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003).

[23] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

[24] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring).

[25] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 n.1 (2003) ("This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context.").

[26] FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT (2005) (citing ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (Civil Cases) § 1.2.1 (plaintiff's burden under Title VII is to prove protected trait was a "substantial or motivating factor"); AMERICAN BAR ASSOCIATION, MODEL JURY INSTRUCTIONS, EMPLOYMENT LITIGATION 1.02[1] (2005) (using a "motivating factor" standard); 3C Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, FEDERAL JURY PRACTICE & INSTRUCTIONS § 171.20 (5th ed. 2001) (essential element of disparate treatment claim is that plaintiff prove protected trait was a "motivating factor," not the "sole motivation or even the primary motivation for the defendant's decision.")).

[27] MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 5 (May 2005) (noting that it is unclear whether a motivating factor instruction would be appropriate outside of a 42 U.S.C. §

C. Fifth Circuit Approach Post-*Reeves* and *Desert Palace*

The Fifth Circuit has not made it clear which approach it will follow.[28] In non-mixed motives cases (i.e., pretext cases) before *Reeves v. Sanderson Plumbing Products, Inc.*,[29] the Fifth Circuit held en banc that the plaintiff was required to prove that his or her protected characteristic was a "determining factor" in the employment decision.[30] Following *Reeves* and *Desert Palace*, the Fifth Circuit has used "determinative reason" in some pretext cases,[31] while at other times using "motivating factor."[32] This interchanging language led, in large measure, to the Committee's difficulties in reaching consensus on how to articulate the proper standard of causation in the charges that follow.

The distinction, if any, between "a motivating factor" and "a determinative reason" is, according to some commentators, critical. Some commentators, including some members of the Committee, assert that, under determinative reason, the burden of persuasion is on the plaintiff at all times, whereas motivating factor places the ultimate burden on the defendant to show that it would have made the same decision regardless of the plaintiff's protected status.[33] These

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2000e-2(m) case); FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.01 (2005) (applying the "motivating factor" standard in mixed motives cases only); Jaclyn Borcherding, *Deserting* McDonnell Douglas*? Desert Palace, Inc. v. Costa*, 57 BAYLOR L. REV. 243, 262 (2005) ("Essentially, a single motivating factor instruction should be given under the McDonnell Douglas pretext analysis; while a case with more than one motivation should be instructed under § 2000e-2(m)."); Stephen Z. Chertkof, *Jury Instructions II: Statutory Discrimination Claims The Plaintiff's Perspective*, SK055 ALI-ABA 431, 440-445 (2005) (recommending limited use of motivating factor instructions to litigation with evidence of mixed motives only); *see also Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (applying a modified *McDonnell Douglas* standard, where the plaintiff may meet his/her ultimate burden of proof by showing either "(1) that the defendant's reason is not true and is instead a pretext for discrimination (pretext alternative), or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic ('mixed motive[s] alternative'."); *Hines v. Grand Casino of La., LLC*, 358 F. Supp. 2d 533 (W.D. La. 2005) (using a motivating factor jury instruction and charge, but acknowledging other alternatives).

[28] *Compare Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005), *with Machinchick v. PB Power, Inc.*, 398 F.3d 345, 351-52 (5th Cir. 2005), *and Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 479 (5th Cir. 2005).

[29] 530 U.S. 133 (2000).

[30] *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc), *overruled by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *but see Nieto v. L& H Packing Co.*, 108 F.3d 621 (5th Cir. 1997) (using "motivating factor"); *see also* Matthew R. Scott and Russell D. Chapman, Reeves v. Sanderson Plumbing Products*: The Emperor Has No Clothes—Pretext Plus is Alive & Kicking*, 37 ST. MARY'S L.J. 179, 180-81 (2005).

[31] *See, e.g., Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 310 (5th Cir. 2004).

[32] *See, e.g., Machinchick v. PB Power, Inc.*, 398 F.3d 345, 351-52 (5th Cir. 2005); *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 479 (5th Cir. 2005).

[33] Stephen Z. Chertkof, *Jury Instructions II: Statutory Discrimination Claims The Plaintiff's Perspective*, SK055 ALI-ABA 431, 442 (2005) (recommending that plaintiffs' lawyers avoid turning every lawsuit into a mixed motives case because "it gives the defendant a second bite at the apple" and a "fallback position that allows it to escape liability for damages."); Matthew R. Scott and Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Cases to Mixed Motive*, 36 ST. MARY'S L.J. 395, 403-04 (2005).

commentators further assert that "determinative reason" carries a higher burden of proof than "motivating factor" or similar language.

Other commentators, including other members of the Committee, argue that there is no substantive distinction between such terms as "because of," "motivating factor," "determining factor," "substantial factor," and the like.[34] According to this viewpoint, all these phrases describe but-for causation. This view argues that "motivating factor" is not something less than but-for causation.[35]

Because of this uncertainty, again, the Committee chose to use the statutory language, "because of," until a more definitive answer develops. It should be noted, however, that where the court determines the case is a "mixed motives" case, it is appropriate to alter the causation language in these charges accordingly.

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[34] *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (equating "motivating factor" and "substantial factor'); *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 479 (5th Cir. 2005) (referring to "substantial factor" and "motivating factor" in race discrimination and retaliation case).

[35] 42 U.S.C. § 2000e-5(g)(2)(B).

11.4

COMMITTEE INTRODUCTION TO SEXUAL HARASSMENT CHARGES

The following overview of sexual harassment law is not intended to encompass all permutations judges and juries will face. Likewise, none of the pattern jury charges on sexual harassment liability are designed to cover all possible factual situations, and any charge submitted to a jury should be modified to conform to the pleadings and the evidence.

In *Meritor Savings Bank, FSB v. Vinson*,[36] the United States Supreme Court held that sexual harassment is "a form of sex discrimination prohibited by Title VII."[37] The holding was based on the observation that Title VII was designed "to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment."[38] The Court credited the Fifth Circuit as the first federal circuit court of appeals "to recognize a cause of action based upon a discriminatory work environment."[39]

In 1993, the United States Supreme Court held Title VII prohibits employers from permitting the workplace to be "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's 'employment and create an abusive working environment. . . . .'"[40] The conduct need not, however, "seriously affect an employee's psychological well-being" or lead the plaintiff to "suffer injury."[41] The Court noted this standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a psychological injury.

In 1998, the United States Supreme Court clarified when and how an employer will be liable for sexual harassment when the alleged harasser is the plaintiff's supervisor.[42] A supervisor is defined as one with immediate or successively higher authority over the plaintiff.[43] The Court held, following the Restatement of Agency (Second) § 219(2)(d), that an employer will be vicariously liable if the plaintiff experienced a tangible employment action because he or

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[36] 477 U.S. 57 (1986).

[37] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986).

[38] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (citation and quotation omitted).

[39] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (harassment based on national origin)).

[40] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

[41] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)

[42] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

[43] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

she rejected the supervisor's sexual requests—but may avoid liability if there was no tangible employment action and the employer establishes the elements of an affirmative defense.[44]

In addition to vicarious liability for supervisor harassment, plaintiffs may claim harassment by co-workers and third parties (as well as supervisors) under a negligence standard.[45] Employers are liable under the negligence standard if they knew or should have known of the sexual harassment and failed to take prompt remedial action. For these claims, employer liability "is direct liability for negligently allowing harassment, not vicarious liability for the harassing actions of employees."[46] Also in 1998, the Supreme Court recognized same-sex sexual harassment as actionable under Title VII.[47]

Finally, in 2004, the Supreme Court addressed the question whether and, if so, under what circumstances, a constructive discharge can be considered a tangible employment action that deprives the employer of the *Faragher/Ellerth* affirmative defense.[48] A constructive discharge requires a showing that the abusive working environment became so intolerable that "resignation qualified as a fitting response."[49] Only a constructive discharge that arises from an official act of the employer rises to the level of a tangible employment action that deprives the employer of the affirmative defense.[50]

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[44] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

[45] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758 (1998) (explaining the various theories of liability for unlawful workplace harassment) (citing Restatement of Agency (Second) § 219).

[46] *Williamson v. City of Houston*, 148 F.3d 462, 465 (5th Cir. 1998).

[47] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

[48] *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

[49] *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004).

[50] *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004).

11.4.1

TITLE VII—SEX DISCRIMINATION— SUPERVISOR SEXUAL HARASSMENT WITHOUT TANGIBLE EMPLOYMENT ACTION (HOSTILE WORK ENVIRONMENT)

A. Committee Notes

This charge is for use in cases where a plaintiff seeks to impose vicarious liability on an employer for sexual harassment by a supervisor where the agency relationship aided the supervisor in creating a hostile or abusive work environment, yet plaintiff did not experience a tangible employment action.[51] This is commonly referred to as a hostile work environment claim. This charge may be used when the alleged harasser is a supervisor with immediate or successively higher authority over the plaintiff.

B. Charge

1. Plaintiff claims [he/she] was sexually harassed by [his/her] supervisor and that [his/her] employer, Defendant, is responsible for the harassing conduct.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's [sex/gender]. This includes sexual harassment. Sexual harassment is unwelcome conduct that is based on plaintiff's [sex/gender].

4. For Defendant to be liable for sexual harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment.[52] To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff's employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance.[53] There is no requirement that the conduct be psychologically injurious.[54]

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[51] *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 758 (1998).

[52] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

[53] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[54] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

5. Although sexual harassment must be based on sex, it need not be motivated by sexual desire.[55] Sexual harassment may include extremely insensitive conduct because of [sex/gender]. Simple teasing, offhand comments, sporadic use of offensive language, occasional gender-related jokes, and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. Discriminatory intimidation, ridicule, sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature in the workplace may be sufficiently extreme to alter the terms and conditions of employment.[56]

6. In determining whether a hostile work environment existed, you must consider the evidence from both the Plaintiff's perspective and from the perspective of a reasonable person. First, Plaintiff must actually find the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff would find the conduct offensive.[57]

7. If you find Plaintiff was sexually harassed, then you must find for Plaintiff unless Defendant proves by a preponderance of the evidence that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant or to avoid harm otherwise.[58] If Defendant proves (a) and (b), you must find for Defendant.

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[55] *Oncale v. v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[56] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

[57] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[58] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

JURY QUESTIONS

Question No. 1

Was Plaintiff sexually harassed?

Answer "Yes" or "No."

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If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 2

A. Did Defendant exercise reasonable care to prevent and promptly correct any sexually harassing behavior?

Answer "Yes" or "No."

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B. Did Plaintiff unreasonably fail to take advantage of any preventive or corrective opportunities provided by Defendant, or to avoid harm otherwise?

Answer "Yes" or "No."

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11.4.2

TITLE VII—SEX DISCRIMINATION— SUPERVISOR SEXUAL HARASSMENT RESULTING IN TANGIBLE EMPLOYMENT ACTION (QUID PRO QUO)

A. Committee Notes

This charge is for use in cases where the plaintiff alleges he or she suffered a tangible employment action because he or she rejected sexual advances, requests, or demands by a supervisor with immediate or successively higher authority over plaintiff.[59]

B. Charge

1. Plaintiff claims [he/she] was [tangible employment action] because [he/she] rejected [his/her] supervisor's sexual advances, requests, or demands.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's sex. Sex discrimination includes discriminating against an employee because the employee rejects a supervisor's sexual advances, requests, or demands.

4. Plaintiff must prove she suffered a tangible employment action because [he/she] rejected [supervisor's name] sexual advances, requests, or demands. A tangible employment action is a significant change in employment status, such as hiring, firing, demotion, failing to promote, reassignment with significantly different responsibilities, undesirable reassignment,[60] or a significant change in benefits.[61]

5. You must find for Plaintiff if [he/she] proves, by a preponderance of the evidence, that:

   a. [Supervisor] made sexual advances, requests, or demands to Plaintiff;

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[59] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

[60] Committee Note: Whether a reassignment is undesirable should be assessed from an objective standpoint. *See generally Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 221 (5th Cir. 1999). If this is a fact question in the case, the court should instruct the jury accordingly.

[61] *Faragher v. City of Boca Raton*, 524 U.S. 775, 761 (1998). Committee Note: This paragraph should not be submitted to the jury if there is no dispute that the plaintiff experienced a tangible employment action.

b. Plaintiff rejected [supervisor] sexual advances, requests, or demands;

c. Plaintiff suffered a tangible employment action;[62]

d. Defendant [tangible employment action] Plaintiff because [he/she] rejected [supervisor] sexual advances, requests, or demands.

6. If Plaintiff fails to prove each of these elements, then you must find for Defendant.

7. If you find that the reason Defendant has given for its decision is unworthy of belief, you may infer Defendant [tangible employment action] Plaintiff because [he/she] rejected the sexual advances, requests, or demands by [supervisor].[63]

8. Plaintiff does not have to prove that [his/her] rejection of [supervisor] sexual advances, requests, or demands was the only reason Defendant [tangible employment action] Plaintiff.

[62] Committee Note: This element should only be submitted in cases where there is a fact question whether Plaintiff suffered a tangible employment action.

[63] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

JURY QUESTION

Question No. 1[64]

Did Plaintiff suffer a tangible employment action because she rejected sexual advances, requests, or demands by [supervisor]?

Answer "Yes" or "No."

_____

[OR]

Question No. 1

Did Defendant [tangible employment action] Plaintiff because [he/she] rejected sexual advances, requests, or demands by [supervisor]?

Answer "Yes" or "No."

_____

[64] Committee Note: This question should be used when there is a fact question whether the plaintiff experienced a tangible employment action. Where there is no question the plaintiff experienced a tangible employment action, the alternative question should be submitted instead.

11.4.3

TITLE VII—SEX DISCRIMINATION— CO-WORKER/DIRECT AND NON-DIRECT SUPERVISOR/THIRD-PARTY SEXUAL HARASSMENT (HOSTILE WORK ENVIRONMENT)

A. Committee Notes

This charge is for use in cases where a plaintiff seeks to impose liability on an employer based upon a negligence standard—that the employer knew, or in the exercise of reasonable care should have known, that plaintiff was being sexually harassed.[65] If the defendant knew or should have known of the harassment, then the defendant had a duty to take prompt remedial action designed to stop the harassment.[66] This charge can be used when the alleged harasser was a co-worker, third party, or supervisor.[67]

B. Charge

1. Plaintiff claims [he/she] was sexually harassed by [harasser] and that [his/her] employer, Defendant, knew, or in the exercise of reasonable care should have known, of the harassment, but did not take prompt remedial action.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's [sex/gender]. This includes sexual harassment. Sexual harassment is unwelcome conduct that is based on plaintiff's [sex/gender].

4. For Defendant to be liable for sexual harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment.[68] To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff's employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with

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[65] *Williamson v. City of Houston*, 148 F.3d 462, 466 (5th Cir. 1998).

[66] *Nash v. Electro Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993).

[67] *Sharp v. City of Houston*, 164 F.3d 923, 928-29 (5th Cir. 1999).

[68] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

Plaintiff's work performance.[69] There is no requirement that the conduct be psychologically injurious.[70]

5. In determining whether a hostile work environment existed, you must consider the evidence from both the Plaintiff's perspective and from the perspective of a reasonable person. First, Plaintiff must actually find the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff would find the conduct offensive.[71]

6. Although sexual harassment must be based on sex, it need not be motivated by sexual desire.[72] Sexual harassment may include extremely insensitive conduct because of [sex/gender]. Simple teasing, offhand comments, sporadic use of offensive language, occasional gender-related jokes, and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. Discriminatory intimidation, ridicule, sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature in the workplace may be sufficiently extreme to alter the terms and conditions of employment.[73]

7. In determining whether Defendant knew or should have known of the harassment, Plaintiff must prove that (a) the harassment was known or communicated to a person who had the authority to receive, address, or report the complaint, even if that person did not do so,[74] or (b) the harassment was so open and obvious that Defendant should have known of it.[75]

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[69] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[70] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

[71] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[72] *Oncale v. v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[73] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

[74] *Williamson v. City of Houston*, 148 F.3d 462, 466-67 (5th Cir. 1998)

[75] *Pfau v. Reed,* 125 F.3d 929 (5th Cir. 1997); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999).

8. Prompt remedial action is conduct by the Defendant that is reasonably calculated to stop the harassment and remedy the situation. Whether Defendant's actions were prompt and remedial depends upon the particular facts, and you may look at, among other things, the effectiveness of any actions taken.[76]

[76] *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989).

JURY QUESTIONS

Question No. 1

Was Plaintiff sexually harassed?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 2

Did Defendant know, or in the exercise of reasonable care should Defendant have known, that Plaintiff was being sexually harassed?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer the following Question:

Question No. 3

Did Defendant fail to take prompt remedial action?

Answer "Yes" or "No."

_____

11.5

COMMITTEE INTRODUCTION TO TITLE VII DISCRIMINATION—
DISPARATE TREATMENT AND NON-SEXUAL HARASSMENT

Although sexual harassment claims are the most prevalent among the Supreme Court's Title VII opinions in recent years, Title VII also prohibits discrimination and harassment based on the other protected categories set forth in Title VII—race, color, religion, national origin, and gender. Title VII discrimination claims typically involve adverse or tangible employment actions such as hiring and firing, demotion, and decisions concerning pay, that are taken allegedly because of the employee's protected trait (i.e., race, color, religion, gender, or national origin).

Before employees had a right to a jury trial under Title VII, the Supreme Court established a careful shifting of burdens for these cases.[77] The burden-shifting framework was set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*[78] and *St. Mary's Honor Center v. Hicks*.[79] Under this framework, a plaintiff must first establish a prima facie case of discrimination.[80] If the plaintiff succeeds in making this prima facie showing, the plaintiff raises a rebuttable presumption of discrimination by a preponderance of the evidence.

At this point, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action.[81] The employer's burden is one of production only—the employer must produce evidence that, if ultimately believed by the trier of fact, establishes a legitimate, non-discriminatory reason for its actions.[82] "[O]nce the employer articulates such a reason, the presumption of unlawful discrimination disappears and the burden shifts back upon the plaintiff to establish by a preponderance of the evidence that the articulated reasons was merely a pretext for unlawful discrimination."[83]

Following *Desert Palace, Inc. v. Costa*,[84] the Fifth Circuit adopted a modified *McDonnell Douglas* approach.[85] Under this approach:

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[77] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

[78] 411 U.S. 792, 802-804 (1973).

[79] 509 U.S. 502, 506–07 (1993).

[80] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

[81] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

[82] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

[83] *McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 282 (5th Cir. 2000).

[84] 539 U.S. 90 (2003).

[85] *Rachid v. Jack in the Box, Inc*, 376 F.3d 305, 309-312 (5th Cir. 2004).

> [T]he plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, 'the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).'"[86]

Despite this careful burden-shifting dance, the Fifth Circuit and Supreme Court have made it clear that the burden shifting procedure should *not* find its way into a jury charge.[87]

While Title VII prohibits *discrimination* based on race, color, religion, sex, and national origin, Title VII also prohibits *harassment* based on these same factors. It is unlawful for an employer to create or allow a hostile work environment for an employee because of the employee's race, color, religion, gender (not to be confused with sex), or national origin.[88] The Supreme Court cases discussed in section 11.4 are therefore applicable in most respects to other Title VII harassment cases. For example, in *National Railroad Passenger Corp. v. Morgan*,[89] the Court noted that the standards for racial harassment claims are the same as those for sexual harassment claims.[90] Thus, the harassment charges here mirror, in many ways, the sexual harassment charges above.

Morgan is the only Supreme Court case on the subject of racial harassment, and the issue presented there was not the existence of non-sexual harassment claims *vel non*, but rather, whether, and under what circumstances, a Title VII plaintiff could file suit on events that fall outside the statutory time period for filing a charge of discrimination (either 180 or 300 days).[91] In addressing this primary question, the Court first noted the distinction between hostile environment harassment claims and those based on discrete acts of discrimination. Unlike the latter, harassment is generally based on the cumulative effect of individual acts that may occur over a series of days or perhaps years and a single act of harassment is often not actionable on its own.[92] Accordingly, as to harassment claims, the Court held that, so long as any act contributing

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[86] *Rachid v. Jack in the Box, Inc*, 376 F.3d 305, 312 (5th Cir. 2004); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-11 (1993);

[87] *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992).

[88] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

[89] 536 U.S. 101 (2002).

[90] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.").

[91] *Nat'l R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 115 (2002).

[92] *Nat'l R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 115 (2002).

to the hostile work environment occurred within the statutory time period, the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, may be considered for purposes of assessing liability.[93] The Court also noted, however, that application of equitable doctrines may either limit or toll the time period within which an employee must file a charge.[94] Further, because the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim—even though some acts occurred outside the statutory time period.[95]

[93] *Nat'l R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 105, 117-18 (2002).

[94] *Nat'l R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 105, 117-18 (2002).

[95] *Nat'l R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 105, 118-19 (2002).

11.5.1

TITLE VII—DISCRIMINATION— DISPARATE TREATMENT— RACE/COLOR/RELIGION/GENDER/NATIONAL ORIGIN

A. Committee Notes

This charge is for use in Title VII discrimination cases where the plaintiff alleges he or she was discriminated against because of a trait protected by Title VII (i.e., his or her race, color, religion, sex, or national origin). This charge can be used in total in cases where all facts are in dispute.

B. Charge

1. Plaintiff claims [he/she] was discriminated against because of [his/her] [protected trait].

2. Defendant denies Plaintiff's claims and contends [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's [protected trait].

4. To prove unlawful discrimination, Plaintiff must prove by a preponderance of the evidence that Defendant [challenged employment action] Plaintiff because of [his/her] [protected trait].

5. Plaintiff does not have to prove that unlawful discrimination was the only reason Defendant [challenged employment action] Plaintiff.[96]

6. If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [challenged employment action] Plaintiff because of [his/her] [protected trait].[97]

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[96] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 & n.7 (1989).

[97] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

JURY QUESTIONS

Question No. 1

Did Defendant [challenged employment action] Plaintiff because of Plaintiff's [protected trait]?

Answer "Yes" or "No."

_____

11.5.2

TITLE VII—DISCRIMINATION— NON-SEXUAL HARASSMENT—SUPERVISOR HARASSMENT WITHOUT TANGIBLE EMPLOYMENT ACTION (HOSTILE WORK ENVIRONMENT)

A. Committee Notes

This charge is for use in cases where the harassment is based on race, color, religion, gender, or national origin. This charge is designed for use in gender harassment cases where there are no sexually explicit overtones. The charge can be used in cases where a plaintiff seeks to impose vicarious liability on an employer for supervisor harassment where the agency relationship aided the supervisor in creating a hostile or abusive work environment, yet plaintiff did not experience a tangible employment action.[98]

B. Charge

1. Plaintiff claims [he/she] was harassed by [his/her] supervisor because of Plaintiff's [protected trait] and that [his/her] employer, Defendant, is responsible for the harassing conduct.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's [protected trait]. This includes [protected trait] harassment.

4. For Defendant to be liable for [protected trait] harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment.[99] To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff's employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance.[100] There is no requirement that the conduct be psychologically injurious.[101]

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[98] *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 758 (1998).

[99] *Nat'l R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 116 n.10 (2002).

[100] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[101] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

5. [Protected trait] harassment may include extremely insensitive conduct because of [protected trait]. Simple teasing, offhand comments, sporadic use of offensive language, occasional jokes related to [protected trait], and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. Discriminatory intimidation, ridicule, or other verbal or physical conduct may be sufficiently extreme to alter the terms and conditions of employment.[102]

6. In determining whether a hostile work environment existed, you must consider the evidence from both the Plaintiff's perspective and from the perspective of a reasonable person. First, Plaintiff must actually find the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff would find the conduct offensive.[103]

7. If you find Plaintiff was [protected trait] harassed, then you must find for Plaintiff unless Defendant proves by a preponderance of the evidence that (a) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant or to avoid harm otherwise.[104] If Defendant proves (a) and (b), you must find for Defendant.

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[102] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Huckabay v. Moore*, 142 F.3d 233, 240 (5th Cir. 1998).

[103] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[104] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

JURY QUESTIONS

Question No. 1

Was Plaintiff harassed because of [his/her] [protected trait]?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 2

A. Did Defendant exercise reasonable care to prevent and promptly correct any [protected trait] harassing behavior?

Answer "Yes" or "No."

_____

B. Did Plaintiff unreasonably fail to take advantage of any preventive or corrective opportunities provided by Defendant, or to avoid harm otherwise?

Answer "Yes" or "No."

_____

11.5.3

TITLE VII—DISCRIMINATION— NON-SEXUAL HARASSMENT—CO-WORKER/DIRECT OR NON-DIRECT SUPERVISOR/THIRD-PARTY HARASSMENT (HOSTILE WORK ENVIRONMENT)

A. Committee Notes

This charge is for use in cases where the harassment is based on race, color, religion, gender, or national origin. This charge is designed for use in gender harassment cases where there are no sexually explicit overtones. This charge can be used in cases where a plaintiff seeks to impose liability on an employer based upon a negligence standard—that the employer knew, or in the exercise of reasonable care should have known, that plaintiff was being harassed because of his or her protected trait.[105]

For these claims, employer liability "is direct liability for negligently allowing harassment, not vicarious liability for the harassing actions of employees."[106] If the defendant knew or should have known of the harassment, then the defendant had a duty to take prompt remedial action designed to stop the harassment.[107] This charge can be used when the alleged harasser was a co-worker, third party, or supervisor.[108]

B. Charge

1. Plaintiff claims [he/she] was harassed by [his/her] supervisor because of Plaintiff's [protected trait] and that Plaintiff's employer, Defendant, is responsible for the harassing conduct.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's [protected trait]. This includes harassment based on a person's [protected trait].

4. For Defendant to be liable for [protected trait] harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment.[109] To determine whether the conduct in this case rises to a

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[105] *Williamson v. City of Houston*, 148 F.3d 462, 466 (5th Cir. 1998).

[106] *Williamson v. City of Houston*, 148 F.3d 462, 465 (5th Cir. 1998).

[107] *Nash v. Electro Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993).

[108] *Sharp v. City of Houston*, 164 F.3d 923, 928-29 (5th Cir. 1999).

[109] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

level that alters the terms or conditions of Plaintiff's employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance.[110] There is no requirement that the conduct be psychologically injurious.[111]

5. Unlawful harassment may include extremely insensitive conduct because of [protected trait]. Simple teasing, offhand comments, sporadic use of offensive language, occasional [protected trait]-related jokes, and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. Discriminatory intimidation, ridicule, or other verbal or physical conduct done because of Plaintiff's [protected trait] may be sufficiently extreme to alter the terms and conditions of employment.[112]

6. In determining whether a hostile work environment existed, you must consider the evidence from both the Plaintiff's perspective and from the perspective of a reasonable person. First, Plaintiff must actually find the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff would find the conduct offensive.[113]

7. In determining whether Defendant knew or should have known of the harassment, Plaintiff must prove that (a) the harassment was known or communicated to a person who had the authority to receive, address, or report the complaint, even if that person did not do so,[114] or (b) the harassment was so open and obvious that Defendant should have known of it.[115]

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[110] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[111] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

[112] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Huckabay v. Moore*, 142 F.3d 233, 240 (5th Cir. 1998).

[113] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[114] *Williamson v. City of Houston*, 148 F.3d 462, 466-67 (5th Cir. 1998)

[115] *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999).

8. Prompt remedial action is conduct by the Defendant that is reasonably calculated to stop the harassment and remedy the situation. Whether Defendant's actions were prompt and remedial depends upon the particular facts, and you may look at, among other things, the effectiveness of any actions taken.[116]

[116] *Waltman v. Int'l Paper Co.,* 875 F.2d 468, 477 (5th Cir. 1989).

JURY QUESTIONS

Question No. 1

Was Plaintiff harassed because of [his/her] [protected trait]?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 2

Did Defendant know, or in the exercise of reasonable care should Defendant have known, that Plaintiff was being harassed because of [his/her] [protected trait]?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer the following Question:

Question No. 3

Did Defendant fail to take prompt remedial action?

Answer "Yes" or "No."

_____

11.6

COMMITTEE INTRODUCTION TO TITLE VII RETALIATION

Title VII makes it unlawful to retaliate against an individual because he or she has (a) opposed any practice made an unlawful employment practice by Title VII, or (b) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.[117] The first section is commonly referred to as the "opposition clause," while the second section is commonly referred to as the "participation clause." The opposition clause requires the employee to demonstrate that he or she had at least a "reasonable belief" that the practice he or she opposed was unlawful.[118] There is no corresponding burden in a participation claim.

Until 2006, the Fifth Circuit had determined that the anti-retaliation provisions protected employees only from "ultimate employment decisions" "such as hiring, granting leave, discharging, promoting, and compensating,"[119] and the denial of paid or unpaid leave.[120] In *Burlington Northern & Santa Fe Railway Co. v. White*,[121] the Supreme Court addressed a circuit split regarding the standard for judging Title VII retaliation claims, as well as the action necessary to constitute unlawful retaliation.

Section 2000e-3 provides:

> It shall be an unlawful employment practice for an employer to discrimination 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.[122]

The primary question in *White* concerned the nature of actions by an employer that could be the subject of a claim for relief under § 2000e-3.

The Seventh Circuit and the District of Columbia Circuit interpreted § 2000e-3 broadly to prohibit any action that a reasonable employee might consider material and that would likely

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[117] 42 U.S.C. § 2000e-3(a).

[118] *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996).

[119] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)).

[120] *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521-22 (5th Cir. 2001); *see also Hockman v. Westward Communications, LLC*, 407 F.3d 317, 331 (5th Cir. 2004) (citing *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000) (suggesting that an unwanted reassignment may also constitute an ultimate employment action)).

[121] 126 S. Ct. 2405 (2006).

[122] 42 U.S.C. § 2000e-3(a).

have dissuaded a reasonable employee from making or supporting a charge of discrimination.[123] The Third, Fourth, and Sixth Circuits held that the retaliation provision covered only adverse changes in the terms, conditions, and benefits of employment.[124] The Fifth and Eighth Circuits took a more restrictive approach, concluding that § 2000e-3 prevented only retaliation that concerns ultimate employment decisions, such as hiring, firing, granting leave, and promotions.[125]

The Court adopted the view of the Seventh and District of Columbia Circuits. The Court determined that the specific acts of discrimination listed in § 2000e-2 should not be read "*in pari materia*" with the "to discriminate against" language in § 2000e-3. According to the Court, § 2000e-3 extends beyond the list of specific wrongs listed in § 2000e-2. In reaching this conclusion, the Court focused on the absence of the "terms, conditions, or privileges of employment"[126] language in § 2000e-3. This absence, the Court concluded, evidenced a congressional intent to expand Title VII's retaliation provision beyond the limitations found in Title VII's basic discrimination provision.[127]

The Court reiterated, however, that § 2000e-3 does not protect an individual from "all retaliation, but from retaliation that produces an injury or harm."[128] Thus, the employer's actions must be of sufficient magnitude that "a reasonable employee would have found the challenged action materially adverse."[129] Thus, to prove unlawful retaliation, a plaintiff must prove the employer's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[130]

White did not address the standard of causation for retaliation claims. Two Fifth Circuit panels, before *White*, articulated the causation standard differently. In *Septimus v. University of Houston*,[131] the panel held the "proper standard of proof on the causation element is that the adverse employment action taken against the plaintiff would not have occurred 'but for' her

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[123] *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).

[124] *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997).

[125] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 707 (5th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

[126] 42 U.S.C. § 2000e-2(a).

[127] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411-12 (2006); *compare* 42 U.S.C. § 2000e-2 *with* 42 U.S.C. § 2000e-3.

[128] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414 (2006).

[129] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

[130] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

[131] 399 F.3d 601 (5th Cir. 2005).

protected conduct."[132] This means "even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct."[133] It is worth noting this case was tried as a pretext case, and not as a mixed motives case.

Following *Septimus*, the Fifth Circuit decided *Bryant v. Compass Group USA, Inc.*,[134] a Title VII race discrimination and retaliation case. There, the panel reversed a judgment in the employee's favor because he failed to establish "that his race or retaliation for his filing of an EEOC claim was a substantial or motivating factor in his termination . . . ."[135]

In the only Fifth Circuit panel decision addressing the causation standard after *White*, the Fifth Circuit panel in *Strong v. University Healthcare System, LLC*[136] reiterated the but-for causation standard stated in *Septimus*.[137] In light of the conflicting panel opinions and no en banc determination of the causation standard, the Committee again suggests using the statutory language—"because of."

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[132] *Septimus v. Univ. of Houston,* 399 F.3d 601, 608 (5th Cir. 2005).

[133] *Rubenstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 402-03 (5th Cir. 2000).

[134] 413 F.3d 471 (5th Cir. 2005).

[135] *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 479 (5th Cir. 2005).

[136] 482 F.3d 802 (5th Cir. 2007).

[137] *Strong v. Univ. Healthcare Sys., LLC*, 482 F.3d 802, 806 (5th Cir. 2007).

11.6.1

TITLE VII—RETALIATION

A. Committee Notes

This charge is for use in Title VII discrimination cases where the plaintiff alleges he or she was discriminated against in retaliation for engaging in activity that is protected by Title VII. This charge can be used in total in cases where all facts are in dispute.

B. Charge

1. Plaintiff claims [s/he] was retaliated against for engaging in activity protected by Title VII.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to retaliate against an employee for engaging in activity protected by Title VII.

4. To prove unlawful retaliation, Plaintiff must prove by a preponderance of the evidence that Defendant took an adverse employment action against [him/her] because [he/she] engaged in protected activity.

5. Protected activity[138] includes opposing an employment practice that is unlawful under Title VII, making a charge of discrimination, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.[139] If the claim is for opposing an employment practice, Plaintiff must prove that [he/she] had at least a reasonable belief that the practice was unlawful under Title VII.[140]

6. "Adverse employment action" is not confined to acts or harms that occur at the workplace. It covers those (and only those) employer actions that

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[138] Committee Note: Whether activity is protected by Title VII will generally be determined by the court as a matter of law. If it has been established as a matter of law, or is not contested, the court may omit this paragraph.

[139] *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 520 (5th Cir. 2001); *see also* 42 U.S.C. § 2000e-3.

[140] *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996). Committee Note: In many cases, the employee has opposed an employment practice that is unlawful under Title VII. In cases where the employee has opposed an employment practice that was not actually made unlawful by Title VII, the court should also instruct the jury that the employee's actions must be based on a reasonable, good faith belief that the practice opposed actually violated Title VII, even if he or she was ultimately mistaken. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

could well dissuade a reasonable worker from making or supporting a charge of discrimination.[141]

7. Plaintiff does not have to prove that unlawful retaliation was the sole reason Defendant [adverse employment action] Plaintiff.[142]

8. If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [adverse employment action] Plaintiff because [s/he] engaged in protected activity.[143]

[141] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58-59 (2006).

[142] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 & n.7 (1989).

[143] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

JURY QUESTION

Question No. 1

Did Defendant take an adverse employment action again Plaintiff because Plaintiff engaged in protected activity?

Answer "Yes" or "No."

_____

11.7

COMMITTEE INTRODUCTION TO THE AMERICANS WITH DISABILITIES ACT

The Americans With Disabilities Act[144] (ADA) is "designed to remove barriers which prevent qualified individuals with disabilities from enjoying employment opportunities available to persons without disabilities."[145] The ADA "seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity."[146] The ADA provides that employers may not "discriminate against a qualified individual with a disability because of the disability of such individual 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."[147]

The Supreme Court has established a three-step process for determining whether someone is disabled within the meaning of the ADA.[148] First, the court must consider whether the condition in question constitutes a physical impairment.[149] Second, the court must determine whether the plaintiff's life activity classifies as a "major life activity" under the ADA.[150] Then, "tying the two statutory phrases together, [the court] ask[s] whether the impairment substantially limited the major life activity."[151] In 1998, the Supreme Court provided further guidance in interpreting these provisions by requiring courts to consider corrective or mitigating measures.[152] Accordingly, determining whether someone is disabled must be done on a case-by-case basis.[153]

In addition to prohibiting discrimination based on a person's disabilities, real or perceived, the ADA imposes on employers the duty to make reasonable accommodations to individuals with disabilities if those accommodations will enable the individual to perform the essential functions of his or her job.[154] A reasonable accommodation may include: (A) making

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[144] 42 U.S.C. §§ 12101-12213.

[145] *Seaman v. CSPH, Inc.*, 179 F.3d 297, 300 (5th Cir. 1999).

[146] *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999).

[147] 42 U.S.C. § 12112(a).

[148] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[149] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[150] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[151] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[152] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999).

[153] *Albertsons, Inc. v. Kirkinburg*, 527 U.S. 555, 565 (1999)

[154] 42 U.S.C. § 12111(9).

existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification or equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[155] The Fifth Circuit has held that a requested accommodation that would require an employer to violate the terms of a collective bargaining agreement is not a reasonable accommodation under the ADA.[156]

The instructions that follow can be used in both ADA and Rehabilitation Act cases. The Committee notes that, as indicated from the brief description above, ADA cases come in a variety of fact situations, given that the definition of disability is tripartite. Thus, some cases may implicate the actual disability prong, while others may implicate all three prongs; actual disability, perceived disability, or a record of a disability. Many of the terms in theses charges are statutory or derived from the regulations, and many have technical definitions. Moreover, many of the instructions will be unnecessary in the usual run of cases, so courts and practitioners will want to ensure that only those instructions that are necessary are submitted, depending on the pleadings and the evidence. Finally, some of the statutory affirmative defenses are addressed here, and of course, these should be submitted only where they are raised by the pleadings and the evidence.

On September 25, 2008 the President signed the Americans with Disabilities Act Amendments of 2008, Pub.L. No. 110-325, 122 Stat. 3553. These amendments, which amended and broadened the ADA's definition of "disability," became effective January 1, 2009. The Committee intends to revise these instructions to reflect this legislation.

[155] *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 622 (5th Cir. 2000) (quoting 42 U.S.C. § 12111(9)).

[156] *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997).

11.7.1

ADA—DISABILITY DISCRIMINATION[157]

A. Committee Notes

This charge is for use in cases where the plaintiff alleges the defendant discriminated against the plaintiff because of his or her disability. This includes failing to hire, failing to promote, or firing or demoting the plaintiff because he or she was a qualified individual with a disability.

B. Charge

1. Plaintiff claims [he/she] was discriminated against because of [his/her] disability.

2. Specifically, Plaintiff claims Defendant [challenged employment action] because of [his/her] disability.

3. Defendant denies Plaintiff's claims and contends [Defendant's reasons and/or affirmative defenses].

4. It is unlawful to [describe challenged employment action] a qualified individual with a disability because of the individual's disability.[158]

5. To succeed in this case, Plaintiff must prove the following three items by a preponderance of the evidence:

   a. Plaintiff has a disability;[159]

   b. Plaintiff was qualified for the job;

   c. Defendant [challenged employment action] Plaintiff because of Plaintiff's disability.

6. Plaintiff does not have to prove that [his/her] disability was the only reason Defendant [challenged employment action] Plaintiff.

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[157] This charge may also be used where disparate impact is asserted under 42 U.S.C. § 12112(b)(6).

[158] 42 U.S.C. § 12112.

[159] If there is a dispute regarding whether Plaintiff's disability status changed between the time of the alleged discrimination and trial, the Court may wish to submit instructions clarifying the appropriate time period for assessing disability. *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999).

7. If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [describe challenged employment action] Plaintiff because of [his/her] disability.[160]

8. Disability means (1) a physical or mental impairment[161] that substantially limits one or more major life activities; or (2) a record of such an impairment; or (3) being regarded as having such an impairment.[162]

9. A person is substantially limited in a major life activity if [he/she] is (i) unable to perform the activity; or (ii) significantly restricted in the condition, manner, or duration under which [he/she] can perform the activity as compared to the average person in the general population.[163] The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact, of or resulting from the impairment.[164]

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[160] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

[161] It is seldom disputed whether the plaintiff has an impairment. If there is a fact issue on this, then the jury may be instructed consistently with the ADA regulations' definitions, such as: "Physical or mental impairment" means: (1) 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 (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

[162] Coverage under the ADA can be established where an individual suffered an adverse employment action as the result of the myths, fears, and stereotypes associated with that individual's disability. 29 C.F.R. § 1630 app. § 1630.2(l) ("An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability. . ."); *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987) ("Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."). Committee Note: Only the theories being advanced in the case need be submitted to the jury.

[163] *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 805 (5th Cir. 1997) (citing 29 C.F.R. § 1630.2(j)(1)).

[164] 29 C.F.R. § 1630.2(j)(2). In cases in which mitigating measures are alleged to impact the disability determination, the court may instruct the jury as follows:

> If the Plaintiff is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those mitigating measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity. Mitigating measures include things such as medicines, or assistive or prosthetic devices. Mitigating measures do not include reasonable accommodations, or compensation strategies that do not actually improve the ability to perform a particular major life activity. For example, use of a wheelchair may improve a person's mobility without improving a person's ability to walk.

a. A major life activity[165] is an activity that is important or significant, but it does not necessarily have to be public, economic, or undertaken daily.[166] Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty,[167] and they include, but are not limited to, such things as caring for oneself,[168] performing manual tasks that are central to daily life,[169] walking, seeing, hearing, speaking, breathing, learning,[170] working,[171] eating,[172] lifting, reaching, sitting, standing,[173] and reproduction.[174]

Sutton v. United Air Lines, Inc., 527 U.S. 471, 482, 488 (1999); 29 C.F.R. § 1630, app. § 1630.2(j).

[165] Although this instruction derives from 29 C.F.R. § 1630.2(j)(1), in most cases the issue of whether a given activity is a major life activity is not in dispute. If there is no dispute that the activity at issue in a particular case is a major life activity, or if the court finds that it is as a matter of law, the above list need not be submitted, and instead, the jury should be instructed that the particular activity in question is a major life activity.

[166] *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).

[167] 29 C.F.R. Part 1630 App., 29 C.F.R. § 1630.2(i).

[168] 29 C.F.R. §1630.2(i).

[169] *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 691 (2002) (interpreting 29 C.F.R. §1630.2(i)).

[170] 29 C.F.R. §1630.2(i).

[171] *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 805 (5th Cir. 1997); 29 C.F.R. § 1630.2(i), (j)(3). If the plaintiff asserts a substantial limitation, whether past, present, or perceived, in the major life activity of working, the following instruction should be used:

> With respect to the major life activity of working, the term substantially limits means significantly restricted in the ability to perform either a class of jobs (that is, jobs using similar training, knowledge, skills or abilities), or a broad range of jobs in various classes (that is, jobs not using similar training, knowledge, skills or abilities), as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> In addition to the factors listed in (i) through (iii) of paragraph nine, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of working: (A) the geographical area to which the individual has reasonable access; (B) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment; and/or (C) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment.

[172] *Waldrip v. Gen'l Elec. Co.*, 325 F.3d 652, 655 (5th Cir. 2003).

[173] *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998).

b. A person has a record of such an impairment if [he/she] has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.[175]

c. A person is regarded as having such an impairment if [he/she]: (i) has a physical or mental impairment that does not substantially limit major life activities, but is treated by Defendant as having a substantially limiting impairment; or (ii) has a physical or mental impairment that substantially limits one or more major life activities, but only because of the attitudes of others toward the impairment; or (iii) has no actual impairment at all, but is treated by Defendant as having a substantially limiting impairment.[176]

10. A qualified individual is one who, with or without reasonable accommodations, can perform the essential functions of the job.[177]

11. Essential functions are those that are fundamental to the job at issue. The term does not include the marginal functions of a job. In deciding whether a function is essential, you may consider a variety of factors: (i) the reasons the job exists, (ii) the number of employees Defendant has to perform that kind of work, (iii) the degree of specialization the job requires, (iv) Defendant's judgment as to which functions are essential, (v) written job descriptions prepared before advertising or interviewing applicants for the position, (vi) the consequences of not requiring an employee to satisfy that function, and (vii) the work experience of others who held the position.[178] You may also consider other factors.[179]

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[174] *Bragdon v. Abbott*, 524 U.S. 624, 638-639 (1998).

[175] 29 C.F.R. § 1630.2(k).

[176] *McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 281 (5th Cir. 2000).

[177] *Rodriguez v. ConAgra Grocery Prods. Co.*, No. 04-11473, slip op. at 8 (5th Cir. Nov. 16, 2005); *Kapche v. City of San Antonio,* 176 F.3d 840, 843 (5th Cir. 1999); 29 C.F.R. § 1630.2(m). Committee Note: Qualified also means "that the individual satisfies the requisite skill, experience, education, and other job-related requirements of the employment position the individual holds or desires." *Id.* There is often no dispute on this part of the definition; however, if there is a dispute, this quoted language should be included in the instruction.

[178] *Kapche v. City of San Antonio,* 176 F.3d 840, 843 (5th Cir. 1999) (citing 29 C.F.R. § 1630.2(n)).

[179] 29 C.F.R. § 1630.2(n); 29 C.F.R. § 1630 App. § 1630.2(n). Committee Note: The jury should not be instructed regarding essential functions when they are not disputed.

JURY QUESTIONS

Question No. 1[180]

Was Plaintiff a qualified individual with a disability?

Answer "Yes" or "No"

_____

If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 1 or 2

Did Defendant [challenged employment action] Plaintiff because Plaintiff has a disability?

Answer "Yes" or "No"

_____

[180] Committee Note: If there is no fact question or dispute regarding whether the plaintiff is a qualified individual with a disability, the court should not submit this question and should, instead, submit only the second question.

11.7.2

ADA—FAILURE TO ACCOMMODATE

A. Committee Notes

This charge is for use in cases where the plaintiff alleges the employer failed to make a reasonable accommodation for plaintiff's disability that would have permitted plaintiff to perform the essential functions of his or her job.

B. Charge

1. Plaintiff claims Defendant discriminated against [him/her] because of [his/her] disability. Specifically, Plaintiff claims Defendant failed to reasonably accommodate Plaintiff's disability.

2. Defendant denies Plaintiff's claims and contends [Defendant's reasons and/or affirmative defenses].

3. The law requires employers to make reasonable accommodations for an employee's [or applicant's] disability.[181]

4. To succeed in this case, Plaintiff must prove the following elements by a preponderance of the evidence:

   a. Plaintiff had a disability;[182]

   b. Plaintiff was qualified for the job;[183]

   c. Defendant knew of Plaintiff's disability;[184]

   d. Plaintiff requested an accommodation;[185]

   e. A reasonable accommodation existed that would have allowed Plaintiff to perform the essential functions of the job;[186] and

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[181] 42 U.S.C. § 12112(b)(5)(A).

[182] 42 U.S.C. § 12112(b)(5)(A).

[183] 42 U.S.C. § 12112(b)(5)(A).

[184] 42 U.S.C. § 12112(b)(5)(A).

[185] *Loulseged v. Azko Nobel Inc.*, 178 F.3d 731, 735 n.4, 736 n.5 (5th Cir. 1999).

f. Defendant failed to provide a reasonable accommodation.[187]

5. A reasonable accommodation is one that is ordinarily reasonable, or reasonable in most cases.[188] Reasonable accommodations may include, for example: (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; or (b) 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.[189]

6. Defendant claims Plaintiff's requested accommodation would have imposed an undue hardship on Defendant. An employer need not provide a reasonable accommodation if it can prove that the accommodation would impose an undue hardship on its business operations. Defendant has the burden of proving by a preponderance of the evidence that the accommodation would have imposed an undue hardship. [190]

7. An "undue hardship" is an action requiring significant difficulty or expense. Factors to be considered include:[191] (a) the nature and cost of the accommodation; (b) the overall financial resources of the facility [or facilities] involved in the accommodation; the number of persons employed there; the effect on expenses and resources, or the impact otherwise on the facility's operation; (c) the overall financial resources of the Defendant; the overall size of the Defendant's business with respect to the number of employees; and the number, type, and location of Defendant's facilities; and (d) the type of operation [or operations] of Defendant, including the composition, structure, and functions of the Defendant's workforce; the geographic separateness, administrative, or fiscal relationship of the affected facility [or facilities] to the Defendant.[192]

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[186] *Riel v. EDS Corp.*, 99 F.3d 678, 683 (5th Cir. 1997).

[187] 42 U.S.C. § 12112(b)(5)(A).

[188] *Riel v. EDS Corp.*, 99 F.3d 678, 683 (5th Cir. 1997).

[189] 42 U.S.C. 12111(9).

[190] For the remaining applicable ADA instructions refer to paragraphs 6 through 7 and subparts within section 11.7.1.

[191] 42 U.S.C. § 12111(10)(B).

[192] This instruction should be utilized where the defendant has asserted the affirmative defense of undue hardship.

JURY QUESTION

Question No. 1

Did Defendant fail to reasonably accommodate Plaintiff under the ADA?

Answer "Yes" or "No"

_____

11.7.3

ADA—DISABILITY HARASSMENT— CO-WORKER/DIRECT AND NON-DIRECT SUPERVISOR/THIRD-PARTY DISABILITY HARASSMENT (HOSTILE WORK ENVIRONMENT)[193]

A. Committee Notes

This charge is for use in cases where disability harassment is alleged under a negligence theory. There is little case law on this cause of action, and these instructions rely heavily on the Fifth Circuit's leading case on this subject, *Flowers v. Southern Regional Physicians Services, Inc.*[194]

B. Charge

1. Plaintiff claims [he/she] was harassed by [harasser] because of [his/her] disability, and that [his/her] employer, Defendant, knew or in the exercise of reasonable care should have known of the harassment, but did not take prompt remedial action.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's [disability]. This includes disability harassment.

4. For Defendant to be liable for disability harassment, the conduct must be sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment and create a hostile or abusive work environment.[195] To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff's employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or

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[193] The Fifth Circuit has recognized a cause of action for disability harassment under the ADA. *Flowers v. S. Reg'l Physicians Servs., Inc.*, 247 F.3d 229, 235-36 (5th Cir. 2001). Although tried shortly after *Faragher and Ellerth* were decided, *Flowers* appears to have been tried solely under a negligence theory, and the Fifth Circuit's decision on appeal addresses only the negligence theory of disability harassment. As *Flowers* is the only published Fifth Circuit opinion available to the Committee at the time these charges were submitted, the Committee did not prepare disability harassment charges under any other theory. Given that many cases interchange the theories in both Title VII and the ADA, the Committee recognizes future cases may provide more guidance on not only the application of theories to disability harassment, but also their viability.

[194] 247 F.3d 229, 235-36 (5th Cir. 2001).

[195] *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229,235-236 (5th Cir. 2001); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance.[196]

5. In determining whether a hostile work environment existed, you must consider the evidence from both the Plaintiff's perspective and from the perspective of a reasonable person. First, Plaintiff must actually find the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff would find the conduct offensive.[197]

6. If Plaintiff proves [he/she] was harassed because of [his/her] disability, then you must decide whether Defendant is liable. To be liable, Plaintiff must prove (a) Defendant either knew of the harassment, or in the exercise of reasonable care should have known of the harassment, and (b) Defendant failed to take prompt remedial action.[198]

7. In determining whether Defendant knew or should have known of the harassment, Plaintiff must prove that (a) the harassment was known or communicated to a person who had the authority to receive, address, or report the complaint, even if that person did not do so,[199] or (b) the harassment was so open and obvious that Defendant should have known of it.[200]

8. Prompt remedial action is conduct by the Defendant that is reasonably calculated to stop the harassment and remedy the situation. Whether Defendant's actions were prompt and remedial depends upon the particular facts, and you may look at, among other things, the effectiveness of any actions taken.[201]

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[196] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[197] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[198] *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 873 (5th Cir. 1999); *Williamson v. City of Houston*, 148 F.3d 462, 465-66 (5th Cir. 1998).

[199] *Williamson v. City of Houston*, 148 F.3d 462, 466-67 (5th Cir. 1998)

[200] *Pfau v. Reed,* 125 F.3d 929 (5th Cir. 1997); *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999).

[201] *See Waltman v. Int'l Paper Co.,* 875 F.2d 468, 477 (5th Cir. 1989). For remaining applicable ADA instructions refer to paragraphs 6 through 7 and subparts within section 11.7.1.

JURY QUESTIONS

Question No. 1

Was Plaintiff harassed because of [his/her] disability?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then answer the following Question:

Question No. 2

Did Defendant know, or in the exercise of reasonable care should Defendant have known, that Plaintiff was being harassed because of [his/her] disability?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer the following Question:

Question No. 3

Did Defendant fail to take prompt remedial action?

Answer "Yes" or "No."

_____

11.7.4

ADA—BUSINESS NECESSITY DEFENSE[202]

A. Committee Notes

This instruction should be used in cases where the Defendant claims its actions were justified by business necessity. The business necessity defense is applicable if the challenged employment action results from applying an across-the-board rule that disqualified the Plaintiff.[203] The business necessity defense should only be used in lieu of, and not in conjunction with, the direct threat defense.

B. Charge

Defendant claims that [applicable employment standard] was a business necessity. Business necessity is a defense to a claim of discrimination under the ADA.

To establish this defense, Defendant must prove by a preponderance of the evidence that its application of qualification standards, tests, or selection criteria, or policies that have [the effect of screening out or otherwise denying a job or benefit to individuals with plaintiff's disability] [a disparate impact on individuals with plaintiff's disability] is:

a. Uniformly applied;

b. Job-related for the position in question;

c. Consistent with business necessity; and

d. Cannot be met by a person with plaintiff's disability even with a reasonable accommodation.

In evaluating whether the risks addressed by the standard constitute a business necessity, you should consider:

a. The magnitude of possible harm; and

b. The probability of occurrence.

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[202] 42 U.S.C. § 12113(a) (describing defenses and terms) and 29 C.F.R. § 1630.15(c) (1999) (describing the four elements a defendant must prove to sustain burden). *EEOC v. Exxon Corp.*, 203 F. 3d 871, 875 (5th Cir. 2000);

[203] *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000).

JURY QUESTION

Question No. 1

Was Defendant's policy that caused Plaintiff to be [challenged employment action] justified by business necessity?

Answer "Yes" or "No"

_____

11.7.5

ADA—DIRECT THREAT DEFENSE

A. Committee Notes

This instruction should be used in cases where the defendant claims its actions were justified by the direct threat affirmative defense. This defense is applicable in cases where the defendant asserts that the plaintiff, assessed individually, would have posed a direct threat in the position held or sought, as opposed to an exclusion based upon an across-the-board rule.[204]

B. Charge

1. If you find Defendant [challenged employment action] because of [his/her] disability, then you must find for Plaintiff unless Defendant proves by a preponderance of the evidence that Plaintiff's [employment/continued employment] [posed/would have posed] a direct threat to Plaintiff and/or Defendant's other employees.[205]

2. A direct threat means a significant risk of substantial harm to the health or safety of Plaintiff or others in the workplace that could not be eliminated by a reasonable accommodation.[206]

3. To prove Plaintiff posed a direct threat, Defendant must prove it performed a specific personal assessment of Plaintiff's present ability[207] to safely perform the essential functions of the job, based on reasonable medical judgment that relied on the most current medical knowledge and/or on the best available objective evidence.[208]

4. In determining whether Plaintiff posed a direct threat, you should consider: (i) how long the risk will last; (ii) the nature and severity of the potential harm; (iii) how likely it is that the harm will occur; and (iv)

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[204] 42 U.S.C. § 12113(a) (describing defenses and terms) and 29 C.F.R. § 1630.15(c) (1999) (describing the four elements a defendant must prove to sustain burden). The Fifth Circuit has held that this defense is applicable in cases where the employer asserts the plaintiff as an individual poses a safety risk. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000). On the other hand, if the challenged employment action results from applying an across-the-board rule that disqualifies the plaintiff, the business necessity defense is applicable.

[205]

[206] 29 C.F.R. § 1630.2(r).

[207] In most cases, the timing of the assessment is not an issue; but, if in dispute, the assessment generally must measure the plaintiff's ability to work safely at the time of the challenged employment action. 29 C.F.R. § 1630.2(r) (referencing "present" ability).

[208] *Kapche v. City of San Antonio*, 304 F.3d 493, 498 (5th Cir. 2002) (citing 29 C.F.R. § 1630.2(r)).

whether the potential harm is likely to occur in the near future.[209] Defendant must also prove there was no reasonable accommodation it could make that would eliminate or reduce the risk so that it was no longer a significant risk of substantial harm.[210]

[209] *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 763 (5th Cir. 1996) (citing 29 C.F.R. § 1630.2(r)).

[210] 29 C.F.R. § 1630.2(r).

JURY QUESTION

Question No. 1

Would the [describe applicable employment action] of Plaintiff have posed a direct threat to Plaintiff or others in the workplace?

Answer "Yes" or "No"

_____

11.8

TITLE VII AND ADA DAMAGES

A. Committee Notes

This charge can be used for all Title VII and ADA cases.

B. Charge

1. If you found that Defendant violated [Title VII/the ADA], then you must determine whether Defendant has caused Plaintiff damages and, if so, you must determine the amount, if any, of those damages.

2. Plaintiff must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. On the other hand, Plaintiff need not prove the amount of [his/her] losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.[211]

3. You should consider the following elements of damages, and no others: (1) economic loss, which includes back pay and benefits; (2) punitive damages, and (3) compensatory damages, which include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.[212]

4. Back pay and benefits include the amounts the evidence shows Plaintiff would have earned had [he/she] [remained an employee of Defendant/been promoted, etc.], and includes fringe benefits such as life and health insurance, stock options, contributions to retirement, etc., minus the amounts of earnings and benefits, if any, Defendant proves by a preponderance of the evidence, Plaintiff received in the interim.[213]

5. Defendant asserts that Plaintiff failed to mitigate [his/her] damages.[214] To prevail on this defense, Defendant must show, by a preponderance of the evidence, that: (a) there were "substantially equivalent employment" positions available; (b) Plaintiff failed to use reasonable diligence in

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[211] *United States v. U.S. Steel*, 520 F.2d 1043, 1050 (5th Cir. 1975).

[212] Section 1981a also provides that a plaintiff may recover for "future pecuniary losses," which by definition does not include front pay. *Pollard v. E.I. DuPont de Numours & Co.*, 532 U.S. 843 (2001).

[213] *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981).

[214] This instruction should be used only when Defendant asserts the affirmative defense that Plaintiff failed to mitigate his or her damages.

seeking those positions; and (c) the amount by which Plaintiff's damages were increased by [his/her] failure to take such reasonable actions.[215]

6. "Substantially equivalent employment" means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job [he/she] [lost/was denied]. Plaintiff does not have to accept a job that is dissimilar to the one [he/she] [lost/was denied], one that would be a demotion, or one that would be demeaning.[216] The reasonableness of Plaintiff's diligence should be evaluated in light of the individual characteristics of Plaintiff and the job market.[217]

7. There is no exact standard for determining compensatory damages. You are to determine an amount that will fairly compensate Plaintiff for any injury s/he has sustained.[218] Do not include as compensatory damages back pay or interest on back pay and/or benefits.

8. Punitive damages are those damages designed to punish a defendant and to deter a defendant and others from engaging in similar conduct in the future.[219]

9. In this case you may award punitive damages if Plaintiff proves by a preponderance of the evidence that: (1) the individual who engaged in the discriminatory act(s) or practice(s) was a managerial employee; (2) [he/she] engaged in the discriminatory act(s) or practice(s) while acting in the scope of [his/her] employment; and (3) [he/she] acted with malice or reckless indifference to Plaintiff's federal protected right to be free from discrimination.[220]

10. If Plaintiff has proven these facts, then you may award punitive damages, unless Defendant proves by a preponderance of the evidence that the

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[215] *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999); *Floca v. Homecare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir.1975).

[216] *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[217] *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1993 (5th Cir. 1999).

[218] SEVENTH CIR. PATTERN JURY INSTR. 7.23

[219] *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 n.4 (5th Cir. 1999).

[220] *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 n.4 (5th Cir. 1999).

[conduct/act] was contrary to the employer's good faith efforts to prevent discrimination in the workplace.[221]

11. In determining whether [employee] was a "managerial employee" of Defendant, you should consider the type of authority [employee] had over Plaintiff and whether Defendant delegated employment decisions to [employee].[222]

12. An action was in "reckless indifference" to Plaintiff's federally protected rights if it was taken in the face of a perceived risk that the conduct would violate federal law.[223] Plaintiff is not required to show egregious or outrageous discrimination to recover punitive damages. However, proof that Defendant engaged in intentional discrimination is not enough in itself to justify an award of punitive damages.[224]

13. In determining whether Defendant made "good faith efforts" to prevent discrimination in the workplace, you may consider things like whether it adopted anti-discrimination policies, whether it educated its employees on the federal anti-discrimination laws, how it responded to Plaintiff's complaint of discrimination, and how it responded to other complaints of discrimination.[225]

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[221] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 281, 286 (5th Cir. 1999).

[222] *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 285 (5th Cir. 1999); *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

[223] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999).

[224] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999).

[225] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999).

JURY QUESTIONS

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages, if any, you have found Defendant caused Plaintiff?

Answer in dollars and cents for the following items and none other:

Back pay and benefits:

_____

Emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life:

_____

Question No. 2

Based on the evidence presented, do you find that Plaintiff should be awarded punitive damages?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer the following Question:

Question No. 3

What sum of money should be assessed against Defendant as punitive damages?

Answer in dollars and cents:

_____

11.9

COMMITTEE INTRODUCTION TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act of 1967 (ADEA), as amended, prohibits discrimination in public and private employment against individuals 40 years of age and older.[226] The ADEA prohibits discrimination based on age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.[227] Under the ADEA, it is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.[228] The ADEA applies to employers with 20 or more employees, employment agencies, and labor organizations.[229]

The ADEA's substantive provisions generally follow those of Title VII, while the ADEA's remedies generally follow those of the Fair Labor Standards Act (FLSA). Most ADEA cases are brought under the disparate treatment theory and follow Title VII burden of proof principles originally set forth.[230] The ADEA specifically incorporates the remedial provisions of the Fair Labor Standards Act.[231] Available legal remedies include back pay, front pay, and liquidated damages. Costs and reasonable attorneys' fees also may be awarded. Appropriate equitable relief may include a judgment to compel employment, reinstatement, or promotion.[232]

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[226] 29 U.S.C. §§ 621-634. The ADEA does not, however, prohibit employers from favoring older workers over younger ones, even if the younger workers are in the ADEA's protected age group of age 40 or older. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004).

[227] 29 U.S.C. § 623.

[228] 29 U.S.C. § 623.

[229] 29 U.S.C. § 623.

[230] The Supreme Court has ruled that the ADEA allows older workers to bring disparate impact cases as well (i.e., to sue for age discrimination when an employer's neutral policy unintentionally discriminates against older workers). *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005).

[231] 29 U.S.C. § 626(b) (incorporating 29 U.S.C. §§ 216, 217(b)).

[232] While the Committee was not able to locate a Fifth Circuit case expressly recognizing an age-based harassment claim, the Fifth Circuit often notes that the rights under the ADEA and Title VII are nearly identical. *Rachid v. Jack in the Box, Inc*, 376 F.3d 305, 309-312 (5th Cir. 2004); *see Lachner v. West*, 147 F. Supp. 2d 538, 543 (N.D. Tex. 2001) (assuming Fifth Circuit would recognize a claim for age-based harassment under the ADEA).

11.9.1

ADEA—DISPARATE TREATMENT

A. Committee Notes

This charge is for use in ADEA cases in which the plaintiff alleges he or she was discriminated against because of age, 40 years or older.[233] This charge applies to disparate treatment cases in which facts concerning each element of proof are in dispute. To the extent that facts concerning elements of proof are not in dispute, the charge may be modified accordingly.[234]

B. Charge

1. Plaintiff claims [he/she] was [challenged employment action] because of [his/her] age.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate against an employee because of the employee's age.

4. To prove discrimination, Plaintiff must prove by a preponderance of the evidence that:

   a. [he/she] was [identify challenged employment action];

   b. [he/she] was 40 years or older at the time [he/she] was [challenged employment action]; and

   c. Defendant [challenged employment action] because of Plaintiff's age.

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[233] Under ADEA § 623(f), there are particular defenses available to a defendant that maintains its decision was the result of a bona fide occupational qualification or a bona fide seniority system. In these cases, the jury must be instructed on the elements of the particular defense asserted. These charges do not contain those defensive instructions.

[234] For authority concerning burdens of proof in age discrimination cases, *see generally Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305,309-312 (5th Cir. 2004); *Kanida v. Gulf Coast Med. Personnel, LP*, 363 F.3d 568 (5th Cir. 2004); *Machinchick v. PB Power, Inc.*, 398 F.3d 345 (5th Cir. 2005); 42 U.S.C. § 2000e-2; MODEL JURY INSTRUCTIONS, EMPLOYMENT LITIGATION § 1.02[1] (2d ed. 2005) (modified); MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT §§ 5.21, 5.91 (April 2001) (modified); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (Civil Cases) § 1.3.1 (1999) (modified); FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.07 (2005).

5. Plaintiff does not have to prove that discrimination is the only reason Defendant [challenged employment action] Plaintiff.

6. If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [challenged employment action] Plaintiff because of [his/her] age.[235]

[235] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

JURY QUESTION

Question No. 1

Did Defendant [challenged employment action] Plaintiff because of Plaintiff's age?

Answer "Yes" or "No."

_____

11.9.2

ADEA HARASSMENT

A. Committee Notes

While the Committee was not able to locate a Fifth Circuit case expressly recognizing an age-based harassment claim, the Fifth Circuit often notes that the rights under the ADEA and Title VII are nearly identical.[236] If the court instructs the jury on an age-based harassment claim, the Committee recommends modifying the harassment charges found in 11.5.2 and 11.5.3, *supra*.

[236] *Rachid v. Jack in the Box, Inc*, 376 F.3d 305, 309-312 (5th Cir. 2004); *see Lachner v. West*, 147 F. Supp. 2d 538, 543 (N.D. Tex. 2001) (assuming Fifth Circuit would recognize a claim for age-based harassment under the ADEA).

11.9.3

ADEA—DAMAGES

A. Committee Notes

This charge may be used in all ADEA cases.

B. Charge

1. If you found that Defendant violated the ADEA, then you must determine whether Defendant has caused Plaintiff damages and, if so, you must determine the amount, if any, of those damages.

2. Plaintiff must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. On the other hand, Plaintiff need not prove the amount of [his/her] losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.[237]

3. You should consider the following elements of damages, and no others: (1) the amounts the evidence shows Plaintiff would have earned had [he/she] [remained an employee of Defendant/been promoted, etc.], including fringe benefits such as life and health insurance,[238] stock options, contributions to retirement, etc., minus the amounts of earnings and benefits, if any, Defendant proves by a preponderance of the evidence, Plaintiff received in the interim.[239]

4. Defendant asserts that Plaintiff failed to mitigate [his/her] damages.[240] To prevail on this defense, Defendant must show, by a preponderance of the evidence, that: (a) there were "substantially equivalent employment" positions available; (b) Plaintiff failed to use reasonable diligence in

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[237] *United States v. U.S. Steel*, 520 F.2d 1043, 1050 (5th Cir. 1975).

[238] A plaintiff may recover damages for lost insurance benefits only if the plaintiff shows he or she actually incurred these expenses by replacement of the lost insurance or occurrence of the insured risk. *Pearce v. Carrier*, 966 F.2d 958 (5th Cir. 1992).

[239] *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 482-83 (5th Cir. 2007); *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981).

[240] This instruction should be used only when Defendant asserts the affirmative defense that Plaintiff failed to mitigate his or her damages.

seeking those positions; and (c) the amount by which Plaintiff's damages were increased by [his/her] failure to take such reasonable actions.[241]

5. "Substantially equivalent employment" means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job [he/she] [lost/was denied]. Plaintiff does not have to accept a job that is dissimilar to the one [he/she] [lost/was denied], one that would be a demotion, or one that would be demeaning.[242] The reasonableness of Plaintiff's diligence should be evaluated in light of the individual characteristics of Plaintiff and the job market.[243]

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[241] *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999); *Floca v. Homecare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir.1975).

[242] *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[243] *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1993 (5th Cir. 1999).

JURY QUESTIONS

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages, if any, you have found Defendant caused Plaintiff?

Answer in dollars and cents for the following items and none other:

Back pay and benefits:

_____

11.9.4

ADEA—WILLFUL VIOLATIONS

A. Committee Notes

Under the Fair Labor Standards Act,[244] a prevailing plaintiff may be awarded liquidated damages. The ADEA incorporates some of the FLSA's remedial provisions.[245] Thus, when there is a finding that a violation of the ADEA was willful, the plaintiff may be awarded liquidated damages.[246]

B. Charge

1. If you find Defendant [challenged employment action] because of Plaintiff's age, then you must also determine whether Defendant's action was "willful." To establish willfulness, Plaintiff must also prove that, when Defendant [challenged employment action] Plaintiff, Defendant either (a) knew that its conduct violated the ADEA, or (b) acted with reckless disregard for compliance with the ADEA.[247]

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[244] 29 U.S.C. § 216(b).

[245] 29 U.S.C. § 626(b).

[246] *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993); *Transworld Airlines, Inc. v. Thurston* , 469 U.S. 111, 125 (1985); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 391-92 (5th Cir. 2003).

[247] *Thurston v. Transworld Airlines, Inc.*, 469 U.S. 111, 125 (1985).

JURY QUESTION

Question No. 1

Was Defendant's [challenged employment action] "willful"?

Answer "Yes" or "No."

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11.10

COMMITTEE INTRODUCTION TO THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993[248] (FMLA) was enacted "to balance the demands of the workplace with the needs of families" by allowing "employees to 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." In this way, Congress sought "to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[249]

An FMLA-covered employer is "any person engaged in commerce or in any industry or activity 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." "Employer" includes persons who act directly or indirectly in the interest of an employer, successors-in-interest, and public agencies as defined in the Act. With regard to the latter, a public agency is considered to be engaged in commerce.[250]

Generally, an employee is eligible for FMLA leave and associated rights if he or she (a) has been employed for at least 12 months by the employer; and (b) has rendered at least 1,250 hours of service during the previous 12-month period.[251] However, an "eligible employee" does not include a worker employed at a worksite where the employer employs less than 50 employees "if the total number of employees employed by that employer within 75 miles of that worksite is less than 50."[252]

The FMLA establishes two categories of rights: prescriptive and proscriptive.[253] The first is comprised of a series of entitlements that includes, among others, the right to a yearly maximum of 12 weeks of leave in specified circumstances,[254] the maintenance of certain job

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[248] 29 U.S.C. §§ 2601-2654.

[249] 29 U.S.C. § 2601(b)(1) and (2).

[250] 29 U.S.C. § 2611(4)(A)-(B).

[251] 29 U.S.C. § 2611(2)(A).

[252] 29 U.S.C. § 2611(2)(B)(ii).

[253] *Nero v. Indus. Molding Corp.*, 167 F.3d, 921, 927 (5th Cir. 1999).

[254] 29 U.S.C. § 2612. Section 2612 provides an eligible employee an entitlement to leave in four situations: (a) because of the birth of a child of the employee, and "in order to care for" such child; (b) because of the placement of a child with the employee for adoption or foster care; (c) to care for a spouse, child or parent with a serious health condition; and (d) because of a serious health condition of the employee that renders him or her unable to perform the functions of the job. Leave may be taken intermittently in the latter two circumstances when "medically necessary," but only with the concurrence of the employer in the first two circumstances. *Id.*, § 2612(b). Where the need for leave is foreseeable (i.e., planned or expected), the employee is required to provide the employer with no less than 30 days' notice, "except that if the date of [medical treatment, adoption, placement or birth] requires leave

benefits during leave,[255] and the right to job restoration to the same or an equivalent position upon return from leave.[256] In cases where the exercise of, or the attempt to exercise, these rights has been denied, restrained or interfered with, the intent of the employer is not material. Ordinarily, legal challenges based on a denial of or interference with these rights are referred to as "interference" or "entitlement" claims.

The second distinct category is comprised of rights that are proscriptive in nature. These rights protect the employee against discriminatory or retaliatory treatment by the employer because the employee has used or sought to use the Act's benefits. Legal challenges in this category are often referred to as "discrimination" claims, and the employer's intent is in issue, as in cases arising under Title VII, the ADEA and the ADA. For example, if the employee has used FMLA leave and returned to his or her job but is shortly thereafter fired by the employer, the employee may establish a discrimination claim by proving that the termination was because of the use of FMLA leave. He or she may do so by showing that the reason asserted by the employer to justify the discharge (e.g., poor performance) is pretextual, or that other evidence exists to show that the termination was because of the employee's use of FMLA rights. Finally, the FMLA, like Title VII, prohibits retaliatory employment actions for opposing conduct made unlawful by the Act or participating in proceedings designed to vindicate FMLA rights.[257]

One who proves a violation of the FMLA may be awarded wages, compensation and benefits denied or lost, interest, liquidated damages, equitable relief (e.g., hiring, reinstatement, promotion), attorney's fees, expert witness fees, "and other costs of the action."[258] The FMLA "provides no relief unless the employee has been prejudiced by the violation . . . ."[259] Unlike the Fair Labor Standards Act, the FMLA does not require a plaintiff to establish that a defendant's conduct was willful in order to obtain liquidated damages. Liquidated damages under the FMLA are automatic unless the employer proves "that the act or omission which violated . . . this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation . . . ." Even if the "good faith" defense is proved, the court need not reduce or eliminate the liquidated damages because "[d]oubling the award is the norm under

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to begin in less than 30 days, the employee shall provide such notice as is practicable." The FMLA provides no notice provision for unexpected or unplanned (*i.e.*, "unforeseeable") leave, but Department of Labor regulations provide that in such cases, "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." 29 C.F.R. § 825.303(a). When providing notice, the employee need not expressly mention the FMLA. He or she need only impart information that "is sufficient to reasonably apprise [the employer] of the employee's request to take time off. . . ." for one of the four categories of leave recognized by the FMLA. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995).

[255] 29 U.S.C. § 2614(c) (relating to group health benefits).

[256] 29 U.S.C. § 2614(a)(1).

[257] 29 U.S.C. § 2615(a)(2)-(b).

[258] 29 U.S.C. § 2617.

[259] *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002).

the FMLA . . .[and] [t]he district court's discretion to reduce the liquidated damages must be exercised consistently with the strong presumption under the statute in favor of doubling."[260]

FMLA litigation may involve a wide variety of issues, and not all of them are, or can be, covered here. Both the statute and the regulations must be consulted. What follows are two "interference" charges and one "discrimination" charge that address the most typical issues presented.

[260] *Nero v. Indus. Molding Corp.*, 167 F.3d, 921, 929 (5th Cir. 1999) (quotation and citation omitted). In those cases where a violation of the FMLA has occurred but there is no loss or denial of wages, salary, employment benefits or other compensation, the employee is nevertheless entitled to "any actual monetary losses sustained, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary. . . ." 29 U.S.C. § 2617(a)(1)(A)(i)(II).

11.10.1

FMLA—INTERFERENCE WITH LEAVE RIGHTS

A. Committee Notes

This charge is for use in cases where a plaintiff alleges his or her leave rights under the FMLA were interfered with, restrained or denied.[261]

B. Charge

1. Plaintiff claims [he/she] was entitled to time off from work (i.e., leave)[262] under the FMLA, and that Defendant interfered with, restrained, or denied [his/her] entitlement to time off.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].[263]

3. It is unlawful for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided by the FMLA.[264] FMLA rights include requesting or taking leave under the FMLA, having the employer maintain certain employment benefits during leave and, once leave is completed, being restored by the employer to the position of employment the employee held when leave commenced, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.[265]

4. Plaintiff was eligible to take leave if, at the time of the commencement of leave, [he/she]: (1) had been employed by the employer for at least 12

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[261] There are many terms contained within the FMLA and its regulations that the Committee believes, in most cases, will not be necessary to submit or define. There may be cases, however, when those definitions are appropriate. In those cases, the Committee refers the court to the following: "Needed to Care For," 29 C.F.R § 825.116; "Parent," 29 C.F.R. § 825.113; "Son or Daughter," 29 C.F.R. § 825. 113; "In Loco Parentis," 29 C.F.R. § 825.113; "Equivalent Position," 29 C.F.R. § 825.215; "Key Employee," 29 C.F.R. § 825.217.

[262] 29 U.S.C. § 2612(a)(1) (entitlement to leave).

[263] Such reasons may include, but not be limited to, that the employee never gave "timely" or "sufficient" notice of the need for leave, or gave no notice of the need for leave, etc.

[264] 29 U.S.C. § 2615(a)(1).

[265] 29 U.S.C. § 2612(a)(1) (entitlement to leave); 29 U.S.C. § 2614(a)(1) (restoration to same or equivalent position); 29 U.S.C. § 2614(c)(1) (maintenance of group health plan benefits). This listing is not exclusive. Under 29 C.F.R. § 825.220(b), "Any violations of the Act or of these regulations constitute interfering with, restraining or denying the exercise of rights provided by the Act." The regulations provide several examples of what may constitute interference.

months; and (2) worked at least 1,250 hours during the previous 12-month period.[266]

5. If eligible,[267] Plaintiff was entitled to take up to 12 weeks of leave in any 12-month period [choose one or more of the following, as applicable]:

   a. Because of the birth of Plaintiff's child and to care for that child;

   b. Because of the placement of a child with Plaintiff for adoption or foster care;

   c. To care for Plaintiff's spouse, son, daughter, or parent, if that person had a serious health condition;

   d. Because of a serious health condition that made Plaintiff unable to perform the functions of [his/her] position.[268]

6. A "serious health condition" means an illness, injury, impairment or physical or mental condition that involves either (a) inpatient care in a hospital, hospice, or residential medical care facility, or (b) continuing treatment by a health care provider.[269]

7. A "health care provider" includes a doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker, so long as the provider is licensed to practice in the State and is performing within the scope of his or her practice.

8. Plaintiff was required to provide notice to Defendant indicating when [he/she] required FMLA leave.

   a. If the need for leave was foreseeable (i.e., planned or expected), Plaintiff was required to provide Defendant at least 30 days notice before leave was to begin, except that if the date [of the treatment/birth/placement] required leave

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[266] 29 U.S.C. § 2611(2)(A) (definition of "eligible employee"). Whether the Plaintiff is an "eligible employee" under the FMLA will seldom be in issue at this stage of the proceedings. This paragraph should be omitted where the employee's eligibility is not in issue.

[267] The phrase "if eligible" can be omitted if there is no dispute as to eligibility.

[268] 29 U.S.C. § 2612(a)(1)(A)-(D).

[269] 29 U.S.C. § 2611(11). A more detailed definition (including a definition of "continuing treatment") is contained within the FMLA regulations and may be included in the Court's submission. 29 C.F.R. § 825.114.

to begin in less than 30 days, Plaintiff was required to provide such notice as was practicable.[270]

b. If the need for leave was unforeseeable (i.e., unplanned or unexpected), Plaintiff was required to give Defendant notice as soon as was practicable under the facts and circumstances. Ordinarily, "as soon as practicable" requires an employee to give at least verbal notification within one or two business days after learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.[271]

c. To give Defendant proper notice of [his/her] need for FMLA leave, Plaintiff was not required to expressly mention the FMLA in particular. Plaintiff need only have provided Defendant enough information to place it on notice that leave was needed because of [serious health condition/birth/placement].[272]

9. To prevail in this case, Plaintiff must prove by a preponderance of the evidence that [he/she] was entitled to time off from work:

a. [Choose one or more of the following, as applicable: (i) because Plaintiff had a "serious health condition" that made [him/her] unable to perform the functions of [his/her] employment position; (ii) to care for Plaintiff's spouse, son, daughter, or parent, if that person had a "serious health condition"; (iii) because of the birth of Plaintiff's child and to care for that child; or (iv) because of the placement of a child with Plaintiff for adoption or foster care.]

b. Plaintiff gave Defendant the proper notice of the need for time off from work for one or more of these reasons; and

c. Defendant in any way interfered with, restrained, or denied Plaintiff's entitlement to take time off from work.

10. In this case, it does not matter whether Defendant intended to violate the FMLA. If Defendant denied Plaintiff a right to which [he/she] was

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[270] 29 C.F.R. § 825.302 (notice requirements for foreseeable leave).

[271] 29 C.F.R. § 825.303(a).

[272] *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995); 29 C.F.R. § 825.303 (notice requirements for unforeseeable leave).

entitled under the FMLA, then Defendant is liable, and Plaintiff should prevail.[273]

[273] *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (plaintiff must have been harmed by violation).

JURY QUESTIONS

Question No. 1

Did Defendant deny, restrain, or interfere with Plaintiff's right to leave under the FMLA, or [his/her] attempt to exercise [his/her] right to leave under the FMLA?

Answer "Yes" or "No."

_____

11.10.2

FMLA— INTERFERENCE— DENIAL OF BENEFITS OR JOB RESTORATION

A. Committee Notes

This charge is for use in cases where a plaintiff alleges his or her job restoration rights and/or the right to maintenance of employment benefits under the FMLA were interfered with, restrained, or denied.[274]

B. Charge

1. [Alternative A: Denial of Benefits]: Plaintiff claims Defendant was required to maintain [his/her] group health plan benefits while [he/she] was on FMLA leave, but that Defendant failed to do so.[275]

   [Alternative B: Denial of Job Restoration]: Plaintiff claims [he/she] was entitled to be restored to [his/her] same position of employment, or to an equivalent position, upon [his/her] return from FMLA leave, but that Defendant failed to restore [him/her] to such a position.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided by the FMLA.[276] FMLA rights include requesting or taking leave under the FMLA, having the employer maintain certain employment benefits during leave and, once leave is completed, being restored by the employer to the position of employment the employee held when leave commenced, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.[277]

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[274] Family and medical leave, job restoration and maintenance of group health plan benefits are not the only rights protected against interference, denial or restraint by the employer under the FMLA. As noted in 29 C.F.R. § 825.220(b), "Any violations of the Act or of these regulations constitute interfering with, restraining or denying the exercise of rights provided by the Act." The regulations provide several examples of what will constitute interference.

[275] For purposes of the FMLA, the term "group health plan" is defined at 26 U.S.C. § 5000(b)(1).

[276] 29 U.S.C. § 2615(a)(1); *see also* 29 C.F.R. § 825.220(b)(making it unlawful interference, denial or restraint of FMLA rights for an employer to violate any FMLA statutory or regulatory provision).

[277] 29 U.S.C. § 2612(a)(1) (entitlement to leave); 29 U.S.C. § 2614(a)(1) (restoration to same or equivalent position); 29 U.S.C. § 2614(c)(1) (maintenance of group health plan benefits).

4. Plaintiff was eligible to take leave if, at the time of the commencement of leave [he/she]: (1) had been employed by Defendant for at least 12 months; and (2) worked at least 1,250 hours during the previous 12-month period.[278]

5. If eligible,[279] Plaintiff was entitled to take up to 12 weeks of leave in any 12-month period [choose one or more of the following, as applicable]:

   a. Because of the birth of Plaintiff's child and to care for that child;

   b. Because of the placement of a child with Plaintiff for adoption or foster care;

   c. To care for Plaintiff's spouse, son, daughter, or parent, if that person had a "serious health condition;" or

   d. Because of a serious health condition that made Plaintiff unable to perform the functions of [his/her] position.[280]

6. While Plaintiff was on FMLA leave, Defendant was required to maintain coverage for Plaintiff under any group health plan for the duration of the leave, under the same conditions coverage would have been provided had Plaintiff not gone on leave.[281]

7. Upon return from FMLA leave, Plaintiff was entitled to be restored to the position of employment [he/she] held when the leave commenced, or to an equivalent position. An "equivalent position" is one that is virtually identical to the position Plaintiff held at the time leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.[282] Plaintiff was entitled to job restoration even if Plaintiff

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[278] 29 U.S.C. § 2611(2)(A) (definition of "eligible employee"). Whether the Plaintiff was an "eligible employee" under the FMLA will seldom be in issue. This paragraph should be omitted where the employee's eligibility is not in issue.

[279] The phrase "if eligible" can be omitted if there is no dispute as to eligibility.

[280] 29 U.S.C. § 2612(a)(1)(A)-(D).

[281] 29 U.S.C. § 2614(c)(1). If the employee does not return from FMLA leave and the employer has maintained group health benefits during the leave, the employer may recover the premium that it paid to maintain the employee's group health plan benefits, so long as the serious health condition resulting in leave was not the reason for the failure to return, or other circumstances beyond the employee's control were responsible for the failure to return. 29 U.S.C. § 2614(c)(2).

[282] 29 U.S.C. § 2614(a)(1). The regulations further define the term "equivalent position." 29 C.F.R. § 825.215(a)-(f).

was replaced while on leave or [his/her] position was restructured to accommodate the leave.[283]

8. Plaintiff's exercise of FMLA leave rights does not entitle [him/her] to greater rights to continued employment or employment benefits than any of [his/her] fellow employees who did not exercise FMLA leave rights. Thus, Defendant was not required to [maintain group health plan benefits/restore Plaintiff to the same or an equivalent position] if Defendant proves Plaintiff's [employment/benefits] would have ended even if Plaintiff had not exercised [his/her] FMLA leave rights.[284]

9. To prevail in this case, Plaintiff must prove by a preponderance of the evidence that:

[Alternative A: Denial of FMLA Benefit(s)]:

a. While Plaintiff was on leave, Defendant failed to maintain group health plan benefits for Plaintiff under the same conditions those benefits would have been provided if Plaintiff had not gone on leave.

[Alternative B: Denial of Job Restoration]:

a. Plaintiff sought to return to employment with Defendant following FMLA leave; and

b. Defendant failed to restore Plaintiff to the same position [he/she] held at the time FMLA leave commenced, or to an equivalent position.

10. In this case, it does not matter whether Defendant intended to violate the FMLA. If Defendant denied Plaintiff a right to which [he/she] was entitled under the FMLA, then Defendant is liable, and Plaintiff should prevail.[285]

11. If Plaintiff proves Defendant failed to restore [him/her] to the same or an equivalent employment position, Defendant may nevertheless succeed by proving by a preponderance of the evidence that Plaintiff's same job, or an equivalent one, would no longer have been available to [him/her] at the

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[283] 29 C.F.R. § 825.214(a).

[284] 29 C.F.R. § 825.216.

[285] *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (plaintiff must have been harmed by violation).

time job restoration was sought because of reasons unrelated to the leave.[286]

[286] 29 C.F.R. § 825.216. This paragraph should be omitted where the only submission involves the failure to maintain group health plan benefits.

JURY QUESTIONS

Question No. 1

[Alternative A: Denial of Group Health Plan Benefits]: Did Defendant fail or refuse to maintain group health plan benefits for Plaintiff during the duration of Plaintiff's leave under the same conditions such benefits would have been provided if Plaintiff had not gone on leave?

[Alternative B: Denial of Job Restoration]: Did Defendant fail or refuse to restore Plaintiff to [his/her] same or an equivalent job position upon Plaintiff's return from FMLA leave?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then proceed to Questions Nos. ____ - ____. Otherwise, do not answer those questions.

11.10.3

FMLA—DISCRIMINATION AND RETALIATION

A. Committee Notes

This charge is for use in cases where a plaintiff alleges he or she was discriminated or retaliated against because he or she exercised or sought to exercise rights under the FMLA.

B. Charge

1. Plaintiff claims [he/she] was [challenged employment action] by Defendant because [he/she] engaged in FMLA-protected activity.

2. Defendant denies Plaintiff's claims and contends that [Defendant's reasons].

3. It is unlawful for an employer to discriminate or retaliate against an employee for engaging in FMLA-protected activity.[287]

4. FMLA-protected activity includes, but is not limited to, requesting or taking leave, having the employer maintain certain employment benefits during leave, and, once leave is completed, seeking restoration to the position of employment Plaintiff held when leave commenced, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.[288]

5. To prevail in this case, Plaintiff must prove by a preponderance of the evidence that:

   a. [He/she] engaged in FMLA-protected activity;

   b. Defendant [challenged employment action]; and

   c. Defendant [challenged employment action] because Plaintiff engaged in FMLA-protected activity.[289]

6. Plaintiff does not have to prove that Plaintiff's FMLA-protected activity is the only reason Defendant [describe the challenged employment action] Plaintiff.

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[287] 29 U.S.C. § 2615(a)(1)and (2). If eligibility for leave is disputed, refer to paragraphs 4 through 8 of 11.10.1.

[288] 29 U.S.C. § 2612(a)(1) (entitlement to leave); 29 U.S.C. § 2614(a)(1) (restoration to same or equivalent position); 29 U.S.C. § 2614(c)(1) (maintenance of group health plan benefits).

[289] *Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999).

7. If you disbelieve the reason(s) Defendant has given for its decision, you may infer Defendant [challenged employment action] Plaintiff because of [his/her] FMLA-protected activity.[290]

[290] *Ratliff v. City of Gainesville*, 256 F.3d 355, 359-62 (5th Cir. 2001).

JURY QUESTIONS

Question No. 1

Did Defendant [challenged employment action] Plaintiff because of Plaintiff's [FMLA-protected activity]?

Answer "Yes" or "No."

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11.10.3

FMLA—WAGE LOSS DAMAGES

A. Committee Notes

The following charge should be used in FMLA cases where the plaintiff has experienced actual damages in the form of lost wages, salary, employment benefits, or other compensation, because of the FMLA violation.

The FMLA presumes a doubling of the damages and interest awarded, unless the defendant proves to the satisfaction of the court that the defendant's action that violated the FMLA was taken in good faith and that the defendant had reasonable grounds for believing its act or omission did not violate the FMLA. The decision to forego doubling is solely for the court and not a question for the jury.

B. Charge

1. If you found that Defendant violated the FMLA, then you must determine whether Defendant has caused Plaintiff damages and, if so, you must determine the amount, if any, of those damages.

2. Plaintiff must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. On the other hand, Plaintiff need not prove the amount of [his/her] losses with mathematical precision, but only with as much certainty and accuracy as the circumstances permit.[291]

3. You should consider the following elements of damages, and no others: (1) any wages, salary, employment benefits, or other compensation denied or lost because of Defendant's violation of the FMLA.

4. Wages, salary, and benefits include the amounts the evidence shows Plaintiff would have earned had [he/she] [remained an employee of Defendant/been promoted, etc.], and includes fringe benefits such as life and health insurance,[292] stock options, contributions to retirement, etc., minus the amounts of earnings and benefits, if any, Defendant proves by a preponderance of the evidence, Plaintiff received in the interim.[293]

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[291] *United States v. U.S. Steel*, 520 F.2d 1043, 1050 (5th Cir. 1975).

[292] A plaintiff may recover damages for lost insurance benefits only if the plaintiff shows he or she actually incurred these expenses by replacement of the lost insurance or occurrence of the insured risk. *Lubke v. City of Arlington*, 455 F.3d 489 (5th Cir. 2006).

[293] *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981).

5. Defendant asserts that Plaintiff failed to mitigate [his/her] damages.[294] To prevail on this defense, Defendant must show, by a preponderance of the evidence, that: (a) there were "substantially equivalent employment" positions available; (b) Plaintiff failed to use reasonable diligence in seeking those positions; and (c) the amount by which Plaintiff's damages were increased by [his/her] failure to take such reasonable actions.[295]

6. "Substantially equivalent employment" means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job [he/she] [lost/was denied]. Plaintiff does not have to accept a job that is dissimilar to the one [he/she] [lost/was denied], one that would be a demotion, or one that would be demeaning.[296] The reasonableness of Plaintiff's diligence should be evaluated in light of the individual characteristics of Plaintiff and the job market.[297]

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[294] This instruction should be used only when Defendant asserts the affirmative defense that Plaintiff failed to mitigate his or her damages.

[295] *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999); *Floca v. Homecare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir.1975).

[296] *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[297] *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1993 (5th Cir. 1999).

JURY QUESTIONS

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages, if any, you have found Defendant caused Plaintiff?

Answer in dollars and cents for the following items and none other:

Wages, salary, employment benefits, or other compensation denied or lost:

_____

11.10.4

FMLA—NON-WAGE LOSS DAMAGES

A. Committee Notes

This charge is for use in an FMLA case where there are no actual wage or benefit losses, and no other compensation lost or denied. This instruction should be used when an employee is denied FMLA leave and is required to spend money to provide an alternative to the leave to which he or she contends she was entitled under the FMLA.

B. Charge

1. If you found that Defendant violated the FMLA, then you must determine whether Defendant has caused Plaintiff damages and, if so, you must determine the amount, if any, of those damages.

2. Plaintiff must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. On the other hand, Plaintiff need not prove the amount of [his/her] losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.[298]

3. You may award as damages any actual monetary losses Plaintiff sustained as a direct result of Defendant's violation of the FMLA, such as the cost of providing care.

[298] *United States v. U.S. Steel*, 520 F.2d 1043, 1050 (5th Cir. 1975).

JURY QUESTIONS

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages, if any, you have found Defendant caused Plaintiff?

Answer in dollars and cents:

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11.11

COMMITTEE COMMENTS ON MIXED MOTIVES INSTRUCTION

As noted, there is considerable disagreement regarding when the mixed motives affirmative defense is properly submitted to the jury. Because the law in this area is still unsettled, the Committee has not endeavored to answer this question. Rather, the following instruction is offered for use when the court believes the mixed motives affirmative defense should be submitted to the jury.

The Supreme Court articulated this affirmative defense in *Price Waterhouse v. Hopkins*.[299] Under *Price Waterhouse*, if the employer proved it would have taken the same action even in the absence of an impermissible factor, the employer had no liability for unlawful discrimination. Congress amended Title VII in 1991 in partial response to what was viewed as a harsh result in *Price Waterhouse*—a potential employer verdict despite the existence of direct evidence; it added section (m) to 42 U.S.C. § 2000e-2, which recognized the affirmative defense, but lessened the impact of its sting. Under the 1991 amendment to Title VII, an employer who successfully meets its burden of proof on the affirmative defense cannot avoid liability altogether as *Price Waterhouse* allowed, but it does avoid the majority of the relief the plaintiff might otherwise recover. Twelve years later, the Supreme Court recognized the availability of this defense in Title VII cases without direct evidence of discrimination.[300]

One question following *Desert Palace* is whether it is appropriate to borrow an affirmative defense that Congress expressly included in Title VII's statutory framework and apply it to claims brought under other statutes—like the ADEA, the ADA, and the FMLA—all of which lack the same or similar statutory language. In two recent decisions involving claims brought under the ADEA, the Fifth Circuit held the defense could be asserted under that statute.[301]

Another question is whether, if the affirmative defense is permitted in non-Title VII cases, does the affirmative defense merely limit the plaintiff's recovery of damages (as does 2000e-5(g)(2)(B), or does it permit the employer to prevail on liability (as was the pre-1991 Act Title VII jurisprudence).[302] If so, the question will be whether it is available only when there is

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[299] 490 U.S. 228 (1989).

[300] *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

[301] *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309-10 (5th Cir. 2004); *Machinchick v. PB Power, Inc.*, 398 F.3d 345 (5th Cir. 2005).

[302] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Fifth Circuit addressed the question in this manner: "Unlike Title VII which explicitly permits mixed-motives cases, the ADEA neither countenances nor prohibits the mixed-motives analysis. Because we base our holding on the absence of a heightened direct evidence requirement in the ADEA, we do not find the statute's silence on the mixed-motives analysis to be dispositive." *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 n.8 (5th Cir. 2004). Yet other circuits, most notably, the Fourth Circuit Court of Appeals, have recognized that section (m) exists in Title VII only and have been reluctant to engraft statutory language from one employment statute to another in the absence of congressional direction. "It has been assumed that the 'mixed-motive' provision of the Civil Rights Act of 1991 does not apply to the ADEA and, therefore, that

direct evidence of discrimination (again, as was largely the case under Title VII before *Desert Palace*) or whether the *Desert Palace* reasoning, which allowed the defense in circumstantial evidence cases as well, will be carried over to claims under other statutes.

Regardless of these unanswered questions, if the court chooses to submit the mixed motives defense, it should be submitted only when properly raised and there is credible evidence from which a reasonable jury could conclude that a mix of permissible and impermissible reasons factored into the employer's decision-making process.[303] If the court chooses to use this instruction, it should be submitted in addition to the other questions in these charges.

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the burden-shifting and direct evidence requirements of *Price Waterhouse* continue to apply to such claims." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 n.2 (4th Cir. 2004); *see also Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004).

[303] *Garcia v. City of Houston*, 201 F.3d 672, 675 (5th Cir. 2000) ("[T]o prove a mixed-motive defense the employer should be able to present some objective proof that the same decision would have been made."); *see also Machinchick v. PB Power, Inc.*, 398 F.3d 345 (5th Cir. 2005); *Rachid v. Jack in the Box*, 376 F.3d 305, 309-10 (5th Cir. 2004); *Roberson v. Alltel Info. Servs.*, 373 F.3d 647. 651 (5th Cir. 2004); Matthew R. Scott and Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Cases to Mixed Motive*, 36 ST. MARY'S L.J. 395, 401 n.81 (2005).

11.11.1

MIXED MOTIVES INSTRUCTION[304]

1. If you find Plaintiff's [protected trait] was a motivating factor in Defendant's decision to [challenged employment action] Plaintiff, even though other considerations were factors in the decision, then you must determine whether Defendant proved by a preponderance of the evidence it would have made the same decision even if Defendant had not considered Plaintiff's [protected trait].

Question No. 1

Has Defendant proven that it would have made the same decision to [challenged employment action] Plaintiff even if it had not considered Plaintiff's [protected trait]?

Answer "Yes" or "No."

_____

[304] If this instruction is submitted, the court should use the "motivating factor" language from 42 U.S.C. § 2000e-2(m) in place of the "because of" causation standard used throughout these charges.