3. EMPLOYMENT DISCRIMINATION: TITLE VII, ADEA

3.01 GENERAL EMPLOYMENT DISCRIMINATION INSTRUCTIONS

Plaintiff claims that [he/she] was [*adverse employment action*] by Defendant because of [*prohibited factor*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that [he/she] was [*adverse employment action*] by Defendant because of [his/her] [*prohibited factor*]. To determine that Plaintiff was [*adverse employment action*] because of [his/her] [*prohibited factor*] you must determine that Defendant would not have [*adverse employment action*] Plaintiff but for their [*prohibited factor*].

Showing that the Plaintiff would not have been [*adverse employment action*] but for [*prohibited factor*] does not require a showing that [*prohibited factor*] was the sole cause or even a primary cause.

If you find that Plaintiff has proved [*adverse employment action*] because of [*prohibited factor*] by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

[The Defendant denies that Plaintiff was discriminated against in any way or that it acted with any improper discriminatory animus in taking the actions at issue in this case.]

[Defendant further asserts by way of an affirmative defense that [*describe affirmative defense*]. [*Insert elements of defense and burden of proof, including, e.g.*: If you find that the Defendant proved each of these things by a preponderance of the evidence, then you must find for Defendant.]]

Committee Comments

a. Scope. This instruction is to be used in Title VII, Section 1981, and ADEA cases. Courts should evaluate whether use of the pattern instructions is appropriate for the facts of a specific case given the wide range of possible claims under these statutes and the myriad ways in which causation can be established in discrimination cases. *See, e.g.*, *Ernst v. City of Chicago*, 837 F.3d 788, 794-95 (7th Cir. 2016) (holding use of instruction that closely mirrored pattern instruction was reversible error because it did not permit jurors to evaluate Plaintiffs' contention that the employer adopted a screening tool for candidates with the intention to use it to exclude women from employment).

b. Authority. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 665 (2020) (holding that the prohibited factor "need not be the sole or primary cause of the employer's adverse action"); *see also Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n.3 (7th Cir. 2014) (noting that a single event can have multiple but-for causes); *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994); *Achor v. Riverside Golf Club*, 117 F.3d 339, 340-41 (7th Cir. 1997); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d

1344, 1350 (7th Cir. 1995); *Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 386 (7th Cir. 2011).

3.02 PRETEXT

If you do not believe the reason[s] that Defendant has given for its decision, you may, but are not required to, infer that Defendant would not have decided to [*adverse employment action*] Plaintiff but for [his/her] [*prohibited factor*] and that Defendant's stated reason is pretext to hide discrimination.

Pretext means a lie, specifically a phony reason for some action. Plaintiff may prove the Defendant's explanation is pretext by showing that: (1) the explanation has no basis in fact, (2) the explanation was not the "real reason," or (3) the reason stated was insufficient to warrant Defendant's actions. Plaintiff may prove this by providing pieces of evidence that cast doubt upon the Defendant's explanation.

Examples of such evidence include suspicious timing, ambiguous oral or written statements, lack of corroboration of certain events relied upon by the decisionmakers, nonsensical or inconsistent reasoning, and a failure to follow company policies. You can also reasonably infer pretext from an employer's shifting or inconsistent explanations for its employment decision.

Committee Comments

An employee may "establish that he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000) (quotation marks omitted). As the Supreme Court explained, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 147. *Hutchens v. Chicago Bd. of Educ.*, 781 F.3d 366, 374 (7th Cir. 2015) (citation omitted) (reversing district court's grant of summary judgment, noting that a "jury could reasonably disbelieve an employer's explanation for a decision inconsistent with the employer's prior conduct"); *Rudin v. Lincoln Land Cmty. Coll.,* 420 F.3d 712, 727 (7th Cir. 2005) ("This court has held in the past that an employer's failure to follow its own internal employment procedures can constitute evidence of pretext.").

Including this instruction is not intended to suggest that the jury should be charged on the elements of a prima facie case or burden shifting. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003) ("[I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.").

3.03 CORPORATE DEFENDANT AND ITS AGENTS

These instructions refer to Defendant or the employer, which is a corporation. A corporation acts through people as its agents or employees. In general, a corporation is responsible for the acts and communications of its agents and employees made while acting within the scope of their authority delegated to them by the corporation or within the scope of their duties as employees of the corporation.

An employee or agent can be acting within the scope of their authority or duties even when they are acting in violation of the employer's policies or instructions.

[Where the employer has authorized an agent to act on its behalf in communicating with an [employee/applicant], information collected by the agent of the employer can be attributed to the employer. This means that the employer can be held responsible for knowing the information because they had the opportunity to be aware of it, regardless of whether they actually knew it or not. Actions taken by the agent can also be attributed to the employer.

An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. [One may be an agent without receiving compensation for services.] [The agency agreement may be oral or written.]]

Committee Comments

a. Violation of Policy. *See E.E.O.C. v. Serv. Temps Inc.*, 679 F.3d 323, 337 (5th Cir. 2012) (relying on *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 543-44 (1999)) ("[M]isapplying a claimed policy is not necessarily a bar to finding that an employee acted within the scope of his employment. Courts look to whether the act is of the kind the employee is employed to perform, whether the discrimination occurred substantially within authorized time and space limits, and whether the act was actuated, at least in part, by a desire to serve the employer.").

b. Third party agents. The bracketed language can be included where the Plaintiff alleges that the employer relied on a third party agent to conduct elements of its employee relations process and believes that knowledge or actions of these third parties should be attributed to the employer.

3.04 ADVERSE EMPLOYMENT ACTION—DISCRIMINATION CLAIM

To succeed on [his/her] discrimination claim, Plaintiff must prove that [his/her] [*alleged consequence of Defendant's conduct*] was an adverse employment action. Not everything that makes an employee unhappy is an adverse employment action. It must be something more than a minor or trivial inconvenience. For example, an adverse employment action exists when someone's pay or benefits are decreased; when [his/her] job is changed in a way that reduces [his/her] career prospects; or when job conditions are changed in a way that changes [his/her] work environment in a disadvantageous way. In this case you must consider whether the [*alleged consequence of Defendant's conduct*] was such a change.

Committee Comments

a. General. *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346 (2024), represents a significant change in what constitutes an "adverse action" for purposes of Title VII. Consistent with longstanding precedent and the prior pattern instruction, courts in this circuit required employees to show that an act challenged as discriminatory was "materially adverse." The Supreme Court made clear, at least for purposes of Title VII, such precedent is no longer good law. *Id.* at 353 n.1 (abrogating cases including *O'Neal v. City of Chicago*, 392 F.3d 909 (7th Cir. 2004)). The Court underscored that:

> First, this decision changes the legal standard used in any circuit that has previously required "significant," "material," or "serious" injury. It lowers the bar Title VII plaintiffs must meet. Second, because it does so, many cases will come out differently. The decisions described [in the Court's opinion] above are examples, intended to illustrate how claims that failed under a significance standard should now succeed.

Id. at 353 n.2. The Court based its decision on Title VII's statutory language, which only requires discrimination "with respect to" an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The Court explained those terms were "not used 'in the narrow contractual sense'; it covers more than the 'economic or tangible.'" *Muldrow*, 601 U.S. at 354 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

In light of *Muldrow*, this instruction should be used as modified to fit the specific facts of the case.

b. Negative performance reviews. Before *Muldrow*, the Seventh Circuit held where a negative performance review does not immediately result in a change of employment status, it can constitute an adverse employment action where there is a loss of pay or promotion opportunities. *Lewis v. City of Chicago,* 496 F.3d 645, 654 (7th Cir. 2007).

c. Transfers/reassignment of duties. For purposes of Title VII, *Muldrow* makes clear that disadvantageous transfers constitute an adverse action where it was disadvantageous because of where the employee reported, the level of prestige and visibility of assignments and coworkers, or impacts on her schedule and vehicle access, among other factors the Court considered disadvantageous. *Muldrow*, 601 U.S. at 359. Courts should analyze whether differences in language of other statutes or the type of transfer challenged requires a similar or different result. *See also Alamo v. Bliss*, 864 F.3d 541, 553 (7th Cir. 2017) ("It also may be that being 'detailed' made it difficult for [the Plaintiff] to continue to perform his job at the same level, or may impact [the Plaintiff's] long-term career prospects. We therefore conclude that, in the context of this case, the allegations regarding excessive 'detailing' plausibly state an adverse employment action.").

3.05 MIXED MOTIVE (TITLE VII DISPARATE TREATMENT CLAIMS)

Plaintiff must prove by a preponderance of the evidence that [his/her] [*prohibited factor*] was a motivating factor in Defendant's decision to [*adverse employment action*] [him/her]. A motivating factor is something that contributed to Defendant's decision.

If you find that Plaintiff has proven that [his/her] [*prohibited factor*] contributed to Defendant's decision to [*adverse employment action*] [him/her], you must then decide whether Defendant has proven by a preponderance of the evidence that it would have taken the same action even if Plaintiff was not [*prohibited factor*]. If so, you must find for the Plaintiff but you may not award [him/her] damages.

Committee Comments

The mixed motive theory is available for disparate treatment claims under Title VII. *See* Title VII: *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 94-95 (2003) (addressing Title VII mixed motive claims); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (holding mixed motive claims are not available under the anti-retaliation provisions of Title VII); ADEA: *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 177 (2009) (holding that mixed motive claims are not available under the ADEA) ("It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action.").

The status of mixed motive claims under the ADA has not been fully resolved. This instruction is likely not available in ADA claims. *See McCann v. Badger Mining Corp.*, 965 F.3d 578, 588 n. 46 (7th Cir. 2020) (whether the ADAAA permits mixed motive claims is technically an open question in the Seventh Circuit but "[t]here seems little doubt that our sister circuits' approach [finding that the ADAAA only allows but-for claims] is the correct one"). *See also* Instruction 4.02, comment c.

3.06 CONSTRUCTIVE DISCHARGE

Plaintiff claims that [he/she] quit [his/her] job because Defendant made [his/her] working conditions intolerable. This is called a "constructive discharge." To succeed on this claim, Plaintiff must prove two things by a preponderance of the evidence:

1. Plaintiff's working conditions were so intolerable that a reasonable person in [his/her] position would have had to quit, or Defendant acted in a manner to communicate to a reasonable person that they would be terminated; and

2. Defendant caused Plaintiff's intolerable working conditions because of Plaintiff's [*prohibited factor*] or Defendant acted because of Plaintiff's [*prohibited factor*] when Defendant communicated that Plaintiff would be terminated. The prohibited factor does not have to be the sole cause or even the primary cause.

Committee Comments

Pennsylvania State Police v. Suders, 542 U.S. 129, 141-46 (2004); *Hazen Paper Co. v. Biggins*, 507 U.S 604, 616-17 (1993); *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 665 (2020) (holding that the prohibited factor "need not be the sole or primary cause of the employer's adverse action"); *see also Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n. 3 (7th Cir. 2014) (noting that a single event can have multiple but-for causes).

3.07 RETALIATION

Plaintiff claims that Defendant retaliated against [him/her] for engaging in activity protected by [*statutorily protected activity, e.g., Title VII, the ADA, the ADEA*]. Plaintiff claims that [he/she] [*statutorily protected activity*] and that Defendant retaliated against him/her by [*adverse employment action*].

[Defendant denies Plaintiffs claim [*and include any specific contentions made by Defendant as for the basis or reason(s) for taking the adverse employment action*].]

To prove this claim, Plaintiff must prove by a preponderance of the evidence that:

1. Plaintiff engaged in [*statutorily protected activity*];

2. Defendant [*adverse employment action*] Plaintiff; and

3. Defendant's decision to [*adverse employment action*] Plaintiff was due to [his/her] engaging in [*statutorily protected activity*].

You need not find that the only reason for Defendant's decision was Plaintiff's [*statutorily protected activity*]. However, you must find that a causal connection existed between Defendant's decision to [*adverse employment action*] and Plaintiff's [*statutorily protected activity*]. The protected activity does not need to be the sole cause or even the primary cause.

If you disbelieve the reason[s] that Defendant has given for its decision, you may, but are not required to, infer that Defendant would not have decided to [*adverse employment action*] Plaintiff but for [him/her] engaging in [*statutorily protected activity*].

Committee Comments

a. Scope. This instruction is to be used in Title VII, § 1981, and ADEA cases. The Seventh Circuit has not addressed whether there is a right to a jury trial under the ADA. Other circuits have concluded that there is no right to a jury trial in an ADA retaliation case involving only a retaliation claim, relying in part on Seventh Circuit law holding that there is no provision for compensatory and punitive damages for such claims. *Israelitt v. Enter. Servs., LLC*, 78 F.4th 647, 660 (4th Cir. 2023) (holding that the ADA does not provide for legal remedies for a retaliation claim so there is no right to a jury trial). Earlier appellate decisions affirmed compensatory and punitive damages awards for ADA retaliation claims, albeit without explicitly discussing their availability under § 503. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 574-76 (8th Cir. 2002); *Foster v. Time Warner Ent. Co., L.P.*, 250 F.3d 1189, 1196-98 (8th Cir. 2001); *Muller v. Costello*, 187 F.3d 298, 306, 314-15 (2d Cir. 1999). Section 503 of the ADA, 42 U.S.C. § 12203, prohibits retaliation and refers to the remedies of

Title VII, 42 U.S.C. § 12117(a), which in turn authorizes legal damages for certain claims under the 1991 Civil Rights Act, § 1981a(a)(1). Until there is a Seventh Circuit decision on the issue, the Committee take no position.

b. Authority. *Runkel v. City of Springfield*, 51 F.4th 736, 746 (7th Cir. 2022) (listing the elements of a retaliation claim under Title VII as: "(i) she engaged in activity protected under Title VII; (ii) she suffered an adverse employment action; and (iii) her protected activity and the adverse action(s) were causally connected.").

Abebe v. Health & Hosp. Corp. of Marion Cnty., 35 F.4th 601, 607 (7th Cir. 2022) (holding that, in order to prevail on his retaliation claim under 42 U.S.C. § 1981, a Plaintiff must identify sufficient evidence for a jury to find: "(1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two."); *Jokich v. Rush Univ. Med. Ctr.*, 42 F.4th 626, 633 (7th Cir. 2022) (same elements for Title VII retaliation); *Parker v. Brooks Life Sci., Inc.*, 39 F.4th 931, 936 (7th Cir. 2022) (same elements for ADA retaliation except that Plaintiff must show a "but for causal connection"); *Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 924 (7th Cir. 2019) (same elements for ADEA retaliation claims).

Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 665 (2020) (holding that the prohibited factor "need not be the sole or primary cause of the employer's adverse action"); *see also Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n. 3 (7th Cir. 2014) (noting that a single event can have multiple but-for causes).

c. Protected Activity. Statutorily protected activity includes opposition to unlawful employment practices as well as participation in any investigation, proceeding, or hearing about such practices. 42 U.S.C. § 2000e-3 (Title VII); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 623(d) (ADEA). "Opposition" need not come in the form of a complaint and need not be about conduct directed toward the Plaintiff. *See Crawford v. Metropolitan Gov't of Nashville and Davidson Co.*, 555 U.S. 271, 274-75, 277-78 (2009) (holding an employee's description of "inappropriate behavior" of sexual nature as part of an employer's internal sexual harassment investigation instigated by someone else constituted "opposition" explaining "nothing in [Title VII] requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question"); *see also* 42 U.S.C. § 2000e-3(a).

d. Good Faith Belief. In many cases, the question of what constitutes a protected activity will not be contested. Where it is, however, the jury should be instructed that: Protected activity includes activity based on a reasonable, good faith belief that Plaintiff's activity opposed adverse treatment of [*plaintiff/other individual*] because of [*prohibited factor*]. This does not require Plaintiff to show that what [he/she] believed was correct. *See Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752

(7th Cir. 2002). *See also Mattson v. Caterpillar, Inc.,* 359 F.3d 885, 891 (7th Cir. 2004) (underlying claim "must not be utterly baseless").

3.08 ADVERSE ACTION—RETALIATION CLAIM

Plaintiff must prove that [his/her] [*alleged consequence of Defendant's conduct*] was a "materially adverse action." In a retaliation claim, a materially adverse action is defined as an action that a reasonable employee would find to dissuade [him/her] from engaging in the protected activity. Not everything that makes an employee unhappy is a materially adverse action. It must be something that is more than a minor or trivial inconvenience. For example, a materially adverse action exists when someone's pay or benefits are decreased; when [his/her] job is changed in a way that significantly reduces [his/her] career prospects; or when job conditions are changed in a way that significantly changes [his/her] work environment in an unfavorable way.

It is not limited to conduct that affects the terms and conditions of employment and extends beyond workplace-related or employment-related acts. Any employer conduct that might well have dissuaded an employee from engaging in protected activity is prohibited.

Committee Comments

In *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346 (2024), the Court made clear that employees are no longer required to show a challenged action was "materially adverse" in Title VII cases. But the Court's ruling did not extend to retaliation cases. In reaching its decision to eliminate the "materially adverse" requirement, the Court distinguished between discrimination and retaliation cases. The Court rejected the Defendant's request to import a significant harm requirement from the Court's decision in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The *Muldrow* Court noted that *White* involved Title VII's anti-retaliation provision:

> Under that section, an employer may not take action against an employee for bringing or aiding a Title VII charge. The Court held that the provision applies only when the retaliatory action is "materially adverse," meaning that it causes "significant" harm. The [defendant] thinks we should import the same standard into the anti-discrimination provision at issue. But that would create a mismatch. *White* adopted the standard for reasons peculiar to the retaliation context. The test was meant to capture those (and only those) employer actions serious enough to "'dissuade[ ]' a reasonable worker from making or supporting a charge of discrimination." If an action causes less serious harm, the Court reasoned, it will not deter Title VII enforcement; and if it will not deter Title VII enforcement, it falls outside the purposes of the ban on retaliation. But no such (frankly extra-textual) reasoning is applicable to the discrimination bar. Whether an action causes significant enough harm to deter any employee conduct is there beside the point. *White* itself noted the difference: The anti-discrimination provision, we

> explained, simply "seeks a workplace where individuals are not discriminated against" because of traits like race and sex. The provision thus flatly "prevent[s] injury to individuals based on" status, without distinguishing between significant and less significant harms.

Muldrow, 601 U.A. at 348 (citations omitted); *see also Lesiv v. Illinois Cent. R.R. Co.*, 39 F.4th 903 (7th Cir. 2022).

3.09 PATTERN OR PRACTICE

Plaintiff claims that Defendant had a pattern or practice of discriminating against [*protected class*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that discrimination on the basis of [*prohibited factor*] was Defendant's standard operating procedure—Defendant's regular practice, rather than the unusual. If you find that Plaintiff has not proven this, you must find for Defendant.

To meet this standard a Plaintiff does not have to prove that every decision was part of the discriminatory pattern or practice or that there was never an exception.

[If you find that Plaintiff has proven that Defendant had a pattern or practice of discriminating, then you must answer another question: Did the Defendant prove by a preponderance of the evidence that it would have taken the adverse employment action against Plaintiff even if it had not made a regular practice of discrimination on the basis of [*prohibited factor*]? If you find that the Defendant has proven this by a preponderance of the evidence, your verdict must be for the Defendant. If you find the Defendant has not proven this, your verdict must be for the Plaintiff.]

Committee Comments

a. Authority. *Adams v. Ameritech Servs., Inc.,* 231 F.3d 414, 422 (7th Cir. 2000) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)); *King v. Gen. Elec. Co.*, 960 F.2d 617, 623-24 (7th Cir. 1992); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 716-17 (7th Cir. 2012).

b. Class actions or cases involving a group of affected employees. In a class action case or in a case involving a group of employees, a court should provide only the first paragraph, as the second paragraph will be provided during the damages phase of the trial. If this is an individual pattern or practice claim or a claim involving a small group of employees, then the court should provide both paragraphs to the jury.

3.10 HARASSMENT BY CO-EMPLOYEE OR THIRD PARTY

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

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

2. The conduct was unwelcome;

3. The conduct occurred because of the Plaintiff's [*prohibited factor e.g., race/sex*], which does not require a finding that [*prohibited factor*] was the sole or primary cause;

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

5. Plaintiff perceived that the conduct made his/her work environment hostile or abusive;

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

7. Defendant did not take reasonable steps to [correct the situation] / [prevent harassment from recurring].

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

Committee Comments

a. Authority. *See Kriescher v. Fox Hills Golf Resort & Conf. Ctr.*, 384 F.3d 912, 915 (7th Cir. 2004); *Rizzo v. Sheahan*, 266 F.3d 705, 711-12 (7th Cir. 2001); *Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp.*, 903 F.3d 618, 625 (7th Cir. 2018); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 978 (7th Cir. 2000); *Parkins v. Civ. Constructors of Illinois, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998); *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001) ("An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made.").

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

In this case, Plaintiff claims that [he/she] was [*e.g., racially/sexually*] harassed at work [*describe conduct*]. To succeed in his/her claim, Plaintiff must prove the following things by a preponderance of the evidence:

1. The conduct was unwelcome;

2. Plaintiff was subjected to this conduct because [he/she] was [*e.g., race/sex*];

The remainder of the instruction should remain the same.

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

To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the Plaintiff's employment. No single factor is required in order to find a work environment hostile or abusive and each incident does not need to be severe or pervasive on its own. Conduct that is based on stereotypes or paternalism can also be hostile or abusive.

See Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); Eighth Circuit Model Civil Jury Instructions 8.42, Notes on Use (2023). *See also Mason v. S. Illinois Univ. at Carbondale*, 233 F.3d 1036, 1044-45 (7th Cir. 2000) ("If a plaintiff claims that he is suffering a hostile work environment based on the conduct of coworkers and supervisors, then under the Supreme Court's totality of circumstances approach, all instances of harassment by all parties are relevant to proving that his environment is sufficiently severe or pervasive. Courts should not carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive.") (citations omitted); *Hall v. City of Chicago,* 713 F.3d 325, 330-31 (7th Cir. 2013) (rejecting a Defendant's attempt to "escape liability by arguing that none of [harasser's] conduct, viewed in an individual context, was objectionable," even where the court itself questioned "whether any of [the harasser's] individual acts alone were sufficiently severe to constitute a hostile workplace under Title VII," because courts "should not carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive" but should instead look under the "totality of the circumstances" and finding that under that approach, "the alleged conduct was sufficient to establish a hostile work environment.") (cleaned up); *Haugerud v. Amery Sch. Dist.,* 259 F.3d 678, 694 (7th Cir. 2001) (finding that, although no single incident of a series of incidents related to the terms and conditions of a female Plaintiff's

employment was "particularly severe," together they were "sufficiently pervasive" to trigger liability under Title VII).

3.11 SUPERVISOR HARASSMENT WITH TANGIBLE EMPLOYMENT ACTION

Plaintiff claims that [he/she] was [*e.g., racially/sexually*] harassed by [*alleged supervisor*]. To succeed on this claim, Plaintiff must prove the following things by a preponderance of the evidence.

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

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

3. The conduct was unwelcome;

4. The conduct occurred because Plaintiff was [*e.g., race/sex*]*;*

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

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

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

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

Committee Comments

a. Scope. This instruction should be used where the parties do not dispute that the Plaintiff experienced a tangible employment action, such as a demotion, a discharge, or an undesirable reassignment. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 753-54 (1998). In such situations, affirmative defenses are unavailable to the Defendant. *See Vance v. Ball State Univ.*, 570 U.S. 421, 428-29 (2013); *see also Faragher v. City of Boca Raton,* 524 U.S. 775, 808 (1998).

For cases where no tangible employment action took place, see Instruction 3.12.

For guidance on modifying the instruction in cases where the parties dispute whether the supervisor's conduct led to a tangible employment action, see Instruction 3.12, comment e.

b. Supervisor definition. A supervisor is an individual empowered to take tangible employment actions against the victim, *i.e.*, to affect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013) (quoting *Ellerth*, 524 U.S. at 761); *see also Faragher v. City of Boca Raton,* 524 U.S. 775, 798 (1998); *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 905 (7th Cir. 2018) ("[A] supervisor is the one with the power to directly affect the terms and conditions of employment. This power includes the authority to hire, fire, promote, demote, discipline or transfer a plaintiff.") (citation omitted).

A court should endeavor to resolve the issue of an alleged harasser's supervisor status prior to trial, but can submit the issue to the jury to decide where disputed facts exist. *See Vance v. Ball State Univ.*, 570 U.S. 421, 443–44 (2013) ("[E]ven where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser's authority to take tangible employment actions), this preliminary question is relatively straightforward.").

c. Employer's liability for supervisor conduct resulting in a tangible employment action. "If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable." *See Vance v. Ball State Univ.,* 570 U.S. 421, 424 (2013)*; see also Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth,* 524 U.S. 742 (1998). Under these circumstances, no affirmative defense to liability for supervisor harassment can be raised. *See Trahanas v. Northwestern Univ.*, 64 F.4th 842, 853–54 (7th Cir. 2023) (explaining employer could assert affirmative defense only because no tangible employment action occurred); *see also Huff v. Sheahan*, 493 F.3d 893, 901-03 (7th Cir. 2007) (reversible error to instruct jury on availability of affirmative defense where supervisor engaged in conduct jury could find was tangible employment action).

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

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

See Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998)*; Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23 (1993); *see also Scaife v. United States Dep't of Veterans Affairs*, 49 F.4th 1109, 1116 (7th Cir. 2022); *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 815 (7th Cir. 2022); *Cole v. Bd. of Trs. of N. Illinois Univ.*, 838 F.3d 888, 897 (7th Cir. 2016).

e. Constructive discharge. If the tangible employment action alleged by Plaintiff is constructive discharge, the Committee suggests modifying the instruction as follows:

7. Plaintiff quit [his/her] job because [*Name's*] conduct made Plaintiff's working conditions so intolerable that a reasonable person in Plaintiff's position would have felt compelled to quit.

See Green v. Brennan, 578 U.S. 547, 555 (2016); *Pennsylvania State Police v. Suders,* 542 U.S. 129, 141 (2004); *see also Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010); *Jordan v. City of Gary, Ind.*, 396 F.3d 825, 836 (7th Cir. 2005).

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

2. The conduct was unwelcome;

3. Plaintiff was subjected to this conduct because [he/she] was [*e.g., race/sex*];

The remainder of the instruction should remain the same.

g. Alternative claims for the same tangible employment action. Where Plaintiff also asserts a disparate treatment claim for the same tangible employment action that Plaintiff claims was caused by a supervisor's harassment (*i.e.*, Plaintiff asserts the same demotion was caused by Plaintiff's protected characteristic, but also the culmination of a supervisor's harassment), a court may wish to clarify that Plaintiff can prevail by proving either set of required elements.

3.12 SUPERVISOR HARASSMENT WITH NO TANGIBLE EMPLOYMENT ACTION

Plaintiff claims that [he/she] was [*e.g., racially/sexually*] harassed by [*alleged supervisor*]. To succeed on this claim, Plaintiff must prove the following things by a preponderance of the evidence.

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

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

3. The conduct was unwelcome;

4. The conduct occurred because Plaintiff was [*e.g., race/sex*]*;*

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

6. At the time the conduct occurred, Plaintiff believed that the conduct made Plaintiff's work environment hostile or abusive.

If you find that Plaintiff did not prove each of these things by a preponderance of the evidence, then you must find for Defendant.

[If, on the other hand, Plaintiff has proved each of these things, but Defendant claims it still should not be held responsible, then you must go on to consider whether Defendant has proved two things by a preponderance of the evidence:

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

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

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

Committee Comments

a. Scope. This instruction should be used when a supervisor's alleged harassment has not led to a tangible employment action. In such cases, the affirmative defense set out in the instruction becomes available to the Defendant. *See Vance v. Ball State Univ.*, 570 U.S. 421, 430 (2013) (explaining an employer can avoid

liability for a supervisor's harassment that does not result in a tangible employment action "by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided") (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998)); *see also Jackson v. Cnty. of Racine*, 474 F.3d 493, 502 (7th Cir. 2007).

Before and after *Vance*, however, circuit precedent has emphasized establishing "'a basis for employer liability'" as an element of a Plaintiff's claim. *Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) (quoting *Erickson v. Wisconsin Dep't of Corr.*, 469 F.3d 600, 604 (7th Cir. 2006)). Like others, that element must be "'evaluated in light of the particular facts and circumstances of the case.'" *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 813 (7th Cir. 2022) (quoting *Lapka*, 517 F.3d at 982) (additional internal quotation marks omitted).

In some cases, the alleged hostile work environment may be attributable to conduct by employees who are coworkers and others who are "supervisors" (see comment b below) but who may not be Plaintiff's supervisor. Regardless of whether a Defendant disputes an employee's supervisory status overall or status as Plaintiff's supervisor, a Plaintiff can elect to prove liability for all such employees' conduct using the elements in Instruction 3.04 (requiring proof of negligence for liability for coworker harassment).

Necessarily, all supervisors are also co-employees and, therefore, the employer can be held liable for their conduct on the same basis as non-supervisory employees. *See, e.g.*, Pattern Civil Jury Instructions for the Ninth Circuit, Instruction 10.7, Comment (directing use of its coworker harassment instruction when the claim "involves harassment by another coworker or a supervisor who is not the plaintiff's direct (immediate or successively higher) supervisor"); *see also Vance v. Ball State Univ.*, 570 U.S. 421, 445-46 (2013) (discussing the importance of a single, easily understood jury instruction and the availability of the negligence-based instruction for coworker harassment when questions arise over an individual's supervisor status).

b. Supervisor definition. *See* Instruction 3.11, comment b.

c. Employer's liability for supervisor conduct resulting in a tangible employment action. *See* Instruction 3.11, comment c.

d. Hostile or abusive work environment. *See* Instruction 3.11, comment d.

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

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

If so, your verdict must be for Plaintiff. If not, you must go on to consider whether Defendant has proved two things to you by a preponderance of the evidence.

The remainder of the instruction should remain the same. *See* Instruction 3.05A, comments a, c & e, and comment a to this instruction.

f. Facts not in dispute. *See* Instruction 3.11, comment f.

g. Alternative claims for the same tangible employment action. *See* Instruction 3.11, comment g.

h. Affirmative defense. The bracketed language should be given only where Defendant has pled the affirmative defense and the alleged harasser is not a sufficiently high level employee that it is unavailable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 789-90 (1998) (actions of proprietor, partner, or corporate office are automatically imputed to the employer).

In certain cases, it may be helpful for the court to advise the jury on Defendant's burden to prove it "exercised reasonable care to prevent and correct any harassing conduct in the workplace." In such cases, the court should consider the following instruction:

In determining whether Defendant exercised reasonable care to prevent and correct any harassing conduct in the workplace, you should consider what was reasonable under the circumstances that then existed, including the gravity of the harassment alleged, whether Defendant had a policy prohibiting such conduct, the reporting procedure available, how widely the policy was disseminated, whether employees were adequately trained on it, whether managerial employees fulfilled their duties under the policy, how promptly and thoroughly Defendant investigated alleged violations of it, and whether Defendant enforced the policy by disciplining or terminating employees who engaged in harassing conduct.

Faragher, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *see also Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624, 630 (7th Cir. 2019) (affirming summary judgment for employer and collecting cases); *E.E.O.C. v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 435 (7th Cir. 2012) (affirming jury verdict for employees and collecting cases); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996).

3.13 WILLFULNESS: WHERE AGE DISCDRIMINATION IS ALLEGED

If you find for Plaintiff, you must then decide whether Defendant willfully violated the Age Discrimination in Employment Act. To show this, Plaintiff must prove by a preponderance of the evidence that Defendant knew that it was violating the Age Discrimination in Employment Act, or was indifferent to whether its actions violated the Age Discrimination in Employment Act.

An attempt by a Defendant to cover up discrimination may be evidence of willfulness. If you find that the Defendant made such an attempt in this case, you may consider that as evidence that Defendant acted willfully.

The Plaintiff need not additionally show that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation.

[The Defendant can avoid this finding if the Defendant proves that they incorrectly but in good faith and nonrecklessly believed that the law permitted a particular age-based decision. If the Defendant has satisfied this burden then you should make a finding that the Defendant did not willfully violate the Age Discrimination in Employment Act.]

Committee Comments

See Hazen Paper Co. v. Biggins, 507 U.S. 604, 616-617 (1993); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 581-82 (7th Cir. 2003); *Mathis v. Phillips Chevrolet, Inc.,* 269 F.3d 771, 778 (7th Cir. 2001) ("[L]eaving managers with hiring authority in ignorance of the basic features of discrimination laws is an 'extraordinary mistake' for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference" sufficient to support a finding of willfulness); *Price v. Marshall Erdman & Assocs., Inc.,* 966 F.2d 320, 323-24 (7th Cir. 1992).

If the case involves a bona fide occupational qualification defense the bracketed language may be appropriate. "The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a 'bona fide occupational qualification' defense." *Hazen Paper*, 507 U.S. at 616. "If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed." *Id.* (citing *McLaughlin v. Richland Shoe Co.,* 486 U.S 128, 135 n. 13 (1988)).

3.14 ELEMENTS OF RELIGIOUS ACCOMMODATION CLAIM

In this case, Plaintiff claims that Defendant unlawfully failed to accommodate Plaintiff's religious belief by [*alleged failure by employer*]. To succeed, Plaintiff must prove the following things by a preponderance of the evidence:

1. Plaintiff wished to engage in an observance or practice that was religious in nature that conflicted with an employment requirement;

2. Plaintiff made Defendant aware of Plaintiff's desire to engage in an observance or practice; and

3. Defendant failed to accommodate Plaintiff's religious belief or practice.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict must be for Defendant.

Committee Comments

a. General authority. This instruction is drawn from 42 U.S.C. § 2000e(j); *Groff v. DeJoy*, 600 U.S. 447, 457 (2023); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) (holding that "religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated"). *See also Kluge v. Brownsburg Comm. School Corp.*, 64 F.4th 861 (7th Cir. 2023), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023) (consistent with *Groff*).

b. Affirmative defense of undue hardship. In many religious accommodation cases, the Defendant will raise "undue hardship" as an affirmative defense. *See* 42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

The Supreme Court recently clarified *Trans World Airlines*, concluding that requiring an employer to show only "more than *de minimus*" impact to prove undue hardship was improper and inconsistent with Title VII. *See Groff*, 600 U.S. at 469-71. The Court explained that "a good deal of the EEOC guidance" on its construction of *Hardison* "is sensible and will be unaffected by our clarifying decision today" (*e.g.*, 29 CFR § 1605.2(d)), but that it "would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification" of this case. *Groff*, 600 U.S. at 471.

It should be noted that *Groff* did expressly state that even though an accommodation's impact on coworkers might have ramifications for the conduct and operation of a business, the mere fact that other coworkers may dislike the religious

practice is not a "cognizable" factor in the undue hardship calculus. *Groff*, 600 U.S. at 472.

Where the "undue hardship" defense is asserted in Title VII religious accommodation cases, a court should instruct the jury regarding the defense as follows:

Defendant claims it was unable to reasonably accommodate Plaintiff's religious observance or practice without undue hardship on the conduct of the employer's business.

To prove that defense, Defendant must prove that granting any accommodation that would have reasonably permitted Plaintiff to engage in the custom or practice would have resulted in substantial additional costs or expenditures in relation to the conduct of Defendant's particular business.

In making that determination, you should consider all relevant factors, including the particular accommodation[s] at issue, their practical impact, whether any additional costs are temporary or ongoing, and the size and operating cost of Defendant.

But you may not consider the fact that Plaintiff's coworkers may have disliked or disapproved of Plaintiff's belief, observance, or practice. You also may not consider the fact that Plaintiff's coworkers may have disliked the fact that Plaintiff received accommodation.

42 U.S.C. § 2000e(j); *Groff v. DeJoy*, 600 U.S. 447, 469-70 (2023); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013).

c. Related affirmative defense of undue hardship in ADA and pregnancy accommodation cases. Pregnancy accommodation claims and disability accommodation claims also have an "undue hardship" defense. *See, e.g.*, Instructions 4.04 & 4.09 (ADA).

That defense, while informative, is not identical to the undue hardship defense for religious accommodation cases. The Supreme Court declined to "instruct lower courts to draw upon decades of ADA caselaw" in interpreting Title VII's religious accommodation undue hardship. *See Groff v. DeJoy*, 600 U.S. 447, 471 (2023).

The ADA regulatory and caselaw guidance should inform pregnancy accommodation claims, however, because the Pregnant Workers' Fairness Act (2023) expressly adopts the statutory defense under the ADA, which is explained in regulatory guidance from the EEOC. *See* 42 U.S.C. § 2000gg(7).

d. Observance or practice "religious in nature." In certain cases, the parties may challenge a Plaintiff's ability to prove that their desire to engage in an

observance or practice was based on a belief that was "religious in nature." In such cases, a court should consider whether it is appropriate to use an additional instruction:

Defendant claims Plaintiff's desire to engage in [*observance or practice*] was not religious in nature. To satisfy this element, Plaintiff need not show the belief or observance is tied to an organized group or widely recognized faith or religion. Plaintiff must only show that the belief on which the observance or practice is based is religious in Plaintiff's own scheme of things and was a belief Plaintiff sincerely held.

See Adeyeye v. Heartland Sweeteners, *LLC*, 721 F.3d 444, 452 (7th Cir. 2013).

3.15 REASONABLENESS OF DEFENDANT'S ACTION

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

Committee Comments

The Committee suggests that a court consider giving this cautionary instruction at its discretion in Title VII, § 1981, and ADEA cases. In *Morris v. BNSF Ry. Co.*, 429 F. Supp. 3d 545, 561-63 (N.D. Ill. 2019), *aff'd*, 969 F.3d 753 (7th Cir. 2020), the employer sought a new trial due to the district court's decision not to give Instruction 3.15. The Seventh Circuit found no abuse of discretion.

3.16 DISPARATE IMPACT—ADEA

Plaintiff alleges that Defendant discriminated against Plaintiff on the basis of age by disparate impact. To recover on this disparate-impact age discrimination claim, Plaintiff must prove by a preponderance of the evidence the following things:

1. Plaintiff was 40 years of age or older at the time the Plaintiff was [[discharged] [not promoted] [demoted] [state other adverse action]]

2. Defendant used a specific facially neutral [[test] [requirement] [practice] [selection criterion]] that, as shown by statistical evidence, had a significantly adverse or disproportionate impact on employees 40 years of age or older; and

3. The identified practice resulted in the Plaintiff being [[discharged] [not hired] [not promoted] [demoted] [state other adverse action]].

If you find that Plaintiff has proven all of these elements, your verdict must be for the Plaintiff. If, on the other hand, Plaintiff has failed to prove any of these elements, your verdict must be for the Defendant.

[Defendant asserts as an affirmative defense that the policy or practice was motivated by [*describe the reasonable factor other than age asserted by Defendant*]. The Defendant must prove this affirmative defense by a preponderance of the evidence. If you find that the Defendant has failed to prove this affirmative defense by a preponderance of the evidence, then you must find for the plaintiff if the other elements have been met.]

Committee Comments

a. Scope. There are no jury trials for disparate impact claims under Title VII. 42 U.S.C. § 1981a(a)(1). *See e.g., Ernst v. City of Chicago,* 837 F.3d 788 (7th Cir. 2016) (disparate treatment claim tried to jury; disparate impact tried to bench); *Baptist v. City of Kankakee*, 481 F.3d 485, 488 (7th Cir. 2007).

b. Authority. *O'Brien v. Caterpillar Inc.,* 900 F.3d 923, 928 (7th Cir. 2018) ("The Supreme Court has held that the ADEA encompasses disparate-impact liability. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (interpreting 29 U.S.C. § 623(a)(2)). Section 623(a)(2) makes it unlawful for an employer 'to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.' Unlike claims of disparate treatment, a disparate-impact claim does not require proof of discriminatory intent.").

c. Reasonable factor. A reasonable factor other than age under the ADEA is distinct from Title VII disparate impact defenses. *See Smith*, 544 U.S. at 243. 1536 ("Unlike [Title VII's] business necessity test, which asks whether there are other

ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."). *See also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008) (explaining that while the bona fide occupational qualification defense is not available in ADEA cases because of statutory differences from Title VII, the "reasonable factor other than age" defense is still one that "exempts otherwise illegal conduct by reference to a further item of proof, thereby creating a defense for which the burden of persuasion falls on the one who claims its benefits, . . . the party seeking relief, . . . here, the employer" (internal quotations and citations omitted)).

d. Failure to hire. The reach of § 4(a)(2) (codified at 29 U.S.C. § 623(a)(2)) does not extend to applicants for employment, as common dictionary definitions confirm that an applicant has no "status as an employee." *Kleber v. CareFusion Corp.,* 914 F.3d 480, 482 (7th Cir. 2019).

3.17 DAMAGES: GENERAL

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

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

Committee Comments

These pattern damages instructions are applicable, with certain limitations, to single Plaintiff discrimination and retaliation claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Damages instructions relating to claims under the Equal Pay Act, 29 U.S.C. § 206(d), are contained in the pattern instructions under that Act. *See* Instruction No. 5.11. An instruction relating to the recovery of liquidated damages under the Age Discrimination in Employment Act is contained in the pattern employment discrimination instructions. *See* Instruction 3.13.

Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989), *superseded by statute on other grounds*, Pub. L. No. 102-166, § 107, 105 Stat. 1071, (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)) ("Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." (internal citations omitted)); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 856 (7th Cir. 2001) (stating Plaintiff was "only entitled to compensation for the damages he proved by a preponderance of the evidence") (citing *Taliferro v. Augle*, 757 F.2d 157, 162 (7th Cir. 1985) ("A plaintiff is not permitted to throw himself on the generosity of the jury. If he wants damages, he must prove them.")); *see also Addington v. Texas*, 441 U.S. 418, 423 (1979).

3.18 COMPENSATORY DAMAGES

Plaintiff alleges the discrimination caused [de*scription of basis for compensatory damages*]. You may award compensatory damages for injuries that Plaintiff has proved by a preponderance of the evidence were caused by Defendant's wrongful conduct.

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

In calculating damages, you should not consider the issue of lost wages, interest, and/or benefits. The court will calculate and determine any damages for past or future lost wages and benefits. You should consider the following types of compensatory damages:

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

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

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

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

[*The court should include only those of the above items that are at issue.*]

Committee Comments

a. ADEA. Compensatory damages are not available under the ADEA, except for a retaliation claim. *Pfeiffer v. Essex Wire Corp.,* 682 F.2d 684, 686-88 (7th Cir. 1982); *Moskowitz v. Trustees of Purdue Univ.,* 5 F.3d 279, 283-84 (7th Cir. 1993).

b. ADA retaliation claims. Compensatory damages are not available on ADA retaliation claims. *Kramer v. Banc of Am. Sec.*, 355 F.3d 961, 965 (7th Cir. 2004). *See also Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009) (discussing a split of authority and following the Seventh Circuit); *Israelitt v. Enter. Servs., LLC*, 78 F.4th 647, 660 (4th Cir. 2023) (holding that the ADA does not provide for legal remedies for a retaliation claim so there is no right to a jury trial).

c. Back pay and front pay. Under Title VII and the ADA, back pay and front pay are equitable remedies to be decided by the court. However, the court may empanel the jury as an advisory jury on the issue, or the parties may, with the court's consent, agree that the jury will decide the issue. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-501 (7th Cir. 2000). Front pay is typically awarded in cases where the equitable remedy of reinstatement is unavailable or not advisable because of workplace incompatibility. *Hildebrandt v. Illinois Dep't of Nat. Res.*, 347 F.3d 1014, 1031 (7th Cir. 2003); *Williams v. Pharmacia Inc.*, 137 F.3d 944, 951-52 (7th Cir. 1998); *Shick v. Illinois Dep't of Human Servs.*, 307 F.3d 605, 614 (7th Cir. 2002).

d. Lost future earnings. Compensatory damages may include "lost future earnings," *i.e.*, the diminution in expected earnings in all future jobs due to reputational or other injuries, over and above any front pay award. Where there is such evidence, the language should be drafted for use in the bracketed fourth paragraph. Care must be taken to distinguish front pay and lost future earnings, which serve different functions. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-54 (7th Cir. 1998):

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

A special interrogatory may be necessary for the court to prevent a double recovery. Moreover, front pay is for the judge to decide, not the jury. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1988).

3.19 BACK PAY

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

Committee Comments

a. Usage. Ordinarily, this instruction will be given only in an ADEA case or a Section 1981 action (where backpay is a legal remedy), not a Title VII case, because under Title VII back pay is an equitable remedy to be decided by the court. *See, e.g., David v. Caterpillar*, *Inc.*, 324 F.3d 851, 866 (7th Cir. 2003). However, the court may empanel the jury as an advisory jury on the issue; or the parties may, with the court's consent, agree that the jury will decide the issue. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-501 (7th Cir. 2000).

b. Limiting subsequent events. Where the Plaintiff's back pay damages are limited by subsequent events, the court should instruct the jury that it may not award back pay damages beyond that event. This is appropriate only where the Defendant's conduct is not a but-for cause of certain damages. When there is a factual dispute about whether Defendant's conduct was a but-for cause of certain damages, the question should go to the jury.

A limiting instruction may be appropriate where a Plaintiff alleging unlawful discharge subsequently obtains a higher paying job or is offered reinstatement by the employer, *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 232-34 (1982); where a Plaintiff challenging a denial of a promotion subsequently voluntarily resigns in circumstances not amounting to a constructive discharge, *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 660 n.8 (7th Cir. 2001); where a Plaintiff has voluntarily removed himself from the labor market, *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1428 (7th Cir. 1986); where a Plaintiff becomes medically unable to work, *Flowers v. Komatsu Mining Sys.*, *Inc.*, 165 F.3d 554, 557-58 (7th Cir. 1999); where periodic plant shutdowns limit the amount of time the Plaintiff could have worked had he not been terminated, *Gaddy v. Abex Corp.*, 884 F.2d 312, 320 (7th Cir. 1989); or where Plaintiff inexcusably delayed in prosecuting his case, *Kamberos v. GTE Automatic Elec. Inc.*, 603 F.2d 598, 603 (7th Cir. 1979).

c. Burden of proof. The Plaintiff bears the burden of presenting evidence that he had lost wages and benefits and their amount. *Horn v. Duke Homes, Div. of*

Windsor Mobile Homes, Inc., 755 F.2d 599, 606-08 (7th Cir. 1985). In many cases, whether the Plaintiff has presented evidence to satisfy this burden will not be in dispute. In the event it is, the instruction regarding Plaintiff's burden should be given.

d. Mitigation. If failure to mitigate is an issue, a separate instruction is provided. *See* Instruction 3.20.

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

3.20 FAILURE TO MITIGATE AFFIRMATIVE DEFENSE

Defendant asserts that Plaintiff's claim for lost wages and benefits should be reduced. To succeed, Defendant must prove by a preponderance of the evidence both that:

1. Plaintiff did not take reasonable actions to reduce [his/her] damages; and

2. That Plaintiff reasonably might have found comparable employment if [he/she] had taken such action.

Reasonable efforts to mitigate damages include that Plaintiff has a duty to use reasonable diligence to mitigate [his/her] damages. That is, Plaintiff has a duty to avoid or to minimize those damages by accepting an unconditional offer of reinstatement or other offers for suitable employment. However, Plaintiff is not required to exercise unreasonable efforts or to incur unreasonable expenses in mitigating [his/her] damages. Plaintiff is not required to bear additional risk or take on additional burdens.

Proof that Plaintiff could have found comparable employment requires specific evidence showing that, with a reasonably diligent search, someone with Plaintiff's qualifications would likely have found a job sooner than they actually did.

Defendant has the burden of proving the amount, if any, damages that Plaintiff could have mitigated through a reasonable effort.

Committee Comments

See Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 231-32 (1982) (holding Plaintiff has duty to mitigate damages by using "reasonable diligence in finding other suitable employment" and that Plaintiff must accept an "unconditional offer of the job originally sought" or lose the right to back pay for the period following Defendant's offer); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967 (7th Cir. 2016) (not required to incur unreasonable expenses).

Additional description may be appropriate here where Plaintiff's qualifications or limitations are unique, for example, where Plaintiff has a disability. *Vega v. Chicago Park Dist.*, 954 F.3d 996, 1009 (7th Cir. 2020) (evidence of available positions must reflect geographic area where Plaintiff lived during the relevant period and employment opportunities for individuals with the aggrieved individual's educational background and employment backgrounds); *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1044 (7th Cir. 1994) ("[C]omparable employment" is a position that affords "virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status" as the previous position).

3.21 PUNITIVE DAMAGES

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

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that [Defendant's conduct] [the conduct of Defendant's [managerial employees/officers]] was done with malice or in reckless disregard of Plaintiff's right not to be discriminated against. An action is in reckless disregard of Plaintiff's rights if taken with knowledge or in the face of a perceived risk that it may violate the law. A Plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer's policies for implementing those laws.

Plaintiff must prove by a preponderance of the evidence that Defendant's [managerial employees/officers] acted within the scope of their employment and in reckless disregard of Plaintiff's right not to be discriminated [and/or retaliated] against.

[In determining whether [*name*] was a managerial agent of Defendant, you should consider the kind of authority Defendant gave [him/her], the amount of discretion [he/she] had in carrying out [his/her] job duties and the manner in which [he/she] carried them out.]

The Plaintiff need not additionally show that the employer's conduct was outrageous or provide direct evidence of the employer's motivation. Defendant's conduct need not be "egregious" to warrant punitive damages.

You should not, however, award Plaintiff punitive damages if Defendant proves that it made a good faith effort to prevent discrimination in the workplace. In determining whether Defendant made good-faith efforts to prevent discrimination, you may consider whether it adopted antidiscrimination policies, whether it educated its employees on the federal antidiscrimination laws, how it responded to Plaintiff's complaint of discrimination [, and how it responded to other complaints of discrimination]. The mere existence of an antidiscrimination policy is not sufficient, in and of itself, to insulate the Defendant from a punitive damages award.

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

- the reprehensibility of Defendant's conduct;
- the impact of Defendant's conduct on Plaintiff;
- the relationship between Plaintiff and Defendant;
- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- Defendant's financial condition; and
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered. However, there is no requirement that compensatory damages also be awarded.

Committee Comments

a. Authority. Title 42 U.S.C. § 1981a(b)(1) states that punitive damages may be awarded where the Defendant "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999), interprets "malice" or "reckless disregard" to refer to the employer's knowledge that it may be violating federal law. For cases applying this standard, see, *e.g.*, *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 661-62 (7th Cir. 2001); *Cooke v. Stefani Mgmt. Services, Inc.*, 250 F.3d 564, 568-70 (7th Cir. 2001); *Gile v. United Airlines, Inc.*, 213 F.3d 365, 375-76 (7th Cir. 2000). The same standard applicable to punitive damages claims under 42 U.S.C. § 1981a(b)(1) applies under 42 U.S.C. § 1981. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441-42 (4th Cir. 2000). Because including the term malice is potentially confusing in light of this interpretation, it is not used in the instruction. *May v. Chrysler Grp., LLC*, 692 F.3d 734, 745 (7th Cir. 2012) (An award of punitive damages does *not* require "evidence of egregious or outrageous conduct by the employer."). *See also Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001) (citing *Hazen Paper,* 507 U.S. at 617, and *Kolstad*, 527 U.S. at 537).

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

c. ADEA. Punitive damages are not available under the ADEA, except for a retaliation claim. *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687-88 (7th Cir. 1982); *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 283-84 (7th Cir. 1993). Liquidated damages may be available, however.

d. ADA retaliation claims. Punitive damages are not available on ADA retaliation claims. *Kramer v. Banc of America Sec., LLC*, 355 F.3d 961, 965 (7th Cir. 2004).

e. Managerial capacity. Where there is an issue as to whether an employee was acting in a managerial capacity justifying the imposition of punitive damages, the relevant bracketed portion of the instruction should be included. *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 663 (7th Cir. 2001). The Seventh Circuit has explained "the plaintiff must establish a basis for imputing liability to the employer based on agency principles. Employers can be liable for the acts of their agents when the employer authorizes or ratifies a discriminatory act, the employer recklessly employs an unfit agent, or the agent commits a discriminatory act while 'employed in a managerial capacity and . . . acting in the scope of employment.'" *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 835 (7th Cir. 2013) (citations omitted).

f. Good faith defense. An employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement antidiscrimination policies. *Kolstad*, 527 U.S. at 545-46. However, the implementation of a written or formal antidiscrimination policy in and of itself is not sufficient to insulate an employer from punitive damages award. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir. 2001).

g. Defendant's financial condition as punitive damages consideration. "Evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Newport v. Fact Concerts*, 453 U.S. 247, 270 (1981) (citing Restatement (Second) of Torts § 908(2) (1979)).

h. Punitive damage caps. The jury should not be informed of the existence or amount of punitive damage caps.

i. No requirement that compensatory damages also be awarded. *Hertzberg v. SRAM Corp.,* 261 F.3d 651, 656, n. 3 (7th Cir. 2001) ("The fact that [Plaintiff] did not recover compensatory damages does not affect the jury's award of punitive damages." (citing *Timm v. Progressive Steel Treating, Inc.,* 137 F.3d 1008, 1010-11 (7th Cir. 1998) (holding that there was "no legal flaw[ ]" in a jury's award of punitive damages in the absence of a compensatory damage award))).