

1 **Instructions for Employment Discrimination Claims Under Title VII**

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2 Model

3 In this case the Plaintiff _____ makes a claim under a Federal Civil Rights statute that
4 prohibits employers from discriminating against an employee [prospective employee] in the terms
5 and conditions of employment because of the employee’s race, color, religion, sex, or national
6 origin.

7 More specifically, [plaintiff] claims that [he/she] was [describe the employment action at
8 issue] by the defendant _____ because of [plaintiff’s] [protected status].

9 [Defendant] denies that [plaintiff] was discriminated against in any way. Further,
10 [defendant] asserts that [describe any affirmative defenses].

11 I will now instruct you more fully on the issues you must address in this case.

12

13 Comment

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

17 *Note on the Relationship Between Title VII Actions and Actions Brought Under the Equal Pay Act*

18 A claim for sex-based wage discrimination can potentially be brought under either the
19 Equal Pay Act, or Title VII, or both. There are some similarities, and some important differences,
20 between a claim under the Equal Pay Act and a Title VII action for sex-based wage discrimination.

21 The most important similarity between the two actions is that the affirmative defenses set
22 forth in the Equal Pay Act — (i) a seniority system; (ii) a merit system; (iii) a system which
23 measures earnings by quantity or quality of production; and (iv) a differential based on any other
24 factor other than sex — are applicable to Title VII actions for sex-based wage discrimination. This
25 was made clear by the Bennett Amendment to Title VII. See the discussion in *County of*
26 *Washington v. Gunther*, 452 U.S. 161 (1981).

27 The most important differences between the two actions are:

28 1. The Equal Pay Act does not require proof of intent to discriminate. The plaintiff recovers
29 under the Equal Pay Act by proving that she received lower pay for substantially equal work. In
30 contrast, Title VII claims for disparate treatment require proof of an intent to discriminate. *See*
31 *Lewis and Norman, Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). But Title
32 VII does not require the plaintiff to prove the EPA statutory requirements of “equal work” and

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33 “similar working conditions”.

34 In *Gunther, supra*, the Supreme Court explained the importance of retaining Title VII
35 recovery as an alternative to recovery under the Equal Pay Act:

36 Under petitioners' reading of the Bennett Amendment, only those sex-based wage
37 discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be
38 brought under Title VII. In practical terms, this means that a woman who is
39 discriminatorily underpaid could obtain no relief -- no matter how egregious the
40 discrimination might be -- unless her employer also employed a man in an equal job in the
41 same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a
42 unique position in the company and then admitted that her salary would have been higher
43 had she been male, the woman would be unable to obtain legal redress under petitioners'
44 interpretation. Similarly, if an employer used a transparently sex-biased system for wage
45 determination, women holding jobs not equal to those held by men would be denied the
46 right to prove that the system is a pretext for discrimination. Moreover, to cite an example
47 arising from a recent case, *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702
48 (1978), if the employer required its female workers to pay more into its pension program
49 than male workers were required to pay, the only women who could bring a Title VII action
50 under petitioners' interpretation would be those who could establish that a man performed
51 equal work: a female auditor thus might have a cause of action while a female secretary
52 might not. Congress surely did not intend the Bennett Amendment to insulate such
53 blatantly discriminatory practices from judicial redress under Title VII.

54 452 U.S. at 178-179.

55 2. Title VII's burden-shifting scheme (see Instructions 5.1.1, 5.1.2) differs from the
56 burdens of proof applicable to an action under the Equal Pay Act. The difference was explained
57 by the Third Circuit in *Stanziale v. Jargowsky*, 200 F.3d 101, 107-108 (3d Cir. 2000), a case in
58 which the plaintiff brought claims under Title VII, the ADEA, and the Equal Pay Act:

59 Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29
60 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell*
61 *Douglas*; rather, they follow a two-step burden-shifting paradigm. The plaintiff must first
62 establish a prima facie case by demonstrating that employees of the opposite sex were paid
63 differently for performing "equal work"--work of substantially equal skill, effort and
64 responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health*
65 *and Social Services*, 865 F.2d 1408, 1413-14 (3rd Cir. 1989). The burden of persuasion
66 then shifts to the employer to demonstrate the applicability of one of the four affirmative
67 defenses specified in the Act. Thus, the employer's burden in an Equal Pay Act claim --
68 being one of ultimate persuasion -- differs significantly from its burden in an ADEA [or
69 Title VII] claim. Because the employer bears the burden of proof at trial, in order to prevail
70 at the summary judgment stage, the employer must prove at least one affirmative defense
71 "so clearly that no rational jury could find to the contrary." *Delaware Dept. of Health*, 865
72 F.2d at 1414.

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73 The employer's burden is significantly different in defending an Equal Pay Act
74 claim for an additional reason. The Equal Pay Act prohibits differential pay for men and
75 women when performing equal work "*except where such payment is made pursuant to*"
76 one of the four affirmative defenses. 29 U.S.C. § 206(d)(1) (emphasis added). We read
77 the highlighted language of the statute as requiring that the employer submit evidence from
78 which a reasonable factfinder could conclude not merely that the employer's proffered
79 reasons could explain the wage disparity, but that the proffered reasons do in fact explain
80 the wage disparity. See also *Delaware Dept. of Health*, 865 F.2d at 1415 (stating that "the
81 correct inquiry was . . . whether, viewing the evidence most favorably to the [plaintiff], a
82 jury could *only* conclude that the pay discrepancy resulted from" one of the affirmative
83 defenses (emphasis added)). Thus, unlike an ADEA or Title VII claim, where an employer
84 need not prove that the proffered legitimate nondiscriminatory reasons actually motivated
85 the salary decision, in an Equal Pay Act claim, an employer must submit evidence from
86 which a reasonable factfinder could conclude that the proffered reasons actually motivated
87 the wage disparity.

88 3. The Equal Pay Act exempts certain specific industries from its coverage, including
89 certain fishing and agricultural businesses. See 29 U.S.C. § 213. These industries are not, however,
90 exempt from Title VII.

91 4. In contrast to Title VII, the Equal Pay Act has no coverage threshold defined in terms of
92 the employer's number of employees.

93 5. The statute of limitations for backpay relief is longer under the EPA. As stated in Lewis
94 and Norman, *Employment Discrimination Law and Practice* § 7.20 (2d ed. 2001):

95 An EPA action is governed by the FLSA [Fair Labor Standards Act] statute of
96 limitations. The FLSA provides a two year statute of limitations for filing, three years in
97 the case of a "willful" violation. These statutes of limitation compare favorably from the
98 plaintiff's perspective with the 180-day or 300-day administrative filing deadlines of Title
99 VII.

100 Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence
101 of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. §
102 2000e-5(e), can include "when a discriminatory compensation decision or other practice is
103 adopted, when an individual becomes subject to a discriminatory compensation decision or other
104 practice, or when an individual is affected by application of a discriminatory compensation
105 decision or other practice, including each time wages, benefits, or other compensation is paid,
106 resulting in whole or in part from such a decision or other practice." *Id.* § 2000e-5(e)(3)(A); see
107 *Mikula v. Allegheny County*, 583 F.3d 181, 185-86 (3d Cir. 2009) (applying Section 2000e-
108 5(e)(3)(A)).¹ This amendment brings the accrual date for a Title VII claim more in line with the
109 EPA mechanism, in which an EPA claim arises each time the employee receives lower pay than

¹ See also *Noel v. Boeing Co.*, 622 F.3d 266, 273 (3d Cir. 2010) (holding that Section 2000e-5(e)(3)(A) "does not apply to failure-to-promote claims").

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110 male employees doing substantially similar work.

111 6. “The Equal Pay Act, unlike Title VII, has no requirement of filing administrative
112 complaints and awaiting administrative conciliation efforts.” *County of Washington v. Gunther*,
113 452 U.S. 161, 175, n.14 (1981).

114 Where the plaintiff claims that wage discrimination is a violation of both Title VII and the
115 Equal Pay Act, it will be necessary to give two sets of instructions, with the exception that the
116 affirmative defenses provided by the Equal Pay Act (see Instructions 11.2.1-11.2.4) will be
117 applicable to both claims. If a claim for sex-based wage discrimination is brought under Title VII
118 only, then these Title VII instructions should be used, with the proviso that where sufficient
119 evidence is presented, the defendant is entitled to an instruction on the affirmative defenses set
120 forth in the Equal Pay Act. See Instructions 11.2.1-11.2.4 for instructions on those affirmative
121 defenses.

122 *Employment relationship*

123 Title VII defines certain conduct by “employer[s]” toward “employees or applicants for
124 employment” as “unlawful employment practice[s].” 42 U.S.C. § 2000e-2(a). In assessing
125 whether the plaintiff counts as an employee for purposes of Title VII, decisionmakers should “look
126 to the factors set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).”
127 *Covington v. International Association of Approved Basketball Officials*, 710 F.3d 114, 119 (3d
128 Cir. 2013); *see also Nationwide Mutual Insurance*, 503 U.S. at 319 (holding unanimously that the
129 definition of “employee” as used in ERISA “incorporate[s] traditional agency law criteria for
130 identifying master-servant relationships”). Decisionmakers should “focus the employment
131 relationship analysis on ‘the level of control the defendant[s] ... exerted over the plaintiff: which
132 entity paid [the employees’] salaries, hired and fired them, and had control over their daily
133 employment activities.’” *Covington*, 710 F.3d at 119 (quoting *Covington v. Int’l Ass’n of*
134 *Approved Basketball Officials*, No. 08–3639, 2010 WL 3404977, at *2 (D.N.J. Aug. 26, 2010));
135 *see also Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 209 (3d Cir. 2015) (holding that summary
136 judgment was inappropriate because, under the circumstances, it was for the jury to decide whether
137 the client of a temporary-staffing agency counted as an employer of one of the agency’s
138 employees). To determine whether a shareholder-director of a business entity counts as that
139 entity’s employee for purposes of Title VII, one should employ the multi-factor test set out in
140 *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). *See Mariotti v.*
141 *Mariotti Bldg. Products, Inc.*, 714 F.3d 761, 765-66 (3d Cir. 2013) (listing the *Clackamas* factors
142 and holding that they apply in Title VII cases).

143 *Religious Organizations*

144 Title VII allows religious organizations to hire and employ employees on the basis of their
145 religious beliefs. 42 U.S.C. § 2000e-1(a) (Title VII claim for religious discrimination cannot be
146 brought against a “religious corporation, association, educational institution or society”). In
147 *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007), the court listed
148 the following factors as pertinent to whether a particular organization is within Title VII’s

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149 exemption for religious organizations:

150 Over the years, courts have looked at the following factors: (1) whether the entity operates
151 for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of
152 incorporation or other pertinent documents state a religious purpose, (4) whether it is
153 owned, affiliated with or financially supported by a formally religious entity such as a
154 church or synagogue, (5) whether a formally religious entity participates in the
155 management, for instance by having representatives on the board of trustees, (6) whether
156 the entity holds itself out to the public as secular or sectarian, (7) whether the entity
157 regularly includes prayer or other forms of worship in its activities, (8) whether it includes
158 religious instruction in its curriculum, to the extent it is an educational institution, and (9)
159 whether its membership is made up by coreligionists.

160 In *LeBoon*, the court found the defendant, a Jewish Community Center, to be “primarily a religious
161 organization” because it identified itself as such; it relied on coreligionists for financial support;
162 area rabbis were involved in management decisions; and board meetings began with Biblical
163 readings and “remained acutely conscious of the Jewish character of the organization.” The fact
164 that the Center engaged in secular activities as well was not dispositive. *Id.* at 229-30. Accordingly
165 the plaintiff, an evangelical Christian who was fired from her position as bookkeeper, could not
166 recover under Title VII on grounds of religious discrimination.

167 By its terms, Title VII does not confer upon religious organizations the right to discriminate
168 against employees on the basis of race, sex, and national origin. But with respect to claims for
169 wrongful termination, the First Amendment’s religion clauses give rise to an affirmative defense
170 that “bar[s] the government from interfering with the decision of a religious group to fire one of
171 its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694,
172 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a retaliation claim under the Americans
173 with Disabilities Act, the Court’s broad description of the issue suggests that its recognition of a
174 “ministerial exception” may apply equally to wrongful-termination claims brought under other
175 federal anti-discrimination statutes. *See id.* at 710 (“The case before us is an employment
176 discrimination suit brought on behalf of a minister, challenging her church's decision to fire her....
177 [T]he ministerial exception bars such a suit.”).

178 The *Hosanna-Tabor* Court did not specify which types of plaintiffs fall within the
179 ministerial exception: It held that “the ministerial exception is not limited to the head of a religious
180 congregation” but declined “to adopt a rigid formula for deciding when an employee qualifies as
181 a minister.” *Id.* at 707. The plaintiff in *Hosanna-Tabor* fell within the exception “[i]n light of ...
182 the formal title given [the plaintiff] by the Church, the substance reflected in that title, her own use
183 of that title, and the important religious functions she performed for the Church.” *Id.* at 708. *See*
184 *also Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006) (pre-*Hosanna-Tabor* decision
185 holding in a Title VII case that the ministerial exception “applies to any claim, the resolution of
186 which would limit a religious institution's right to choose who will perform particular spiritual
187 functions”).

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188 Nor did the *Hosanna-Tabor* Court decide whether the ministerial exception extends beyond
189 wrongful-termination claims. *See Hosanna-Tabor*, 132 S. Ct. at 710 (“The case before us is an
190 employment discrimination suit brought on behalf of a minister, challenging her church’s decision
191 to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view
192 on whether the exception bars other types of suits, including actions by employees alleging breach
193 of contract or tortious conduct by their religious employers.”). *See also Petruska*, 462 F.3d at 308
194 n.11 (noting that the court was not deciding whether the ministerial exception would bar claims
195 for hostile work environment sexual harassment).

196 The *Hosanna-Tabor* Court did make clear that, where the ministerial exception applies, it
197 bars wrongful-termination claims regardless of the type of relief sought. *See Hosanna-Tabor*, 132
198 S. Ct. at 709. In addition, the ministerial exception applies even if the plaintiff asserts that the
199 defendant’s claimed religious reason for the firing is merely pretextual. *See id.*

200 *Discrimination because of religion*

201 Title VII prohibits adverse employment actions motivated by a protected characteristic;
202 among those characteristics is “religion.” 42 U.S.C. § 2000e–2(a)(1). Where a Title VII religious-
203 discrimination claim is grounded on a claim that the employer was motivated by the plaintiff’s
204 religious beliefs, the instructions provided in this Chapter should be a good fit. But “religion” as
205 used in Title VII includes more than religious belief. “The term ‘religion’ includes all aspects of
206 religious observance and practice, as well as belief, unless an employer demonstrates that he is
207 unable to reasonably accommodate to an employee’s or prospective employee’s religious
208 observance or practice without undue hardship on the conduct of the employer’s business.” 42
209 U.S.C. § 2000e(j). Coupling this definition with the statutory prohibition on discrimination
210 “because of ... religion,” 42 U.S.C. § 2000e–2(a)(1), the Supreme Court has recognized a Title
211 VII disparate-treatment claim for failure to accommodate a religious practice. *See E.E.O.C. v.*
212 *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015) (holding that “religious
213 practice is one of the protected characteristics that cannot be accorded disparate treatment and must
214 be accommodated”). The Committee has not attempted to determine the ways in which the
215 disparate-treatment instructions in this Chapter would need to be modified for application to a
216 claim for failure to accommodate a religious practice.

217 *Title VII Excludes RFRA Claims for Job-Related Federal Religious Discrimination:*

218 In *Francis v. Mineta*, 505 F.3d 266, 270-71 (3d Cir. 2007), an employee attempted to bring
219 an employment discrimination action under the Religious Freedom Restoration Act, 42 U.S.C. §§
220 2000bb-2000bb-4. (The employee had failed to exhaust administrative remedies with the EEOC,
221 so Title VII was unavailable to him.) The court held that “nothing in RFRA alters the exclusive
222 nature of Title VII with regard to employees’ claims of religion-based employment
223 discrimination.” The court relied on the legislative history of RFRA, which demonstrated that
224 “Congress did not intend RFRA to create a vehicle for allowing religious accommodation claims
225 in the context of federal employment to do an end run around the legislative scheme of Title VII.”

226 *Title VII Protection of Pregnancy:*

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227 Since 1978, Title VII has included specific statutory language addressing pregnancy:

228 In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which
229 added new language to Title VII's definitions subsection. The first clause of the
230 1978 Act specifies that Title VII's "ter[m] 'because of sex' ... include[s] ... because
231 of or on the basis of pregnancy, childbirth, or related medical conditions." §
232 2000e(k). The second clause says that "women affected by pregnancy, childbirth,
233 or related medical conditions shall be treated the same for all employment-related
234 purposes ... as other persons not so affected but similar in their ability or inability
235 to work...." *Ibid.*

236 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344-45 (2015); *see also id.* at 1353-55
237 (explaining how the *McDonnell Douglas* proof framework applies to a claim "that the denial of an
238 accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second
239 clause").

240 The Court of Appeals has held that the Pregnancy Discrimination Act's reference to
241 "related medical conditions" includes abortion. *See Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358,
242 364 (3d Cir. 2008) (concluding "that an employer may not discriminate against a woman employee
243 because she has exercised her right to have an abortion").

244 On the subject of pension accrual rules that predated the enactment of the Pregnancy
245 Discrimination Act, *see AT & T Corp. v. Hulteen*, 556 U.S. 701, 708 (2009) ("Although adopting
246 a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a
247 seniority system does not necessarily violate the statute when it gives current effect to such rules
248 that operated before the PDA.").

249 *Interaction between disparate impact and disparate treatment principles*

250 Concerning the interaction between disparate-impact and disparate-treatment principles
251 under Title VII, *see Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (holding that "under Title
252 VII, before an employer can engage in intentional discrimination for the asserted purpose of
253 avoiding or remedying an unintentional disparate impact, the employer must have a strong basis
254 in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-
255 conscious, discriminatory action," but also noting that "Title VII does not prohibit an employer
256 from considering, before administering a test or practice, how to design that test or practice in
257 order to provide a fair opportunity for all individuals, regardless of their race"). *See also NAACP*
258 *v. North Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 484-85 (3d Cir. 2011) (rejecting defendant's
259 argument that it should be allowed to maintain a residency requirement despite its disparate impact
260 on African-Americans because the defendant feared disparate-treatment claims by Hispanic
261 candidates).

262 *Discrimination involving gender stereotypes*

263 For a discussion of Title VII claims based on gender stereotyping, *see Prowel v. Wise*

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264 *Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (“[I]t is possible that the harassment Prowel
265 alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate
266 the possibility that Prowel was also harassed for his failure to conform to gender stereotypes....
267 Because both scenarios are plausible, the case presents a question of fact for the jury....”).

268 *Discrimination on the basis of sexual orientation or transgender status*

269 The Third Circuit has held that Title VII does not bar discrimination on the basis of sexual
270 orientation. See *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001)
271 (“Title VII does not prohibit discrimination based on sexual orientation.”). More recently, the
272 EEOC has published opinions (in cases involving federal-government employment) recognizing
273 sexual-orientation and gender-identity claims as actionable under Title VII. See *Macy v. Holder*,
274 EEOC Appeal No. 0120120821, 2012 WL 1435995, at *4 (EEOC Apr. 20, 2012) (“clarif[ying]
275 that claims of discrimination based on transgender status, also referred to as claims of
276 discrimination based on gender identity, are cognizable under Title VII’s sex discrimination
277 prohibition, and may therefore be processed under Part 1614 of EEOC’s federal sector EEO
278 complaints process”); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at
279 *10 (EEOC July 15, 2015) (holding “that Complainant’s allegations of discrimination on the basis
280 of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of
281 Title VII”). As of spring 2016, the Third Circuit has not revisited its holding in *Bibby* since the
282 issuance of these EEOC decisions.

5.1.1 Disparate Treatment – Mixed-Motive

5.1.1 Elements of a Title VII Claim— Disparate Treatment — Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] [protected status] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [plaintiff's protected status] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [protected status] was a “motivating factor” if [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[For use where defendant sets forth a “same decision” affirmative defense:²

If you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled to damages. [Plaintiff] is not entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [protected class] had played no role in

² The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

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31 the employment decision.]

32

33 **Comment**

34 The Supreme Court has ruled that direct evidence is not required for a plaintiff to prove
35 that discrimination was a motivating factor in a "mixed-motive" case, *i.e.*, a case in which an
36 employer had both legitimate and illegitimate reasons for making a job decision. *Desert Palace*
37 *Inc. v. Costa*, 539 U.S. 90 (2003). The *Desert Palace* Court concluded that in order to be entitled
38 to a mixed-motive instruction, "a plaintiff need only present sufficient evidence for a reasonable
39 jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national
40 origin was a motivating factor for any employment practice." *Id.* at 95-96 (internal quotation
41 omitted). The mixed-motive instruction above — including the instruction on the affirmative
42 defense — tracks the instructions approved in *Desert Palace*.

43 While direct evidence is not required to make out a mixed motive case, it is nonetheless
44 true that the distinction between "mixed-motive" cases and "pretext" cases is often determined by
45 whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the
46 plaintiff produces direct evidence of discrimination, this may be sufficient to show that the
47 defendant's activity was motivated at least in part by animus toward a protected class, and therefore
48 a "mixed-motive" instruction is warranted. If the evidence of discrimination is only circumstantial,
49 then the defendant can argue that there was no animus at all, and that its employment decision can
50 be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that
51 the alleged non-discriminatory motive is a pretext, and accordingly Instruction 5.1.2 should be
52 given. *See generally Stackhouse v. Pennsylvania State Police*, 2006 WL 680871 at *4 (M.D.Pa.
53 2006) ("A pretext theory of discrimination is typically presented by way of circumstantial
54 evidence, from which the finder of fact may infer the falsity of the employer's explanation to show
55 bias. A mixed-motive theory of discrimination, however, is usually put forth by presenting
56 evidence of conduct or statements by persons involved in the decisionmaking process that may be
57 viewed as directly reflecting the alleged discriminatory attitude.") (internal citations and
58 quotations omitted).

59 On the proper use of a mixed-motive instruction — and the continuing viability of the
60 mixed-motive/pretext distinction — see Matthew Scott and Russell Chapman, *Much Ado About*
61 *Nothing — Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All*
62 *Employment Discrimination Cases To Mixed-Motive*, 36 St. Mary's L.J. 395 (2005):

63 Thus, a case properly analyzed under [42 U.S.C.] § 2000e-2(a) (what some
64 commentators refer to as pretext cases) involves the plaintiff alleging an improper motive
65 for the defendant's conduct, while the defendant disavows that motive and professes only
66 a non-discriminatory motive. On the other hand, a true mixed motive case under [42
67 U.S.C.] § 2000e-2(m) involves either a defendant who . . . *admits* to a partially
68 discriminatory reason for its actions, while also claiming it would have taken the same
69 action were it not for the illegitimate rationale or . . . [there is] otherwise credible evidence

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70 to support such a finding.

71 The rationale for the distinction . . . is simple. When the defendant renounces any
72 illegal motive, it puts the plaintiff to a higher standard of proof that the challenged
73 employment action was taken *because of* the plaintiff’s race/color/religion/sex/national
74 origin. But, the plaintiff, if successful, is entitled to the full panoply of damages under §
75 2000e-5. . . .

76 At the same time, where the defendant is contrite and admits an improper motive
77 (something no jury will take lightly), or there is evidence to support such a finding, the
78 defendant’s liability risk is reduced to declaratory relief, attorneys’ fees and costs if the
79 defendant proves it would have taken the same action even without considering the
80 protected trait. The quid pro quo for this reduced financial risk is the lesser standard of
81 liability (the challenged employment action need only be a motivating factor).

82 Thus, the distinction between mixed-motive and pretext cases is retained after *Desert*
83 *Palace*. The Third Circuit has indicated that it retains that distinction. *See, e.g., Makky v. Chertoff*,
84 541 F.3d 205, 215 (3d Cir. 2008) (“A Title VII plaintiff may state a claim for discrimination under
85 either the pretext theory set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or
86 the mixed-motive theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), under
87 which a plaintiff may show that an employment decision was made based on both legitimate and
88 illegitimate reasons.”).³ *See also Hanes v. Columbia Gas of Pennsylvania Nisource Co.*, 2008 WL
89 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit “adheres to a distinction between ‘pretext’
90 cases, in which the employee asserts that the employer's justification for an adverse action is false,
91 and ‘mixed-motives’ cases, in which the employee asserts that both legitimate and illegitimate
92 motivations played a role in the action”; “determinative factor” analysis applies to the former and
93 “motivating factor” analysis applies to the latter).

94 Whether to give a mixed-motive or a pretext instruction (or both) is a question of law for
95 the court. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1097-98 (3d Cir.1995). *See also*
96 *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 788 (3d Cir. 2016) (“[E]ven at trial, an employee
97 may present his case under both [pretext and mixed-motive] theories, provided that, prior to
98 instructing the jury, the judge decides whether one or both theories applies” (internal quotation
99 marks and citation omitted).); *Urban v. Bayer Corp. Pharmaceutical Div.*, 2006 WL 3289946
100 (D.N.J. 2006) (analyzing discrimination claim first under mixed-motive theory and then under
101 pretext theory).

102 “*Same Decision*” *Affirmative Defense in Mixed-Motive Cases*

³ The *Makky* court’s statement (quoted in the text) should not be taken to suggest that the complaint must specify whether the plaintiff will rely on a pretext theory, a mixed-motive theory, or both. *See Connelly v. Lane Const. Corp.*, 809 F.3d 780, 788 (3d Cir. 2016) (“The distinction between those two types of cases” has to do with types of proof, “and identifying the proof before there has been discovery would seem to put the cart before the horse.”).

5.1.1 Disparate Treatment – Mixed-Motive

103 Where the plaintiff has shown intentional discrimination in a mixed motive case, the
104 defendant can still avoid liability for money damages by demonstrating by a preponderance of the
105 evidence that the same decision would have been made even in the absence of the impermissible
106 motivating factor. If the defendant establishes this defense, the plaintiff is then entitled only to
107 declaratory and injunctive relief, attorney’s fees and costs. Orders of reinstatement, as well as the
108 substitutes of back and front pay, are prohibited if a same decision defense is proven. 42 U.S.C.
109 §2000e-5(g)(2)(B).

110 *Failure to Rehire as an Adverse Employment Action*

111 In *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008),
112 the court held that the failure to renew an employment arrangement, “whether at-will or for a
113 limited period of time, is an employment action, and an employer violates Title VII if it takes an
114 adverse employment action for a reason prohibited by Title VII.” *See also Connelly v. Lane Const.*
115 *Corp.*, 809 F.3d 780, 791 (3d Cir. 2016) (holding that plaintiff adequately pleaded a disparate
116 treatment claim where her “allegations raise[d] a reasonable expectation that discovery w[ould]
117 reveal evidence that [her] protected status as a woman played either a motivating or determinative
118 factor in [defendant]’s decision not to rehire her”). The Instruction accordingly contains a
119 bracketed alternative for failure to renew an employment arrangement as an adverse employment
120 action.

121 *Suspension with Pay Generally Not an Adverse Employment Action*

122 “A paid suspension pending an investigation of an employee’s alleged wrongdoing does
123 not fall under any of the forms of adverse action mentioned by Title VII’s substantive provision.”
124 *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015). Thus, “a suspension
125 with pay, ‘without more,’ is not an adverse employment action under the substantive provision of
126 Title VII.” *Id.* (quoting *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006)). *Compare Jones*, 796
127 F.3d at 325 (“[W]e need not consider and do not decide whether a paid suspension constitutes an
128 adverse action in the retaliation context.”).

129 *Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for* 130 *Employment*

131 In *Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008), the court held that “a mixed-motive
132 plaintiff has failed to establish a prima facie case of a Title VII employment discrimination claim
133 if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for
134 the position plaintiff sought to obtain or retain.” The court noted that “[i]n this respect at least,
135 requirements under *Price Waterhouse* do not differ from those of *McDonnell Douglas*.” The
136 *Makky* court emphasized that the requirement of an objective qualification was minimal and would
137 arise only in specific and limited fact situations where the plaintiff “does not possess the objective
138 baseline qualifications to do his/her job will not be entitled to avoid dismissal.” The court explained
139 the minimal qualification requirement as follows:

140 This involves inquiry only into the bare minimum requirement necessary to perform

5.1.1 Disparate Treatment – Mixed-Motive

141 the job at issue. *Typically, this minimum requirement will take the form of some type of*
142 *licensing requirement, such as a medical, law, or pilot's license, or an analogous*
143 *requirement measured by an external or independent body rather than the court or the*
144 *jury. * * ** We caution that we are not imposing a requirement that mixed-motive plaintiffs
145 show that they were subjectively qualified for their jobs, i.e., performed their jobs well.
146 Rather, we speak only in terms of an absolute minimum requirement of qualification, best
147 characterized in those circumstances that require a license or a similar prerequisite in order
148 to perform the job.

149 *Id.* (Emphasis added.)

150 The *Makky* court held that the determination of whether a plaintiff had obtained an
151 objective qualification for employment is a question of fact. But it would be extremely rare for the
152 court to have to instruct the jury on whether the plaintiff has met an objective job requirement
153 within the meaning of *Makky*. The examples given by the court are in the nature of licenses or
154 certifications by an external body — in the vast majority of cases, the parties will not dispute
155 whether the license or certification was issued. (In *Makky*, the requirement was that the employee
156 have a security clearance, and he could not contest that his clearance was denied.) In the rare case
157 in which the existence of an objective externally-imposed qualification raises a question of fact,
158 the court will need to add a third element to the basic instruction. For example:

159 Third: [Plaintiff] was [properly licensed] [met the requirements of an independent body
160 that set minimum requirements for [plaintiff's] job].

161 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

162 Construing a statute that contains similar motivating-factor language, the Supreme Court
163 ruled that “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the
164 supervisor to cause an adverse employment action, and if that act is a proximate cause of the
165 ultimate employment action, then the employer is liable under [the Uniformed Services
166 Employment and Reemployment Rights Act of 1994]” even if the ultimate employment decision
167 is taken by one other than the supervisor with the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186,
168 1194 (2011) (footnotes omitted). The Court did not explicitly state whether this ruling extends to
169 claims under 42 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor),
170 though it noted the similarity between Section 2000e-2(m)’s language and that of the USERRA.

1 **5.1.2 Elements of a Title VII Claim – Disparate Treatment — Pretext**

2 **Model**

3 In this case [plaintiff] is alleging that [describe alleged disparate treatment] [plaintiff]. In
4 order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must
5 prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff]
6 must prove that [his/her] [protected status] was a determinative factor in [defendant’s] decision to
7 [describe action] [plaintiff].

8 To prevail on this claim, [plaintiff] must prove both of the following by a preponderance
9 of the evidence:

10 First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff’s] employment
11 arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]]
12 [constructively discharged [plaintiff]]; and

13 Second: [Plaintiff’s] [protected status] was a determinative factor in [defendant’s] decision.

14 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
15 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
16 [plaintiff’s] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of
17 intent, such as statements admitting discrimination. Intentional discrimination may be inferred
18 from the existence of other facts.

19 [For example, you have been shown statistics in this case. Statistics are one form of
20 evidence that you may consider when deciding whether a defendant intentionally discriminated
21 against a plaintiff. You should evaluate statistical evidence along with all the other evidence
22 received in the case in deciding whether [defendant] intentionally discriminated against
23 [plaintiff]].

24 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If
25 you disbelieve [defendant’s] explanations for its conduct, then you may, but need not, find that
26 [plaintiff] has proved intentional discrimination. In determining whether [defendant’s] stated
27 reason for its actions was a pretext, or excuse, for discrimination, you may not question
28 [defendant’s] business judgment. You cannot find intentional discrimination simply because you
29 disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are
30 not to consider [defendant’s] wisdom. However, you may consider whether [defendant’s] reason is
31 merely a cover-up for discrimination.

32 Ultimately, you must decide whether [plaintiff] has proven that [his/her] [protected status]
33 was a determinative factor in [defendant’s employment decision.] “Determinative factor” means
34 that if not for [plaintiff’s] [protected status], the [adverse employment action] would not have
35 occurred.

5.1.2 Disparate Treatment – Pretext

36

37 **Comment**

38 On the distinction between mixed-motive and pretext cases (and the continuing viability of
39 that distinction), see the Commentary to Instruction 5.1.1.

40 *The McDonnell Douglas Burden-Shifting Test*

41 The Instruction does not charge the jury on the complex burden-shifting formula
42 established for pretext cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and
43 *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).⁴ Under the *McDonnell*
44 *Douglas* formula a plaintiff who proves a prima facie case of discriminatory treatment raises a
45 presumption of intentional discrimination. The defendant then has the burden of production, not
46 persuasion, to rebut the presumption of discrimination by articulating a nondiscriminatory reason
47 for its actions. If the defendant does articulate a nondiscriminatory reason, the plaintiff must prove
48 intentional discrimination by demonstrating that the defendant’s proffered reason was a pretext,
49 hiding the real discriminatory motive.

50 In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3d Cir. 1998), the Third Circuit
51 declared that “the jurors must be instructed that they are entitled to infer, but need not, that the
52 plaintiff’s ultimate burden of demonstrating intentional discrimination by a preponderance of the
53 evidence can be met if they find that the facts needed to make up the prima facie case have been
54 established and they disbelieve the employer’s explanation for its decision.” The court also stated,
55 however, that “[t]his does not mean that the instruction should include the technical aspects of the
56 *McDonnell Douglas* burden shifting, a charge reviewed as unduly confusing and irrelevant for a
57 jury.” The court concluded as follows:

58 Without a charge on pretext, the course of the jury’s deliberations will depend on whether
59 the jurors are smart enough or intuitive enough to realize that inferences of discrimination
60 may be drawn from the evidence establishing plaintiff’s prima facie case and the pretextual
61 nature of the employer’s proffered reasons for its actions. It does not denigrate the
62 intelligence of our jurors to suggest that they need some instruction in the permissibility of
63 drawing that inference.

64 In *Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, 347 n.1 (3d Cir. 1999), the Third
65 Circuit gave extensive guidance on the place of the *McDonnell Douglas* test in jury instructions:

66 The short of it is that judges should remember that their audience is composed of jurors

⁴ Instruction 5.1.2’s statement of the elements of a pretext claim would require adjustment in a case involving a claim of pregnancy discrimination. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1353-55 (2015) (explaining how the *McDonnell Douglas* proof framework applies to a claim “that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act’s second clause”).

5.1.2 Disparate Treatment – Pretext

67 and not law students. Instructions that explain the subtleties of the *McDonnell Douglas*
68 framework are generally inappropriate when jurors are being asked to determine whether
69 intentional discrimination has occurred. To be sure, a jury instruction that contains
70 elements of the *McDonnell Douglas* framework may sometimes be required. For example,
71 it has been suggested that "in the rare case when the employer has not articulated a
72 legitimate nondiscriminatory reason, the jury must decide any disputed elements of the
73 prima facie case and is instructed to render a verdict for the plaintiff if those elements are
74 proved." *Ryther [v. KARE II]*, 108 F.3d at 849 n.14 (Loken, J., for majority of en banc
75 court). But though elements of the framework may comprise part of the instruction, judges
76 should present them in a manner that is free of legalistic jargon. In most cases, of course,
77 determinations concerning a prima facie case will remain the exclusive domain of the trial
78 judge.

79 On proof of intentional discrimination, see *Sheridan v. E.I. DuPont de Nemours and Co.*,
80 100 F.3d 1061, 1066-1067 (3d Cir. 1996) (“[T]he elements of the prima facie case and disbelief
81 of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted,
82 but not required, to draw an inference leading it to conclude that there was intentional
83 discrimination.”).

84 In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993), the Supreme Court stated
85 that a plaintiff in a Title VII case always bears the burden of proving whether the defendant
86 intentionally discriminated against the plaintiff. The instruction follows the ruling in *Hicks*.

87 *Determinative Factor*

88 The reference in the instruction to a “determinative factor” is taken from *Watson v. SEPTA*,
89 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is “determinative
90 factor”, while the appropriate term in mixed-motive cases is “motivating factor”). See also *LeBoon*
91 *v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 232 n.8 (3d Cir. 2007) (in a pretext case, the
92 plaintiff must show that the prohibited intent was a “*determinative factor*” for the job action)
93 (emphasis in original); *Atkinson v. Lafayette College*, 460 F.3d 447, 455 (3d Cir. 2006) (“Faced
94 with legitimate, non-discriminatory reasons for Lafayette College's actions, the burden of proof
95 rested with Atkinson to demonstrate that the reasons proffered were pretextual and that gender was
96 a determinative factor in the decisions.”); *Hanes v. Columbia Gas of Pennsylvania Nisource Co.*,
97 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit “adheres to a distinction between
98 ‘pretext’ cases, in which the employee asserts that the employer's justification for an adverse action
99 is false, and ‘mixed-motives’ cases, in which the employee asserts that both legitimate and
100 illegitimate motivations played a role in the action”; “determinative factor” analysis applies to the
101 former and “motivating factor” analysis applies to the latter).

102 The plaintiff need not prove that the plaintiff’s protected status was the only factor in the
103 challenged employment decision, but the plaintiff must prove that the protected status was a
104 determinative factor. For example, if the employer fires women who steal office supplies but not
105 men who steal office supplies, then the women’s gender is a determinative factor in the firing even
106 though there is another factor (stealing office supplies) which if applied uniformly might have

5.1.2 Disparate Treatment – Pretext

107 justified the challenged employment decision. *See, e.g., McDonnell Douglas Corp. v. Green*, 411
108 U.S. 792, 804 (1973) (“Petitioner may justifiably refuse to rehire one who was engaged in
109 unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all
110 races.”).⁵

111 *Pretext*

112 The Third Circuit described standards for proof of pretext in *Doe v. C.A.R.S. Protection*
113 *Plus, Inc.* 527 F.3d 358, 370 (3d Cir. 2008):

114 In order to show pretext, a plaintiff must submit evidence which (1) casts doubt upon the
115 legitimate reason proffered by the employer such that a fact-finder could reasonably
116 conclude that the reason was a fabrication; or (2) would allow the fact-finder to infer that
117 discrimination was more likely than not a motivating or determinative cause of the
118 employee's termination. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); *Chauhan*
119 *v. M. Alfieri Co., Inc.*, 897 F.2d 123, 128 (3d Cir. 1990). Put another way, to avoid summary
120 judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons
121 must allow a fact-finder reasonably to infer that each of the employer's proffered non-
122 discriminatory reasons was either a post hoc fabrication or otherwise did not actually
123 motivate the employment action (that is, that the proffered reason is a pretext).

124 *See also Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) (“To make a showing of pretext,
125 ‘the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could
126 reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that
127 an invidious discriminatory reason was more likely than not a motivating or determinative cause
128 of the employer's action’” (quoting *Fuentes*, 32 F.3d at 764).).

129 The reference in these opinions to “a motivating *or* determinative cause” seems to indicate
130 that the two terms are interchangeable. But they are not, because a factor might “motivate” conduct
131 and yet not be the “determinative” cause of the conduct — proof that the factor was determinative
132 is thus a more difficult burden. The very distinction between pretext and mixed-motive cases is
133 that in the former the plaintiff must show that discrimination is the “determinative” factor for the
134 job action, while in the latter the plaintiff need only prove that discrimination is a “motivating”
135 (i.e., one among others) factor. *See, e.g., Stackhouse v. Pennsylvania State Police*, 2006 WL
136 680871 at *4 (M.D.Pa. 2006) (“Whether a case is classified as one of pretext or mixed-motive has
137 important consequences on the burden that a plaintiff has at trial, and hence on the instructions

⁵ In *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015), the court rejected the plaintiff's contention “that a reasonable jury could draw an inference of discrimination because SEPTA declined to punish male employees who engaged in the same alleged misconduct as she.” *Jones*, 796 F.3d at 327-28. The court of appeals reasoned that even if the plaintiff's supervisor had allowed a male employee “to underreport his vacation time to compensate him for unpaid overtime work,” and “even if this practice was against SEPTA rules, it was materially different from [the plaintiff's] misconduct because [the male employee] did not fraudulently claim pay for work he never performed.” *Id.* at 328.

5.1.2 Disparate Treatment – Pretext

138 given to the jury”; “determinative factor” analysis applies to the former and “motivating factor”
139 analysis applies to the latter) (citing *Watson v. SEPTA*, 207 F.3d 207, 214-15 & n. 5 (3d Cir. 2000)).
140 Accordingly, the instruction on pretext follows the standards set forth in *Doe*, *Fuentes*, and *Burton*,
141 with the exception that it uses only the term “determinative” and not the term “motivating.”

142 *Business Judgment*

143 On the “business judgment” portion of the instruction, see *Billet v. CIGNA Corp.*, 940
144 F.2d 812, 825 (3d Cir.1991), where the court stated that “[b]arring discrimination, a company has
145 the right to make business judgments on employee status, particularly when the decision involves
146 subjective factors deemed essential to certain positions.” The *Billet* court noted that “[a] plaintiff
147 has the burden of casting doubt on an employer’s articulated reasons for an employment decision.
148 Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid
149 management decision.” The *Billet* court cited favorably the First Circuit’s decision in *Loeb v.*
150 *Textron, Inc.*, 600 F.2d 1003, 1012 n. 6 (1st Cir.1979), where the court stated that “[w]hile an
151 employer’s judgment or course of action may seem poor or erroneous to outsiders, the relevant
152 question is simply whether the given reason was a pretext for illegal discrimination.”

153 *Failure to Rehire as an Adverse Employment Action*

154 In *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008),
155 the court held that the failure to renew an employment arrangement, “whether at-will or for a
156 limited period of time, is an employment action, and an employer violates Title VII if it takes an
157 adverse employment action for a reason prohibited by Title VII.” See also *Connelly v. Lane Const.*
158 *Corp.*, 809 F.3d 780, 791 (3d Cir. 2016) (holding that plaintiff adequately pleaded a disparate
159 treatment claim where her “allegations raise[d] a reasonable expectation that discovery w[ould]
160 reveal evidence that [her] protected status as a woman played either a motivating or determinative
161 factor in [defendant]’s decision not to rehire her”). The Instruction accordingly contains a
162 bracketed alternative for failure to renew an employment arrangement as an adverse employment
163 action.

164 *Suspension with Pay Generally Not an Adverse Employment Action*

165 “A paid suspension pending an investigation of an employee’s alleged wrongdoing does
166 not fall under any of the forms of adverse action mentioned by Title VII’s substantive provision.”
167 *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015). Thus, “a suspension
168 with pay, ‘without more,’ is not an adverse employment action under the substantive provision of
169 Title VII.” *Id.* (quoting *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006)). Compare *Jones*, 796
170 F.3d at 325 (“[W]e need not consider and do not decide whether a paid suspension constitutes an
171 adverse action in the retaliation context.”).

172 *Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for* 173 *Employment*

174 In *Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008), the court declared that in both

5.1.2 Disparate Treatment – Pretext

175 pretext and mixed-motive cases, a plaintiff “has failed to establish a prima facie case of a Title VII
176 employment discrimination claim if there is unchallenged objective evidence that s/he did not
177 possess the minimal qualifications for the position plaintiff sought to obtain or retain.” The court
178 explained the minimal qualification requirement as a narrow one best expressed as “circumstances
179 that require a license or a similar prerequisite in order to perform the job.”

180 It would be extremely rare for the court to have to instruct the jury on whether the plaintiff
181 has met an objective job requirement within the meaning of *Makky*. The examples given by the
182 court are in the nature of licenses or certifications by an external body — in the vast majority of
183 cases, the parties will not dispute whether the license or certification was issued. In the rare case
184 in which the existence of an objective externally-imposed qualification raises a question of fact,
185 the court will need to add a third element to the basic instruction. For example:

186 Third: [Plaintiff] was [properly licensed] [met the requirements of an independent body
187 that set minimum requirements for [plaintiff’s] job].

1 **5.1.3 Elements of a Title VII Claim — Harassment — Quid Pro Quo**

2 **Model**

3 [Plaintiff] alleges that [his/her] supervisor [name of supervisor], subjected [him/her] to
4 harassment. It is for you to decide whether [employer] is liable to [plaintiff] for the actions of
5 [supervisor].

6 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
7 the evidence:

8 First: [Plaintiff] was subjected to [describe activity] by [supervisor], because of [plaintiff's]
9 [sex] [race] [religion] [national origin];

10 Second: [Supervisor's] conduct was not welcomed by [plaintiff];

11 Third: [Plaintiff's] submission to [supervisor's] conduct was an express or implied
12 condition for receiving a job benefit or avoiding a job detriment;⁶

13 Fourth: [Plaintiff] was subjected to an adverse “tangible employment action”; a tangible
14 employment action is defined as a significant change in employment status, such as hiring,
15 firing, failing to promote, reassignment with significantly different responsibilities, or a
16 decision causing significant change in benefits; and

17 Fifth: [Plaintiff's] [rejection of] [failure to submit to] [supervisor's] conduct was a
18 motivating factor in the decision to [describe the alleged tangible employment action].

19 If any of the above elements has not been proved by the preponderance of the evidence,
20 your verdict must be for [defendant] and you need not proceed further in considering this claim.

21 **[When a jury question is raised as to whether the harassing employee is the plaintiff's**
22 **supervisor, the following instruction may be given:**

23 [Defendant] is liable for any discriminatory harassment the plaintiff has proven if the
24 plaintiff also proves by a preponderance of the evidence that [name of person] is a supervisor. A
25 supervisor is one who had the power to take tangible employment action against [plaintiff]. [As
26 you will recall, a tangible employment action is defined as a significant change in employment
27 status, such as hiring, firing, failing to promote, reassignment with significantly different
28 responsibilities, or a decision causing significant change in benefits.].]

⁶ This third element in the Instruction may require modification in some cases. See the Comment's discussion of *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282 (3d Cir. 2000), *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and 29 C.F.R. § 1604.11(a)(2).

5.1.3 Harassment – Quid Pro Quo

29 **Comment**

30 Instructions 5.1.3 through 5.1.5 address claims for harassment in violation of Title VII. A
31 plaintiff asserting such a claim must show discrimination and must also establish the employer’s
32 liability for that discrimination.⁷ The framework applicable to those two questions will vary
33 depending on the specifics of the case.

34 The Supreme Court has declared that the “quid pro quo” and “hostile work environment”
35 labels are not controlling for purposes of establishing employer liability. But the two terms do
36 provide a basic demarcation for the kinds of harassment actions that are brought under Title VII.
37 See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 750 (1998) (“The terms quid pro quo and
38 hostile work environment are helpful, perhaps, in making a rough demarcation between cases in
39 which threats are carried out and those where they are not or are absent altogether, but beyond this
40 are of limited utility. . . . The principal significance of the distinction is to instruct that Title VII is
41 violated by either explicit or constructive alterations in the terms or conditions of employment and
42 to explain the latter must be severe or pervasive.”) In other words, these terms retain significance
43 with respect to the first inquiry (showing discrimination) rather than the second (determining
44 employer liability).

45 *Showing discrimination*

46 One way to show discrimination is through what is known as a “quid pro quo” claim;
47 Instruction 5.1.3 provides a model for instructions on such a claim. Another way to show
48 discrimination is through what is termed a “hostile work environment” claim; Instructions 5.1.4
49 and 5.1.5 provide models for instructions on such claims.

50 Instruction 5.1.3's third element is appropriate for use in quid pro quo cases where the
51 supervisor expressly or impliedly conditioned a job benefit (or avoidance of a job detriment) on
52 the plaintiff’s submission to supervisor’s conduct at the time of the conduct. “However, [Third
53 Circuit] law contains no requirement that the plaintiff show that the employer implicitly or
54 explicitly threatened retaliation when making the advance.” *Farrell v. Planters Lifesavers Co.*,
55 206 F.3d 271, 282 (3d Cir. 2000). So long as the plaintiff shows “that his or her response to
56 unwelcome advances was subsequently used as a basis for a decision about compensation, etc. . . . ,
57 the plaintiff need not show that submission was linked to compensation, etc. at or before the time
58 when the advances occurred.” *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997),
59 *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53
60 (2006). See also 29 C.F.R. § 1604.11(a)(2). In a case where the plaintiff rests the quid pro quo
61 claim on the argument that the plaintiff’s response was subsequently used as a basis for a decision
62 concerning a job benefit or detriment, the third element in the model instruction should be revised
63 or omitted.

⁷ A supervisor cannot be liable under Title VII for acts of harassment. See *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) (concluding “that Congress did not intend to hold individual employees liable under Title VII”).

5.1.3 Harassment – Quid Pro Quo

64 *Employer liability*

65 Where an employee suffers an adverse tangible employment action as a result of a
66 supervisor’s discriminatory harassment, the employer is strictly liable for the supervisor’s conduct.
67 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (an employer is strictly liable for
68 supervisor harassment that "culminates in a tangible employment action, such as discharge,
69 demotion, or undesirable reassignment"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790
70 (1998) (stating that “there is nothing remarkable in the fact that claims against employers for
71 discriminatory employment actions with tangible results, like hiring, firing, promotion,
72 compensation, and work assignment, have resulted in employer liability once the discrimination
73 was shown”).

74 By contrast, when no adverse tangible employment action occurred, the employer has an
75 affirmative defense:

76 When no tangible employment action is taken, a defending employer may raise an
77 affirmative defense to liability or damages, subject to proof by a preponderance of
78 the evidence.... The defense comprises two necessary elements: (a) that the
79 employer exercised reasonable care to prevent and correct promptly any sexually
80 harassing behavior, and (b) that the plaintiff employee unreasonably failed to take
81 advantage of any preventive or corrective opportunities provided by the employer
82 or to avoid harm otherwise.

83 *Ellerth*, 524 U.S. at 765.

84 Instruction 5.1.3 is designed for use in cases that involve a tangible employment action.
85 The instruction’s definition of “tangible employment action” is taken from *Burlington Industries,*
86 *Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It should be noted that the failure to renew an
87 employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New*
88 *Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to
89 renew an employment arrangement, “whether at-will or for a limited period of time, is an
90 employment action, and an employer violates Title VII if it takes an adverse employment action
91 for a reason prohibited by Title VII”). As discussed below, it is possible that a plaintiff might
92 frame a case as a quid pro quo case even though it does not involve evidence of an adverse tangible
93 employment action; in such instances, the *Ellerth / Faragher* affirmative defense will be available.
94 See Instruction 5.1.5 for an instruction on that affirmative defense.

95 *Unfulfilled threats*

96 In some instances, a supervisor might threaten an adverse employment action but fail to
97 act on the threat after the plaintiff rejects the supervisor’s advances. In such a scenario, it is
98 necessary to consider the implications for both the question of discrimination and the question of
99 employer liability. On the question of discrimination, because such a claim “involves only
100 unfulfilled threats, it should be categorized as a hostile work environment claim which requires a
101 showing of severe or pervasive conduct.” *Ellerth*, 524 U.S. at 754. And on the question of

5.1.3 Harassment – Quid Pro Quo

102 employer liability, because such a claim involves no tangible employment action, the *Ellerth /*
103 *Faragher* affirmative defense will be available. In sum, such a case should be analyzed under the
104 framework set forth in Instruction and Comment 5.1.5.

105 *Submission to demands*

106 In other instances, a supervisor’s threat of an adverse employment action might succeed in
107 securing the plaintiff’s submission to the supervisor’s demand and the supervisor might therefore
108 take no adverse tangible employment action of a sort that would be reflected in the official records
109 of the employer. On the question of proving discrimination, it is not entirely clear whether Third
110 Circuit caselaw would require a “hostile environment” analysis in such a case. The *Robinson* court
111 suggested in dictum that in

112 cases in which an employee is told beforehand that his or her compensation or some
113 other term, condition, or privilege of employment will be affected by his or her
114 response to the unwelcome sexual advances , a quid pro quo violation occurs at
115 the time when an employee is told that his or her compensation, etc. is dependent
116 upon submission to unwelcome sexual advances. At that point, the employee has
117 been subjected to discrimination because of sex.... Whether the employee thereafter
118 submits to or rebuffs the advances, a violation has nevertheless occurred.

119 *Robinson*, 120 F.3d at 1297. This aspect of *Robinson* is no longer good law with respect to cases
120 in which the plaintiff rebuffs the supervisor’s advances and no adverse tangible employment action
121 occurs; as noted above, under *Ellerth* a plaintiff in such a case would need to meet the hostile
122 environment standard for proving discrimination. What is less clear is whether the same is true
123 for cases in which the plaintiff submits to the supervisor’s advances. Neither *Ellerth* nor *Faragher*
124 was such a case and those cases do not directly illuminate the question.

125 Similarly, on the question of employer liability *Ellerth* and *Faragher* do not directly
126 address whether the *Ellerth / Faragher* affirmative defense would be available in such a case. The
127 Second and Ninth Circuits have answered this question in the negative. The Second Circuit
128 concluded that when a supervisor conditions an employee’s continued employment on the
129 employee’s submission to the supervisor’s sexual demands and the employee submits, this “classic
130 quid pro quo” constitutes a tangible employment action that deprives the employer of the
131 affirmative defense. *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002). In such a
132 situation, the *Jin* court reasoned, it is the supervisor’s “empowerment ... as an agent who could
133 make economic decisions affecting employees under his control that enable[s] him to force [the
134 employee] to submit.” *Id.*; see also *id.* at 98 (stating that supervisor’s “use of his supervisory
135 authority to require [plaintiff’s] submission was, for Title VII purposes, the act of the employer”).
136 The Ninth Circuit has followed *Jin*, concluding that “a ‘tangible employment action’ occurs when
137 the supervisor threatens the employee with discharge and, in order to avoid the threatened action,
138 the employee complies with the supervisor’s demands.” *Holly D. v. California Institute of*
139 *Technology*, 339 F.3d 1158, 1167 (9th Cir. 2003).

140 Though the Third Circuit cited *Jin*’s reasoning with approval in *Suders v. Easton*, 325 F.3d

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141 432 (3d Cir. 2003), it is unclear whether this fact supports or undermines *Jin*'s persuasiveness in
142 this circuit. On the one hand, in *Suders* the court of appeals endorsed *Jin*'s rationale: "in quid pro
143 quo cases where a victimized employee submits to a supervisor's demands for sexual favors in
144 return for job benefits, such as continued employment... the more sensible approach ... is to
145 recognize that, by his or her actions, a supervisor invokes the official authority of the enterprise."
146 *Suders*, 325 F.3d at 458-59. But the *Suders* court did so in the course of holding that "a
147 constructive discharge, when proved, constitutes a tangible employment action within the meaning
148 of *Ellerth* and *Faragher*," 325 F.3d at 435 – a point on which the Supreme Court reversed, *see*
149 *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004) (holding that in order to count as a
150 tangible employment action the constructive discharge must result from "an employer-sanctioned
151 adverse action").

152 It could be argued that *Jin* and *Holly D.* rest in tension with *Ellerth*, *Faragher* and *Suders*,
153 given that when the plaintiff submits to a supervisor's demand and no tangible employment action
154 of an official nature is taken the supervisor's acts are not as readily attributable to the company,
155 *see Ellerth*, 524 U.S. at 762 (stressing that tangible employment actions are usually documented,
156 may be subject to review by the employer, and may require the employer's approval); *see also*
157 *Lutkewitte v. Gonzales*, 436 F.3d 248, 263 (D.C. Cir. 2006) (Brown, J., concurring in judgment)
158 (arguing that the panel majority should have rejected *Jin* and *Holly D.* rather than avoiding the
159 question, and reasoning that "the unavailability of the affirmative defense in cases where a tangible
160 employment action has taken place is premised largely on the notice (constructive or otherwise)
161 that such an action gives to the employer-notice that the delegated authority is being used to
162 discriminate against an employee"). *But see Jin*, 310 F.3d at 98 ("though a tangible employment
163 action 'in most cases is documented in official company records, and *may* be subject to review by
164 higher level supervisors,' the Supreme Court did not require such conditions in all cases.")
165 (quoting, with added emphasis, *Ellerth*, 524 U.S. at 762).

166 If the court concludes that it is appropriate to follow the approach taken in *Jin* and *Holly*
167 *D.* – a question that, as noted above, appears to be unsettled – then the court should consider
168 whether to refer only to a 'tangible employment action' rather than an 'adverse tangible
169 employment action.' *See Jin*, 310 F.3d at 101 (holding that it was error to "use[] the phrase
170 'tangible adverse action' instead of 'tangible employment action'" and that such error was
171 "especially significant in the context of this case, where we hold that an employer is liable when a
172 supervisor grants a tangible job benefit to an employee based on the employee's submission to
173 sexual demands").

174 *Definition of "supervisor"*

175 "[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or
176 she is empowered by the employer to take tangible employment actions against the victim...."
177 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

5.1.4 Elements of a Title VII Action — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [protected status].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is a [membership in a protected class].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's protected class] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Sixth: [Plaintiff] suffered an adverse “tangible employment action” as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Seventh: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of [protected class] harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.]

Comment

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

32 If the court wishes to provide a more detailed instruction on what constitutes a hostile work
33 environment, such an instruction is provided in 5.2.1.

34 It should be noted that constructive discharge is the adverse employment action that is most
35 common with claims of hostile work environment.⁸ Instruction 5.2.2 provides an instruction
36 setting forth the relevant factors for a finding of constructive discharge. That instruction can be
37 used to amplify the term “adverse employment action” in appropriate cases. In *Spencer v. Wal-*
38 *Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot
39 receive back pay in the absence of a constructive discharge. “Put simply, if a hostile work
40 environment does not rise to the level where one is forced to abandon the job, loss of pay is not an
41 issue.” As ADA damages are coextensive with Title VII damages — see the Comment to
42 Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII hostile work
43 environment cases.

44 The instruction’s definition of “tangible employment action” is taken from *Burlington*
45 *Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It should be noted that the failure to renew an
46 employment arrangement can also constitute an adverse employment action. See *Wilkerson v. New*
47 *Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to
48 renew an employment arrangement, “whether at-will or for a limited period of time, is an
49 employment action, and an employer violates Title VII if it takes an adverse employment action
50 for a reason prohibited by Title VII”). Compare *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d
51 323, 328 (3d Cir. 2015) (holding that a paid suspension while an employee was investigated for
52 alleged misconduct was not a tangible employment action).

53 *Liability for Non-Supervisors*

54 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or
55 she is empowered by the employer to take tangible employment actions against the victim....”
56 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). Respondeat superior liability for
57 harassment by non-supervisory employees exists only where the employer “knew or should have
58 known about the harassment, but failed to take prompt and adequate remedial action.” *Jensen v.*
59 *Potter*, 435 F.3d 444, 453 (3d Cir. 2006) (internal quotations omitted).⁹ In a case where a plaintiff
60 suffered “harassment by [non-supervisory] co-workers who possess the authority to inflict
61 psychological injury by assigning unpleasant tasks or by altering the work environment in

⁸ Instruction 5.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 5.1.5 should be used instead. See Comment 5.1.5 (discussing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 150 (2004).

⁹ “[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.” *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

62 objectionable ways,” the Supreme Court has stated that “the jury should be instructed that the
63 nature and degree of authority wielded by the harasser is an important factor to be considered in
64 determining whether the employer was negligent.” *Vance*, 133 S. Ct. at 2451. *See also Kunin v.*
65 *Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

66 [T]here can be constructive notice in two situations: where an employee provides
67 management level personnel with enough information to raise a probability of sexual
68 harassment in the mind of a reasonable employer, or where the harassment is so pervasive
69 and open that a reasonable employer would have had to be aware of it. We believe that
70 these standards strike the correct balance between protecting the rights of the employee
71 and the employer by faulting the employer for turning a blind eye to overt signs of
72 harassment but not requiring it to attain a level of omniscience, in the absence of actual
73 notice, about all misconduct that may occur in the workplace.

74 The court of appeals has drawn upon agency principles for guidance on the definition of
75 “management level” personnel:

76 [A]n employee's knowledge of allegations of coworker sexual harassment may
77 typically be imputed to the employer in two circumstances: first, where the
78 employee is sufficiently senior in the employer's governing hierarchy, or otherwise
79 in a position of administrative responsibility over employees under him, such as a
80 departmental or plant manager, so that such knowledge is important to the
81 employee's general managerial duties. In this case, the employee usually has the
82 authority to act on behalf of the employer to stop the harassment, for example, by
83 disciplining employees or by changing their employment status or work
84 assignments....

85 Second, an employee's knowledge of sexual harassment will be imputed to
86 the employer where the employee is specifically employed to deal with sexual
87 harassment. Typically such an employee will be part of the employer's human
88 resources, personnel, or employee relations group or department. Often an
89 employer will designate a human resources manager as a point person for receiving
90 complaints of harassment. In this circumstance, employee knowledge is imputed to
91 the employer based on the specific mandate from the employer to respond to and
92 report on sexual harassment.

93 *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 107-08 (3d Cir. 2009).

94 For a case in which a jury question was raised as to whether the employer's efforts to
95 remedy a non-supervisor's harassment were prompt and adequate, *see Andreoli v. Gates*, 482 F.3d
96 641, 648 (3d Cir. 2007) (Rehabilitation Act) (employee had to speak to five supervisors in order
97 to elicit any response from management about the non-supervisor's acts of harassment, and even
98 then the employer took five months to move the employee to a different shift; no attempts were
99 made to discipline or instruct the harassing employee).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

100 *Characteristics of a Hostile Work Environment*

101 In sexual harassment cases, examples of conduct warranting a finding of a hostile work
102 environment include verbal abuse of a sexual nature; graphic verbal commentaries about an
103 individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to
104 describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene
105 comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters
106 or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. See *Harris*
107 *v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (“discriminatory intimidation, ridicule, and
108 insult”); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for
109 sexual favors, fondling, following plaintiff into women's restroom, and supervisor's exposing
110 himself); *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168 (3d Cir. 2013) (stressing that
111 inquiry “must consider the totality of the circumstances” rather than viewing component parts
112 separately).

113 The Third Circuit has described the standards for a hostile work environment claim, as
114 applied to sex discrimination, in *Weston v. Pennsylvania*, 251 F.3d 420, 425-426 (3d Cir. 2001):

115 Hostile work environment harassment occurs when unwelcome sexual conduct
116 unreasonably interferes with a person's performance or creates an intimidating, hostile, or
117 offensive working environment. . . . In order to be actionable, the harassment must be so
118 severe or pervasive that it alters the conditions of the victim's employment and creates an
119 abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).

120 In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court clarified the
121 elements of a discrimination claim resulting from a hostile work environment. In order to
122 fall within the purview of Title VII, the conduct in question must be severe and pervasive
123 enough to create an "objectively hostile or abusive work environment--an environment that
124 a reasonable person would find hostile--and an environment the victim-employee
125 subjectively perceives as abusive or hostile." In determining whether an environment is
126 hostile or abusive, we must look at numerous factors, including "the frequency of the
127 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or
128 a mere offensive utterance; whether it unreasonably interferes with an employee's work
129 performance."

130 Title VII protects only against harassment based on discrimination against a protected
131 class. It is not “a general civility code for the American workplace.” *Oncale v. Sundowner Offshore*
132 *Servs., Inc.*, 523 U.S. 75, 80-81 (1998). “Many may suffer severe harassment at work, but if the
133 reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII
134 provides no relief.” *Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006).

135 *Severe or Pervasive Activity*

136 The terms “severe or pervasive” set forth in the instruction are in accord with Supreme
137 Court case law and provide for alternative possibilities for finding harassment. See *Jensen v.*

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

138 *Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) (“The disjunctive phrasing means that ‘severity’ and
139 ‘pervasiveness’ are alternative possibilities: some harassment may be severe enough to
140 contaminate an environment even if not pervasive; other, less objectionable, conduct will
141 contaminate the workplace only if it is pervasive.”) (quoting 2 C.Sullivan et. al., *Employment*
142 *Discrimination Law and Practice* 455 (3d ed. 2002).

143 *Subjective and Objective Components*

144 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that
145 a hostile work environment claim has both objective and subjective¹⁰ components. A hostile
146 environment must be “one that a reasonable person would find hostile and abusive, and one that
147 the victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
148 subjective components.

149 *Hostile Work Environment That Pre-exists the Plaintiff’s Employment*

150 The instruction refers to harassing “conduct” that “was motivated by the fact that [plaintiff]
151 is a [membership in a protected class].” This language is broad enough to cover the
152 situation where the plaintiff is the first member of a protected class to enter the
153 work environment, and the working conditions pre-existed the plaintiff’s
154 employment. In this situation, the “conduct” is the refusal to change an environment
155 that is hostile to members of the plaintiff’s class. The court may wish to modify the
156 instruction so that it refers specifically to the failure to correct a pre-existing
157 environment.

158 *Harassment as Retaliation for Protected Activity*

159 In *Jensen v. Potter*, 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation
160 provision of Title VII “can be offended by harassment that is severe or pervasive enough to create
161 a hostile work environment.” The *Jensen* court also declared that “our usual hostile work
162 environment framework applies equally to Jensen’s claim of retaliatory harassment.” But
163 subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S.53, 68 (2006),
164 set forth a legal standard for determining retaliation that appears to be less rigorous than the
165 standard for determining a hostile work environment. The Court in *White* declared that a plaintiff
166 has a cause of action for retaliation under Title VII if the employer’s actions in response to
167 protected activity “well might have dissuaded a reasonable worker from making or supporting a
168 charge of discrimination.” After *White*, the Title VII retaliation provision can be offended by any
169 activity of the employer — whether harassment or some other action — that satisfies the *White*
170 standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

¹⁰ See *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168-69 (3d Cir. 2013) (noting that “the inherently subjective question of whether particular conduct was unwelcome presents difficult problems of proof and turns on credibility determinations,” and finding jury question on this issue despite evidence that plaintiff “engaged in certain unprofessional conduct”).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

171 *Religious Discrimination*

172 Employees subject to a hostile work environment on the basis of their religion are entitled
173 to recovery under Title VII, pursuant to the same legal standards applied to sex discrimination. *See*
174 *Abramson v. William Paterson College*, 260 F.3d 265, 277 n.5 (3d Cir. 2001) (“We have yet to
175 address a hostile work environment claim based on religion. However, Title VII has been
176 construed under our case law to support claims of a hostile work environment with respect to other
177 categories (i.e., sex, race, national origin). We see no reason to treat Abramson's hostile work
178 environment claim any differently, given Title VII's language.”).

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

1 **5.1.5 Elements of a Title VII Claim — Harassment — Hostile Work**
2 **Environment — No Tangible Employment Action**

3 **Model**

4 [Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this
5 harassment was motivated by [plaintiff's] [protected status].

6 [Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if
7 [plaintiff] proves all of the following elements by a preponderance of the evidence:

8 First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to
9 plaintiff's claim] by [names].

10 Second: [Names] conduct was not welcomed by [plaintiff].

11 Third: [Names] conduct was motivated by the fact that [plaintiff] is a [membership in a
12 protected class].

13 Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's]
14 position would find [plaintiff's] work environment to be hostile or abusive. This element
15 requires you to look at the evidence from the point of view of a reasonable [member of
16 plaintiff's protected class] reaction to [plaintiff's] work environment.

17 Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of
18 [names] conduct.

19 **[For use when the alleged harassment is by non-supervisory employees:**

20 Sixth: Management level employees knew, or should have known, of the abusive conduct.
21 Management level employees should have known of the abusive conduct if 1) an employee
22 provided management level personnel with enough information to raise a probability of
23 [protected class] harassment in the mind of a reasonable employer, or if 2) the harassment
24 was so pervasive and open that a reasonable employer would have had to be aware of it.]

25 If any of the above elements has not been proved by a preponderance of the evidence, your
26 verdict must be for [defendant] and you need not proceed further in considering this claim. If you
27 find that the elements have been proved, then you must consider [employer's] affirmative defense.
28 I will instruct you now on the elements of that affirmative defense.

29 You must find for [defendant] if you find that [defendant] has proved both of the following
30 elements by a preponderance of the evidence:

31 First: [Defendant] exercised reasonable care to prevent harassment in the workplace on the
32 basis of [protected status], and also exercised reasonable care to promptly correct any

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

33 harassing behavior that does occur.

34 Second: [Plaintiff] unreasonably failed to take advantage of any preventive or corrective
35 opportunities provided by [defendant].

36 Proof of the four following facts will be enough to establish the first element that I just
37 referred to, concerning prevention and correction of harassment:

38 1. [Defendant] had established an explicit policy against harassment in the
39 workplace on the basis of [protected status].

40 2. That policy was fully communicated to its employees.

41 3. That policy provided a reasonable way for [plaintiff] to make a claim of
42 harassment to higher management.

43 4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

44 On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure
45 provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed
46 to take advantage of a corrective opportunity.

47

48 **Comment**

49 If the court wishes to provide a more detailed instruction on what constitutes a hostile work
50 environment, such an instruction is provided in 5.2.1.

51 This instruction is to be used in discriminatory harassment cases where the plaintiff did not
52 suffer any “tangible” employment action such as discharge or demotion, but rather suffered
53 “intangible” harm flowing from harassment that is “sufficiently severe or pervasive to create a
54 hostile work environment.” *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and
55 in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is
56 strictly liable for supervisor harassment that “culminates in a tangible employment action, such as
57 discharge, demotion, or undesirable reassignment.” *Ellerth*, 524 U.S. at 765. But when no such
58 tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on
59 the basis of the defense, the employer must prove that “(a) [it] exercised reasonable care to prevent
60 and correct promptly any sexually harassing behavior,”¹¹ and that (b) the employee “unreasonably

¹¹ See, e.g., *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015) (holding that the employer exercised reasonable care where it “took several steps in response to [the plaintiff’s] allegations of harassment [by her supervisor]: it conducted an investigation, made findings, developed a ‘plan of action,’ required [the supervisor] to attend a counseling session, and gave him a demerit on his evaluation”); *id.* (stating that “[a]lthough it appears [the

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

61 failed to take advantage of any preventive or corrective opportunities provided by the employer or
62 to avoid harm otherwise.”¹² *Ellerth*, 524 U.S. at 751 (1998).

63 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment
64 action also justifies requiring the plaintiff to prove a further element, in order to protect the
65 employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.
66 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is
67 empowered by the employer to take tangible employment actions against the victim...” *Vance v.*
68 *Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). Respondeat superior liability for the acts of non-
69 supervisory employees exists only where “the defendant knew or should have known of the
70 harassment and failed to take prompt remedial action.” *Andrews v. City of Philadelphia*, 895 F.2d
71 1469, 1486 (3d Cir. 1990).¹³ In a case where a plaintiff suffered “harassment by [non-supervisory]
72 co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks
73 or by altering the work environment in objectionable ways,” the Supreme Court has stated that
74 “the jury should be instructed that the nature and degree of authority wielded by the harasser is an
75 important factor to be considered in determining whether the employer was negligent.” *Vance*,
76 133 S. Ct. at 2451. *See also Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

77 [T]here can be constructive notice in two situations: where an employee provides
78 management level personnel with enough information to raise a probability of sexual
79 harassment in the mind of a reasonable employer, or where the harassment is so pervasive
80 and open that a reasonable employer would have had to be aware of it. We believe that
81 these standards strike the correct balance between protecting the rights of the employee
82 and the employer by faulting the employer for turning a blind eye to overt signs of
83 harassment but not requiring it to attain a level of omniscience, in the absence of actual
84 notice, about all misconduct that may occur in the workplace.

85 The court of appeals has drawn upon agency principles for guidance on the definition of
86 “management level” personnel:

87 [A]n employee's knowledge of allegations of coworker sexual harassment may

supervisor] never received training on [the employer’s] sexual harassment policy until after [the
plaintiff] complained, [the plaintiff] identifies no authority showing that this precludes [the
employer] from asserting the *Faragher-Ellerth* defense”).

¹² *See, e.g., Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015)
(finding an unreasonable failure by the employee where “[d]espite 10 years of alleged
harassment [by her supervisor], ... she never made a complaint until [the supervisor] accused her
of timesheet fraud, despite the fact that she knew that the [employer’s] EEO Office fielded such
complaints”).

¹³ “[E]mployer liability for co-worker harassment exists only if the employer failed to
provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have
known of the harassment and failed to take prompt and appropriate remedial action.” *Huston v.*
Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 105 (3d Cir. 2009).

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88 typically be imputed to the employer in two circumstances: first, where the
89 employee is sufficiently senior in the employer's governing hierarchy, or otherwise
90 in a position of administrative responsibility over employees under him, such as a
91 departmental or plant manager, so that such knowledge is important to the
92 employee's general managerial duties. In this case, the employee usually has the
93 authority to act on behalf of the employer to stop the harassment, for example, by
94 disciplining employees or by changing their employment status or work
95 assignments....

96 Second, an employee's knowledge of sexual harassment will be imputed to
97 the employer where the employee is specifically employed to deal with sexual
98 harassment. Typically such an employee will be part of the employer's human
99 resources, personnel, or employee relations group or department. Often an
100 employer will designate a human resources manager as a point person for receiving
101 complaints of harassment. In this circumstance, employee knowledge is imputed to
102 the employer based on the specific mandate from the employer to respond to and
103 report on sexual harassment.

104 *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 107-08 (3d Cir. 2009).

105 *Characteristics of a Hostile Work Environment*

106 In sexual harassment cases, examples of conduct warranting a finding of a hostile work
107 environment include verbal abuse of a sexual nature; graphic verbal commentaries about an
108 individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to
109 describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene
110 comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters
111 or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris*
112 *v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (discriminatory intimidation, ridicule and insult);
113 *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for sexual
114 favors, fondling, following plaintiff into women's restroom, and supervisor's exposing himself).
115 Instruction 5.2.1 provides a full instruction if the court wishes to provide guidance on what is a
116 hostile work environment.

117 The Third Circuit has described the standards for a hostile work environment claim, as
118 applied to sex discrimination, in *Weston v. Pennsylvania*, 251 F.3d 420, 425-426 (3d Cir. 2001):

119 Hostile work environment harassment occurs when unwelcome sexual conduct
120 unreasonably interferes with a person's performance or creates an intimidating, hostile, or
121 offensive working environment. . . . In order to be actionable, the harassment must be so
122 severe or pervasive that it alters the conditions of the victim's employment and creates an
123 abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).

124 In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court clarified the
125 elements of a discrimination claim resulting from a hostile work environment. In order to

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126 fall within the purview of Title VII, the conduct in question must be severe and pervasive
127 enough to create an “objectively hostile or abusive work environment – an environment
128 that a reasonable person would find hostile – and an environment the victim-employee
129 subjectively perceives as abusive or hostile.” In determining whether an environment is
130 hostile or abusive, we must look at numerous factors, including “the frequency of the
131 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or
132 a mere offensive utterance; whether it unreasonably interferes with an employee's work
133 performance.” The Supreme Court recently reaffirmed *Harris*’ “severe and pervasive” test
134 in *Faragher v. City of Boca Raton*, 524 U.S. 775, 783 (1998), and *Burlington Indus., Inc.*
135 *v. Ellerth*, 524 U.S. 742, 753 (1998).

136 Title VII protects only against harassment based on discrimination against a protected
137 class. It is not “a general civility code for the American workplace.” *Oncala v. Sundowner Offshore*
138 *Servs., Inc.*, 523 U.S. 75, 80-81 (1998). “Many may suffer severe harassment at work, but if the
139 reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII
140 provides no relief.” *Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006).

141 *Severe or Pervasive Activity*

142 The terms “severe or pervasive” set forth in the instruction are in accord with Supreme
143 Court case law and provide for alternative possibilities for finding harassment. See *Jensen v.*
144 *Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) (“The disjunctive phrasing means that ‘severity’ and
145 ‘pervasiveness’ are alternative possibilities: some harassment may be severe enough to
146 contaminate an environment even if not pervasive; other, less objectionable, conduct will
147 contaminate the workplace only if it is pervasive.”) (quoting 2 C.Sullivan et. al., *Employment*
148 *Discrimination Law and Practice* 455 (3d ed. 2002).

149 *Objective and Subjective Components*

150 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that
151 a hostile work environment claim has both objective and subjective components. A hostile
152 environment must be “one that a reasonable person would find hostile and abusive, and one that
153 the victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
154 subjective components.

155 *Affirmative Defense Where Constructive Discharge Is Not Based on an Official Act*

156 In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148-52 (2004), the Court considered
157 the relationship between constructive discharge brought about by supervisor harassment and the
158 affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that “an employer
159 does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act
160 precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the
161 defense is available to the employer whose supervisors are charged with harassment.” The Court
162 reasoned as follows:

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163 [W]hen an official act does not underlie the constructive discharge, the *Ellerth* and
164 *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the
165 employer. As those leading decisions indicate, official directions and declarations are the
166 acts most likely to be brought home to the employer, the measures over which the employer
167 can exercise greatest control. See *Ellerth*, 524 U.S., at 762. Absent “an official act of the
168 enterprise,” *ibid.*, as the last straw, the employer ordinarily would have no particular reason
169 to suspect that a resignation is not the typical kind daily occurring in the work force. And
170 as *Ellerth* and *Faragher* further point out, an official act reflected in company records--a
171 demotion or a reduction in compensation, for example--shows "beyond question" that the
172 supervisor has used his managerial or controlling position to the employee's disadvantage.
173 See *Ellerth*, 524 U.S., at 760. Absent such an official act, the extent to which the
174 supervisor's misconduct has been aided by the agency relation . . . is less certain. That
175 uncertainty, our precedent establishes . . . justifies affording the employer the chance to
176 establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held
177 vicariously liable.

178 . . .

179 Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action
180 has the duty to mitigate harm, but the defendant bears the burden to allege and prove that
181 the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to
182 mitigation in her pleading or to present those facts in her case in chief, but she would do
183 so in anticipation of the employer's affirmative defense, not as a legal requirement.

184 *Hostile Work Environment That Precedes the Plaintiff's Employment*

185 The instruction refers to harassing “conduct” that “was motivated by the fact that [plaintiff]
186 is a [membership in a protected class].” This language is broad enough to cover the situation where
187 the plaintiff is the first member of a protected class to enter the work environment, and the working
188 conditions pre-existed the plaintiff's employment. In this situation, the “conduct” is the refusal to
189 change an environment that is hostile to members of the plaintiff's class. The judge may wish to
190 modify the instruction so that it refers specifically to the failure to correct a pre-existing
191 environment.

192 *Harassment as Retaliation for Protected Activity*

193 In *Jensen v. Potter*, 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation
194 provision of Title VII “can be offended by harassment that is severe or pervasive enough to create
195 a hostile work environment.” The *Jensen* court also declared that “our usual hostile work
196 environment framework applies equally to Jensen's claim of retaliatory harassment.” But
197 subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53, 68 (2006),
198 set forth a legal standard for determining retaliation that appears to be less rigorous than the
199 standard for determining a hostile work environment. The Court in *White* declared that a plaintiff
200 has a cause of action for retaliation under Title VII if the employer's actions in response to
201 protected activity “well might have dissuaded a reasonable worker from making or supporting a

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202 charge of discrimination.” After *White*, the Title VII retaliation provision can be offended by any
203 activity of the employer — whether harassment or some other action — that satisfies the *White*
204 standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

205 *Back Pay*

206 In *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that
207 an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. “Put simply,
208 if a hostile work environment does not rise to the level where one is forced to abandon the job,
209 loss of pay is not an issue.” As ADA damages are coextensive with Title VII damages — see the
210 Comment to Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII
211 hostile work environment cases. Thus, back pay will not be available in an action in which
212 Instruction 5.1.5 is given, because the plaintiff has not raised a jury question on a tangible
213 employment action.

5.1.6 Elements of a Title VII Claim — Disparate Impact

No Instruction

Comment

Distinction Between Disparate Impact and Disparate Treatment; Elements of Disparate Treatment Claim

The instructions provided in Chapter 5 focus on disparate treatment claims under Title VII – i.e., on claims in which a central question is whether the employer had an intent to discriminate. Title VII claims can alternatively be brought under a disparate impact theory, in which event the plaintiff need not show discriminatory intent. In a disparate impact case, the plaintiff must first present a prima facie case by showing “that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern.” *Meditz v. City of Newark*, 658 F.3d 364, 370 (3d Cir. 2011) (quoting *NAACP v. Harrison*, 940 F.2d 792, 798 (3d Cir. 1991) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977))). If the plaintiff does so, “the defendant can overcome the showing of disparate impact by proving a ‘manifest relationship’ between the policy and job performance.” *El v. SEPTA*, 479 F.3d 232, 239 (3d Cir. 2007) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)); see also 42 U.S.C. § 2000e-2(k) (addressing burdens of proof in disparate impact cases); *NAACP v. North Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 477, 482 (3d Cir. 2011) (discussing and applying business-necessity defense under Section 2000e-2(k)). Even if the defendant proves this business necessity defense, “the plaintiff can overcome it by showing that an alternative policy exists that would serve the employer's legitimate goals as well as the challenged policy with less of a discriminatory effect.” *El*, 479 F.3d at 239 n.9.

No instruction is provided on disparate impact claims, because a right to jury trial is not provided under Title VII for such claims. The basic remedies provision of Title VII, 42 U.S.C.A. § 1981a(a)(1), provides as follows:

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination (*not an employment practice that is unlawful because of its disparate impact*) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)], from the respondent.

42 U.S.C.A. § 1981a(a)(1) (emphasis added). See also Seventh Circuit Pattern Jury Instructions 3.08 (no instruction provided for disparate impact claims under Title VII); *Pollard v. Wawa Food Market*, 366 F.Supp.2d 247, 254 (E.D. Pa. 2005) (“Because Pollard proceeds under a disparate impact theory, and not under a theory of intentional discrimination, if successful on her Title VII claim she would be entitled only to equitable relief. 42 U.S.C. §1981a(a)(1). She therefore is not

5.1.6 Disparate Impact

39 entitled to a jury trial on that claim.”).

40 In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate
41 impact claims are cognizable under the Age Discrimination in Employment Act. The ADEA
42 provides a right to jury trial in such claims. *See* 29 U.S.C. § 626(c)(2) (“[A] person shall be entitled
43 to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable
44 relief is sought by any party in such action.”). Where an ADEA disparate impact claim is tried
45 together with a Title VII disparate impact claim, the parties or the court may decide to refer the
46 Title VII claim to the jury. In that case, the instruction provided for ADEA disparate impact claims
47 (see Instruction 8.1.5) can be modified to apply to the Title VII claim. Care must be taken,
48 however, to instruct separately on the Title VII disparate impact claim, as the substantive standards
49 of recovery under Title VII in disparate impact cases are broader than those applicable to the
50 ADEA. See the Comment to Instruction 8.1.5 for a more complete discussion.

5.1.7 Elements of a Title VII Claim — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].¹⁴

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [describe activity protected by Title VII].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a reasonable,¹⁵ good faith belief that [plaintiff's] [or someone else's] right to be free from discrimination on the basis of [protected status] was violated.

Concerning the second element, the term “materially adverse” means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in

¹⁴ Instruction 5.1.7 will often be used in cases in which the same employee engaged in the protected activity and directly suffered the retaliation. As noted in the Comment, Title VII also bars retaliation against another employee if the circumstances are such that the retaliation against that employee might well dissuade a reasonable worker from engaging in protected activity. *See Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011). In cases in which the plaintiff is not the person who engaged in protected activity, the instruction should be modified appropriately. Among such changes, the following language could be added to the paragraph that explains the second element: “That is to say, you must decide if any actions [defendant] took against [plaintiff] might well discourage a reasonable worker in [third party's] position from [describe protected activity]. You must decide that question based on the circumstances of the case. [To take two examples, firing a close family member will almost always meet that test, but inflicting less serious harm on a mere acquaintance will almost never do so.]”

¹⁵ See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

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21 many ways. For example, you may or may not find that there is a sufficient connection through
22 timing, that is [employer's] action followed shortly after [employer] became aware of [plaintiff's]
23 [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage
24 of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change
25 in demeanor toward [plaintiff].

26 Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative
27 effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for
28 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

29

30 **Comment**

31 Title VII protects employees and former employees who attempt to exercise the rights
32 guaranteed by the Act against retaliation by employers. 42 U.S.C.A. § 2000e-3(a) is the anti-
33 retaliation provision of Title VII, and it provides as follows:

34 **§ 2000e-3. Other unlawful employment practices**

35 (a) Discrimination for making charges, testifying, assisting, or participating in enforcement
36 proceedings. It shall be an unlawful employment practice for an employer to discriminate
37 against any of his employees or applicants for employment, for an employment agency, or
38 joint labor-management committee controlling apprenticeship or other training or
39 retraining, including on-the-job training programs, to discriminate against any individual,
40 or for a labor organization to discriminate against any member thereof or applicant for
41 membership, because he has opposed any practice made an unlawful employment practice
42 by this subchapter, or because he has made a charge, testified, assisted, or participated in
43 any manner in an investigation, proceeding, or hearing under this subchapter.

44 *Protected Activities*

45 Activities protected from retaliation under Title VII include the following: 1) opposing any

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46 practice made unlawful by Title VII;¹⁶ 2) making a charge of employment discrimination;¹⁷ 3)
47 testifying, assisting or participating in any manner in an investigation, proceeding or hearing under
48 Title VII. *Id.*

49 Informal complaints and protests can constitute protected activity under the “opposition”
50 clause of 42 U.S.C. § 2000e-3(a). “Opposition to discrimination can take the form of informal
51 protests of discriminatory employment practices, including making complaints to management.
52 To determine if retaliation plaintiffs sufficiently opposed discrimination, we look to the message
53 being conveyed rather than the means of conveyance.” *Moore v. City of Philadelphia*, 461 F.3d
54 331, 343 (3d Cir. 2006) (citations omitted).¹⁸ In *Crawford v. Metropolitan Gov’t of Nashville and*
55 *Davidson Cty., Tennessee*, 555 U.S. 271, 277 (2009), the Court held that the antiretaliation
56 provision’s “opposition” clause does not require the employee to initiate a complaint. The
57 provision also protects an employee who speaks out about discrimination by answering questions

¹⁶ Where an employer conditioned its conversion of terminated at-will employees into independent contractors on the employees’ signing releases of all existing claims (including but not limited to discrimination claims), an employee’s refusal to sign that release did not constitute opposition within the meaning of Title VII’s anti-retaliation provision: “[R]efusing to sign a release ... does not communicate opposition sufficiently specific to qualify as protected employee activity.... Because Allstate’s Release barred its signatories from bringing *any* claims against Allstate concerning their employment or termination, employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination.” *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015).

To constitute opposition, a complaint must relate to a category of activity prohibited by Title VII. *See Connolly v. Lane Const. Corp.*, 809 F.3d 780, 792 n.10 (3d Cir. 2016) (holding that certain of the plaintiff’s “complaints, to the extent they implicated only safety issues, were not protected activity for purposes of her retaliation claim”).

¹⁷ *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (filing EEOC complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53 (2006).

¹⁸ In *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130, 135 (3d Cir. 2006), the court held that general protest on public issues does not constitute protected activity. To be protected under Title VII, the employee’s activity must be directed to the employer’s alleged illegal employment practice; it must “identify the employer and the practice – if not specifically, at least by context.” In *Curay-Cramer*, the plaintiff alleged that her employer retaliated against her after she signed a pro-choice advertisement, thus advocating a position on a public issue that her employer opposed. But because the advertisement did not mention her employer or refer to any employment practice, the plaintiff’s actions did not constitute protected activity.

The *Curay-Cramer* court further held that the plaintiff could not elevate her claim by protesting her employer’s decision to fire her for signing the advertisement. The court noted that “an employee may not insulate herself from termination by covering herself with the cloak of Title VII’s opposition protections after committing non-protected conduct that was the basis of the decision to terminate.” The court reasoned that “[i]f subsequent conduct could prevent an employer from following up on an earlier decision to terminate, employers would be placed in a judicial straight-jacket not contemplated by Congress.”

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58 during an employer’s internal investigation. The Court declared that there is “no reason to doubt
59 that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking
60 the discussion, and nothing in the statute requires a freakish rule protecting an employee who
61 reports discrimination on her own initiative but not one who reports the same discrimination in the
62 same words when her boss asks a question.” *See also Kachmar v. SunGard Data Sys., Inc.*, 109
63 F.3d 173, 177 (3d Cir. 1997) (advocating salary increases for women employees, to compensate
64 them equally with males, was protected activity).

65 “[A] plaintiff need not prove the merits of the underlying discrimination complaint, but
66 only that ‘he was acting under a good faith, reasonable belief that a violation existed.’” *Aman v.*
67 *Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) (quoting *Griffiths v. CIGNA Corp.*,
68 988 F.2d 457, 468 (3d Cir. 1993) (quoting *Sumner v. United States Postal Service*, 899 F.2d 203,
69 209 (2d Cir. 1990)), *overruled on other grounds by Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir.
70 1995)). The good-faith-and-reasonable-belief test clearly applies to actions under the “opposition”
71 clause of Section 2000e-3(a). There is some authority for the proposition that a less demanding
72 test applies to actions under the “participation” clause of Section 2000e-3(a) – i.e., the clause that
73 refers to a person who “has made a charge, testified, assisted, or participated in any manner in an
74 investigation, proceeding, or hearing under this subchapter,” 42 U.S.C. § 2000e-3(a). After noting
75 authorities stating that “the ‘participation clause’ ... offers much broader protection to Title VII
76 employees than does the ‘opposition clause,’” the Court of Appeals in *Slagle v. County of Clarion*,
77 435 F.3d 262 (3d Cir. 2006), stated that for filing a charge to constitute protected activity, “[a]ll
78 that is required is that plaintiff allege in the charge that his or her employer violated Title VII by
79 discriminating against him or her on the basis of race, color, religion, sex, or national origin, in
80 any manner.” *Slagle*, 435 F.3d at 266, 268. (The plaintiff in *Slagle* failed to surmount even this
81 “low bar.” *Id.*) Later that same year, however, a different panel of the Court of Appeals indicated
82 that the good-faith-and-reasonable-belief test applies to both opposition and participation claims:
83 “Whether the employee opposes, or participates in a proceeding against, the employer’s activity,
84 the employee must hold an objectively reasonable belief, in good faith, that the activity they oppose
85 is unlawful under Title VII.” *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006).
86 (The facts of *Moore* featured adverse actions both pre-dating and post-dating the filing of the
87 EEOC charge, *see id.* at 340, 345-48.)

88 In accord with instructions from other circuits, Instruction 5.1.7 directs the jury to
89 determine both the good faith and the reasonableness of the plaintiff’s belief that employment
90 discrimination had occurred. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII
91 retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for
92 use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981
93 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA,
94 and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to
95 harassment or discrimination) under Title VII and other federal discrimination laws; instruction
96 uses phrase “reasonably believed”); *id.* Notes on Use, Note 5 (using phrase “reasonably and in
97 good faith believe”); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation)
98 (discussing reasonableness requirement in the comment but not in the model instruction). In cases
99 where the protected nature of the plaintiff’s activity is not in dispute, this portion of the instruction

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100 can be modified and the court can simply instruct the jury that specified actions by the plaintiff
101 constituted protected activity.

102 *Standard for Actionable Retaliation*

103 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that
104 a cause of action for retaliation under Title VII lies whenever the employer responds to protected
105 activity in such a way “that a reasonable employee would have found the challenged action
106 materially adverse, which in this context means it well might have dissuaded a reasonable worker
107 from making or supporting a charge of discrimination.” (citations omitted).¹⁹ The Court elaborated
108 on this standard in the following passage:

109 We speak of *material* adversity because we believe it is important to separate
110 significant from trivial harms. Title VII, we have said, does not set forth “a general civility
111 code for the American workplace.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.
112 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee’s decision to report
113 discriminatory behavior cannot immunize that employee from those petty slights or minor
114 annoyances that often take place at work and that all employees experience. See 1 B.
115 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting
116 that “courts have held that personality conflicts at work that generate antipathy” and
117 “snubbing” by supervisors and co-workers” are not actionable under § 704(a)). The anti-
118 retaliation provision seeks to prevent employer interference with “unfettered access” to
119 Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely
120 “to deter victims of discrimination from complaining to the EEOC,” the courts, and their
121 employers. And normally petty slights, minor annoyances, and simple lack of good
122 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

123 We refer to reactions of a *reasonable* employee because we believe that the
124 provision’s standard for judging harm must be objective. An objective standard is judicially
125 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial
126 effort to determine a plaintiff’s unusual subjective feelings. We have emphasized the need
127 for objective standards in other Title VII contexts, and those same concerns animate our
128 decision here. See, e.g., [*Pennsylvania State Police v. Suders*, 542 U.S., at 141, 124 S. Ct.
129 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,
130 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment

¹⁹ Where an employer terminated at-will employees but offered them a chance to serve as independent contractors if they signed releases of all existing claims (including but not limited to discrimination claims), the employer’s denial of the independent-contractor arrangement to terminated employees who refused to sign that release did not constitute an adverse action for purposes of Title VII’s anti-retaliation provision. *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015) (“[T]he terminated agents were not entitled to convert to independent contractor status.... And the [EEOC] has cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee’s refusal to sign a release.”).

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131 doctrine).

132 We phrase the standard in general terms because the significance of any given act
133 of retaliation will often depend upon the particular circumstances. Context matters. . . . A
134 schedule change in an employee's work schedule may make little difference to many
135 workers, but may matter enormously to a young mother with school age children. A
136 supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty
137 slight. But to retaliate by excluding an employee from a weekly training lunch that
138 contributes significantly to the employee's professional advancement might well deter a
139 reasonable employee from complaining about discrimination. Hence, a legal standard that
140 speaks in general terms rather than specific prohibited acts is preferable, for an act that
141 would be immaterial in some situations is material in others.

142 Finally, we note that . . . the standard is tied to the challenged retaliatory act, not
143 the underlying conduct that forms the basis of the Title VII complaint. By focusing on the
144 materiality of the challenged action and the perspective of a reasonable person in the
145 plaintiff's position, we believe this standard will screen out trivial conduct while effectively
146 capturing those acts that are likely to dissuade employees from complaining or assisting in
147 complaints about discrimination.

148 548 U.S. at 68 (some citations omitted). The instruction follows the guidelines of the Supreme
149 Court's decision in *White*. For applications of the *White* standard, see *Moore v. City of*
150 *Philadelphia*, 461 F.3d 331, 348 (3d Cir. 2006) (finding that a transfer of a police officer from a
151 district where he had earned goodwill and established good relations with the community could
152 constitute actionable retaliation, because it "is the kind of action that might dissuade a police
153 officer from making or supporting a charge of unlawful discrimination within his squad."); *Id.* at
154 352 (aggressive enforcement of sick-check policy "well might have dissuaded a reasonable worker
155 from making or supporting a charge of discrimination.").

156 *No Requirement That Retaliation Be Job-Related To Be Actionable*

157 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 61-62 (2006), held
158 that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
159 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
160 employment action in order to recover for retaliation. The Court distinguished Title VII's
161 retaliation provision from its basic anti-discrimination provision, which does require an adverse
162 employment action.

163 The language of the substantive provision differs from that of the anti-retaliation provision
164 in important ways. Section 703(a) sets forth Title VII's core anti-discrimination provision
165 in the following terms:

166 "It shall be an unlawful employment practice for an employer --

167 "(1) to fail or refuse to hire or to discharge any individual, or otherwise to

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168 discriminate against any individual *with respect to his compensation, terms,*
169 *conditions, or privileges of employment,* because of such individual's race, color,
170 religion, sex, or national origin; or

171 "(2) to limit, segregate, or classify his employees or applicants for employment in
172 any way *which would deprive or tend to deprive any individual of employment*
173 *opportunities or otherwise adversely affect his status as an employee,* because of
174 such individual's race, color, religion, sex, or national origin." § 2000e-2(a)
175 (emphasis added).

176 Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:

177 "It shall be an unlawful employment practice for an employer *to discriminate*
178 *against* any of his employees or applicants for employment . . . because he has
179 opposed any practice made an unlawful employment practice by this subchapter, or
180 because he has made a charge, testified, assisted, or participated in any manner in
181 an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a)
182 (emphasis added).

183 The underscored words in the substantive provision -- "hire," "discharge," "compensation,
184 terms, conditions, or privileges of employment," "employment opportunities," and "status
185 as an employee" -- explicitly limit the scope of that provision to actions that affect
186 employment or alter the conditions of the workplace. No such limiting words appear in the
187 anti-retaliation provision. Given these linguistic differences, the question here is not
188 whether identical or similar words should be read *in pari materia* to mean the same thing.

189 The *White* Court explained the rationale for providing broader protection in the retaliation
190 provision than is provided in the basic discrimination provision of Title VII:

191 There is strong reason to believe that Congress intended the differences that its
192 language suggests, for the two provisions differ not only in language but in purpose as well.
193 The anti-discrimination provision seeks a workplace where individuals are not
194 discriminated against because of their racial, ethnic, religious, or gender-based status. See
195 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801, 93 S. Ct. 1817, 36 L. Ed. 2d
196 668 (1973). The anti-retaliation provision seeks to secure that primary objective by
197 preventing an employer from interfering (through retaliation) with an employee's efforts to
198 secure or advance enforcement of the Act's basic guarantees. The substantive provision
199 seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-
200 retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their
201 conduct.

202 To secure the first objective, Congress did not need to prohibit anything other than
203 employment-related discrimination. The substantive provision's basic objective of
204 "equality of employment opportunities" and the elimination of practices that tend to bring
205 about "stratified job environments," *id.*, at 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668, would be

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206 achieved were all employment-related discrimination miraculously eliminated.

207 But one cannot secure the second objective by focusing only upon employer actions
208 and harm that concern employment and the workplace. Were all such actions and harms
209 eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer
210 can effectively retaliate against an employee by taking actions not directly related to his
211 employment or by causing him harm *outside* the workplace. See, e.g., *Rochon v. Gonzales*,
212 438 F.3d at 1213 (FBI retaliation against employee "took the form of the FBI's refusal,
213 contrary to policy, to investigate death threats a federal prisoner made against [the agent]
214 and his wife"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996) (finding
215 actionable retaliation where employer filed false criminal charges against former employee
216 who complained about discrimination). A provision limited to employment-related actions
217 would not deter the many forms that effective retaliation can take. Hence, such a limited
218 construction would fail to fully achieve the anti-retaliation provision's "primary purpose,"
219 namely, "maintaining unfettered access to statutory remedial mechanisms." *Robinson v.*
220 *Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

221 548 U.S. at 63-64 (emphasis in original)

222 Accordingly, the instruction contains bracketed material to cover a plaintiff's claim for
223 retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority
224 which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment
225 action. See, e.g., *Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995) (requiring the plaintiff
226 in a retaliation case to prove among other things that "the employer took an adverse employment
227 action against her"). See also *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006)
228 (observing that the *White* decision rejected Third Circuit law that limited recovery for retaliation
229 to those actions that altered the employee's compensation or terms and conditions of employment).

230 *Membership In Protected Class Not Required*

231 An employee need not be a member of a protected class to be subject to actionable
232 retaliation under Title VII. For example, a white employee who complains about discrimination
233 against black employees, and is subject to retaliation for those complaints, is protected by the Title
234 VII anti-retaliation provision. See *Moore v. City of Philadelphia*, 461 F.3d 331, 342 (3d Cir. 2006)
235 ("Title VII's whistleblower protection is not limited to those who blow the whistle on their own
236 mistreatment or on the mistreatment of their own race, sex, or other protected class.")

237 *Claim by victim of retaliation for another's protected activity*

238 Title VII not only bars retaliation against the employee who engaged in the protected
239 activity; it also bars retaliation against another employee if the circumstances are such that the
240 retaliation against that employee might well dissuade a reasonable worker from engaging in
241 protected activity. See *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 868 (2011)
242 ("We think it obvious that a reasonable worker might be dissuaded from engaging in protected
243 activity if she knew that her fiancé would be fired."). The *Thompson* Court stressed that analysis

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244 of a claim of third-party retaliation is fact-specific. *See id.* (“We expect that firing a close family
245 member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere
246 acquaintance will almost never do so, but beyond that we are reluctant to generalize.”).

247 In order to bring a retaliation claim under Title VII, the third-party victim of the retaliation
248 must show that he or she “falls within the zone of interests protected by Title VII.” *Id.* at 870. In
249 *Thompson*, the plaintiff fell “well within the zone of interests sought to be protected by Title VII”
250 because he was an employee of the defendant and because “injuring him was the employer’s
251 intended means of harming” his fiancée, who had engaged in the protected activity that triggered
252 the retaliation. *See id.*

253 The *Thompson* Court did not specify whether the questions noted in the two preceding
254 paragraphs should be decided by the judge or the jury. In keeping with existing practice, it seems
255 likely that it is for the jury to determine whether, under the circumstances, retaliation against the
256 third party might well dissuade a reasonable worker from engaging in protected activity. By
257 contrast, it may be for the judge rather than the jury to determine whether the third party falls
258 within the zone of interests protected by Title VII. Bracketed options in Instruction 5.1.7 reflect
259 these considerations.

260 *Causation*

261 For a helpful discussion on the importance of the time period between the plaintiff’s
262 protected activity and the action challenged as retaliatory, as well as other factors that might be
263 relevant to a finding of causation, *see Marra v. Philadelphia Housing Authority*, 497 F.3d 286,
264 302 (3d Cir. 2007) (a case involving a claim of retaliation under the Pennsylvania Human Relations
265 Act, which the court found to be subject to the same standards of substantive law as an action for
266 retaliation under Title VII) :

267 We have recognized that a plaintiff may rely on a “broad array of evidence” to
268 demonstrate a causal link between his protected activity and the adverse action taken
269 against him. *Farrell [v. Planters Lifesavers Co., 206 F.3d 271, 284 (3d Cir. 2000)]*. In
270 certain narrow circumstances, an “unusually suggestive” proximity in time between the
271 protected activity and the adverse action may be sufficient, on its own, to establish the
272 requisite causal connection. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir.
273 1997); *see Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989) (discharge of plaintiff
274 two days after filing EEOC complaint found to be sufficient, under the circumstances, to
275 establish causation). Conversely, however, “[t]he mere passage of time is not legally
276 conclusive proof against retaliation.” *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d
277 892, 894 (3d Cir. 1993) (citation omitted); *see also Kachmar v. SunGard Data Sys., Inc.*,
278 109 F.3d 173, 178 (3d Cir. 1997) (“It is important to emphasize that it is causation, not
279 temporal proximity itself, that is an element of plaintiff’s prima facie case, and temporal
280 proximity merely provides an evidentiary basis from which an inference can be drawn.”).
281 Where the time between the protected activity and adverse action is not so close as to be
282 unusually suggestive of a causal connection standing alone, courts may look to the
283 intervening period for demonstrative proof, such as actual antagonistic conduct or animus

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284 against the employee, *see, e.g., Woodson* [v. Scott Paper Co., 109 F.3d 913, 921 (3d Cir.
285 1997)] (finding sufficient causal connection based on "pattern of antagonism" during
286 intervening two-year period between protected activity and adverse action), or other types
287 of circumstantial evidence, such as inconsistent reasons given by the employer for
288 terminating the employee or the employer's treatment of other employees, that give rise to
289 an inference of causation when considered as a whole. *Farrell*, 206 F.3d at 280-81.

290 The *Marra* court noted that the time period relevant to causation is that between the date
291 of the employee's protected activity and the date on which the employer made the decision to take
292 adverse action. In *Marra* the employer made the decision to terminate the plaintiff five months
293 after the protected activity, but the employee was not officially terminated until several months
294 later. The court held that the relevant time period ran to when the decision to terminate was made.
295 497 F.3d at 286.

296 The *Marra* court also emphasized that in assessing causation, the cumulative effect of the
297 employer's conduct must be evaluated: "it matters not whether each piece of evidence of
298 antagonistic conduct is alone sufficient to support an inference of causation, so long as the evidence
299 permits such an inference when considered collectively." 497 F.3d at 303.

300 For other Third Circuit cases evaluating the causative connection between protected
301 activity and an adverse employment decision, *see Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir.
302 2006) (noting that temporal proximity and a pattern of antagonism "are not the exclusive ways to
303 show causation" and that the element of causation in retaliation cases "is highly context-specific");
304 *Moore v. City of Philadelphia*, 461 F.3d 331, 352 (3d Cir. 2006) (employee was subject to three
305 sick-checks in his first five months of medical leave; after filing a lawsuit alleging discrimination,
306 he was subject to sick-checks every other day; the "striking difference" in the application of the
307 sick-check policy "would support an inference that the more aggressive enforcement "was caused
308 by retaliatory animus."); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir.
309 2007) ("Although there is no bright line rule as to what constitutes unduly suggestive temporal
310 proximity, a gap of three months between the protected activity and the adverse action, without
311 more, cannot create an inference of causation and defeat summary judgment."); *Jones v.*
312 *Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 331 (3d Cir. 2015) (rejecting the plaintiff's
313 argument that timing provided evidence of retaliation in a case where fewer than 12 weeks elapsed
314 between the plaintiff's complaint of harassment and her employer's determination that she should
315 be suspended without pay for committing fraud, and noting that the employer "spent [the
316 intervening time] on a thorough investigation into her alleged malfeasance"); *Connelly v. Lane*
317 *Const. Corp.*, 809 F.3d 780, 792-93 (3d Cir. 2016) (holding inference of causation permissible
318 where employer "continued to rehire [plaintiff] for four years despite her complaints about co-
319 workers, but declined to rehire her at the first such opportunity after she complained of harassment
320 by a supervisor"; and noting that the timing – "protected activity in May 2010," employer's layoff
321 of plaintiff in October 2010, and employer's failure to rehire plaintiff in spring 2011 – should be
322 assessed in light of "the seasonal character of [plaintiff's] work").

323 In appropriate cases, it may be useful to note that if the jury disbelieves the employer's
324 proffered non-retaliatory reason for the employment decision, it may consider that fact in

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325 determining whether the defendant’s proffered reason was really a cover-up for retaliation. *Cf.*,
326 *e.g.*, *Moore*, 461 F.3d at 342, 346 (applying the *McDonnell Douglas* framework to a Title VII
327 retaliation claim and analyzing, inter alia, whether “the plaintiffs tendered sufficient evidence to
328 overcome the non-retaliatory explanation offered by their employer”); *Daniels v. School District*
329 *of Philadelphia*, 776 F.3d 181, 198 (3d Cir. 2015) (upholding grant of summary judgment against
330 plaintiff on retaliation claims under, inter alia, Title VII, because the defendant had “proffered
331 legitimate reasons for [its] adverse actions, which Daniels has failed to rebut”).²⁰ If the court
332 wishes to modify Instruction 5.1.7 in this manner, it could adapt the penultimate paragraph of
333 Instruction 5.1.2 by substituting references to retaliation for references to discrimination:

334 [Defendant] has given a nonretaliatory reason for its [describe defendant’s action].
335 If you disbelieve [defendant’s] explanations for its conduct, then you may, but need
336 not, find that [plaintiff] has proved retaliation. In determining whether
337 [defendant’s] stated reason for its actions was a pretext, or excuse, for retaliation,
338 you may not question [defendant’s] business judgment. You cannot find retaliation
339 simply because you disagree with the business judgment of [defendant] or believe
340 it is harsh or unreasonable. You are not to consider [defendant’s] wisdom.
341 However, you may consider whether [defendant’s] reason is merely a cover-up for
342 retaliation.

343 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

344 Construing the Uniformed Services Employment and Reemployment Rights Act of 1994
345 (USERRA), the Supreme Court ruled that “if a supervisor performs an act motivated by
346 antimilitary animus that is intended by the supervisor to cause an adverse employment action, and
347 if that act is a proximate cause of the ultimate employment action, then the employer is liable under
348 USERRA” even if the ultimate employment decision is taken by one other than the supervisor with
349 the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). The Court
350 did not explicitly state whether this ruling extends to Title VII discrimination claims under 42
351 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor), though it noted
352 the similarity between Section 2000e-2(m)’s language and that of the USERRA. Unlike Title VII
353 discrimination claims under 42 U.S.C. § 2000e-2(m), Title VII retaliation claims are not founded

²⁰ In *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015), the plaintiff failed in her attempt to convince the court that a jury could regard her employer’s misconduct finding as pretextual:

Jones claims that “she never falsified her timesheets” and suggests that this supports an inference that SEPTA’s actions were motivated by a desire for revenge rather than a bona fide belief that Jones had stolen wages.... The District Court found no evidence supporting Jones’s denial of wrongdoing, however, and also rightly noted that showing that an employer incorrectly found an employee guilty of misconduct is insufficient to prove retaliation anyway.

Jones, 796 F.3d at 330.

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354 on any explicit statutory reference to discrimination as “a motivating factor.” Because the Court’s
355 analysis in *Staub* was framed as an interpretation of the statutory language in the USERRA, it was
356 initially unclear whether *Staub*’s holding extends to Title VII retaliation claims. However, the
357 Court of Appeals, in *McKenna v. City of Philadelphia*, 649 F.3d 171 (3d Cir. 2011), treated *Staub*
358 as applicable to the plaintiff’s Title VII retaliation claim. See *McKenna*, 649 F.3d at 180 (holding
359 that “under *Staub*, the District Court did not err in denying the City’s motion for judgment as a
360 matter of law/notwithstanding the verdict”); *id.* (concluding that though the jury instructions –
361 given prior to the decision in *Staub* – “did not precisely hew to the proximate cause language
362 adopted in *Staub*, ... the variation was harmless”).²¹ Thus, in a case involving retaliatory animus
363 by one other than the ultimate decisionmaker, Instruction 5.1.7 should be modified to reflect
364 *McKenna*’s application of *Staub*.

365 *Retaliation Against Perceived Protected Activity*

366 In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), an ADA case, the
367 court declared that the retaliation provision in Title VII protected an employee against retaliation
368 for “perceived” protected activity. “Because the statutes forbid an employer’s taking adverse action
369 against an employee for discriminatory reasons, it does not matter whether the factual basis for the
370 employer’s discriminatory animus was correct and that, so long as the employer’s specific intent
371 was discriminatory, the retaliation is actionable.” 283 F.3d at 562. For the fairly unusual case in
372 which the employer is alleged to have retaliated for perceived rather than actual protected activity,
373 the instruction can be modified consistently with the court’s directive in *Fogleman*.

374 *Determinative Effect*

375 Instruction 5.1.7 requires the plaintiff to show that the plaintiff’s protected activity had a
376 “determinative effect” on the allegedly retaliatory activity. This is the standard typically used in
377 Title VII pretext cases outside the context of retaliation. See Comment 5.1.2. Title VII claims that
378 do not involve retaliation can alternatively proceed on a mixed-motive theory under 42 U.S.C.
379 § 2000e-2(m), subject to the affirmative defense stated in 42 U.S.C. § 2000e-5(g)(2)(B), see
380 Comment 5.1.1, but the mixed-motive proof framework is unavailable for Title VII retaliation
381 claims. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533 (2013) (“Title VII
382 retaliation claims must be proved according to traditional principles of but-for causation, not the
383 lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation
384 would not have occurred in the absence of the alleged wrongful action or actions of the
385 employer.”); *id.* at 2534 (rejecting contention that the *Price Waterhouse* mixed-motive test could
386 be used for Title VII retaliation claims).

²¹ In *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 331 (3d Cir. 2015), the Court of Appeals applied the *Staub / McKenna* framework but held that the plaintiff failed to point to evidence that her supervisor’s animus proximately caused her employer’s decision to fire her for misconduct.

5.2.1 Hostile or Abusive Work Environment

5.2.1 Title VII Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

- The total physical environment of [plaintiff's] work area.
- The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.
- The reasonable expectations of [plaintiff] upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on [plaintiff's] mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward [plaintiff].
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [plaintiff's membership in a protected class]. The harassing conduct may, but need not be [sexual/racial, etc.] in nature. Rather, its defining characteristic is that the harassment complained of is linked to the victim's [protected status]. The key question is whether [plaintiff], as a [member of protected class], was subjected to harsh employment

5.2.1 Hostile or Abusive Work Environment

31 conditions to which [those outside the protected class] were not.

32 It is important to understand that, in determining whether a hostile work environment
33 existed at the [employer's workplace] you must consider the evidence from the perspective of a
34 reasonable [member of protected class] in the same position. That is, you must determine whether
35 a reasonable [member of protected class] would have been offended or harmed by the conduct in
36 question. You must evaluate the total circumstances and determine whether the alleged harassing
37 behavior could be objectively classified as the kind of behavior that would seriously affect the
38 psychological or emotional well-being of a reasonable [member of protected class]. The reasonable
39 [member of protected class] is simply one of normal sensitivity and emotional make-up.

40

41 **Comment**

42 This instruction can be used to provide the jury more guidance for determining whether a
43 hostile work environment exists in a claim for harassment under Title VII. See Instructions 5.1.4
44 and 5.1.5 for instructions on harassment claims.

45 In *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997), the Third Circuit set
46 forth the following requirements for proving a hostile work environment claim in a sex
47 discrimination case under Title VII:

48 (1) the employee suffered intentional discrimination because of [his or her] sex; (2) the
49 discrimination was pervasive and regular; (3) the discrimination detrimentally affected the
50 plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same
51 sex in that position; and (5) the existence of respondeat superior liability.

52 Instruction 5.2.1 is similar to the instruction approved (with respect to claims under the
53 New Jersey Law Against Discrimination) in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95,
54 115-17 (3d Cir. 1999).

55 The Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75, 80 (1998),
56 noted that an employer is not liable under Title VII for a workplace environment that is harsh for
57 all employees; generalized harassment is not prohibited by Title VII. *See also Jensen v. Potter*,
58 435 F.3d 444, 449 (3d Cir. 2006) (“Many may suffer severe harassment at work, but if the reason
59 for that harassment is one that is not proscribed by Title VII, it follows that Title VII provides no
60 relief.”)

61 The pattern instruction follows *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998),
62 in which the Court stated that “isolated incidents (unless extremely serious) will not amount to
63 discriminatory changes of the terms and conditions of employment.”

1 **5.2.2 Title VII Definitions — Constructive Discharge**

2 **Model**

3 In this case, to show that [he/she] was subjected to an adverse “tangible employment
4 action,” [plaintiff] claims that [he/she] was forced to resign due to [name’s] discriminatory
5 conduct. Such a forced resignation, if proven, is called a “constructive discharge.” To prove that
6 [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions
7 became so intolerable that a reasonable person in the employee’s position would have felt
8 compelled to resign.

9

10 **Comment**

11 This instruction can be used when the plaintiff was not fired, but resigned, and claims that
12 she nonetheless suffered an adverse employment action because she was constructively discharged
13 due to an adverse action or actions that were sanctioned by her employer. This instruction is
14 designed for integration into either Instruction 5.1.3 (with respect to the instruction’s fourth
15 element) or Instruction 5.1.4 (with respect to the instruction’s sixth element). If, instead, the
16 plaintiff claims that she was constructively discharged based on a supervisor’s or co-worker’s
17 adverse action or actions that were not sanctioned by the employer, the constructive discharge
18 would not count as a tangible adverse employment action (for the purposes of determining whether
19 the employer may assert an *Ellerth / Faragher* affirmative defense). See Comment 5.1.5. See also
20 *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) (“[A]n employer does not have
21 recourse to the *Ellerth / Faragher* affirmative defense when a supervisor’s official act precipitates
22 the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is
23 available to the employer whose supervisors are charged with harassment.”).

24 In *Suders*, the Court explained that “[u]nder the constructive discharge doctrine, an
25 employee’s reasonable decision to resign because of unendurable working conditions is assimilated
26 to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions
27 become so intolerable that a reasonable person in the employee’s position would have felt
28 compelled to resign?” See also *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir. 1993)
29 (ADEA claim) (close supervision of the employee was not enough to constitute a constructive
30 discharge); *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 169-70 (3d Cir. 2013) (“In
31 determining whether an employee was forced to resign, we consider a number of factors, including
32 whether the employee was threatened with discharge, encouraged to resign, demoted, subject to
33 reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job
34 responsibilities, or given unsatisfactory job evaluations.”).

5.3.1 Bona Fide Occupational Qualification

1 5.3.1 Title VII Defenses — Bona Fide Occupational Qualification

2 Model

3 If you find that [plaintiff] has established by a preponderance of the evidence that
4 [defendant] [describe employment action] because of [his/her] [protected status], then you must
5 consider [defendant's] defense that its action was based on a bona fide occupational qualification.

6 To avoid liability for intentional discrimination on the basis of this contention, [defendant]
7 must prove both of the following elements by a preponderance of the evidence:

8 First: The occupational qualification relied upon by [defendant] is reasonably necessary
9 for the normal operation of [defendant's] business.

10 Second: [Defendant] either had reasonable cause to believe that all or substantially all
11 persons [in the protected class] would be unable to perform the job safely and efficiently,
12 or that it was impossible or highly impractical to consider the necessary qualifications of
13 each [person in the protected class]. [Defendant's] belief should be evaluated in light of
14 all the circumstances in the case, to determine whether it has a reasonable basis in fact.

15 If you find that [defendant] has proved these two elements by a preponderance of the
16 evidence, then you must find for [defendant].

17

18 Comment

19 In some cases, an employer may defend a disparate treatment claim by proving that the
20 discriminatory treatment is a bona fide occupational qualification (BFOQ) reasonably necessary
21 to the normal operation of the particular enterprise. 42 U.S.C.A. § 2000e-2(e)(1) provides as
22 follows:

23 (1) it shall not be an unlawful employment practice for an employer to hire and employ
24 employees, for an employment agency to classify, or refer for employment any individual,
25 for a labor organization to classify its membership or to classify or refer for employment
26 any individual, or for an employer, labor organization, or joint labor-management
27 committee controlling apprenticeship or other training or retraining programs to admit or
28 employ any individual in any such program, on the basis of his religion, sex, or national
29 origin in those certain instances where religion, sex, or national origin is a bona fide
30 occupational qualification reasonably necessary to the normal operation of that particular
31 business or enterprise...

32 *See, e.g., United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991) (sex was not
33 BFOQ where employer adopted policy barring all women, except those whose infertility was
34 medically documented, from jobs involving actual or potential lead exposure exceeding OSHA

5.3.1 Bona Fide Occupational Qualification

35 standards); *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (gender was BFOQ for
36 correctional counselor position where sex offenders were scattered throughout prison's facilities).
37 The *Johnson Controls* Court held that the burden of persuasion in establishing the BFOQ defense
38 rests with the defendant. 499 U.S. at 200.

39 Under Title VII, a BFOQ may relate only to religion, sex or national origin. 42 U.S.C.A. §
40 2000e-2(e)(1). There is no BFOQ defense in racial discrimination cases. 42 U.S.C.A. § 2000e-
41 2(e)(1). See *Ferrill v. Parker Group*, 168 F.3d 468, 475 (11th Cir.1999) (no BFOQ defense to race-
42 matched telemarketing or polling).

43 The Third Circuit, in *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir.
44 1996), analyzed the BFOQ defense, in the context of a gender discrimination case, as follows:

45 Under the BFOQ defense, overt gender-based discrimination can be countenanced
46 if sex "is a bona fide occupational qualification reasonably necessary to the normal
47 operation of [a] particular business or enterprise [.]" 42 U.S.C. § 2000e-2(e)(1). The BFOQ
48 defense is written narrowly, and the Supreme Court has read it narrowly. See *Johnson*
49 *Controls*, 499 U.S. at 201. The Supreme Court has interpreted this provision to mean that
50 discrimination is permissible only if those aspects of a job that allegedly require
51 discrimination fall within the " 'essence' of the particular business." *Id.* at 206.
52 Alternatively, the Supreme Court has stated that sex discrimination "is valid only when the
53 essence of the business operation would be undermined" if the business eliminated its
54 discriminatory policy. *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).

55 The employer has the burden of establishing the BFOQ defense. *Johnson Controls*,
56 499 U.S. at 200. The employer must have a "basis in fact" for its belief that no members of
57 one sex could perform the job in question. *Dothard*, 433 U.S. at 335. However, appraisals
58 need not be based on objective, empirical evidence, and common sense and deference to
59 experts in the field may be used. See *id.* (relying on expert testimony, not statistical
60 evidence, to determine BFOQ defense); *Torres v. Wisconsin Dep't Health and Social*
61 *Servs.*, 859 F.2d 1523, 1531-32 (7th Cir.1988) (in establishing a BFOQ defense, defendants
62 need not produce objective evidence, but rather employer's action should be evaluated on
63 basis of totality of circumstances as contained in the record). The employer must also
64 demonstrate that it "could not reasonably arrange job responsibilities in a way to minimize
65 a clash between the privacy interests of the [patients], and the non-discriminatory principle
66 of Title VII." *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th
67 Cir.1980).

68 See also *Lanning v. SEPTA*, 181 F.3d 478, 500 (3d Cir. 1999) (under the defense of bona fide
69 occupational qualification, "the greater the safety factor, measured by the likelihood of harm and
70 the probable severity of that harm in case of an accident, the more stringent may be the job
71 qualifications....", quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)).

1 **5.3.2 Title VII Defenses — Bona Fide Seniority System**

2 *No Instruction*

3

4 **Comment**

5 In contrast to a bona fide occupational qualification, which is an affirmative defense, the
6 treatment of an employer’s alleged bona fide seniority system is simply one aspect of the plaintiff’s
7 burden of proving intentional discrimination in a Title VII case.²² In *Lorance v. AT & T*
8 *Technologies, Inc.*, 490 U.S. 900, 908-09 (1989), *superseded by statute on other grounds*, Pub. L.
9 No. 102-166, Title I, § 112, 105 Stat. 1079, codified as amended at 42 U.S.C. § 2000e-5(e)(2), the
10 Court emphasized that the plaintiff has the burden of proving intentional discrimination and held
11 that, as applied to seniority systems, the plaintiff must prove that the seniority system is a means
12 of intentional discrimination. Thus the existence of a bona fide seniority system is not an
13 affirmative defense; rather it is simply an aspect of the plaintiff’s burden of proving discrimination.
14 The *Lorance* Court specifically distinguished seniority systems from bona fide occupational
15 qualifications, a defense on which the defendant does have the burden. *See also Colgan v. Fisher*
16 *Scientific Co.*, 935 F.2d 1407, 1417 (3d Cir. 1991) (stating that petitioning employees “were
17 required to allege that either the creation or the operation of the seniority system was the result of
18 intentional discrimination”); *Green v. USX Corp.*, 896 F.2d 801, 806 (3d Cir. 1990) (noting that
19 proof of disparate treatment, not simply disparate impact, is required to invalidate a seniority
20 system under Title VII). Accordingly, no instruction is included for any affirmative defense for a
21 bona fide seniority system.

²² See 42 U.S.C. § 2000e-2(h); see also *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009) (applying § 2000e-2(h)).

5.4.1 Compensatory Damages – General Instructions

5.4.1 Title VII Damages — Compensatory Damages — General Instruction

Model

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

If you find by a preponderance of the evidence that [defendant] intentionally discriminated against [plaintiff] by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. [Plaintiff] must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions [or omissions] actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for

5.4.1 Compensatory Damages – General Instructions

38 the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she]
39 had continued in employment with [defendant]. These elements of recovery of wages that
40 [plaintiff] would have received from [defendant] are called “back pay” and “front pay”. [Under
41 the applicable law, the determination of “back pay” and “front pay” is for the court.] [“Back pay”
42 and “front pay” are to be awarded separately under instructions that I will soon give you, and any
43 amounts for “back pay” and “front pay” are to be entered separately on the verdict form.]

44 You may award damages for monetary losses that [plaintiff] may suffer in the future as a
45 result of [defendant’s] [allegedly unlawful act or omission]. [For example, you may award
46 damages for loss of earnings resulting from any harm to [plaintiff’s] reputation that was suffered
47 as a result of [defendant’s] [allegedly unlawful act or omission]. Where a victim of discrimination
48 has been terminated by an employer, and has sued that employer for discrimination, [he/she] may
49 find it more difficult to be employed in the future, or may have to take a job that pays less than if
50 the discrimination had not occurred. That element of damages is distinct from the amount of wages
51 [plaintiff] would have earned in the future from [defendant] if [he/she] had retained the job.]

52 As I instructed you previously, [plaintiff] has the burden of proving damages by a
53 preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of
54 [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy
55 as circumstances permit.

56 [You are instructed that [plaintiff] has a duty under the law to “mitigate” [his/her]
57 damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may
58 have existed under the circumstances to reduce or minimize the loss or damage caused by
59 [defendant]. It is [defendant’s] burden to prove that [plaintiff] has failed to mitigate. So if
60 [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take
61 advantage of an opportunity that was reasonably available to [him/her], then you must reduce the
62 amount of [plaintiff’s] damages by the amount that could have been reasonably obtained if [he/she]
63 had taken advantage of such an opportunity.]

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

67

68 **Comment**

69 Title VII distinguishes between disparate treatment and disparate impact discrimination
70 and allows recovery of compensatory damages only to those who suffered intentional
71 discrimination. 42 U.S.C.A. § 1981a(a)(1).

72 *Cap on Damages*

73 The Civil Rights Act of 1991 (42 U.S.C. § 1981a) provides for compensatory damages and

5.4.1 Compensatory Damages – General Instructions

74 a right to jury trial for disparate treatment violations. But it also imposes a statutory limit on the
75 amount of compensatory damages that can be awarded. See 42 U.S.C. § 1981a(b)(3):

76 **Limitations.** The sum of the amount of compensatory damages awarded under this section
77 for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss
78 of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages
79 awarded under this section, shall not exceed, for each complaining party--

80 (A) in the case of a respondent who has more than 14 and fewer than 101 employees
81 in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 50,000;

82 (B) in the case of a respondent who has more than 100 and fewer than 201
83 employees in each of 20 or more calendar weeks in the current or preceding calendar year,
84 \$ 100,000; and

85 (C) in the case of a respondent who has more than 200 and fewer than 501
86 employees in each of 20 or more calendar weeks in the current or preceding calendar year,
87 \$ 200,000; and

88 (D) in the case of a respondent who has more than 500 employees in each of 20 or
89 more calendar weeks in the current or preceding calendar year, \$ 300,000.

90 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations
91 on recovery of compensatory damages.

92 *No Right to Jury Trial for Back Pay and Front Pay*

93 Back pay and front pay are equitable remedies that are to be distinguished from the
94 compensatory damages to be determined by the jury under Title VII. See the Comments to
95 Instructions 5.4.3 & 5.4.4. Compensatory damages may include lost future earnings over and
96 above the front pay award. For example, the plaintiff may recover the diminution in expected
97 earnings in all future jobs due to reputational or other injuries, above any front pay award. The
98 court in *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-54 (7th Cir. 1998), described the difference
99 between the equitable remedy of front pay and compensatory damages for loss of future earnings
100 in the following passage:

101 Front pay in this case compensated Williams for the immediate effects of Pharmacia's
102 unlawful termination of her employment. The front pay award approximated the benefit
103 Williams would have received had she been able to return to her old job. The district court
104 appropriately limited the duration of Williams's front pay award to one year because she
105 would have lost her position by that time in any event because of the merger with Upjohn.

106 The lost future earnings award, in contrast, compensates Williams for a lifetime of
107 diminished earnings resulting from the reputational harms she suffered as a result of
108 Pharmacia's discrimination. Even if reinstatement had been feasible in this case, Williams
109 would still have been entitled to compensation for her lost future earnings. As the district

5.4.1 Compensatory Damages – General Instructions

110 court explained:

111 Reinstatement (and therefore front pay) . . . does not and cannot erase that the victim
112 of discrimination has been terminated by an employer, has sued that employer for
113 discrimination, and the subsequent decrease in the employee's attractiveness to
114 other employers into the future, leading to further loss in time or level of
115 experience. Reinstatement does not revise an employee's resume or erase all
116 forward-looking aspects of the injury caused by the discriminatory conduct.

117 A reinstated employee whose reputation and future prospects have been damaged
118 may be effectively locked in to his or her current employer. Such an employee cannot
119 change jobs readily to pursue higher wages and is more likely to remain unemployed if
120 the current employer goes out of business or subsequently terminates the employee for
121 legitimate reasons. These effects of discrimination diminish the employee's lifetime
122 expected earnings. Even if Williams had been able to return to her old job, the jury could
123 find that Williams suffered injury to her future earning capacity even during her period of
124 reinstatement. Thus, there is no overlap between the lost future earnings award and the
125 front pay award.

126 The *Williams* court emphasized the importance of distinguishing front pay from lost future
127 earnings, in order to avoid double-counting.

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

139 The pattern instruction contains bracketed material that would instruct the jury not to award
140 back pay or front pay. The jury may, however, enter an award of back pay and front pay as
141 advisory, or by consent of the parties. In those circumstances, the court should refer to instructions
142 5.4.3 for back pay and 5.4.4 for front pay. In many cases it is commonplace for back pay issues to
143 be submitted to the jury. The court may think it prudent to consult with counsel on whether the
144 issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated
145 basis) or are to be left to the court's determination without reference to the jury.

146 *Damages for Pain and Suffering*

147 In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir. 1988), the Court held

5.4.1 Compensatory Damages – General Instructions

148 that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering damages
149 without first presenting evidence of actual injury. The court stated that “[t]he justifications that
150 support presumed damages in defamation cases do not apply in § 1981 and Title VII cases.
151 Damages do not follow of course in § 1981 and Title VII cases and are easier to prove when they
152 do.”

153 *Attorney Fees and Costs*

154 There appears to be no uniform practice regarding the use of an instruction that warns the
155 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
156 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
157 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
158 above what you award as damages. It is my duty to decide whether to award attorney fees and
159 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
160 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
161 properly objected to the instruction, and, reviewing for plain error, found none: “We need not and
162 do not decide now whether a district court commits error by informing a jury about the availability
163 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not
164 plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction directing
165 the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable that a jury
166 tasked with computing damages might, absent information that the Court has discretion to award
167 attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of
168 litigation.” *Id.* Second, it is implausible “that the jury, in order to eliminate the chance that Collins
169 might be awarded attorney fees, took the disproportionate step of returning a verdict against him
170 even though it believed he was the victim of age discrimination, notwithstanding the District
171 Court’s clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of*
172 *Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir.
173 1991)).

1 **5.4.2 Title VII Damages — Punitive Damages**

2 **Model**

3 [Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to
4 [plaintiff's] federally protected rights and that as a result there should be an award of what are
5 called “punitive” damages. A jury may award punitive damages to punish a defendant, or to deter
6 the defendant and others like the defendant from committing such conduct in the future. [Where
7 appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury,
8 and so receives nominal rather than compensatory damages.]

9 An award of punitive damages is permissible in this case only if you find by a
10 preponderance of the evidence that a management official of [defendant] personally acted with
11 malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice
12 if a person knows that it violates the federal law prohibiting discrimination and does it anyway.
13 An action is with reckless indifference if taken with knowledge that it may violate the law.

14 **[For use where the defendant raises a jury question on good-faith attempt to comply**
15 **with the law:**

16 But even if you make a finding that there has been an act of discrimination with malice or
17 reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant]
18 proves by a preponderance of the evidence that it made a good-faith attempt to comply with the
19 law, by adopting policies and procedures designed to prevent unlawful discrimination such as that
20 suffered by [plaintiff].]

21 An award of punitive damages is discretionary; that is, if you find that the legal
22 requirements for punitive damages are satisfied [and that [defendant] has not proved that it made
23 a good-faith attempt to comply with the law], then you may decide to award punitive damages, or
24 you may decide not to award them. I will now discuss some considerations that should guide your
25 exercise of this discretion.

26 If you have found the elements permitting punitive damages, as discussed in this
27 instruction, then you should consider the purposes of punitive damages. The purposes of punitive
28 damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to
29 deter a defendant and others like the defendant from doing similar things in the future, or both.
30 Thus, you may consider whether to award punitive damages to punish [defendant]. You should
31 also consider whether actual damages standing alone are sufficient to deter or prevent [defendant]
32 from again performing any wrongful acts it may have performed. Finally, you should consider
33 whether an award of punitive damages in this case is likely to deter others from performing
34 wrongful acts similar to those [defendant] may have committed.

35 If you decide to award punitive damages, then you should also consider the purposes of
36 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
37 amount of punitive damages, you should consider the degree to which [defendant] should be

5.4.2 Punitive Damages

38 punished for its wrongful conduct, and the degree to which an award of one sum or another will
39 deter [defendant] or others from committing similar wrongful acts in the future.

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

45

46 **Comment**

47 42 U.S.C.A. § 1981a(b)(1) provides that “[a] complaining party may recover punitive
48 damages under this section [Title VII] against a respondent (other than a government, government
49 agency or political subdivision) if the complaining party demonstrates that the respondent engaged
50 in a discriminatory practice or discriminatory practices with malice or with reckless indifference
51 to the federally protected rights of an aggrieved individual.” Punitive damages are available only
52 in cases of intentional discrimination, i.e., cases that do not rely on the disparate impact theory of
53 discrimination.

54 In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme
55 Court held that plaintiffs are not required to show egregious or outrageous discrimination in order
56 to recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean,
57 however, that proof of intentional discrimination is not enough in itself to justify an award of
58 punitive damages, because the statute suggests a congressional intent to authorize punitive awards
59 “in only a subset of cases involving intentional discrimination.” Therefore, “an employer must at
60 least discriminate in the face of a perceived risk that its actions will violate federal law to be liable
61 in punitive damages.” *Kolstad*, 527 U.S. at 536. The Court further held that an employer may be
62 held liable for a punitive damage award for the intentionally discriminatory conduct of its
63 employee only if the employee served the employer in a managerial capacity and committed the
64 intentional discrimination at issue while acting in the scope of employment, and the employer did
65 not engage in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In
66 determining whether an employee is in a managerial capacity, a court should review the type of
67 authority that the employer has given to the employee and the amount of discretion that the
68 employee has in what is done and how it is accomplished. *Id.*, 527 U.S. at 543.

69 *Affirmative Defense to Punitive Damages for Good-Faith Attempt to Comply With the Law*

70 The Court in *Kolstad* established an employer’s good faith as a defense to punitive
71 damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff’s
72 proof for punitive damages. The instruction sets out the employer’s good faith attempt to comply
73 with anti-discrimination law as an affirmative defense. The issue has not yet been decided in the
74 Third Circuit, but the weight of authority in the other circuits establishes that the defendant has the
75 burden of showing a good-faith attempt to comply with laws prohibiting discrimination. *See*

5.4.2 Punitive Damages

76 *Medcalf v. Trustees of University of Pennsylvania*, 71 Fed. Appx. 924, 933 n.3 (3d Cir. 2003)
77 (noting that “the Third Circuit has not addressed the issue of whether the good faith compliance
78 standard set out in *Kolstad* is an affirmative defense for which the defendant bears the burden of
79 proof, or whether the plaintiff must disprove the defendant's good faith compliance with Title VII
80 by a preponderance of the evidence”; but also noting that “[a] number of other circuits have
81 determined that the defense is an affirmative one”); *Romano v. U-Haul Int'l*, 233 F.3d 655, 670
82 (1st Cir. 2000) (“The defendant . . . is responsible for showing good faith efforts to comply with
83 the requirements of Title VII”); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376,
84 385 (2d Cir. 2001) (referring to the defense as an affirmative defense that “requires an employer
85 to establish both that it had an antidiscrimination policy and made good faith effort to enforce it”);
86 *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001) (“Even if the plaintiff
87 establishes that the employer's managerial agents recklessly disregarded his federally protected
88 rights while acting within the scope of their employment, the employer may avoid liability for
89 punitive damages if it can show that it engaged in good faith efforts to implement an
90 antidiscrimination policy.”); *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 931 (8th Cir. 2004)
91 (“A corporation may avoid punitive damages by showing that it made good faith efforts to comply
92 with Title VII after the discriminatory conduct.”); *Passantino v. Johnson & Johnson Consumer
93 Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000) (under *Kolstad*, defendants may “establish an
94 affirmative defense to punitive damages liability when they have a bona fide policy against
95 discrimination, regardless of whether or not the prohibited activity engaged in by their managerial
96 employees involved a tangible employment action.”); *Davey v. Lockheed Martin Corp.*, 301 F.3d
97 1204, 1208 (10th Cir. 2002) (under *Kolstad*, “even if the plaintiff establishes that the employer's
98 managerial employees recklessly disregarded federally-protected rights while acting within the
99 scope of employment, punitive damages will not be awarded if the employer shows that it engaged
100 in good faith efforts to comply with Title VII.”).

101 *Caps on Punitive Damages*

102 Punitive damages are subject to caps in Title VII actions. See 42 U.S.C. § 1981a(b)(3). But
103 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations
104 on recovery of punitive damages.

105 *Due Process Limitations*

106 The Supreme Court has imposed some due process limits on both the size of punitive
107 damages awards and the process by which those awards are determined and reviewed. In
108 performing the substantive due process review of the size of punitive awards, a court must consider
109 three factors: “the degree of reprehensibility of” the defendant’s conduct; “the disparity between
110 the harm or potential harm suffered by” the plaintiff and the punitive award; and the difference
111 between the punitive award “and the civil penalties authorized or imposed in comparable cases.”
112 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

113 For a complete discussion of the applicability of the *Gore* factors to a jury instruction on
114 punitive damages, see the Comment to Instruction 4.8.3.

5.4.3 Back Pay – For Advisory or Stipulated Jury

5.4.3 Title VII Damages – Back Pay— For Advisory or Stipulated Jury

Model

If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff], then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You may award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's] intentional discrimination.

[Alternative One – for use when plaintiff does not seek back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period:] Back pay damages, if any, apply from the time [plaintiff] was [describe employment action] until the date of your verdict. [However, federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. Therefore the back pay award in this case must be determined only for the period between [specify dates]].]

[Alternative Two – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge:] In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period but two years or less before the filing of the charge (hereafter “prior date”)]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.]

[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge:] In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in

5.4.3 Back Pay – For Advisory or Stipulated Jury

40 [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also
41 claims that [defendant] committed a similar or related unlawful employment practice with regard
42 to discrimination in compensation on [date outside charge filing period and more than two years
43 before the filing of the charge (hereafter “prior date”)]. If you find that [defendant] intentionally
44 discriminated against [plaintiff] in [describe employment action] on [date within the charge filing
45 period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on
46 [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or
47 related to [defendant’s] [describe employment action] on [date within the charge filing period],
48 then back pay damages, if any, apply from [date two years prior to filing date of charge (hereafter
49 “two-year date”)] until the date of your verdict. In that case, back pay applies from [two-year date]
50 rather than [prior date] because federal law limits a plaintiff’s recovery for back pay to a maximum
51 of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal
52 Employment Opportunity Commission. If you find that [defendant] intentionally discriminated
53 against [plaintiff] in [describe employment action] on [date within the charge filing period], but
54 you do not find that [defendant] committed a similar or related unlawful employment practice with
55 regard to discrimination in compensation on [prior date], then back pay damages, if any, apply
56 from [date within the charge filing period] until the date of your verdict.]

57 You must reduce any award by the amount of the expenses that [plaintiff] would have
58 incurred in making those earnings.

59 If you award back pay, you are instructed to deduct from the back pay figure whatever
60 wages [plaintiff] has obtained from other employment during this period. However, please note
61 that you should not deduct social security benefits, unemployment compensation and pension
62 benefits from an award of back pay.

63 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is
64 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
65 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant]
66 persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially
67 equivalent job opportunities that were reasonably available to [him/ her], you must reduce the
68 award of damages by the amount of the wages that [plaintiff] reasonably would have earned if
69 [he/she] had obtained those opportunities.]

70 **[Add the following instruction if defendant claims “after-acquired evidence” of misconduct**
71 **by the plaintiff:**

72 [Defendant] contends that it would have made the same decision to [describe employment
73 decision] [plaintiff] because of conduct that it discovered after it made the employment decision.
74 Specifically, [defendant] claims that when it became aware of the [describe the after-discovered
75 misconduct], it would have made the decision at that point had it not been made previously.

76 If [defendant] proves by a preponderance of the evidence that it would have made the same
77 decision and would have [describe employment decision] [plaintiff] because of [describe after-
78 discovered evidence], you must limit any award of back pay to the date [defendant] would have

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79 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired
80 information.]

81

82 **Comment**

83 Title VII authorizes a back pay award as a remedy for intentional discrimination. 42 U.S.C.
84 § 2000e-5(g)(1). See *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (the back pay award authorized
85 by Title VII "is a manifestation of Congress' intent to make persons whole for injuries suffered
86 through past discrimination."). Title VII provides a presumption in favor of a back pay award once
87 liability has been found. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

88 *Back Pay Is an Equitable Remedy*

89 An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim
90 for back pay. See 42 U.S.C. §1981a(b)(2) ("Compensatory damages awarded under this section
91 shall not include backpay, interest on backpay, or any other type of relief authorized under section
92 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e5(g)]."); 42 U.S.C. § 2000e-5(g)(1) ("If
93 the court finds that the respondent has intentionally engaged in or is intentionally engaging in an
94 unlawful employment practice charged in the complaint, the court may enjoin the respondent from
95 engaging in such unlawful employment practice, and order such affirmative action as may be
96 appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with
97 or without back pay . . . or any other equitable relief as the court deems appropriate) (emphasis
98 added). See also *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir.
99 2009) (explaining in Title VII case that "back pay and front pay are equitable remedies to be
100 determined by the court"); *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 (3d Cir. 2006)
101 (relying on the statutory language of Title VII, which applies to damages recovery under the ADA,
102 the court holds in an ADA action that "back pay remains an equitable remedy to be awarded within
103 the discretion of the court"); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001)
104 (noting that front pay and back pay are equitable remedies not subject to the Title VII cap on
105 compensatory damages).

106 An instruction on back pay is nonetheless included because the parties or the court may
107 wish to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be
108 seeking compensatory damages and the jury will be sitting anyway. See Fed. R. Civ. P. 39(c).
109 Alternatively, the parties may agree to a jury determination on back pay, in which case this
110 instruction would also be appropriate. In many cases it is commonplace for back pay issues to be
111 submitted to the jury. The court may think it prudent to consult with counsel on whether the issues
112 of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis)
113 or are to be left to the court's determination without reference to the jury. Instruction 5.4.1, on
114 compensatory damages, instructs the jury in such cases to provide separate awards for
115 compensatory damages, back pay, and front pay.

116 *Computation of Back Pay*

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117 The appropriate standard for measuring a back pay award under Title VII is “to take the
118 difference between the actual wages earned and the wages the individual would have earned in the
119 position that, but for discrimination, the individual would have attained.” *Gunby v. Pennsylvania*
120 *Elec. Co.*, 840 F.2d 1108, 1119-20 (3d Cir. 1988). For a discussion of the limits on use of lay
121 witness testimony to establish back pay and front pay calculations, see *Donlin*, 581 F.3d at 81-83.
122 For a discussion of the use of comparators to establish what the plaintiff would have earned as an
123 employee of the defendant, see *id.* at 90.

124 42 U.S.C. § 2000e-5(g)(1) provides that “[b]ack pay liability shall not accrue from a date
125 more than two years prior to the filing of a charge with the Commission.” The court of appeals
126 has explained that “[t]his constitutes a limit on liability, not a statute of limitations, and has been
127 interpreted as a cap on the amount of back pay that may be awarded under Title VII.” *Bereda v.*
128 *Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it
129 was plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set
130 the relevant limit under the circumstances of the case). See *id.* Accordingly, when the facts of the
131 case make Section 2000e-5's cap relevant, the court should instruct the jury on it.

132 Section 2000e-5's current framework for computing a back pay award for Title VII pay
133 discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter*
134 *v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). *Ledbetter* asserted a Title VII pay
135 discrimination claim; specifically, she claimed that she received disparate pay during the charge
136 filing period as a result of intentional discrimination in pay decisions prior to the charge filing
137 period. A closely divided Court held this claim untimely: “A new violation does not occur, and a
138 new charging period does not commence, upon the occurrence of subsequent nondiscriminatory
139 acts that entail adverse effects resulting from the past discrimination.” *Id.* at 628. Finding, inter
140 alia, that the *Ledbetter* decision “significantly impairs statutory protections against discrimination
141 in compensation by unduly restricting the time period in which victims of discrimination can
142 challenge and recover for discriminatory compensation decisions or other practices, contrary to
143 the intent of Congress,” and that the decision “ignores the reality of wage discrimination and is at
144 odds with the robust application of the civil rights laws that Congress intended,” Congress enacted
145 the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA). Pub. L. No. 111-2, § 2, January 29, 2009, 123
146 Stat. 5. The LLFPA added the following provisions to 42 U.S.C. § 2000e-5(e):

147 (3)(A) For purposes of this section, an unlawful employment practice
148 occurs, with respect to discrimination in compensation in violation of this
149 subchapter, when a discriminatory compensation decision or other practice is
150 adopted, when an individual becomes subject to a discriminatory compensation
151 decision or other practice, or when an individual is affected by application of a
152 discriminatory compensation decision or other practice, including each time wages,
153 benefits, or other compensation is paid, resulting in whole or in part from such a
154 decision or other practice.

155 (B) In addition to any relief authorized by section 1981a of this title, liability
156 may accrue and an aggrieved person may obtain relief as provided in subsection
157 (g)(1), including recovery of back pay for up to two years preceding the filing of

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158 the charge, where the unlawful employment practices that have occurred during the
159 charge filing period are similar or related to unlawful employment practices with
160 regard to discrimination in compensation that occurred outside the time for filing a
161 charge.

162 Under this framework, the specific instructions on back pay calculation will vary depending on (a)
163 whether the plaintiff asserts a pay-discrimination claim;²³ (b) if so, whether the plaintiff asserts not
164 only an unlawful act within the charge filing period but also a similar or related unlawful action
165 prior to the charge filing period; and (c) if so, whether the similar or related prior action fell more
166 than two years prior to the filing of the charge.

167 Alternative One in the model instruction is suggested for use when the plaintiff does not
168 seek back pay from periods earlier than the date of the unlawful employment practice that provides
169 the basis for the plaintiff’s claim.²⁴ Alternative Two in the model is suggested for use when the
170 plaintiff alleges pay discrimination and seeks back pay from periods earlier than the date that the
171 unlawful employment practice occurred within the charge filing period but starting two years or
172 less before the filing of the charge; in that situation, the two-year limit need not be mentioned.
173 Alternative Three in the model is suggested for use when the plaintiff alleges pay discrimination
174 and seeks back pay from periods earlier than the date that the unlawful employment practice
175 occurred within the charge filing period based on an act more than two years before the filing of
176 the charge.

177 In *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1983), the court held that
178 unemployment benefits should not be deducted from a Title VII back pay award. That holding is
179 reflected in the instruction.

180 *Mitigation*

181 On the question of mitigation that would reduce an award of back pay, see *Booker v.*
182 *Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir.1995):

183 A successful claimant's duty to mitigate damages is found in Title VII: "Interim
184 earnings or amounts earnable with reasonable diligence by the person or persons
185 discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C.
186 § 2000e-5(g)(1); see *Ellis v. Ringgold Sch. Dist.*, 832 F.2d 27, 29 (3d Cir. 1987). Although
187 the statutory duty to mitigate damages is placed on a Title VII plaintiff, the employer has
188 the burden of proving a failure to mitigate. See *Anastasio v. Schering Corp.*, 838 F.2d 701,

²³ See *Noel v. Boeing Co.*, 622 F.3d 266, 273 (3d Cir. 2010) (holding that the LLFPA “does not apply to failure-to-promote claims”).

²⁴ Ordinarily, the bracketed language in Alternative One concerning the two-year limit will be unnecessary: Because the charge filing periods (180 or 300 days) are shorter than two years, a timely charge will fall less than two years after the unlawful practice. The bracketed language is provided for use in cases where that is not true – for instance, where the plaintiff’s charge was untimely but the defendant waived its timeliness defense.

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189 707-08 (3d Cir. 1988). To meet its burden, an employer must demonstrate that 1)
190 substantially equivalent work was available, and 2) the Title VII claimant did not exercise
191 reasonable diligence to obtain the employment.

192 . . .

193 The reasonableness of a Title VII claimant's diligence should be evaluated in light of the
194 individual characteristics of the claimant and the job market. See *Tubari Ltd., Inc. v.*
195 *NLRB*, 959 F.2d 451, 454 (3d Cir. 1992). Generally, a plaintiff may satisfy the "reasonable
196 diligence" requirement by demonstrating a continuing commitment to be a member of the
197 work force and by remaining ready, willing, and available to accept employment. . . .

198 The duty of a successful Title VII claimant to mitigate damages is not met by using
199 reasonable diligence to obtain any employment. Rather, the claimant must use reasonable
200 diligence to obtain substantially equivalent employment. See *Ford Motor Co. v. EEOC*,
201 458 U.S. 219, 231-32 (1982). Substantially equivalent employment is that employment
202 which affords virtually identical promotional opportunities, compensation, job
203 responsibilities, and status as the position from which the Title VII claimant has been
204 discriminatorily terminated.

205 In *Booker*, the court rejected the defendant's argument that any failure to mitigate damages
206 must result in a forfeiture of all back pay. The court noted that "the plain language of section
207 2000e-5 shows that amounts that could have been earned with reasonable diligence should be used
208 to reduce or decrease a back pay award, not to wholly cut off the right to any back pay. See 42
209 U.S.C. §2000e-5(g)(1)." The court further reasoned that the "no-mitigation-no back pay" argument
210 is inconsistent with the "make whole" purpose underlying Title VII. 64 F.3d at 865.

211 The court of appeals has cited with approval decisions stating that "only unjustified refusals
212 to find or accept other employment are penalized." *Donlin*, 581 F.3d at 89. Thus, for example,
213 "the employee is not required to accept employment which is located an unreasonable distance
214 from her home." *Id.*; see also *id.* at 89 & n.13 (plaintiff's choice – after her dismissal – of lower-
215 paying job did not constitute a failure to mitigate because additional cost of commuting would
216 have offset any additional earnings from alternative higher-paying job).

217 *After-Acquired Evidence of Employee Misconduct*

218 In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court
219 held that if an employer discharges an employee for a discriminatory reason, later-discovered
220 evidence that the employer could have used to discharge the employee for a legitimate reason does
221 not immunize the employer from liability. However, the employer in such a circumstance does not
222 have to offer reinstatement or front pay and only has to provide back pay "from the date of the
223 unlawful discharge to the date the new information was discovered." 513 U.S. at 362. See also
224 *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that "after-
225 acquired evidence may be used to limit the remedies available to a plaintiff where the employer
226 can first establish that the wrongdoing was of such severity that the employee in fact would have

5.4.3 Back Pay – For Advisory or Stipulated Jury

227 been terminated on those grounds alone if the employer had known of it at the time of the
228 discharge.”). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing
229 that it would have made the same employment decision when it became aware of the post-decision
230 evidence of the employee’s misconduct.

5.4.4 Front Pay – For Advisory or Stipulated Jury

5.4.4 Title VII Damages — Front Pay — For Advisory or Stipulated Jury

Model

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. You must make this reduction because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. So you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims “after-acquired evidence” of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future.]

Comment

There is no right to jury trial under Title VII for a claim for front pay. See *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay under Title VII is not an element of compensatory damages). In *Pollard* the Court reasoned that the Civil Rights Act of 1991 expanded the remedies available in Title VII actions to include legal remedies and provided

5.4.4 Front Pay – For Advisory or Stipulated Jury

36 a right to jury trial on those remedies. Therefore, remedies that were cognizable under Title VII
37 before the Civil Rights Act of 1991 must be treated as equitable remedies. Any doubt on the
38 question is answered by the Civil Rights Act itself: 42 U.S.C. § 1981a(a)(1) provides that, in
39 intentional discrimination cases brought under Title VII, "the complaining party may recover
40 compensatory and punitive damages as allowed in subsection (b) of [§ 1981a], in addition to any
41 relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent." See also
42 *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir. 2009) (explaining
43 in Title VII case that "back pay and front pay are equitable remedies to be determined by the
44 court").

45 An instruction on front pay is nonetheless included because the parties or the court may
46 wish to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be
47 seeking compensatory damages and the jury will be sitting anyway. See Fed. R. Civ. P. 39(c).
48 Alternatively, the parties may agree to a jury determination on front pay, in which case this
49 instruction would also be appropriate. Instruction 5.4.1, on compensatory damages, instructs the
50 jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

51 Front pay is considered a remedy that substitutes for reinstatement, and is awarded when
52 reinstatement is not viable under the circumstances. See *Berndt v. Kaiser Aluminum & Chemical*
53 *Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent
54 reinstatement, front pay may be an alternate remedy").

55 "[T]here will often be uncertainty concerning how long the front-pay period should be, and
56 the evidence adduced at trial will rarely point to a single, certain number of weeks, months, or
57 years. More likely, the evidence will support a range of reasonable front-pay periods. Within this
58 range, the district court should decide which award is most appropriate to make the claimant
59 whole." *Donlin*, 581 F.3d at 87.

60 In *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 339 (1988), the Court held that "damages
61 awarded in suits governed by federal law should be reduced to present value." (Citing *St. Louis*
62 *Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985)). The "self-evident" reason is that "a
63 given sum of money in hand is worth more than the like sum of money payable in the future." The
64 Court concluded that a "failure to instruct the jury that present value is the proper measure of a
65 damages award is error." *Id.* Accordingly, the instruction requires the jury to reduce the award of
66 front pay to present value. It should be noted that where damages are determined under state law,
67 a present value instruction may not be required under the law of certain states. See, e.g.,
68 *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset"
69 method, under which no reduction is necessary to determine present value, as the value of future
70 income streams is likely to be offset by inflation).

1 **5.4.5 Title VII Damages — Nominal Damages**

2 **Model**

3 If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and
4 therefore is not entitled to compensatory damages, then you must award nominal damages of \$
5 1.00.

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

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

11
12 **Comment**

13 Nominal damages may be awarded under Title VII. *See, e.g., Bailey v. Runyon*, 220 F.3d
14 879, 882 (8th Cir. 2000) (nominal damages are appropriately awarded where a Title VII violation
15 is proved even though no actual damages are shown). *See generally*, Availability of Nominal
16 Damages in Action Under Title VII of Civil Rights Act of 1964, 143 A.L.R.Fed. 269 (1998). An
17 instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual
18 injury. However, when the plaintiff has presented evidence of actual injury and that evidence is
19 undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages
20 instruction is emphasized to the exclusion of appropriate instructions on compensatory damages.
21 Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new
22 trial, based partly on the ground that because the plaintiff had presented “undisputed proof of actual
23 injury, an instruction on nominal damages was inappropriate.” In upholding the grant of a new
24 trial, the Court of Appeals noted that “nominal damages may only be awarded in the absence of
25 proof of actual injury.” *Id.* at 453. The court observed that the district court had “recognized that
26 he had erroneously instructed the jury on nominal damages and failed to inform it of the availability
27 of compensatory damages for pain and suffering.” *Id.* Accordingly, the court held that “[t]he
28 court's error in failing to instruct as to the availability of damages for such intangible harms,
29 coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing
30 and misleading.” *Id.* at 454.

31 Nominal damages may not exceed one dollar. *See Mayberry v. Robinson*, 427 F.Supp.
32 297, 314 (M.D.Pa.1977) (“It is clear that the rule of law in the Third Circuit is that nominal
33 damages may not exceed \$1.00.”) (citing *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823,
34 830 (3d Cir.1976)).