Instructions For Race Discrimination Claims Under 42 U.S.C § 1981

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6.0 Section 1981 Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Federal Civil Rights statute that prohibits discrimination against [an employee] [an applicant for employment] because of the person's race.

Specifically, [plaintiff] claims that [he/she] was [describe the employment action at issue] by defendant[s] _____ because of [plaintiff's] race.

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

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

Comment

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

42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts. It prohibits racial discrimination against whites as well as nonwhites. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976) (Section 1981 was intended to "proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race"). In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court held that Section 1981 regulated private conduct as well as governmental action.[1]

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court restricted the application of Section 1981 to claims arising out of the formation of the contract. But the Civil Rights Act of 1991 legislatively overruled the Supreme Court's decision in *Patterson*, providing that the clause "to make and enforce contracts" in Section 1981 "includes the making, performance,

[1] Though Section 1981 regulates both public and private action, the Court of Appeals has held that Section 1981 does not provide a *remedy* for a government actor's violation of its terms. *See McGovern v. City of Philadelphia*, 554 F.3d 114, 122 (3d Cir. 2009) ("[N]o implied private right of action exists against state actors under 42 U.S.C. § 1981."). *See generally* Comment 6.1.7 (discussing *McGovern*). A claim against a government actor for a violation of Section 1981 can in appropriate circumstances be brought under 42 U.S.C. § 1983. For discussion of Section 1983 claims, see generally Chapter 4.

modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "[A] plaintiff cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce.'" *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479-80 (2006).

The protections afforded by Section 1981 may in many cases overlap with those of Title VII. But the standards and protections of the two provisions are not identical. For example, a Section 1981 plaintiff does not have to fulfill various prerequisites, including the completion of the EEOC administrative process, before bringing a court action. Also, Title VII applies only to employers with 15 or more employees, whereas Section 1981 imposes no such limitation.[2] Employees cannot be sued under Title VII, but they can be sued under Section 1981. On the other hand, Title VII protects against discrimination on the basis of sex, creed or color as well as race, while Section 1981 prohibits racial discrimination only. Title VII and Section 1981 are subject to different limitations periods as well. See *Cardenas v. Massey*, 269 F.3d 251, 266 (3d Cir. 2001).

For ease of reference, these pattern instructions provide a separate set of instructions specifically applicable to Section 1981 claims. But where both Section 1981 and Title VII are both applicable, and the instructions for both provisions are substantively identical, there is no need to give two sets of instructions. In such cases, these Section 1981 instructions can be used because the claim will have to be one sounding in race discrimination. The Comment will note if a Section 1981 instruction is substantively identical to a Title VII instruction.

With respect to claims for wrongful termination, the First Amendment's religion clauses give rise to an affirmative defense that "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a retaliation claim under the Americans with Disabilities Act, the Court's broad description of the issue suggests that its recognition of a "ministerial exception" may apply equally to wrongful-termination claims brought under other federal anti-discrimination statutes. *See id*. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her…. [T]he ministerial exception bars such a suit."). For further

[2] Indeed, persons other than employers can be sued under Section 1981. *See, e.g.*, *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 220 (3d Cir. 2015) (noting that independent contractors can bring claims under Section 1981). Conversely, the fact that a person is an employer for purposes of Title VII liability does not necessarily establish the existence of a contractual relationship for purposes of Section 1981. *Compare id.* at 209 (holding that jury question existed as to whether the client of a temporary-staffing agency counted as an employer of one of the agency's employees for Title VII purposes), *with id.* at 220 (holding that the temporary-worker plaintiff's Section 1981 claim was appropriately dismissed on summary judgment because "the record does not indicate that [the plaintiff] entered into a contract with [the staffing agency's client] or ever attempted to do so").

discussion of the ministerial exception, see Comment 5.0.

6.1.1 Elements of a Section 1981 Claim— Disparate Treatment —Mixed-Motive

Model

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

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

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

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

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

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

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

[For use where defendant sets forth a "same decision" affirmative defense:[3]

If you find in [plaintiff's] favor with respect to each of the facts that [plaintiff] must prove, you must then decide whether [defendant] has shown that [defendant] would have made the same decision with respect to [plaintiff's] employment even if there had been no racially discriminatory motive. Your verdict must be for [defendant] if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] race had played no role in the employment decision.**]**

[3] 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.

Comment

At the outset, it should be noted that in the context of two other statutory schemes the Supreme Court has rejected the "mixed motive" framework for employment discrimination cases. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court rejected the use of the mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). And in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the Court barred the use of the mixed-motive framework for Title VII retaliation claims. *See Nassar*, 133 S. Ct. at 2533 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."); *id.* at 2534 (rejecting contention that the *Price Waterhouse* mixed-motive test could be used for Title VII retaliation claims).

The Court's analyses in *Gross* and *Nassar* focused closely on the text of the relevant statutes. The statutory language in question – from the ADEA (in *Gross*) and from Title VII's retaliation provision (in *Nassar*) – differs from the language of Section 1981, so it is unclear whether the Court would disapprove the use of a mixed-motive test in Section 1981 cases.

Two cases decided by the Court of Appeals between *Gross* and *Nassar* bear upon this question. In *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009), the parties agreed that *Gross* had no application to the Section 1981 claim in that case, and the panel therefore did not have occasion to decide the issue. *See id.* at 182 n.5 (majority opinion) (noting that it was unnecessary to decide the question but also suggesting that *Gross* was distinguishable because "Section 1981 ... does not include the 'because of' language used in the ADEA" and "use of the *Price Waterhouse* framework makes sense in light of section 1981's text"); *id.* at 185 (Jordan, J., concurring) ("[C]ontrary to dicta in footnote five of the Majority Opinion, the Supreme Court's decision in *Gross* ... may well have an impact on our precedent concerning the analytical approach to be taken in employment discrimination cases under § 1981."). In *Anderson v. Wachovia Mortgage Corp.*, 621 F.3d 261 (3d Cir. 2010), the Court of Appeals stated that "both the direct evidence test introduced by *Price Waterhouse v. Hopkins* ... and the burden-shifting framework introduced by *McDonnell Douglas Corp. v. Green* ... may be used to determine whether an employer has discriminated against a plaintiff in violation of § 1981," *id.* at 267-68; the *Anderson* court ruled, however, that the plaintiffs' evidence did not qualify their case for application of the *Price Waterhouse* test, *see id.* at 269. These instructions were constructed on the assumption that the mixed-motive and pretext frameworks apply in Section 1981 cases.

The distinction between "mixed-motive" cases and "pretext" cases is generally determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to show that the

defendant's activity was motivated at least in part by racial animus, and therefore a "mixed-motive" instruction is given. If the evidence of discrimination is only circumstantial, then defendant can argue that there was no racial animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 6.1.2 should be given. *See generally Fakete v. Aetna, Inc.,* 308 F.3d 335 (3d Cir. 2002) (using "direct evidence" to describe "mixed-motive" cases and noting that pretext cases arise when the plaintiff presents only indirect or circumstantial evidence of discrimination); *Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506 (3d Cir. 2004) (same); *Anderson*, 621 F.3d at 269 (holding the *Price Waterhouse* framework inapplicable to plaintiffs' Section 1981 discriminatory-lending claims because plaintiffs had failed to point to "direct evidence of discrimination").[4]

Same Decision Defense

In *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), the court of appeals rejected a plaintiff's challenge to the jury instructions on her race discrimination claims under Section 1981 and Section 1983. Reasoning that "Title VII and sections 1981 and 1983 all require a showing of 'but for' causation," the court of appeals refused to credit the plaintiff's contention that she "need only show that race was a 'substantial' or 'motivating' factor" in the defendant's decision." *Id.* at 914-15. The *Lewis* court's reasoning, however, did not appear to foreclose the possibility of a burden-shifting framework in Section 1981 cases. Responding to the plaintiff's reliance on *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), the panel majority observed:

> In *Mt. Healthy* ... Justice Rehnquist specifically rejected the proposition that, under § 1983, it was enough to show that protected constitutional activity was a "substantial factor" leading to the challenged action. *Id.* at 285, 97 S.Ct. at 575. *Mt. Healthy* merely found that, after an initial showing that protected activity was a "substantial" or "motivating factor," the burden shifted to defendants to show that the same action would have occurred even in the absence of such activity. *Id.* at 287, 97 S.Ct. at 576. It therefore did not deviate from the requirement of "but for" causation; rather, its only effect was to allocate and specify burdens of proof.

Lewis, 725 F.2d at 916.

Because the court of appeals has indicated that the approach to Section 1981 claims generally follows that taken with respect to Title VII claims, *see, e.g., Schurr v. Resorts Intern. Hotel, Inc.*, 196 F.3d 486, 499 (3d Cir. 1999), it can be argued that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), setting a mixed-motive framework for Title VII discrimination claims, also set in place a framework for Section 1981 claims. But

[4] *Glanzman* and *Fakete* were ADEA cases and their application of the *Price Waterhouse* mixed-motive framework to ADEA cases has, as noted above, been overruled by *Gross*.

complications arise from the fact that the Price Waterhouse framework has been altered – for Title VII discrimination claims – by legislation enacted in 1991. Specifically, Section 107 of the Civil Rights Act of 1991 (42 U.S.C. § 2000e-5(g)(2)(B)) changed the law concerning "mixed-motive" liability on Title VII discrimination claims. Previously, a defendant could escape liability by proving the "same decision" would have been made even without a discriminatory motive. The Civil Rights Act of 1991 provides that a "same decision" defense precludes an award for money damages, but not liability.

The Eleventh Circuit has held that the change wrought by the Civil Rights Act of 1991 does not apply to Section 1981 actions. *Mabra v. United Food & Comm. Workers Union No. 1996,* 176 F.3d 1357, 1358 (11th Cir. 1999). The Court parsed the 1991 Act and concluded that while Congress had amended the mixed-motive provisions in Title VII, it had not amended them in Section 1981:

> Enacted as part of the Civil Rights Act of 1991 ("1991 Act"), the mixed-motive amendments specifically add two provisions to the text of Title VII; they make no amendment or addition to § 1981. See Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)). In contrast, the portion of the 1991 Act amending § 1981 by adding two new subsections to the text of that statute makes no mention of any change in the mixed-motive analysis in § 1981 cases. Id. at 1071-72.

The amendments to Section 1981 that were added by the 1991 Act and cited by the *Mabra* court were:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The Eleventh Circuit pattern instruction accordingly provides that if the jury finds that the same decision would have been made, the jury must find for the defendant. See Eleventh Circuit Pattern Jury Instruction 4.9.

The Third Circuit follows the Eleventh Circuit approach. *See Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009) ("[A]lthough the Civil Rights Act of 1991 amended section 1981 in other ways, it did not make the mixed-motive amendments described above applicable to section 1981 actions. Therefore, *Price Waterhouse*, and not the 1991 amendments to Title VII, controls the instant case, and Craftmatic has a complete defense to liability if it would have made the same

decision without consideration of Brown's race.”).[4] Accordingly, the pattern instruction sets forth the “same decision” defense as one that precludes liability, and thus differentiates it from the “same decision” defense in Title VII discrimination actions.

Animus of Employee Who Was Not the Ultimate Decisionmaker

For a discussion of the Court’s treatment in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), of the animus of an employee who was not the ultimate decisionmaker, see Comment 5.1.7. *Staub* concerned a statute that used the term “motivating factor,” and it is unclear whether the ruling in *Staub* would extend to mixed-motive claims under statutes (such as Section 1981) that do not contain the same explicit statutory reference to discrimination as a “motivating factor.”

[4] In *Nassar*, the Court reasoned that the 1991 amendments’ changes to Title VII supported its conclusion that the *Price Waterhouse* mixed-motive framework is inapplicable to Title VII retaliation claims. *See Nassar*, 133 S. Ct. at 2534. The Committee has not attempted to determine whether that reasoning also forecloses the use of the *Price Waterhouse* framework for Section 1981 claims. *Cf., e.g.*, Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. Rev. 279, 326 (2010) (arguing that the 1991 amendments do not foreclose the use of the Price Waterhouse mixed-motive test for Section 1981 claims).

6.1.2 Elements of a Section 1981 Claim— Disparate Treatment— Pretext Model

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

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

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] race was a determinative factor in [defendant's] decision.

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

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

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

Ultimately, you must decide whether [plaintiff] has proven that [his/her] race was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff 's] race, the [adverse employment action] would not have occurred.

Comment

This instruction is to be used when the plaintiff's proof of discrimination is circumstantial rather than direct. See the Comment to Instruction 6.1.1. The instruction is substantively identical to the pretext instruction given for Title VII cases. See Instruction 5.1.2.[5] Where the plaintiff seeks recovery under both Title VII and Section 1981, this instruction may be given for both causes of action.

Discriminatory intent is required to support a claim under Section 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (holding that Section 1981 requires discriminatory intent and that the burden-shifting framework set by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), applies to Section 1981 claims). *See also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 135 (3d Cir. 1985) (Section 1981 requires a showing of intent to discriminate on the basis of race); *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir.1996) ("[A] facially neutral policy does not violate equal protection solely because of disproportionate effects" because Section 1981 provides a cause of action "for intentional discrimination only.").

If the plaintiff establishes a prima facie case of discrimination,[6] the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506–07 (1992). *See also Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir.1993) (pretext turns on the qualifications and criteria identified by the employer, not the categories the plaintiff considers important). If the defendant meets this burden, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for race discrimination, or in some other way prove it is more likely than not that race motivated the employer. *Texas Dept. of Community Affairs v.*

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[5] Instruction 5.1.2's first element includes a bracketed alternative for failure to renew an employment arrangement as an adverse employment action. That alternative is based on *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008). *Wilkerson* involved a Title VII retaliation claim rather than a Section 1981 claim; thus, it does not provide direct authority for the inclusion of such an alternative in Instruction 6.1.2.

[6] The court of appeals has adapted the prima facie case as follows for the purpose of a Section 1981 discriminatory-lending claim:

> [The] plaintiff must show (1) that he belongs to a protected class, (2) that he applied and was qualified for credit that was available from the defendant, (3) that his application was denied or that its approval was made subject to unreasonable or overly burdensome conditions, and (4) that some additional evidence exists that establishes a causal nexus between the harm suffered and the plaintiff's membership in a protected class, from which a reasonable juror could infer, in light of common experience, that the defendant acted with discriminatory intent.

Anderson v. Wachovia Mortgage Corp., 621 F.3d 261, 275 (3d Cir. 2010).

Burdine, 450 U.S. 248, 253 (1981). The plaintiff retains the ultimate burden of persuading the jury of intentional discrimination. The factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-67 (3d Cir.1996) (en banc).

In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 279 (3d Cir.1998), the court held that the question of whether the defendant has met its intermediate burden of production under the *McDonnell Douglas* test is a "threshold matter to be decided by the judge."

For further commentary on the standards applicable to pretext cases, see the Comment to Instruction 5.1.2.

6.1.3 Elements of a Section 1981 Claim — Harassment —Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] race. [Defendant(s)] [is/are] liable for racial harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

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

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

Third: [Names] conduct was motivated by the fact that [plaintiff] is [race].

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

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

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

[For use with respect to the employer when the alleged harassment is by non-supervisory employees:

However, as to [employer], because [names of alleged harassers] are not supervisors, you must also determine whether [employer] is responsible under the law for those acts. For [employer] to be liable for the acts of harassment of non-supervisor employees, [plaintiff] must prove by a preponderance of the evidence that management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of racial harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

Comment

The standards for a hostile work environment claim are identical under Title VII and Section 1981. *See, e.g., Verdin v. Weeks Marine Inc*., 124 Fed. Appx. 92, 95 (3d Cir. 2005) ("Regarding Verdin's hostile work environment claim, the same standard used under Title VII applies under Section 1981. *See McKenna v. Pac. Rail Serv*., 32 F.3d 820, 826 n. 3 (3d Cir.1994)."); *Ocasio v. Lehigh Valley Family Health Center,* 92 Fed.Appx. 876, 879-80 (3d Cir. 2004) ("As amended by the 1991 Civil Rights Act, § 1981 now encompasses hostile work environment claims, and we apply the same standards as in a similar Title VII claim.").

However, while the standards of liability are identical, there is a major difference in the coverage of the two provisions. Under Title VII, only employers can be liable for discrimination in employment. In contrast, Section 1981 prohibits individuals, including other employees, from racial discrimination against an employee. See *Cardenas v. Massey,* 269 F.3d 251, 268 (3d Cir. 2001) ("Although claims against individual supervisors are not permitted under Title VII, this court has found individual liability under § 1981 when [the defendants] intentionally cause an infringement of rights protected by Section 1981, regardless of whether the [employer] may also be held liable."); *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir. 1986) ("employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable"). Accordingly, the instruction modifies the instruction used for Title VII hostile work environment claims, to specify that individual employees can be liable for acts of racial harassment. See Instruction 5.1.4.

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 6.2.2.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[7] Instruction 6.2.3 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

Liability for Non-Supervisors

Respondeat superior liability for discriminatory harassment by non-supervisory

[7] Instruction 6.1.3 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 6.1.4 should be used instead. *See* Comment 6.1.4 (discussing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 150 (2004).

employees[8] exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). See also *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

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

For a discussion of the definition of "management level personnel" in a Title VII case, see Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir. 2009)).

Severe or Pervasive Activity

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

Subjective and Objective Components

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

Hostile Work Environment That Pre-exists the Plaintiff's Employment

The instruction refers to harassing "conduct" that "was motivated by the fact that [plaintiff]

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[8] In the context of Title VII claims, the Supreme Court has held that "an employee is a 'supervisor' for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim...." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). For further discussion of *Vance*, see Comment 5.1.4.

is a [plaintiff's race]." This language is broad enough to cover the situation where the plaintiff is the first member of the plaintiff's race to enter the work environment, and the working conditions pre-existed the plaintiff's employment. In this situation, the "conduct" is the refusal to change an environment that is hostile to member of the plaintiff's race. The court may wish to modify the instruction so that it refers specifically to the failure to correct a pre-existing environment.

Quid Pro Quo Claims

These Section 1981 instructions do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and Section 1981 applies to racial discrimination only. Where a Section 1981 claim is raised on quid pro quo grounds, the court can use Instruction 5.1.3, with the proviso that it must be modified if the supervisor is also being sued for individual liability.

6.1.4 Elements of a Section 1981 Claim— Harassment — Hostile Work Environment — No Tangible Employment Action

Model

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

[Defendant(s)] [is/are] liable for racial harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

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

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

Third: [names] conduct was motivated by the fact that [plaintiff] is [race].

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

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

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

However, as to [employer], because [names of harassers] are not supervisors, you must also determine whether [employer] is responsible under the law for those acts. For [employer] to be liable for the acts of harassment of non-supervisor employees, plaintiff must prove by a preponderance of the evidence that management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of racial harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

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

With respect to [employer] you must find for [employer] if you find that [employer] has proved both of the following elements by a preponderance of the evidence:

First: That [employer] exercised reasonable care to prevent racial harassment in the workplace, and also exercised reasonable care to promptly correct the harassing behavior that does occur.

Second: That [plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [employer].

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

1. [Employer] had established an explicit policy against harassment in the workplace on the basis of race.

2. That policy was fully communicated to its employees.

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

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

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

The defense of having an effective procedure for handling racial discrimination complaints is available to the employer only. It has nothing to do with the individual liability of employees for acts of racial discrimination.

Comment

As discussed in the Comment to 6.1.3, the Third Circuit as well as other courts have held that the standards for a hostile work environment claim are identical under Title VII and Section 1981. However, as also discussed in that Comment, Section 1981 prohibits individuals, including employees, from engaging in acts of racial discrimination. Therefore this instruction modifies the instruction used for Title VII hostile work environment claims, to specify that individual employees can be liable for acts of racial discrimination in creating a hostile work environment. See Instruction 5.1.5.

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 6.2.2.

This instruction is to be used in racial harassment cases where the plaintiff did not suffer

any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998). *See Swinton v. Potomac Corp*., 270 F.3d 794, 817 (9th Cir. 2001) (holding that the *Faragher/Ellerth* defense applies to Section 1981 actions in the same manner as in Title VII actions).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.[9] Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). *See also* Comment 6.1.3 (discussing *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999), and *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009)).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 138-41 (2004), the Court considered the relationship between constructive discharge brought about by supervisor harassment and the affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that "an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."

[9] In the context of Title VII claims, the Supreme Court has held that "an employee is a 'supervisor' for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim...." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). For further discussion of *Vance*, see Comment 5.1.5.

6.1.5 Elements of a Section 1981 Claim — Disparate Impact

No Instruction

Comment

Section 1981 requires proof of intentional discrimination. Thus, there is no cause of action for disparate impact under section 1981. *See, e.g.*, *Pollard v. Wawa Food Market*, 366 F. Supp.2d 247, 252 (E.D.Pa. 2005) (concluding that disparate impact claims "are not actionable under section 1981" because section 1981 requires proof of discriminatory motive, and disparate impact claims do not).

6.1.6 Elements of a Section 1981 Claim — Retaliation

Model

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

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

First: [Plaintiff] [describe activity protected by Section 1981].

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

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

[**[Alternative One:]** 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,[8] good faith belief that [plaintiff's] [or someone else's] right to be free from racial discrimination was violated.] [**[Alternative Two:]** Concerning the first element, [plaintiff] must prove that [plaintiff's] [or someone else's] right to be free from racial discrimination was violated. And plaintiff must also prove that [he/she] was acting under a reasonable,[9] good faith belief that such a violation had occurred.] [Important: See Comment for a discussion of the choice between these two versions.]

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

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant(s)] action followed shortly after [defendant(s)] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more

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

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

extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

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

Comment

Unlike Title VII, Section 1981 does not contain a specific statutory provision prohibiting retaliation. But the Supreme Court has held that retaliation claims are cognizable under Section 1981 despite the absence of specific statutory language. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). And the Third Circuit has indicated that the legal standards for a retaliation claim under Section 1981 are generally the same as those applicable to a Title VII retaliation claim. *See, e.g., Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001) ("[T]o establish a *prima facie* retaliation claim under Title VII [or] § 1981 … , [a plaintiff] must show: (1) that he engaged in a protected activity; (2) that he suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and the adverse employment action"); *Khair v. Campbell Soup Co.*, 893 F. Supp. 316, 335-36 (D.N.J. 1995) (noting that with respect to retaliation claims, "The Civil Rights Act of 1991 extended § 1981 to the reaches of Title VII.").

Where the plaintiff seeks recovery under both Title VII and Section 1981 for retaliation, it may be possible to use this instruction for both causes of action. It should be noted, however, that a claim under Section 1981 can be brought against an individual as well as the employer. Therefore a plaintiff might bring a retaliation claim not only against the employer but also against the employee who took the allegedly retaliatory action. It would then be appropriate to instruct the jury that while it can impose liability on the individual under Section 1981, it cannot do so under Title VII. Additionally, there is Third Circuit authority for the proposition that Section 1981 retaliation claims require proof of an additional element that does not apply to Title VII retaliation claims. That proposition finds support in *Estate of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 798 (3d Cir. 2010). After noting the Supreme Court's holding in *CBOCS West* "that section 1981 also encompasses 'the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights,'" *Oliva*, 604 F.3d at 798 (quoting *CBOCS*, 128 S.Ct. at 1958), the *Oliva* court stated: "In a retaliation case a plaintiff must demonstrate that there had been an underlying section 1981 violation. *Id.*" *Oliva*, 604 F.3d at 798.[10]

[10] The Court of Appeals, in *Oliva*, spent little time on this aspect of the case:

To the extent that *Oliva* requires proof of an underlying violation, that requirement departs from the approach taken with respect to Title VII retaliation claims and retaliation claims under similar statutory schemes. *See* Instruction 5.1.7 (Title VII retaliation); Instruction 8.1.5 (ADEA retaliation); Instruction 9.1.7 (ADA retaliation); Instruction 10.1.4 (FMLA retaliation); Instruction 11.1.2 (Equal Pay Act retaliation). As of spring 2016, no other circuits had adopted such a requirement for Section 1981 claims. Moreover, such a requirement appears to conflict with the understanding of at least some Justices. In *CBOCS*, Justices Thomas and Scalia, dissenting from the Court's holding that Section 1981 encompasses retaliation claims, objected (inter alia) that a plaintiff "'need not show that the [race] discrimination forming the basis of his complaints actually occurred,'" and that as a result, "the Court 'creates an entirely new cause of action for a secondary rights holder, beyond the claim of the original rights holder ….'" *CBOCS*, 553 U.S. at 464-65 (Thomas, J., joined by Scalia, J., dissenting) (quoting *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 194-95 (2005) (Thomas, J., joined by Rehnquist, C.J., & Scalia & Kennedy, JJ., dissenting)). The *CBOCS* majority did not explicitly respond to this facet of the dissenters' argument.

Oliva's statement that a Section 1981 retaliation claim requires proof of an underlying Section 1981 violation may also be in some degree of tension with a prior opinion by the Court of Appeals. In *Jones v. School District of Philadelphia*, 198 F.3d 403, 414-15 (3d Cir. 1999), the Court of Appeals first held that the district court properly granted summary judgment on the plaintiff's race discrimination claims, and then held that plaintiff's retaliation claims (under Section 1981, Title VII, and the Pennsylvania Human Relations Act) failed due to lack of causation; had the *Jones* court believed that proof of an underlying violation of Section 1981 was required for a Section 1981 retaliation claim, the court's ruling on the discrimination claims would have dictated a ruling for the defendant on the Section 1981 retaliation claim – yet the Court of Appeals instead based its ruling (as to all three types of retaliation claims) solely on finding a lack of evidence of causation.

> The record before us would justify a reasonable factfinder to conclude that Gallagher and Waldron demonstrated to Oliva how to stop, search, and, in some cases, arrest motorists without probable cause by reason of their race. Of course, that practice would violate section 1981's guarantee that all persons are entitled to the same "full and equal benefit" of the law. *See* 42 U.S.C. § 1981(a). When a trooper complains about unjustified racial profiling he engages in protected activity and, accordingly, Oliva had a right to complain about such violations without fear of retaliation.

Estate of Oliva ex rel. McHugh v. New Jersey, 604 F.3d 788, 798 (3d Cir. 2010) (footnotes omitted). The Court of Appeals devoted a much lengthier discussion to questions of causation, holding ultimately that the plaintiff had failed to establish causation as to any of the allegedly retaliatory acts. *See Oliva*, 604 F.3d at 798-802.

Without attempting to resolve the issue, the Committee wishes to ensure that users of these instructions are aware of the language in *Oliva* indicating that Section 1981 retaliation claims require proof of an underlying violation. *See also, e.g., Ellis v. Budget Maintenance, Inc.*, 25 F. Supp. 3d 749 (E.D. Pa. 2014) (holding that *Oliva* requires proof of an underlying violation), *appeal dismissed* (Nov. 25, 2014).

The most common activities protected from retaliation under Section 1981 and Title VII are: 1) opposing unlawful discrimination; 2) making a charge of employment discrimination; 3) testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Section 1981. See the discussion of protected activity in the Comment to Instruction 5.1.7. *See also Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (filing discrimination complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White*, 126 S.Ct. 2405 (2006); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (advocating equal treatment was protected activity); *Aman v. Cort Furniture*, 85 F.3d 1074, 1085 (3d Cir. 1989) (under Title VII's anti-retaliation provision "a plaintiff need not prove the merits of the underlying discrimination complaint, but only that 'he was acting under a good faith, reasonable belief that a violation existed'" (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 468 (3d Cir. 1993) (quoting *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990)), *overruled on other grounds by Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir. 1995))).

In accord with instructions from other circuits, Instruction 6.1.6 directs the jury to determine both the good faith and the reasonableness of the plaintiff's belief that employment discrimination had occurred. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA, and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to harassment or discrimination) under Title VII and other federal discrimination laws; instruction uses phrase "reasonably believed"); *id.* Notes on Use, Note 5 (using phrase "reasonably and in good faith believe"); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation) (discussing reasonableness requirement in the comment but not in the model instruction). In cases where the protected nature of the plaintiff's activity is not in dispute, this portion of the instruction can be modified and the court can simply instruct the jury that specified actions by the plaintiff constituted protected activity. As noted above, there is Third Circuit authority for the proposition that Section 1981 retaliation claims – unlike retaliation claims under a number of other federal statutes – require proof of an underlying violation. Instruction 6.1.6 offers two alternative versions of the instruction on protected activity. The first alternative tracks the approach taken in Instructions 5.1.7, 8.1.5, 9.1.7, 10.1.4, and 11.1.2, and states that the plaintiff need not prove an underlying Section 1981 violation. The second alternative implements *Oliva*'s statement that a Section 1981 retaliation claim requires proof of an underlying Section 1981 violation; this

alternative instructs that the plaintiff must prove both that there was such a violation and that plaintiff was acting under a reasonable, good faith belief that such a violation had occurred. If the court employs the second alternative, it may wish to instruct the jury that if the jury finds an underlying Section 1981 violation, then it should also find that the plaintiff's belief (that such a violation had occurred) was reasonable.

Determinative effect

Instruction 6.1.6 requires the plaintiff to show that the plaintiff's protected activity had a determinative effect on the allegedly retaliatory activity. This is the standard typically used in Section 1981 pretext cases outside the context of retaliation. See Instruction 6.1.2; *see also Estate of Oliva* ex rel. *McHugh v. New Jersey*, 604 F.3d 788, 798 (3d Cir. 2010) (applying the pretext framework to Section 1981 retaliation claims). It appears that Section 1981 cases that do not involve retaliation can alternatively proceed on a mixed-motive theory subject to a same-decision affirmative defense. See Comment 6.1.1. In the absence of precedential opinions from the court of appeals addressing the question, it is difficult to predict whether such a mixed-motive framework would be available for Section 1981 retaliation claims. *Compare Solomon v. Philadelphia Newspapers, Inc.*, 2009 WL 215340, at *2 (3d Cir. 2009) (unpublished opinion) (Section 1981 retaliation claim requires proof that retaliatory animus had a determinative effect), *with Evans v. Port Authority Trans-Hudson Corp.*, 2006 WL 408391, 5 (3d Cir. 2006) (unpublished opinion) ("Among the elements that a plaintiff must establish in order to prevail on a retaliation claim under § 1981 is that the protected activity was a substantial or motivating factor in the alleged retaliatory action." (Internal quotation marks omitted.)). More recently, in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533-34 (2013), the Supreme Court barred the use of the mixed-motive framework for Title VII retaliation claims. The statutory language governing Title VII retaliation claims differs significantly from that governing Section 1981 retaliation claims, *see Nassar*, 133 S. Ct. at 2530 ("Unlike Title IX, § 1981, § 1982, and the federal-sector provisions of the ADEA, Title VII is a detailed statutory scheme."), and the Committee has not attempted to predict whether *Nassar* forecloses the use of a mixed-motive test for Section 1981 retaliation claims.

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court in *White* also held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. Because the standards for retaliation claims under Section 1981 have been equated to those applicable to Title VII, the instruction is written to comply with the standard for actionable retaliation in *White*. For a more complete

discussion of *White*, see the Comment to Instruction 5.1.7.

Retaliation for another's protected activity

The Supreme Court held in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), that Title VII not only bars retaliation against the employee who engaged in the protected activity, it 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 id.* at 868. The *Thompson* Court did not discuss whether its holding extends to retaliation claims under other statutory schemes such as Section 1981. The *Thompson* Court's holding that the third-party retaliation victim can sometimes assert a retaliation claim under Title VII rested on the Court's analysis of the specific statutory language of Title VII. *See Thompson*, 131 S. Ct. at 869 (analyzing language in 42 U.S.C. § 2000e-5(f)(1) stating that "a civil action may be brought ... by the person claiming to be aggrieved"). Because Section 1981 does not contain similar statutory language, it is unclear whether that holding would extend to claims under Section 1981. For further discussion of *Thompson*, see Comment 5.1.7.

6.1.7 Elements of a Section 1981 Claim — Municipal Liability — No Instruction

Comment

Section 1981 applies against employers acting under color of State law. See 42 U.S.C. § 1981(c). Where a government employee brings a claim of racial discrimination in employment, there can be an overlap of Section 1981 and Section 1983 protections. In *Jett v. Dallas Indep. School Dist*., 491 U.S. 701, 731 (1989), the Supreme Court held that the remedial provisions of Section 1983 constituted the exclusive federal remedy for violations of rights enumerated in Section 1981 for actions under color of State law. The Civil Rights Act of 1991 amended Section 1981 after the decision in *Jett*, however; and the circuits have split over whether that Act established an independent private cause of action under Section 1981 against employers acting under color of state law for acts of racial discrimination. *See, e.g., Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996) (Civil Rights Act of 1991 restored a private right of action under Section 1981 for racial discrimination in employment under color of state law); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir.1995) (section 1983 continues as the exclusive federal remedy for rights guaranteed in section 1981 by state actors); *Johnson v. City of Fort Lauderdale*, 114 F.3d 1089 (11th Cir.1997) (following Fourth Circuit view).

The Third Circuit has "join[ed] five of [its] sister circuits in holding that no implied private right of action exists against state actors under 42 U.S.C. § 1981." *McGovern v. City of Philadelphia*, 554 F.3d 114, 122 (3d Cir. 2009).[11] Accordingly, no municipal-liability instruction is provided here. A claim against a government actor for a violation of Section 1981 can in appropriate circumstances be brought under 42 U.S.C. § 1983. For discussion of Section 1983 claims, see generally Chapter 4.

[11] As the quote in the text indicates, the *McGovern* court described its determination on this point as a holding. The *McGovern* court also noted another ground for its resolution of the case: "Even if we were to recognize a cause of action under § 1981, McGovern's claim against the City was appropriately dismissed for an independent reason: he did not allege that the discrimination he suffered was pursuant to an official policy or custom of the City." *McGovern*, 554 F.3d at 121.

6.2.1 Section 1981 Definitions — Race

Model

You must determine whether the discrimination, if any, was based on race, as it is only racial discrimination that is prohibited by this statute under which [plaintiff] seeks relief. The parties dispute whether [plaintiff] is a member of a "race" entitled to the protections of the statute. You are instructed that the statute is intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended to forbid, even if it would not be classified as racial in terms of modern usage or scientific theory.

Comment

42 U.S.C. § 1981 prohibits racial discrimination. In *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609-10 (1987), the Court considered whether a person of Arab descent was entitled to the protections of Section 1981. Defendants argued that the plaintiff was a Caucasian as that term is commonly understood in modern usage. But the Court found that the question of race had to be determined by reference to a different time period, i.e., the 19th Century, when Section 1981 was enacted. "Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law." Id. The Court elaborated on the proper inquiry as follows:

> In the middle years of the 19th century, dictionaries commonly referred to race as a "continued series of descendants from a parent who is called the stock," N. Webster, An American Dictionary of the English Language 666 (New York 1830) (emphasis in original), "the lineage of a family," 2 N. Webster, A Dictionary of the English Language 411 (New Haven 1841), or "descendants of a common ancestor," J. Donald, Chambers' Etymological Dictionary of the English Language 415 (London 1871). . . . It was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races, 8 The Century Dictionary and Cyclopedia 4926 (1911), or to race as involving divisions of mankind based upon different physical characteristics. Webster's Collegiate Dictionary 794 (3d ed. 1916). Even so, modern dictionaries still include among the definitions of race "a family, tribe, people, or nation belonging to the same stock." Webster's Third New International Dictionary 1870 (1971); Webster's Ninth New Collegiate Dictionary 969 (1986).
>
> Encyclopedias of the 19th century also described race in terms of ethnic groups, which is a narrower concept of race than petitioners urge. Encyclopedia Americana in 1858, for example, referred to various races such as Finns, vol. 5, p. 123, gypsies, 6 id., at 123, Basques, 1 id., at 602, and Hebrews, 6 id., at 209. The 1863 version of the New

> American Cyclopaedia divided the Arabs into a number of subsidiary races, vol. 1, p. 739; represented the Hebrews as of the Semitic race, 9 id., at 27, and identified numerous other groups as constituting races, including Swedes, 15 id., at 216, Norwegians, 12 id., at 410, Germans, 8 id., at 200, Greeks, 8 id., at 438, Finns, 7 id., at 513, Italians, 9 id., at 644-645 (referring to mixture of different races), Spanish, 14 id., at 804, Mongolians, 11 id., at 651, Russians, 14 id., at 226, and the like. The Ninth edition of the Encyclopedia Britannica also referred to Arabs, vol. 2, p. 245 (1878), Jews, 13 id., at 685 (1881), and other ethnic groups such as Germans, 10 id., at 473 (1879), Hungarians, 12 id., at 365 (1880), and Greeks, 11 id., at 83 (1880), as separate races.
>
> These dictionary and encyclopedic sources are somewhat diverse, but it is clear that they do not support the claim that for the purposes of § 1981, Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race. We would expect the legislative history of § 1981 . . . to reflect this common understanding, which it surely does. The debates are replete with references to the Scandinavian races, Cong. Globe, 39th Cong., 1st Sess., 499 (1866) (remarks of Sen. Cowan), as well as the Chinese, id., at 523 (remarks of Sen. Davis), Latin, id., at 238 (remarks of Rep. Kasson during debate of home rule for the District of Columbia), Spanish, id., at 251 (remarks of Sen. Davis during debate of District of Columbia suffrage), and Anglo-Saxon races, id., at 542 (remarks of Rep. Dawson). Jews, ibid., Mexicans, see ibid. (remarks of Rep. Dawson), blacks, passim, and Mongolians, id., at 498 (remarks of Sen. Cowan), were similarly categorized. Gypsies were referred to as a race. Ibid. (remarks of Sen. Cowan). Likewise, the Germans. . . .
>
> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. The Court of Appeals was thus quite right in holding that § 1981, "at a minimum," reaches discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens." It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

Note that Section 1981 does not prohibit racial discrimination that is solely on the basis of location of birth (as distinct from ethnic or genetic characteristics). See Bennun v. Rutgers State Univ., 941 F.2d 154, 172 (3d Cir. 1991) ("Section 1981 does not mention national origin"); King v. Township of E. Lampeter, 17 F. Supp. 2d 394, 417 (E.D. Pa. 1998) (holding that disparate treatment on the basis of national origin was not within the scope of Section 1981). While the line between race and national origin may in some cases be vague, it must be remembered that the Court in St. Francis College intended that the term “race” be applied

broadly. Thus, in *Schouten v. CSX Transp., Inc*., 58 F.Supp.2d 614, 617-18 (E.D. Pa. 1999), the court declared that "for purposes of Section 1981, race is to be interpreted broadly and may encompass ancestry or ethnic characteristics."

6.2.2 Section 1981 Definitions — Hostile or Abusive Work Environment Model

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

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

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

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [race]. The harassing conduct may, but need not be racially-based in nature. Rather, its defining characteristic is that the harassment complained of was linked

to [plaintiff's] [race]. The key question is whether [plaintiff], as a [plaintiff's race], was subjected to harsh employment conditions to which [those other than members of the plaintiff's race] were not.

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

Comment

This instruction can be used if the court wishes to provide a more detailed instruction on what constitutes a hostile work environment than those set forth in Instructions 6.1.3 and 6.1.4. This instruction is substantively identical to the definition of hostile work environment in Title VII cases. See Instruction 5.2.1. The standards for a hostile work environment claim are identical under Title VII and Section 1981. *See, e.g., Verdin v. Weeks Marine Inc*., 124 Fed.Appx. 92, 94 (3d Cir. 2005) ("Regarding Verdin's hostile work environment claim, the same standard used under Title VII applies under Section 1981."); *Ocasio v. Lehigh Valley Family Health Center,* 92 Fed.Appx. 876, 879-80 (3d Cir. 2004) ("As amended by the 1991 Civil Rights Act, § 1981 now encompasses hostile work environment claims, and we apply the same standards as in a similar Title VII claim."). Where the plaintiff seeks recovery under both Title VII and Section 1981, this instruction may be given for both causes of action.

For further commentary on the definition of a hostile work environment, see Instruction 5.2.1.

6.2.3 Section 1981 Definitions — Constructive Discharge

Model

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

Comment

The court of appeals has applied its Title VII constructive-discharge precedent in the context of Section 1981 claims. *See Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 412 (3d Cir. 1999) (citing *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984)). Accordingly, this instruction is substantively identical to the constructive discharge instruction for Title VII actions. *See* Instruction 5.2.2.

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into Instruction 6.1.3 (with respect to the instruction's sixth element). Assuming that the Title VII framework concerning employer liability for harassment applies to Section 1981 actions, the employer's ability to assert an *Ellerth / Faragher* affirmative defense in a constructive discharge case will depend on whether the constructive discharge resulted from actions that were sanctioned by the employer. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the Ellerth/ Faragher affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."); *see also* Comment 5.1.5.

6.3.1 Section 1981 Defenses — Bona Fide Occupational Qualification

No Instruction

Comment

There is no BFOQ defense in racial discrimination cases. 42 U.S.C.A. § 2000e-2(e)(1). *See Ferrill v. Parker Group*, 168 F.3d 468, 475 (11th Cir.1999) (no BFOQ defense to race-matched telemarketing or polling).

6.3.2 Section 1981 Defenses — Bona Fide Seniority System

No Instruction

Comment

Title VII provides that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ." 42 U. S. C. § 2000e-2(h). In *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 908-09 (1989), *superseded by statute on other grounds*, Pub. L. No. 102-166, Title I, § 112, 105 Stat. 1079, codified as amended at 42 U.S.C. § 2000e-5(e)(2), the Court stated that the plaintiff has the burden of proving intentional discrimination and held that, as applied to seniority systems, the plaintiff must prove that the seniority system is a means of intentional discrimination. Thus the existence of a bona fide seniority system is not an affirmative defense; rather it is simply an aspect of the plaintiff's burden of proving discrimination. The standards for proving intentional discrimination are the same for Title VII and Section 1981. *See Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108 (3d Cir. 1988). Accordingly, no instruction is included for any affirmative defense for a bona fide seniority system.

6.4.1 Section 1981 Damages — Compensatory Damages — General Instruction

Model

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

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

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

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

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

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

fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had continued in employment with [defendant]. These elements of recovery of wages that [plaintiff] would have received from [defendant] are called “back pay” and “front pay”. [Under the applicable law, the determination of “back pay” and “front pay” is for the court.] [“Back pay” and “front pay” are to be awarded separately under instructions that I will soon give you, and any amounts for “back pay”and “front pay” are to be entered separately on the verdict form.]

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

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

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

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

Comment

Compensatory damages are recoverable under Section 1981. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (individual who establishes a cause of action under

Section 1981 is entitled to both equitable and legal relief, including compensatory, and under certain circumstances, punitive damages).

Compensatory damages may include emotional distress and humiliation as well as out-of-pocket costs. *See, e.g., Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir.1988) ("General compensatory damages are available under §1981, and such damages may include compensation for emotional pain and suffering."). "The plaintiff must present evidence of actual injury, however, before recovering compensatory damages for mental distress." Id.

There is a right to jury trial for compensatory damages under Section 1981. *Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984). However, compensatory damages are to be distinguished from awards of front pay and back pay, which constitute equitable relief. Id. (noting that a claim for back pay is one for equitable relief, but that the plaintiff nonetheless had a right to jury trial on his claims for compensatory damages). Where claims for back pay and front pay are brought with claims for compensatory damages, the trial court may wish to use the jury as an adviser on the amount to be awarded for back pay or front pay; alternatively, the parties may wish to stipulate that the jury's determination of back pay and front pay will be binding. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or is to be left to the court's determination without reference to the jury.

For further comment on compensatory damages, see the Comment to Instruction 5.4.1.

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age

discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

6.4.2 Section 1981 Damages — Punitive Damages

Model

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

For Individual Defendant:

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

For Employer-Defendant:

[However, punitive damages cannot be imposed on an employer where its employees acted contrary to the employer's own good faith efforts to comply with the law by implementing policies and procedures designed to prevent unlawful discrimination in the workplace.

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

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

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

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

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

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which [defendant(s)] should be punished for the wrongful conduct at issue in this case, and the degree to which an award of one sum or another will deter [defendant(s)] or others from committing similar wrongful acts in the future.

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

Comment

In *Johnson v. Railway Express Agency, Inc*., 421 U.S. 454, 460 (1975), the Supreme Court held that a plaintiff in a Section 1981 action is entitled to punitive damages "under certain circumstances." Unlike Title VII, which places caps on punitive damage awards, there is no such

statutory cap for Section 1981 actions.

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

The *Kolstad* decision construed a 1991 amendment to Title VII that made punitive damages available in Title VII actions for the first time. Thus it is not explicitly applicable to Section 1981 actions, as to which punitive damages have always been available. Nonetheless, the analysis in *Kolstad* seems readily applicable to discrimination claims brought under Section 1981. As with Title VII, the plaintiff should do something more than prove race discrimination to justify punitive damages; otherwise every violation of Section 1981 would automatically qualify for a punitive damages award. Similarly, punitive damages in a Section 1981 action should not be found against an employer solely on the basis of respondeat superior.

Accordingly, the pattern instruction incorporates the *Kolstad* standards in the same fashion as the instruction for Title VII actions. *See* Instruction 5.4.2. *See also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1048 (8th Cir.2002) (holding that the *Kolstad* standards apply to an award of punitive damages under Section 1981); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (stating that "any case law construing the punitive damages standard set forth in § 1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim"); *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir.2001) (applying *Kolstad* in a Section 1981 action and affirming a punitive damages award of $1,000,000 against an employer, where highly offensive language was directed at the plaintiff, coupled by the abject failure of the employer to combat the harassment).

However, the instruction differs in one important respect from that to be employed in Title VII cases: it takes account of the possibility that an employee might be subject to punitive damages under Section 1981. In contrast, only employers can be liable under Title VII. Unlike employers, employees would not be entitled to a defense for good faith attempt to comply with federal law.

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

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

6.4.3 Section 1981 Damages — Back Pay— For Advisory or Stipulated Jury

Model

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

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

Back pay damages, if any, apply from the time [plaintiff] was [describe adverse employment action] until the date of your verdict.

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

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

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

[Add the following instruction if the employer claims "after-acquired evidence" of misconduct by the plaintiff:

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

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

Comment

Back pay awards are available against an employer under Section 1981. *See Johnson v. Ry Express Agency, Inc.*, 421 U.S. 454, 459 (1975). A backpay award under Section 1981 is not restricted to the two years specified for backpay recovery under Title VII. Id.

An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim for back pay. *See Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984) (noting that a claim for back pay is one for equitable relief, but that the plaintiff nonetheless had a right to jury trial on his claims for compensatory damages); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (noting that front pay and back pay are equitable remedies).

An instruction on back pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R. Civ. P. 39(c). Alternatively, the parties may stipulate to a jury determination on back pay, in which case this instruction would also be appropriate. Instruction 6.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

For further commentary on back pay, see the Comment to Instruction 5.4.3.

6.4.4 Section 1981 Damages — Front Pay — For Advisory or Stipulated Jury

Model

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

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

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

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

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

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

Comment

An award of front pay is an equitable remedy, as it provides a substitute for reinstatement. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc*., 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy"). Thus there is no right to a jury trial for a claim for front pay.

An instruction on front pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may stipulate to a jury determination on front pay, in which case this instruction would also be appropriate. *See Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823, 832 (3d Cir.1994) (upholding a jury's determination of the amount of front pay due the plaintiff in a Section 1983 employment action). Instruction 6.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

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

6.4.5 Section 1981 Damages — Nominal Damages

Model

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

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

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

Comment

Nominal damages may be awarded under Section 1981. *See Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1259 (6th Cir.1985) (award of nominal damages proper in absence of absent proof of compensable injury) An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." *See id.* at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." Id. Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." Id. at 454.

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