

1 **Instructions Regarding Section 1983 Employment Claims**
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1 **7.0 Section 1983 Employment Discrimination**

2
3 **Comment**

4
5 Chapter 7 discusses employment discrimination claims brought by public employees under
6 Section 1983. Instructions 7.1 and 7.2 and Comment 7.3 address Equal Protection claims
7 concerning discrimination based upon plaintiff’s membership in a protected class.¹ Instruction 7.4
8 addresses First Amendment retaliation claims. Comment 7.5 concerns damages.

9
10 Comparison of Section 1983 employment discrimination and Title VII employment
11 discrimination claims. A Section 1983 employment discrimination claim may be similar in many
12 respects to a Title VII disparate treatment claim. Thus, some of the Title VII instructions may be
13 adapted for use with respect to Section 1983 employment discrimination claims. This comment
14 compares and contrasts the two causes of action; more specific comparisons concerning particular
15 types of claims are drawn in the comments that follow.

16
17 Section 1983 requires action under color of state law. Title VII applies to both private and
18 public employers.² By contrast, Section 1983 applies only to defendants who acted under color of
19 state law.³ *See, e.g., Krynicki v. University of Pittsburgh*, 742 F.2d 94, 103 (3d Cir. 1984) (holding
20 that University of Pittsburgh and Temple University acted under color of state law); *see also supra*
21 *Comment 4.4.*

1 The Supreme Court has held that a public employee’s equal protection claim cannot be based upon a “class-of-one” theory – i.e., a public employee cannot “state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee’s membership in any particular class.” *Engquist v. Oregon Department of Agriculture*, 128 S.Ct. 2146, 2148-2149, 2157 (2008).

2 *See* 42 U.S.C. § 2000e(b) (defining “employer” to include – subject to certain exceptions – “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person”); *id.* § 2000e(a) (defining “person” to include “governments, governmental agencies, [and] political subdivisions”); *id.* § 2000e(h) (defining “industry affecting commerce” to include “any governmental industry, business, or activity”).

3 Some plaintiffs asserting intentional race discrimination may also bring a claim under 42 U.S.C. § 1981, which applies to both private and public employers. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) (noting that “the Court has construed [Section 1981] to forbid all ‘racial’ discrimination in the making of private as well as public contracts”).

7.0 Section 1983 Employment Discrimination

1 An equal protection claim under Section 1983 requires intentional discrimination. Title
2 VII authorizes claims for disparate impact. *See* Comment 5.1.6. The Section 1983 employment
3 discrimination claims addressed in this comment rest on a violation of the Equal Protection
4 Clause,⁴ which requires a showing of intentional discrimination. *See, e.g., Personnel*
5 *Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Robinson v. City of Pittsburgh*, 120
6 F.3d 1286, 1293 (3d Cir. 1997) (“To prevail on her § 1983 equal protection claim, Robinson was
7 required to prove that she was subjected to ‘purposeful discrimination’ because of her sex.”),
8 *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53
9 (2006); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). Thus, disparate
10 impact claims are not actionable under Section 1983. However, evidence of disparate impact may
11 help a Section 1983 plaintiff to show purposeful discrimination.

12
13 Section 1983 claims against individual defendants. In contrast to Title VII, which does
14 not provide a cause of action against individual employees,⁵ Section 1983 may provide a cause of
15 action for unconstitutional employment discrimination by an individual, so long as the plaintiff
16 shows that the defendant acted under color of state law. *See Fitzgerald v. Barnstable School*
17 *Committee*, 129 S. Ct. 788, 796 (2009) (“The Equal Protection Clause reaches only state actors,
18 but § 1983 equal protection claims may be brought against individuals as well as municipalities
19 and certain other state entities.”).

20
21 The plaintiff can make this showing by proving that the defendant was the plaintiff’s
22 supervisor, or by proving that the defendant exercised de facto supervisory authority over the
23 plaintiff.⁶ *See Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 23 (3d Cir. 1997) (“There is simply no
24 plausible justification for distinguishing between abuse of state authority by one who holds the
25 formal title of supervisor, on the one hand, and abuse of state authority by one who bears no such
26 title but whose regular duties nonetheless include a virtually identical supervisory role, on the
27 other.”). To establish a Section 1983 claim against a supervisor based on the activity of a

⁴ Plaintiffs bringing Section 1983 employment claims could also assert violations of other constitutional protections. *See, e.g., Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1306-07 (3d Cir. 1993) (affirming dismissal of procedural due process claim because plaintiff did not have property interest in employment).

⁵ *See supra* Comment 5.1.3.

⁶ For a discussion of caselaw from other circuits concerning the possible liability of non-supervisory co-workers for equal protection violations arising from sexual harassment, see Cheryl L. Anderson, “Nothing Personal:” *Individual Liability under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 92-98 (1998) (arguing that non-supervisory co-workers can violate equal protection by “us[ing] their position with a government employer as an opportunity to engage in severe and pervasive harassment of fellow employees”); *see also infra* Comment 7.3.

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1 subordinate, the plaintiff must also satisfy the requirements for supervisory liability under Section
2 1983. *See supra* Comment 4.6.1.

3
4 Qualified immunity, when applicable, provides a defense to Section 1983 claims against
5 state and local officials sued in their individual capacities.⁷ *See supra* Comment 4.7.2; *see also*
6 Comment 4.7.1 (concerning absolute immunity).

7
8 Section 1983 claims against municipal defendants. A Section 1983 employment
9 discrimination claim against a municipal defendant requires a showing that the violation of
10 plaintiff's constitutional rights resulted from a municipal policy or custom. *See, e.g., Andrews,*
11 895 F.2d at 1480; *see supra* Comments 4.6.3 - 4.6.8. This test differs from Title VII's test for
12 respondeat superior liability. *See supra* Comments 5.1.3 - 5.1.5.

13
14 Section 1983 does not provide a claim against the state. State governments are not
15 "persons" who can be sued under Section 1983. *See Will v. Michigan Department of State Police,*
16 491 U.S. 58, 65 (1989).⁸ By contrast, Title VII authorizes claims against state governments. *See*
17 *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) (rejecting state sovereign immunity defense to Title
18 VII claim on the ground that Congress can validly abrogate state sovereign immunity when
19 legislating pursuant to Section 5 of the Fourteenth Amendment).⁹

20
21 Section 1983 does not require employment discrimination plaintiffs to exhaust
22 administrative remedies. In order to assert a Title VII employment discrimination claim, the
23 plaintiff must first exhaust administrative remedies. *See, e.g., Williams v. Runyon,* 130 F.3d 568,
24 573 (3d Cir. 1997) ("In Title VII actions, failure to exhaust administrative remedies is an

⁷ As noted above, a Section 1983 employment discrimination plaintiff must show intentional discrimination in order to establish an equal protection violation. For discussion of whether a defendant who intended to discriminate can receive the benefit of qualified immunity, *see Andrews*, 895 F.2d at 1480 ("Liciardello and Doyle objectively should have known the applicable legal standard, and thus are not protected by qualified immunity in treating, or allowing their subordinates to treat, female employees differently on the basis of gender in their work environment."); *see also supra* Comment 4.7.2 (discussing analogous questions).

⁸ Similarly, Section 1983 does not provide a cause of action against state officials in their official capacities. *See Will*, 491 U.S. at 71.

⁹ Reasoning that *Fitzpatrick's* holding does not foreclose inquiry into whether Title VII is a valid exercise of Congress's Section 5 enforcement powers, the Seventh Circuit considered that question and concluded that "the 1972 Act validly abrogated the States' Eleventh Amendment immunity with respect to Title VII disparate treatment claims." *Nanda v. Board of Trustees of University of Illinois*, 303 F.3d 817, 831 (7th Cir. 2002).

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1 affirmative defense in the nature of statute of limitations.”). There is no such exhaustion
2 requirement for a Section 1983 employment discrimination claim.¹⁰
3

4 Section 1983 has a more generous limitations period than Title VII. As noted above, a
5 person wishing to sue under Title VII must present the claim to the relevant agency within strict
6 time limits. By contrast, the limitations period for a Section 1983 equal protection claim is
7 borrowed from the relevant state statute of limitations for personal injury suits, *see Wilson v.*
8 *Garcia*, 471 U.S. 261, 280 (1985), and is likely to be considerably longer.
9

10 Section 1983 employment discrimination remedies differ from Title VII remedies.
11 Statutory caps apply to compensatory and punitive damages awards under Title VII. *See supra*
12 *Comments 5.4.1, 5.4.2.* No such caps apply to Section 1983 employment discrimination claims.
13 There may also be differences in the allocation of tasks between judge and jury concerning matters
14 such as front pay and back pay. *Compare Comments 5.4.3 and 5.4.4* (discussing back pay and
15 front pay under Title VII) *with Comment 7.5* (discussing back pay and front pay under Section
16 1983).
17

18 Title VII does not preempt employment discrimination claims under Section 1983. The
19 Court of Appeals has rejected the contention that Title VII preempts Section 1983 remedies for
20 employment discrimination. *See, e.g., Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1079
21 (3d Cir. 1990) (“[T]he comprehensive scheme provided in Title VII does not preempt section 1983,
22 and . . . discrimination claims may be brought under either statute, or both.”).¹¹ Although *Bradley*
23 predated the Civil Rights Act of 1991,¹² district courts within the Third Circuit have continued to

¹⁰ Nor is the Section 1983 employment discrimination plaintiff required to exhaust state administrative remedies before suing. *See Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

¹¹ *Compare Price v. Delaware Dept. of Correction*, 40 F.Supp.2d 544, 558 (D. Del. 1999) (“A claim of retaliation cannot be the sole basis for a § 1983 claim where there is no violation of the Constitution or federal law, other than the retaliation provision of Title VII.”).

As to *Bivens* claims by federal employees, *see Brown v. General Services Administration*, 425 U.S. 820, 835 (1976) (holding that Title VII was the exclusive avenue for employment discrimination claims by federal employees in the competitive service); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (holding that personal staff member of Member of Congress could bring *Bivens* claim for employment discrimination); RICHARD H. FALLON, JR., ET AL., *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 816 n.4 (5th ed. 2003) (asking whether Congress’s extension of Title VII remedies to House and Senate employees should preclude the remedy recognized in *Davis*).

¹² The Civil Rights Act of 1991 amended Title VII in a number of ways; among other changes, it authorized compensatory and punitive damages for intentional discrimination claims and provided a right to a jury trial on such claims, *see P.L. 102-166*, November 21, 1991, § 102,

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1 apply *Bradley* since 1991. *See, e.g., Bair v. City of Atlantic City*, 100 F. Supp. 2d 262, 266 (D.N.J.
2 2000) (“The vast majority of courts, including the Third Circuit, hold that claims under Section
3 1983 and Title VII are not necessarily mutually exclusive; if the right which a plaintiff claims was
4 violated is constitutionally based, and also a right protected by Title VII, a plaintiff may bring
5 either a Title VII claim or a Section 1983 claim, or both.”). *Cf. Fitzgerald*, 129 S. Ct. at 797
6 (holding that Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. § 1681(a),
7 does not displace claims under Section 1983 for equal protection violations arising from gender
8 discrimination in schools). *But see Hildebrand v. Allegheny County*, 757 F.3d 99 (3d Cir. 2014)
9 (holding that the Age Discrimination in Employment Act precludes an action for age
10 discrimination under section 1983).

11
12 The usefulness of special interrogatories. When the plaintiff asserts claims against multiple
13 defendants, or when the plaintiff asserts both Title VII claims and Section 1983 equal protection
14 claims, the court should take care to distinguish the differing liability requirements; in this regard,
15 it may also be useful to employ special interrogatories. *Cf. Gierlinger v. New York State Police*,
16 15 F.3d 32, 34 (2d Cir. 1994) (“Since separate theories of liability with different standards of
17 individual involvement were presented to a jury, it would have been better practice and aided
18 appellate review had the trial court made use of special interrogatories on the liability issues.”).

105 Stat. 1071, 1072-74.

1 **7.1 Section 1983 Employment Discrimination – Mixed Motive**

2
3 **Model**

4
5 The Fourteenth Amendment to the United States Constitution protects persons from being
6 subjected to discrimination, by persons acting under color of state law, on the basis of [describe
7 protected class, e.g., sex]. In this case [plaintiff] is alleging that [defendant] [describe alleged
8 disparate treatment] [plaintiff].

9
10 In order for [plaintiff] to recover on this discrimination claim against [defendant],
11 [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means
12 that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's]
13 decision to [describe action] [plaintiff].

14
15 To prevail on this claim, [plaintiff] must prove both of the following by a preponderance
16 of the evidence:

17
18 First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment
19 arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]]
20 [constructively discharged [plaintiff]]; and

21
22 Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

23
24 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
25 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
26 [plaintiff's] federal civil rights.

27
28 In showing that [plaintiff's] [protected class] was a motivating factor for [defendant's]
29 action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation
30 or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that
31 [plaintiff's protected class] played a motivating part in [defendant's] decision even though other
32 factors may also have motivated [defendant].

33
34 As used in this instruction, [plaintiff's] [protected status] was a “motivating factor” if
35 [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state
36 adverse employment action] [plaintiff].

37
38 **[For use where defendant sets forth a “same decision” affirmative defense:¹³**

¹³ The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

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1 However, if you find that [defendant's] treatment of [plaintiff] was motivated by both
2 discriminatory and lawful reasons, you must consider [defendant's] “same decision” defense. If
3 [defendant] proves by a preponderance of the evidence that [defendant] would have treated
4 [plaintiff] the same even if [plaintiff's] [protected class] had played no role in the employment
5 decision, then your verdict must be for [defendant] on this claim.]
6

7 **Comment**

8
9 In mixed-motive cases where the defendant establishes a “same decision” defense, the
10 defendant is not liable under Section 1983 for a constitutional violation. *See, e.g., Mount Healthy*
11 *City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (in a First Amendment
12 retaliation case, holding that “[t]he constitutional principle at stake is sufficiently vindicated if
13 [the] employee is placed in no worse a position than if he had not engaged in the conduct”). By
14 contrast, the establishment of a “same decision” defense will not shield a defendant from all Title
15 VII liability in a mixed-motive employment discrimination case; rather, it will narrow the remedies
16 awarded.¹⁴ Instruction 7.1's treatment of the “same decision” defense accordingly differs from the
17 treatment of that defense in Instruction 5.1.1 (mixed-motive instruction for Title VII employment
18 discrimination claims).
19

20 In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court
21 rejected the use of a mixed-motive framework for claims under the Age Discrimination in
22 Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the *Price*
23 *Waterhouse* mixed-motive framework applied to ADEA claims; that the ADEA's reference to
24 discrimination “because of” age indicated that but-for causation is the appropriate test; and that
25 this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory
26 mixed-motive framework codified at Section 2000e-5(g)(2)(B), that provision was not drafted so

¹⁴ *See* 42 U.S.C. § 2000e-2(m) (providing that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”); *id.* § 2000e-5(g)(2)(B) (limiting remedies under Section 2000e-2(m), in a case where the defendant “demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor,” to declaratory relief, certain injunctive relief, and certain attorney's fees and costs).

 Although the Court of Appeals has not discussed whether a similar approach should be applied to Section 1983 claims, at least one other Circuit has ruled that it should not. *See Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1084 & n.5 (11th Cir. 1996) (contrasting Title VII claims with Section 1983 claims and noting that “with regard to employment discrimination claims brought pursuant to 42 U.S.C. § 1983, [the ‘same decision’] defense effects a total avoidance of liability”).

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1 as to cover ADEA claims. In *University of Texas Southwestern Medical Center v. Nassar*, 133 S.
2 Ct. 2517 (2013), the Court built upon *Gross* and ruled out the possibility of using a mixed-motive
3 framework for claims under Title VII’s retaliation provision. (*Nassar* is discussed fully in
4 Comment 5.1.7).

5
6 The decisions in *Gross* and *Nassar* do not appear to affect employment discrimination
7 claims founded on the Equal Protection Clause and brought under Section 1983. Although the
8 Court has not explicitly held that juries in Section 1983 Equal Protection employment-
9 discrimination cases should be instructed according to the *Mount Healthy* burden-shifting
10 framework, that framework accords with the Court’s general approach to Equal Protection claims.
11 See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252,
12 271 n.21 (1977) (holding in the context of a bench trial on an Equal Protection claim of race
13 discrimination in zoning that “[p]roof that the decision by the Village was motivated in part by a
14 racially discriminatory purpose would have shifted to the Village the burden of establishing
15 that the same decision would have resulted even had the impermissible purpose not been
16 considered”); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 269 (1989) (O’Connor, J.,
17 concurring in the judgment) (“[W]here a public employee brings a ‘disparate treatment’ claim
18 under 42 U.S.C. § 1983 and the Equal Protection Clause the employee is entitled to the favorable
19 evidentiary framework of *Arlington Heights*.”). Moreover, the *Nassar* Court distinguished
20 decisions under other statutory schemes that assimilated retaliation claims to discrimination
21 claims. For example, the Court’s conclusion in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442,
22 452–53 (2008), that 42 U.S.C. § 1981 forbids retaliation was based on the broad language of
23 Section 1981, which the *Nassar* Court contrasted with the more specific language of Title VII. See
24 *Nassar*, 133 S. Ct. at 2530 (reasoning that decisions interpreting “broad, general bars on
25 discrimination” are inapposite to the interpretation of “a statute as precise, complex, and
26 exhaustive as Title VII”).

27
28 The instruction given above is designed for use with respect to a claim against an individual
29 official who took an adverse employment action against the plaintiff. Such claims will not present
30 a difficult question concerning supervisory liability: If the defendant is proven to have taken the
31 adverse employment action, then clearly the defendant meets the requirements for imposing
32 supervisory liability, on the ground that the defendant had authority over the plaintiff and
33 personally participated in the adverse action. If the plaintiff also asserts a claim against the
34 supervisor of a person who took the adverse employment action, then the instruction should be
35 augmented to present the question of supervisory liability to the jury. See *supra* Instruction 4.6.1.
36 If the plaintiff is asserting a claim against a municipal defendant, the instruction should be
37 augmented to present the jury with the question of municipal liability. See *supra* Instructions 4.6.3
38 - 4.6.8.

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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 employment discrimination claims founded on the Equal Protection Clause and brought under Section 1983; neither the Equal Protection Clause nor Section 1983 contains the same explicit reference to discrimination as a “motivating factor.”

1 **7.2 Section 1983 Employment Discrimination – Pretext**

2
3 **Model**

4
5 The Fourteenth Amendment to the United States Constitution protects persons from being
6 subjected to discrimination, by persons acting under color of state law, on the basis of [describe
7 protected class, e.g., sex]. In this case [plaintiff] is alleging that [defendant] [describe alleged
8 disparate treatment] [plaintiff].
9

10 In order for [plaintiff] to recover on this discrimination claim against [defendant],
11 [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means
12 that [plaintiff] must prove that [his/her] [protected status] was a determinative factor in
13 [defendant’s] decision to [describe action] [plaintiff].
14

15 To prevail on this claim, [plaintiff] must prove both of the following by a preponderance
16 of the evidence:
17

18 First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff’s] employment
19 arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]]
20 [constructively discharged [plaintiff]]; and
21

22 Second: [Plaintiff’s] [protected status] was a determinative factor in [defendant’s] decision.
23
24

25 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
26 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
27 [plaintiff’s] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of
28 intent, such as statements admitting discrimination. Intentional discrimination may be inferred
29 from the existence of other facts.
30

31 [For example, you have been shown statistics in this case. Statistics are one form of
32 evidence that you may consider when deciding whether a defendant intentionally discriminated
33 against a plaintiff. You should evaluate statistical evidence along with all the other evidence
34 received in the case in deciding whether [defendant] intentionally discriminated against
35 [plaintiff]].
36

37 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If
38 you disbelieve [defendant’s] explanations for its conduct, then you may, but need not, find that
39 [plaintiff] has proved intentional discrimination. In determining whether [defendant’s] stated
40 reason for its actions was a pretext, or excuse, for discrimination, you may not question defendant’s
41 managerial judgment. You cannot find intentional discrimination simply because you disagree

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1 with the managerial judgment of [defendant] or believe it is harsh or unreasonable. You are not
2 to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is
3 merely a cover-up for discrimination.
4

5 Ultimately, you must decide whether [plaintiff] has proven that [his/her] [protected status]
6 was a determinative factor in [defendant's employment decision.] “Determinative factor” means
7 that if not for [plaintiff's] [protected status], the [adverse employment action] would not have
8 occurred.
9

10 **Comment**

11
12 The *McDonnell Douglas* framework applies to Section 1983 employment discrimination
13 claims. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (assuming “that
14 the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment
15 claims under 42 U.S.C. § 1983”); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 432 (3d
16 Cir. 1997) (“Our application of the *McDonnell Douglas-Burdine* framework is applicable to
17 Stewart's allegation of racial discrimination under 42 U.S.C. §§ 1981 and 1983.”); *McKenna v.*
18 *Pacific Rail Service*, 32 F.3d 820, 826 n.3 (3d Cir. 1994) (“Although *McDonnell Douglas* itself
19 involved [Title VII claims], the shifting burden analysis with which the case name is now
20 synonymous also has been applied in section 1983 cases”); *Lewis v. University of Pittsburgh*,
21 725 F.2d 910, 915 & n.5 (3d Cir. 1983) .
22

23 Instruction 7.2 largely mirrors Instruction 5.1.2 (Title VII pretext instruction). Instruction
24 7.2's discussion of pretext substitutes the term “managerial judgment” for “business judgment,”
25 because the latter might seem incongruous in an instruction concerning a government entity.
26

27 The instruction given above is designed for use with respect to a claim against an individual
28 official who took an adverse employment action against the plaintiff. Such claims will not present
29 a difficult question concerning supervisory liability: If the defendant is proven to have taken the
30 adverse employment action, then the defendant meets the requirements for imposing supervisory
31 liability, on the ground that the defendant had authority over the plaintiff and personally
32 participated in the adverse action. If the plaintiff also asserts a claim against the supervisor of a
33 person who took the adverse employment action, then the instruction should be augmented to
34 present the question of supervisory liability to the jury. *See supra* Instruction 4.6.1. If the plaintiff
35 is asserting a claim against a municipal defendant, the instruction should be augmented to present
36 the jury with the question of municipal liability. *See supra* Instructions 4.6.3 - 4.6.8.
37
38
39
40

1 **7.3 Section 1983 Employment Discrimination – Harassment**

2
3 *No Instruction*

4
5
6 **Comment**

7
8 The Court of Appeals has made clear that sexual harassment can give rise to an equal
9 protection claim. It has also indicated that the elements of such a claim are not identical to those
10 of a Title VII harassment claim (at least if the claim proceeds on a hostile environment theory). It
11 has not, however, specified precisely the elements of an equal protection claim for hostile
12 environment sexual harassment. This Comment discusses principles that can be drawn from
13 relevant Third Circuit cases.

14
15 Discriminatory intent. As noted above, equal protection claims require a showing of
16 discriminatory intent. Sexual harassment claims can meet that requirement. *See, e.g., Andrews v.*
17 *City of Philadelphia*, 895 F.2d 1469, 1478-79 (3d Cir. 1990) (upholding verdict for plaintiff on
18 sexual harassment claims against city employees, based on conclusion that evidence supported
19 finding of purposeful discrimination); *cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)
20 (stating in Title VII case that “[w]ithout question, when a supervisor sexually harasses a
21 subordinate because of the subordinate's sex, that supervisor ‘discriminate[s]’ on the basis of sex”);
22 *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (en banc) (in assessing retaliation
23 claim, explaining that “[t]he harassment [reported by the plaintiff] was a form of gender
24 discrimination since Fusaro presumably would not have behaved in the same manner toward a
25 supplicant male spouse of a female employee.”).¹⁵

26
27 The requirement of action under color of state law. To establish a Section 1983 claim
28 against an alleged harasser, the plaintiff must show that the defendant acted under color of state
29 law. The Court of Appeals has suggested that this requires the defendant to have some measure
30 of control or authority over the plaintiff. *See Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 24 (3d
31 Cir. 1997) (“Under these circumstances La Penta's role within the departmental structure afforded
32 him sufficient authority over Bonenberger to satisfy the color of law requirement of section

¹⁵ *See also Bohlen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986)
 (“Sexual harassment of female employees by a state employer constitutes sex discrimination for
 purposes of the equal protection clause of the fourteenth amendment.”); Cheryl L. Anderson,
 “Nothing Personal:” Individual Liability under 42 U.S.C. § 1983 for Sexual Harassment as an
 Equal Protection Claim, 19 BERKELEY J. EMP. & LAB. L. 60, 80 (1998) (citing *Meritor Savings*
 Bank as support for argument that sex harassment can satisfy the intentional discrimination
 requirement for equal protection claims).

7.3 Section 1983 Employment Discrimination – Harassment

1 1983.”)¹⁶ However, the Court of Appeals has made clear that this requirement can be met even if
2 the defendant is not the plaintiff’s formal supervisor: “A state employee may, under certain
3 circumstances, wield considerable control over a subordinate whose work he regularly supervises,
4 even if he does not hire, fire, or issue regular evaluations of her work.” *Bonenberger*, 132 F.3d at
5 23.

6
7 Quid pro quo claims where adverse employment action follows. There appear to be
8 commonalities between Title VII and Section 1983 quid pro quo claims where adverse
9 employment action follows. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296-99 &
10 n.14 (3d Cir. 1997) (discussing merits of Title VII quid pro quo claim at length and briefly stating
11 in footnote that “our discussion in this section applies equally to” a Section 1983 quid pro quo
12 claim by the plaintiff), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v.*
13 *White*, 548 U.S. 53 (2006). The instruction for such a Section 1983 claim would probably be quite
14 similar, in most respects, to Instruction 5.1.3.¹⁷

15
16 As noted above, a Section 1983 plaintiff must show that the defendant acted under color
17 of state law. The plaintiff can make that showing by demonstrating that the defendant exercised
18 authority over the plaintiff. If the plaintiff shows that the defendant took an adverse employment
19 action¹⁸ against the plaintiff, that evidence should also establish that the defendant acted under
20 color of state law.¹⁹

¹⁶ The *Bonenberger* court noted that “a state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not act under color of law.” *Bonenberger*, 132 F.3d at 24. It could be argued that when a co-worker who lacks even de facto supervisory authority over the plaintiff takes advantage of the plaintiff’s presence in the workplace in order to subject the plaintiff to harassment, the harassment is connected with the defendant’s execution of official duties in the sense that those duties provide the defendant with an otherwise unavailable opportunity to harass. However, the *Bonenberger* court’s emphasis on whether the defendant had “control” or “authority” over the plaintiff, *see id.* at 23-24, suggests that the Court of Appeals would not necessarily embrace this expansive an interpretation of action under color of state law.

¹⁷ Obviously, the prefatory language would be different, and the instruction would need to take account of the relevant theories of supervisory and municipal liability (*see supra* Instructions 4.6.1, 4.6.3 - 4.6.8).

¹⁸ *Cf.* Instruction 5.1.3 (defining “tangible employment action” for purposes of Title VII harassment claims).

¹⁹ *Cf. Bonenberger*, 132 F.3d at 28 (“Title VII *quid pro quo* sexual harassment generally requires that the harasser have authority to carry out the *quid pro quo* offer or threat.”).

7.3 Section 1983 Employment Discrimination – Harassment

1 Hostile environment claims. The Court of Appeals has indicated that the elements of a
2 hostile work environment claim under Section 1983 are not identical to those of a claim under
3 Title VII.²⁰ In *Andrews v. City of Philadelphia*, the court enumerated five elements “for a sexually
4 hostile work environment [claim] under Title VII: (1) the employees suffered intentional
5 discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the
6 discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally
7 affect a reasonable person of the same sex in that position; and (5) the existence of respondeat
8 superior liability.” *Andrews*, 895 F.2d at 1482. The Section 1983 claim in *Andrews* had been tried
9 to a jury while the Title VII claim had not, and the court was faced with the question of what effect
10 the jury determinations on the Section 1983 claims should have on the court’s resolution of the
11 Title VII claims. The court stated:

12
13 Section 1983 and Title VII claims are complex actions with different elements. Proof of
14 some of these elements, particularly discrimination based upon sex and subjective harm is
15 identical, and thus the court should be bound by the jury's determination on these issues.
16 Other elements, particularly the objective element of the Title VII claim, are uniquely Title
17 VII elements, and although the judge's decision here may be affected by certain findings
18 of the jury, they are ultimately a decision of the court.

19
20 *Andrews*, 895 F.2d at 1483 n.4. *Andrews*, then, made clear that the elements of hostile environment
21 claims under Title VII and under the Equal Protection Clause are not identical. But *Andrews* did
22 not specify the elements of the latter type of claim. Moreover, *Andrews* cannot currently be taken
23 as an authoritative statement of Title VII hostile-environment law,²¹ and it is unclear how an equal

²⁰ Some other courts have noted differences as well. For example, the Seventh Circuit Court of Appeals has stated that on an equal protection claim “the ultimate inquiry is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the conditions of the victim's employment.” *Bohen*, 799 F.2d at 1187; *see also Ascolese v. Southeastern Pennsylvania Transp. Authority*, 902 F. Supp. 533, 547 (E.D. Pa. 1995) (“Because the analysis under section 1983 focuses on intentional discrimination, it differs from that under Title VII, in which the focus is on whether or not the sexual harassment altered the conditions of the victim's employment.”) (citing *Bohen*).

On the other hand, some courts have indicated that the elements of Section 1983 sexual harassment claims mirror those of claims brought under Title VII. *See, e.g., Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003) (applying elements of Title VII claim to Section 1983 harassment claim); *cf. Ascolese*, 902 F. Supp. at 548 (drawing upon Title VII caselaw concerning sexual harassment in order to address Section 1983 sexual harassment claim, while acknowledging that the Title VII precedent “does not apply directly”).

²¹ Thus, for example, instead of applying the *Andrews* “pervasive and regular” test, more recent Third Circuit caselaw recognizes that courts analyzing Title VII hostile-environment claims

7.3 Section 1983 Employment Discrimination – Harassment

1 protection hostile environment claim should be affected, if at all, by later developments in sexual
2 harassment law under Title VII. The paragraphs that follow, however, attempt to draw together
3 existing Third Circuit doctrine on equal protection hostile environment claims.
4

5 As noted above, a defendant who subjects a plaintiff to harassment on the basis of a
6 protected characteristic is guilty of intentional discrimination. If that defendant acted under color
7 of state law, then he or she violated the Equal Protection Clause and may be liable under Section
8 1983.²² In addition, the normal rules of supervisory and municipal liability apply in order to
9 determine whether the harasser’s supervisor and/or municipal employer are liable under Section
10 1983 for the harasser’s equal protection violation.²³
11

12 A subtler question arises if the harasser did not act under color of state law. As noted
13 above, the Court of Appeals has indicated that a co-worker who lacks any control or authority over
14 the plaintiff does not act under color of state law.²⁴ In such a case, the harasser apparently would
15 not have committed an equal protection violation, which would mean that the harasser’s supervisor
16 (or the municipal employer) could be held liable under Section 1983 only if the supervisor
17 defendant (or the municipal defendant) committed an equal protection violation. That raises the
18 question of what level of action or indifference suffices to show intent to discriminate on the part
19 of the supervisor or the municipality.
20

21 A plaintiff can show an equal protection violation by a supervisor who fails properly to
22 address harassment by the plaintiff’s co-workers, if the supervisor acted with intent to discriminate.

should look to whether the conduct in question was “severe or pervasive.” See Comment 5.1.4.

²² See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (holding that jury verdict for plaintiff on Section 1983 equal protection claim against plaintiff’s supervisor could be sustained on the ground that the supervisor “personally participated in” the sexual harassment of the plaintiff).

²³ See, e.g., *Bonenberger*, 132 F.3d at 25 (applying municipal liability doctrine in case involving alleged harassment by officer with de facto supervisory authority); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) (in case involving alleged harassment by plaintiff’s supervisor, applying supervisory liability doctrines to claims against police chief and assistant police chief).

²⁴ See *Zelinski v. Pennsylvania State Police*, 108 Fed. Appx. 700, 703 (3d Cir. 2004) (non-precedential opinion) (holding that defendant did not act under color of law when committing alleged harassment because he had neither formal nor de facto supervisory authority over plaintiff).

By contrast, the conclusion that the alleged harasser did not act under color of state law would not preclude Title VII liability for the employer. See, e.g., *Zelinski*, 108 Fed.Appx. at 704 (holding that district court should not have granted summary judgment dismissing Title VII harassment claim).

7.3 Section 1983 Employment Discrimination – Harassment

1 For example, in *Andrews*, evidence justifying findings that one plaintiff’s supervisor was aware of
2 sexual harassment by the plaintiff’s “male colleagues” and that the supervisor’s failure “to
3 investigate the source of the problem implicitly encouraged squad members to continue in their
4 abuse” of the plaintiff provided an alternate ground for upholding the verdict for the plaintiff on
5 the Section 1983 equal protection claim against her supervisor. *Andrews*, 895 F.2d at 1479.
6 Similarly, the *Andrews* court sustained the jury verdict for the plaintiffs on their Section 1983 equal
7 protection claims against the commanding officer of their division, based on evidence that would
8 support a finding that he “acquiesced in the sexual discrimination against” the plaintiffs. *Id.* The
9 Court of Appeals reasoned:

10
11 There is evidence that Liciardello was aware of the problems concerning foul language and
12 pornographic materials but did nothing to stop them. The language and the pictures were
13 so offensive and regular that they could not have gone unnoticed by the man who was
14 ultimately responsible for the conduct of the Division. He took no measures to investigate
15 the missing case problems which Conn and Andrews, but none of the male officers,
16 suffered. Additionally, he provided an important insight to his personal "boys will be boys
17 attitude" toward sex-based harassment when he cautioned Conn, "You have to expect this
18 working with the guys."

19
20 *Andrews*, 895 F.2d at 1479.

21
22 Thus, it would seem that an equal protection claim under Section 1983 arises if the
23 harassment that gives rise to a hostile environment claim is (1) committed or caused by one with
24 formal or de facto supervisory authority or (2) improperly addressed by one with formal or de facto
25 supervisory authority under circumstances that show that the supervisory individual had an intent
26 to discriminate. Similarly, it would seem that a municipal employer can be liable on the theory
27 that it directly encouraged harassment of the plaintiff, or on the theory that it did not do enough to
28 prevent the harassment.²⁵

29
30
²⁵ See *Bohen*, 799 F.2d at 1187 (“[A] plaintiff can make an ultimate showing of sex
discrimination either by showing that sexual harassment that is attributable to the employer under
§ 1983 amounted to intentional sex discrimination or by showing that the conscious failure of the
employer to protect the plaintiff from the abusive conditions created by fellow employees
amounted to intentional discrimination.”); cf. *Reynolds v. Borough of Avalon*, 799 F. Supp. 442,
447 (D.N.J. 1992) (holding that “a reasonable jury might find that the risk of sexual harassment in
the workplace is so obvious that an employer’s failure to take action to prevent or stop it from
occurring—even in the absence of actual knowledge of its occurrence—constitutes deliberate
indifference, where the employer has also failed to take any steps to encourage the reporting of
such incidents”).

1 **7.4 Employment Discrimination – Retaliation – First Amendment**
2 **Model**
3

4 The First Amendment to the United States Constitution gives persons a right to [freedom
5 of speech] [petition the Government for a redress of grievances].²⁶ Government employees have
6 a limited right to engage in free speech on matters of public importance, and government
7 employers must not retaliate against their employees for exercising this right. In this case
8 [plaintiff] claims that [describe alleged protected activity], and that [defendant] retaliated against
9 [plaintiff] by [describe alleged retaliation].²⁷
10

11 It is my duty to instruct you on whether [plaintiff] engaged in activity that was protected
12 by the First Amendment. In this case, I instruct you that the following activity was protected by
13 the First Amendment:
14

- 15 ● [Describe specifically the plaintiff’s protected activity]. In the rest of this
16 instruction, I will refer to these events as “[plaintiff’s] protected activity.”

²⁶ As noted in the Comment, a First Amendment retaliation claim can be grounded on the
Petition Clause instead of, or in addition to, the Free Speech Clause.

²⁷ The instruction given in the text assumes that there are no material disputes of historical
fact that must be resolved before the court determines whether the plaintiff engaged in protected
activity. Such questions may include, for example, what the plaintiff said, and in what context;
and whether the defendant believed that the plaintiff had made the relevant statement. (Whether
the defendant actually believed a certain set of facts concerning the plaintiff’s protected activity
appears to be a fact question for the jury. However, the reasonableness of the defendant’s belief
seems to be a question of law for the court. *See* Comment.)

If such factual disputes exist, it may be necessary to segment the jury’s deliberations, as
follows:

First, the court could instruct the jury on the factual questions relevant to the protected-
activity determination. E.g.: It is your task to resolve the following disputes of fact: [Describe
factual disputes that must be resolved in order for the court to determine whether plaintiff
engaged in protected activity.] The verdict form includes places where you will write your
answers to these questions.

Once the jury returns its answers concerning those fact questions, the court can determine
the protected-activity question and can instruct the jury on the remaining prongs of the claim (as
shown in the text).

Thus instructed, the jury can resume its deliberations and determine the claim.

7.4 Section 1983 Employment – Retaliation – First Amendment

1
2 In order for [plaintiff] to recover on this claim against [defendant], [plaintiff] must prove
3 both of the following by a preponderance of the evidence:
4

5 First: [Defendant] [failed to promote] [terminated] [constructively discharged]²⁸
6 [plaintiff]; and
7

8 Second: [Plaintiff’s] protected activity was a motivating factor in [defendant's] decision.
9

10 In showing that [plaintiff's] protected activity was a motivating factor for [defendant’s]
11 action, [plaintiff] is not required to prove that [his/her] protected activity was the sole motivation
12 or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her]
13 protected activity played a motivating part in [defendant's] decision even though other factors may
14 also have motivated [defendant]. [Plaintiff] could make this showing in a number of ways. The
15 timing of events can be relevant, for example if [defendant’s] action followed very shortly after
16 [defendant] became aware of [plaintiff’s] protected activity. However, a more extended passage
17 of time does not necessarily rule out a finding that [plaintiff’s] protected activity was a motivating
18 factor. For instance, you may also consider any antagonism shown toward [plaintiff] or any change
19 in demeanor toward [plaintiff].
20

21 **[For use where defendant sets forth a “same decision” affirmative defense:²⁹**
22

23 However, [defendant] argues that [he/she] would have made the same decision to [describe
24 adverse action] whether or not [plaintiff] had engaged in the protected activity. If [defendant]
25 proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same
26 even if [plaintiff's] protected activity had played no role in the employment decision, then your
27 verdict must be for [defendant] on this claim.]
28
29

30 **Comment**

31

32 Structure of test. The Court of Appeals applies “a well-established three-step test to
33 evaluate a public employee's claim of retaliation for engaging in activity protected under the First
34 Amendment.” *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005), *abrogated on other*

²⁸ The examples given in the text do not exhaust the range of possible acts that can give rise to a retaliation claim; but the acts must, in the aggregate, be more than de minimis. *See* Comment.

²⁹ 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.

7.4 Section 1983 Employment – Retaliation – First Amendment

1 grounds by *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).³⁰ “First, the employee must
2 show that the activity is in fact protected.” *Hill*, 411 F.3d at 125 (citing *Pickering v. Bd. of Educ.*,
3 391 U.S. 563 (1968)). “Second, the employee must show that the protected activity ‘was a
4 substantial factor in the alleged retaliatory action.’” *Id.* (quoting *Mt. Healthy City Sch. Dist. Bd. of*
5 *Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). “Third, the employer may defeat the employee's claim
6 by demonstrating that the same adverse action would have taken place in the absence of the
7 protected conduct.” *Id.*

8
9 Comparison with Title VII. A plaintiff may have a valid Title VII retaliation claim but not
10 a valid First Amendment retaliation claim. *See, e.g., Zelinski v. Pennsylvania State Police*, 108
11 Fed. Appx. 700, 707-08 (3d Cir. 2004) (non-precedential opinion) (vacating grant of summary
12 judgment dismissing Title VII retaliation claim, but affirming grant of summary judgment
13 dismissing First Amendment retaliation claim). The disparity arises because the definitions of
14 ‘protected activity’ differ depending on whether the claim is asserted under Title VII or under the
15 First Amendment.

16
17 The Court of Appeals once stated, in the retaliation context, that “[t]he causation required
18 to establish a claim under § 1983 is identical to that required under Title VII.” *Brennan v. Norton*,
19 350 F.3d 399, 420 (3d Cir. 2003), *abrogated on other grounds by Borough of Duryea v. Guarnieri*,
20 131 S. Ct. 2488 (2011). On other occasions, however, it used distinct tests for each. *See Azzaro v.*
21 *County of Allegheny*, 110 F.3d 968, 973-75 (3d Cir. 1997) (en banc). In *University of Texas*
22 *Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the Court rejected the motivating-
23 factor standard for claims under Title VII’s retaliation provision. *Nassar*, however, did not disturb
24 the standard used for First Amendment retaliation claims. As a result, the causation standard for
25 Title VII retaliation claims is “but for” causation, while the causation standard for First
26 Amendment retaliation claims is “motivating factor,” subject to the “same decision” affirmative
27 defense. *See also Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000)
28 (“First Amendment retaliation cases are not governed by Title VII's burden-shifting analysis, but
29 rather by [the] *Mount Healthy* framework. In that case, the Supreme Court made it crystal clear
30 that an employee may not recover in a dual-motives case if the employer shows that it would have
31 taken the same action even absent the protected speech.”).

32
33 First element: protected activity. To be protected under the First Amendment, speech by a
34 government employee “must be on a matter of public concern, and the employee's interest in
35 expressing herself on this matter must not be outweighed by any injury the speech could cause to
36 “the interest of the State, as an employer, in promoting the efficiency of the public services it
37 performs through its employees.”” *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality
38 opinion) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Ed.*

³⁰ *See also Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006).

7.4 Section 1983 Employment – Retaliation – First Amendment

1 of *Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)).³¹

2
3 Moreover, in order to be protected by the First Amendment, the plaintiff’s statement

³¹ It should be noted that the First Amendment right to petition can provide an alternative means for an employee to establish the first element of the retaliation test. “[R]etaliation by a government employer for a public employee’s exercise of the right of access to the courts may implicate the protections of the Petition Clause.” *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011). In *Guarnieri*, the Court held that Petition Clause retaliation claims require the plaintiff to show that the petition was on a matter of public concern, *see id.* at 2491-92, and the Court stated that the same basic framework that governs Speech Clause retaliation claims also governs Petition Clause retaliation claims:

If a public employee petitions as an employee on a matter of purely private concern, the employee’s First Amendment interest must give way, as it does in speech cases.... When a public employee petitions as a citizen on a matter of public concern, the employee’s First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs.

Id. at 2500. A public employee may also have a retaliation claim based on the First Amendment right to freedom of association. *See, e.g., Heffernan v. Paterson*, 777 F.3d 147 (3d Cir.), *cert. granted*, 136 S. Ct. 29 (2015) (following freedom of speech precedents in deciding a freedom of association claim).

7.4 Section 1983 Employment – Retaliation – First Amendment

1 ordinarily³² must not be made pursuant to the plaintiff’s job responsibilities³³ as a government
2 employee: A closely divided Court held in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), that
3 “when public employees make statements pursuant to their official duties, the employees are not
4 speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

³² The Supreme Court has noted “some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006). In *Garcetti*, which involved a deputy district attorney who sued the County of Los Angeles, and also certain of his supervisors in the Los Angeles District Attorney’s Office, the Court found it unnecessary to determine whether its analysis in *Garcetti* “would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id. Cf. Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008) (“If *Garcetti* applied to this case, Borden’s speech would not be protected as it was made pursuant to his official duties as a coach of the EBHS football team and not as an ordinary citizen. However, even if *Garcetti* does not apply in the educational context, Borden’s conduct is not on a matter of public concern for the reasons just described.”).

The Court of Appeals has noted that “[t]he full implications of the Supreme Court’s statements in *Garcetti* regarding ‘speech related to scholarship or teaching’ are not clear.... As a result, federal circuit courts differ over whether (and, if so, when) to apply *Garcetti*’s official-duty test to academic instructors.” *Gorum v. Sessoms*, 561 F.3d 179, 186 n.6 (3d Cir. 2009). The plaintiff in *Gorum* was dismissed from his tenured position as a university professor; the plaintiff, challenging the defendant’s explanation that he was dismissed for doctoring student grades, asserted instead that the dismissal was retaliatory. On appeal the plaintiff pointed to his service as an advisor to a student in connection with a disciplinary proceeding and his involvement in the rescission of an invitation to the university president to speak at a fraternity prayer breakfast. The *Gorum* court held that neither of these incidents involved citizen speech; rather, under *Garcetti*, these activities were undertaken pursuant to the plaintiff’s duties. The court noted: “In determining that Gorum did not speak as a citizen.... we apply the official duty test because Gorum’s actions so clearly were not ‘speech related to scholarship or teaching,’ ... and because we believe that such a determination here does not ‘imperil First Amendment protection of academic freedom in public colleges and universities.” *Gorum*, 561 F.3d at 186 (quoting *Garcetti*, 547 U.S. at 425, and Justice Souter’s dissent in *Garcetti*, *id.* at 438).

³³ The Court has not “articulate[d] a comprehensive framework for defining the scope of an employee’s duties,” but it has stressed that “[t]he proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” *Garcetti*, 126 S. Ct. at 1961-62.

7.4 Section 1983 Employment – Retaliation – First Amendment

1 communications from employer discipline.” *Id.* at 1960.³⁴ The Court of Appeals has since held
2 that when testifying truthfully in court proceedings, a public employee speaks as a citizen even if
3 the court testimony stemmed from the employee’s official duties in an investigation: “the act of
4 offering truthful testimony is the responsibility of every citizen, and the First Amendment
5 protection associated with fulfilling that duty of citizenship is not vitiated by one’s status as a public
6 employee. That an employee’s official responsibilities provided the initial impetus to appear in
7 court is immaterial to his/her independent obligation as a citizen to testify truthfully.” *Reilly v.*
8 *City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008). In *Lane v. Franks*, 134 S. Ct. 2369, 2378
9 (2014), the Supreme Court endorsed *Reilly*, holding “[t]ruthful testimony under oath by a public
10 employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment
11 purposes.” It reserved, however, the question of whether this would also be true for testimony

³⁴ The Court of Appeals has summed up the post- *Garcetti* test thus:

A public employee’s statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have “an adequate justification for treating the employee differently from any other member of the general public” as a result of the statement he made. . . . A public employee does not speak “as a citizen” when he makes a statement “pursuant to [his] official duties.”

Hill v. Borough of Kutztown, 455 F.3d 225, 241-42 (3d Cir. 2006). In *Hill*, the Court distinguished between retaliation based upon the plaintiff borough manager’s reporting of harassing behavior and retaliation based upon the plaintiff’s advocacy of a telecommunications project. Retaliation based on the reporting was not actionable, because reporting harassment formed part of the borough manager’s duties. However, the claim of retaliation based on the plaintiff’s advocacy of the telecommunications project should not have been dismissed at the 12(b)(6) stage, because the complaint could be read to allege that the plaintiff was speaking as a citizen rather than as part of his official duties. *See id.* at 242.

For another decision applying *Garcetti*, see *Foraker v. Chaffinch*, 501 F.3d 231, 241-42 (3d Cir. 2007) (“Reporting problems at the firing range was among the tasks that Price and Warren were paid to perform. Their positions in the DSP required them to report up the chain of command, and their positions as instructors who regularly used and performed light maintenance on the equipment at the range on a daily basis put any environmental concerns there within the scope of their routine operations.”), *abrogated on other grounds by Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011); *see also Foraker*, 501 F.3d at 250 (Pollak, D.J., concurring) (“Less clear is that the statements Price and Warren made to the State Auditor--statements ordered to be made to a high state official beyond the chain of state police command--were part of their employment duties.... But, given the statements Price and Warren had made to their senior officers, it was not clear error for the District Court to find that the directive to Price and Warren to aid the State Auditor’s inquiry broadened the scope of their employment duties.”).

7.4 Section 1983 Employment – Retaliation – First Amendment

1 given as “part of an employee’s ordinary job duties.” *Id.* at n.4.
2

3 The court of appeals has rejected the argument that *Garcetti* “precludes First Amendment
4 protection for speech that ‘owes its existence to a public employee’s professional responsibilities,’”
5 insisting on the more speech protective standard of whether the speech was made “pursuant to
6 official duties.” *Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979, 989 (3d Cir. 2014). It
7 also noted the possibility, but did not decide, that *Lane*—by repeatedly referring to speech that is
8 *ordinarily* within the scope of an employee’s duties—might narrow the range of employee speech
9 left unprotected by *Garcetti*. *Id.* at 990. See also *Flora v. County of Luzerne*, 776 F.3d 169, 180
10 (3d Cir. 2015) (relying on *Dougherty* and holding that a public defender’s “ordinary job duties did
11 not include the public reporting of lingering effects from government corruption or the filing of a
12 class action suit to compel adequate funding for his office. Rather, he represented indigent clients
13 in criminal court and in related proceedings.”). For a discussion (albeit without resolution) of the
14 difficulties involved in applying *Garcetti* to speech by an elected official, see *Werkheiser v.*
15 *Pocono Twp.*, 780 F.3d 172 (3d Cir. 2015).
16

17 Before applying the *Connick / Pickering* test, the court must first determine the content of
18 the relevant speech. In *Waters v. Churchill*, the Supreme Court addressed whether the analysis
19 should proceed based upon “what the government employer thought was said, or . . . what the trier
20 of fact ultimately determines to have been said.” *Waters*, 511 U.S. at 664 (plurality opinion). The
21 plurality rejected the latter test, because it reasoned that such a test “would force the government
22 employer to come to its factual conclusions through procedures that substantially mirror the
23 evidentiary rules used in court.” *Id.* at 676. But the plurality also rejected the notion that “the
24 court must apply the *Connick* test only to the facts as the employer thought them to be, without
25 considering the reasonableness of the employer’s conclusions.” *Id.* at 677. Rather, the plurality
26 concluded that “courts [should] look to the facts as the employer *reasonably* found them to be.”
27 *Id.* at 677 (emphasis in original).³⁵

³⁵ However, it is important to note that if the plaintiff did not in fact engage in constitutionally protected activity, but the employer retaliates in the mistaken belief that the plaintiff did engage in such activity, the plaintiff does not have a First Amendment retaliation claim. “Plaintiffs in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected, and, therefore, only if there actually was *conduct*.” *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 495 (3d Cir. 2002) (emphasis in original) (noting that other courts have also concluded that “there can be no First Amendment claim when there is no speech by the plaintiff”); see also *Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997) (“[I]n the absence of speech, or, at the extreme, intended speech, there has been no constitutional violation cognizable under section 1983 based on an asserted ‘bad motive’ on the part of defendant.”); *Heffernan v. Paterson*, 777 F.3d 147 (3d Cir.), *cert. granted*, 136 S. Ct. 29 (2015) (following *Ambrose* and *Fogarty* in deciding a freedom of association claim). Compare *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3d Cir. 2002) (upholding retaliation claim under the Americans with Disabilities Act on “a perception theory of discrimination,” on the ground that the

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1 The plurality’s approach struck a middle course between the approaches favored by the
2 remaining Justices. Three Justices in *Waters* would have rejected the requirement that the
3 employer’s belief concerning the content of the speech be reasonable. *See Waters*, 511 U.S. at 686
4 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment). The other two Justices,
5 by contrast, would have focused upon what the trier of fact ultimately determined the plaintiff had
6 actually said (regardless of what the employer believed). *See id.* at 696 (Stevens, J., joined by
7 Blackmun, J., dissenting). Thus, as Justice Souter pointed out in his concurrence, the approach
8 taken by the *Waters* plurality appears to be the one that courts should follow, because an approach
9 favoring greater liability than the plurality’s would contravene the approaches taken by a majority
10 of Justices, while an approach favoring narrower liability would also contravene the approaches
11 of a majority (albeit a different majority) of Justices.³⁶

12
13 The *Waters* plurality did not explicitly address the question of who should determine what
14 the employer reasonably believed.³⁷ However, the plurality’s application of its test is indicative:

relevant statutory language “focus[es] on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter”).

³⁶ As Justice Souter explained:

Though Justice O'CONNOR's opinion speaks for just four Members of the Court, the reasonableness test it sets out is clearly the one that lower courts should apply. A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable (assuming the absence of pretext), see ante, at 1890-1891 (plurality opinion); post, at 1893-1896 (SCALIA, J., concurring in judgment); and a majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech Clause, see ante, at 1888-1890 (plurality opinion); post, at 1898-1900 (STEVENS, J., dissenting); see also post, at 1899, n. 4 (STEVENS, J., dissenting) ("Justice O'CONNOR appropriately rejects [Justice SCALIA's] position, at least for those instances in which the employer unreasonably believes an incorrect report concerning speech that was in fact protected and disciplines an employee based upon that misunderstanding. I, of course, agree with Justice O'CONNOR that discipline in such circumstances violates the First Amendment").

Waters, 511 U.S. at 685 (Souter, J., concurring).

³⁷ The plurality framed the question thus: “Should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?” *Waters*, 511 U.S. at 668. As noted in the text, the plurality’s answer is that the court should apply the *Connick* test to the speech as the employer reasonably found it to be; but the

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1 it stated that “if petitioners really did believe Perkins-Graham's and Ballew's story, and fired
2 Churchill because of it, they must win. Their belief, based on the investigation they conducted,
3 would have been entirely reasonable.” *Waters*, 511 U.S. at 679-80. The plurality’s willingness to
4 analyze the reasonableness of the employer’s belief indicates that the plurality viewed the
5 reasonableness of the belief as a question of law for the court. However, where there are material
6 and disputed questions of historical fact – concerning the steps taken to investigate, or concerning
7 whether the employer actually believed the relevant version of the employee’s speech – those
8 questions presumably would be for the trier of fact.³⁸
9

10 Whether the plaintiff’s statements were protected by the First Amendment is a question of
11 law for the court. *See Azzaro v. County of Allegheny*, 110 F.3d 968, 975 (3d Cir. 1997) (en banc)
12 (“We must first inquire whether Azzaro's reports to Fox and Sirabella were protected by the First
13 Amendment. This is a question of law.”).³⁹ Three conditions must be met in order for the plaintiff’s
14 statements to be protected. “First, the employee's [expressive] conduct must address a ‘matter of
15 public concern,’ which is to be determined by the ‘content, form, and context of a given statement,
16 as revealed by the whole record.’” *Azzaro*, 110 F.3d at 976 (quoting *Connick v. Myers*, 461 U.S.
17 138, 147-48 (1983)).⁴⁰ Second, the employee’s expressive conduct must not have been part of the

plurality did not explain who should determine any disputes of material fact as to what the
employer actually believed.

³⁸ The Court of Appeals “ha[s] often noted that the first prong of the First Amendment
retaliation test presents questions of law for the court.” *Hill*, 411 F.3d at 127. *See also Curinga v.*
City of Clairton, 357 F.3d 305, 310 (3d Cir. 2004) (“[T]he first factor is a question of law.”);
Baldassare v. State of N.J., 250 F.3d 188, 195 (3d Cir. 2001) (stating that whether speech is on
matter of public concern and whether *Pickering* balancing test is met “are questions of law for the
court”); *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005) (same); *Green v. Philadelphia*
Housing Authority, 105 F.3d 882, 885 (3d Cir. 1997) (“Determining whether Green's appearance
is protected activity under *Pickering* is an issue of law for the court to decide.”). Such statements,
however, appear to focus on the point that application of the *Connell / Pickering* tests is a matter
of law for the court – not on the question of who should determine any underlying disputes of
historical fact.

³⁹ The underlying historical facts, if disputed, would presumably present a jury question.

⁴⁰ *See, e.g., Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 171 (3d Cir.
2008) (holding that football coach’s bowing his head and kneeling during student prayer “occur in
private settings, namely at an invitation-only dinner and in a closed locker room,” and thus that
the coach’s expressive conduct did not concern “matters of public concern triggering protection of
his right, as a public employee, to freedom of speech”); *Gorum v. Sessoms*, 561 F.3d 179, 187 (3d
Cir. 2009) (professor’s assistance to student in connection with disciplinary proceeding was not
speech on matter of public concern but, rather, “related to the personal grievance of one student”).

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1 employee’s job duties. *See supra* (discussing *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). Third,
2 “the value of that expression must outweigh ‘the government’s interest in the effective and efficient
3 fulfillment of its responsibilities to the public.’” *Azzaro*, 110 F.3d at 976 (quoting *Connick*, 461
4 U.S. at 150).

5
6 A report of sexual harassment by a government official can constitute speech on a matter
7 of public concern. In *Azzaro*, the plaintiff (a county employee) reported to her supervisor and to
8 the County Director of Administration “an incident of sexual harassment by an assistant to the
9 [County] Commissioner which occurred in the Commissioner’s office during the course of an
10 appointment *Azzaro* had made, in her capacity as the spouse of an employee, to plead for her
11 husband’s job.” *Azzaro*, 110 F.3d at 978. Reasoning that the plaintiff’s reports “brought to light
12 actual wrongdoing on the part of one exercising public authority that would be relevant to the
13 electorate’s evaluation of the performance of the office of an elected official,” the en banc majority
14 held that the reports “should be regarded as a matter of public concern unless something in their
15 form or context deprived them of their value to the process of self-governance.” *Id.* at 978-79.
16 Under *Azzaro*, some reports of sexual harassment by a government employee clearly will
17 constitute speech on matters of public concern; but it may not be the case that all such speech
18 meets that test. *See id.* at 978 n.4 (suggesting that in “a situation in which a public employee has
19 filed a complaint about an isolated incident of what he or she perceived to be inappropriate conduct
20 on the part of a non-supervisory co-worker,” the report “would presumably be less important to an
21 evaluation of the performance of the public office involved than the situation now before us”); *see*
22 *id.* at 981 (Becker, J., joined by Scirica, Roth & Alito, JJ., concurring) (“It seems to me that there
23 will be many complaints of sexual harassment, about more aggravated conduct than that described
24 in footnote 4 of the opinion, which will not qualify as matters of public concern.”); *see also*
25 *Montone v. City of Jersey City*, 709 F.3d 181, 194-95 (3d Cir. 2013) (holding that plaintiff’s
26 “speech involved a matter of public concern,” even though “no elected figure [wa]s involved,”

A statement that, taken alone, concerns a matter of public concern might not receive First Amendment protection if the context of the statement leads the court to conclude that the government’s interest outweighs the public value of the statement. For example, in *Miller v. Clinton County*, 544 F.3d 542 (3d Cir. 2008), a state court judge fired a probation officer after the officer wrote a letter to the judge criticizing the way the probation office was run. That criticism clearly addressed a matter of public concern. But the court, focusing on the fact that the bulk of the plaintiff’s letter asserted “private grievances” concerning the plaintiff’s supervisor and working conditions, held that “[t]he personal context in which Miller’s letter arose, in addition to the tangential connection between the issues of public concern and the overall thrust of the letter so minimizes any public concern in the subject of her expression as to tip the First Amendment balance in favor of her employer.” *Miller*, 544 F.3d at 550-51. The court noted, however, that it did not “suggest that speech which is otherwise public in nature can be sanctioned merely because it arises in the context of personal dissatisfaction or a personal grievance.... It is not the grinding of the proverbial axe that removes the protection of the First Amendment, it is the private nature of the employee’s speech.” *Id.* at 551 n.6.

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1 where there were “at least three separate instances of alleged sexual harassment . . . and the
2 inappropriate conduct was not directed solely at Montone”).
3

4 If the court concludes that the plaintiff’s speech addressed a matter of public concern and
5 that the plaintiff was not speaking pursuant to his or her job responsibilities, then the court must
6 proceed to balance “the public employee's interest in speaking about a matter of public concern
7 and the value to the community of her being free to speak on such matters”⁴¹ against “the
8 government's interest as an employer in promoting the efficiency of the services it performs
9 through its employees.”⁴² *Id.* at 980 (citing, inter alia, *Pickering v. Board of Educ.*, 391 U.S. 563

⁴¹ See also *Baldassare v. State of N.J.*, 250 F.3d 188, 198 (3d Cir. 2001) (“[T]he public's interest in exposing potential wrongdoing by public employees is especially powerful.”).

⁴² In a 1994 decision, the Court of Appeals indicated that such balancing should occur only if the employer concedes that the speech played a factor in the dismissal:

[A] public employer may dismiss an employee for speech addressing a matter of public concern if the state's interest, as an employer, in promoting the efficiency of its operations outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. This balancing test comes into play only if the public employer concedes that it dismissed an employee because of the employee's protected speech but contends that it was justified in doing so. Rutgers denies that it dismissed San Filippo for his protected activities; accordingly, the balancing test has no application in the case at bar.

San Filippo v. Bongiovanni, 30 F.3d 424, 434 n.11 (3d Cir. 1994), *abrogated on other grounds by Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).

However, in at least one subsequent case the Court of Appeals performed the balancing analysis even though the defendant disputed whether the speech was a motivating factor. See *Azzaro*, 110 F.3d at 980 (performing balancing analysis); *id.* at 981 (finding “a material dispute of fact as to whether [plaintiff’s] reports were a motivating factor in the discharge decision”).

Another permutation arises if the plaintiff-employee claims that the adverse action was motivated by a particular speech incident, and the defendant-employer responds that the adverse action was instead motivated by another speech incident. For example, in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), a hearing officer had found that the plaintiff police officer had violated departmental rules by, inter alia, making inappropriate comments about women in the presence of subordinate officers. See *id.* at 221. The police officer sued, asserting that the discipline to which he was subjected (based on this finding) was harsher than it would otherwise have been because of his participation (including trial testimony) in a prior police investigation. See *id.* at 219-20. “Where a plaintiff claims that the stated grounds for his/her discipline were a pretext for the discipline imposed, the court does not apply the *Pickering* balancing test solely to

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1 (1968)); *see also* *Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir. 2003) (explaining that the court
2 should “consider the nature of the relationship between the employee and the employer as well as
3 any disruption the employee's speech may cause, including the impact of the speech on the
4 employer's ability to maintain discipline and relationships in the work place”), *abrogated on other*
5 *grounds by Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).⁴³ In applying the *Pickering*
6 balancing test, the district court should be aware that “[s]ome disruption is almost certainly
7 inevitable,” and that it “is against [Third Circuit] precedent to find against an employee where the
8 disruption ‘was primarily the result, not of the plaintiff's exercise of speech, but of his superiors’
9 attempts to suppress it.” *Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979, 992 (3d Cir.
10 2014) (quoting *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983)).
11

12 Second element: substantial factor.⁴⁴ The plaintiff must show a “causal link” between the
13 protected speech and the adverse employment action. *See, e.g., Thomas v. Town of Hammonton*,
14 351 F.3d 108, 114 (3d Cir. 2003); *see also* *Azzaro*, 110 F.3d at 981 (reversing summary judgment
15 dismissing First Amendment retaliation claim, because there existed “a material dispute of fact as
16 to whether [plaintiff's] reports were a motivating factor in the discharge decision”).
17

18 The adverse action must be more than *de minimis*. *See McKee v. Hart*, 436 F.3d 165,170
19 (3d Cir. 2006) (“[N]ot every critical comment—or series of comments—made by an employer to an
20 employee provides a basis for a colorable allegation that the employee has been deprived of his or
21 her constitutional rights.”). However, “a plaintiff may be able to establish liability under § 1983
22 based upon a continuing course of conduct even though some or all of the conduct complained of
23 would be *de minimis* by itself or if viewed in isolation.” *Brennan v. Norton*, 350 F.3d 399, 419
24 n.16 (3d Cir. 2003), *abrogated on other grounds by Borough of Duryea v. Guarnieri*, 131 S. Ct.
25 2488 (2011); *see also* *Suppan v. Dadonna*, 203 F.3d 228, 234 (3d Cir. 2000) (“[A] trier of fact
26 could determine that a violation of the First Amendment occurred at the time of the rankings on
27 the promotion lists and that some relief is appropriate even if plaintiffs cannot prove a causal
28 connection between the rankings and the failure to promote.”). In cases where the parties dispute
29 whether an actionable adverse action occurred, the factfinder must determine whether “the alleged
30 retaliatory conduct was sufficient ‘to deter a person of ordinary firmness’ from exercising his First
31 Amendment rights.” *Suppan*, 203 F.3d at 235 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir.

the speech that defendants claim motivated the disciplinary action ... such as Reilly's violation of department regulations here. Rather, the court considers all of the speech that the plaintiff alleges is protected ... such as Reilly's testimony at the Munoz trial.” *Reilly*, 532 F.3d at 232.

⁴³ In *Azzaro*, noting the “substantial public interest in Azzaro’s revelations” and the “negligible” nature of any countervailing government interest, the Court of Appeals held that “the *Pickering* balance falls in Azzaro's favor.” *Azzaro*, 110 F.3d at 980.

⁴⁴ The “substantial factor” and “same decision” inquiries “present[] question[s] of fact for the jury.” *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005).

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1 1982)); *see also O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006); *Thomas v.*
2 *Independence Tp.*, 463 F.3d 285, 296 (3d Cir. 2006); *Werkheiser v. Pocono Twp.*, 780 F.3d 172
3 (3d Cir. 2015) (discussing but not resolving what kinds of political retaliation by elected officials
4 against their peers violate the First Amendment).⁴⁵
5

6 “[F]or protected conduct to be a substantial or motivating factor in a decision, the
7 decisionmakers must be aware of the protected conduct.” *Ambrose v. Township of Robinson, Pa.*,
8 303 F.3d 488, 493 (3d Cir. 2002). If the plaintiff shows that the decisionmaker was aware of the
9 protected conduct, then the plaintiff may use the temporal proximity between that knowledge and
10 the adverse employment action to argue causation. “[A] suggestive temporal proximity between
11 the protected activity and the alleged retaliatory action can be probative of causation,” *Thomas*,
12 351 F.3d at 114, but “[e]ven if timing alone could ever be sufficient to establish a causal link, . . .
13 the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive
14 before a causal link will be inferred.” *Estate of Smith v. Marasco*, 318 F.3d 497, 512 (3d Cir.
15 2003) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)).⁴⁶
16

17 In *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007) – a case involving retaliation
18 claims under both the First Amendment and the Rehabilitation Act – the Court of Appeals noted
19 three options for proving causation:
20

21 To establish the requisite causal connection a plaintiff usually must prove either (1)
22 an unusually suggestive temporal proximity between the protected activity and the
23 allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to
24 establish a causal link.... In the absence of that proof the plaintiff must show [(3)]
25 that from the "evidence gleaned from the record as a whole" the trier of the fact
26 should infer causation.
27

⁴⁵ In *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007), the Court of Appeals listed the ordinary-firmness standard as an element of the claim, stating that the plaintiff must show “(2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights.” *See also Brightwell v. Lehman*, 637 F.3d 187, 194 (3d Cir. 2011) (holding that the alleged retaliation – a misconduct report (charging the plaintiff inmate with lying about an underlying incident) that was later dismissed – “does not rise to the level of ‘adverse action’” because it did not meet the ordinary-firmness standard).

⁴⁶ Compare *San Filippo*, 30 F.3d at 444 (“Although a dismissal that occurs years after protected activity might not ordinarily support an inference of retaliation, where, as here, a plaintiff engages in subsequent protected activity and the plaintiff is dismissed shortly after the final episode of such protected activity, a fact-finder may reasonably infer that it was the aggregate of the protected activities that led to retaliatory dismissal.”).

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1 *Id.* at 267.⁴⁷
2

3 Affirmative defense: same decision. As noted above, the second element requires the
4 plaintiff to demonstrate that “the protected activity was a substantial or motivating factor for the
5 adverse action.” *Fultz v. Dunn*, 165 F.3d 215, 218 (3d Cir. 1998). If the plaintiff makes this
6 showing, “the defendant can escape liability by showing that . . . he would have taken the same
7 action absent the protected activity.” *Fultz*, 165 F.3d at 218.⁴⁸ The defendant has the burden of
8 proof on this third prong of the test. *See Hill*, 411 F.3d at 126 n.11 (“[T]he defendant bears the
9 burdens of proof and persuasion on the third prong.”)⁴⁹ In other words, “the defendant[], in
10 proving ‘same decision,’ must prove that the protected conduct was *not* the but-for cause.” *Suppan*
11 *v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000).
12
13

⁴⁷ The *Lauren W.* court noted that “[a] court must be diligent in enforcing these causation requirements because otherwise a public actor cognizant of the possibility that litigation might be filed against him, particularly in his individual capacity, could be chilled from taking action that he deemed appropriate and, in fact, was appropriate.” *Lauren W.*, 480 F.3d at 267.

⁴⁸ “[S]ubstantial factor” does not mean ‘dominant’ or ‘primary’ factor. . . . Thus, even if a plaintiff shows that activity protected by the First Amendment was a ‘substantial factor’ in her termination, the defendant may show that some other factor unrelated to the protected activity was the but-for cause of the termination.” *Hill*, 411 F.3d at 126 n.11.

⁴⁹ Thus, the Court of Appeals has termed the same-decision assertion an “affirmative defense.” *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000).

1 **7.5** **Section 1983 – Employment – Damages**

2

3 **Comment**

4

5 Instruction 4.8.1 provides a general instruction concerning compensatory damages in

6 Section 1983 cases;⁵⁰ though the Comment to Instruction 4.8.1 sets forth principles that govern

7 employment claims under Section 1983, that instruction will require tailoring to the particularities

8 of employment litigation. One set of questions that may arise relates to back pay and front pay. It

9 is clear that a Section 1983 employment discrimination plaintiff can recover back pay and front

10 pay in appropriate cases. What is less clear is the division of labor between judge and jury on

11 these questions.⁵¹

12

13 Framework for analysis. The Supreme Court’s decision in *City of Monterey v. Del Monte*

14 *Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), provides an overarching framework for analyzing

15 the right to a jury trial in Section 1983 cases.⁵² In *Del Monte Dunes*, the Court held that “a § 1983

16 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment.” *Del*

17 *Monte Dunes*, 526 U.S. at 709.⁵³ Specifically, the Court held that there is a Seventh Amendment

18 right⁵⁴ to a jury determination of the question of liability in a Section 1983 suit seeking damages

⁵⁰ See also Instructions 4.8.2 (nominal damages) and 4.8.3 (punitive damages).

⁵¹ For discussion of similar issues with respect to Title VII claims, see the Comments to Instructions 5.4.3 and 5.4.4.

⁵² Back pay and front pay remedies for Title VII claims are governed by other statutes and precedents. See Comment 5.4.3 (discussing Title VII back pay awards in light of 42 U.S.C. §1981(b)(2), 42 U.S.C. § 2000e-5(g)(1), and *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001)); Comment 5.4.4 (discussing Title VII front pay awards in light of 42 U.S.C. § 1981a(a)(1) and *Pollard*).

⁵³ Justice Scalia would have held that all Section 1983 claims for damages carry a Seventh Amendment jury right. See *id.* at 723 (Scalia, J., concurring in part and in the judgment). However, both the plurality and the dissent were willing to scrutinize specific types of constitutional damages claims brought under Section 1983 to discern whether the particular type of claim triggered a jury right. See *id.* at 711-12 (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Thomas, JJ.) (noting doubts as to whether claim-specific analysis was appropriate but engaging in that analysis anyway); *id.* at 751-52 (Souter, J., joined by O’Connor, Ginsburg and Breyer, JJ., concurring in part and dissenting in part) (rejecting Justice Scalia’s proposed approach). None of the Justices, though, questioned the notion that a Section 1983 damages claim that was tort-like in nature and that sought legal relief should carry a right to a jury trial. See, e.g., *id.* at 709 (majority opinion); *id.* at 751 (concurrence/dissent).

⁵⁴ See U.S. Const. amend. VII (“In Suits at common law, where the value in controversy

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1 reflecting just compensation for a regulatory taking. *See id.* at 721. As the Court explained,
2 “[e]ven when viewed as a simple suit for just compensation, . . . Del Monte Dunes' action sought
3 essentially legal relief.” *Id.* at 710. The Court relied on “the ‘general rule’ that monetary relief is
4 legal,” *id.* (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998)
5 (quoting *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990))),
6 and on the view that “[j]ust compensation . . . differs from equitable restitution and other monetary
7 remedies available in equity, for in determining just compensation, ‘the question is what has the
8 owner lost, not what has the taker gained,’” *id.* (quoting *Boston Chamber of Commerce v. Boston*,
9 217 U.S. 189, 195 (1910)).

10
11 Once a court determines that a Section 1983 suit seeks legal relief – thus triggering the
12 right to a jury – the court must next ascertain “whether the particular issues” in question are “proper
13 for determination by the jury.” *Del Monte Dunes*, 526 U.S. at 718 (citing *Markman v. Westview*
14 *Instruments, Inc.*, 517 U.S. 370 (1996)).⁵⁵ The court should first “look to history to determine
15 whether the particular issues, or analogous ones, were decided by judge or by jury in suits at
16 common law at the time the Seventh Amendment was adopted.” *Del Monte Dunes*, 526 U.S. at
17 718. “Where history does not provide a clear answer,” the court should “look to precedent and
18 functional considerations.” *Id.*

19
20 Back pay. If back pay is seen as a form of compensatory damages (measured in terms of
21 lost wages), then it could be argued that there should be a right to a jury on Section 1983 claims
22 for back pay. *See* DAN B. DOBBS, 2 LAW OF REMEDIES § 6.10(5), at 233 (2d ed. 1993). This view,
23 however, is far from universally accepted, *see id.* at 231 (“The courts of appeal have taken at least
24 five different positions about the right of jury trial in back pay claims under §§ 1981 and 1983.”),
25 and the Third Circuit caselaw is inconclusive.

26
27 The Court of Appeals has suggested that an award of back pay under Section 1983
28 ordinarily is an equitable remedy concerning which there is no right to a jury. *See Laskaris v.*
29 *Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984) (“[A]lthough the request for back pay under section
30 1983 seeks only equitable relief . . . , a claim for compensatory and punitive damages is a legal
31 claim entitling the plaintiff to a jury trial.”).⁵⁶ Thus, for example, in *Savarese v. Agriss*, the Court

shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

⁵⁵ As noted above, the relevant issue in *Del Monte Dunes* was one of liability. When the question at hand concerns which decisionmaker (judge or jury) should decide a remedies question, the analysis seems likely to turn principally on whether the remedy is equitable or legal in nature.

⁵⁶ The *Laskaris* court cited *Gurmankin v. Costanzo*, 626 F.2d 1115, 1122-23 (3d Cir. 1980) as support for this proposition. *Gurmankin*, however, did not concern the right to a jury trial. In *Gurmankin*, the Court of Appeals held that the trial judge’s denial of back pay (after a bench trial) constituted an abuse of discretion. *See id.* at 1124-25. As support for the view that “backpay [is] an integral aspect of equitable relief to be awarded in a suit brought under section 1983 against a

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1 of Appeals (in vacating and remanding for a redetermination of damages and back pay) indicated
2 that the question of compensatory damages was for the jury while the question of back pay was
3 for the trial judge. *See Savarese v. Agriss*, 883 F.2d 1194, 1206 (3d Cir. 1989) (“[W]e will vacate
4 both Savarese's compensatory damage award and the equitable award of back pay for Savarese
5 and remand to the district court for a new trial on compensatory damages and a recalculation of
6 back pay by the district judge.”).

school district,” *id.* at 1122, the Court of Appeals cited *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970). *Harkless*, by contrast, did concern the jury issue: the *Harkless* court held that “a claim for back pay presented in an equitable action for reinstatement authorized by § 1983 is not for jury consideration nor are the factual issues which form the basis of the claim for reinstatement.” *Harkless*, 427 F.2d at 324; *see also Johnson v. Chapel Hill Independent School Dist.*, 853 F.2d 375, 383 (5th Cir. 1988) (“A back pay award under Title VII is considered equitable rather than legal in nature, and its character does not change simply because the award is made pursuant to § 1981 or § 1983.”).

Like the Fifth Circuit, the Fourth Circuit has held that back pay is for the court, not the jury, to determine. *See Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 n.8 (4th Cir. 1966) (“[T]he hospital moved to have the question of back pay determined by a jury. But the claim is not one for damages; it is an integral part of the equitable remedy of reinstatement, and should be determined by the court.”).

The First Circuit has taken the opposite view:

In tort actions for personal injury tried to a jury, lost wages are invariably treated as being part of compensatory damages. . . . [T]he determination of back pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury.

In addition to the seventh amendment implication, there is also a sound practical reason for having the jury factor in back pay when determining compensatory damages. Submission of the issue of back pay to the jury as a factor to be considered in its award of compensatory damages eliminates the inevitable overlap between compensatory damages and back pay. In most cases of an alleged unconstitutional firing, there will be evidence of the employee's pay. To expect a jury to ignore this is unrealistic, especially where it may constitute the major item of compensatory damages.

Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989). However, the *Santiago-Negron* court specified that “[w]here only reinstatement and back pay are requested or if they are the only issues, in addition to liability, remaining in the case then both reinstatement and back pay shall be for the court.” *Id.*

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1 On at least one occasion, however, the Court of Appeals has appeared to contemplate a
2 procedure by which both back pay and front pay were submitted to the jury.⁵⁷ In *Squires v. Bonser*,
3 the Court of Appeals held that the district court abused its discretion in denying reinstatement.
4 *Squires v. Bonser*, 54 F.3d 168, 176 (3d Cir. 1995). Because an order granting reinstatement would
5 render an award of front pay inappropriate, the court remanded for a new trial on compensatory
6 damages. *See id.* at 177. The court’s discussion evinced an assumption that the compensatory
7 damages determination would include back pay. *See id.* at 176 n.15 (noting that in the previous
8 trial the trial judge instructed the jury that the “[p]laintiff is entitled to be compensated for any
9 wages that you find that he lost up to this date, or any wages that you find that he may lose in the
10 future”); *id.* at 176 n.16 (“[A]sking the jury for a lump-sum award which includes front-pay when
11 the plaintiff also seeks reinstatement. . . . wastes judicial resources in that if reinstatement is
12 awarded a retrial is then required to parcel out the damages into component parts (i.e., front-pay
13 versus back-pay).”).

14
15 If the back pay issue is submitted to the jury,⁵⁸ the court could draft an instruction on that
16 issue by making appropriate adaptations to Instruction 5.4.3 (concerning back pay under Title VII).

17
18 Front pay. Reinstatement is preferred over front pay.⁵⁹ The determination concerning
19 reinstatement is for the district court.⁶⁰ If the district court determines that reinstatement is

⁵⁷ In addition, caselaw suggests that back pay may not be an equitable remedy when sought from an individual defendant. In a Section 1983 case that focused on official immunity, rather than on the right to a jury, the Court of Appeals stated that “[a]s to backpay and attorneys fees . . . a recovery against individual defendants would be in the nature of damages, rather than as a part of the equitable remedy of reinstatement.” *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 43 (3d Cir. 1974), *judgment vacated on other grounds*, 421 U.S. 983 (1975); *see also Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 n.7 (1st Cir. 1988) (“To say that an ‘individual capacity’ defendant is liable for ‘back pay’ is a misnomer; he may be liable for compensatory damages in the same amount (plaintiff’s lost wages), but such liability must first hurdle any applicable immunity defense.”)

⁵⁸ Even if there is no right to a jury determination on back pay, the court could submit the issue by stipulation of the parties or for an advisory verdict.

⁵⁹ “[A] denial of reinstatement is unwarranted unless grounded in a rationale which is harmonious with the legislative goals of providing plaintiffs make-whole relief and deterring employers from unconstitutional conduct.” *Squires*, 54 F.3d at 172. “[R]einstatement is the preferred remedy to cover the loss of future earnings. . . . However, reinstatement is not the exclusive remedy, because it is not always feasible. . . . When reinstatement is not appropriate, front pay is the alternate remedy.” *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 831 (3d Cir. 1994), *opinion amended by order* (3d Cir. 1995).

⁶⁰ “Reinstatement is an equitable remedy available in unconstitutional discharge cases

1 appropriate, then the district court should award reinstatement and should not permit the award of
 2 front pay.

3
 4 Where an award of front pay is warranted, it may be the case that the amount of front pay
 5 should be determined by the jury,⁶¹ though here, too, the Third Circuit caselaw is inconclusive.⁶²
 6 In the context of the Age Discrimination in Employment Act, the Court of Appeals has treated the
 7 amount of front pay as a question for the jury. *See Maxfield v. Sinclair Intern.*, 766 F.2d 788, (3d
 8 Cir. 1985) (“Since reinstatement is an equitable remedy, it is the district court that should decide
 9 whether reinstatement is feasible. . . . Of course the amount of damages available as front pay is
 10 a jury question.”). The *Maxfield* court’s reasoning suggests that front pay should be viewed as a

arising under § 1983. . . . The decision whether to award reinstatement thus lies within the
 discretion of the district court.” *Squires*, 54 F.3d at 171 (citing *Versarge v. Township of Clinton,*
New Jersey, 984 F.2d 1359, 1368 (3d Cir. 1993)).

⁶¹ In *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823 (3d Cir. 1994), *opinion*
amended by order (3d Cir. 1995), the Court of Appeals held that the district court did not abuse its
 discretion in rejecting the remedy of reinstatement. *See id.* at 832. The district court had submitted
 the issue of front pay to the jury, and the Court of Appeals upheld the jury’s award against an
 excessiveness challenge. *See id.* at 833.

The Court of Appeals’ treatment of front pay in the context of sovereign immunity also
 provides oblique support for the view that front pay may properly be included within the scope
 of compensatory damages. In *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996),
 the plaintiffs sought to cast their Section 1983 claim for front pay as an equitable claim, in order
 to avoid state sovereign immunity, *see id.* at 698. The Court of Appeals rejected this contention,
 holding “that ‘front pay’ relief, under the circumstances of this case, would provide nothing more
 than compensatory damages which would have to be paid from the Commonwealth’s coffers.”
Id.

⁶² A number of decisions from other circuits suggest that front pay in Section 1983 cases
 presents a question for the judge. *See, e.g., Johnson v. Chapel Hill Independent School Dist.*, 853
 F.2d 375, 383 (5th Cir. 1988) (“A front pay award . . . must be viewed as essentially equitable in
 nature.”); *Biondo v. City of Chicago*, 382 F.3d 680, 683, 690 (7th Cir. 2004) (noting that front pay
 was “equitable relief” awarded by the district court); *Ballard v. Muskogee Regional Medical*
Center, 238 F.3d 1250, 1253 (10th Cir. 2001) (“An award of front pay for claims under § 1983 is
 an equitable remedy; thus, the district court has discretion to decide whether such an award is
 appropriate.”); *see also Grantham v. Trickey*, 21 F.3d 289, 296 n.5 (8th Cir. 1994) (“When
 reinstatement is not feasible, the court may grant front pay as an alternative equitable remedy.”).

In the First Circuit “[a]wards of front pay . . . are generally entrusted to the district judge’s
 discretion.” *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 380 (1st Cir. 2004). However,
 the *Johnson* court noted “some dispute . . . as to whether a jury should make calculations, if
 disputed, for purposes of the award.” *Id.* at 380 n.8.

7.5 Section 1983 Employment – Damages

1 legal remedy,⁶³ and thus that in Section 1983 cases where the court holds that front pay is
2 appropriate the amount should be determined by the jury. Assuming that the amount of front pay
3 is to be determined by the jury in cases where front pay is warranted, where the issue of
4 reinstatement is contested it seems advisable to submit the front pay issue to the jury along with
5 other elements of compensatory damages.⁶⁴ However, to ensure that the resulting award can be
6 adjusted where necessary, the court should require the jury to itemize how much of the
7 compensatory damages award is attributable to front pay and how much to other items.⁶⁵
8

9 If the front pay issue is submitted to the jury,⁶⁶ the court could draft an instruction on that
10 issue by making appropriate adaptations to Instruction 5.4.4 (concerning front pay under Title VII).

⁶³ The treatment of front pay under Title VII is not determinative in this regard. *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 & n.4 (2002) (holding that plaintiffs' claim for restitution sought legal relief and thus was not cognizable under ERISA, and rejecting contrary argument founded upon characterization of back pay as equitable relief under Title VII because "Title VII has nothing to do with this case").

⁶⁴ Two reasons argue in favor of this approach: The trial judge may not have decided whether reinstatement is appropriate (prior to the submission of the case to the jury), and the trial judge's determination on reinstatement is subject to appellate review (albeit for abuse of discretion).

⁶⁵ The Court of Appeals has stated:

[W]e discourage the practice of asking the jury for a lump-sum award which includes front-pay when the plaintiff also seeks reinstatement. Such a procedure wastes judicial resources in that if reinstatement is awarded a retrial is then required to parcel out the damages into component parts (i.e., front-pay versus back-pay). Accordingly, we believe the preferable course for a plaintiff seeking the equitable remedy of reinstatement is for such a plaintiff to ask for a jury interrogatory concerning the amount of damages attributable to front-pay in order to avoid a double recovery. In the future, we may require such a practice in order to preserve a claim for reinstatement.

Squires, 54 F.3d at 176 n.16.

⁶⁶ Even if there is no right to a jury determination on front pay, the court could submit the issue by stipulation of the parties or for an advisory verdict.