Instructions For Claims Under the Age Discrimination In Employment Act

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8.0 ADEA Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Federal Civil Rights statute that prohibits age discrimination against [an employee] [an applicant for employment], if that person is 40 years of age or older. This statute is known as the Age Discrimination in Employment Act or "ADEA."

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

[Defendant] denies that [plaintiff] was discriminated against because of [his/her] age. Further, [defendant] asserts that [describe any affirmative defenses].

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

Comment

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

Neither Title VII nor Section 1981 prohibits employers from discriminating on grounds of age. In the Age Discrimination in Employment Act of 1967, however, Congress provided protection for employees over the age of 40 who are the victims of discrimination because of age.[1] The central provision of the ADEA is 29 U.S.C. § 623, which provides in part as follows:

> § 623. Prohibition of age discrimination
>
> (a) Employer practices. It shall be unlawful for an employer--
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

[1] In *Hildebrand v. Allegheny County*, 757 F.3d 99 (3d Cir. 2014), the Court of Appeals held that the ADEA displaces Section 1983 Equal Protection claims for age discrimination. *See id.* at 110 ("Congress intended the ADEA to be the exclusive remedy for claims of age discrimination in employment.").

> (3) to reduce the wage rate of any employee in order to comply with this Act.

In *Hill v. Borough of Kutztown*, 455 F.3d 225, 247 (3d Cir. 2006), the Third Circuit set forth the basic elements of an ADEA claim as follows:

> To state a claim for age discrimination under the ADEA, a plaintiff must allege that (1) he is over forty, (2) he is qualified for the position in question, (3) he suffered from an adverse employment decision, and (4) his replacement was sufficiently younger to permit a reasonable inference of age discrimination.

The *Hill* court found that these standards were met where the 42-year-old plaintiff alleged that he was constructively discharged from his job, for which he was qualified, and replaced by a person who was 27. The court noted that "[c]onstructive discharge is an adverse employment decision that may form the basis of an ADEA claim." Id. at 247 n. 32.

Relationship Between the Coverage of the ADEA and Title VII

The ADEA is patterned after Title VII, with the exception of the provisions on damages, which are patterned after the Fair Labor Standards Act. In some instances the legal standards for determining discrimination under the ADEA are the same as those applicable to Title VII. For example, in *Thurston v. TWA*, 469 U.S. 111, 121 (1985), the Court applied Title VII precedent to conclude in an ADEA case that an employer may not apportion a benefit in a discriminatory way even if it could have withheld the benefit in question altogether; the *Thurston* Court stated that this principle "applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.' *Lorillard v. Pons*, supra, [434 U.S. 575] at 584 [1978]." The *Thurston* Court also noted that "[s]everal Courts of Appeals have recognized the similarity between the two statutes. In *Hodgson v. First Federal Savings & Loan Assn*., 455 F.2d 818, 820 (1972), for example, the United States Court of Appeals for the Fifth Circuit stated that with 'a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964.'"

Prior to June 2009 a number of courts had applied Title VII's distinction between pretext and mixed-motive cases to the ADEA context. For instance, in *Massarsky v. General Motors Corp*., 706 F.2d 111, 116-17 (3d Cir. 1983), the Third Circuit noted that "because in many respects the provisions of the ADEA parallel those of Title VII, many courts have adapted to issues of age discrimination the principles of law applicable to cases arising under Title VII of the Civil Rights Act." The Court in *Massarsky* held that the delineation between "mixed motive" and "pretext cases"— also known as a delineation between "direct" and "indirect" evidence of discrimination — that had been developed under Title VII, was also applicable to ADEA claims. *See also Miller v. Cigna Corp.,* 47 F.3d 586 (3d Cir. 1995) (en banc) (confirming that the "mixed motive"/ "pretext" dichotomy found in Title VII disparate treatment cases is also applicable in ADEA disparate treatment cases); *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 725 n.5 (3d Cir. 1995) ("We generally rely on both ADEA cases and cases arising under Title VII . . . because Title VII and the ADEA have been given parallel constructions due to their similarities in purpose and structure."). But in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme

Court rejected the use of the Title VII mixed-motive framework for ADEA cases. Thus, unlike Chapter 5 – which provides separate instructions for "pretext" cases and "mixed-motive" cases – Chapter 8 provides only one instruction for disparate treatment, because in all ADEA cases the plaintiff always retains the burden to prove that age discrimination was the but-for cause of the adverse employment action. *See* Comment 8.1.1.

There are a number of other important differences in the legal standards of ADEA and Title VII. One example is that punitive damages are not available under the ADEA, as the statute provides a substitute of "liquidated" (double) damages for "willful" violations. This difference and all others will be noted in the commentary to the individual ADEA instructions.

Admissibility of Evidence of Other Acts of Age Discrimination

In *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S.Ct. 1140 (2007), the Court provided guidance on how a trial court should treat evidence of "other acts" of age discrimination. The plaintiff argued that her employer had a company-wide policy discriminating against age, and proffered a number of instances in which other age-protected employees had suffered adverse job determinations. The trial court excluded this evidence on the ground that none of the instances involved the plaintiff's immediate supervisors. The court of appeals took this as a ruling that "me-too" evidence was never relevant, i.e., as a *per se* rule of exclusion.

The Supreme Court agreed with the court of appeals that a *per se* rule of admissibility or inadmissibility of other acts of discrimination is not permissible, given that Fed.R.Evid. 403 requires the trial court to balance the probative value of evidence against the dangers of prejudice, confusion and delay. But the Court found it "not entirely clear" that the trial court in this case had in fact excluded the evidence under a *per se* rule. It remanded the case to allow the trial court "to conduct the relevant inquiry under the appropriate standard." The Court noted that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case" and that "[a]pplying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry."

With respect to claims for wrongful termination, the First Amendment's religion clauses give rise to an affirmative defense that "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a retaliation claim under the Americans with Disabilities Act, the Court's broad description of the issue suggests that its recognition of a "ministerial exception" may apply equally to wrongful-termination claims brought under other federal anti-discrimination statutes. *See id*. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her…. [T]he ministerial exception bars such a suit."). For further discussion of the ministerial exception, see Comment 5.0.

8.1.1 Elements of an ADEA Claim— Disparate Treatment

Model

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

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

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

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

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

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

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

[For use where plaintiff claims replacement by a younger employee:

In this case [plaintiff] is claiming that [he/she] was replaced by a younger employee [name]. It is not necessary for [plaintiff's] replacement to be under 40 years of age. The question is whether [name of replacement employee] is substantially younger than [plaintiff].**]**

[For use in a reduction in force case:

In this case, [plaintiff] was laid off from [his/her] job as part of a reduction in force. [Plaintiff] need not show that he was replaced in [his/her] position by a younger employee. But [plaintiff] must show that [he/she] was laid off from a position for which [he/she] was qualified, and that substantially younger employers were treated more favorably.**]**

Concluding instruction:

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

In deciding whether age was a determinative factor, you must be careful to distinguish age from other factors that are not dependent on age. [For example, if [defendant's] action was based on [plaintiff's] seniority, this is not an age-dependent decision. A person's seniority is based on time with the employer, and this is not the same factor as the person's age. Thus, an employer does not violate the ADEA just by interfering with an older employee's benefits that would have vested by virtue of the employee's years of service.]

Comment

"To establish a disparate-treatment claim under the plain language of the ADEA, ... a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009). Under *Gross*, the "mixed motive" burden-shifting instruction that courts apply to some Title VII cases under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is unavailable in ADEA cases. Thus, this chapter contains no analogue to Instruction 5.1.1.

Instruction 8.1.1 is modeled on Instruction 5.1.2's language concerning Title VII pretext cases. The *Gross* Court stated that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 ... (1973), utilized in Title VII cases is appropriate in the ADEA context," *see Gross*, 557 U.S. at 175 n.2. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964 ... , also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the *McDonnell Douglas* framework is fully applicable here."). The court of appeals has "conclude[d] that the but-for causation standard required by *Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases." *Smith v. City of Allentown*, 589 F.3d 684, 691 (3d Cir. 2009).

Miller v. Cigna Corp., 47 F.3d 586 (3d Cir. 1995) (en banc), was decided under the assumption that ADEA mixed-motive cases were governed by a framework distinct from that governing ADEA pretext cases. Obviously, that assumption is no longer good law after *Gross*,

but the *Miller* court's discussion of the appropriate instruction for an ADEA pretext case remains instructive:

> A plaintiff in an ADEA case who does not qualify for a burden shifting instruction under *Price Waterhouse* [i.e., a "mixed-motive" case] has the burden of persuading the trier of fact by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process.

Miller, 47 F.3d at 596-97 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). The court in *Miller* reversed a verdict for the defendant because the trial judge instructed the jury that age must be the "sole cause" of the employer's decision. That standard was too stringent; instead, in a pretext case, "plaintiff must prove by a preponderance of the evidence that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process."

If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993) (Title VII case). "The legitimacy of the employer's proffered business justification will be affected both by the duties and responsibilities of the employee's position and the nature of the justification. Concomitantly, the significance of variations among an individual's personnel evaluations may well depend upon the nature of the employee's responsibilities; a more exacting standard of performance may have to be applied to positions of greater responsibility." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 (3d Cir. 1988) (ADEA case).

If the defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for age discrimination, or in some other way prove it more likely than not that age motivated the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (Title VII case). The plaintiff retains the ultimate burden of proving intentional discrimination. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (en banc) ("Under the ADEA, the ultimate burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer's decision. The plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision.").[1] The

[1] *See also Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) (ADEA and Title VII case) ("To make a showing of pretext, 'the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action'" (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).). The second of these two numbered alternatives was

factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). The employer's proffered reason can be shown to be pretextual by circumstantial as well as direct evidence. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (en banc) (ADEA case). "To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997) (ADEA case). *See also Tomasso v. Boeing Co.*, 445 F.3d 702, 707 (3d Cir. 2006) (ADEA case) (noting that the employee "need not always offer evidence sufficient to discredit all of the rationales advanced by the employer" because "the rejection of some explanations may so undermine the employer's credibility as to enable a rational factfinder to disbelieve the remaining rationales, even where the employee fails to produce evidence particular to those rationales.").

Seniority Distinct From Age

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), the Court held that the ADEA does not prohibit discrimination on the basis of an employee's seniority, as distinct from age. In *Hazen*, the employer fired the employee to prevent him from vesting in the pension plan. The Court found that the employer's action was not prohibited by the ADEA. The Court reasoned as follows:

> [T]he ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.
>
> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. . . . On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, *see* 29 U. S. C. § 631(a), may have worked for a particular employer his entire career, while

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not at issue in *Burton*, because the court relied on the first alternative, holding that there was evidence that would justify a factfinder in disbelieving the employer's stated reason. *See id.* at 431. Although the *Burton* court phrased the second alternative in terms that seem to permit a finding of liability based on proof that discrimination was "a motivating … cause," such an approach would appear to contravene the *Gross* Court's requirement of but-for causation.

> an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."
>
> . . .
>
> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly. . . . Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

See also Kentucky Retirement Systems v. EEOC, 128 S. Ct. 2361, 2370 (2008) ("Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status."). The pattern instruction advises the jury to distinguish between age-related discrimination and discrimination on other grounds that might correlate with age.

Substantially Younger Replacement

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Court rejected the argument that an ADEA plaintiff in a discharge case must show that he was replaced by someone under 40. Under *O'Connor*, the question is whether the employer relied on age in making the challenged decision, not on whether the employer chose someone outside the protected class. The Court added, however, that an inference of age discrimination "cannot be drawn from the replacement of one worker with another insignificantly younger." 517 U.S. at 313. *See also Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792-93 (3d Cir. 1985) ("The probative value of the age of the replacement will depend on the circumstances of the case. Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may be circumstantial evidence that gives rise to that inference. [citing cases] If the difference in ages of the two employees were insignificant, the district court would likely find that the evidence was insufficient to permit an inference of discrimination.").

On the question of what is a substantial difference in age, *see, e.g., Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995) (noting that no particular age difference must be shown; citing

cases holding that a five year difference was sufficient, and other case law indicating that a one year difference was insufficient to support an inference of age discrimination).

Discrimination on the Basis of Relative Youth

ADEA liability does not lie when a member of the protected class suffers discrimination because she is too young. In *General Dynamics Land Systems, Inc., v. Cline*, 540 U.S. 581 (2004), the employer retained health care benefits only for current employers who were older than 50. This meant that employees within the protected age class of 40-50 were disentitled. The Court rejected an ADEA claim, relying on legislative history indicating that Congress intended to protect older workers only; it did not prohibit favoring the old over the young. In sum, "ADEA protects only relatively older workers (over 40) from discrimination favoring relatively younger ones (of any age)." Lewis & Norman, *Employment Discrimination Law and Practice* 428 (2d ed. 2004).

Reduction in Force

On the standards for proving age discrimination in reduction in force cases, *see, e.g.*, *Tomasso v. Boeing Co.*, 445 F.3d 702, 706 n.4 (3d Cir. 2006):

> Ordinarily, to make out a prima facie case [of age discrimination] the plaintiff must show . . . that he was replaced by a sufficiently younger person to create an inference of age discrimination. *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002). However, where an employee is terminated during a RIF, the [disputed question] becomes whether the employer retained employees who do not belong to the protected class.

See also Dreyer v. ARCO Chemical Co., 801 F.2d 651, 653 (3d Cir. 1986) (noting that in reduction of force cases "it is often impracticable to require a plaintiff whose job has been eliminated to show replacement" and so the question becomes whether the plaintiff was laid off from a job for which he was qualified while substantially younger employees were treated more favorably), *overruled on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993); *Anderson v. CONRAIL*, 297 F.3d 242 (3d Cir. 2002) (in a reduction in force case, the plaintiff must show that a similarly situated substantially younger employee was retained).

8.1.2 Elements of an ADEA Claim — Harassment — Hostile Work Environment — Tangible Employment Action

Model

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

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

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

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

Third: [Names] conduct was motivated by the fact that [plaintiff] is [age over 40].

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

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

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

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

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

Comment

Courts have held that the ADEA prohibits harassment on the basis of age (when the plaintiff is 40 years of age or older) though there is no Third Circuit case law on the subject. *See,*

e.g., *Montgomery v. John Deere & Co.*, 169 F.3d 556 (8th Cir. 1999) (asking an employee when he is going to retire can sometimes be so unnecessary and excessive as to constitute evidence of discriminatory harassment); *Peecock v. Northwestern Nat'l Ins. Group,* 156 F.3d 1231 (6th Cir. 1998) (unpublished opinion) ("In order to prove a prima facie case of a hostile work environment, a plaintiff must show: 1) that the employee is 40 years or older; 2) the employee was subjected to harassment either through words or actions, based on age; 3) the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile or offensive work environment ; and 4) the existence of some basis for liability on the part of the employer."); *Burns v. AAF-McQuay, Inc.*, 166 F.3d 292 (4th Cir. 1999) (same standard); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th Cir. 1997) (upholding a verdict on a claim of hostile work environment under the ADEA).

This instruction is substantively identical to Instruction 5.1.4, covering hostile work environment claims with a tangible employment action under Title VII. Like Title VII — and unlike Section 1981 — the ADEA regulates employers only, and not individual employees. Therefore, the instruction is written in terms of employer liability for the acts of its employees.

Respondeat superior liability for harassment by non-supervisory employees[2] exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990).

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 8.2.1.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[3] Instruction 8.2.2 provides an instruction

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

[3] As Comment 8.1.3 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding "that an employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment." Assuming that the same approach applies in ADEA cases, Instruction 8.1.2 is appropriate for use in cases where the evidence supports a

setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases.

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

These ADEA instructions on harassment do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and the ADEA applies to age discrimination only. If an ADEA claim is ever raised on quid pro quo grounds, the court can modify Instruction 5.1.3 for that occasion.

For further commentary on hostile work environment claims, see the Comment to Instruction 5.1.4.

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claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 8.1.3 should be used instead.

8.1.3 Elements of an ADEA Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

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

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

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

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

Third: [Names] conduct was motivated by the fact that [plaintiff] is [age over 40].

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

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

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

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

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

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

First: That [defendant] exercised reasonable care to prevent harassment in the workplace on the basis of age, and also exercised reasonable care to promptly correct any harassing behavior that does occur.

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

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

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

2. That policy was fully communicated to its employees.

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

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

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

Comment

As discussed in the Commentary to Instruction 8.1.3, courts have held that the ADEA protects against harassment on the basis of age, though the Third Circuit has not yet decided the question.

This instruction is substantively identical to Instruction 5.1.5, covering hostile work environment claims with no tangible employment action under Title VII. Like Title VII — and unlike Section 1981 — the ADEA regulates employers only, and not individual employees. Therefore, the instruction is written in terms of employer liability for the acts of its employees.

This instruction is to be used in discriminatory harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on

the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.[4] Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990).

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 8.2.1.

These ADEA instructions on harassment do not include a pattern instruction for quid pro quo claims. This is because quid pro quo claims are almost invariably grounded in sex discrimination, and the ADEA applies to age discrimination only. If an ADEA claim is ever raised on quid pro quo grounds, the court can modify Instruction 5.1.3 for that occasion.

For further commentary on hostile work environment claims, see Instructions 5.1.4 and 5.1.5.

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

8.1.4 Elements of an ADEA Claim–Disparate Impact

Model

In this case, [plaintiff] claims that [defendant], by [describe employment practice], has caused an adverse, disproportionate impact on persons 40 years of age or older. The parties agree that [defendant's] conduct is neutral on its face, but [plaintiff] contends that in fact people 40 and older have been treated more harshly by [defendant]. This is what is known in the law as "disparate impact."

To find a disparate impact, you do not need to consider whether [defendant] intended to discriminate against persons 40 and older. You must focus on the consequences or results of specific employment practices.

To recover on [his/her] claim of disparate impact, [plaintiff] must prove both of the following by a preponderance of the evidence.

First: [Defendant] has engaged in a specific employment practice or practices that caused [defendant] to [fail to hire] [fail to promote] [demote] [terminate] [constructively discharge][plaintiff] because [plaintiff] was [40 or older].

Second: [Defendant's] [describe employment practice] had a significantly disproportionate adverse impact on persons 40 years of age or older.

Note that it is not enough for [plaintiff] to prove that workers 40 and older have suffered a disparate impact. Nor is it enough to allege that some generalized policy is responsible for a disparate impact. Instead, [plaintiff] must prove that a specific employment practice or practices caused the disproportionate adverse impact on persons 40 years of age or older.

[Affirmative Defense:

[Defendant] contends that [describe employment practice] was based on reasonable factors other than age. [Defendant] has the burden of proving both of the following elements by a preponderance of the evidence:

First: The [employment practice] [selection criterion] is job-related for the positions in question.

Second: The [employment practice] [selection criterion] is justified by business necessity.

If you find that [plaintiff] has proved each of the elements on which [he/she] has the burden of proof, your verdict should be for [plaintiff], unless you also find that [defendant] has proved this affirmative defense, in which event your verdict should be for [defendant].**]**

Comment

8.1.4 Disparate Impact

In *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir. 1995), the court explained the distinction between "disparate impact" and "disparate treatment" claims:

> A policy can be discriminatory because of its treatment of or impact on employees. In a disparate treatment case, the employer simply treats some people less favorably because of their [protected status]. On the other hand, disparate impact liability involves employment activities that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. (Citations omitted).

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court held that the ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery in Title VII cases. The Court observed, however, that the disparate impact ground of recovery in the ADEA is narrower than that provided in Title VII, in two respects. First, the ADEA permits a disparate impact "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Second, the 1991 amendment to Title VII modified the Supreme Court's holding in *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989), in which the Court narrowly construed the employer's exposure to disparate-impact liability under Title VII. Because the 1991 amendment did not affect the ADEA, it follows that the standards of *Wards Cove* remain applicable to disparate impact actions under the ADEA. Under *Wards Cove*, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Smith v. Jackson*, 544 U.S. at 235 (emphasis in original). The instruction reflects both of these limitations on disparate impact recovery in ADEA cases.

Unlike Title VII, the ADEA provides a right to jury trial for all claims covered by the Act, including, now, disparate impact claims. See 29 U.S.C. § 626(c)(2) ("[A] person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action.").

Affirmative Defense for Reasonable Factors Other Than Age

In *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008), the Court held that in a disparate-impact case, the employer has the burden of production of proving that its employment decision was made on the basis of reasonable factors other than age. The Instruction accordingly sets forth reasonable factors other than age as an affirmative defense.

8.1.5 Elements of an ADEA Claim — Retaliation

Model

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

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

First: [Plaintiff] [describe activity protected by the ADEA].

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

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

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a reasonable,[2] good faith belief that [plaintiff's] [or someone else's] rights under the Age Discrimination in Employment Act were violated.

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

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

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

Comment

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

8.1.5 Retaliation

The ADEA provides a cause of action for retaliation:

> (d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

29 U.S.C. § 623(d). This section applies to protect employees in the private sector; the ADEA provision covering federal employees, *see* 29 U.S.C. §633a(a), does not contain an explicit provision on retaliation. However, the Supreme Court in *Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1943 (2008), held "that § 633a(a) prohibits retaliation against a federal employee who complains of age discrimination."

The substantive standards for a retaliation claim under the ADEA are generally the same as those applied to Title VII retaliation claims. Lewis and Norman, *Employment Discrimination* 453 (2d ed. 2004) ("Section 623(d) of ADEA provides protection against retaliation in the same terms as § 704(a) of Title VII.") ; *Daniels v. Sch. Dist. of Philadelphia*, 776 F.3d 181, 192 (3d Cir. 2015) (addressing retaliation claims under Title VII, the ADEA, and the Pennsylvania Human Rights Act "together[,] as the circumstances of this case do not require that we make differing analyses").

Protected Activity

The most common activities protected from retaliation under the ADEA and Title VII are: 1) opposing or complaining about discrimination;[3] 2) making a charge of employment discrimination; 3) testifying, assisting or participating in any manner in an investigation, proceeding or hearing under under the ADEA. See the discussion of protected activity in the Comment to Instruction 5.1.7. *See also Fasold v. Justice*, 409 F.3d 178, 188 (3d Cir. 2005) (filing a complaint with the EEOC is protected activity); *Robinson v. City of Pittsburgh*, 120 F.3d 1286,

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

1299 (3d Cir. 1997) (filing discrimination complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53 (2006); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3rd Cir. 1997) (advocating equal treatment was protected activity); *Aman v. Cort Furniture*, 85 F.3d 1074, 1085 (3d Cir. 1989) (under Title VII's anti-retaliation provision "a plaintiff need not prove the merits of the underlying discrimination complaint, but only that 'he was acting under a good faith, reasonable belief that a violation existed.'" (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 468 (3d Cir. 1993) (quoting *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990)), *overruled on other grounds by Miller v. CIGNA Corp*., 47 F.3d 586 (3d Cir. 1995))).

In accord with instructions from other circuits, Instruction 8.1.5 directs the jury to determine both the good faith and the reasonableness of the plaintiff's belief that employment discrimination had occurred. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA, and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to harassment or discrimination) under Title VII and other federal discrimination laws; instruction uses phrase "reasonably believed"); *id.* Notes on Use, Note 5 (using phrase "reasonably and in good faith believe"); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation) (discussing reasonableness requirement in the comment but not in the model instruction). In cases where the protected nature of the plaintiff's activity is not in dispute, this portion of the instruction can be modified and the court can simply instruct the jury that specified actions by the plaintiff constituted protected activity.

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (internal quotation marks and citations omitted).[4] The Court elaborated on this standard in the following passage:

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

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

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

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

Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively

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employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee's refusal to sign a release.").

> capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

548 U.S. at 68-70 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively identical to the ADEA provision on retaliation, supra. This instruction therefore follows the guidelines of the Supreme Court's decision in *White*.

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2413 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any* discrimination by an employer in response to protected activity.

Because the ADEA anti-retaliation provision is substantively identical to the Title VII provision construed in *White* — it broadly prohibits discrimination without reference to employment-related decisions — this instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her").

It should be noted, however, that damages for emotional distress and pain and suffering are not recoverable under the ADEA. *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834, 842 (3d Cir. 1977) (relying on legislative history tying recovery under the ADEA to that provided by the Fair Labor Standards Act, and not Title VII; holding that "damages for pain and suffering or emotional distress cannot properly be awarded in ADEA cases"), *overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc). So, to the extent that retaliatory activity is not job-related, it is probably less likely to be compensable under the ADEA than it is under Title VII. For further discussion of *White*, see the Comment to Instruction 5.1.7.

Retaliation for another's protected activity

The Supreme Court held in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), that Title VII not only bars retaliation against the employee who engaged in the protected activity, it also bars retaliation against another employee if the circumstances are such that the

retaliation against that employee might well dissuade a reasonable worker from engaging in protected activity. *See id.* at 868. The *Thompson* Court did not discuss whether its holding extends to retaliation claims under other statutory schemes such as the ADEA. The *Thompson* Court's holding that the third-party retaliation victim can sometimes assert a retaliation claim under Title VII rested on the Court's analysis of the specific statutory language of Title VII. *See Thompson*, 131 S. Ct. at 869 (analyzing language in 42 U.S.C. § 2000e-5(f)(1) stating that "a civil action may be brought ... by the person claiming to be aggrieved"). The ADEA contains similar language. *See* 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter ...."). For further discussion of *Thompson*, see Comment 5.1.7. For a pre-*Thompson* Third Circuit case holding that the ADEA does not encompass third-party retaliation claims, see *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir. 2002).

Determinative Effect

As discussed in Comment 8.1.1, the Supreme Court has held with respect to non-retaliation ADEA claims that the plaintiff must prove but-for causation (and thus that a mixed-motive burden-shifting framework is unavailable). *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177-78 (2009). Although the *Gross* Court was interpreting 29 U.S.C. § 636(a), its reasoning seems equally applicable to 29 U.S.C. § 636(d) (the ADEA's anti-retaliation provision). And this view also seems consistent with the Court's more recent decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2528 (2013) (holding "that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action"); *id*. at 2531-32 (discussing policy concerns relating to the standard of proof for retaliation claims). Accordingly, Instruction 8.1.5 requires the plaintiff to prove that the plaintiff's protected activity had a determinative effect on the defendant's retaliatory activity.

Non-retaliatory Reason; Pretext

As with other types of discrimination or retaliation claims, the defendant may proffer a non-retaliatory reason for its employment decision, and the plaintiff may seek to rebut that reason by showing that it was really a cover-up for retaliation. *See, e.g., Daniels v. School District of Philadelphia*, 776 F.3d 181, 198 (3d Cir. 2015) (upholding grant of summary judgment against plaintiff on retaliation claims under, inter alia, the ADEA, because the defendant had "proffered legitimate reasons for [its] adverse actions, which Daniels has failed to rebut").

Employer's Attitude Toward Employee

On the relevance of an employer's attitude toward an employee who engaged in protected activity, see *Fasold v. Justice*, 409 F.3d 178, 190 (3d Cir. 2005) (reversing a grant of summary judgment for an employer on an ADEA retaliation claim and noting that "we cannot discount the possibility that [the supervisor's] irritation with Fasold's pending administrative claims influenced the calculus [the supervisor] made in his decision to deny the Level II grievance.").

8.1.5 Retaliation

Retaliation Against Perceived Protected Activity

In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), an ADA case, the court declared that the retaliation provisions in the ADEA protected an employee against retaliation for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. If the fairly unusual case arises in which the employer is alleged to have retaliated for perceived rather than actual protected activity, then the instruction can be modified consistently with the court's directive in *Fogleman.*

8.2.1 ADEA Definitions — Hostile or Abusive Work Environment

Model

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

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

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

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [his/her] age. The harassing conduct may, but need not be age-based in nature. Rather, its defining characteristic is that the harassment complained of was linked to [plaintiff's] age. The key question is whether [plaintiff], as a person of [plaintiff's age] was subjected to harsh employment conditions to which substantially younger employees were not.

8.2.1 Hostile or Abusive Work Environment

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

Comment

This instruction can be used if the court wishes to provide a more detailed instruction on what constitutes a hostile work environment than those set forth in Instructions 8.1.3 and 8.1.4. This instruction is substantively identical to the definition of hostile work environment in Title VII cases. See Instruction 5.2.1.

8.2.2 ADEA Definitions — Constructive Discharge

Model

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

Comment

In ADEA cases (as in Title VII cases, see Comment 5.2.2), courts in the Third Circuit "employ an objective test to determine whether an employee can recover on a claim of constructive discharge.... Specifically, a court must determine 'whether a reasonable jury could find that the [employer] permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign.'" *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d Cir. 2001). Instruction 8.2.2 is substantively identical to the constructive discharge instruction for Title VII actions. See Instruction 5.2.2.

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into Instruction 8.1.2 (with respect to the instruction's sixth element). Assuming that the Title VII framework concerning employer liability for harassment applies to ADEA actions, the employer's ability to assert an *Ellerth/Faragher* affirmative defense in a constructive discharge case will depend on whether the constructive discharge resulted from actions that were sanctioned by the employer. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."); *see also* Comment 5.1.5.

8.3.1 ADEA Defenses — Bona Fide Occupational Qualification

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [his/her] age, then you must consider [defendant's] defense that its age limitation is a bona fide occupational qualification.

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

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

Second: That [defendant] either had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform the job safely and efficiently, or that it was impossible or highly impractical to consider the necessary qualifications of each older employee. [Defendant's] belief should be evaluated in light of all the circumstances in the case, to determine whether it has a reasonable basis in fact.

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

Comment

Section 4(f)(1) of the ADEA provides that it is not unlawful for an employer to take an action otherwise prohibited by the Act if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 629(f)(1). This language is identical to that provided in Title VII. Accordingly, the instruction is substantively identical to Instruction 5.3.1, which covers the BFOQ defense in Title VII cases.

In *Western Airlines v. Criswell*, 472 U.S. 400, 410 (1985), the Court declared that the BFOQ defense is an "extremely narrow" exception; it held that the defense did not justify the employer's plan to retire members of commercial airline flight crews when they reached 60 years of age. The *Criswell* Court described the BFOQ defense applicable in ADEA actions in the following passage:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that

> goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

The *Criswell* Court made it clear that the BFOQ defense is an affirmative defense; the burden of establishing its elements is on the defendant.

8.3.2 ADEA Defenses — Bona Fide Seniority System

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [plaintiff's] age, then you must consider [defendant's] defense that it was applying the terms of a good faith seniority system. An employer can lawfully use a seniority system in making employment decisions unless the seniority rules were designed and used to discriminate against older workers. Put another way, if the seniority rules are legitimate and not designed to discriminate, then the rules are lawful and can be used to make employment decisions.

To establish the defense of a good faith seniority system, [defendant] must prove both of the following by a preponderance of the evidence:

First: That the seniority system used the length of service of employees, and not the age of the employees, as the primary basis for giving available job opportunities to its workers.

Second: That [defendant's] [challenged employment action] was consistent with its seniority system.

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

Comment

The ADEA permits disparate treatment "to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2)(A). Thus the seniority system will be invalid if it is dependent on age rather than seniority. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) (rejecting a claim of age discrimination where the challenged employment practice was the product of a bona fide seniority system). *See also Dalton v. Mercer County Board of Educ*., 887 F.2d 490, 492 (4th Cir.1989) (choosing an applicant with the most seniority pursuant to a bona fide statutory seniority system is not a violation of ADEA).

The Supreme Court has held that challenges to the effects of bona fide seniority systems may not be based upon assertions of disparate impact; rather, a plaintiff must prove intentional discrimination. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352-56 (1977). *See also Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir.1995) (challenges of age discrimination to bona fide seniority systems must rest upon claim of disparate treatment rather than disparate impact).

8.3.3 ADEA Defenses — Waiver

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [plaintiff's] age, then you must consider the defense alleged by [defendant] that [plaintiff] knowingly and voluntarily consented to a waiver of [plaintiff's] ADEA claims.

Federal law permits [plaintiff] to waive ADEA rights provided that, at a minimum, [defendant] proves by a preponderance of the evidence that the following safeguards are met:

1. The waiver is part of an agreement between [plaintiff] and [defendant] that is written in a way that is intended to be understood by [plaintiff] or by the average individual eligible to participate;

2. The waiver specifically refers to rights or claims arising out of the Age Discrimination in Employment Act;

3. [Plaintiff] did not waive rights or claims that may arise after the date the waiver was executed;

4. [Plaintiff] waived rights under the ADEA in exchange for something of value beyond that to which [he/she] was already entitled; and

5. [Plaintiff] was advised in writing to consult an attorney before executing the waiver agreement.

[In this case, [plaintiff] has presented evidence challenging the validity of this waiver. Specifically [describe plaintiff's evidence challenging waiver]. It is for you to determine whether or not the waiver was knowing and voluntary. In doing so, you must consider all the circumstances surrounding the signing of the waiver. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff's] waiver of ADEA rights was knowing and voluntary. The fact that the agreement complies with the minimum standards of Federal law does not necessarily mean that the waiver was knowing and voluntary.]

Comment

The Older Workers Benefit Protection Act (OWBPA) permits workers to sign releases of ADEA claims, provided the waiver is knowing and voluntary and the minimum standards of the OWBPA are met. 29 U.S.C.A. § 626(f)(1).[5] The proponent of the release has the burden to prove

[5] "It is hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled." *E.E.O.C. v. Allstate Ins.*

that the minimum statutory requirements for the release have been satisfied. *See Ruehl v. Viacom, Inc.,* 500 F.3d 375, 381 (3d Cir. 2007) (waiver invalid where employer could not establish that the employee was provided the necessary information required by the OWBPA: "Having the employee *say* he was informed in writing — when he was not — does not satisfy the OWBPA requirements.") (emphasis in original). The minimum statutory requirements for a valid waiver are as follows:

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under [the ADEA];
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult an attorney prior to executing the agreement.

29 U.S.C. § 626(f)(1). *See* Lewis and Norman, *Employment Discrimination* 456-57 (2d ed. 2004) for a discussion of the statutory requirements.

The statutory factors are minimum requirements. *See Wastak v. Lehigh Valley Health Network,* 342 F.3d 281, 295, n.8 (3d Cir. 2003) (noting that the OWBPA establishes "a floor, not a ceiling"). Whether a waiver is knowing and voluntary is determined by a totality of the circumstances. *See Bennett v. Coors Brewing Co.,* 189 F.3d 1221, 1229 (10th Cir.1999) (noting that the statutory factors governing a waiver under OWBPA are minimum requirements, and holding that non-statutory factors such as fraud and duress may render an ADEA waiver not knowing and voluntary); *Griffin v. Kraft General Foods, Inc*., 62 F.3d 368, 373-74 (11th Cir.1995) (validity of waiver of ADEA claims must be determined under the totality of the circumstances). But if the waiver agreement on its face meets the minimum statutory requirements of OWBPA, the issue of whether or not the plaintiff has given a knowing and voluntary consent to a waiver of ADEA claims will only reach the jury if the plaintiff has come forward with specific evidence sufficient to raise a question as to the validity of the waiver. The court in *Pierce v. Atchison Topeka*

Co., 778 F.3d 444, 449 (3d Cir. 2015). In *Allstate*, the employer conditioned its conversion of terminated at-will employees into independent contractors on the employees' signing releases of all existing claims (including but not limited to discrimination claims). The Court of Appeals rejected the EEOC's argument that there was inadequate consideration for such releases, reasoning that there was no "good reason why an employer cannot require a release of discrimination claims by a terminated employee in exchange for a new business relationship with the employer." *Allstate*, 778 F.3d at 451.

& Santa Fe Ry., 110 F.3d 431, 438 (7th Cir.1997), explained why the plaintiff has a burden of production when contending that a release conforming with the statute was not knowing and voluntary:

> To place upon the employer the burden of demonstrating that an otherwise unambiguous release of claims was not signed knowingly and voluntarily risks undermining the usefulness of waivers by clouding them in uncertainty. This danger is compounded by the difficulty of demonstrating that someone's actions were knowing and voluntary, an assumption about human behavior which the law typically indulges as a matter of faith.
>
> This line of reasoning has force. . . . [W]e believe that the concerns it reflects are adequately addressed by placing the burden of production, rather than the burden of proof, on the party who . . . seeks to invalidate a waiver of federal rights. Such a rule does not mean that a claim that a release was not executed knowingly and voluntarily will necessarily reach a jury. The plaintiff must come forward with specific evidence sufficient to raise a question as to the validity of the release . . . . A bald assertion of misrepresentation by the employer, standing alone, is legally insufficient. Moreover, certain factors, such as the participation of an attorney in negotiating the release, will give rise to a presumption that the waiver was knowing and voluntary. As for the difficulty of establishing that an employee did not act knowingly and voluntarily, a burden which some have likened to "proving a negative," we believe that this difficulty is minimized by requiring the employee to produce specific evidence of factors that vitiated his consent to the release.

The court in *Pierce* emphasized—as does the instruction—that while the plaintiff has a burden of production when the release conforms to minimum statutory requirements, it is the defendant's burden to prove that the release was knowing and voluntary once the plaintiff's burden of production is met.

An employer who obtains a waiver through a nonconforming release cannot defeat an ADEA claim simply because the plaintiff did not tender back the consideration paid in exchange for the waiver. *Oubre v. Entergy Operations, Inc*., 522 U.S. 422, 427-28 (1998).

8.4.1 ADEA Damages — General Compensatory Damages

No Instruction

Comment

General compensatory damages, such as for pain and suffering, are not recoverable in ADEA actions. *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834, 842 (3d Cir. 1977) (relying on legislative history tying recovery under the ADEA to that provided by the Fair Labor Standards Act, and not Title VII; holding that "damages for pain and suffering or emotional distress cannot properly be awarded in ADEA cases"), *overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc); *Haskell v. Kaman Corp.*, 743 F.2d 113, 120-21 (2d Cir. 1984) ("plaintiffs are not entitled to recovery for emotional distress in ADEA actions").

The ADEA mandates an award for back pay and liquidated damages, and permits an award for front pay. See Instructions 8.4.2 - 8.4.4 for instructions covering these awards.

8.4.2. ADEA Damages — Back Pay

Model

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

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

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

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

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

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

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

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

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

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

Comment

Back pay awards are mandatory under the ADEA after a finding of discrimination; the ADEA incorporates damages provisions from the Fair Labor Standards Act providing that back pay "shall" be awarded. Accordingly, while back pay is an equitable remedy under some statutes (such as Title VII), back pay is a damages remedy under the ADEA, and therefore the parties have a right to a jury trial on questions of back pay. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting that the ADEA incorporates the FLSA provision that employers "shall be liable" for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion, and holding that in a private action under the ADEA a trial by jury is available where sought by one of the parties); *Anastasio v. Schering Corp.*, 838 F.2d 701 (3d Cir. 1988) (distinguishing the ADEA, where back pay is a mandatory element of damages, from the discretionary back pay remedy in Title VII).

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court held that if an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability. However, the employer in such a circumstance does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful discharge to the date the new information was discovered." 513 U.S. at 362. *See also Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that "after-acquired evidence may be used to limit the remedies available to a plaintiff where the employer can first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing that it would have made the same employment decision when it became aware of the post-decision evidence of the employee's misconduct.

Under the ADEA, collateral benefits such as unemployment compensation, pension benefits and social security benefits are not to be deducted from a back pay award. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986) (unemployment compensation is not to be deducted from a back pay award in an ADEA action); *Maxfield v. Sinclair Int'l,* 766 F.2d 788 (3d Cir. 1985) (social security benefits cannot be offset as an award of backpay is a mandatory element of damages under the ADEA). In contrast, courts have held that the ADEA does require interim earnings to be deducted from back pay awards. Id. The instruction reflects these legal standards.

Attorney Fees and Costs

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

8.4.3. ADEA Damages — Liquidated Damages

Model

If you find that [plaintiff] is entitled to recover damages for lost wages or benefits, you must determine if [defendant's] conduct was willful. If you find that [defendant] willfully violated the law, then you must award plaintiff double the amount of damages for lost wages and benefits that you have found. [Plaintiff] has the burden of proving willfulness by a preponderance of the evidence.

You must find [defendant's] violation of the ADEA to be willful if [defendant] knew or showed reckless disregard for whether the [challenged action] was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard as to whether its conduct was prohibited by the law, then [defendant's] conduct was not willful and you cannot award double the amount of damages for lost wages and benefits.

Comment

Punitive damages are not available under the ADEA. *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834, 842 (3d Cir. 1977), *overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc). 29 U.S.C. § 626(b) instead incorporates the liquidated damages provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b). The statute provides that doubling of damages is mandatory if there is a finding that the defendant willfully violated the law. *Cf. Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F.Supp.2d 838, 841 (E.D.Pa. 2001) (holding that punitive damages are available for claims of retaliation under the Equal Pay Act and Fair Labor Standards Act, and distinguishing ADEA actions, where punitive damages are not available for any claim).

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985), the Court held that willfulness must be found under the ADEA if the employer either knew or showed reckless disregard of the fact that its conduct was prohibited by the statute. The challenged action in *Thurston* was the company-wide implementation of a policy that was found to violate the ADEA. The Court held that a willful violation could not be found under the circumstances, as the company had sought advice of counsel in advance of the implementation of the policy, and was told that the policy would not violate the ADEA.

The Third Circuit held after *Thurston* that a stricter standard of willfulness must be applied to discrete acts (as opposed to policies) found to violate the ADEA. The court in *Dreyer v. ARCO Chem. Co.*, 801 F.2d 651, 656-57 (1986) explained as follows:

> Many cases since *Thurston* have extracted from it the dual "knew or showed reckless disregard" test of willfulness to all claimed violations of the ADEA. However, there is a

> distinction between cases where the employer action that is claimed to violate the ADEA consists of adoption of a policy, as in *Thurston*, and cases where the employer action consists of a decision directed at an individual, such as termination or demotion. The "knew or reckless disregard" standard is particularly apt in the former situation . . . In such a situation, it is meaningful to inquire whether the employer knew that the action was in violation of the Act or whether it acted in reckless disregard of the prohibitions of the ADEA.
>
> . . .
>
> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.

Four years after *Dreyer*, the Supreme Court decided *Hazen Paper Co., v. Biggins*, 507 U.S. 604 (1993). Unlike *Thurston*, *Hazen Paper* involved a discrete action against a single employee. In analyzing the possibility of liquidated damages in such a case, the *Hazen* Court rejected any requirement that the defendant's action must be "outrageous" before liquidated damages can be imposed. It adhered to the *Thurston* "knowing/reckless disregard" test of willfulness for all acts of intentional age discrimination. Addressing the concern that liquidated damages would be automatic in all cases in which a discrete act was found to be intentional age discrimination, the Court declared as follows:

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons, see, e. g., § 623(f)(2) (exemption for bona fide seniority systems and employee benefit plans); § 631(c) (exemption for bona fide executives and high policymakers). If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.
>
> Nor do we see how the instant case can be distinguished from *Thurston* . . . The only distinction between *Thurston* and the case before us is the existence of formal discrimination. Age entered into the employment decision there through a formal and publicized policy, and not as an undisclosed factor motivating the employer on an ad hoc basis, which is what respondent alleges occurred here. But surely an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut against imposing a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages.

8.4.3 Liquidated Damages

> We therefore reaffirm that the *Thurston* definition of "willful" -- that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute -- applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision.

507 U.S. at 616. Accordingly, the instruction does not include any requirement that the defendant's conduct must have been outrageous. *See Starceski v. Westinghouse Elec. Corp.,* 54 F.3d 1089, 1099, n.2 (3d Cir. 1995) (noting that the Third Circuit's "outrageousness" requirement in *Dreyer* had been effectively overruled by *Hazen*).

The amount of damages to be doubled under the ADEA liquidated damages provision does not include front pay. *Blum v. Witco Chem. Corp.,* 829 F.2d 367, 373 (3d Cir. 1987) (noting that a front pay award "is the monetary equivalent of the equitable remedy of reinstatement" and therefore is not part of the "wages" that are to be doubled under the terms of the statute).

Liquidated damages are of course not available in disparate impact cases, as liquidated damages are premised on a knowing or reckless disregard of the law. In contrast, disparate impact liability is not dependent on a knowing or intentional violation.

In *Potence v. Hazleton Area School District,* 357 F.3d 366 (3d Cir. 2004), the court held that the ADEA authorizes the imposition of liquidated damages against government employers who engage in willful age discrimination.

8.4.4. ADEA Damages — Front Pay

Model

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

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

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

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

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

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

Comment

8.4.4 Front Pay

Front pay may be awarded if reinstatement is not possible. In *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 795-96 (3d Cir. 1985), the court rejected the defendant's argument that an award of front pay is not permitted in an ADEA action, and discussed the role of a front pay award in the following passage:

> Although this court has not yet spoken on whether an award of future lost earnings is precluded by the ADEA, . . . the line of cases we find most persuasive allows such an award. As Judge Weinfeld wrote in *Koyen v. Consolidated Edison Co. of New York*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983), "To deny [authority to grant front pay] would defeat a purpose of the Act to make a victim of discrimination 'whole' and to restore him to the economic position he would have occupied but for the unlawful conduct of his employer."
>
> Moreover, it is significant that whereas the FLSA has no provision for future damages, when Congress enacted the ADEA it added the following provision to the remedies taken from the FLSA:
>
>> In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section.
>
> 29 U.S.C. § 626(b). The inclusion of equitable relief strengthens the conclusion that Congress intended victims of age discrimination to be made whole by restoring them to the position they would have been in had the discrimination never occurred.
>
> Front pay, an award for future earnings, is sometimes needed to achieve that purpose. Ordinarily, an employee would be made whole by a backpay award coupled with an order for reinstatement. Reinstatement is the preferred remedy to avoid future lost earnings, but reinstatement may not be feasible in all cases. There may be no position available at the time of judgment or the relationship between the parties may have been so damaged by animosity that reinstatement is impracticable. In such circumstances, the remedial purpose of the statute would be thwarted and plaintiff would suffer irreparable harm if front pay were not available as an alternate remedy to reinstatement. Since reinstatement is an equitable remedy, it is the district court that should decide whether reinstatement is feasible. *Of course the amount of damages available as front pay is a jury question.* (Emphasis added).

Because front pay is essentially an equitable remedy in lieu of reinstatement, the plaintiff's entitlement to front pay is an issue for the court, not the jury. But in *Maxfield, supra,* the court declared that once the court finds that reinstatement is not feasible, it is for the jury to determine the amount of "damages" available as front pay. Thus, it appears in the Third Circuit

that the parties have the right to a jury trial to determine the amount of front pay — though this is not the case in actions brought under Title VII or Section 1981.

8.4.5 ADEA Damages — Nominal Damages

Model

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

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

However, if you find compensable injury, you must award damages for lost wages or benefits (as I instructed you), rather than nominal damages.

Comment

There is no Third Circuit case law on the availability of nominal damages in an ADEA case. But it appears that an award of nominal damages in an ADEA action might be justified in an extraordinary case, and so a pattern instruction is provided. The Eighth Circuit Committee Comment on a nominal damage instruction in an ADEA case opines that "[n]ominal damages normally are not appropriate in ADEA cases" and explains as follows:

> Recoverable damages in ADEA cases normally are limited to lost wages and benefits and in most ADEA cases, it will be undisputed that the plaintiff has some actual damages. Although case law does not clearly authorize this remedy in age discrimination cases, a nominal damage instruction may be considered in appropriate cases, and Model Instruction 5.02B, supra, should be used. Most cases that allow nominal damages just assume they are permissible without much discussion of the issue. *See e.g.*, *Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1438 (D. Kan. 1987) (ADEA); *Graefenhain v. Pabst Brewing Co.*, 670 F. Supp. 1415, 1416 (E.D. Wis. 1987) (ADEA).