

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

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2 Model

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

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

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

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

12

13 Comment

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

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

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

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

27 The most important differences between the two actions are:

28 1. The Equal Pay Act does not require proof of intent to discriminate. The plaintiff recovers
29 under the Equal Pay Act by proving that she received lower pay for substantially equal work. In
30 contrast, Title VII claims for disparate treatment require proof of an intent to discriminate. *See*

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31 Lewis and Norman, *Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). But Title
32 VII does not require the plaintiff to prove the EPA statutory requirements of “equal work” and
33 “similar working conditions”.

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

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

54 452 U.S. at 178-179.

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

59 Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29
60 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell*
61 *Douglas*; rather, they follow a two-step burden-shifting paradigm. The plaintiff must first
62 establish a prima facie case by demonstrating that employees of the opposite sex were paid
63 differently for performing "equal work"--work of substantially equal skill, effort and
64 responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health*
65 *and Social Services*, 865 F.2d 1408, 1413-14 (3rd Cir. 1989). The burden of persuasion
66 then shifts to the employer to demonstrate the applicability of one of the four affirmative
67 defenses specified in the Act. Thus, the employer's burden in an Equal Pay Act claim --
68 being one of ultimate persuasion -- differs significantly from its burden in an ADEA [or

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69 Title VII] claim. Because the employer bears the burden of proof at trial, in order to prevail
70 at the summary judgment stage, the employer must prove at least one affirmative defense
71 "so clearly that no rational jury could find to the contrary." *Delaware Dept. of Health*, 865
72 F.2d at 1414.

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

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

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

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

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

100 Under Title VII, the statute of limitations for a pay claim¹ begins to run upon the occurrence
101 of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. §

¹ For purposes of brevity, this discussion focuses on deadlines applicable to claims by private-sector employees. For discussion of deadlines applicable to claims by federal employees, see, e.g., *Green v. Brennan*, 136 S. Ct. 1769 (2016).

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102 2000e-5(e), can include “when a discriminatory compensation decision or other practice is
103 adopted, when an individual becomes subject to a discriminatory compensation decision or other
104 practice, or when an individual is affected by application of a discriminatory compensation
105 decision or other practice, including each time wages, benefits, or other compensation is paid,
106 resulting in whole or in part from such a decision or other practice.” *Id.* § 2000e-5(e)(3)(A); *see*
107 *Mikula v. Allegheny County*, 583 F.3d 181, 185-86 (3d Cir. 2009) (applying Section 2000e-
108 5(e)(3)(A)).² This amendment brings the accrual date for a Title VII claim more in line with the
109 EPA mechanism, in which an EPA claim arises each time the employee receives lower pay than
110 male employees doing substantially similar work.

111 6. “The Equal Pay Act, unlike Title VII, has no requirement of filing administrative
112 complaints and awaiting administrative conciliation efforts.” *County of Washington v. Gunther*,
113 452 U.S. 161, 175, n.14 (1981).³

² *See also Noel v. Boeing Co.*, 622 F.3d 266, 273 (3d Cir. 2010) (holding that Section 2000e-5(e)(3)(A) “does not apply to failure-to-promote claims”).

³ As to Title VII’s administrative-exhaustion requirement, *see* 42 U.S.C. § 2000e-5; *see also* 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 11:1.50 (online edition updated December 2018) (discussing the plaintiff’s option to await the outcome of the administrative proceeding or to obtain a “right-to-sue” letter prior to that outcome). “In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations.... Because failure to exhaust administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies.” *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *see also Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1846, 1851 (2019) (unanimous opinion) (holding that Title VII’s requirement of administrative charge-filing “is not jurisdictional” and explaining that this requirement is instead “a [claim-]processing rule, albeit a mandatory one”).

In *Williams*, which involved the distinctive exhaustion requirement set by 29 C.F.R. § 1614.105 for suits by federal employees, the Court of Appeals evinced the view that the question of exhaustion could properly be submitted to the jury. *See id.* (“By failing to offer any evidence to the jury on an issue upon which he carried the burden of proof, the Postmaster effectively waived his affirmative defense.”). The Court of Appeals has not applied *Williams* to address the judge/jury division of labor in a case involving the more general exhaustion provisions in Section 2000e-5, but at least one other Court of Appeals has held that the questions to which a jury trial right attaches include “the defense in a Title VII case of having failed to file a timely administrative complaint.” *Begolli v. Home Depot U.S.A., Inc.*, 701 F.3d 1158, 1160 (7th Cir. 2012). *Compare Small v. Camden Cty.*, 728 F.3d 265, 269, 271 (3d Cir. 2013) (holding that compliance with the exhaustion requirement set by the Prison Litigation Reform Act presents a question that can be resolved by the judge).

In the event that a dispute over exhaustion presents a jury question, the court may wish to

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114 7. The Supreme Court decided in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that
115 discrimination on the basis of sexual orientation or transgender status is a subset of discrimination
116 on account of sex under Title VII. It is not clear if this principle applies to the EPA. See Chapter
117 11. Where the plaintiff claims that wage discrimination is a violation of both Title VII and the
118 Equal Pay Act, it will be necessary to give two sets of instructions, with the exception that the
119 affirmative defenses provided by the Equal Pay Act (see Instructions 11.2.1-11.2.4) will be
120 applicable to both claims. If a claim for sex-based wage discrimination is brought under Title VII
121 only, then these Title VII instructions should be used, with the proviso that where sufficient
122 evidence is presented, the defendant is entitled to an instruction on the affirmative defenses set
123 forth in the Equal Pay Act. See Instructions 11.2.1-11.2.4 for instructions on those affirmative
124 defenses.

125 *Employment relationship*

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

146 *Religious Organizations*

147 Title VII allows religious organizations to hire and employ employees on the basis of their
148 religious beliefs. 42 U.S.C. § 2000e-1(a) (Title VII claim for religious discrimination cannot be

submit relevant interrogatories to the jury. As of this time, the Committee has not prepared a model instruction on exhaustion. The Committee welcomes feedback from users of the model instructions concerning the need for, and appropriate nature of, such a model instruction.

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149 brought against a “religious corporation, association, educational institution or society”). In
150 *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007), the court listed
151 the following factors as pertinent to whether a particular organization is within Title VII’s
152 exemption for religious organizations:

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

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

170 By its terms, Title VII does not confer upon religious organizations the right to discriminate
171 against employees on the basis of race, sex (including sexual orientation and transgender status),
172 and national origin. But with respect to claims for wrongful termination, the First Amendment’s
173 religion clauses give rise to an affirmative defense that “bar[s] the government from interfering
174 with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical
175 Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). The significance of this
176 decision was reinforced by *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049
177 (2020), which expanded the scope of the exception. That decision involved the Age Discrimination
178 in Employment Act and Americans with Disabilities Act, but there is little doubt that the exception
179 applies to Title VII and other federal and state antidiscrimination statutes. Further, while the
180 discharge in *Hosanna-Tabor* implicated religious principles of the employer, the schools in *Our
181 Lady of Guadalupe* were held entitled to the protection of the exception even though the decisions
182 challenged there were said to be based on secular concerns. *Id.* at 2058 (“The school maintains
183 that it based its decisions on classroom performance—specifically, Morrissey-Berru’s difficulty in
184 administering a new reading and writing program, which had been introduced by the school’s new
185 principal as part of an effort to maintain accreditation and improve the school’s academic
186 program.”); *id.* at 2059 (“The school maintains that the decision was based on [Biel’s] poor
187 performance—namely, a failure to observe the planned curriculum and keep an orderly
188 classroom.”).

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189 The *Hosanna-Tabor* Court engaged in a fact-specific analysis to conclude that the teacher
190 in question was a minister, although it also held that “the ministerial exception is not limited to the
191 head of a religious congregation,” but it declined “to adopt a rigid formula for deciding when an
192 employee qualifies as a minister.” *Id.* at 707. *Our Lady of Guadalupe School*, while not attempting
193 a comprehensive definition of the term, took a broad view of its reach. Plaintiffs were lay teachers
194 in Catholic elementary schools without ministerial titles or special training and neither was held
195 out by the schools as a minister or held herself out as such. Further, most of their work involved
196 teaching secular subjects. Nevertheless, each taught religion classes and led their classes in prayer
197 and other religious activities. The Court held that sufficed to bring them within the exception:
198 “When a school with a religious mission entrusts a teacher with the responsibility of educating and
199 forming students in the faith, judicial intervention into disputes between the school and the teacher
200 threatens the school’s independence in a way that the First Amendment does not allow.” *Id.* at
201 2069. *See also Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006) (pre-*Hosanna-Tabor*
202 decision holding in a Title VII case that the ministerial exception “applies to any claim, the
203 resolution of which would limit a religious institution's right to choose who will perform particular
204 spiritual functions”).

205 Both *Hosanna-Tabor* and *Our Lady of Guadalupe* involved wrongful termination claims,
206 and *Hosanna-Tabor* held that such claims were barred regardless of the type of relief sought. *See*
207 *Hosanna-Tabor*, 132 S. Ct. at 709 (“The case before us is an employment discrimination suit
208 brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only
209 that the ministerial exception bars such a suit. We express no view on whether the exception bars
210 other types of suits, including actions by employees alleging breach of contract or tortious conduct
211 by their religious employers.”). The logic of both clearly would embrace claims of failure to hire,
212 but neither explicitly addressed whether or to what extent the exception barred challenges based
213 on discrimination in terms and conditions of employment. *See also Petruska*, 462 F.3d at 308 n.11
214 (noting that the court was not deciding whether the ministerial exception would bar claims for
215 hostile work environment sexual harassment).). *Cf. Elvig v. Calvin Presbyterian Church*, 375 F.3d
216 951, 964 (9th Cir. 2004) (review of a church’s decision to terminate plaintiff’s ministry foreclosed,
217 but plaintiff’s hostile environment claims may be pursued).

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

222 *Discrimination because of religion*

223 Title VII prohibits adverse employment actions motivated by a protected characteristic;
224 among those characteristics is “religion.” 42 U.S.C. § 2000e–2(a)(1). Where a Title VII religious-
225 discrimination claim is grounded on a claim that the employer was motivated by the plaintiff’s

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226 religious beliefs,⁴ the instructions provided in this Chapter should be a good fit. But “religion” as
227 used in Title VII includes more than religious belief. “The term ‘religion’ includes all aspects of
228 religious observance and practice, as well as belief, unless an employer demonstrates that he is
229 unable to reasonably accommodate to an employee’s or prospective employee’s religious
230 observance or practice without undue hardship on the conduct of the employer’s business.” 42
231 U.S.C. § 2000e(j). Coupling this definition with the statutory prohibition on discrimination
232 “because of ... religion,” 42 U.S.C. § 2000e–2(a)(1), the Supreme Court has recognized a Title
233 VII disparate-treatment claim for failure to accommodate a religious practice. *See E.E.O.C. v.*
234 *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015) (holding that “religious
235 practice is one of the protected characteristics that cannot be accorded disparate treatment and must
236 be accommodated”). The Committee has not attempted to determine the ways in which the
237 disparate-treatment instructions in this Chapter would need to be modified for application to a
238 claim for failure to accommodate a religious practice.

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

240 In *Francis v. Mineta*, 505 F.3d 266, 270-71 (3d Cir. 2007), an employee attempted to bring
241 an employment discrimination action under the Religious Freedom Restoration Act, 42 U.S.C. §§
242 2000bb-2000bb-4. (The employee had failed to exhaust administrative remedies with the EEOC,
243 so Title VII was unavailable to him.) The court held that “nothing in RFRA alters the exclusive
244 nature of Title VII with regard to employees’ claims of religion-based employment
245 discrimination.” The court relied on the legislative history of RFRA, which demonstrated that
246 “Congress did not intend RFRA to create a vehicle for allowing religious accommodation claims
247 in the context of federal employment to do an end run around the legislative scheme of Title VII.”

248 *Title VII Protection of Pregnancy:*

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

250 In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which
251 added new language to Title VII’s definitions subsection. The first clause of the
252 1978 Act specifies that Title VII’s “ter[m] ‘because of sex’ ... include[s] ... because
253 of or on the basis of pregnancy, childbirth, or related medical conditions.” §
254 2000e(k). The second clause says that “women affected by pregnancy, childbirth,
255 or related medical conditions shall be treated the same for all employment-related
256 purposes ... as other persons not so affected but similar in their ability or inability

⁴ In assessing whether beliefs are religious, one should consider whether those beliefs
“address[] fundamental and ultimate questions having to do with deep and imponderable
matters,’ are ‘comprehensive in nature,’ and are accompanied by ‘certain formal and external
signs.’ ” *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 491 (3d Cir. 2017) (quoting *Africa*
v. Com. of Pa., 662 F.2d 1025, 1032 (3d Cir. 1981), and holding that the plaintiff’s anti-
vaccination beliefs did not count as religious because they satisfied none of these three factors).

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257 to work....” *Ibid.*

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

262 The Court of Appeals has held that the Pregnancy Discrimination Act’s reference to
263 “related medical conditions” includes abortion. *See Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358,
264 364 (3d Cir. 2008) (concluding “that an employer may not discriminate against a woman employee
265 because she has exercised her right to have an abortion”).

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

271 *Interaction between disparate impact and disparate treatment principles*

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

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

285 Although the Third Circuit earlier held that Title VII does not bar discrimination on the
286 basis of sexual orientation, *see Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261
287 (3d Cir. 2001) (“Title VII does not prohibit discrimination based on sexual orientation.”), the
288 Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), overturned that
289 result. It recognized that discrimination on the basis of sexual orientation or transgender status is
290 a subset of sex discrimination. As the Court wrote: “[a]n individual’s homosexuality or transgender
291 status is not relevant to employment decisions,” “because it is impossible to discriminate against
292 a person for being homosexual or transgender without discriminating against that individual based

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293 on sex.” *Id.* at 1741.

294 Even while *Bibby* controlled, the Third Circuit recognized that discrimination based on sex
295 or gender stereotypes (sometimes called “gender nonconformity”) might fall within Title VII’s
296 prohibition of sex discrimination. *See Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d
297 Cir. 2009) (“[I]t is possible that the harassment Prowel alleges was because of his sexual
298 orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was
299 also harassed for his failure to conform to gender stereotypes.... Because both scenarios are
300 plausible, the case presents a question of fact for the jury....”).

301

302 *Federal Employee Claims*

303 Title VII claims by federal employees are governed by a separate statutory section, which
304 provides in relevant part that for various specified types of federal-government employees “[a]ll
305 personnel actions affecting [such] employees or applicants for [such] employment ... shall be
306 made free from any discrimination based on race, color, religion, sex, or national origin.” 42
307 U.S.C. § 2000e-16(a). The Court of Appeals has held that motivating factor causation applies to
308 federal employee claims under that statute. *Makky v. Chertoff*, 541 F. 3d 205, 213-214 (3d Cir.
309 2008), although that decision did not focus on the language of Section 2000e-16(a).

310 The Supreme Court’s recent decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), may or
311 may not have implications for Title VII discrimination cases brought by federal employees. *Babb*
312 was a case claiming age discrimination, and the Court recognized a new causation structure for
313 ADEA discrimination claims by federal employees. Parallel to § 2000e-16(a) of Title VII, the
314 ADEA’s extension of protection from age discrimination to federal employees provides generally
315 that “personnel actions . . . shall be made free from any discrimination based on age.” 29 U. S. C.
316 §633a(a). Despite recognizing the default rule requiring proof of a “but-for cause” for
317 antidiscrimination statutes, the Court read the “plain meaning of the critical statutory language”
318 to “demand[] that personnel actions be untainted by any consideration of age.” *Id.* at 1171. That
319 means that, while the plaintiff must prove that discrimination caused, in a but-for sense, a
320 difference in her treatment, she does not have to establish that that different treatment resulted in
321 a different ultimate outcome in order to establish a violation. Rather, the Court distinguished
322 between processes and outcomes with respect to remedies. Proving taint suffices for a violation
323 but

324 does not mean that a plaintiff may obtain all forms of relief that are generally available
325 for a violation of §633a(a), including hiring, reinstatement, backpay, and compensatory
326 damages, without showing that a personnel action would have been different if age had
327 not been taken into account. To obtain such relief, a plaintiff must show that age was a
328 but-for cause of the challenged employment decision. But if age discrimination played a
329 lesser part in the decision, other remedies may be appropriate.

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330 *Id.* In other words, absent a showing of but-for causation in the ultimate result, plaintiff’s proof of
331 a “taint” establishes a violation and entitles plaintiff to whatever remedies are appropriate when
332 the final personnel action remained unaffected. However, such a plaintiff apparently must show
333 something more than bias by someone involved in the process since the Court also wrote:
334 “plaintiffs are not without a remedy if they show that age was a but-for cause of differential
335 treatment in an employment decision but not a but-for cause of the decision itself.” *Id.* at 1170.

336
337 *Babb* may suggest, contrary to *Makky*, that motivating factor causation is not applicable to
338 claims of discrimination in the outcome of personnel decisions. The contrary argument is that
339 Section 2000e-16(d) applies “the provisions of §706(f) through (k), as applicable” to federal
340 employee actions. And §706(g) contains the “same decision anyway” defense to full relief, thus
341 suggesting that motivating factor causation applies in Section 2000e-16 suits. This possibility was
342 noted in a footnote to Justice Thomas’s dissent in *Babb*. *Id.* at 1182 n.2.

5.1.1 Disparate Treatment – Mixed-Motive

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

Model

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

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

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff’s] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]] [or otherwise discriminated against [plaintiff] in a serious and tangible way with respect to [plaintiff’s] compensation, terms, conditions, or privileges of employment]⁵; and

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

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

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

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

[For use where defendant sets forth a “same decision” affirmative defense:⁶

⁵ Please see the Comment for discussion of the last item in this list of alternatives.

⁶ The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

5.1.1 Disparate Treatment – Mixed-Motive

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

35 **Comment**

36 The Supreme Court has ruled that direct evidence is not required for a plaintiff to prove
37 that discrimination was a motivating factor in a “mixed-motive” case, *i.e.*, a case in which an
38 employer had both legitimate and illegitimate reasons for making a job decision. *Desert Palace*
39 *Inc. v. Costa*, 539 U.S. 90 (2003). The *Desert Palace* Court concluded that in order to be entitled
40 to a mixed-motive instruction, “a plaintiff need only present sufficient evidence for a reasonable
41 jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national
42 origin was a motivating factor for any employment practice.’ ” *Id.* at 101 (quoting 42 U.S.C.
43 § 2000e-2(m)). The mixed-motive instruction above — including the instruction on the affirmative
44 defense — tracks the instructions approved in *Desert Palace*.

45 In *Egan v. Delaware River Port Authority*, 851 F.3d 263, 274 (3d Cir. 2017), the Court of
46 Appeals applied the reasoning of *Desert Palace* to FMLA retaliation-for-exercise claims, and held
47 “that direct evidence is not required to obtain a mixed-motive instruction under the FMLA.” The
48 *Egan* court explained that, if a mixed-motive instruction is requested, the court “should ...
49 determine[] whether there [i]s evidence from which a reasonable jury could conclude that the
50 [defendant] had legitimate and illegitimate reasons for its employment decision and that [the
51 plaintiff's] use of FMLA leave was a negative factor in the employment decision”; if so, the mixed-
52 motive instruction is available. *Id.* at 275. For the moment, the Committee has not attempted to
53 determine whether the standard outlined in *Egan* also governs in Title VII cases. That standard
54 differs from the suggestions offered in prior versions of this Comment; those prior suggestions are
55 set out in a footnote.⁷

⁷ Prior versions of this Comment (pre-*Egan*) stated as follows:

While direct evidence is not required to make out a mixed motive case, it is nonetheless true that the distinction between “mixed-motive” cases and “pretext” cases is often determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this may be sufficient to show that the defendant’s activity was motivated at least in part by animus toward a protected class, and therefore a “mixed-motive” instruction is warranted. If the evidence of discrimination is only circumstantial, then the defendant can argue that there was no animus at all, and that its

5.1.1 Disparate Treatment – Mixed-Motive

56 Whatever the precise standard for determining when a mixed-motive instruction is
57 available, it is clear that the distinction between mixed-motive and pretext cases is retained after
58 *Desert Palace*. The Third Circuit has indicated that it retains that distinction. *See, e.g., Makky v.*
59 *Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008) (“A Title VII plaintiff may state a claim for
60 discrimination under either the pretext theory set forth in *McDonnell Douglas Corp. v. Green*, 411

employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 5.1.2 should be given. *See generally Stackhouse v. Pennsylvania State Police*, 2006 WL 680871 at *4 (M.D. Pa. 2006) (“A pretext theory of discrimination is typically presented by way of circumstantial evidence, from which the finder of fact may infer the falsity of the employer's explanation to show bias. A mixed-motive theory of discrimination, however, is usually put forth by presenting evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.”) (internal citations and quotations omitted).

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

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

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

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

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61 U.S. 792 (1973), or the mixed-motive theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S.
62 228 (1989), under which a plaintiff may show that an employment decision was made based on
63 both legitimate and illegitimate reasons.”⁸ See also *Hanes v. Columbia Gas of Pennsylvania*
64 *Nisource Co.*, 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit “adheres to a
65 distinction between ‘pretext’ cases, in which the employee asserts that the employer’s justification
66 for an adverse action is false, and ‘mixed-motives’ cases, in which the employee asserts that both
67 legitimate and illegitimate motivations played a role in the action”; “determinative factor” analysis
68 applies to the former and “motivating factor” analysis applies to the latter).

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

77 “Same Decision” Affirmative Defense in Mixed-Motive Cases

78 Where the plaintiff has shown intentional discrimination in a mixed motive case, the
79 defendant can still avoid liability for money damages by demonstrating by a preponderance of the
80 evidence that the same decision would have been made even in the absence of the impermissible
81 motivating factor. If the defendant establishes this defense, the plaintiff is then entitled only to
82 declaratory and injunctive relief, attorney’s fees and costs. Orders of reinstatement, as well as the
83 substitutes of back and front pay, are prohibited if a same decision defense is proven. 42 U.S.C.
84 §2000e-5(g)(2)(B).

85 Adverse Employment Action – General Considerations

86 Title VII provides that “[i]t shall be an unlawful employment practice for an employer ...
87 to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any
88 individual with respect to his compensation, terms, conditions, or privileges of employment,
89 because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-
90 2(a)(1).⁹ Failures or refusals to hire and discharges are specifically included within the statute’s

⁸ The *Makky* court’s statement (quoted in the text) should not be taken to suggest that the complaint must specify whether the plaintiff will rely on a pretext theory, a mixed-motive theory, or both. See *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 788 (3d Cir. 2016) (“The distinction between those two types of cases” has to do with types of proof, “and identifying the proof before there has been discovery would seem to put the cart before the horse.”).

⁹ In addition, Section 2000e-2(a)(2) provides that “[i]t shall be an unlawful employment

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91 scope. Other employment actions are included if they “otherwise ... discriminate against any
92 individual with respect to his compensation, terms, conditions, or privileges of employment.”
93 Thus, wage discrimination counts as an adverse action, since it is discrimination with respect to
94 compensation.¹⁰ The circumstances under which harassing conduct rises to the level of
95 discrimination in the terms, conditions, or privileges of employment have been spelled out by
96 caselaw,¹¹ and Instructions 5.1.3 through 5.1.5 accordingly guide the jury through the application
97 of the standards that the Supreme Court and Third Circuit caselaw have set. Likewise, constructive
98 discharge counts as action that affects employment terms, conditions, or privileges,¹² and
99 Instruction 5.2.2 guides the jury on how to assess whether a constructive discharge has occurred.
100 “[T]he ‘terms, conditions, or privileges of employment’ clearly include benefits that are part of an
101 employment contract.”¹³ But, in addition, the term “privileges” encompasses benefits that, though
102 they are not contractually required, are incidents of employment or form part and parcel of the
103 employment relationship.¹⁴ The Court of Appeals has indicated that an alteration of the terms,

practice for an employer ... to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(2). Caselaw concerning disparate treatment claims tends to focus on Section 2000e-2(a)(1), whereas Section 2000e-2(a)(2) is often viewed as targeting practices that have a disparate impact. *See, e.g., E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (noting that Sections 2000e-2(a)(1) and (2) are “often referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision”). The discussion in the text focuses on Section 2000e-2(a)(1).

¹⁰ *See* Comment 5.0, discussing *Washington Cty. v. Gunther*, 452 U.S. 161 (1981).

¹¹ *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“The phrase “terms, conditions, or privileges of employment” evinces a congressional intent “to strike at the entire spectrum of disparate treatment of men and women” in employment,’ which includes requiring people to work in a discriminatorily hostile or abusive environment.” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978))); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013) (“[T]he plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered.”).

¹² *See, e.g., Pennsylvania State Police v. Suders*, 542 U.S. 129, 142-43 (2004).

¹³ *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984); *see also id.* at 75 (“If the evidence at trial establishes that the parties contracted to have petitioner considered for partnership, that promise clearly was a term, condition, or privilege of her employment. Title VII would then bind respondent to consider petitioner for partnership as the statute provides, i.e., without regard to petitioner’s sex.”).

¹⁴ “Those benefits that comprise the ‘incidents of employment,’ S.Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), or that form ‘an aspect of the relationship between the employer and

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104 conditions, or privileges of employment must be “serious and tangible” in order to be actionable.¹⁵
105 But there is not a great deal of Third Circuit caselaw addressing what meets that test or who should
106 decide whether the test is met. Some of the relevant caselaw arose in the context of Title VII
107 retaliation claims, which – before the Supreme Court’s 2006 decision in *Burlington Northern* –
108 were subject (in the Third Circuit) to the same “adverse employment action” test as claims under
109 Title VII’s substantive discrimination provision.¹⁶ In a number of instances, the Court of Appeals
110 has affirmed grants of summary judgment that turned upon a ruling concerning the absence of an
111 adverse employment action.¹⁷ On the other hand, where the material adverseness of an
112 employment action requires assessment of fact-specific circumstances, the Court of Appeals has
113 on at least one occasion specified that this assessment is for the jury rather than the judge.¹⁸ Failure

employees,’ *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 ... (1971), may not be afforded in a manner contrary to Title VII.” *Hishon*, 467 U.S. at 75-76 (footnotes omitted). The *Hishon* Court also suggested that the question is whether the benefit in question “was part and parcel of [the relevant type of employee’s] status as an employee” of the employer. *Id.* at 76.

¹⁵ *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015) (quoting prior Third Circuit caselaw). In *Jones*, the court held that “[a] paid suspension pending an investigation of an employee’s alleged wrongdoing” did not count as an adverse action under Section 2000e–2(a)(1), because “the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer’s disciplinary policies in appropriate circumstances.” *Jones*, 796 F.3d at 326 (quoting *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006)). In *Jones*, the Court of Appeals affirmed the grant of summary judgment to the defendant. *See Jones*, 796 F.3d at 332.

¹⁶ *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300–01 (3d Cir. 1997) (holding “that the ‘adverse employment action’ element of a retaliation plaintiff’s prima facie case incorporates the same requirement that the retaliatory conduct rise to the level of a violation of 42 U.S.C. § 2000e–2(a)(1) or (2)” and that the plaintiff’s “allegations that she was subjected to ‘unsubstantiated oral reprimands’ and ‘unnecessary derogatory comments’ ” did not meet that test). *See also Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 787-88 (3d Cir. 1998) (reversing grant of summary judgment to defendant on plaintiff’s ADA retaliation claim, and noting that while “minor or trivial actions that merely make an employee ‘unhappy’ are not sufficient to qualify as retaliation under the ADA,” relegating “an employee to an undesirable schedule can be more than a ‘trivial’ or minor change in the employee’s working conditions”).

¹⁷ *See Jones*, 796 F.3d at 332; *Harris v. Supervalu Holdings-PA LLC*, 262 Fed. Appx. 470, 472 (3d Cir. 2008) (nonprecedential per curiam opinion). *See also Walker v. Centocor Ortho Biotech, Inc.*, 558 Fed. Appx. 216, 220 (3d Cir. 2014) (nonprecedential opinion concerning Section 1981 claim); *Barnes v. Nationwide Mut. Ins. Co.*, 598 Fed. Appx. 86, 87 (3d Cir. 2015) (same).

¹⁸ *See Hampton v. Borough of Tinton Falls Police Dep’t*, 98 F.3d 107, 116 (3d Cir. 1996) (“Although the rotation may not be a demotion, it came on the heels of [Hampton’s] EEOC

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114 to accommodate a religious practice can be the basis for a claim under Section 2000e-2(a)(1), but
115 the model instructions do not attempt to formulate an instruction for use in such cases.¹⁹

116 Instruction 5.1.1 offers a list of alternatives by which the plaintiff could meet the “adverse
117 employment action” element – failure to hire; failure to renew an employment agreement; failure
118 to promote; demotion; termination; constructive discharge; or “otherwise discriminat[ing] against
119 [plaintiff] in a serious and tangible way with respect to [plaintiff’s] compensation, terms,
120 conditions, or privileges of employment.” In a case where the plaintiff relies upon the last of these
121 options (“otherwise discriminat[ing]”), the court will need to determine whether categorizing the
122 event(s) in question as an adverse employment action presents a question of law for the court or a
123 question for the jury. As noted below, some types of actions are categorically outside the ambit
124 of actionable conduct (e.g., paid suspension pending investigation of alleged wrongdoing) and a
125 case involving such an action (and no other adverse conduct) would not reach a jury (for lack of
126 an adverse action). In other instances, the type of employment action might not be categorically
127 sufficient or categorically insufficient, but rather might count as an adverse employment action
128 only if it had enough of an effect (i.e., if it was serious and tangible); as to such actions, the
129 Committee has not attempted to determine whether it is for the judge or for the jury to decide
130 whether the action was serious and tangible so as to count as an adverse employment action.

131 *Failure to Rehire as an Adverse Employment Action*

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

filing, and plaintiffs argue that the road patrol assignment is less desirable than that of detective bureau. Moreover, Hampton remains in his new assignment even though it was supposed to have been temporary. The significance of these facts should be resolved by jury deliberations, not motions for summary judgment.”). This discussion in *Hampton* concerned retaliation claims (including under Title VII) – but, as noted above, the Court of Appeals during this time period borrowed the adverse-action test for Title VII retaliation claims from the principles governing Title VII discrimination claims.

¹⁹ *See* Comment 5.0 (discussing *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015)).

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

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

150 *Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for*
151 *Employment*

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

161 This involves inquiry only into the bare minimum requirement necessary to perform
162 the job at issue. Typically, this minimum requirement will take the form of some type of
163 licensing requirement, such as a medical, law, or pilot’s license, or an analogous
164 requirement measured by an external or independent body rather than the court or the
165 jury. * * * We caution that we are not imposing a requirement that mixed-motive plaintiffs
166 show that they were subjectively qualified for their jobs, i.e., performed their jobs well.
167 Rather, we speak only in terms of an absolute minimum requirement of qualification, best
168 characterized in those circumstances that require a license or a similar prerequisite in order
169 to perform the job.

170 *Id.* (Emphasis added.)

171 The *Makky* court held that the determination of whether a plaintiff had obtained an
172 objective qualification for employment is a question of fact. But it would be extremely rare for the
173 court to have to instruct the jury on whether the plaintiff has met an objective job requirement
174 within the meaning of *Makky*. The examples given by the court are in the nature of licenses or
175 certifications by an external body — in the vast majority of cases, the parties will not dispute
176 whether the license or certification was issued. (In *Makky*, the requirement was that the employee
177 have a security clearance, and he could not contest that his clearance was denied.) In the rare case
178 in which the existence of an objective externally-imposed qualification raises a question of fact,

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179 the court will need to add a third element to the basic instruction. For example:

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

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

183 Construing a statute that contains similar motivating-factor language, the Supreme Court
184 ruled that “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the
185 supervisor to cause an adverse employment action, and if that act is a proximate cause of the
186 ultimate employment action, then the employer is liable under [the Uniformed Services
187 Employment and Reemployment Rights Act of 1994]” even if the ultimate employment decision
188 is taken by one other than the supervisor with the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186,
189 1194 (2011) (footnotes omitted). The Court did not explicitly state whether this ruling extends to
190 claims under 42 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor),
191 though it noted the similarity between Section 2000e-2(m)’s language and that of the USERRA.
192 Since *Staub*, however, the Third Circuit has frequently applied that decision in Title VII cases.
193 *E.g., McKenna v. City of Phila.*, 649 F.3d 171 (3d Cir. 2011); *Jones v. SEPTA*, 796 F.3d 323 (3d
194 Cir. 2015).

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

2 **Model**

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

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

10 First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff’s] employment
11 arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]]
12 [constructively discharged [plaintiff]] [or otherwise discriminated against [plaintiff] in a
13 serious and tangible way with respect to [plaintiff’s] compensation, terms, conditions, or
14 privileges of employment]²⁰; and

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

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

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

26 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If
27 you believe [defendant’s] stated reason and if you find that the [adverse employment action] would
28 have occurred because of defendant’s stated reason regardless of [plaintiff’s] [protected status],
29 then you must find for [defendant]. If you disbelieve [defendant’s] stated reason for its conduct,
30 then you may, but need not, find that [plaintiff] has proved intentional discrimination. In
31 determining whether [defendant’s] stated reason for its actions was a pretext, or excuse, for
32 discrimination, you may not question [defendant’s] business judgment. You cannot find intentional
33 discrimination simply because you disagree with the business judgment of [defendant] or believe

²⁰ Please see the Comment for discussion of the last item in this list of alternatives.

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34 it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may
35 consider whether [plaintiff] has proven that [defendant's] reason is merely a cover-up for
36 discrimination.

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

41

42 **Comment**

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

45 *The McDonnell Douglas Burden-Shifting Test*

46 The Instruction does not charge the jury on the complex burden-shifting formula
47 established for pretext cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and
48 *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).²¹ Under the *McDonnell*
49 *Douglas* formula a plaintiff who proves a prima facie case of discriminatory treatment raises a
50 presumption of intentional discrimination. The defendant then has the burden of production, not
51 persuasion, to rebut the presumption of discrimination by articulating a nondiscriminatory reason
52 for its actions. If the defendant does articulate a nondiscriminatory reason, the plaintiff must prove
53 intentional discrimination by demonstrating that the defendant's proffered reason was a pretext,
54 hiding the real discriminatory motive.

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

²¹ Instruction 5.1.2's statement of the elements of a pretext claim would require adjustment in a case involving a claim of pregnancy discrimination. *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1353-55 (2015) (explaining how the *McDonnell Douglas* proof framework applies to a claim “that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause”).

5.1.2 Disparate Treatment – Pretext

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

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

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

84 On proof of intentional discrimination, see *Sheridan v. E.I. DuPont de Nemours and Co.*,
85 100 F.3d 1061, 1066-1067 (3d Cir. 1996) (“[T]he elements of the prima facie case and disbelief
86 of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted,
87 but not required, to draw an inference leading it to conclude that there was intentional
88 discrimination.”).

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

92 *Determinative Factor*

93 The reference in the instruction to a “determinative factor” is taken from *Watson v. SEPTA*,
94 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is “determinative
95 factor”, while the appropriate term in mixed-motive cases is “motivating factor”). *See also LeBoon*
96 *v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 232 n.8 (3d Cir. 2007) (in a pretext case, the
97 plaintiff must show that the prohibited intent was a “*determinative factor*” for the job action)
98 (emphasis in original); *Atkinson v. Lafayette College*, 460 F.3d 447, 455 (3d Cir. 2006) (“Faced
99 with legitimate, non-discriminatory reasons for Lafayette College's actions, the burden of proof

5.1.2 Disparate Treatment – Pretext

100 rested with Atkinson to demonstrate that the reasons proffered were pretextual and that gender was
101 a determinative factor in the decisions.”); *Hanes v. Columbia Gas of Pennsylvania Nisource Co.*,
102 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit “adheres to a distinction between
103 ‘pretext’ cases, in which the employee asserts that the employer's justification for an adverse action
104 is false, and ‘mixed-motives’ cases, in which the employee asserts that both legitimate and
105 illegitimate motivations played a role in the action”; “determinative factor” analysis applies to the
106 former and “motivating factor” analysis applies to the latter).

107 The plaintiff need not prove that the plaintiff’s protected status was the only factor in the
108 challenged employment decision, but the plaintiff must prove that the protected status was a
109 determinative factor. For example, if the employer fires women who steal office supplies but not
110 men who steal office supplies, then the women’s gender is a determinative factor in the firing even
111 though there is another factor (stealing office supplies) which if applied uniformly might have
112 justified the challenged employment decision. *See, e.g., McDonnell Douglas Corp. v. Green*, 411
113 U.S. 792, 804 (1973) (“Petitioner may justifiably refuse to rehire one who was engaged in
114 unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all
115 races.”).²²

116 *Pretext*

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

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

²² In *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015), the court rejected the plaintiff’s contention “that a reasonable jury could draw an inference of discrimination because SEPTA declined to punish male employees who engaged in the same alleged misconduct as she.” *Jones*, 796 F.3d at 327-28. The court of appeals reasoned that even if the plaintiff’s supervisor had allowed a male employee “to underreport his vacation time to compensate him for unpaid overtime work,” and “even if this practice was against SEPTA rules, it was materially different from [the plaintiff’s] misconduct because [the male employee] did not fraudulently claim pay for work he never performed.” *Id.* at 328.

5.1.2 Disparate Treatment – Pretext

129 *See also* *Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) (“To make a showing of pretext,
130 ‘the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could
131 reasonably either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that
132 an invidious discriminatory reason was more likely than not a motivating or determinative cause
133 of the employer’s action’ ” (quoting *Fuentes*, 32 F.3d at 764).).²³

134 The reference in these opinions to “a motivating *or* determinative cause” seems to indicate
135 that the two terms are interchangeable. But they are not, because a factor might “motivate” conduct
136 and yet not be the “determinative” cause of the conduct — proof that the factor was determinative
137 is thus a more difficult burden. The very distinction between pretext and mixed-motive cases is
138 that in the former the plaintiff must show that discrimination is the “determinative” factor for the
139 job action, while in the latter the plaintiff need only prove that discrimination is a “motivating”
140 (i.e., one among others) factor. *See, e.g., Stackhouse v. Pennsylvania State Police*, 2006 WL
141 680871 at *4 (M.D. Pa. 2006) (“Whether a case is classified as one of pretext or mixed-motive has
142 important consequences on the burden that a plaintiff has at trial, and hence on the instructions
143 given to the jury”; “determinative factor” analysis applies to the former and “motivating factor”
144 analysis applies to the latter) (citing *Watson v. SEPTA*, 207 F.3d 207, 214-15 & n.5 (3d Cir. 2000)).
145 Accordingly, the instruction on pretext follows the standards set forth in *Doe*, *Fuentes*, and *Burton*,
146 with the exception that it uses only the term “determinative” and not the term “motivating.”

147 *Business Judgment*

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

158 *Adverse Employment Action – General Considerations*

²³ In *In re Tribune Media Co.*, 902 F.3d 384 (3d Cir. 2018), the Court of Appeals upheld the lower courts’ rejection of the claimant’s Title VII race-discrimination wrongful-termination claim because the employer “provided a legitimate, non-discriminatory reason for his discharge” and because this stated “rationale was not pretextual because [the claimant] and [his allegedly-harassing co-worker] were both fired for engaging in the same conduct [and the claimant] gives us no examples of similarly situated individuals who were disciplined more leniently for the same type of conduct.” *Tribune Media*, 902 F.3d at 404.

5.1.2 Disparate Treatment – Pretext

159 Instruction 5.1.2 offers a list of alternatives by which the plaintiff could meet the “adverse
160 employment action” element – failure to hire; failure to renew an employment agreement; failure
161 to promote; demotion; termination; constructive discharge; or “otherwise discriminat[ing] against
162 [plaintiff] in a serious and tangible way with respect to [plaintiff’s] compensation, terms,
163 conditions, or privileges of employment.” In a case where the plaintiff relies upon the last of these
164 options (“otherwise discriminat[ing]”), the court will need to determine whether categorizing the
165 event(s) in question as an adverse employment action presents a question of law for the court or a
166 question for the jury. As noted below, some types of actions are categorically outside the ambit
167 of actionable conduct (e.g., paid suspension pending investigation of alleged wrongdoing) and a
168 case involving such an action (and no other adverse conduct) would not reach a jury (for lack of
169 an adverse action). In other instances, the type of employment action might not be categorically
170 sufficient or categorically insufficient, but rather might count as an adverse employment action
171 only if it had enough of an effect (i.e., if it was sufficiently serious and tangible); as to such actions,
172 the Committee has not attempted to determine whether it is for the judge or for the jury to decide
173 whether the action was sufficiently serious and tangible to count as an adverse employment action.
174 See Comment 5.1.1 for further discussion of this issue.

175 *Failure to Rehire as an Adverse Employment Action*

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

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

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

194 *Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for* 195 *Employment*

5.1.2 Disparate Treatment – Pretext

196 In *Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008), the court declared that in both
197 pretext and mixed-motive cases, a plaintiff “has failed to establish a prima facie case of a Title VII
198 employment discrimination claim if there is unchallenged objective evidence that s/he did not
199 possess the minimal qualifications for the position plaintiff sought to obtain or retain.” The court
200 explained the minimal qualification requirement as a narrow one best expressed as “circumstances
201 that require a license or a similar prerequisite in order to perform the job.”

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

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

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

2 **Model**

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

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

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

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

11 Third: [Plaintiff's] submission to [supervisor's] conduct was an express or implied
12 condition for receiving a job benefit or avoiding a job detriment;²⁴

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

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

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

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

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

²⁴ This third element in the Instruction may require modification in some cases. See the Comment's discussion of *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282 (3d Cir. 2000), *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and 29 C.F.R. § 1604.11(a)(2).

5.1.3 Harassment – Quid Pro Quo

28 responsibilities, or a decision causing significant change in benefits.].]

29 **Comment**

30 Instructions 5.1.3 through 5.1.5 address claims for harassment in violation of Title VII. A
31 plaintiff asserting such a claim must show discrimination and must also establish the employer’s
32 liability for that discrimination.²⁵ The framework applicable to those two questions will vary
33 depending on the specifics of the case.

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

45 *Showing discrimination*

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

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

²⁵ A supervisor cannot be liable under Title VII for acts of harassment. *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) (concluding “that Congress did not intend to hold individual employees liable under Title VII”).

5.1.3 Harassment – Quid Pro Quo

61 claim on the argument that the plaintiff’s response was subsequently used as a basis for a decision
62 concerning a job benefit or detriment, the third element in the model instruction should be revised
63 or omitted.

64 *Employer liability*

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

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

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

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

84 Instruction 5.1.3 is designed for use in cases that involve a tangible employment action.
85 The instruction’s definition of “tangible employment action” is taken from *Burlington Industries,*
86 *Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).²⁶ It should be noted that the failure to renew an
87 employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New*
88 *Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to
89 renew an employment arrangement, “whether at-will or for a limited period of time, is an
90 employment action, and an employer violates Title VII if it takes an adverse employment action
91 for a reason prohibited by Title VII”). *Compare Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d
92 323, 328 (3d Cir. 2015) (holding that a paid suspension while an employee was investigated for

²⁶ For a case finding a jury question as to the existence of a tangible employment action, see *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 219 (3d Cir. 2017) (holding that “[a] reasonable juror could conclude that Marshall gave Moody [work] hours to entice her to accede to his sexual demands and then reduced her hours after she rejected him”).

5.1.3 Harassment – Quid Pro Quo

93 alleged misconduct was not a tangible employment action). As discussed below, it is possible that
94 a plaintiff might frame a case as a quid pro quo case even though it does not involve evidence of
95 an adverse tangible employment action; in such instances, the *Ellerth/Faragher* affirmative
96 defense will be available. See Instruction 5.1.5 for an instruction on that affirmative defense.

97 *Unfulfilled threats*

98 In some instances, a supervisor might threaten an adverse employment action but fail to
99 act on the threat after the plaintiff rejects the supervisor’s advances. In such a scenario, it is
100 necessary to consider the implications for both the question of discrimination and the question of
101 employer liability. On the question of discrimination, because such a claim “involves only
102 unfulfilled threats, it should be categorized as a hostile work environment claim which requires a
103 showing of severe or pervasive conduct.” *Ellerth*, 524 U.S. at 754. And on the question of
104 employer liability, because such a claim involves no tangible employment action, the
105 *Ellerth/Faragher* affirmative defense will be available. In sum, such a case should be analyzed
106 under the framework set forth in Instruction and Comment 5.1.5.

107 *Submission to demands*

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

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

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

127 Similarly, on the question of employer liability *Ellerth* and *Faragher* do not directly
128 address whether the *Ellerth/Faragher* affirmative defense would be available in such a case. The

5.1.3 Harassment – Quid Pro Quo

129 Second and Ninth Circuits have answered this question in the negative. The Second Circuit
130 concluded that when a supervisor conditions an employee’s continued employment on the
131 employee’s submission to the supervisor’s sexual demands and the employee submits, this “classic
132 quid pro quo” constitutes a tangible employment action that deprives the employer of the
133 affirmative defense. *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002). In such a
134 situation, the *Jin* court reasoned, it is the supervisor’s “empowerment ... as an agent who could
135 make economic decisions affecting employees under his control that enable[s] him to force [the
136 employee] to submit.” *Id.*; see also *id.* at 98 (stating that supervisor’s “use of his supervisory
137 authority to require [plaintiff’s] submission was, for Title VII purposes, the act of the employer”).
138 The Ninth Circuit has followed *Jin*, concluding that “a ‘tangible employment action’ occurs when
139 the supervisor threatens the employee with discharge and, in order to avoid the threatened action,
140 the employee complies with the supervisor’s demands.” *Holly D. v. California Institute of
141 Technology*, 339 F.3d 1158, 1167 (9th Cir. 2003).

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

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

168 Some uncertain light was shed on the availability of the *Ellerth* / *Faragher* defense, in a

5.1.3 Harassment – Quid Pro Quo

169 submission-to-demands case, by *Moody v. Atlantic City Board of Education*, 870 F.3d 206 (3d Cir.
170 2017). In *Moody*, the plaintiff alleged that her supervisor “told her that she would get an
171 employment contract if she had sex with him,” and that – perceiving a threat to her job – she
172 “reluctantly had sex with him.” *Id.* at 211. (The court of appeals had no occasion to analyze this
173 as a *quid pro quo* claim because the plaintiff stated the intent to proceed under a hostile-
174 environment framework rather than a *quid pro quo* framework. *See id.* at 213.) The court of
175 appeals held that there were disputed questions of material fact that required resolution in order to
176 determine whether the defendant could invoke the *Ellerth / Faragher* defense. *See id.* at 220. But
177 in so holding, the court of appeals did not rely upon the plaintiff’s allegation that she submitted to
178 her supervisor’s demand for sex. Rather, the court of appeals reasoned that “[a] reasonable juror
179 could conclude that Marshall gave Moody [work] hours to entice her to accede to his sexual
180 demands and then reduced her hours after she rejected him”; accordingly, the court reasoned, there
181 was “a disputed issue of material fact as to whether she suffered a tangible employment action” –
182 namely, whether the supervisor reduced the plaintiff’s hours after she rejected him. *Id.* at 219.
183 (By “rejected,” the court was referring to the plaintiff’s account that, after submitting to the
184 demand for sex, she told her supervisor it would never happen again. *Id.* at 211.)

185 If the court concludes that it is appropriate to follow the approach taken in *Jin* and *Holly*
186 *D.* – a question that, as noted above, appears to be unsettled – then the court should consider
187 whether to refer only to a ‘tangible employment action’ rather than an ‘adverse tangible
188 employment action.’ *See Jin*, 310 F.3d at 101 (holding that it was error to “use[] the phrase
189 ‘tangible adverse action’ instead of ‘tangible employment action’ ” and that such error was
190 “especially significant in the context of this case, where we hold that an employer is liable when a
191 supervisor grants a tangible job benefit to an employee based on the employee’s submission to
192 sexual demands”).

193 *Definition of “supervisor”*

194 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or
195 she is empowered by the employer to take tangible employment actions against the victim....”
196 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). *See also Moody*, 870 F.3d at 217 (“[T]he
197 record here supports the conclusion that Marshall was Moody’s supervisor because (a) the Board
198 empowered him as the custodial foreman to select from the list of substitute custodians who could
199 actually work at New York Avenue School; ... (b) the Board conceded that while Moody was on
200 school premises, Marshall served in a supervisory role; (c) the record identifies no other person
201 who was present full time or even sporadically on the school’s premises, or anywhere for that
202 matter, who served as Moody’s supervisor; and (d) since Moody’s primary benefit from her
203 employment was hourly compensation, and since Marshall controlled 70% of her hours, his
204 decision to assign or withhold hours significantly affected her pay.”).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

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

Model

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

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

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

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

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

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

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

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

Comment

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

The Court of Appeals has set out the elements of a hostile work environment claim as follows:

To succeed on a hostile work environment claim, the plaintiff must establish

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

30 that 1) the employee suffered intentional discrimination because of his/her sex, 2)
31 the discrimination was severe or pervasive, 3) the discrimination detrimentally
32 affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable
33 person in like circumstances, and 5) the existence of *respondeat superior* liability.

34 *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013).

35 It should be noted that constructive discharge is the adverse employment action that is most
36 common with claims of hostile work environment.²⁷ Instruction 5.2.2 provides an instruction
37 setting forth the relevant factors for a finding of constructive discharge. That instruction can be
38 used to amplify the term “adverse employment action” in appropriate cases. In *Spencer v. Wal-*
39 *Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot
40 receive back pay in the absence of a constructive discharge. “Put simply, if a hostile work
41 environment does not rise to the level where one is forced to abandon the job, loss of pay is not an
42 issue.” As ADA damages are coextensive with Title VII damages — see the Comment to
43 Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII hostile work
44 environment cases.

45 The instruction’s definition of “tangible employment action” is taken from *Burlington*
46 *Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).²⁸ It should be noted that the failure to renew
47 an employment arrangement can also constitute an adverse employment action. *See Wilkerson v.*
48 *New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure
49 to renew an employment arrangement, “whether at-will or for a limited period of time, is an
50 employment action, and an employer violates Title VII if it takes an adverse employment action
51 for a reason prohibited by Title VII”). *Compare Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d
52 323, 328 (3d Cir. 2015) (holding that a paid suspension while an employee was investigated for
53 alleged misconduct was not a tangible employment action).

54 *Liability for Non-Supervisors*

55 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or
56 she is empowered by the employer to take tangible employment actions against the victim....”

²⁷ Instruction 5.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 5.1.5 should be used instead. *See* Comment 5.1.5 (discussing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 150 (2004).

²⁸ For a case finding a jury question as to the existence of a tangible employment action, *see Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 219 (3d Cir. 2017) (holding that “[a] reasonable juror could conclude that Marshall gave Moody [work] hours to entice her to accede to his sexual demands and then reduced her hours after she rejected him”).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

57 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).²⁹ Respondeat superior liability for
58 harassment by non-supervisory employees exists only where the employer “knew or should have
59 known about the harassment, but failed to take prompt and adequate remedial action.” *Jensen v.*
60 *Potter*, 435 F.3d 444, 453 (3d Cir. 2006) (internal quotations omitted).³⁰ In a case where a plaintiff
61 suffered “harassment by [non-supervisory] co-workers who possess the authority to inflict
62 psychological injury by assigning unpleasant tasks or by altering the work environment in
63 objectionable ways,” the Supreme Court has stated that “the jury should be instructed that the
64 nature and degree of authority wielded by the harasser is an important factor to be considered in
65 determining whether the employer was negligent.” *Vance*, 133 S. Ct. at 2451. *See also Kunin v.*
66 *Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

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

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

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

²⁹ Applying *Vance*, the panel majority in *Moody v. Atlantic City Board of Education* cited multiple factors in holding that a custodial foreman was the plaintiff’s supervisor:

[T]he record here supports the conclusion that Marshall was Moody’s supervisor because (a) the Board empowered him as the custodial foreman to select from the list of substitute custodians who could actually work at New York Avenue School;... (b) the Board conceded that while Moody was on school premises, Marshall served in a supervisory role; (c) the record identifies no other person who was present full time or even sporadically on the school’s premises, or anywhere for that matter, who served as Moody’s supervisor; and (d) since Moody’s primary benefit from her employment was hourly compensation, and since Marshall controlled 70% of her hours, his decision to assign or withhold hours significantly affected her pay.

Moody v. Atl. City Bd. of Educ., 870 F.3d 206, 217 (3d Cir. 2017).

³⁰ “[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.” *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

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

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

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

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

101 *Characteristics of a Hostile Work Environment*

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

114 The Third Circuit has described the standards for a hostile work environment claim, as

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115 applied to sex discrimination, in *Weston v. Pennsylvania*, 251 F.3d 420, 425-426 (3d Cir. 2001):

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

121 To judge whether the environment was hostile under this standard, one must “look[] at all the
122 circumstances, including the frequency of the discriminatory conduct; its severity; whether it is
123 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably
124 interferes with an employee’s work performance.” *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206,
125 215 (3d Cir. 2017) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) (citation
126 and internal quotation marks omitted)).

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

132 *Severe or Pervasive Activity*

133 The terms “severe or pervasive” set forth in the instruction are in accord with Supreme
134 Court case law and provide for alternative possibilities for finding harassment. *See Jensen v.*
135 *Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) (“The disjunctive phrasing means that ‘severity’ and
136 ‘pervasiveness’ are alternative possibilities: some harassment may be severe enough to
137 contaminate an environment even if not pervasive; other, less objectionable, conduct will
138 contaminate the workplace only if it is pervasive.”) (quoting 2 C. Sullivan et. al., *Employment*
139 *Discrimination Law and Practice* 455 (3d ed. 2002). *See, e.g., Moody v. Atl. City Bd. of Educ.*,
140 870 F.3d 206, 215 (3d Cir. 2017) (finding evidence that met the “severe” test where plaintiff
141 alleged that her supervisor “expected [her] to give sexual favors in exchange for work, touched
142 [her] against her wishes, made sexual comments to her, and exposed himself to her”).

143 *Subjective and Objective Components*

144 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that
145 a hostile work environment claim has both objective and subjective³¹ components. A hostile

³¹ *See Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168-69 (3d Cir. 2013) (noting that “the inherently subjective question of whether particular conduct was unwelcome presents difficult problems of proof and turns on credibility determinations,” and finding jury question on this issue despite evidence that plaintiff “engaged in certain unprofessional conduct”).

5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

146 environment must be “one that a reasonable person would find hostile and abusive, and one that
147 the victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
148 subjective components.

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

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

157 *Harassment as Retaliation for Protected Activity*

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

170 *Religious Discrimination*

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

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

5.1.5 Elements of a Title VII 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] [protected status].

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

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

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

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

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

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

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

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

[In the event this Instruction is given, omit the following instruction regarding the employer's affirmative defense.]

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.

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

34 First: [Defendant] exercised reasonable care to prevent harassment in the workplace on the
35 basis of [protected status], and also exercised reasonable care to promptly correct any
36 harassing behavior that does occur.

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

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

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

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

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

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

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

51 **Comment**

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

54 The Court of Appeals has set out the elements of a hostile work environment claim as
55 follows:

56 To succeed on a hostile work environment claim, the plaintiff must establish
57 that 1) the employee suffered intentional discrimination because of his/her sex, 2)
58 the discrimination was severe or pervasive, 3) the discrimination detrimentally
59 affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable
60 person in like circumstances, and 5) the existence of *respondeat superior* liability.

61 *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013).

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

62 This instruction is to be used in discriminatory harassment cases where the plaintiff did not
63 suffer any “tangible” employment action such as discharge or demotion, but rather suffered
64 “intangible” harm flowing from harassment that is “sufficiently severe or pervasive to create a
65 hostile work environment.” *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998).³² In *Faragher* and
66 in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is
67 strictly liable for supervisor harassment that “culminates in a tangible employment action, such as
68 discharge, demotion, or undesirable reassignment.” *Ellerth*, 524 U.S. at 765. But when no such
69 tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on
70 the basis of the defense, the employer must prove that “(a) [it] exercised reasonable care to prevent
71 and correct promptly any sexually harassing behavior,”³³ and that (b) the employee “unreasonably
72 failed to take advantage of any preventive or corrective opportunities provided by the employer or
73 to avoid harm otherwise.”³⁴ *Ellerth*, 524 U.S. at 751 (1998).

³² For a case finding a jury question as to the existence of a tangible employment action, see *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 219 (3d Cir. 2017) (holding that “[a] reasonable juror could conclude that Marshall gave Moody [work] hours to entice her to accede to his sexual demands and then reduced her hours after she rejected him”).

³³ Compare *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015) (holding that the employer exercised reasonable care where it “took several steps in response to [the plaintiff’s] allegations of harassment [by her supervisor]: it conducted an investigation, made findings, developed a ‘plan of action,’ required [the supervisor] to attend a counseling session, and gave him a demerit on his evaluation”); *id.* (stating that “[a]lthough it appears [the supervisor] never received training on [the employer’s] sexual harassment policy until after [the plaintiff] complained, [the plaintiff] identifies no authority showing that this precludes [the employer] from asserting the *Faragher-Ellerth* defense”), with *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 312 (3d Cir. 2018) (finding a jury question that precluded summary judgment on the first element of the *Faragher-Ellerth* defense where – though the County had provided plaintiff with its anti-harassment policy, had twice reprimanded her supervisor for conduct toward others, and ultimately fired the supervisor – there was evidence that “County officials were faced with indicators that [the supervisor’s] behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward [his] harassment”).

³⁴ Compare *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015) (finding an unreasonable failure by the employee where “[d]espite 10 years of alleged harassment [by her supervisor], ... she never made a complaint until [the supervisor] accused her of timesheet fraud, despite the fact that she knew that the [employer’s] EEO Office fielded such complaints”), with *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 314 (3d Cir. 2018) (“If a plaintiff’s genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as

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74 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment
75 action also justifies requiring the plaintiff to prove a further element, in order to protect the
76 employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.
77 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is
78 empowered by the employer to take tangible employment actions against the victim....” *Vance v.*
79 *Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).³⁵ Respondeat superior liability for the acts of non-
80 supervisory employees exists only where “the defendant knew or should have known of the
81 harassment and failed to take prompt remedial action.” *Andrews v. City of Philadelphia*, 895 F.2d
82 1469, 1486 (3d Cir. 1990).³⁶ In a case where a plaintiff suffered “harassment by [non-supervisory]
83 co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks
84 or by altering the work environment in objectionable ways,” the Supreme Court has stated that

a matter of law. Instead, the court should leave the issue for the jury to determine at trial.”); *id.* at 315 n.16 (“The trial judge can instruct the jury that a plaintiff’s fears must be specific, not generalized, in order to defeat the *Faragher-Ellerth* defense.”).

³⁵ Applying *Vance*, the panel majority in *Moody v. Atlantic City Board of Education* cited multiple factors in holding that a custodial foreman was the plaintiff’s supervisor:

[T]he record here supports the conclusion that Marshall was Moody’s supervisor because (a) the Board empowered him as the custodial foreman to select from the list of substitute custodians who could actually work at New York Avenue School;... (b) the Board conceded that while Moody was on school premises, Marshall served in a supervisory role; (c) the record identifies no other person who was present full time or even sporadically on the school’s premises, or anywhere for that matter, who served as Moody’s supervisor; and (d) since Moody’s primary benefit from her employment was hourly compensation, and since Marshall controlled 70% of her hours, his decision to assign or withhold hours significantly affected her pay.

Moody v. Atl. City Bd. of Educ., 870 F.3d 206, 217 (3d Cir. 2017).

³⁶ “[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.” *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 (3d Cir. 2009).

In *In re Tribune Media Co.*, 902 F.3d 384 (3d Cir. 2018), the Court of Appeals found insufficient evidence “that the station had actual or constructive knowledge of” racial animus on the part of the claimant’s co-worker at the time of the altercation between the two men. *See id.* at 400-01 (reasoning that statements by both supervisory and non-supervisory employees indicated the co-worker “had a ‘problem’” but did not specifically point to “racial animosity”; a 1993 incident “involved disputed accusations of racial bias [by the co-worker] and occurred 15 years before” the events in suit; and the co-worker’s self-declared nickname, “the Nazi,” may not have been known to management). Even if the employer learned of racial animus on the co-worker’s part when investigating the altercation, the Court of Appeals held, the employer took “prompt and appropriate remedial action” by firing the co-worker. *See id.* at 401.

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85 “the jury should be instructed that the nature and degree of authority wielded by the harasser is an
86 important factor to be considered in determining whether the employer was negligent.” *Vance*,
87 133 S. Ct. at 2451. *See also Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

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

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

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

107 Second, an employee's knowledge of sexual harassment will be imputed to
108 the employer where the employee is specifically employed to deal with sexual
109 harassment. Typically such an employee will be part of the employer's human
110 resources, personnel, or employee relations group or department. Often an
111 employer will designate a human resources manager as a point person for receiving
112 complaints of harassment. In this circumstance, employee knowledge is imputed to
113 the employer based on the specific mandate from the employer to respond to and
114 report on sexual harassment.

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

116 *Characteristics of a Hostile Work Environment*

117 In sexual harassment cases, examples of conduct warranting a finding of a hostile work
118 environment include verbal abuse of a sexual nature; graphic verbal commentaries about an
119 individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to
120 describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

121 comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters
122 or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris*
123 *v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (discriminatory intimidation, ridicule and insult);
124 *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for sexual
125 favors, fondling, following plaintiff into women's restroom, and supervisor's exposing himself).
126 Instruction 5.2.1 provides a full instruction if the court wishes to provide guidance on what is a
127 hostile work environment.

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

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

135 To judge whether the environment was hostile under this standard, one must “look[] at all the
136 circumstances, including the frequency of the discriminatory conduct; its severity; whether it is
137 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably
138 interferes with an employee's work performance.” *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206,
139 215 (3d Cir. 2017) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) (citation
140 and internal quotation marks omitted)).

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

146 *Severe or Pervasive Activity*

147 The terms “severe or pervasive” set forth in the instruction are in accord with Supreme
148 Court case law and provide for alternative possibilities for finding harassment. *See Jensen v.*
149 *Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) (“The disjunctive phrasing means that ‘severity’ and
150 ‘pervasiveness’ are alternative possibilities: some harassment may be severe enough to
151 contaminate an environment even if not pervasive; other, less objectionable, conduct will
152 contaminate the workplace only if it is pervasive.”) (quoting 2 C.Sullivan et. al., *Employment*
153 *Discrimination Law and Practice* 455 (3d ed. 2002). *See, e.g., Moody v. Atl. City Bd. of Educ.*,
154 870 F.3d 206, 215 (3d Cir. 2017) (finding evidence that met the “severe” test where plaintiff
155 alleged that her supervisor “expected [her] to give sexual favors in exchange for work, touched
156 [her] against her wishes, made sexual comments to her, and exposed himself to her”).

5.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

157 *Objective and Subjective Components*

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

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

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

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

186 . . .

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

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

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193 The instruction refers to harassing “conduct” that “was motivated by the fact that [plaintiff]
194 is a [membership in a protected class].” This language is broad enough to cover the situation where
195 the plaintiff is the first member of a protected class to enter the work environment, and the working
196 conditions pre-existed the plaintiff’s employment. In this situation, the “conduct” is the refusal to
197 change an environment that is hostile to members of the plaintiff’s class. The judge may wish to
198 modify the instruction so that it refers specifically to the failure to correct a pre-existing
199 environment.

200 *Harassment as Retaliation for Protected Activity*

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

213 *Back Pay*

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

5.1.6 Elements of a Title VII Claim — Disparate Impact

No Instruction

Comment

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

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

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

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

42 U.S.C. § 1981a(a)(1) (emphasis added). *See also* Seventh Circuit Pattern Jury Instructions 3.08 (no instruction provided for disparate impact claims under Title VII); *Pollard v. Wawa Food Market*, 366 F. Supp. 2d 247, 254 (E.D. Pa. 2005) (“Because Pollard proceeds under a disparate

5.1.6 Disparate Impact

37 impact theory, and not under a theory of intentional discrimination, if successful on her Title VII
38 claim she would be entitled only to equitable relief. 42 U.S.C. §1981a(a)(1). She therefore is not
39 entitled to a jury trial on that claim.”).

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

5.1.7 Elements of a Title VII Claim — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].³⁷

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

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

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

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

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a reasonable,³⁸ good faith belief that [plaintiff's] [or someone else's] right to be free from discrimination on the basis of [protected status] was violated.

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

³⁷ Instruction 5.1.7 will often be used in cases in which the same employee engaged in the protected activity and directly suffered the retaliation. As noted in the Comment, Title VII also bars retaliation against another employee if the circumstances are such that the retaliation against that employee might well dissuade a reasonable worker from engaging in protected activity. *See Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011). In cases in which the plaintiff is not the person who engaged in protected activity, the instruction should be modified appropriately. Among such changes, the following language could be added to the paragraph that explains the second element: “That is to say, you must decide if any actions [defendant] took against [plaintiff] might well discourage a reasonable worker in [third party's] position from [describe protected activity]. You must decide that question based on the circumstances of the case. [To take two examples, firing a close family member will almost always meet that test, but inflicting less serious harm on a mere acquaintance will almost never do so.]”

³⁸ See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

19 workplace or to [plaintiff’s] employment.]

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

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

29

30 **Comment**

31 Title VII protects employees and former employees who attempt to exercise the rights
32 guaranteed by the Act against retaliation by employers. 42 U.S.C. § 2000e-3(a) is the anti-
33 retaliation provision of Title VII,³⁹ and it provides as follows:

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

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

44 *Protected Activities*

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

³⁹ See below for a discussion of the separate statutory provision that governs retaliation claims by federal employees.

5.1.7 Retaliation

46 practice made unlawful by Title VII;⁴⁰ 2) making a charge of employment discrimination;⁴¹ 3)
47 testifying, assisting or participating in any manner in an investigation, proceeding or hearing under
48 Title VII. *Id.*

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

⁴⁰ Where an employer conditioned its conversion of terminated at-will employees into independent contractors on the employees’ signing releases of all existing claims (including but not limited to discrimination claims), an employee’s refusal to sign that release did not constitute opposition within the meaning of Title VII’s anti-retaliation provision: “[R]efusing to sign a release . . . does not communicate opposition sufficiently specific to qualify as protected employee activity. . . . Because Allstate’s Release barred its signatories from bringing *any* claims against Allstate concerning their employment or termination, employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination.” *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015).

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

⁴¹ *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (filing EEOC complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53 (2006).

⁴² In *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130, 135 (3d Cir. 2006), the court held that general protest on public issues does not constitute protected activity. To be protected under Title VII, the employee’s activity must be directed to the employer’s alleged illegal employment practice; it must “identify the employer and the practice – if not specifically, at least by context.” In *Curay-Cramer*, the plaintiff alleged that her employer retaliated against her after she signed a pro-choice advertisement, thus advocating a position on a public issue that her employer opposed. But because the advertisement did not mention her employer or refer to any employment practice, the plaintiff’s actions did not constitute protected activity.

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

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56 provision’s “opposition” clause does not require the employee to initiate a complaint. The
57 provision also protects an employee who speaks out about discrimination by answering questions
58 during an employer’s internal investigation. The Court declared that there is “no reason to doubt
59 that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking
60 the discussion, and nothing in the statute requires a freakish rule protecting an employee who
61 reports discrimination on her own initiative but not one who reports the same discrimination in the
62 same words when her boss asks a question.” *See also Kachmar v. SunGard Data Sys., Inc.*, 109
63 F.3d 173, 177 (3d Cir. 1997) (advocating salary increases for women employees, to compensate
64 them equally with males, was protected activity). “[A] plaintiff need not prove the merits of the
65 underlying discrimination complaint, but only that ‘he was acting under a good faith, reasonable
66 belief that a violation existed.’ ” *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d
67 Cir. 1996) (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 468 (3d Cir. 1993) (quoting *Sumner*
68 *v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990)), *overruled on other grounds by*
69 *Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir. 1995)). The good-faith-and-reasonable-belief test
70 clearly applies to actions under the “opposition” clause of Section 2000e-3(a). There is some
71 authority for the proposition that a less demanding test applies to actions under the “participation”
72 clause of Section 2000e-3(a) – i.e., the clause that refers to a person who “has made a charge,
73 testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under
74 this subchapter,” 42 U.S.C. § 2000e-3(a). Thus, in *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268
75 (2001), after holding plaintiff’s conduct unprotected by the opposition clause because the plaintiff
76 could not have reasonably believed the challenged employer actions to be illegal, the Supreme
77 Court went on to consider plaintiff’s participation claim based on the same employer action.

78 Third Circuit authority, however, is divided. After noting authorities stating that “the
79 ‘participation clause’ ... offers much broader protection to Title VII employees than does the
80 ‘opposition clause,’ ” the Court of Appeals in *Slagle v. County of Clarion*, 435 F.3d 262 (3d Cir.
81 2006), stated that for filing a charge to constitute protected activity, “[a]ll that is required is that
82 plaintiff allege in the charge that his or her employer violated Title VII by discriminating against
83 him or her on the basis of race, color, religion, sex, or national origin, in any manner.” *Slagle*, 435
84 F.3d at 266, 268. (The plaintiff in *Slagle* failed to surmount even this “low bar.” *Id.*) Later that
85 same year, however, a different panel of the Court of Appeals indicated that the good-faith-and-
86 reasonable-belief test applies to both opposition and participation claims: “Whether the employee
87 opposes, or participates in a proceeding against, the employer’s activity, the employee must hold
88 an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title
89 VII.” *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). (The facts of *Moore*
90 featured adverse actions both pre-dating and post-dating the filing of the EEOC charge, *see id.* at
91 340, 345-48.)

92 In accord with instructions from other circuits, Instruction 5.1.7 directs the jury to
93 determine both the good faith and the reasonableness of the plaintiff’s belief that employment
94 discrimination had occurred. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII
95 retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for
96 use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981

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97 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA,
98 and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to
99 harassment or discrimination) under Title VII and other federal discrimination laws; instruction
100 uses phrase “reasonably believed”); *id.* Notes on Use, Note 5 (using phrase “reasonably and in
101 good faith believe”); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation)
102 (discussing reasonableness requirement in the comment but not in the model instruction). In cases
103 where the protected nature of the plaintiff’s activity is not in dispute, this portion of the instruction
104 can be modified and the court can simply instruct the jury that specified actions by the plaintiff
105 constituted protected activity.

106 *Standard for Actionable Retaliation*

107 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that
108 a cause of action for retaliation under Section 2000e-3(a) lies whenever the employer responds to
109 protected activity in such a way “that a reasonable employee would have found the challenged
110 action materially adverse, which in this context means it well might have dissuaded a reasonable
111 worker from making or supporting a charge of discrimination.” (citations omitted).⁴³ The Court
112 elaborated on this standard in the following passage:

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

⁴³ 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 Section 2000e-3(a). *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015) (“[T]he terminated agents were not entitled to convert to independent contractor status.... And the [EEOC] has cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee’s refusal to sign a release.”).

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126 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

127 We refer to reactions of a *reasonable* employee because we believe that the
128 provision's standard for judging harm must be objective. An objective standard is judicially
129 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial
130 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need
131 for objective standards in other Title VII contexts, and those same concerns animate our
132 decision here. See, e.g., [*Pennsylvania State Police v.*] *Suders*, 542 U.S., at 141, 124 S. Ct.
133 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,
134 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment
135 doctrine).

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

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

152 548 U.S. at 68 (some citations omitted). The instruction follows the guidelines of the Supreme
153 Court's decision in *White*. For applications of the *White* standard, see *Moore v. City of*
154 *Philadelphia*, 461 F.3d 331, 348 (3d Cir. 2006) (finding that a transfer of a police officer from a
155 district where he had earned goodwill and established good relations with the community could
156 constitute actionable retaliation, because it "is the kind of action that might dissuade a police
157 officer from making or supporting a charge of unlawful discrimination within his squad."); *Id.* at
158 352 (aggressive enforcement of sick-check policy "well might have dissuaded a reasonable worker
159 from making or supporting a charge of discrimination."); *Moody v. Atl. City Bd. of Educ.*, 870 F.3d
160 206, 220 (3d Cir. 2017) (holding that plaintiff presented evidence that would justify a finding of a
161 materially adverse action where plaintiff's "working hours declined three-fold in the months
162 following her complaint as compared to the months preceding her complaint").

163 In *Komis v. Sec'y of United States Dep't of Labor*, 918 F.3d 289 (3d Cir. 2019), the plaintiff

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164 (a former federal employee) brought a claim for retaliatory hostile work environment and the jury
165 charge included the “severe or pervasive” standard drawn from Title VII hostile-environment law.
166 The plaintiff contended that “the ... instruction that a retaliatory hostile work environment claim
167 requires proof of ‘conduct ... so severe or pervasive that a reasonable person in Ms. Komis’[s]
168 position would find her work environment hostile or abusive[’] ... was erroneous because
169 *Burlington Northern* did away with the ‘severe or pervasive’ requirement for retaliation claims—
170 including for a retaliatory hostile work environment.” *Komis*, 918 F.3d at 297. The Court of
171 Appeals, applying a harmless-error test, declined to resolve that question. *See id.* at 299
172 (“Whatever the room in magnitude of harm between conduct severe or pervasive such that it affects
173 the terms and conditions of employment and materially adverse conduct that would dissuade a
174 reasonable worker from invoking her antidiscrimination rights, *Komis* has not shown how it might
175 change the outcome in her case.”).

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

177 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 61-62 (2006), held
178 that retaliation need not be job-related to be actionable under Section 2000e-3(a). In doing so, the
179 Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an
180 adverse employment action in order to recover for retaliation. The Court distinguished Section
181 2000e-3(a) from Title VII’s basic anti-discrimination provision, which does require an adverse
182 employment action.

183 The language of the substantive provision differs from that of the anti-retaliation provision
184 in important ways. Section 703(a) sets forth Title VII’s core anti-discrimination provision
185 in the following terms:

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

187 "(1) *to fail or refuse to hire or to discharge any individual, or otherwise to*
188 *discriminate against any individual with respect to his compensation, terms,*
189 *conditions, or privileges of employment, because of such individual's race, color,*
190 *religion, sex, or national origin; or*

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

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

197 "It shall be an unlawful employment practice for an employer *to discriminate*
198 *against* any of his employees or applicants for employment . . . because he has

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199 opposed any practice made an unlawful employment practice by this subchapter, or
200 because he has made a charge, testified, assisted, or participated in any manner in
201 an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a)
202 (emphasis added).

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

209 The *White* Court explained the rationale for providing broader protection in Section 2000e-
210 3(a) than is provided in the basic discrimination provision of Title VII:

211 There is strong reason to believe that Congress intended the differences that its
212 language suggests, for the two provisions differ not only in language but in purpose as well.
213 The anti-discrimination provision seeks a workplace where individuals are not
214 discriminated against because of their racial, ethnic, religious, or gender-based status. See
215 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801, 93 S. Ct. 1817, 36 L. Ed. 2d
216 668 (1973). The anti-retaliation provision seeks to secure that primary objective by
217 preventing an employer from interfering (through retaliation) with an employee's efforts to
218 secure or advance enforcement of the Act's basic guarantees. The substantive provision
219 seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-
220 retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their
221 conduct.

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

227 But one cannot secure the second objective by focusing only upon employer actions
228 and harm that concern employment and the workplace. Were all such actions and harms
229 eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer
230 can effectively retaliate against an employee by taking actions not directly related to his
231 employment or by causing him harm *outside* the workplace. See, *e.g.*, *Rochon v. Gonzales*,
232 438 F.3d at 1213 (FBI retaliation against employee "took the form of the FBI's refusal,
233 contrary to policy, to investigate death threats a federal prisoner made against [the agent]
234 and his wife"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996) (finding
235 actionable retaliation where employer filed false criminal charges against former employee
236 who complained about discrimination). A provision limited to employment-related actions

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237 would not deter the many forms that effective retaliation can take. Hence, such a limited
238 construction would fail to fully achieve the anti-retaliation provision's "primary purpose,"
239 namely, "maintaining unfettered access to statutory remedial mechanisms." *Robinson v.*
240 *Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

241 548 U.S. at 63-64 (emphasis in original)

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

250 *Membership In Protected Class Not Required*

251 An employee need not be a member of a protected class to be subject to actionable
252 retaliation under Section 2000e-3(a). For example, 2000e-3(a) protects a white employee who
253 complains about discrimination against black employees and is subject to retaliation for those
254 complaints. *See Moore v. City of Philadelphia*, 461 F.3d 331, 342 (3d Cir. 2006) ("Title VII's
255 whistleblower protection is not limited to those who blow the whistle on their own mistreatment
256 or on the mistreatment of their own race, sex, or other protected class.")

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

258 Section 2000e-3(a) not only bars retaliation against the employee who engaged in the
259 protected activity; it also bars retaliation against another employee if the circumstances are such
260 that the retaliation against that employee might well dissuade a reasonable worker from engaging
261 in protected activity. *See Thompson v. North American Stainless, LP*, 562 U.S. 170, 174 (2011)
262 ("We think it obvious that a reasonable worker might be dissuaded from engaging in protected
263 activity if she knew that her fiancé would be fired."). The *Thompson* Court stressed that analysis
264 of a claim of third-party retaliation is fact-specific. *See id.* at 174-75 ("We expect that firing a
265 close family member will almost always meet the *Burlington* standard, and inflicting a milder
266 reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to
267 generalize.").

268 In order to bring a retaliation claim under Section 2000e-3(a), the third-party victim of the
269 retaliation must show that he or she "falls within the zone of interests protected by Title VII." *Id.*
270 at 178. In *Thompson*, the plaintiff fell "well within the zone of interests sought to be protected by
271 Title VII" because he was an employee of the defendant and because "injuring him was the
272 employer's intended means of harming" his fiancée, who had engaged in the protected activity that

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273 triggered the retaliation. *See id.*

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

281 *Causation*

282 For a helpful discussion on the importance of the time period between the plaintiff's
283 protected activity and the action challenged as retaliatory, as well as other factors that might be
284 relevant to a finding of causation, *see Marra v. Philadelphia Housing Authority*, 497 F.3d 286,
285 302 (3d Cir. 2007) (a case involving a claim of retaliation under the Pennsylvania Human Relations
286 Act, which the court found to be subject to the same standards of substantive law as an action for
287 retaliation under Title VII) :

288 We have recognized that a plaintiff may rely on a "broad array of evidence" to
289 demonstrate a causal link between his protected activity and the adverse action taken
290 against him. *Farrell [v. Planters Lifesavers Co.]*, 206 F.3d 271, 284 (3d Cir. 2000)]. In
291 certain narrow circumstances, an "unusually suggestive" proximity in time between the
292 protected activity and the adverse action may be sufficient, on its own, to establish the
293 requisite causal connection. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir.
294 1997); *see Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989) (discharge of plaintiff
295 two days after filing EEOC complaint found to be sufficient, under the circumstances, to
296 establish causation). Conversely, however, "[t]he mere passage of time is not legally
297 conclusive proof against retaliation." *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d
298 892, 894 (3d Cir. 1993) (citation omitted); *see also Kachmar v. SunGard Data Sys., Inc.*,
299 109 F.3d 173, 178 (3d Cir. 1997) ("It is important to emphasize that it is causation, not
300 temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal
301 proximity merely provides an evidentiary basis from which an inference can be drawn.").
302 Where the time between the protected activity and adverse action is not so close as to be
303 unusually suggestive of a causal connection standing alone, courts may look to the
304 intervening period for demonstrative proof, such as actual antagonistic conduct or animus
305 against the employee, *see, e.g., Woodson [v. Scott Paper Co.]*, 109 F.3d 913, 921 (3d Cir.
306 1997)] (finding sufficient causal connection based on "pattern of antagonism" during
307 intervening two-year period between protected activity and adverse action), or other types
308 of circumstantial evidence, such as inconsistent reasons given by the employer for
309 terminating the employee or the employer's treatment of other employees, that give rise to
310 an inference of causation when considered as a whole. *Farrell*, 206 F.3d at 280-81.

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311 The *Marra* court noted that the time period relevant to causation is that between the date
312 of the employee’s protected activity and the date on which the employer made the decision to take
313 adverse action. In *Marra* the employer made the decision to terminate the plaintiff five months
314 after the protected activity, but the employee was not officially terminated until several months
315 later. The court held that the relevant time period ran to when the decision to terminate was made.
316 497 F.3d at 286.

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

321 For other Third Circuit cases evaluating the causative connection between protected
322 activity and an adverse employment decision, see *Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir.
323 2006) (noting that temporal proximity and a pattern of antagonism “are not the exclusive ways to
324 show causation” and that the element of causation in retaliation cases “is highly context-specific”);
325 *Moore v. City of Philadelphia*, 461 F.3d 331, 352 (3d Cir. 2006) (employee was subject to three
326 sick-checks in his first five months of medical leave; after filing a lawsuit alleging discrimination,
327 he was subject to sick-checks every other day; the “striking difference” in the application of the
328 sick-check policy “would support an inference that the more aggressive enforcement “was caused
329 by retaliatory animus.”); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 233 (3d Cir.
330 2007) (“Although there is no bright line rule as to what constitutes unduly suggestive temporal
331 proximity, a gap of three months between the protected activity and the adverse action, without
332 more, cannot create an inference of causation and defeat summary judgment.”); *Jones v.*
333 *Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 331 (3d Cir. 2015) (rejecting the plaintiff’s
334 argument that timing provided evidence of retaliation in a case where fewer than 12 weeks elapsed
335 between the plaintiff’s complaint of harassment and her employer’s determination that she should
336 be suspended without pay for committing fraud, and noting that the employer “spent [the
337 intervening time] on a thorough investigation into her alleged malfeasance”); *Connelly v. Lane*
338 *Const. Corp.*, 809 F.3d 780, 792-93 (3d Cir. 2016) (holding inference of causation permissible
339 where employer “continued to rehire [plaintiff] for four years despite her complaints about co-
340 workers, but declined to rehire her at the first such opportunity after she complained of harassment
341 by a supervisor”; and noting that the timing – “protected activity in May 2010,” employer’s layoff
342 of plaintiff in October 2010, and employer’s failure to rehire plaintiff in spring 2011 – should be
343 assessed in light of “the seasonal character of [plaintiff’s] work”); *Carvalho-Grevious v. Delaware*
344 *State Univ.*, 851 F.3d 249, 259-63 (3d Cir. 2017) (applying the *McDonnell-Douglas* burden-
345 shifting test in reviewing the grant of summary judgment on the plaintiff’s Title VII and Section
346 1981 retaliation claims); *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 221 (3d Cir. 2017) (holding
347 that “[t]he close temporal connection between [plaintiff’s] complaint and the reduction in her
348 hours” sufficed “to provide prima facie evidence of a causal connection” where plaintiff’s “hours
349 declined immediately following the filing of her complaint and never recovered”).

350 In appropriate cases, it may be useful to note that if the jury disbelieves the employer’s

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351 proffered non-retaliatory reason for the employment decision, it may consider that fact in
352 determining whether the defendant’s proffered reason was really a cover-up for retaliation. *Cf.*,
353 *e.g.*, *Moore*, 461 F.3d at 342, 346 (applying the *McDonnell Douglas* framework to a Title VII
354 retaliation claim and analyzing, inter alia, whether “the plaintiffs tendered sufficient evidence to
355 overcome the non-retaliatory explanation offered by their employer”); *Daniels v. School District*
356 *of Philadelphia*, 776 F.3d 181, 198 (3d Cir. 2015) (upholding grant of summary judgment against
357 plaintiff on retaliation claims under, inter alia, Title VII, because the defendant had “proffered
358 legitimate reasons for [its] adverse actions, which Daniels has failed to rebut”).⁴⁴ If the court
359 wishes to modify Instruction 5.1.7 in this manner, it could adapt the penultimate paragraph of
360 Instruction 5.1.2 by substituting references to retaliation for references to discrimination:

361 [Defendant] has given a nonretaliatory reason for its [describe defendant’s action].
362 If you disbelieve [defendant’s] explanations for its conduct, then you may, but need
363 not, find that [plaintiff] has proved retaliation. In determining whether
364 [defendant’s] stated reason for its actions was a pretext, or excuse, for retaliation,
365 you may not question [defendant’s] business judgment. You cannot find retaliation
366 simply because you disagree with the business judgment of [defendant] or believe
367 it is harsh or unreasonable. You are not to consider [defendant’s] wisdom.
368 However, you may consider whether [defendant’s] reason is merely a cover-up for
369 retaliation.

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

371 Construing the Uniformed Services Employment and Reemployment Rights Act of 1994
372 (USERRA), the Supreme Court ruled that “if a supervisor performs an act motivated by
373 antimilitary animus that is intended by the supervisor to cause an adverse employment action, and
374 if that act is a proximate cause of the ultimate employment action, then the employer is liable under
375 USERRA” even if the ultimate employment decision is taken by one other than the supervisor with
376 the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). The Court
377 did not explicitly state whether this ruling extends to Title VII discrimination claims under 42

⁴⁴ In *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015), the plaintiff failed in her attempt to convince the court that a jury could regard her employer’s misconduct finding as pretextual:

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

Jones, 796 F.3d at 330.

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378 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor), though it noted
379 the similarity between Section 2000e-2(m)’s language and that of the USERRA. Unlike Title VII
380 discrimination claims under 42 U.S.C. § 2000e-2(m), retaliation claims under Section 2000e-3(a)
381 are not founded on any explicit statutory reference to discrimination as “a motivating factor.”
382 Because the Court’s analysis in *Staub* was framed as an interpretation of the statutory language in
383 the USERRA, it was initially unclear whether *Staub*’s holding extends to Title VII retaliation
384 claims. However, the Court of Appeals, in *McKenna v. City of Philadelphia*, 649 F.3d 171 (3d
385 Cir. 2011), treated *Staub* as applicable to the plaintiff’s Title VII retaliation claim. *See McKenna*,
386 649 F.3d at 180 (holding that “under *Staub*, the District Court did not err in denying the City’s
387 motion for judgment as a matter of law/notwithstanding the verdict”); *id.* (concluding that though
388 the jury instructions – given prior to the decision in *Staub* – “did not precisely hew to the proximate
389 cause language adopted in *Staub*, ... the variation was harmless”).⁴⁵ Thus, in a case involving
390 retaliatory animus by one other than the ultimate decisionmaker, Instruction 5.1.7 should be
391 modified to reflect *McKenna*’s application of *Staub*.

392 *Retaliation Against Perceived Protected Activity*

393 In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), the court held that
394 anti-retaliation provisions in the Americans with Disabilities Act, the Age Discrimination in
395 Employment Act, and Pennsylvania state law extended to retaliation for “perceived” protected
396 activity. “Because the statutes forbid an employer’s taking adverse action against an employee for
397 discriminatory reasons, it does not matter whether the factual basis for the employer’s
398 discriminatory animus was correct[;] ... so long as the employer’s specific intent was
399 discriminatory, the retaliation is actionable.” 283 F.3d at 562. The *Fogleman* court noted that its
400 precedents interpreting the ADA and ADEA retaliation provisions were equally applicable to
401 Section 2000e-3(a). *See* 283 F.3d at 567 (“Because the anti-retaliation provisions of the ADA and
402 ADEA are nearly identical, as is the anti-retaliation provision of Title VII, we have held that
403 precedent interpreting any one of these statutes is equally relevant to interpretation of the others.”).
404 Accordingly, the *Fogleman* holding concerning perceived protected activity seems applicable to
405 retaliation claims under Section 2000e-3(a). For the fairly unusual case in which the employer is
406 alleged to have retaliated for perceived rather than actual protected activity, the instruction can be
407 modified consistently with the court’s directive in *Fogleman*.

408 *Determinative Effect*

409 Instruction 5.1.7 requires the plaintiff to show that the plaintiff’s protected activity had a
410 “determinative effect” on the allegedly retaliatory activity. This is the standard typically used in
411 Title VII pretext cases outside the context of retaliation. *See* Comment 5.1.2. Title VII claims that

⁴⁵ In *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 331 (3d Cir. 2015), the Court of Appeals applied the *Staub / McKenna* framework but held that the plaintiff failed to point to evidence that her supervisor’s animus proximately caused her employer’s decision to fire her for misconduct.

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412 do not involve retaliation can alternatively proceed on a mixed-motive theory under 42 U.S.C.
413 § 2000e-2(m), subject to the affirmative defense stated in 42 U.S.C. § 2000e-5(g)(2)(B), *see*
414 Comment 5.1.1, but the mixed-motive proof framework is unavailable for Title VII retaliation
415 claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (“Title VII
416 retaliation claims must be proved according to traditional principles of but-for causation, not the
417 lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation
418 would not have occurred in the absence of the alleged wrongful action or actions of the
419 employer.”); *id.* at 2534 (rejecting contention that the *Price Waterhouse* mixed-motive test could
420 be used for Title VII retaliation claims).⁴⁶

421 *Federal employees’ retaliation claims*

422 Title VII claims by federal employees are governed by a separate statutory section, which
423 provides in relevant part that for various specified types of federal-government employees “[a]ll
424 personnel actions affecting [such] employees or applicants for [such] employment ... shall be
425 made free from any discrimination based on race, color, religion, sex, or national origin.” 42
426 U.S.C. § 2000e-16(a). The Court of Appeals has held “that federal employees may bring claims
427 for retaliation under [Section 2000e-16(a)] even though [that] provision does not explicitly
428 reference retaliation.” *Komis v. Sec’y of United States Dep’t of Labor*, 918 F.3d 289, 294 (3d Cir.
429 2019) (finding that the case did not present an occasion to address the government’s contention
430 that “federal-sector retaliation claims are, unlike their private-sector counterparts, limited to
431 challenging ‘personnel actions’”). *Komis*, however, did not focus on the causation standard for a
432 retaliation claim although the Court has held that motivating factor causation governed to federal
433 employee discrimination claims under that statute. *Makky v. Chertoff*, 541 F.3d 205, 213-214 (3d
434 Cir. 2008). The Supreme Court’s recent decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), may
435 or may not have implications for Title VII retaliation cases brought by federal employees. *See*
436 Comment 5.0.

437

⁴⁶ For a discussion of *Nassar*’s implications for summary judgment practice, *see* *Carvalho-Grevious v. Delaware State Univ.*, 851 F.3d 249, 257, 259 (3d Cir. 2017).

1 **5.2.1 Title VII Definitions — Hostile or Abusive Work Environment**

2 **Model**

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

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

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

25 It is not enough that the work environment was generally harsh, unfriendly, unpleasant,
26 crude or vulgar to all employees. In order to find a hostile work environment, you must find that
27 [plaintiff] was harassed because of [plaintiff's membership in a protected class]. The harassing
28 conduct may, but need not be [sexual/racial, etc.] in nature. Rather, its defining characteristic is

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29 that the harassment complained of is linked to the victim's [protected status]. The key question is
30 whether [plaintiff], as a [member of protected class], was subjected to harsh employment
31 conditions to which [those outside the protected class] were not.

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

40

41 **Comment**

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

45 The Court of Appeals has set out the elements of a hostile work environment claim as
46 follows:

47 To succeed on a hostile work environment claim, the plaintiff must establish
48 that 1) the employee suffered intentional discrimination because of his/her sex, 2)
49 the discrimination was severe or pervasive, 3) the discrimination detrimentally
50 affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable
51 person in like circumstances, and 5) the existence of *respondeat superior* liability.

52 *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013); *see also Castleberry v. STI*
53 *Grp.*, 863 F.3d 259, 264 (3d Cir. 2017) (noting, in a Section 1981 case, that although circuit
54 precedent had used various formulations, “[t]he correct standard is ‘severe or pervasive’”).

55 Instruction 5.2.1 is similar to the instruction approved (with respect to claims under the
56 New Jersey Law Against Discrimination) in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95,
57 115-17 (3d Cir. 1999).

58 The Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75, 80 (1998),
59 noted that an employer is not liable under Title VII for a workplace environment that is harsh for
60 all employees; generalized harassment is not prohibited by Title VII. *See also Jensen v. Potter*,
61 435 F.3d 444, 449 (3d Cir. 2006) (“Many may suffer severe harassment at work, but if the reason
62 for that harassment is one that is not proscribed by Title VII, it follows that Title VII provides no

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63 relief.”)

64 The pattern instruction follows *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998),
65 in which the Court stated that “isolated incidents (unless extremely serious) will not amount to
66 discriminatory changes of the terms and conditions of employment.” *Compare Moody v. Atl. City*
67 *Bd. of Educ.*, 870 F.3d 206, 215 (3d Cir. 2017) (finding evidence that met the “severe” test where
68 plaintiff alleged that her supervisor “expected [her] to give sexual favors in exchange for work,
69 touched [her] against her wishes, made sexual comments to her, and exposed himself to her”). *See*
70 *also Doe by & through Doe v. Boyertown Area School District*, 897 F.3d 518, 521, 534-35 (3d
71 Cir. 2018) (finding Title VII precedents persuasive in applying Title IX of the Education
72 Amendments of 1972 and holding that school district’s policy “allowing transgender students to
73 use bathrooms and locker rooms that are consistent with the students’ gender identities” did not
74 create a hostile environment for cisgender students).

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

2 **Model**

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

9

10 **Comment**

11 This instruction can be used when the plaintiff was not fired, but resigned, and claims that
12 she nonetheless suffered an adverse employment action because she was constructively discharged
13 due to an adverse action or actions that were sanctioned by her employer. This instruction is
14 designed for use with any of Instructions 5.1.1 through 5.1.4. If, instead, the plaintiff claims that
15 she was constructively discharged based on a supervisor’s or co-worker’s adverse action or actions
16 that were not sanctioned by the employer, the constructive discharge would not count as a tangible
17 adverse employment action (for the purposes of determining whether the employer may assert an
18 *Ellerth/Faragher* affirmative defense). See Comment 5.1.5. See also *Pennsylvania State Police*
19 *v. Suders*, 542 U.S. 129, 140-41 (2004) (“[A]n employer does not have recourse to the *Ellerth/*
20 *Faragher* affirmative defense when a supervisor's official act precipitates the constructive
21 discharge; absent such a ‘tangible employment action,’ however, the defense is available to the
22 employer whose supervisors are charged with harassment.”).

23 In *Suders*, the Court explained that “[u]nder the constructive discharge doctrine, an
24 employee's reasonable decision to resign because of unendurable working conditions is assimilated
25 to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions
26 become so intolerable that a reasonable person in the employee's position would have felt
27 compelled to resign?” See also *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir. 1993)
28 (ADEA claim) (close supervision of the employee was not enough to constitute a constructive
29 discharge); *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 169-70 (3d Cir. 2013) (“In
30 determining whether an employee was forced to resign, we consider a number of factors, including
31 whether the employee was threatened with discharge, encouraged to resign, demoted, subject to
32 reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job
33 responsibilities, or given unsatisfactory job evaluations.”); *DiFiore v. CSL Behring, LLC*, 879 F.3d
34 71, 79 (3d Cir. 2018) (False Claims Act retaliation claim and Pennsylvania wrongful discharge
35 claim) (holding that “no reasonable jury could find” constructive discharge where plaintiff “may
36 have been subjected to difficult or unpleasant working conditions, but these conditions [fell] well
37 short of unbearable” and plaintiff “did not sufficiently explore alternative solutions or means of

5.2.2 Constructive Discharge

38 improving her situation”). Though the Instruction does not set out resignation as a stand-alone
39 element, the claim requires that the plaintiff actually did resign. *See Green v. Brennan*, 136 S. Ct.
40 1769, 1777 (2016) (“A claim of constructive discharge ... has two basic elements. A plaintiff must
41 prove first that he was discriminated against by his employer to the point where a reasonable person
42 in his position would have felt compelled to resign.... But he must also show that he actually
43 resigned.”).

5.3.1 Bona Fide Occupational Qualification

5.3.1 Title VII 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] [protected status], then you must consider [defendant's] defense that its action was based on a bona fide occupational qualification.

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

Second: [Defendant] either had reasonable cause to believe that all or substantially all persons [in the protected class] 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 [person in the protected class]. [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

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

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

See, e.g., United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (sex was not BFOQ where employer adopted policy barring all women, except those whose infertility was

5.3.1 Bona Fide Occupational Qualification

33 medically documented, from jobs involving actual or potential lead exposure exceeding OSHA
34 standards); *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (gender was BFOQ for
35 correctional counselor position where sex offenders were scattered throughout prison's facilities).
36 The *Johnson Controls* Court held that the burden of persuasion in establishing the BFOQ defense
37 rests with the defendant. 499 U.S. at 200.

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

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

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

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

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

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

2 *No Instruction*

3
4 **Comment**

5 In contrast to a bona fide occupational qualification, which is an affirmative defense, the
6 treatment of an employer’s alleged bona fide seniority system is simply one aspect of the plaintiff’s
7 burden of proving intentional discrimination in a Title VII case.⁴⁷ In *Lorance v. AT & T*
8 *Technologies, Inc.*, 490 U.S. 900, 908-09 (1989), *superseded by statute on other grounds*, Pub. L.
9 No. 102-166, Title I, § 112, 105 Stat. 1079, codified as amended at 42 U.S.C. § 2000e-5(e)(2), the
10 Court emphasized that the plaintiff has the burden of proving intentional discrimination and held
11 that, as applied to seniority systems, the plaintiff must prove that the seniority system is a means
12 of intentional discrimination. Thus the existence of a bona fide seniority system is not an
13 affirmative defense; rather it is simply an aspect of the plaintiff’s burden of proving discrimination.
14 The *Lorance* Court specifically distinguished seniority systems from bona fide occupational
15 qualifications, a defense on which the defendant does have the burden. *See also Colgan v. Fisher*
16 *Scientific Co.*, 935 F.2d 1407, 1417 (3d Cir. 1991) (stating that petitioning employees “were
17 required to allege that either the creation or the operation of the seniority system was the result of
18 intentional discrimination”); *Green v. USX Corp.*, 896 F.2d 801, 806 (3d Cir. 1990) (noting that
19 proof of disparate treatment, not simply disparate impact, is required to invalidate a seniority
20 system under Title VII). Accordingly, no instruction is included for any affirmative defense for a
21 bona fide seniority system.

⁴⁷ See 42 U.S.C. § 2000e-2(h); see also *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009) (applying § 2000e-2(h)).

5.4.1 Compensatory Damages – General Instructions

5.4.1 Title VII Damages — Compensatory Damages — General Instruction

Model

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

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

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

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

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

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

5.4.1 Compensatory Damages – General Instructions

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

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

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

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

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

68 **Comment**

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

5.4.1 Compensatory Damages – General Instructions

72 *Cap on Damages*

73 The Civil Rights Act of 1991 (42 U.S.C. § 1981a) provides for compensatory damages and
74 a right to jury trial for disparate treatment violations. But it also imposes a statutory limit on the
75 amount of compensatory damages that can be awarded. See 42 U.S.C. § 1981a(b)(3):

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

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

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

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

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

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

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

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

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

5.4.1 Compensatory Damages – General Instructions

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

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

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

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

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

139 The pattern instruction contains bracketed material that would instruct the jury not to award
140 back pay or front pay. The jury may, however, enter an award of back pay and front pay as
141 advisory, or by consent of the parties. In those circumstances, the court should refer to instructions
142 5.4.3 for back pay and 5.4.4 for front pay. In many cases it is commonplace for back pay issues to
143 be submitted to the jury. The court may think it prudent to consult with counsel on whether the

5.4.1 Compensatory Damages – General Instructions

144 issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated
145 basis) or are to be left to the court’s determination without reference to the jury.

146 *Damages for Pain and Suffering*

147 In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir. 1988), the Court held
148 that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering damages
149 without first presenting evidence of actual injury. The court stated that “[t]he justifications that
150 support presumed damages in defamation cases do not apply in § 1981 and Title VII cases.
151 Damages do not follow of course in § 1981 and Title VII cases and are easier to prove when they
152 do.”

153 *Attorney Fees and Costs*

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

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

2 **Model**

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

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

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

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

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

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

35 If you decide to award punitive damages, then you should also consider the purposes of

5.4.2 Punitive Damages

36 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
37 amount of punitive damages, you should consider the degree to which [defendant] should be
38 punished for its wrongful conduct, and the degree to which an award of one sum or another will
39 deter [defendant] or others from committing similar wrongful acts in the future.

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

45

46 **Comment**

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

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

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

70 The Court in *Kolstad* established an employer’s good faith as a defense to punitive
71 damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff’s

5.4.2 Punitive Damages

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

101 *Caps on Punitive Damages*

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

105 *Due Process Limitations*

106 The Supreme Court has imposed some due process limits on both the size of punitive
107 damages awards and the process by which those awards are determined and reviewed. In
108 performing the substantive due process review of the size of punitive awards, a court must consider
109 three factors: “the degree of reprehensibility of” the defendant’s conduct; “the disparity between
110 the harm or potential harm suffered by” the plaintiff and the punitive award; and the difference

5.4.2 Punitive Damages

111 between the punitive award “and the civil penalties authorized or imposed in comparable cases.”
112 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

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

5.4.3 Back Pay – For Advisory or Stipulated Jury

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

Model

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

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

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

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

[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the

5.4.3 Back Pay – For Advisory or Stipulated Jury

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

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

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

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

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

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

5.4.3 Back Pay – For Advisory or Stipulated Jury

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

81

82 **Comment**

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

88 *Back Pay Is an Equitable Remedy*

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

106 An instruction on back pay is nonetheless included because the parties or the court may
107 wish to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be
108 seeking compensatory damages and the jury will be sitting anyway. *See* Fed. R. Civ. P. 39(c).
109 Alternatively, the parties may agree to a jury determination on back pay, in which case this
110 instruction would also be appropriate. In many cases it is commonplace for back pay issues to be
111 submitted to the jury. The court may think it prudent to consult with counsel on whether the issues
112 of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis)

5.4.3 Back Pay – For Advisory or Stipulated Jury

113 or are to be left to the court’s determination without reference to the jury. Instruction 5.4.1, on
114 compensatory damages, instructs the jury in such cases to provide separate awards for
115 compensatory damages, back pay, and front pay.

116 *Computation of Back Pay*

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

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

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

147 (3)(A) For purposes of this section, an unlawful employment practice
148 occurs, with respect to discrimination in compensation in violation of this
149 subchapter, when a discriminatory compensation decision or other practice is
150 adopted, when an individual becomes subject to a discriminatory compensation

5.4.3 Back Pay – For Advisory or Stipulated Jury

151 decision or other practice, or when an individual is affected by application of a
152 discriminatory compensation decision or other practice, including each time wages,
153 benefits, or other compensation is paid, resulting in whole or in part from such a
154 decision or other practice.

155 (B) In addition to any relief authorized by section 1981a of this title, liability
156 may accrue and an aggrieved person may obtain relief as provided in subsection
157 (g)(1), including recovery of back pay for up to two years preceding the filing of
158 the charge, where the unlawful employment practices that have occurred during the
159 charge filing period are similar or related to unlawful employment practices with
160 regard to discrimination in compensation that occurred outside the time for filing a
161 charge.

162 Under this framework, the specific instructions on back pay calculation will vary depending on (a)
163 whether the plaintiff asserts a pay-discrimination claim;⁴⁸ (b) if so, whether the plaintiff asserts not
164 only an unlawful act within the charge filing period but also a similar or related unlawful action
165 prior to the charge filing period; and (c) if so, whether the similar or related prior action fell more
166 than two years prior to the filing of the charge.

167 Alternative One in the model instruction is suggested for use when the plaintiff does not
168 seek back pay from periods earlier than the date of the unlawful employment practice that provides
169 the basis for the plaintiff’s claim.⁴⁹ Alternative Two in the model is suggested for use when the
170 plaintiff alleges pay discrimination and seeks back pay from periods earlier than the date that the
171 unlawful employment practice occurred within the charge filing period but starting two years or
172 less before the filing of the charge; in that situation, the two-year limit need not be mentioned.
173 Alternative Three in the model is suggested for use when the plaintiff alleges pay discrimination
174 and seeks back pay from periods earlier than the date that the unlawful employment practice
175 occurred within the charge filing period based on an act more than two years before the filing of
176 the charge.

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

⁴⁸ See *Noel v. Boeing Co.*, 622 F.3d 266, 273 (3d Cir. 2010) (holding that the LLFPA “does not apply to failure-to-promote claims”).

⁴⁹ Ordinarily, the bracketed language in Alternative One concerning the two-year limit will be unnecessary: Because the charge filing periods are shorter than two years, a timely charge will fall less than two years after the unlawful practice. The bracketed language is provided for use in cases where that is not true – for instance, where the plaintiff’s charge was untimely but the defendant waived its timeliness defense.

5.4.3 Back Pay – For Advisory or Stipulated Jury

180 *Mitigation*

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

183 A successful claimant's duty to mitigate damages is found in Title VII: "Interim
184 earnings or amounts earnable with reasonable diligence by the person or persons
185 discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C.
186 § 2000e-5(g)(1); see *Ellis v. Ringgold Sch. Dist.*, 832 F.2d 27, 29 (3d Cir. 1987). Although
187 the statutory duty to mitigate damages is placed on a Title VII plaintiff, the employer has
188 the burden of proving a failure to mitigate. See *Anastasio v. Schering Corp.*, 838 F.2d 701,
189 707-08 (3d Cir. 1988). To meet its burden, an employer must demonstrate that 1)
190 substantially equivalent work was available, and 2) the Title VII claimant did not exercise
191 reasonable diligence to obtain the employment.

192 . . .

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

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

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

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

5.4.3 Back Pay – For Advisory or Stipulated Jury

216 have offset any additional earnings from alternative higher-paying job).

217 *After-Acquired Evidence of Employee Misconduct*

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

5.4.4 Front Pay – For Advisory or Stipulated Jury

1 **5.4.4 Title VII Damages** — Front Pay — For Advisory or Stipulated Jury

2 **Model**

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

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

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

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

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

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

30

31 **Comment**

32 There is no right to jury trial under Title VII for a claim for front pay. *See Pollard v. E. I.*
33 *du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay under Title VII is not an

5.4.4 Front Pay – For Advisory or Stipulated Jury

34 element of compensatory damages). In *Pollard* the Court reasoned that the Civil Rights Act of
35 1991 expanded the remedies available in Title VII actions to include legal remedies and provided
36 a right to jury trial on those remedies. Therefore, remedies that were cognizable under Title VII
37 before the Civil Rights Act of 1991 must be treated as equitable remedies. Any doubt on the
38 question is answered by the Civil Rights Act itself: 42 U.S.C. § 1981a(a)(1) provides that, in
39 intentional discrimination cases brought under Title VII, "the complaining party may recover
40 compensatory and punitive damages as allowed in subsection (b) of [§ 1981a], in addition to any
41 relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent." *See also*
42 *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir. 2009) (explaining in
43 Title VII case that "back pay and front pay are equitable remedies to be determined by the court").

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

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

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

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

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

2 **Model**

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

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

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

11
12 **Comment**

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

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