

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 claim<sup>1</sup> begins to run upon the occurrence  
101 of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. §

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<sup>1</sup> 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)).<sup>2</sup> 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).<sup>3</sup>

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<sup>2</sup> *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”).

<sup>3</sup> 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 submit relevant interrogatories to the jury. As of this time, the Committee has not prepared a

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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  
149 brought against a “religious corporation, association, educational institution or society”). In

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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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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,<sup>4</sup> 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”).

237 The Committee has not attempted to determine the ways in which the disparate-treatment  
238 instructions in this Chapter would need to be modified for application to a claim for failure to  
239 accommodate a religious practice. Any instruction should consider *Groff v. DeJoy*, 123 S. Ct. 2279  
240 (2023), which clarified language from a much earlier Supreme Court decision, *Trans World*  
241 *Airlines, Inc. v. Hardison*, 432 U. S. 63 (1977), that had been read by a number of courts to mean  
242 that an employer’s incurring more than de minimis costs for an accommodation would be an undue  
243 hardship. Instead, the correct standard is whether granting an accommodation would result in  
244 “substantial increased costs for the employer in relation to the conduct of its particular business,”  
245 while “tak[ing] into account all relevant factors in the case at hand, including the particular  
246 accommodations at issue and their practical impact in light of the nature, ‘size and operating cost  
247 of [an] employer.’” *Id.* at 2295 (citation omitted). The Court stated that employers need not violate  
248 governing seniority systems. Beyond that, relevant costs were those the employer suffered, which  
249 means that costs to coworkers are irrelevant unless they pose difficulties for the employer: even  
250 when they do, hardship “attributable to employee animosity to a particular religion, to religion in  
251 general, or to the very notion of accommodating religious practice cannot be considered ‘undue.’”  
252 *Id.* at 2296. Guidance for an Instruction may be found in the EEOC’s current regulations, 29 CFR  
253 §1605.2(e)(1) (2022), which the Court referenced positively but did not endorse in toto. Guidance  
254 may also be found in ADA Instruction 9.1.3 since the Americans with Disabilities Act also requires  
255 reasonable accommodation short of undue hardship although the Court did not rely on the ADA  
256 and the two statutes address very different concerns.

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

258 In *Francis v. Mineta*, 505 F.3d 266, 270-71 (3d Cir. 2007), an employee attempted to bring

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<sup>4</sup> 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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259 an employment discrimination action under the Religious Freedom Restoration Act, 42 U.S.C. §§  
260 2000bb-2000bb-4. (The employee had failed to exhaust administrative remedies with the EEOC,  
261 so Title VII was unavailable to him.) The court held that “nothing in RFRA alters the exclusive  
262 nature of Title VII with regard to employees’ claims of religion-based employment  
263 discrimination.” The court relied on the legislative history of RFRA, which demonstrated that  
264 “Congress did not intend RFRA to create a vehicle for allowing religious accommodation claims  
265 in the context of federal employment to do an end run around the legislative scheme of Title VII..”

266 *Title VII Protection of Pregnancy:*

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

268 In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which  
269 added new language to Title VII's definitions subsection. The first clause of the  
270 1978 Act specifies that Title VII’s “ter[m] ‘because of sex’ ... include[s] ... because  
271 of or on the basis of pregnancy, childbirth, or related medical conditions.” §  
272 2000e(k). The second clause says that “women affected by pregnancy, childbirth,  
273 or related medical conditions shall be treated the same for all employment-related  
274 purposes ... as other persons not so affected but similar in their ability or inability  
275 to work....” *Ibid.*

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

280 The Court of Appeals has held that the Pregnancy Discrimination Act’s reference to  
281 “related medical conditions” includes abortion. *See Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358,  
282 364 (3d Cir. 2008) (concluding “that an employer may not discriminate against a woman employee  
283 because she has exercised her right to have an abortion”).

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

289 *Interaction between disparate impact and disparate treatment principles*

290 Concerning the interaction between disparate-impact and disparate-treatment principles  
291 under Title VII, *see Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (holding that “under Title  
292 VII, before an employer can engage in intentional discrimination for the asserted purpose of  
293 avoiding or remedying an unintentional disparate impact, the employer must have a strong basis

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294 in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-  
295 conscious, discriminatory action,” but also noting that “Title VII does not prohibit an employer  
296 from considering, before administering a test or practice, how to design that test or practice in  
297 order to provide a fair opportunity for all individuals, regardless of their race”). *See also NAACP*  
298 *v. North Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 484-85 (3d Cir. 2011) (rejecting defendant’s  
299 argument that it should be allowed to maintain a residency requirement despite its disparate impact  
300 on African-Americans because the defendant feared disparate-treatment claims by Hispanic  
301 candidates).

### 302 *Discrimination on the basis of sexual orientation or transgender status*

303 Although the Third Circuit earlier held that Title VII does not bar discrimination on the  
304 basis of sexual orientation, *see Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261  
305 (3d Cir. 2001) (“Title VII does not prohibit discrimination based on sexual orientation.”), the  
306 Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), overturned that  
307 result. It recognized that discrimination on the basis of sexual orientation or transgender status is  
308 a subset of sex discrimination. As the Court wrote: “[a]n individual’s homosexuality or transgender  
309 status is not relevant to employment decisions,” “because it is impossible to discriminate against  
310 a person for being homosexual or transgender without discriminating against that individual based  
311 on sex.” *Id.* at 1741.

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

### 319 *Discrimination on the Basis of Interracial Association*

320 For purposes of Title VII, race discrimination includes discrimination on the basis of the  
321 race of individuals with whom the plaintiff associates. In *Kengerski v. Harper*, 6 F.4th 531, 538  
322 (3d Cir. 2021), plaintiff claimed retaliation for his internal complaint of harassment on the basis  
323 of his familial association with a black grandniece, and the court agreed that such a claim could be  
324 actionable. Associational discrimination is “well grounded in the text of Title VII” although “the  
325 name is a misnomer because, when you discriminate against an employee because of his  
326 association with someone of a different race, you are in effect discriminating against him ‘because  
327 of [his own] race’ in violation of Title VII.”) (citation omitted). Further, “[t]his theory of  
328 discrimination is not limited to close or substantial relationships.” *Id.*

### 329 *Federal Employee Claims*

## 5.0 Title VII Introductory Instruction

330 Title VII claims by federal employees are governed by a separate statutory section, which  
331 provides in relevant part that for various specified types of federal-government employees “[a]ll  
332 personnel actions affecting [such] employees or applicants for [such] employment . . . shall be  
333 made free from any discrimination based on race, color, religion, sex, or national origin.” 42  
334 U.S.C. § 2000e-16(a). The Court of Appeals has held that motivating factor causation applies to  
335 federal employee claims under that statute. *Makky v. Chertoff*, 541 F. 3d 205, 213-214 (3d Cir.  
336 2008), although that decision did not focus on the language of Section 2000e-16(a).

337 The Supreme Court’s recent decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), may or  
338 may not have implications for Title VII discrimination cases brought by federal employees. *Babb*  
339 was a case claiming age discrimination, and the Court recognized a new causation structure for  
340 ADEA discrimination claims by federal employees. Parallel to § 2000e-16(a) of Title VII, the  
341 ADEA’s extension of protection from age discrimination to federal employees provides generally  
342 that “personnel actions . . . shall be made free from any discrimination based on age.” 29 U. S. C.  
343 §633a(a). Despite recognizing the default rule requiring proof of a “but-for cause” for  
344 antidiscrimination statutes, the Court read the “plain meaning of the critical statutory language”  
345 to “demand[] that personnel actions be untainted by any consideration of age.” *Id.* at 1171. That  
346 means that, while the plaintiff must prove that discrimination caused, in a but-for sense, a  
347 difference in her treatment, she does not have to establish that that different treatment resulted in  
348 a different ultimate outcome in order to establish a violation. Rather, the Court distinguished  
349 between processes and outcomes with respect to remedies. Proving taint suffices for a violation  
350 but

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

357 *Id.* In other words, absent a showing of but-for causation in the ultimate result, plaintiff’s proof of  
358 a “taint” establishes a violation and entitles plaintiff to whatever remedies are appropriate when  
359 the final personnel action remained unaffected. However, such a plaintiff apparently must show  
360 something more than bias by someone involved in the process since the Court also wrote:  
361 “plaintiffs are not without a remedy if they show that age was a but-for cause of differential  
362 treatment in an employment decision but not a but-for cause of the decision itself.” *Id.* at 1170.  
363

364 *Babb* may suggest, contrary to *Makky*, that motivating factor causation is not applicable to  
365 claims of discrimination in the outcome of personnel decisions. The contrary argument is that  
366 Section 2000e-16(d) applies “the provisions of §706(f) through (k), as applicable” to federal  
367 employee actions. And §706(g) contains the “same decision anyway” defense to full relief, thus  
368 suggesting that motivating factor causation applies in Section 2000e-16 suits. This possibility was  
369 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]<sup>5</sup>; 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:<sup>6</sup>**

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<sup>5</sup> Please see the Comment for discussion of the last item in this list of alternatives.

<sup>6</sup> 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.<sup>7</sup>

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<sup>7</sup> 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 employment decision can

### 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

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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).

### 5.1.1 Disparate Treatment – Mixed-Motive

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.”<sup>8</sup> 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).<sup>9</sup> Failures or refusals to hire and discharges are specifically included within the statute’s

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<sup>8</sup> 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.”).

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

### 5.1.1 Disparate Treatment – Mixed-Motive

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.<sup>10</sup> 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,<sup>11</sup> 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,<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup> The Court of Appeals has indicated that an alteration of the terms,

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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).

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

<sup>11</sup> *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.”).

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

<sup>13</sup> *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.”).

<sup>14</sup> “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.<sup>15</sup>  
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.<sup>16</sup> 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.<sup>17</sup> Recently, however, the Court held that being placed on “surplus”  
112 status was equivalent to a notice of termination and would constitute an adverse action even if no  
113 layoff ultimately occurred.<sup>17.1</sup> On the other hand, where the material adverseness of an employment

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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.

<sup>15</sup> *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.

<sup>16</sup> *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”).

<sup>17</sup> *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).

<sup>17.1</sup> *Fowler v. AT&T, Inc.*, 19 F.4th 292, 301 (3d Cir. 2021) (“we hold that a notice of termination, like the selection for surplus status here, is an adverse employment action even if an

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114 action requires assessment of fact-specific circumstances, the Court of Appeals has on at least one  
115 occasion specified that this assessment is for the jury rather than the judge.<sup>18</sup> Failure to  
116 accommodate a religious practice can be the basis for a claim under Section 2000e-2(a)(1), but the  
117 model instructions do not attempt to formulate an instruction for use in such cases.<sup>19</sup>

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

#### 133 *Failure to Rehire as an Adverse Employment Action*

134 In *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008),  
135 the court held that the failure to renew an employment arrangement, “whether at-will or for a  
136 limited period of time, is an employment action, and an employer violates Title VII if it takes an  
137 adverse employment action for a reason prohibited by Title VII.” See also *Connelly v. Lane Const.*  
138 *Corp.*, 809 F.3d 780, 791 (3d Cir. 2016) (holding that plaintiff adequately pleaded a disparate

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employee is given a window of time—small or large—before her actual discharge. Such a notice is adverse without regard to whether the employee is permitted to apply for other positions within the company, or even if she ultimately succeeds in finding another position.”).

<sup>18</sup> 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 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.

<sup>19</sup> See Comment 5.0 (discussing *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033-34 (2015) and *Groff v. DeJoy*, 123 S. Ct. 2279 (2023)).

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139 treatment claim where her “allegations raise[d] a reasonable expectation that discovery w[ould]  
140 reveal evidence that [her] protected status as a woman played either a motivating or determinative  
141 factor in [defendant]’s decision not to rehire her”). The Instruction accordingly contains a  
142 bracketed alternative for failure to renew an employment arrangement as an adverse employment  
143 action.

#### 144 *Suspension with Pay Generally Not an Adverse Employment Action*

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

#### 152 *Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for* 153 *Employment*

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

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

172 *Id.* (Emphasis added.)

173 The *Makky* court held that the determination of whether a plaintiff had obtained an  
174 objective qualification for employment is a question of fact. But it would be extremely rare for the

### 5.1.1 Disparate Treatment – Mixed-Motive

175 court to have to instruct the jury on whether the plaintiff has met an objective job requirement  
176 within the meaning of *Makky*. The examples given by the court are in the nature of licenses or  
177 certifications by an external body — in the vast majority of cases, the parties will not dispute  
178 whether the license or certification was issued. (In *Makky*, the requirement was that the employee  
179 have a security clearance, and he could not contest that his clearance was denied.) In the rare case  
180 in which the existence of an objective externally-imposed qualification raises a question of fact,  
181 the court will need to add a third element to the basic instruction. For example:

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

#### 184 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

185           Construing a statute that contains similar motivating-factor language, the Supreme Court  
186 ruled that “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the  
187 supervisor to cause an adverse employment action, and if that act is a proximate cause of the  
188 ultimate employment action, then the employer is liable under [the Uniformed Services  
189 Employment and Reemployment Rights Act of 1994]” even if the ultimate employment decision  
190 is taken by one other than the supervisor with the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186,  
191 1194 (2011) (footnotes omitted). The Court did not explicitly state whether this ruling extends to  
192 claims under 42 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor),  
193 though it noted the similarity between Section 2000e-2(m)’s language and that of the USERRA.  
194 Since *Staub*, however, the Third Circuit has frequently applied that decision in Title VII cases.  
195 *E.g., McKenna v. City of Phila.*, 649 F.3d 171 (3d Cir. 2011); *Jones v. SEPTA*, 796 F.3d 323 (3d  
196 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]<sup>20</sup>; 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

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<sup>20</sup> Please see the Comment for discussion of the last item in this list of alternatives.

## 5.1.2 Disparate Treatment – Pretext

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).<sup>21</sup> 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:

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<sup>21</sup> 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.”).<sup>22</sup>

### 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).

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<sup>22</sup> 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).).<sup>23</sup>

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*

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<sup>23</sup> 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;<sup>24</sup>

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

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<sup>24</sup> 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.<sup>25</sup> 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

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<sup>25</sup> 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 may  
75 nevertheless be liable for supervisor harassment on either of two bases. The first is where the  
76 alleged harasser is the “proxy” or “alter ego” of the employer. *O’Brien v. Middle E. Forum*, 57  
77 F.4th 110 (3d Cir. 2023). The second basis is when the employer fails to establish an affirmative  
78 defense:

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

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

87 Instruction 5.1.3 is designed for use in cases that involve a tangible employment action.  
88 The instruction’s definition of “tangible employment action” is taken from *Burlington Industries,*  
89 *Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).<sup>26</sup> It should be noted that the failure to renew an  
90 employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New*  
91 *Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to  
92 renew an employment arrangement, “whether at-will or for a limited period of time, is an

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<sup>26</sup> 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”).

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93 employment action, and an employer violates Title VII if it takes an adverse employment action  
94 for a reason prohibited by Title VII”). *Compare Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d  
95 323, 328 (3d Cir. 2015) (holding that a paid suspension while an employee was investigated for  
96 alleged misconduct was not a tangible employment action). As discussed below, it is possible that  
97 a plaintiff might frame a case as a quid pro quo case even though it does not involve evidence of  
98 an adverse tangible employment action; in such instances, the *Ellerth/Faragher* affirmative  
99 defense will be available. See Instruction 5.1.5 for an instruction on that affirmative defense.

#### 100 *Unfulfilled threats*

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

#### 111 *Submission to demands*

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

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

125 *Robinson*, 120 F.3d at 1297. This aspect of *Robinson* is no longer good law with respect to cases  
126 in which the plaintiff rebuffs the supervisor’s advances and no adverse tangible employment action  
127 occurs; as noted above, under *Ellerth* a plaintiff in such a case would need to meet the hostile  
128 environment standard for proving discrimination. What is less clear is whether the same is true  
129 for cases in which the plaintiff submits to the supervisor’s advances. Neither *Ellerth* nor *Faragher*

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130 was such a case and those cases do not directly illuminate the question.

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

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

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

### 5.1.3 Harassment – Quid Pro Quo

170 higher level supervisors,’ the Supreme Court did not require such conditions in all cases.”)  
171 (quoting, with added emphasis, *Ellerth*, 524 U.S. at 762).

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

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

197 *Definition of “supervisor”*

198 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or  
199 she is empowered by the employer to take tangible employment actions against the victim...”  
200 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). *See also Moody*, 870 F.3d at 217 (“[T]he  
201 record here supports the conclusion that Marshall was Moody’s supervisor because (a) the Board  
202 empowered him as the custodial foreman to select from the list of substitute custodians who could  
203 actually work at New York Avenue School; ... (b) the Board conceded that while Moody was on  
204 school premises, Marshall served in a supervisory role; (c) the record identifies no other person  
205 who was present full time or even sporadically on the school’s premises, or anywhere for that  
206 matter, who served as Moody’s supervisor; and (d) since Moody’s primary benefit from her  
207 employment was hourly compensation, and since Marshall controlled 70% of her hours, his  
208 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.<sup>27</sup> 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).<sup>28</sup> 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....”

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<sup>27</sup> 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).

<sup>28</sup> 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).<sup>29</sup> 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).<sup>30</sup> 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

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<sup>29</sup> 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).

<sup>30</sup> “[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

#### 5.1.4 Harassment – Hostile Work Environment – Tangible Employment Action

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. Breedon*, 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”). *See also*  
143 *Starnes v. Butler Cty. Court of Common Pleas*, 971 F.3d 416, 427-29 (3d Cir. 2020) (in a §1983  
144 suit, the court found the severe or pervasive element of a hostile work environment claim  
145 sufficiently stated by allegations that plaintiff’s supervisor "coerced her into engaging in sexual  
146 relations, shared pornography with her, asked her to film herself performing sexual acts, engaged  
147 in a pattern of flirtatious behavior, scolded her for speaking with male colleagues, assigned her  
148 duties forcing her to be close to him, and treated her differently than her male colleagues.”).

#### 149 *Subjective and Objective Components*

150 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that

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151 a hostile work environment claim has both objective and subjective<sup>31</sup> components. A hostile  
152 environment must be “one that a reasonable person would find hostile and abusive, and one that  
153 the victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and  
154 subjective components.

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

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

##### 163 *Harassment as Retaliation for Protected Activity*

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

##### 176 *Religious Discrimination*

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

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<sup>31</sup> 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”).

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183 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 liability.]**

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 further consider whether the employer is liable for such conduct. An employer may be liable for the actions of its supervisors as I will

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32 describe.

33 **[Give instruction (A) when the facts permit a finding either of proxy liability or of**  
34 **presumptive liability subject to an affirmative defense. When the alleged individual harasser**  
35 **is not highly enough placed to create a triable issue of proxy liability, give only instruction**  
36 **(B).]**

37 (A.) An employer is liable when the [individual harasser’s name] is plaintiff’s supervisor and either  
38 highly placed enough to be the proxy of the employer or, absent that, when the employer has failed  
39 to make out the affirmative defense.

40 With respect to proxy liability, the employer is strictly liable for the conduct of [name] if [name]  
41 is highly enough placed within the employer’s hierarchy such as [his/her] conduct is deemed that  
42 of the employer. To do so, [name] must exercise exceptional authority and control within the  
43 employer but need not be its chief executive officer. In making this determination, you may look  
44 at the employer’s formal institutional structure, evidence of how decision-making in fact occurs  
45 on a day-to-day basis, and any other evidence you find establishes exceptional authority and  
46 control.

47 If you find proxy liability, the employer is liable for the harassment. If you find no proxy liability,  
48 the employer is still liable unless it has established an affirmative defense. I will instruct you now  
49 on the elements of that affirmative defense.

50 (B). If any of the above elements has not been proved by a preponderance of the evidence, your  
51 verdict must be for [defendant] and you need not proceed further in considering this claim. If you  
52 find that the elements have been proved, then you must consider whether [name] is the plaintiff’s  
53 supervisor. If you so find, you must find for plaintiff unless you also find that the [employer] has  
54 proven an affirmative defense by a preponderance of the evidence. [employer’s] affirmative  
55 defense. I will instruct you now on the elements of that affirmative defense.

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

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

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

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

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

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

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

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

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

#### 74 75 **Comment**

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

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

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

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

86 This instruction is to be used in discriminatory harassment cases where the plaintiff did not  
87 suffer any “tangible” employment action such as discharge or demotion, but rather suffered  
88 “intangible” harm flowing from harassment that is “sufficiently severe or pervasive to create a  
89 hostile work environment.” *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998).<sup>32</sup> In *Faragher* and  
90 in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is  
91 strictly liable for supervisor harassment that “culminates in a tangible employment action, such as

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<sup>32</sup> 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”).

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92 discharge, demotion, or undesirable reassignment.” *Ellerth*, 524 U.S. at 765. But when no such  
93 tangible action is taken, the employer may still be liable for harassment by supervisors. Such  
94 liability arises in two situations. The first is when the supervisor in question is highly enough  
95 placed within the institutional employer to be its “proxy” or “alter ego.” The second is where the  
96 employer fails to establish an affirmative defense to the presumptive liability that arises from  
97 supervisory harassment even when there is no tangible employment action.

98 In *O'Brien v. Middle E. Forum*, 57 F.4th 110 (3d Cir. 2023), the Third Circuit “now join[s]  
99 our sister Circuit Courts of Appeals and hold[s] that the *Faragher/Ellerth* defense is unavailable  
100 when the alleged harasser is the employer's proxy or alter ego.” *Id.* at 120. . The opinion used the  
101 two terms interchangeably, but the model instruction uses only “proxy” for the sake of simplicity.  
102 As for what suffices to satisfy this standard, the rationale for liability is that the institutional  
103 employer is itself acting when the harassing conduct is by a proxy or alter ego. Thus, while  
104 “merely serving as a supervisor with some amount of control over a subordinate does not establish  
105 proxy status,” such status can be found “where “an official... [is] high enough in the management  
106 hierarchy that his actions 'speak' for the employer.” *O'Brien* cautioned that “only individuals with  
107 exceptional authority and control within an organization” can meet this standard. 57 F.4th at 121  
108 (quoting *Helm v. Kansas*, 656 F.3d 1277, 1286 (10th Cir. 2011)).

109 Applying this concept to the case at hand, the alleged harasser was Gregg Roman, plaintiff’s direct  
110 supervisor, and the Court found a triable issue as to his being a proxy for the Forum. It wrote:

111 Roman served as the Chief Operating Officer, Director, and Secretary of the Board. The  
112 jury heard testimony that . . . he was second in command at the Forum, and was poised to  
113 “be the successor to become president of the organization.” There was testimony that his  
114 job was to “run[] the administration” of the organization; he was the “man in charge” of  
115 dictating policies for the day-to-day governance of the Forum's main Philadelphia office,  
116 and he was “responsible for all of the administration oversight with anybody that worked  
117 at the Forum.” The jury also heard testimony about his public-facing role which included  
118 making media appearances on behalf of the Forum.

119 *O'Brien*, 57 F.4th at 121-22 (citations omitted).). The model instructions look to this paragraph to  
120 frame the evidence that may be relevant to the proxy decision in terms of institutional structure,  
121 day-to-day operations, and other evidence.

122 If proxy liability is not established, an employer may still be liable for supervisor  
123 harassment even when no tangible employment action is taken. Such liability arises from the  
124 harassing actions of a supervisor unless the employer establishes an affirmative defense. To prevail  
125 on the basis of the defense, the employer must prove that “(a) [it] exercised reasonable care to  
126 prevent and correct promptly any sexually harassing behavior,”<sup>33</sup> and that (b) the employee

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<sup>33</sup> Compare *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015)

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127 “unreasonably failed to take advantage of any preventive or corrective opportunities provided by  
128 the employer or to avoid harm otherwise.”<sup>34</sup> *Ellerth*, 524 U.S. at 751 (1998).

129 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment  
130 action also justifies requiring the plaintiff to prove a further element, in order to protect the  
131 employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.  
132 “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is  
133 empowered by the employer to take tangible employment actions against the victim....” *Vance v.*  
134 *Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).<sup>35</sup> Respondeat superior liability for the acts of non-

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(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”).

<sup>34</sup> 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 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.”).

<sup>35</sup> 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,

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135 supervisory employees exists only where "the defendant knew or should have known of the  
136 harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d  
137 1469, 1486 (3d Cir. 1990).<sup>36</sup> In a case where a plaintiff suffered "harassment by [non-supervisory]  
138 co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks  
139 or by altering the work environment in objectionable ways," the Supreme Court has stated that  
140 "the jury should be instructed that the nature and degree of authority wielded by the harasser is an  
141 important factor to be considered in determining whether the employer was negligent." *Vance*,  
142 133 S. Ct. at 2451. *See also Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

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

151 The court of appeals has drawn upon agency principles for guidance on the definition of

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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).

<sup>36</sup> "[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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152 “management level” personnel:

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

162 Second, an employee's knowledge of sexual harassment will be imputed to  
163 the employer where the employee is specifically employed to deal with sexual  
164 harassment. Typically such an employee will be part of the employer's human  
165 resources, personnel, or employee relations group or department. Often an  
166 employer will designate a human resources manager as a point person for receiving  
167 complaints of harassment. In this circumstance, employee knowledge is imputed to  
168 the employer based on the specific mandate from the employer to respond to and  
169 report on sexual harassment.

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

#### 171 *Characteristics of a Hostile Work Environment*

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

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

185 Hostile work environment harassment occurs when unwelcome sexual conduct  
186 unreasonably interferes with a person's performance or creates an intimidating, hostile, or  
187 offensive working environment. . . . In order to be actionable, the harassment must be so

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188 severe or pervasive that it alters the conditions of the victim’s employment and creates an  
189 abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).

190 To judge whether the environment was hostile under this standard, one must “look[] at all the  
191 circumstances, including the frequency of the discriminatory conduct; its severity; whether it is  
192 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably  
193 interferes with an employee’s work performance.” *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206,  
194 215 (3d Cir. 2017) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) (citation  
195 and internal quotation marks omitted)).

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

#### 201 *Severe or Pervasive Activity*

202 The terms “severe or pervasive” set forth in the instruction are in accord with Supreme  
203 Court case law and provide for alternative possibilities for finding harassment. *See Jensen v.*  
204 *Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) (“The disjunctive phrasing means that ‘severity’ and  
205 ‘pervasiveness’ are alternative possibilities: some harassment may be severe enough to  
206 contaminate an environment even if not pervasive; other, less objectionable, conduct will  
207 contaminate the workplace only if it is pervasive.”) (quoting 2 C.Sullivan et. al., *Employment*  
208 *Discrimination Law and Practice* 455 (3d ed. 2002). *See, e.g., Moody v. Atl. City Bd. of Educ.*,  
209 870 F.3d 206, 215 (3d Cir. 2017) (finding evidence that met the “severe” test where plaintiff  
210 alleged that her supervisor “expected [her] to give sexual favors in exchange for work, touched  
211 [her] against her wishes, made sexual comments to her, and exposed himself to her”).

#### 212 *Objective and Subjective Components*

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

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

219 In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148-52 (2004), the Court considered  
220 the relationship between constructive discharge brought about by supervisor harassment and the  
221 affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that “an employer  
222 does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act

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223 precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the  
224 defense is available to the employer whose supervisors are charged with harassment.” The Court  
225 reasoned as follows:

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

241 . . .

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

#### 247 *Hostile Work Environment That Precedes the Plaintiff’s Employment*

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

#### 255 *Harassment as Retaliation for Protected Activity*

256 In *Jensen v. Potter*, 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation  
257 provision of Title VII “can be offended by harassment that is severe or pervasive enough to create  
258 a hostile work environment.” The *Jensen* court also declared that “our usual hostile work

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259 environment framework applies equally to Jensen’s claim of retaliatory harassment.” But  
260 subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53, 68 (2006),  
261 set forth a legal standard for determining retaliation that appears to be less rigorous than the  
262 standard for determining a hostile work environment. The Court in *White* declared that a plaintiff  
263 has a cause of action for retaliation under Title VII if the employer’s actions in response to  
264 protected activity “well might have dissuaded a reasonable worker from making or supporting a  
265 charge of discrimination.” After *White*, the Title VII retaliation provision can be offended by any  
266 activity of the employer — whether harassment or some other action — that satisfies the *White*  
267 standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

#### 268 *Back Pay*

269 In *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that  
270 an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. “Put simply,  
271 if a hostile work environment does not rise to the level where one is forced to abandon the job,  
272 loss of pay is not an issue.” As ADA damages are coextensive with Title VII damages — see the  
273 Comment to Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII  
274 hostile work environment cases. Thus, back pay will not be available in an action in which  
275 Instruction 5.1.5 is given, because the plaintiff has not raised a jury question on a tangible  
276 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].<sup>37</sup>

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,<sup>38</sup> 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

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<sup>37</sup> 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.]”

<sup>38</sup> 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,<sup>39</sup> and it provides as follows:

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

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

44 *Protected Activities*

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

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

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46 practice made unlawful by Title VII;<sup>40</sup> 2) making a charge of employment discrimination;<sup>41</sup> 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).<sup>42</sup> 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

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<sup>40</sup> 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”).

<sup>41</sup> *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).

<sup>42</sup> 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)). *Cf. Kengerski v. Harper*, 6 F.4th 531, 536  
70 (3d Cir. 2021) (distinguishing between a hostile-work-environment claim and a retaliation claim:  
71 to prevail on the former a plaintiff needs to show that the environment was actually hostile while  
72 success on the latter requires only “an objectively reasonable belief” of that reality). The good-  
73 faith-and-reasonable-belief test clearly applies to actions under the “opposition” clause of Section  
74 2000e-3(a). There is some authority for the proposition that a less demanding test applies to  
75 actions under the “participation” clause of Section 2000e-3(a) – i.e., the clause that refers to a  
76 person who “has made a charge, testified, assisted, or participated in any manner in an  
77 investigation, proceeding, or hearing under this subchapter,” 42 U.S.C. § 2000e-3(a). Thus, in  
78 *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), after holding plaintiff’s conduct unprotected  
79 by the opposition clause because the plaintiff could not have reasonably believed the challenged  
80 employer actions to be illegal, the Supreme Court went on to consider plaintiff’s participation  
81 claim based on the same employer action.

82 Third Circuit authority, however, is divided. After noting authorities stating that “the  
83 ‘participation clause’ ... offers much broader protection to Title VII employees than does the  
84 ‘opposition clause,’ ” the Court of Appeals in *Slagle v. County of Clarion*, 435 F.3d 262 (3d Cir.  
85 2006), stated that for filing a charge to constitute protected activity, “[a]ll that is required is that  
86 plaintiff allege in the charge that his or her employer violated Title VII by discriminating against  
87 him or her on the basis of race, color, religion, sex, or national origin, in any manner.” *Slagle*, 435  
88 F.3d at 266, 268. (The plaintiff in *Slagle* failed to surmount even this “low bar.” *Id.*) Later that  
89 same year, however, a different panel of the Court of Appeals indicated that the good-faith-and-  
90 reasonable-belief test applies to both opposition and participation claims: “Whether the employee  
91 opposes, or participates in a proceeding against, the employer’s activity, the employee must hold  
92 an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title  
93 VII.” *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). (The facts of *Moore*  
94 featured adverse actions both pre-dating and post-dating the filing of the EEOC charge, *see id.* at  
95 340, 345-48.)

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96 In accord with instructions from other circuits, Instruction 5.1.7 directs the jury to  
97 determine both the good faith and the reasonableness of the plaintiff's belief that employment  
98 discrimination had occurred. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII  
99 retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for  
100 use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981  
101 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA,  
102 and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to  
103 harassment or discrimination) under Title VII and other federal discrimination laws; instruction  
104 uses phrase "reasonably believed"); *id.* Notes on Use, Note 5 (using phrase "reasonably and in  
105 good faith believe"); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation)  
106 (discussing reasonableness requirement in the comment but not in the model instruction). In cases  
107 where the protected nature of the plaintiff's activity is not in dispute, this portion of the instruction  
108 can be modified and the court can simply instruct the jury that specified actions by the plaintiff  
109 constituted protected activity.

### 110 *Standard for Actionable Retaliation*

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

117 We speak of *material* adversity because we believe it is important to separate  
118 significant from trivial harms. Title VII, we have said, does not set forth "a general civility  
119 code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.  
120 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report  
121 discriminatory behavior cannot immunize that employee from those petty slights or minor  
122 annoyances that often take place at work and that all employees experience. See 1 B.  
123 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting  
124 that "courts have held that personality conflicts at work that generate antipathy" and  
125 "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-

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<sup>43</sup> 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 retaliation provision seeks to prevent employer interference with "unfettered access" to  
127 Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely  
128 "to deter victims of discrimination from complaining to the EEOC," the courts, and their  
129 employers. And normally petty slights, minor annoyances, and simple lack of good  
130 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

131 We refer to reactions of a *reasonable* employee because we believe that the  
132 provision's standard for judging harm must be objective. An objective standard is judicially  
133 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial  
134 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need  
135 for objective standards in other Title VII contexts, and those same concerns animate our  
136 decision here. See, e.g., [*Pennsylvania State Police v. Suders*, 542 U.S., at 141, 124 S. Ct.  
137 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,  
138 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment  
139 doctrine).

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

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

156 548 U.S. at 68 (some citations omitted). The instruction follows the guidelines of the Supreme  
157 Court's decision in *White*. For applications of the *White* standard, see *Moore v. City of*  
158 *Philadelphia*, 461 F.3d 331, 348 (3d Cir. 2006) (finding that a transfer of a police officer from a  
159 district where he had earned goodwill and established good relations with the community could  
160 constitute actionable retaliation, because it "is the kind of action that might dissuade a police  
161 officer from making or supporting a charge of unlawful discrimination within his squad."); *Id.* at  
162 352 (aggressive enforcement of sick-check policy "well might have dissuaded a reasonable worker  
163 from making or supporting a charge of discrimination."); *Moody v. Atl. City Bd. of Educ.*, 870 F.3d  
164 206, 220 (3d Cir. 2017) (holding that plaintiff presented evidence that would justify a finding of a

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165 materially adverse action where plaintiff’s “working hours declined three-fold in the months  
166 following her complaint as compared to the months preceding her complaint”).

167 In *Komis v. Sec’y of United States Dep’t of Labor*, 918 F.3d 289 (3d Cir. 2019), the plaintiff  
168 (a former federal employee) brought a claim for retaliatory hostile work environment and the jury  
169 charge included the “severe or pervasive” standard drawn from Title VII hostile-environment law.  
170 The plaintiff contended that “the ... instruction that a retaliatory hostile work environment claim  
171 requires proof of ‘conduct ... so severe or pervasive that a reasonable person in Ms. Komis’[s]  
172 position would find her work environment hostile or abusive[’] ... was erroneous because  
173 *Burlington Northern* did away with the ‘severe or pervasive’ requirement for retaliation claims—  
174 including for a retaliatory hostile work environment.” *Komis*, 918 F.3d at 297. The Court of  
175 Appeals, applying a harmless-error test, declined to resolve that question. *See id.* at 299  
176 (“Whatever the room in magnitude of harm between conduct severe or pervasive such that it affects  
177 the terms and conditions of employment and materially adverse conduct that would dissuade a  
178 reasonable worker from invoking her antidiscrimination rights, Komis has not shown how it might  
179 change the outcome in her case.”).

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

181 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 61-62 (2006), held  
182 that retaliation need not be job-related to be actionable under Section 2000e-3(a). In doing so, the  
183 Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an  
184 adverse employment action in order to recover for retaliation. The Court distinguished Section  
185 2000e-3(a) from Title VII’s basic anti-discrimination provision, which does require an adverse  
186 employment action.

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

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

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

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

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

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

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

213 The *White* Court explained the rationale for providing broader protection in Section 2000e-  
214 3(a) than is provided in the basic discrimination provision of Title VII:

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

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

231 But one cannot secure the second objective by focusing only upon employer actions  
232 and harm that concern employment and the workplace. Were all such actions and harms  
233 eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer  
234 can effectively retaliate against an employee by taking actions not directly related to his  
235 employment or by causing him harm *outside* the workplace. See, *e.g.*, *Rochon v. Gonzales*,  
236 438 F.3d at 1213 (FBI retaliation against employee "took the form of the FBI's refusal,

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237 contrary to policy, to investigate death threats a federal prisoner made against [the agent]  
238 and his wife"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996) (finding  
239 actionable retaliation where employer filed false criminal charges against former employee  
240 who complained about discrimination). A provision limited to employment-related actions  
241 would not deter the many forms that effective retaliation can take. Hence, such a limited  
242 construction would fail to fully achieve the anti-retaliation provision's "primary purpose,"  
243 namely, "maintaining unfettered access to statutory remedial mechanisms." *Robinson v.*  
244 *Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

245 548 U.S. at 63-64 (emphasis in original)

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

254 *Membership In Protected Class Not Required*

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

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

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

272 In order to bring a retaliation claim under Section 2000e-3(a), the third-party victim of the

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273 retaliation must show that he or she “falls within the zone of interests protected by Title VII.” *Id.*  
274 at 178. In *Thompson*, the plaintiff fell “well within the zone of interests sought to be protected by  
275 Title VII” because he was an employee of the defendant and because “injuring him was the  
276 employer's intended means of harming” his fiancée, who had engaged in the protected activity that  
277 triggered the retaliation. *See id.*

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

### 285 *Causation*

286 For a helpful discussion on the importance of the time period between the plaintiff's  
287 protected activity and the action challenged as retaliatory, as well as other factors that might be  
288 relevant to a finding of causation, *see Marra v. Philadelphia Housing Authority*, 497 F.3d 286,  
289 302 (3d Cir. 2007) (a case involving a claim of retaliation under the Pennsylvania Human Relations  
290 Act, which the court found to be subject to the same standards of substantive law as an action for  
291 retaliation under Title VII) :

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

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312 of circumstantial evidence, such as inconsistent reasons given by the employer for  
313 terminating the employee or the employer's treatment of other employees, that give rise to  
314 an inference of causation when considered as a whole. *Farrell*, 206 F.3d at 280-81.

315 The *Marra* court noted that the time period relevant to causation is that between the date  
316 of the employee's protected activity and the date on which the employer made the decision to take  
317 adverse action. In *Marra* the employer made the decision to terminate the plaintiff five months  
318 after the protected activity, but the employee was not officially terminated until several months  
319 later. The court held that the relevant time period ran to when the decision to terminate was made.  
320 497 F.3d at 286.

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

325 For other Third Circuit cases evaluating the causative connection between protected  
326 activity and an adverse employment decision, see *Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir.  
327 2006) (noting that temporal proximity and a pattern of antagonism "are not the exclusive ways to  
328 show causation" and that the element of causation in retaliation cases "is highly context-specific");  
329 *Moore v. City of Philadelphia*, 461 F.3d 331, 352 (3d Cir. 2006) (employee was subject to three  
330 sick-checks in his first five months of medical leave; after filing a lawsuit alleging discrimination,  
331 he was subject to sick-checks every other day; the "striking difference" in the application of the  
332 sick-check policy "would support an inference that the more aggressive enforcement "was caused  
333 by retaliatory animus."); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir.  
334 2007) ("Although there is no bright line rule as to what constitutes unduly suggestive temporal  
335 proximity, a gap of three months between the protected activity and the adverse action, without  
336 more, cannot create an inference of causation and defeat summary judgment."); *Jones v.*  
337 *Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 331 (3d Cir. 2015) (rejecting the plaintiff's  
338 argument that timing provided evidence of retaliation in a case where fewer than 12 weeks elapsed  
339 between the plaintiff's complaint of harassment and her employer's determination that she should  
340 be suspended without pay for committing fraud, and noting that the employer "spent [the  
341 intervening time] on a thorough investigation into her alleged malfeasance"); *Connelly v. Lane*  
342 *Const. Corp.*, 809 F.3d 780, 792-93 (3d Cir. 2016) (holding inference of causation permissible  
343 where employer "continued to rehire [plaintiff] for four years despite her complaints about co-  
344 workers, but declined to rehire her at the first such opportunity after she complained of harassment  
345 by a supervisor"; and noting that the timing – "protected activity in May 2010," employer's layoff  
346 of plaintiff in October 2010, and employer's failure to rehire plaintiff in spring 2011 – should be  
347 assessed in light of "the seasonal character of [plaintiff's] work"); *Carvalho-Grevious v. Delaware*  
348 *State Univ.*, 851 F.3d 249, 259-63 (3d Cir. 2017) (applying the *McDonnell-Douglas* burden-  
349 shifting test in reviewing the grant of summary judgment on the plaintiff's Title VII and Section  
350 1981 retaliation claims); *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 221 (3d Cir. 2017) (holding  
351 that "[t]he close temporal connection between [plaintiff's] complaint and the reduction in her

## 5.1.7 Retaliation

352 hours” sufficed “to provide prima facie evidence of a causal connection” where plaintiff’s “hours  
353 declined immediately following the filing of her complaint and never recovered”).

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

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

### 374 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

375 Construing the Uniformed Services Employment and Reemployment Rights Act of 1994  
376 (USERRA), the Supreme Court ruled that “if a supervisor performs an act motivated by  
377 antimilitary animus that is intended by the supervisor to cause an adverse employment action, and

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<sup>44</sup> 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.

## 5.1.7 Retaliation

378 if that act is a proximate cause of the ultimate employment action, then the employer is liable under  
379 USERRA” even if the ultimate employment decision is taken by one other than the supervisor with  
380 the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). The Court  
381 did not explicitly state whether this ruling extends to Title VII discrimination claims under 42  
382 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor), though it noted  
383 the similarity between Section 2000e-2(m)’s language and that of the USERRA. Unlike Title VII  
384 discrimination claims under 42 U.S.C. § 2000e-2(m), retaliation claims under Section 2000e-3(a)  
385 are not founded on any explicit statutory reference to discrimination as “a motivating factor.”  
386 Because the Court’s analysis in *Staub* was framed as an interpretation of the statutory language in  
387 the USERRA, it was initially unclear whether *Staub*’s holding extends to Title VII retaliation  
388 claims. However, the Court of Appeals, in *McKenna v. City of Philadelphia*, 649 F.3d 171 (3d  
389 Cir. 2011), treated *Staub* as applicable to the plaintiff’s Title VII retaliation claim. *See McKenna*,  
390 649 F.3d at 180 (holding that “under *Staub*, the District Court did not err in denying the City’s  
391 motion for judgment as a matter of law/notwithstanding the verdict”); *id.* (concluding that though  
392 the jury instructions – given prior to the decision in *Staub* – “did not precisely hew to the proximate  
393 cause language adopted in *Staub*, ... the variation was harmless”).<sup>45</sup> Thus, in a case involving  
394 retaliatory animus by one other than the ultimate decisionmaker, Instruction 5.1.7 should be  
395 modified to reflect *McKenna*’s application of *Staub*.

### 396 *Retaliation Against Perceived Protected Activity*

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

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<sup>45</sup> 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.

412 *Determinative Effect*

413 Instruction 5.1.7 requires the plaintiff to show that the plaintiff’s protected activity had a  
414 “determinative effect” on the allegedly retaliatory activity. This is the standard typically used in  
415 Title VII pretext cases outside the context of retaliation. See Comment 5.1.2. Title VII claims that  
416 do not involve retaliation can alternatively proceed on a mixed-motive theory under 42 U.S.C.  
417 § 2000e-2(m), subject to the affirmative defense stated in 42 U.S.C. § 2000e-5(g)(2)(B), see  
418 Comment 5.1.1, but the mixed-motive proof framework is unavailable for Title VII retaliation  
419 claims. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (“Title VII  
420 retaliation claims must be proved according to traditional principles of but-for causation, not the  
421 lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation  
422 would not have occurred in the absence of the alleged wrongful action or actions of the  
423 employer.”); *id.* at 2534 (rejecting contention that the *Price Waterhouse* mixed-motive test could  
424 be used for Title VII retaliation claims).<sup>46</sup>

425 *Federal employees’ retaliation claims*

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

441

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<sup>46</sup> 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

## 5.2.1 Hostile or Abusive Work Environment

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 with more guidance for determining  
43 whether a hostile work environment exists in a claim for harassment under Title VII. See  
44 Instructions 5.1.4 and 5.1.5 for instructions on harassment claims.

45 Instruction 5.2.1 is similar to the instruction approved (with respect to claims under the  
46 New Jersey Law Against Discrimination) in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95,  
47 115-17 (3d Cir. 1999). The list of factors in this Instruction that may be considered in determining  
48 whether a work environment is hostile is not derived from any single precedential decision of the  
49 Third Circuit but is an amalgamation of factors found in *Hurley* and other sources. However,  
50 *Nitkin v. Main Line Health*, 67 F.4th 565, 571 (3d Cir. 2023), made clear in the summary judgment  
51 context that in looking to such factors only reasonably specific incidents can be considered,  
52 holding that “the District Court properly excluded Nitkin's ‘general, unsubstantiated allegations  
53 that the alleged conduct occurred ‘regularly’ or ‘all the time.’”

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); *see also Castleberry v. STI*  
62 *Grp.*, 863 F.3d 259, 264 (3d Cir. 2017) (noting, in a Section 1981 case, that although circuit  
63 precedent had used various formulations, “[t]he correct standard is ‘severe or pervasive’ ”).

## 5.2.1 Hostile or Abusive Work Environment

64

65           The Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75, 80 (1998),  
66 noted that an employer is not liable under Title VII for a workplace environment that is harsh for  
67 all employees; generalized harassment is not prohibited by Title VII. *See also Jensen v. Potter*,  
68 435 F.3d 444, 449 (3d Cir. 2006) (“Many may suffer severe harassment at work, but if the reason  
69 for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no  
70 relief.”)

71           The pattern instruction follows *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998),  
72 in which the Court stated that “isolated incidents (unless extremely serious) will not amount to  
73 discriminatory changes of the terms and conditions of employment.” *Compare Moody v. Atl. City*  
74 *Bd. of Educ.*, 870 F.3d 206, 215 (3d Cir. 2017) (finding evidence that met the “severe” test where  
75 plaintiff alleged that her supervisor “expected [her] to give sexual favors in exchange for work,  
76 touched [her] against her wishes, made sexual comments to her, and exposed himself to her”) *with*  
77 *Nitkin v. Main Line Health*, 67 F.4th 565, 571-72 (3d Cir. 2023) (holding in the summary judgment  
78 context that seven incidents “spread out over a span of over three-and-a-half years” and consisting  
79 only of verbal statements to or in plaintiff’s presence that fell short of “proposition[ing] her for a  
80 date or sex” could not be found actionable). *See also Doe by & through Doe v. Boyertown Area*  
81 *School District*, 897 F.3d 518, 521, 534-35 (3d Cir. 2018) (finding Title VII precedents persuasive  
82 in applying Title IX of the Education Amendments of 1972 and holding that school district’s policy  
83 “allowing transgender students to use bathrooms and locker rooms that are consistent with the  
84 students’ gender identities” did not 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.<sup>47</sup> 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.

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<sup>47</sup> 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.]

67

#### 68 **Comment**

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

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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

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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;<sup>48</sup> (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.<sup>49</sup> 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.

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<sup>48</sup> 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”).

<sup>49</sup> 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.

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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)).