

Instructions For Sex Discrimination Claims Under the Equal Pay Act

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1 *Introductory Note to Equal Pay Act Instructions*

2 These Equal Pay Act instructions vary from the pattern established in the previous
3 employment discrimination instructions. This different structure is due to the following
4 circumstances:

5 1) An Equal Pay Act plaintiff is not required to prove an intent to discriminate, so
6 there is no basis for a mixed-motive or pretext instruction.

7 2) There is no cause of action for hostile work environment under the Equal Pay Act,
8 because the Act only grants recovery of equal pay for equal work.

9 3) There is no separate cause of action for disparate treatment under the Equal Pay
10 Act, because the basic cause of action under the Act is one for disparate treatment in pay.

11 4) There is no need for separate instructions for definitions, because there is only one
12 basic instruction for an Equal Pay Act claim, and the pertinent definitions are included
13 within it.

14 5) The damages available in a basic Equal Pay Act claim differ from those available
15 under the other employment discrimination statutes, and more importantly differ from the
16 damages available in a retaliation action. Thus, the damage instructions need to be
17 bifurcated into basic Equal Pay Act claims and retaliation claims.

18 6) The Supreme Court decided in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020),
19 that discrimination on the basis of sexual orientation or transgender status is a subset of
20 discrimination on account of sex under Title VII. It is not clear if this principle applies to the
21 EPA. Circuit Courts since *Bostock* have begun to interpret the reach of its holding. *See, e.g.*,
22 *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024) ("Title
23 VII's definition of sex discrimination under *Bostock* simply does not mean the same thing for
24 other anti-discrimination mandates, whether under the Equal Protection Clause, Title VI,
25 or Title IX."). In *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), the Court declined to
26 address whether *Bostock*'s reasoning applies beyond the Title VII context. *Id.* at 1834 ("We
27 have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context,
28 and we need not do so here."). As of August 25, 2025, the Court of Appeals has not examined
29 this in the context of the EPA. Sexual orientation and transgender status may be treated
30 differently under Section 1983. See Comment 7.0

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Model

In this case the Plaintiff _____ has made a claim under the Equal Pay Act, a statute that prohibits an employer from paying women less than men for jobs that require substantially equal work.

Specifically, [plaintiff] claims that she was paid less than (a) male employee(s) even though she performed substantially equal work.

[Defendant] claims that [plaintiff's] job was not substantially equal to the jobs performed by the male employee(s). Further, [defendant] asserts that [describe any affirmative defenses].

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

Comment

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

The central provision of the Equal Pay Act is 29 U.S.C. §206(d)(1), which provides as follows:

(d) Prohibition of sex discrimination.

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Supreme Court in *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), described the intent of the Equal Pay Act:

Congress' purpose in enacting the Equal Pay Act was to remedy what was

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perceived to be a serious and endemic problem of employment discrimination in private industry--the fact that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. The solution adopted was quite simple in principle: to require that “equal work will be rewarded by equal wages.”

The Equal Pay Act was created to prohibit wage discrimination against women. But the language of the statute is broad enough to permit recovery by a male alleging sex-based wage discrimination. *See, e.g., Stanziale v. Jargowsky*, 200 F.3d 101 (3d Cir. 2000) (analyzing Equal Pay Act claim by male employee). These instructions are written using the feminine for the plaintiff, as the case law indicates that virtually all of the plaintiffs are women, but it can of course be modified if the plaintiff is male.

Relationship to Title VII

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

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

The most important differences between the two actions are:

1. The Equal Pay Act does not require proof of intent to discriminate. *EEOC v. Delaware Dept. of Health and Social Services*, 865 F.2d 1408 (3d Cir. 1989). The plaintiff recovers under the Equal Pay Act by proving that she received lower pay for substantially equal work. In contrast, Title VII disparate treatment claims require proof of an intent to discriminate. *See Lewis and Norman, Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). On the other hand, Title VII does not require the plaintiff to prove the Equal Pay Act statutory requirements of “equal work” and “similar working conditions.” In *Gunther, supra*, the Supreme Court explained the importance of retaining Title VII recovery as an alternative to recovery under the Equal Pay Act. The *Gunther* Court recognized that under the Bennett Amendment to Title VII, a claim for sex-based wage discrimination is subject to the affirmative defenses of the Equal Pay Act. But the Court held that a Title VII action is not similarly subject to the statutory requirements of showing “equal work,” “similar working conditions,” etc. The Court found it important to retain the possibility of recovery for intentional sex-based wage discrimination under Title VII:

Under petitioners’ reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the “equal work” standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman

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1 who is discriminatorily underpaid could obtain no relief -- no matter how egregious
2 the discrimination might be -- unless her employer also employed a man in an equal
3 job in the same establishment, at a higher rate of pay. Thus, if an employer hired
4 a woman for a unique position in the company and then admitted that her salary
5 would have been higher had she been male, the woman would be unable to obtain
6 legal redress under petitioners' interpretation. Similarly, if an employer used a
7 transparently sex-biased system for wage determination, women holding jobs not
8 equal to those held by men would be denied the right to prove that the system is a
9 pretext for discrimination. Moreover . . . if the employer required its female
10 workers to pay more into its pension program than male workers were required to
11 pay, the only women who could bring a Title VII action under petitioners'
12 interpretation would be those who could establish that a man performed equal work:
13 a female auditor thus might have a cause of action while a female secretary might
14 not. Congress surely did not intend the Bennett Amendment to insulate such
15 blatantly discriminatory practices from judicial redress under Title VII.

16 452 U.S. at 178-79.

17 2. Title VII's burden-shifting schemes (*see* Instructions 5.1.1, 5.1.2) differ from the
18 burdens of proof applicable to an action under the Equal Pay Act. The difference was explained
19 by the Court of Appeals in *Stanziale*, 200 F.3d at 107-108 (3d Cir. 2000), a case in which the
20 plaintiff brought claims under Title VII, the ADEA, and the Equal Pay Act:

21 Unlike the ADEA and Title VII claims, claims based upon the Equal Pay
22 Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting
23 framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting
24 paradigm. The plaintiff must first establish a prima facie case by demonstrating that
25 employees of the opposite sex were paid differently for performing "equal work"-
26 -work of substantially equal skill, effort and responsibility, under similar working
27 conditions. *E.E.O.C. v. Delaware Dept. of Health and Social Services*, 865 F.2d
28 1408, 1413-14 (3rd Cir. 1989). The burden of persuasion then shifts to the employer
29 to demonstrate the applicability of one of the four affirmative defenses specified in
30 the Act. Thus, the employer's burden in an Equal Pay Act claim -- being one of
31 ultimate persuasion -- differs significantly from its burden in an ADEA [or Title
32 VII] claim. Because the employer bears the burden of proof at trial, in order to
33 prevail at the summary judgment stage, the employer must prove at least one
34 affirmative defense "so clearly that no rational jury could find to the contrary."
35 *Delaware Dept. of Health*, 865 F.2d at 1414.

36 The employer's burden is significantly different in defending an Equal Pay
37 Act claim for an additional reason. The Equal Pay Act prohibits differential pay for
38 men and women when performing equal work "*except where such payment is made*
39 *pursuant to*" one of the four affirmative defenses. 29 U.S.C. § 206(d)(1)
40 (emphasis added). We read the highlighted language of the statute as requiring that
41 the employer submit evidence from which a reasonable factfinder could conclude

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1 not merely that the employer’s proffered reasons could explain the wage
2 disparity, but that the proffered reasons do in fact explain the wage disparity. See
3 also *Delaware Dept. of Health*, 865 F.2d at 1415 (stating that “the correct inquiry
4 was . . . whether, viewing the evidence most favorably to the [plaintiff], a jury could
5 only conclude that the pay discrepancy resulted from” one of the affirmative
6 defenses (emphasis added)). Thus, unlike an ADEA or Title VII claim, where an
7 employer need not prove that the proffered legitimate nondiscriminatory reasons
8 actually motivated the salary decision, in an Equal Pay Act claim, an employer must
9 submit evidence from which a reasonable factfinder could conclude that the
10 proffered reasons actually motivated the wage disparity.

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

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

16 5. The Equal Pay Act carries a longer limitations period for back pay than does Title VII.
17 As stated in Lewis and Norman, *Employment Discrimination Law and Practice* § 7.20 (2d ed.
18 2001):

19 An EPA action is governed by the FLSA [Fair Labor Standards Act] statute
20 of limitations. The FLSA provides a two year statute of limitations for filing, three
21 years in the case of a “willful” violation. These statutes of limitation compare
22 favorably from the plaintiff’s perspective with the 180-day or 300-day
23 administrative filing deadlines of Title VII.

24 Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence
25 of an “unlawful employment practice,” which, pursuant to the 2009 amendments to 42 U.S.C. §
26 2000e-5(e), can include “when a discriminatory compensation decision or other practice is
27 adopted, when an individual becomes subject to a discriminatory compensation decision or other
28 practice, or when an individual is affected by application of a discriminatory compensation
29 decision or other practice, including each time wages, benefits, or other compensation is paid,
30 resulting in whole or in part from such a decision or other practice.” *Id.* § 2000e-5(e)(3)(A).¹
31 This amendment brings the accrual date for a Title VII claim more in line with the EPA
32 mechanism, in which an EPA claim arises each time the employee receives lower pay than male
33 employees doing substantially similar work.

34 6. “The Equal Pay Act, unlike Title VII, has no requirement of filing administrative
35 complaints and awaiting administrative conciliation efforts.” *County of Washington v. Gunther*,

¹ See *Noel v. The 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”).

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1 452 U.S. 161, 175, n.14 (1981).

2 Where the plaintiff claims that wage discrimination is a violation of both Title VII and the
3 Equal Pay Act, it will be necessary to give two sets of instructions, with the proviso that the
4 affirmative defenses provided by the Equal Pay Act (*see* Instructions 11.2.1-11.2.4) will be
5 applicable to both claims.
6

7 7. The Supreme Court decided in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that
8 discrimination on the basis of sexual orientation or transgender status is a subset of discrimination
9 on account of sex under Title VII. It is not clear if this principle applies to the EPA.

11.1.1 Basic Elements of an Equal Pay Act Claim

Model

For [plaintiff] to prevail on her claim against [defendant] for violation of the Equal Pay Act, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Defendant] has employed [plaintiff] and (a) male employee(s) in jobs requiring substantially equal skill, effort and responsibility;

Second: the two jobs are performed under similar working conditions; and

Third: [Plaintiff] was paid a lower wage than the male employee(s) doing substantially equal work.

I will now give you further instructions on these three elements. When evaluating whether [plaintiff] has established these three elements, you must keep in mind that [plaintiff] does not have to prove that [defendant] meant to discriminate against [plaintiff] because she was female. In other words, [plaintiff] does not have to prove intent to discriminate.

In determining whether [plaintiff's] job required substantially equal skill, effort, and responsibility as that of the male employee(s), you must compare the jobs and not the individual employees holding those jobs. It is not necessary that the two jobs be identical; the Equal Pay Act requires proof that the performance of the two jobs demands "substantially equal" skill, effort and responsibility. Insignificant, insubstantial, or trivial differences do not matter and may be disregarded. Job classifications, descriptions, or titles are not controlling. It is the actual work or performance requirements of the two jobs that is important.

In evaluating whether the performance requirements of the two jobs are substantially equal, you must consider the "skill," "effort" and "responsibility" required for these jobs. I will now tell you what is meant by these terms, "skill," "effort" and "responsibility."

Skill:

In deciding whether the jobs require substantially equal "skill" you should consider such factors as the level of education, experience, training and ability necessary to meet the performance requirements of the respective jobs. Jobs may require "equal skill" even if one job does not require workers to use these skills as often as another job. Remember also that you are to compare the jobs, not the employees. So the fact that a male employee has a qualification that [plaintiff] does not is relevant only if the particular qualification is necessary or useful for performing the job.

Effort:

In deciding whether the jobs require substantially equal "effort" you should consider the mental, physical and emotional requirements for performing the job. Duties that result in mental or physical fatigue or emotional stress, as well as factors that alleviate fatigue and stress, should

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be weighed together in assessing the relative effort involved. “Equal effort” does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort to do the jobs, they require “equal effort.” However, if the job of the male employee(s) require(s) additional tasks that consume a significant amount of extra time and effort that would not be expected of [plaintiff], then the jobs do not require substantially equal effort.

Responsibility:

In deciding whether the jobs involve substantially equal “responsibility,” you should consider the degree of accountability expected by the employer for a person filling the jobs, as well as the amount of preparation required to perform the job duties. You should also take into account such things as the level of authority delegated to [plaintiff] as compared to the male employee(s), including whether [plaintiff] and the male employee(s) were equally expected to direct the work of others, or to represent [defendant] in dealing with customers or suppliers. Finally, you should consider the consequences to the employer of effective performance in the respective jobs.

You should note that “skill,” “effort” and “responsibility” constitute separate tests, each of which must be met in order for the equal pay requirement to apply.

Similar Working Conditions:

With respect to the second element of [plaintiff’s] claim, you must find that the jobs are performed under similar working conditions. The conditions need only be similar; they need not be identical. In deciding whether the working conditions of the two jobs are similar, you should consider the surroundings or the environment in which the work is performed — including any hazards or risks, travel, and weather — to which the respective employees may be exposed. [I instruct you, however, that time of day is not relevant to determining whether working conditions are similar. For example, it is not relevant that some employees work the day shift and some the night shift.]

Wage Comparison:

With respect to the third element of [plaintiff’s] claim, [plaintiff] must prove that she was paid a lower wage than (a) male employee(s) doing substantially equal work. In determining the respective levels of pay, you are to consider all forms of compensation, whether called wages, salary, profit sharing, expense account, use of company car, gasoline allowance, or some other name. Fringe benefits are also included in the comparison of wages under the Equal Pay Act, as are vacation and holiday pay and overtime pay.

Comment

To establish a violation of the Equal Pay Act, a plaintiff must prove that the defendant paid her lower wages than were paid to a man or men for “equal work on jobs the performance of which

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1 requires equal skill, effort and responsibility, and which are performed under similar working
2 conditions.” *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The Court in *Corning*
3 *Glass* stated that the element of similar working conditions “encompasses two subfactors:
4 ‘surroundings’ and ‘hazards.’ “ It proceeded to describe these two subfactors:

5 “‘Surroundings’ measures the elements, such as toxic chemicals or fumes, regularly
6 encountered by a worker, their intensity, and their frequency. “‘Hazards’ takes into
7 account the physical hazards regularly encountered, their frequency, and the
8 severity of injury they can cause.

9 The *Corning* Court held that under this definition the time of day at which employees worked
10 could not be relevant to working conditions. Thus, the fact that male employees worked the night
11 shift and females the day shift did not make the jobs unequal. *See also EEOC v. State of Delaware*
12 *Dept. of Health and Social Services*, 865 F.2d 1408, 1417 (3d Cir. 1989) (rejecting the argument
13 that working conditions are dissimilar if one employee sells products inside a store and another
14 sells the products outside the establishment).

15 In the leading case of *Brobst v. Columbus Services Intern.*, 761 F.2d 148, 151 (3d Cir.
16 1985), the court provided a number of guidelines for determining whether the plaintiff has met the
17 burden of proving that she was doing “equal work” within the meaning of the Equal Pay Act. It
18 noted that plaintiffs must establish their case “by proving actual job content; by the same token the
19 employer may not rely merely on the job description.” Reviewing Court of Appeals case law, the
20 *Brobst* court analyzed the “equal work” requirement as follows:

21 As our opinions show, the relevant issue is not the name under which the
22 position was classified but what was actually done. *See Usery v. Allegheny County*
23 *Institution District*, 544 F.2d 148 (3d Cir. 1976); *Shultz v. Wheaton Glass Co.*, 421
24 F.2d 259 (3d Cir. 1970).

25 In *Wheaton Glass*, we explained that Congress did not intend to limit the
26 applicability of the Equal Pay Act to cases involving identical work. In *Allegheny*
27 *County*, we quoted the applicable regulation stating, “Congress did not intend that
28 inconsequential differences in job content would be a valid excuse for payments of
29 a lower wage to an employee of one sex than to an employee of the opposite sex if
30 the two are performing equal work on essentially the same jobs in the same
31 establishment.” *Allegheny County*, 544 F.2d at 152 (quoting 29 C.F.R. § 800.120
32 (1974)). Applying that regulation, we held that although beauticians, unlike
33 barbers, used several tools in addition to the basic scissors, clippers and combs
34 “which use requires more effort of performance”, this did not support a finding of
35 unequal work. *Id.* at 152.

36 All the courts have agreed that the test is whether the work is “substantially
37 equal”. When the Supreme Court reversed this court’s determination that work on
38 a night shift was not equal to the same work performed on a day shift, it took a

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1 pragmatic approach to the issue of equality, holding that inspection work whether
2 performed during the day or night is “equal work” within the meaning of the Act.
3 *Corning Glass Works v. Brennan*, 417 U.S. at 202-03.

4 The crucial finding on the equal work issue is whether the jobs to be
5 compared have a “common core” of tasks, i.e., whether a significant portion of the
6 two jobs is identical. The inquiry then turns to whether the differing or additional
7 tasks make the work substantially different. . . . Given the fact-intensive nature of
8 the inquiry, summary judgment will often be inappropriate.

9 For other cases in the Court of Appeals discussing the concept of “equal work”, *see, e.g.*,
10 *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1172 (3d Cir. 1977) (noting that “mechanical
11 and surface similarities are inadequate to establish the equality of two positions”); *Welde v. Tetley,*
12 *Inc.*, 864 F. Supp. 440, 442 (M.D. Pa. 1994) (noting that the term “skill” “includes an assessment
13 of such factors as experience, training and ability”; “effort” “refers to the physical or mental
14 exertion needed to perform a job”; “responsibility” “concerns the degree of accountability required
15 in performing a job, with emphasis on the importance of the job obligation”; and that the three
16 terms — skill, effort and responsibility — “constitute separate tests, each of which must be met
17 in order for the equal pay standard to apply”).

18 For a definition of “wages,” see 29 C.F.R. § 1620.10:

19 Under the EPA, the term “wages” generally includes all payments made to [or on
20 behalf of] an employee as remuneration for employment. The term includes all
21 forms of compensation irrespective of the time of payment, whether paid
22 periodically or deferred until a later date, and whether called wages, salary, profit
23 sharing, expense account, monthly minimum, bonus, uniform cleaning allowance,
24 hotel accommodations, use of company car, gasoline allowance, or some other
25 name. Fringe benefits are deemed to be remuneration for employment. . . .
26 [V]acation and holiday pay, and premium payments for work on Saturdays,
27 Sundays, holidays, regular days of rest or other days or hours in excess or outside
28 of the employee’s regular days or hours of work are deemed remuneration for
29 employment and therefore wage payments that must be considered in applying the
30 EPA, even though not a part of the employee’s “regular rate.”

11.1.2 Equal Pay Act — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against her because she opposed a practice made unlawful by the Equal Pay Act.

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

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer²] [testified/agreed to testify in a proceeding] asserting rights under the Equal Pay Act.

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

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

Concerning the first element, [plaintiff] need not prove the merits of any Equal Pay Act claim, but only that she was acting under a reasonable,³ good faith belief that [her] [or someone else's] rights under the Equal Pay Act were violated.

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

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

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

² See the Comment to this instruction for a discussion of whether complaints to a private employer are protected activity under the Equal Pay Act.

³ See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

Comment

29 U.S.C. § 215(a)(3), a provision of the Fair Labor Standards Act, establishes a cause of action for retaliation against employees who assert rights under the Equal Pay Act or the FLSA. Section 215(a)(3) provides that it is unlawful “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding . . .”

Protected Activity

The literal terms of the statute might be read to limit protected conduct to that involved in a formal proceeding.⁴ However, the Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), held that “the statutory term ‘filed any complaint’ includes oral as well as written complaints within its scope,” *id.* at 4. “To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.” *Id.* at 14.

The *Kasten* Court declined to decide whether the anti-retaliation provision encompasses complaints made to a private employer rather than to the government. *See id.* at 17 (applying the Court’s usual practice of declining to “consider a separate legal question not raised in the certiorari briefs”). The Court of Appeals has not yet decided that question either.⁵ It is worth noting that several district courts within the Circuit, as well as most of the other Courts of Appeal, have held that Section 215(a)(3) should be construed broadly. In a pre-*Kasten* case, *Dougherty v. Ciber, Inc.*, 2005 WL 2030473 (M.D. Pa. 2005), a district court provided an analysis of the statute and the case law that still seems relevant:

The United States Court of Appeals for the Third Circuit has not directly addressed the issue of whether making an informal complaint to an employer

⁴ Such a reading would contrast with the retaliation provisions of other acts (such as Title VII and the ADEA) which protect any act in opposition to prohibited practices under the respective statutes, including informal complaints to an employer.

⁵ *Gillispie v. RegionalCare Hosp. Partners Inc.*, 892 F.3d 585 (3d Cir. 2018), which interpreted the whistleblower-protection provision in the Emergency Medical Treatment and Active Labor Act (“EMTALA”), might shed some indirect light on the question whether protected conduct under the FLSA’s anti-retaliation provision includes communications made only to the employer and not to an outside authority. In *Gillispie*, the court ruled that the EMTALA provision does extend to purely internal reports, both because the EMTALA provision contains no reference to “official” reports and because a contrary ruling would incentivize employers to fire employees before they had an opportunity to take their report to an outside authority. *Gillispie*, 892 F.3d at 596-97.

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1 constitutes a protected activity under section 215(a)(3). Although some courts have
2 narrowly construed the language of section 215(a)(3), many circuits give effect to
3 the remedial nature of the FLSA by affording broad employee protection through a
4 liberal interpretation of section 215(a)(3). See, e.g., *Valerio v. Putnam Assoc., Inc.*,
5 173 F.3d 35, 42-43 (1st Cir.1999) (finding that “filed any complaint” encompasses
6 more than filings with a government agency such that filing of a complaint with an
7 employer may give rise to a retaliation claim); *Lambert v. Ackerly*, 180 F.3d 997,
8 1005 (9th Cir.1999) (holding that “filed any complaint” “extends to employees who
9 complain to their employer about an alleged violation of the Act”); *EEOC v. Romeo*
10 *Cnty. Sch.*, 976 F.2d 985, 989-90 (6th Cir.1992) (holding that plaintiff’s oral
11 complaint to her employer was sufficient to trigger the protection of § 215(a)(3));
12 *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir.1984) (holding that §
13 215(a)(3) “also applies to the unofficial assertion rights through complaints at
14 work”); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir.1975)
15 (concluding that even though the aggrieved parties did not file a formal complaint
16 with a government agency, “the unofficial complaints expressed by the women to
17 their employer about unequal pay constitute an assertion of rights protected under
18 the [FLSA]”).

19 Similarly, the United States Court of Appeals for the Third Circuit has
20 instructed that the language of the anti-retaliation provision should be construed
21 liberally. *Brock v. Richardson*, 812 F.2d 121, 123-24 (3d Cir.1987) (holding that
22 the remedial provisions of the Fair Labor Standards Act “must not be interpreted or
23 applied in a narrow, grudging manner”). In *Brock*, an employee was discharged
24 because the employer mistakenly believed that the employee filed a complaint with
25 the Department of Labor. The Third Circuit concluded that the discharge created
26 the “same atmosphere of intimidation as does the discharge of an employee who
27 did in fact complain of FLSA violations.” *Id.* at 125; see also *Fogarty v. Boles*, 121
28 F.3d 886, 891 (3d Cir.1997) (holding that because the FLSA is aimed at eliminating
29 an atmosphere of intimidation, the discharge of employees under the mistaken
30 impression that they had participated in protected statutory activity is enough to
31 establish a violation of the Act). The Third Circuit noted that courts have looked to
32 the “animating spirit” of the anti-retaliation provision in “applying it to activities
33 that might have not been explicitly covered by the language” of section 215(a)(3).
34 *Brock*, 812 F.3d at 124. Further, the Court reasoned that the FLSA was designed to
35 encourage employees to report suspected violations and therefore “the key to
36 construing the anti-retaliation provision is the need to prevent employees’ fear of
37 economic retaliation for voicing grievances about substandard conditions.” *Id.*

38 In applying the interpretation announced in *Brock*, several district courts
39 within the Third Circuit have held that informal complaints to employers are
40 protected activities under section 215(a)(3). See, e.g., *Chennisi v. Communications*
41 *Constr. Group*, 2005 WL 387594, at *2 (E.D. Pa. Feb.17, 2005); *Coyle v. Madden*,

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No. 03-4433, 2003 WL 22999222 (E.D. Pa. Dec.17, 2003). In concluding that an internal complaint to an employer regarding a violation of the FLSA is a protected activity under § 215(a)(3), one court in the Eastern District reasoned that in order to achieve the “remedial and humanitarian” purpose of the FLSA, it is necessary to make an internal complaint a protected activity. *Chennisi*, 2005 WL 387594, at *2. Under a narrower construction, informal settlement of complaints would be discouraged, as an employee would be required to take legal action in order to preserve her FLSA rights. Accordingly, this Court agrees that the Third Circuit’s liberal interpretation of the phrase “filed any complaint” affords employees who make informal complaints protection under section 215(a)(3).

Accordingly, the instruction lists informal complaints to the employer as one of the activities protected from retaliation by the employer.

In accord with the retaliation instructions in other Chapters (*see, e.g.*, Instruction 5.1.7 concerning Title VII retaliation claims), Instruction 11.1.2 requires a “reasonable, good faith belief” that an Equal Pay Act violation occurred. The statute itself does not explicitly require reasonableness and good faith. Tracking the approach taken in instructions from other circuits concerning retaliation under various employment discrimination statutes, Instruction 11.1.2 directs the jury to determine both the good faith and the reasonableness of the plaintiff’s belief that an Equal Pay Act violation occurred. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA, and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to harassment or discrimination) under Title VII and other federal discrimination laws; instruction uses phrase “reasonably believed”); *id.* Notes on Use, Note 5 (using phrase “reasonably and in good faith believe”); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation) (discussing reasonableness requirement in the comment but not in the model instruction). In cases where the protected nature of the plaintiff’s activity is not in dispute, this portion of the instruction can be modified and the court can simply instruct the jury that specified actions by the plaintiff constituted protected activity.

Standard for Actionable Retaliation

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

We speak of *material* adversity because we believe it is important to

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

16 We refer to reactions of a *reasonable* employee because we believe that the
17 provision’s standard for judging harm must be objective. An objective standard is
18 judicially administrable. It avoids the uncertainties and unfair discrepancies that
19 can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.
20 We have emphasized the need for objective standards in other Title VII contexts,
21 and those same concerns animate our decision here. See, e.g., [*Pennsylvania State*
22 *Police v. Suders*, 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive
23 discharge doctrine); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct.
24 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

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

36 Finally, we note that . . . the standard is tied to the challenged retaliatory
37 act, not the underlying conduct that forms the basis of the Title VII complaint. By
38 focusing on the materiality of the challenged action and the perspective of a
39 reasonable person in the plaintiff’s position, we believe this standard will screen
40 out trivial conduct while effectively capturing those acts that are likely to dissuade

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employees from complaining or assisting in complaints about discrimination.

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

The anti-retaliation provision of Title VII, construed by the Court in *White*, is very similar to the Equal Pay Act provision on retaliation, *supra*. This instruction therefore follows the guidelines of the Supreme Court’s decision in *White*.⁴

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 64 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Court of Appeals (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII’s retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action. The Court noted that unlike the basic anti-discrimination provision, which refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any* discrimination by an employer in response to protected activity.

The Equal Pay Act anti-retaliation provision is very similar to the Title VII provision construed in *White*. Moreover, it not only bars “discharge” but broadly prohibits “any other ... discriminat[ion].” Accordingly, this instruction contains bracketed material to cover a plaintiff’s claim for retaliation that is not job-related. The instruction does not follow pre-*White* Court of Appeals authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir. 1995)(requiring the plaintiff in a retaliation case to prove among other things that “the employer took an adverse employment action against her”). For further discussion of *White*, see the Comment to Instruction 5.1.7.

Damages

It is important to note that the damages available for retaliation differ from the damages available for a violation of the Equal Pay Act itself. Under the Equal Pay Act, the plaintiff is entitled to the pay that she should have received for equal work, with that figure doubled as liquidated damages. *See* Instructions 11.3.1-11.3.2. A cause of action for retaliation does not seek equal pay recovery *per se*; indeed a person may engage in protected activity by complaining about

⁴ The Committee has not attempted to determine whether *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011) – in which the Supreme Court recognized a right of action under Title VII for certain third parties who engaged in no protected activity but were subjected to reprisals based on the protected activities of another employee – provides authority for recognition of similar third-party retaliation claims under the Equal Pay Act. For a discussion of *Thompson*, see Comment 5.1.7.

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wage discrimination even if that person is not the victim of the wage discrimination. The damages asserted in a retaliation claim are those suffered by the plaintiff from the retaliatory act. Thus, the damages in a retaliation cause of action are the same as those provided in any other action for damages, e.g., pain and suffering, lost wages, etc. *See* Instruction 11.3.7.

Determinative Effect

Instruction 11.1.2 requires the plaintiff to show that the plaintiff’s protected activity had a “determinative effect” on the allegedly retaliatory activity. This language is similar to that provided in Instruction 5.1.7 for Title VII retaliation claims. Prior to 2013, courts had recognized a distinction between pretext and mixed-motive cases in the context of Title VII retaliation claims. In 2013, however, the Supreme Court held that the mixed-motive proof framework is unavailable for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360(2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against a background tort principle of “but for” causation, *see Nassar*, 570 U.S. at 347; that Title VII’s retaliation provision uses the word “because,” which is incompatible with a mixed-motive test, *see id.* at 352; that Congress would have structured the statutory framework differently had it wished to encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test set forth in 42 U.S.C. ‘§ 2000e-2(m) and 2000e 5(g)(2)(B), *see id.* at 353; that policy considerations support a restrictive approach to the standards of proof for retaliation claims, *see id.* at 356-358; and that the “careful balance” that Congress set in the Civil Rights Act of 1991 forecloses the use of the Price Waterhouse mixed-motive test for Title VII retaliation claims, *id.* at 362. *See also Comcast Corp. v. Nat’l Ass’n of African American-Owned Media*, 140 S.Ct. 1009, 1014 (2020) (rejecting mixed motive framework for claims under Section 1981; the Court viewed but-for causation as a default principle for tort suits, and it saw no reason in the text of the statute to depart from that “‘background’ rule.”).

The Court of Appeals has not applied a mixed-motive framework to Equal Pay Act retaliation claims, and, in light of these decisions, it is unclear whether such a framework can appropriately govern such claims.

11.2.1 Equal Pay Act Defenses — Seniority System

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide seniority system. In order to establish that a seniority system exists, [defendant] must show that it uses a system that gives employees rights and benefits that improve the longer they work for [defendant].

In determining whether [defendant] has demonstrated a bona fide seniority system, you should consider that a valid seniority system ordinarily includes rules that

1. define when the seniority time clock begins ticking;
2. specify how and when a particular person's seniority may be lost;
3. define which time will count toward the accrual of seniority and which will not;
4. specify the types of employment conditions that will be governed by seniority and those that will not.

For [defendant] to successfully demonstrate a bona fide seniority system, [defendant] must regularly consider seniority rather than doing so randomly or on a case-by-case basis, and [defendant] must apply its system uniformly in its decisions.

[[Plaintiff] contends that [defendant's] seniority system was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] seniority system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide seniority system, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

Wage differentials based on a bona fide seniority system do not violate the Equal Pay Act. 29 U.S.C. § 206(d)(1). *See, e.g., Strag v. Board of Trustees*, 55 F.3d 943, 948 (4th Cir. 1995); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995). In order to be relied on as an affirmative defense, the seniority system must be applied fairly among all employees unless there are defined exceptions

11.2.1 Seniority System

1 that are known and understood by the employees. *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.
2 1995) (if seniority system is to be relied upon as affirmative defense, employer must be able to
3 identify standards for measuring seniority that are systematically applied and observed).

4 The instruction provides for the possibility that the plaintiff will introduce evidence that
5 the defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of*
6 *Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court
7 stated that to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer
8 intended to discriminate. Such a showing, however, may be used to establish that an employer's
9 reliance on an affirmative defense is merely a pretext for discrimination." The court favorably
10 cited the opinion in *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated
11 that "the appropriate inquiry to determine if the factor put forward is a pretext, is whether the
12 employer has used the factor reasonably in light of the employer's stated purpose as well as its
13 other practices."

14 Under the Equal Pay Act, the defendant at all times retains the burden of proving a
15 legitimate reason for the discrepancy in pay. See *Stanziale v. Jargowsky*, 200 F.3d at 107-08
16 ("Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206
17 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather,
18 they follow a two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School*, 136
19 Fed. Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that
20 a factor other than sex caused them to set the salaries that they did" and giving no indication that
21 the plaintiff has the burden of proving pretext by a preponderance of the evidence).⁶ Accordingly,
22 the instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of
23 the evidence.

⁶ At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the plaintiff.

11.2.2 Equal Pay Act Defenses — Merit System

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide merit system.

In order to establish the existence of a bona fide merit system, [defendant] must show an organized and structured procedure under which employees are systematically evaluated according to established standards that are designed to determine the relative merits of the employees. To be a bona fide merit system, the system must reward persons because they performed better; the reward must not be based upon their positions, but upon their personal performance. In order to be valid, [defendant] must inform its employees of the existence of the merit system, either by writing or in some other way, and it must not be based upon gender.

[[Plaintiff] contends that [defendant's] merit system was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] merit system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide merit system, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

A merit system is an affirmative defense under the Equal Pay Act. 29 U.S.C. § 206(d)(2). A merit system is an organized, structured procedure under which employees are evaluated systematically according to predetermined criteria. *Ryduchowski v. Port Authority*, 203 F.3d 135, 142-43 (2d Cir. 2000). An employer must show that its merit system is administered, if not formally, at least systematically and objectively. *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986). The mere existence of a written set of job descriptions, regularly evaluated, does not constitute a “merit system” where there is no organized means of advancement or reward for merit. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 345-46 (7th Cir. 1988).

The existence of the merit system must be communicated to the affected employees. *Ryduchowski v. Port Authority*, 203 F.3d 135, 143 (2d Cir. 2000) (employees must be aware of merit system and merit system must not be gender-based); *EEOC v. Whittin Machine Works*, 635 F.2d 1095, 1098 n.6 (4th Cir. 1980) (defendant's burden of establishing a merit system was not met where defendant maintained no written guidelines and had “failed to communicate the

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essential components of the putative sex neutral pay system to its employees”).

The instruction provides for the possibility that the plaintiff will introduce evidence that the defendant’s affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that to prevail on an Equal Pay Act claim, “a plaintiff need not prove that the employer intended to discriminate. Such a showing, however, may be used to establish that an employer’s reliance on an affirmative defense is merely a pretext for discrimination.” The court favorably cited the opinion in *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated that “the appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer’s stated purpose as well as its other practices.”

Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay. *See Stanziale*, 200 F.3d at 107-08 (“Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm.”); *Henderson v. Chartiers Valley School*, 136 Fed. Appx. 456, 459 (3d Cir. 2005) (approving an instruction that the defendant “must prove that a factor other than sex caused them to set the salaries that they did” and giving no indication that the plaintiff has the burden of proving pretext by a preponderance of the evidence).⁷ Accordingly, the instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

⁷ At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, “the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext.” *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.2.3 System Measuring Earnings By Quantity or Quality

11.2.3 Equal Pay Act Defenses — System Measuring Earnings By Quantity or Quality

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a bona fide system that measures employee earnings by quantity or quality of the work.

In order to prove the existence of a bona fide system measuring quantity or quality, [defendant] must show that such a system is in place and has been applied regularly and consistently. A valid system under this exception measures the employee's earnings by the quantity or quality of each employee's production.

The quantity test refers to equal dollar per unit compensation rates. [Defendant] is not liable for wage discrimination if it has implemented a system under which two employees receive the same pay rate but one receives more total compensation because that employee produces more.

The quality test refers to increased compensation for higher quality products. [Defendant] is not liable for wage discrimination if it regularly rewards employees of both sexes equally for producing higher quality products through compensation incentives.

[[Plaintiff] contends that [defendant's] system of measuring quantity or quality was not bona fide, but rather was a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] system was implemented in good faith or instead was a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of a bona fide system tying wages to quantity or quality, your verdict must be for [defendant]. If [defendant] has not proved this defense, then you must find for [plaintiff].

Comment

The Equal Pay Act provides an affirmative defense if the employer has a system under which a comparable employee receives more total compensation because he produces more value for the employer. 29 U.S.C. § 206(d)(3). Thus, in *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973), the court held that an affirmative defense for unequal pay had been established where one clothing department in a store was more profitable than another.

The instruction provides for the possibility that the plaintiff will introduce evidence that

11.2.3 System Measuring Earnings By Quantity or Quality

1 the defendant's affirmative defense is a pretext for sex discrimination. In *EEOC v. State of*
2 *Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court
3 stated that to prevail on an Equal Pay Act claim, "a plaintiff need not prove that the employer
4 intended to discriminate. Such a showing, however, may be used to establish that an employer's
5 reliance on an affirmative defense is merely a pretext for discrimination." The court favorably
6 cited the opinion in *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated
7 that "the appropriate inquiry to determine if the factor put forward is a pretext, is whether the
8 employer has used the factor reasonably in light of the employer's stated purpose as well as its
9 other practices."

10 Under the Equal Pay Act, the defendant at all times retains the burden of proving a
11 legitimate reason for the discrepancy in pay. See *Stanziale*, 200 F.3d at 107-08 ("Unlike the
12 ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do
13 not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a
14 two-step burden-shifting paradigm."); *Henderson v. Chartiers Valley School*, 136 Fed. Appx.
15 456, 459 (3d Cir. 2005) (approving an instruction that the defendant "must prove that a factor other
16 than sex caused them to set the salaries that they did" and giving no indication that the plaintiff
17 has the burden of proving pretext by a preponderance of the evidence).⁸ Accordingly, the
18 instruction does not impose a burden on the plaintiff of proving pretext by a preponderance of the
19 evidence.

⁸ At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, "the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext." *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.2.4 Equal Pay Act Defenses — Factor Other Than Sex

Model

If you find that [plaintiff] has proved each of the elements that she must establish in support of her claim under the Equal Pay Act, you must then consider [defendant's] defense. [Defendant] contends that the difference in pay between the two jobs was the result of a factor other than sex. Specifically, [defendant] claims that the difference in pay is attributable to [employee's education] [employee's experience] [training programs in which employees participate] [any other factor other than sex on which defendant has presented sufficient evidence to raise a jury question]. To establish that this defense, [defendant] must prove that [plaintiff's] sex played no part in the difference in wages.

[[Plaintiff] contends that [defendant's] explanation for the difference in pay is only a pretext, or excuse, for paying higher wages to men for equal work. Remember that [plaintiff] does not have to prove that [defendant] intended to discriminate. However, evidence of intent to discriminate may be considered in determining whether [defendant's] explanation is valid or instead is a cover-up for paying higher wages to men for equal work.].

If you find [defendant] has proved by a preponderance of the evidence that the difference in pay was the result of [describe defendant's explanation], your verdict must be for [defendant]. However, if you determine that [defendant] has failed to prove that the difference in pay was caused by this factor other than sex, you must decide in favor of [plaintiff].

Comment

29 U.S.C. § 206(d) provides for a catch-all affirmative defense: plaintiff is not entitled to recovery of equal pay if the defendant can prove that the disparity in pay was due to any other factor other than sex. The Court of Appeals has held that in order for the defendant to meet its burden, it must show “that the proffered reasons actually motivated the wage disparity.” *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000).

In *Stanziale*, the court acknowledged that qualifications, education, job skills, experience, and certifications may all equate to a “any other factor other than sex.” *Id.* at 106, 108. An employer does not establish an affirmative defense by claiming that “market forces” justify a disparity in pay for equal work, i.e., that men had to be paid higher because otherwise they would not have taken the job. *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991).

Education

Differences in education may justify differences in wages, but only where the education is relevant to successful performance of the job. *See* 29 C.F.R. § 1620.15 (“Possession of a skill not needed to meet requirements of the job cannot be considered in making a determination regarding

11.2.4 Factor Other Than Sex

equality of skill.”). *See, e.g., Glunt v. GES Exposition Services, Inc.*, 123 F. Supp. 2d 847, 860-61 (D. Md. 2000) (additional formal education is a bona fide reason under the Equal Pay Act for paying different wages; however, the defense is applicable only when superior formal education is actually relevant and necessary to the job in question); *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 430 (M.D. La.1977) (fact that one male manager had three years of college did not justify disparity between his salary and female plaintiffs with better performance records absent showing that a college education was a prerequisite to employment as manager or that employer derived any great benefit from manager having such qualifications).

Experience:

Less experience can be a legitimate factor other than sex for lower pay. *See, e.g., EEOC v. New York Times Broadcasting Service, Inc.*, 542 F.2d 356, 359-60 (6th Cir. 1976) (evidence that starting salaries paid to new employees bore direct relationship to prior broadcast experience was sufficient to show that discrepancy in pay was not based on considerations of sex); *Stanley v. University of Southern California*, 178 F.3d 1069, 1075 (9th Cir. 1999) (male coach had coached Olympic team, written book on basketball, and had 14 years more experience than the plaintiff, the coach of the women’s basketball team).

Training Program:

Wage differentials arising because one worker is participating in a bona fide training program have been found to be based on a factor other than sex. *See, e.g., Shultz v. First Victoria Nat’l Bank*, 420 F.2d 648, 654 (5th Cir. 1969). A training program must have substance and significance independent of the trainee’s regular job. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1047 (5th Cir. 1973) (training program coterminous with “man’s work” cannot qualify as a factor other than sex).

Pretext:

The instruction provides for the possibility that the plaintiff will introduce evidence that the defendant’s affirmative defense is a pretext for sex discrimination. In *EEOC v. State of Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1414, n.8 (3d Cir. 1989), the court stated that to prevail on an Equal Pay Act claim, “a plaintiff need not prove that the employer intended to discriminate. Such a showing, however, may be used to establish that an employer’s reliance on an affirmative defense is merely a pretext for discrimination.” The court favorably cited the opinion in *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986), which stated that “the appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer’s stated purpose as well as its other practices.”

Under the Equal Pay Act, the defendant at all times retains the burden of proving a legitimate reason for the discrepancy in pay. *See Stanziale*, 200 F.3d at 107-08 (“Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm.”); *Henderson v. Charters Valley School*, 136 Fed. Appx. 456,

11.2.4 Factor Other Than Sex

1 459 (3d Cir. 2005) (approving an instruction that the defendant “must prove that a factor other than
2 sex caused them to set the salaries that they did” and giving no indication that the plaintiff has the
3 burden of proving pretext by a preponderance of the evidence).⁹ Accordingly, the instruction does
4 not impose a burden on the plaintiff of proving pretext by a preponderance of the evidence.

⁹ At least one district court opinion has stated that where the employer demonstrates that there is a legitimate reason for the discrepancy in pay, “the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason for the disparity presented by defendant is only a pretext.” *Welde v. Tetley*, 864 F. Supp. 440 (M.D. Pa. 1994). But there is nothing in the Equal Pay Act to justify shifting the burden of disproving the affirmative defense to the defendant.

11.3.1 General Compensatory Damages

11.3.1 Equal Pay Act Damages — General Compensatory Damages

No Instruction

Comment

29 U.S.C. § 216(b) provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and “an additional equal amount as liquidated damages.” There is no statutory authority for an award of damages such as for emotional distress, pain and suffering, or lost opportunity. Accordingly, no instruction is provided.

It should be noted, however, that general compensatory damages are available if the cause of action is for retaliation rather than unequal pay. A damages instruction for retaliation is provided *infra*. See Instruction 11.3.7.

11.3.2 Back Pay – Non-Willful Violations

11.3.2 Equal Pay Act Damages — Back Pay — Non-Willful Violations

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she was paid less than [name(s) of male employee(s)] for performing substantially equal work, [and if you find that [defendant] has failed to show that the wage differential was based on a permissible factor on which I previously instructed you] then you must award damages to [plaintiff]. [Plaintiff] has the burden of proving the amount of those damages by a preponderance of the evidence.

[Instruct as follows if the plaintiff's pay is compared to a single male employee:]

You must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.]

[Instruct as follows if the plaintiff's pay is compared to more than one male employee:]

You must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.]

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

Comment

The Equal Pay Act provides recovery for two years of wage differential if the defendant's violation was non-willful; it extends the recovery of damages to a third year if the defendant's violation is willful. 29 U.S.C. § 255(a). This instruction is to be used when the plaintiff does not present evidence sufficient to create a jury question on whether the defendant acted willfully. See 11.3.3 for an instruction covering a willful violation of the Equal Pay Act.

11.3.2 Back Pay – Non-Willful Violations

1 Where the plaintiff compares her salary to more than one male employee, most courts have
2 held that the proper amount of damages is the difference between the plaintiff's pay and the
3 average amount of pay earned by the male comparables as a group. *See, e.g., Melanson v. Rantoul*,
4 536 F. Supp. 271 (D.R.I. 1982); *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 431 (M.D. La. 1977)
5 (stating that applying averages "best serves the interest of justice"). At least one court, however,
6 has held that damages should be assessed by comparing the plaintiff's wages "to the highest male
7 salary being paid for the job at the time of performance." *Grimes v. Athens Newspaper, Inc.*, 604
8 F. Supp. 1166, 1168 (M.D. Ga. 1985). There appears to be no Third Circuit case law on this point.

9 *Attorney Fees and Costs*

10 There appears to be no uniform practice regarding the use of an instruction that warns the
11 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
12 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if
13 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
14 above what you award as damages. It is my duty to decide whether to award attorney fees and
15 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
16 calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
17 properly objected to the instruction, and, reviewing for plain error, found none: "We need not and
18 do not decide now whether a district court commits error by informing a jury about the availability
19 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not
20 plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction
21 directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable
22 that a jury tasked with computing damages might, absent information that the Court has discretion
23 to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense
24 of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that
25 Collins might be awarded attorney fees, took the disproportionate step of returning a verdict
26 against him even though it believed he was the victim of age discrimination, notwithstanding the
27 District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher*
28 *v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051
29 (9th Cir. 1991)).

11.3.3 Back Pay – Willful Violations

11.3.3 Equal Pay Act Damages — Back Pay — Willful Violations

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she was paid less than [name(s) of male employee(s)] for performing substantially equal work, [and if you find that [defendant] has failed to show that the wage differential was based on a permissible factor on which I previously instructed you] then you must award damages to [plaintiff]. [Plaintiff] has the burden of proving the amount of those damages by a preponderance of the evidence.

In this case, [plaintiff] alleges that [defendant] willfully violated the Equal Pay Act. If [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Equal Pay Act was willful, then this will have an effect on the damages that you must award. I will explain this effect in a minute, but first I will provide you more information on what it means to be a “willful” violation.

You must find [defendant's] violation of the Equal Pay Act to be willful if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless disregard for whether [plaintiff's] underpayment was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not willful.

[Instruct as follows if the plaintiff's pay is compared to a single male employee:]

If you find that [defendant's] violation was willful, then you must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Equal Pay Act was not willful, then you must award [plaintiff] the difference between what she was paid (in both wages and benefits) and what [name of male employee] was paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to damages for an extra year if she proves that [defendant's] violation was willful.]

[Instruct as follows if the plaintiff's pay is compared to more than one male employee:]

If you find that [defendant's] violation was willful, then you must award [plaintiff] the amount of damages that compensates her for the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [three years before the date the lawsuit

11.3.3 Back Pay – Willful Violations

was filed] through the date of your verdict. However, if you find that [defendant’s] violation of the Equal Pay Act was not willful, then you must award [plaintiff] the difference between what she was paid (in both wages and benefits) and the average amount of what [names or job titles of male employees] were paid (in both wages and benefits) during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to damages for an extra year if she proves that [defendant’s] violation was willful.]

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

Comment

The Equal Pay Act provides recovery for two years of wage differential if the defendant’s violation was non-willful; it extends the recovery of damages to a third year if the defendant’s violation was willful. 29 U.S.C. § 255(a). This instruction is to be used when the plaintiff presents evidence sufficient to create a jury question on whether the defendant acted willfully. See Instruction 11.3.2 for the instruction to be used when there is insufficient evidence to create a jury question on willfulness.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Court held that the standard for “willfulness” under the Equal Pay Act is the same as the standard for “willfulness” required for an award of liquidated damages under the ADEA. That standard is met if the employer “either knew or showed reckless disregard” for the matter of whether its conduct violated the law. This instruction accordingly uses that definition of “willfulness.” *See EEOC v. State of Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1419 (3d Cir. 1989) (affirming a jury verdict on willfulness, and an award for a third year of damages, where the jury could have found that a personnel director “must have entertained a strong suspicion of an Equal Pay Act violation which, with the most cursory investigation, would have led to actual knowledge.”). *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (adopting the standard of “either knew or showed reckless disregard” for determination of “willfulness” under the liquidated damages provision of the ADEA).

Where the plaintiff compares her salary to more than one male employee, most courts have held that the proper amount of damages is the difference between the plaintiff’s salary and the average amount of salary earned by the male comparables as a group. *See Melanson v. Rantoul*, 536 F. Supp. 271 (D.R.I. 1982); *Bullock v. Pizza Hut, Inc.*, 429 F. Supp. 424, 431 (M.D. La. 1977) (stating that applying averages “best serves the interest of justice”). At least one court, however, has held that damages should be assessed by comparing the plaintiff’s wages “to the highest male salary being paid for the job at the time of performance.” *Grimes v. Athens Newspaper, Inc.*, 604 F. Supp. 1166, 1168 (M.D. Ga. 1985). There appears to be no Third Circuit case law on this point.

11.3.3 Back Pay – Willful Violations

1 *Attorney Fees and Costs*

2 There appears to be no uniform practice regarding the use of an instruction that warns the
3 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
4 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
5 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
6 above what you award as damages. It is my duty to decide whether to award attorney fees and
7 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
8 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
9 properly objected to the instruction, and, reviewing for plain error, found none: “We need not and
10 do not decide now whether a district court commits error by informing a jury about the availability
11 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not
12 plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction
13 directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable
14 that a jury tasked with computing damages might, absent information that the Court has discretion
15 to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense
16 of litigation.” *Id.* Second, it is implausible “that the jury, in order to eliminate the chance that
17 Collins might be awarded attorney fees, took the disproportionate step of returning a verdict
18 against him even though it believed he was the victim of age discrimination, notwithstanding the
19 District Court’s clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v.*
20 *City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th
21 Cir. 1991)).

11.3.4 Equal Pay Act Damages — Liquidated Damages

No Instruction

Comment

29 U.S.C. § 216 provides for an automatic doubling of back pay damages awarded for a violation of the Equal Pay Act. No instruction is necessary on liquidated damages, because there is no issue for the jury to decide concerning the availability or amount of liquidated damages. The court simply doubles the award of back pay damages found by the jury.

It should be noted that 29 U.S.C. § 260 provides that “if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [Equal Pay Act], the court may, in its sound discretion” reduce the award of liquidated damages (but not the underlying damages award). No instruction is necessary on good faith, either, because the question of good faith in this circumstance is a question for “the court.” The jury has no authority to reduce an award of liquidated damages under the Equal Pay Act. *See, e.g., Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573 (11th Cir. 1988) (“An employer may avoid the mandatory nature of an award of liquidated damages if the court chooses not to make an award where the employer shows its actions were in good faith and shows it has reasonable grounds for believing that those actions did not violate the Equal Pay Act.”); *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1031 (5th Cir. 1993) (question of “good faith under 29 U.S.C. § 260 is an issue that the court must resolve”).

1 **11.3.5 Equal Pay Act Damages — Front Pay**

2
3 *No Instruction*

4
5 **Comment**

6 Front pay is a substitute remedy when reinstatement is not feasible. *See* the commentary to
7 Instruction 8.4.4. An Equal Pay Act claim does not involve the plaintiff’s discharge.
8 Accordingly, front pay cannot be awarded under the Equal Pay Act. *See* 29 U.S.C. § 216(b), which
9 provides that recovery for an Equal Pay Act violation consists of the amount of underpayment and
10 “an additional equal amount as liquidated damages” with no mention of front pay.

1 **11.3.6 Equal Pay Act Damages — Nominal Damages**

2
3 *No Instruction*

4
5 **Comment**

6 The gravamen of an Equal Pay Act claim (as distinct from a retaliation claim under the
7 Equal Pay Act) is that the plaintiff was paid less than male employees for equal work. Therefore
8 it would seem impossible for a jury to find that the defendant violated the plaintiff's rights under
9 the Equal Pay Act and yet the plaintiff is entitled only to nominal damages. Accordingly, no
10 instruction is included.

11.3.7 Equal Pay Act Damages — Damages for Retaliation

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that she suffered an adverse employment action as a result of [describe protected activity] then you must determine the amount of damages suffered by [plaintiff] as a result of [defendant's] retaliation. Damages for retaliation are distinct from any damages [plaintiff] may be entitled to for having been paid a lower wage than male employees for equal work. [Plaintiff] has the burden of proving damages from the retaliation by a preponderance of the evidence.

The following are the kinds of damages that the law may allow a plaintiff to recover when an employer retaliates against the plaintiff for engaging in protected activity under the Equal Pay Act:

1. Compensatory damages.
2. Nominal damages.
3. Punitive damages.

Not all of these damages are necessarily available in any single action. Remember that [plaintiff] has the burden of proving by a preponderance of the evidence that she is entitled to any of the damages that the law makes potentially available to her for an act of retaliation.

I will now instruct you on each of the kinds of damages that are potentially recoverable by [plaintiff] for an act of retaliation.

Compensatory damages:

If you find [defendant] liable for retaliation, then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate her for any injury 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 retaliation had not occurred.

[Plaintiff] must show that the damage she claimed would not have occurred without [defendant's] retaliation. [Plaintiff] must also show that [defendant's] act of retaliation 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 of retaliation. [There can be more than one cause of an injury. To find that [defendant's] retaliation caused [plaintiff's] injury, you need not find that [defendant's] act was the nearest cause, either in time or space. However, if [plaintiff's] claimed injury was caused by a later, independent event that intervened between [defendant's] act of retaliation and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably

11.3.7 Damages for Retaliation

foreseeable by [defendant].]

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

[Plaintiff] claims the following items of damages *[include any of the following that are warranted by the evidence]*:

- Physical harm to [plaintiff] during and after the events at issue, including ill health, physical pain, disability, or discomfort, and any such physical harm that [plaintiff] is reasonably certain to experience in the future. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.

- Emotional and mental harm to [plaintiff] during and after the events at issue, including humiliation, and mental anguish, and any such emotional and mental harm that [plaintiff] is reasonably certain to experience in the future.

- The reasonable value of the medical [psychological, hospital, nursing, and similar] care and supplies that [plaintiff] reasonably needed and actually obtained, and the reasonable value of such care and supplies that [plaintiff] is reasonably certain to need in the future.

- The [wages, salary, profits, reasonable value of the working time] that [plaintiff] has lost because of [defendant's] retaliation, and the [wages, etc.] that [plaintiff] is reasonably certain to lose in the future because of that retaliation.¹⁰

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

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

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine.

¹⁰ If the court orders the plaintiff's reinstatement, then the instruction on future lost wages should not be given.

11.3.7 Damages for Retaliation

Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Nominal Damages:

If you return a verdict for [plaintiff] on her retaliation claim, but [plaintiff] has failed to prove actual injury resulting from the act of retaliation and therefore is not entitled to compensatory damages, then you must award nominal damages of \$ 1.00.

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

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

Punitive Damages:

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

An award of punitive damages is permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference in retaliating against [plaintiff] after she [describe protected activity]. An action is with malice if a person knows that it violates the federal law prohibiting retaliation and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

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

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

11.3.7 Damages for Retaliation

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

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

15 If you decide to award punitive damages, then you should also consider the purposes of
16 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
17 amount of punitive damages, you should consider the degree to which [defendant] should be
18 punished for its wrongful conduct, and the degree to which an award of one sum or another will
19 deter [defendant] or others from committing similar wrongful acts in the future.

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

26 **Comment**

27 29 U.S.C. § 216(b) provides for the following recovery for a violation of the anti-retaliation
28 provision of the Equal Pay Act (or the Fair Labor Standards Act):

29 “such legal or equitable relief as may be appropriate to effectuate the purposes of
30 [the anti-retaliation provision] including without limitation employment,
31 reinstatement, promotion, and the payment of wages lost and an additional equal
32 amount as liquidated damages.”

33 The instruction authorizes the jury to award all of the damages generally awarded for an
34 injury at common law. Any other remedies, such as reinstatement or promotion, are equitable
35 remedies left for the court. *See generally Brock v. Richardson*, 812 F.2d 121, 123 (3d Cir. 1987)
36 (stating that the anti-retaliation provision is to be “liberally interpreted” and affirming an award of
37 back pay).

11.3.7 Damages for Retaliation

1 In *Marrow v. Allstate Sec. & Investigative Services, Inc.*, 167 F. Supp. 2d 838, 841 (E.D.
2 Pa. 2001), the court held that punitive damages could be awarded for a violation of the anti-
3 retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215, which applies to the Equal
4 Pay Act as well. The court noted that section 216 “authorizes ‘legal’ relief, a term commonly
5 understood to include compensatory and punitive damages.” See also *Travis v. Gary Community*
6 *Mental Health Center*, 921 F.2d 108, 112 (7th Cir. 1990) (“Compensation for emotional distress,
7 and punitive damages, are appropriate for intentional torts such as retaliatory discharge.”).

8 If the jury awards lost wages for retaliation, it is for the court to double the amount as
9 liquidated damages, subject to reduction by the court if the defendant proves that the violation was
10 in good faith. See the Comment to Instruction 11.3.4.

11 *Attorney Fees and Costs*

12 There appears to be no uniform practice regarding the use of an instruction that warns the
13 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
14 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
15 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
16 above what you award as damages. It is my duty to decide whether to award attorney fees and
17 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
18 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
19 properly objected to the instruction, and, reviewing for plain error, found none: “We need not and
20 do not decide now whether a district court commits error by informing a jury about the availability
21 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not
22 plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction
23 directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable
24 that a jury tasked with computing damages might, absent information that the Court has discretion
25 to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense
26 of litigation.” *Id.* Second, it is implausible “that the jury, in order to eliminate the chance that
27 Collins might be awarded attorney fees, took the disproportionate step of returning a verdict
28 against him even though it believed he was the victim of age discrimination, notwithstanding the
29 District Court’s clear instructions to the contrary.” *Id.*; see also *id.* at 658 (distinguishing *Fisher*
30 *v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051
31 (9th Cir. 1991)).