PATTERN JURY INSTRUCTIONS (Civil Cases)

Prepared by the

Committee on Civil Pattern

Jury Instructions

District Judges Association

Fifth Circuit

2020

with revisions through June 2020

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FOREWORD TO 2014 EDITION

In July 2011, the Fifth Circuit District Judges Association formed the Pattern Jury Instruction Committee (Civil) including Judges Lee Rosenthal, Ron Clark, Elizabeth Foote, Sul Ozerden, Michael P. Mills, Stanwood Duval, Mary Ann Lemmon, Sarah Vance, Melinda Harmon and Dan Jordan. The Committee was charged with reviewing the existing pattern instructions and updating them where necessary.

After an initial review, the Committee determined that the time had come for a top-to-bottom examination for substantive accuracy. While many of the existing instructions remained valid, a significant number no longer reflected current law. This is no reflection on prior committees, which did an excellent job drafting prior patterns. The law is not stagnant; it was time to update. Accordingly, the 2014 edition of the Fifth Circuit Pattern Jury Instructions (Civil) will represent a substantial overhaul.

The Committee approached this project with a consistent mantra: present instructions that are as balanced, accurate, and user friendly as possible. Given the breadth of that undertaking, outside assistance was essential. And in the end, nearly one hundred judges, attorneys, law professors, and law students helped draft, vet, edit, and proofread the final product. In all, the instructions went through four rounds of review, each time by a different panel of reviewers.

In every case, the volunteer reviewers were recruited for their expertise in the chapters they helped produce. In most cases, the volunteers presided, practiced, or taught within the Fifth Circuit and possessed hands-on experience applying this circuit's standards, though some experts beyond this circuit were consulted.

Readers will note that the subject areas are not identical to previous editions. Chapter 6 on Antitrust and Chapter 8 on RICO have been deleted because the Committee concluded that the existing instructions were no longer trustworthy and that the issues arose too infrequently to justify revision. Chapter 9 on Patent Infringement has been deleted because the Committee learned that practitioners favored other pattern instructions for patent cases. Chapter 14 on statutes of

limitations was also deleted because such statutes generally involve state-law issues and Louisiana, Mississippi, and Texas all have variations that were not reflected in the old pattern instructions. For some of these chapters, the Committee has suggested other sources. The Committee also added instructions, including an instruction on electronic communications during trial and a new section on the Fair Labor Standards Act.

Those using the new instructions will also observe that they are heavily footnoted. There is simply no way to draft an instruction that covers every possible factual case. The patterns therefore address the most common factual scenarios, but the footnotes direct the reader to other potential issues and authorities. The notes also allow the reader to review the source to determine whether the instruction remains current.

Along these same lines, the Committee received a fair number of suggested instructions from attorneys and professors that represented novel legal theories. The Committee did not include these suggestions—though some were footnoted—concluding that pattern instructions are not the place to advance the law. Again, the patterns were designed to cover the most common issues.

This major undertaking lasted more than three years, and there are many to thank. The Committee offers its heartfelt appreciation to all who helped produce the 2014 edition, including our law clerks and summer externs. Special thanks are extended to Professor Lonny Hoffman, who served as our reporter and devoted countless hours to the project. His guidance and input were invaluable.

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PRELIMINARY INSTRUCTIONS

1.1 Instructions for Beginning of Trial

Members of the jury panel, if you have a cell phone, PDA, smart phone, iPhone or any other wireless communication device with you, please take it out now and turn it off. Do not turn it to vibrate or silent; power it down. During jury selection, you must leave it off.

There are certain rules you must follow while participating in this trial.

First, you may not communicate with anyone about the case, including your fellow jurors, until it is time to deliberate. I understand you may want to tell your family, close friends and other people that you have been called for jury service so that you can explain when you are required to be in court. You should warn them not to ask you about this case, tell you anything they know or think they know about it, or discuss this case in your presence, until after I accept your verdict or excuse you as a juror.

Similarly, you must not give any information to anyone by any means about this case. For example, do not talk face-to-face or use any electronic device or

media, such as the telephone, a cell or smart phone, camera, recording device, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, YouTube, Snapchat, Instagram, or Twitter, or any other way to communicate to anyone any information about this case until I accept your verdict or until you have been excused as a juror. This includes any information about the parties, witnesses, participants, [claims] [charges], evidence, or anything else related to this case.

Second, do not speak with anyone in or around the courthouse other than your fellow jurors or court personnel. Some of the people you encounter may have some connection to the case. If you were to speak with them, that could create an appearance or raise a suspicion of impropriety.

Third, do not do any research—on the Internet, in libraries, in books, newspapers, magazines, or using any other source or method. Do not make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other devices to search for or view any place discussed in the testimony. Do not in any way research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge, until after you have been excused as jurors. If you happen to see or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect the parties' right to have this case decided only on evidence they know about, that has been presented here in court. If you do any research, investigation or experiment that we do not know about, or gain any information through improper communications, then your verdict may be influenced by inac-

curate, incomplete or misleading information that has not been tested by the trial process, which includes the oath to tell the truth and cross-examination. It could also be unfair to the parties' right to know what information the jurors are relying on to decide the case. Each of the parties is entitled to a fair trial by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide the case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.

1.2 Preliminary Instructions to Jury

MEMBERS OF THE JURY:

You have now been sworn as the jury to try this case. As the judge, I will decide all questions of law and procedure. As the jury, you are the judges of the facts. At the end of the trial, I will instruct you on the rules of law that you must apply to the facts as you find them.

Alternate 1:

Pay close attention to the testimony and evidence. You will not be allowed to take notes.

Alternate 2:

You may take notes during the trial. Do not allow your note-taking to distract you from listening to the testimony. Your notes are an aid to your memory. If your memory should later be different from your notes, you should rely on your memory. Do not be unduly influenced by the notes of other jurors. A juror's notes are not entitled to any greater weight than each juror's recollection of the testimony.

Until this trial is over, do not discuss this case with anyone and do not permit anyone to discuss this case in your presence. This includes your spouse, children, relatives, friends, coworkers, and people with whom you commute to court each day. During your jury service, you must not communicate any information about this case by any means, by conversation or with the tools of technology. For example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, camera, recording device, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, Snapchat, Instagram, or Twitter, or any other way to

communicate to anyone any information about this case until I accept your verdict or excuse you as a juror.

Do not even discuss the case with the other jurors until the end of the case when you retire to deliberate. It is unfair to discuss the case before all of the evidence is in, because you may become an advocate for one side or the other. The parties, the witnesses, the attorneys, and persons associated with the case are not allowed to communicate with you. And you may not speak with anyone else in or around the courthouse other than your fellow jurors or court personnel.

Do not make any independent investigation of this case. You must rely solely on what you see and hear in this courtroom. Do not try to learn anything about the case from any other source. In particular, you may not use any electronic device or media, such as a telephone, cell phone, smartphone, or computer to research any issue touching on this case. Do not go online or read any newspaper account of this trial or listen to any radio or television newscast about it. Do not visit or view any place discussed in this case and do not use Internet programs or other devices to search for or to view any place discussed in the testimony. In sum, you may not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge, until after you have been excused as jurors.

There are some issues of law or procedure that I must decide that the attorneys and I must discuss. These issues are not part of what you must decide and they are not properly discussed in your presence. To avoid having you leave the courtroom and to save time, I may discuss these issues with the attorneys at the bench, out of your hearing. When I confer with the attorneys at the bench, please do not listen to what we are discussing. If the discussions require more time, I

may have you leave the courtroom until the lawyers and I resolve the issues. I will try to keep these interruptions as few and as brief as possible.

The trial will now begin. Lawyers for each side will make an opening statement. Opening statements are intended to assist you in understanding the significance of the evidence that will be presented. The opening statements are not evidence.

After the opening statements, the plaintiff will present [his/her/its] case through witness testimony and documentary or other evidence. Next, the defendant will have an opportunity to present [his/her/its] case. The plaintiff may then present rebuttal evidence. After all the evidence is introduced, [I will instruct you on the law that applies to this case. The lawyers will then make closing arguments.][I will instruct you on the law that applies to this case. The lawyers will then make closing arguments.][1] **Closing arguments are not evidence, but rather the attorneys' interpretations of what the evidence has shown or not shown. Finally, you will go into the jury room to deliberate to reach a verdict.**

Keep an open mind during the entire trial. Do not decide the case until you have heard all of the evidence, [the closing arguments, and my instructions.][my instructions, and the closing arguments.]

It is now time for the opening statements.

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[1]Some judges prefer to instruct the jury before the lawyers argue, so that the closing arguments can address the instructions. Other judges prefer to have arguments before the instructions.

2

GENERAL INSTRUCTIONS

Note

Chapter 2 includes instructions that may be used at various times during the course of the proceedings. It also contains instructions that can be used in the jury charge at the end of the trial. Chapter 3 contains the most common instructions used in the jury charge. The Chapter 2 instructions can be incorporated in the jury charge set out in Chapter 3, as applicable.

2.1 First Recess

We are about to take our first break in this trial. Remember, until the trial is over, you are not to discuss this case with anyone, including your fellow jurors. If anyone approaches you and tries to talk to you about the case, advise me about it immediately. Do not read or listen to any news reports of the trial or use any technology tools to do independent research. Remember to keep an open mind until all the evidence has been received. Finally, do not speak with anyone in or around the courthouse other than your fellow jurors or court personnel.

2.2 Stipulated Testimony

A "stipulation" is something that the attorneys agree is accurate. When there is no dispute about certain testimony, the attorneys may agree or "stipulate" to that testimony.

Stipulated testimony must be considered in the same way as if that testimony had been received here in court.

2.3 Stipulations of Fact

A "stipulation" is an agreement. When there is no dispute about certain facts, the attorneys may agree or "stipulate" to those facts. You must accept a stipulated fact as evidence and treat that fact as having been proven here in court.

2.4 Judicial Notice

You must accept as proved facts of which the court takes judicial notice. The court has taken judicial notice that [state the facts].

2.5 Discontinuance as to Some Parties

Certain parties are no longer involved in this trial. As jurors, it is your duty to consider the issues among the remaining parties.

2.6 Limiting Instruction

When testimony or an exhibit is admitted for a limited purpose, you may consider that testimony or exhibit only for the specific limited purpose for which it was admitted.

2.7 Charts and Summaries

Certain charts and summaries have been shown to you solely to help explain or summarize the facts disclosed by the books, records, and other documents that are in evidence. These charts and summaries are not evidence or proof of any facts. You should determine the facts from the evidence.

2.8 Demonstrative Evidence

Exhibit [specify] is an illustration. It is a party's [description/picture/model] used to describe something involved in this trial. If your recollection of the evidence differs from the exhibit, rely on your recollection.

2.9 Witness Not Called[1]

[Name of witness] was available to both sides. Plaintiff/Defendant [name] cannot complain that [name of witness] was not called to testify, because either Plaintiff or Defendant [name] could have called [name of witness].[2]

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[1]This instruction is appropriate only if the issue arises during closing argument or at some other time in trial.

[2]There are limits to this instruction. *See*, *e.g.*, *United States v. Wilson*, 322 F.3d 353, 343 (5th Cir. 2003) (noting that a negative inference is drawn when the missing witness has information "peculiarly within his knowledge"); *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1046–47 (5th Cir. 1990) (holding that adverse inference rule applies when party " 'has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction [at issue]' ").

2.10 Similar Acts

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatsoever that the act was done in this case.

Then how may you consider evidence of similar acts?

You may consider evidence of similar acts for the limited purpose of showing [name]'s [motive], [opportunity], [intent], [knowledge], [plan], [identity], or [absence of mistake or accident], which is at issue in this case.

Such evidence may not be considered for any other purpose whatsoever. You may not use the evidence to consider or reflect [name]'s character.

2.11 Impeachment by Witness's Inconsistent Statements

In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at the trial.

A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

2.12 Impeachment by Witness's Felony Conviction

In weighing the credibility of a witness, you may consider the fact that he or she has previously been convicted of a felony. Such a conviction does not necessarily destroy the witness's credibility, but it is one of the circumstances you may take into account in determining the weight to give to his or her testimony.

2.13 Deposition Testimony

Certain testimony [will now be] [has been] presented to you through a deposition. A deposition is the sworn, recorded answers to questions a witness was asked in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness's testimony may be presented, under oath, in the form of a deposition. Some time before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. The questions and answers [will be][have been] [read][shown] to you today. This deposition testimony is entitled to the same consideration [and is to be judged by you as to credibility] [and weighed and otherwise considered by you in the same way] as if the witness had been present and had testified from the witness stand in court.

2.14 Transcript of Recorded Conversation

A typewritten transcript of an oral conversation, which can be heard on a recording received in evidence [as Exhibit ____] was shown to you. The transcript also purports to identify the speakers engaged in such conversation.

I have admitted the transcript [as Exhibit ____] for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the recording, and also to aid you in identifying the speakers.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine, based on your evaluation of the testimony you have heard about the preparation of the transcript and on your own examination of the transcript in relation to your hearing of the recording itself as the primary evidence of its own contents. If you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

2.15 Law-Enforcement Officer Testimony

You are required to evaluate the testimony of a law-enforcement officer as you would the testimony of any other witness. No special weight may be given to his or her testimony because he or she is a law enforcement officer.

2.16 Bias—Corporate Party Involved

Do not let bias, prejudice or sympathy play any part in your deliberations. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

2.17 Clear and Convincing Evidence

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the truth of the matter sought to be established. It is evidence so clear, direct, weighty and convincing as to enable you to come to a clear conviction without hesitancy.[1]

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[1] *See Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013).

2.18 Civil Allen Charge[1]

Please continue your deliberations in an effort to reach a verdict. This is an important case. The trial has been expensive in terms of time, effort, money and emotional strain to all parties involved. If you should fail to agree on a verdict, the case may have to be tried again. There is no reason to believe that the case can be retried, by either side, better or more exhaustively than it has been tried before you.

Any future jury would be selected in the same manner and from the same source as you were chosen. There is no reason to believe that those jurors would be more conscientious, more impartial or more competent to decide the case than you are.

It is your duty to consult with one another and to deliberate with a view to reaching a verdict if you can do so, consistent with your individual judgments. You must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of the other jurors or just to reach a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not

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[1]This proposed instruction was largely derived from Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* §§ 106.09, 106.10 (5th ed. 2000).

In *Brooks v. Bay State Abrasive Prods., Inc.*, 516 F.2d 1003, 1004 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit stated that an *Allen* charge may be used in civil cases if it makes clear to the members of the jury that: (1) they have a duty to adhere to their honest opinions; and (2) they are not doing anything improper by maintaining a good faith opinion although a mistrial may result.

This charge should be given only after the jury has directly stated that it cannot reach a verdict, or when the amount of time spent in deliberations is excessively long, as compared with the nature of the issues and length of the trial, so that it is obvious that the jury is having difficulty reaching a verdict.

hesitate to reexamine your own views, and to change your opinion if you are convinced that it is wrong. To reach a unanimous verdict, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to reexamine your own views. If a substantial majority of you are for a verdict for one party, each of you who holds a different position ought to consider whether your position is reasonable.

I suggest that you now carefully reexamine and consider all the evidence in the case in light of my instructions on the law. In your deliberations you are to consider all of the instructions I have given to you as a whole. You should not single out any part of any instruction including this one.

You may now continue your deliberations.

3

JURY CHARGE

Note

Chapter 3 contains the most common instructions given in the jury charge. Specific instructions from Chapter 2 may be incorporated, as indicated in the footnotes, when applicable.

3.1 Jury Charge

MEMBERS OF THE JURY:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiff or the defendant in arriving at your verdict.[1]

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[1]*See* Instruction No. 2.16 for corporations and other entities.

3.2 Burden of Proof: Preponderance of The Evidence

Plaintiff [name] has the burden of proving [his/her/its] case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that Plaintiff [name] has failed to prove any element of [his/her/its] claim by a preponderance of the evidence, then [he/she/it] may not recover on that claim.[1]

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[1] *See* Pattern Jury Instruction 2.17, if the burden of proof is by clear and convincing evidence.

3.3 Evidence

The evidence you are to consider consists of the testimony of the witnesses, the documents and other exhibits admitted into evidence, and any fair inferences and reasonable conclusions you can draw from the facts and circumstances that have been proven.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.[1]

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[1]If applicable, insert Pattern Jury Instruction 2.3 Stipulations of Fact; 2.4 Judicial Notice; 2.7 Demonstrative Evidence.

3.4 Witnesses

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.[1]

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[1]If applicable, insert Pattern Jury Instructions 2.2 Stipulated Testimony; 2.6 Limiting Instruction; 2.8 Adverse Presumption; 2.9 Similar Acts; 2.10 Impeachment by Witness's Inconsistent Statements; 2.11 Impeachment by Witness's Felony Conviction; 2.12 Deposition Testimony.

3.5 Expert Witnesses

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.[1]

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[1]The instruction does not refer to the witness as an "expert" in the jury charge. Rules 702 and 703 of the Federal Rules of Evidence were amended in 2000 in response to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Rules 702 and 703 continue "the practice of . . . referring to a qualified witness as an 'expert' " in the rule itself. Fed. R. Evid. 702 Committee Note on 2000 amendments. However, Rule 702's Committee Note to the 2000 Amendments recognize that:

> Indeed, there is much to be said for the practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'."

Fed. R. Evid. 702 Committee Note on 2000 amendments (quoting Hon. Charles Richey, *Proposal to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994)).

3.6 No Inference from Filing Suit

The fact that a person brought a lawsuit and is in court seeking damages creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

3.7 Duty to Deliberate; Notes

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Alternate 1:

Remember at all times, you are the judges of the facts. You have not been allowed to take notes during this trial. You must rely on your memory.

Alternate 2:

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial. Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a [jury foreperson] [presiding juror] to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have

reached a unanimous verdict, your [jury foreperson] [presiding juror] must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the [jury foreperson] [presiding juror] should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberations.

4

ADMIRALTY

4.1 Seaman Status

Plaintiff [name] is seeking damages from Defendant [name] for injuries that [he/she] allegedly suffered as a result of an accident while [he/she] was performing [specify work/task].

Plaintiff [name]'s claim arises under a federal law known as the maritime law. In order for Plaintiff to recover for the claims [he/she] is asserting, claims for [maintenance and cure, damages under the Jones Act and for unseaworthiness], Plaintiff must be a seaman. Plaintiff [name] claims that because of the nature of [his/her] employment with Defendant [name], [he/she] was a seaman and is entitled to bring this claim. Defendant [name] denies that Plaintiff [name] was a seaman and contends that [he/she] has no such right. You must first determine whether, when the accident happened, Plaintiff [name] was a seaman as the law defines that term.[1]

A two-part test is used to make this determination. For Plaintiff [name] to be considered a seaman:

1. [his/her] duties must contribute to the function of the vessel or the accomplishment of the vessel's mission; and

2. [he/she] must have an employment related connection to [a vessel] [an identifiable group of

[1] *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337, 355 (1991).

vessels subject to common ownership or control][2] that is substantial in both duration and nature.

For the first part of the test, you must determine whether Plaintiff [name] has proved by a preponderance of the evidence that [his/her] duties contributed to the function of a vessel or the accomplishment of its mission or to the operation of the vessel. A person need not aid in the navigation of a vessel in order to qualify as a seaman. Plaintiff [name] must show only that [he/she] did the ship's work.[3]

If you do not find this first part of the test satisfied, then your deliberations on seaman status are over and Plaintiff [name] cannot recover under the Jones Act, unseaworthiness or for maintenance and cure.

If you do find this first part of the test satisfied, you then must consider the second part of the test. You must decide whether Plaintiff [name] has proved by a preponderance of the evidence that [he/she] has a substantial employment related connection to [a vessel] [an identifiable group of vessels under common ownership or control] that is substantial in terms of both duration and nature.[4] In determining whether Plaintiff [name] has proved that [he/she] had a connection to [a vessel] [an identifiable group of vessels under common ownership or control] that is both substantial in duration and nature, you must consider the totality of the circumstances of [his/her] employment. The ultimate

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[2]*Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 557 (1997).

[3]*Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995).

[4]*Chandris, Inc.*, 515 U.S. at 366 (citing with approval the Fifth Circuit's definition of an "identifiable fleet" of vessels as a "finite group of vessels under common ownership or control."); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) ("By fleet we mean an identifiable group of vessels acting together or under one control"); *Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240, 244–45 (5th Cir. 1983) ("[O]ne can be a member of a crew of numerous vessels which have common ownership or control.").

inquiry is whether [his/her] fundamental employment was substantially connected to the function or mission of the vessel or whether [he/she] was simply a land-based employee who happened to be working aboard the vessel at a given time.[5]

For example, if a land-based employee is given a change of assignment to a vessel for a permanent or indefinite period and [his/her] land-based duties are eliminated, [he/she] is a seaman even if [he/she] is injured on the first day of assignment on the vessel. In other words, if a seaman is reassigned to new job responsibilities, the seaman status determination should be made in light of that reassignment.

On the other hand, if an employee does [land-based work] [fixed-platform-based work] as well as work on a vessel that contributes to the function or mission of the vessel, you must determine whether [his/her] temporal connection to the vessel is substantial in nature and duration and not simply work aboard the vessel that is sporadic and for an insignificant period.

In determining whether Plaintiff [name] was a seaman when the accident occurred, you must look at the nature and location of [his/her] work for Defendant [name] as a whole. If Plaintiff [name]'s regularly assigned duties required [him/her] to divide work time between vessel and [land] [a fixed platform], you must determine [his/her] status as a seaman in the context of [his/her] entire employment with [his/her] employer, [name], not just [his/her] duties when [he/she] was injured.

If you find that Plaintiff [name] has satisfied both parts of this test, then you must find that [he/she] is a

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[5]*Chandris*, 515 U.S. at 370 (quoting *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 432 (5th Cir. 1984)); *Chambers v. Wilco Indus. Serv., L.L.C.*, 2010 WL 3070392 at *6–7 (E.D. La. Aug. 3, 2010).

seaman for purposes of the Jones Act, unseaworthiness, and maintenance and cure.

(If the plaintiff is a seaman and is injured on land):

A maritime worker who has attained seaman status does not lose that protection automatically when on shore. A seaman may pursue claims under the Jones Act, maintenance and cure and unseaworthiness whenever [he/she] is injured in the service of a vessel, whether the injury occurs on or off the ship.[6] The right to recover as a seaman does not depend on the place where the injury occurs. Instead, the right depends on the nature of the service and its relationship to the operation of the vessel. If you find that Plaintiff [name] has proved by a preponderance of the evidence that [he/she] meets the criteria and [his/her] injury occurred in the service of the vessel, then [he/she] is entitled to seek recovery under the Jones Act regardless of whether the injury occurred on land.

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[6] *Chandris*, 515 U.S. at 360 (citing *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943)).

4.2 Vessels

You must determine whether the [specify structure by name or description] was a "vessel." A vessel is any water craft practically capable of maritime transportation, regardless of its primary purpose or state of movement at a particular moment.[1] A water craft need not be in motion to qualify as a vessel. You must consider whether a reasonable observer looking at the physical characteristics and activities of the [specify structure by name or description] would consider it designed to a practical degree for carrying people or things over water. If so, then it is a vessel.[2] A water craft that has been permanently moored or otherwise made practically incapable of transportation or movement is not a vessel.[3]

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[1] *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 494–95 (2005).

[2] *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 741 (2013) (discussing in depth various factors to consider in determining whether a structure is a vessel).

[3] *Stewart*, 543 U.S. at 494 ("[A] water craft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement."); see *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295 (5th Cir. 2008) (explaining that *Stewart* does not require the Fifth Circuit to modify its precedent that an incomplete water craft is not a vessel in navigation).

4.3 Jones Act—Unseaworthiness—Maintenance and Cure (Seaman Status Not Contested)

Plaintiff [name], [a seaman], is asserting three separate claims against Defendant [name].

Plaintiff [name]'s first claim, under the federal law known as the Jones Act, is that [his/her] employer, Defendant [name], was negligent, and that this negligence was a cause of [his/her] injuries. Plaintiff [name]'s second claim is that unseaworthiness of a vessel caused [his/her] injuries. Plaintiff [name]'s third claim is for what is called maintenance and cure.

You must consider each of these claims separately. Plaintiff [name] is not required to prove all of these claims. [He/she] may recover if [he/she] proves any one of them. However, [he/she] may recover only those damages or benefits the law provides for the claims that [he/she] proves, and [he/she] may not recover the same damages or benefits more than once.

4.4 Jones Act—Negligence

Under the Jones Act, Plaintiff [name] must prove that [his/her] employer was negligent. Negligence is doing an act that a reasonably prudent person would not do, or failing to do something that a reasonably prudent person would do, under the same or similar circumstances. The occurrence of an accident, standing alone, does not mean that anyone was negligent or that anyone's negligence caused the accident.

In a Jones Act claim, the word "negligence" is liberally interpreted. It includes any breach of duty that an employer owes to its employees who are seamen, including the duty of providing for the safety of the crew. Under the Jones Act, if the employer's negligent act was the cause, in whole or in part, of injury to a seaman employee, then you must find that the employer is liable under the Jones Act.[1] In other words, under the Jones Act, Defendant [name] bears the responsibility for any negligence that played a part, however slight, in causing Plaintiff [name]'s injury.[2] Negligence may be a cause of injury even though it operates in combination with another's act or with some other cause, if the negligence played any part in causing such injury.

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[1]In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Supreme Court held that a railroad's duty under FELA to provide its employees with a safe place to work includes a duty to avoid subjecting its workers to negligently inflicted emotional injury. The Court ruled that "injury" as used in that statute may encompass both physical and emotional injury. The Court also stated that a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, but a worker outside the zone of danger will not. Because FELA standards have been carried into the Jones Act, this zone-of-danger standard applies to Jones Act claims as well as FELA claims. In Jones Act cases in which a plaintiff sues for purely emotional injury, without physical impact but within the zone of danger, the jury should be instructed accordingly. Whether a reasonable person under the circumstances would have had a fear of physical impact is a question for the jury.

[2]*CSX Transp., Inc. v. McBride*, 564 U.S. 685, 704 (2011) (internal citation omitted).

Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a duty to provide their employees with a reasonably safe place to work. If you find that Plaintiff [name] was injured because Defendant [name] failed to furnish [him/her] with a reasonably safe place to work, and that Plaintiff [name]'s working conditions could have been made safe through the exercise of reasonable care, then you must find that Defendant [name] was negligent.

The fact that Defendant [name] conducted its operations in a manner similar to that of other companies is not conclusive as to whether Defendant [name] was negligent or not.

You must determine if the operation in question was reasonably safe under the circumstances. The fact that a certain practice had been continued for a long period of time does not necessarily mean that it is reasonably safe under all circumstances. A long-accepted practice may be an unsafe practice. A practice is not necessarily unsafe or unreasonable, however, merely because it injures someone.

A seaman's employer is legally responsible for the negligence of one of [his/her/its] employees while that employee is acting within the course and scope of [his/her] [job] [employment].

If you find from a preponderance of the evidence that Defendant [name] assigned Plaintiff [name] to perform a task that the Plaintiff [name] was not adequately trained to perform, you must find that Defendant [name] was negligent.

4.5 Unseaworthiness

Plaintiff [name] seeks damages for personal injury that [he/she] claims was caused by the unseaworthiness of Defendant [name]'s vessel, the [name].

A shipowner owes every member of the crew employed on its vessel the absolute duty to keep and maintain the vessel and all its decks and passageways, appliances, gear, tools, parts and equipment in a seaworthy condition at all times.

A seaworthy vessel is one that is reasonably fit for its intended use. The duty to provide a seaworthy vessel is absolute because the owner may not delegate that duty to anyone. Liability for an unseaworthy condition does not in any way depend on negligence or fault or blame. If an owner does not provide a seaworthy vessel—a vessel that is reasonably fit for its intended use—no amount of care or prudence excuses the owner.

The duty to provide a seaworthy vessel includes the duty to supply an adequate and competent crew. A vessel may be unseaworthy even though it has a numerically adequate crew, if too few persons are assigned to a given task.

However, the vessel owner is not required to furnish an accident-free ship. [He/she/it] need only furnish a vessel and appurtenances that are reasonably fit for the intended use and a crew that is reasonably adequate for the assigned tasks.

The vessel owner is not required to provide the best appliances and equipment, or the finest crews, on [his/her/its] vessel. [He/she/it] is required to provide only gear that is reasonably proper and suitable for its intended use and a crew that is reasonably adequate.

In summary, if you find that the vessel owner did

not provide an adequate crew of sufficient number to perform the tasks required, or if you find that the vessel was in any manner unfit under the law as I have explained it to you and that this was a proximate cause of the injury, a term I will explain to you, then you may find that the vessel was unseaworthy and the vessel owner liable, without considering any negligence on the part of the vessel owner or any of [his/her/its] employees.

However, if you find that the owner had a capable crew, and had appliances and gear that were safe and suitable for their intended use, then the vessel was not unseaworthy and Defendant [name] is not liable to Plaintiff [name] on the claim of unseaworthiness.

4.6 Causation

Not every injury[1] that follows an accident necessarily results from it. The accident must be the cause of the injury.

In determining causation, different rules apply to the Jones Act claim and to the unseaworthiness claim.

Under the Jones Act, for both the employer's negligence and the seaman's contributory negligence,[2] an injury or damage is considered caused by an act or failure to act if the act or omission brought about or actually caused the injury or damage, in whole or in part. In other words, under the Jones Act, a defendant and a plaintiff each bear the responsibility for any negligence that played a part, however slight, in causing the plaintiff's injury.[3]

For the unseaworthiness claim, the seaman must show not merely that the unseaworthy condition was a cause of the injury, but that such condition was a proximate cause of the injury. This means that Plaintiff [name] must show that the condition in question [played a substantial part] [was a substantial factor] in bringing about or actually causing [his/her] injury, and that the injury was either a direct result or a reasonably probable consequence of the condition.

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[1] *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), discussing claims for purely emotional injuries within the zone of danger of physical impact. If a claim for purely emotional injuries is made, without physical impact but within the zone of danger that causes a fear of physical impact, then an instruction should be given consistent with *Gottshall*. *See also* Pattern Instruction 4.4.

[2] *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

[3] *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 704 (2011) (internal citation omitted).

4.7 Contributory Negligence

Defendant [name] contends that Plaintiff [name] was negligent and that Plaintiff [name]'s negligence caused or contributed to causing [his/her] injury. This is the defense of contributory negligence. Plaintiff [name]'s negligence will be considered a cause of the injury if it played a part—no matter how slight—in bringing about [his/her] injury.[1] Defendant [name] has the burden of proving that Plaintiff [name] was contributorily negligent. If Plaintiff [name]'s negligence contributed to [his/her] injury, [he/she] may still recover damages, but the amount of [his/her] recovery will be reduced by the extent of his contributory negligence.

A seaman is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only [his/her] reliance on [his/her] employer to provide a safe work environment, but also [his/her] own experience, training and education. Under the Jones Act, a seaman has the duty to exercise that degree of care for [his/her] own safety that a reasonable seaman would exercise in like circumstances.[2]

(If the case involves concealment of material information in hiring:)

You may find Plaintiff [name] was contributorily negligent if you find that [he/she] concealed material information about a preexisting injury or physical condition from [his/her] employer; exposed [his/her] body to a risk of reinjuring or aggravating a preexisting

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[1] *Norfolk S. R.R. v. Sorrell*, 549 U.S. 158 (2007).

[2] *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc).

injury or condition; and then suffered reinjury or aggravation of that injury or condition.[3]

If you find that [Defendant [name] was negligent] [the vessel was unseaworthy], and that the [negligence] [unseaworthiness] was a proximate [legal] cause of Plaintiff [name]'s injury, but you also find that the accident was due partly to Plaintiff [name]'s contributory negligence, then you must determine the percentage Plaintiff [name]'s negligence contributed to the accident. You will provide this information by filling in the appropriate blanks in the jury questions. Do not make any reduction in the amount of damages that you award to Plaintiff [name]. It is my job to reduce any damages that you award by any percentage of contributory negligence that you assign to Plaintiff [name].

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[3]*Johnson v. Cenac Towing, Inc.*, 544 F.3d 296 (5th Cir. 2008); *Ramirez v. Am. Pollution Control Corp.*, 364 F. App'x. 856 (5th Cir. 2010).

4.8 Damages

If you find that Defendant [name] is liable, you must award the amount you find by a preponderance of the evidence is full and just compensation for all of Plaintiff [name]'s damages.[1] **(If punitive damages are an issue:)** [You also will be asked to determine if Defendant [name] is liable for punitive damages. Because the methods of determining punitive damages and compensatory damages differ, I will instruct you separately on punitive damages. The instructions I give you now apply only to your consideration of compensatory damages.]

Compensatory damages are not allowed as a punishment against a party. Such damages cannot be based on speculation, because compensatory damages must be actual damages to be recoverable. But compensatory damages are not restricted to out-of-pocket losses of money or lost time. Instead, compensatory damages may include mental and physical aspects of injury, tangible and intangible. Compensatory damages are intended to make Plaintiff [name] whole, or to restore [him/her] to the position [he/she] would have been in if the accident had not happened.

In determining compensatory damages, you should consider only the following elements, to the extent you find that Plaintiff [name] has established them by a preponderance of the evidence: past and future physical pain and suffering, including physical disability, impairment, and inconvenience, and the effect of Plaintiff [name]'s injuries and inconvenience on the normal pursuits and pleasures of life; past and future mental anguish and feelings of economic insecurity

[1]If there is no issue about punitive damages, the bracketed sentences that follow can be deleted and the instructions on compensatory damages can continue. If the pleadings and evidence raise issues about punitive damages, include the bracketed language.

caused by disability; income loss in the past; impairment of earning capacity or ability in the future, including impairment of Plaintiff [name]'s earning capacity due to [his/her] physical condition; past medical expenses [unless medical expenses have been paid as cure]; and the reasonable value, not exceeding actual cost to Plaintiff [name], of medical care that you find from the evidence will be reasonably certain to be required in the future as a proximate result of the injury in question.

If you find that Plaintiff [name] is entitled to an award of damages for loss of past or future earnings, there are two particular factors you must consider. First you should consider loss after income taxes; that is you should determine the actual or net income that Plaintiff [name] has lost or will lose, taking into consideration that any past or future earnings would be subject to income taxes. You must award the Plaintiff [name] only [his/her] net earnings after tax. This is so because any award you may make here is not subject to income tax. The federal or state government will not tax any amount that you award on this basis.

Second, an amount to cover a future loss of earnings is more valuable to Plaintiff [name] if [he/she] received the amount today than if [he/she] received the same amount in the future. If you decide to award Plaintiff [name] an amount for lost future earnings, you must discount that amount to present value by considering what return would be realized on a relatively risk free investment and deducting that amount from the gross future earning award.

However, some of these damages, such as mental or physical pain and suffering, are intangible things about which no evidence of value is required. In awarding these damages, you are not determining value, instead determining what amount that will fairly

compensate Plaintiff [name] for [his/her] injuries.

4.9 Punitive Damages[1]

You may, but are not required to, award punitive damages against a defendant if that defendant has acted willfully and wantonly. The purpose of an award of punitive damages is to punish the defendant and to deter [him/her/it] and others from acting as [he/she/it] did.[2]

A defendant's action is willful or wanton if it is in reckless or callous disregard of, or with indifference to, the rights of the plaintiff. An actor is indifferent to the rights of another, regardless of the actor's state of mind, when [he/she/it] proceeds in disregard of a high and excessive degree of danger that is known to [him/her/it] or was apparent to a reasonable person in [his/her/its] position.[3]

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[1]Punitive damages are presently available under general maritime law only if the employer allegedly willfully and wantonly disregarded its maintenance and cure obligation. *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009) (*abrogating Guervara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995)); see Instruction No. 4.11. The Supreme Court has held that punitive damages are not available to a seaman in his claims under the Jones Act or for unseaworthiness. *Dutra Grp. v. Batterton*, 139 S. Ct 2275 (2019). It remains unclear whether a seaman may recover for punitive damages from a non-employer third party under the general maritime law. *Scarborough v. Clemco Indus.*, 391 F. 3d 660, 667–68 (5th Cir. 2004), *cert. denied,* 544 U.S. 999 (2005) (holding that punitive damages are not available to a Jones Act seaman or his survivors in a wrongful death claim against a third party). *Compare Collins v. A.B.C. Marine Towing, L.L.C.*, No. 14-1900, 2015 WL 5254710 (E.D. La. Sept. 9, 2015), *and Hume v. Consol. Grain & Barge, Inc.*, No. 15-0935, 2016 WL 1089349 (E.D. La. Mar. 21, 2016) (both holding punitive damages are recoverable by seaman against a third party), *with Howard v. Offshore Liftboats, LLC*, No. 13-4811, 2015 WL 7428581 (E.D. La. Nov. 20, 2015), *Rockett v. Belle Chase Marine Transp., LLC*, 260 F.Supp.3d 688 (E.D. La. May 22, 2017), *and Wade v. Clemco Indus. Corp.*, No. 16-502, 2017 WL 434425 (E.D. La. Feb. 1, 2017) (all holding the opposite).

[2]On the general subject of punitive damages and the guidelines to be considered in fashioning jury instructions, *see Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

[3]W. Page Keeton et al., *Prosser and Keeton on Torts*, § 34, at 213 (West, 5th ed. 1984).

4.10 Maintenance and Cure Claims and Their Relationship to Jones Act and Unseaworthiness Claims—Punitive Damages for Willful Withholding of Maintenance and Cure

Plaintiff [name]'s third claim is that, as a seaman, [he/she] is entitled to recover maintenance and cure. This claim is separate and independent from both the Jones Act and the unseaworthiness claims of the Plaintiff [name]. You must decide this claim separately from your determination of [his/her] Jones Act and unseaworthiness claims.

Maintenance and cure provides a seaman who is disabled by injury or illness while in the ship's service with medical care and treatment and the means of maintaining [him/her]self while [he/she] is recuperating.

Maintenance and cure is a seaman's remedy. [If you determine that Plaintiff [name] was a seaman, you then must determine if [he/she] is entitled to maintenance and cure.] [Plaintiff [name] is a seaman; therefore, you must determine whether [he/she] is entitled to maintenance and cure.] When there are ambiguities or doubts about a seaman's right to maintenance and cure, you should resolve those ambiguities or doubts in the seaman's favor.[1]

A seaman is entitled to maintenance and cure even though [he/she] was not injured as a result of any negligence on the part of his employer or any unsea-

[1] *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962) ("When there are ambiguities or doubts [regarding maintenance and cure], they are resolved in favor of the seaman."); *Johnson v. Marlin Drilling Co.*, 893 F.2d 77, 79–80 (5th Cir. 1990) (applying "ambiguities or doubts" rule to find that a treating physician's opinion that contradicted the opinion of the doctor performing the independent medical examination "would require a finding in favor" of the seaman).

worthy condition of the vessel. To recover maintenance and cure, Plaintiff [name] need only show that [he/she] suffered injury or illness while in the service of the vessel on which [he/she] was employed as a seaman, without willful misbehavior on [his/her] part. The injury or illness need not be work-related; it need only occur while the seaman is in the ship's service. Maintenance and cure may not be reduced because of any negligence on the seaman's part.

The "cure" to which a seaman may be entitled includes the costs of medical attention, including the services of physicians and nurses as well as hospitalization, medicines and medical apparatus. However, the employer has no duty to provide cure for any period during which a seaman is hospitalized at the employer's expense.

Maintenance is the cost of food, lodging, and transportation to and from a medical facility. A seaman is not entitled to maintenance for any period that [he/she] is an inpatient in any hospital, because the cure provided by the employer through hospitalization includes the seaman's food and lodging.

A seaman is entitled to receive maintenance and cure from the date [he/she] leaves the vessel until [he/she] reaches what is called "maximum cure." Maximum cure is the point at which no further improvement in the seaman's medical condition is reasonably expected. If it appears that a seaman's condition is incurable, or that the treatment will not improve a seaman's physical condition but will only relieve pain, [he/she] has reached maximum cure. The obligation to provide maintenance and cure usually ends when qualified medical opinion is to the effect that maximum possible cure has been accomplished.

If you decide that Plaintiff [name] is entitled to maintenance and cure, you must determine when the

employer's obligation to pay maintenance began, and when it ends. One factor you may consider in determining when the period ends is when the seaman resumed [his/her] employment, if [he/she] did so. If, however, the evidence supports a finding that economic necessity forced the seaman to return to work before reaching maximum cure, you may take that finding into consideration in determining when the period for maintenance and cure ends.

If you find that Plaintiff [name] is entitled to an award of damages under either the Jones Act or unseaworthiness claims, and if you award [him/her] either lost wages or medical expenses, then you may not award [him/her] maintenance and cure for the same period. That is because Plaintiff [name] may not recover twice for the same loss of wages or medical expenses. However, Plaintiff [name] may also be entitled to an award of damages if Defendant [name] failed to pay maintenance and cure when it was due.[2]

An employer who has received a claim for maintenance and cure is entitled to investigate the claim. If, after investigating the claim, the employer unreasonably rejects it, [he/she] is liable for both the maintenance and cure payments [he/she] should have made, and for any compensatory damages caused by [his/her] unreasonable failure to pay. Compensatory damages may include any aggravation of Plaintiff [name]'s condi-

[2]The existence and extent of a double-recovery problem will vary from case to case. Avoiding double recovery requires careful screening of the evidence and a jury charge tailored to fit the evidence presented. For example, if the value of the food or lodging supplied to the seaman by the vessel owner is included in the wage base from which loss of earnings is calculated, then those items must not again be awarded as maintenance. If a jury awards loss of earnings from the date of injury to some date after the end of the voyage, then those same earnings cannot again be awarded as part of maintenance recovery under the ship owner's obligation to provide wages until the end of the voyage. *See Colburn v. Bunge Towing, Inc.*, 883 F.2d 372 (5th Cir. 1989).

tion because of the failure to provide maintenance and cure.

You may award compensatory damages because the employer failed to provide maintenance and cure if you find by a preponderance of the evidence that:

1. Plaintiff [name] was entitled to maintenance and cure;

2. it was not provided;

3. Defendant [name] acted unreasonably in failing to provide maintenance and cure; and

4. the failure to provide the maintenance and cure resulted in some injury to Plaintiff [name].[3]

(If punitive damages for maintenance and cure are at issue:)

If you also find that the employer's failure to pay maintenance and cure was not only unreasonable, but was also willful and wanton, that is, with the deliberate intent to do so, you may also award Plaintiff [name] punitive damages and attorney's fees. You may not award these damages unless the employer acted callously or willfully in disregard of the seaman's claim for maintenance and cure. The purpose of an award of punitive damages is to punish a defendant and to deter the defendant and others from such conduct in the future.

A plaintiff may not recover attorney's fees for prosecuting Jones Act or unseaworthiness claims. Instead,

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[3]*See Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) (abrogated on other grounds); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (abrogated with respect to punitive damages award for wrongful failure to pay maintenance and cure obligation); *Atl. Sounding, Inc. v. Townsend*, 557 U.S. 404 (2009).

fees may be recovered only for prosecuting claims that the employer not only failed to pay maintenance and cure, but did so in willful and wanton disregard of the obligation to do so. You may award such attorney's fees only if you find that the vessel owner acted willfully and wantonly in disregarding the vessel owner's obligation to pay maintenance and cure.[4]

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[4]*Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009) (abrogating *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995)).

4.11 Section 905(b) Longshore and Harbor Workers' Compensation Act Claim

A. Committee Note

A maritime worker who is a seaman has a Jones Act claim and remedy against his or her employer, and an unseaworthiness claim and remedy against the operator of the vessel as to which he or she is a seaman, whether the operator is his or her employer or not. A maritime worker who is not a seaman may claim LHWCA benefits from his or her employer, and may bring a negligence action under 33 U.S.C. § 905(b) against the operator of the vessel on which he or she is working (and, in some cases, against the employer, if the employer is operating the vessel). The standards for liability under the Jones Act and unseaworthiness differ from those for liability under § 905(b). The categories of maritime worker—seaman and nonseaman—are mutually exclusive[1] and require independent determinations. A maritime worker is limited to LHWCA remedies only if there is no genuine factual dispute about whether the worker was a seaman under the Jones Act.[2]

B. Charge

1. LHWCA STATUS

A worker is covered by the LHWCA if [he/she] is (1) engaged in maritime employment and (2) is injured at a place within the coverage of the act. These are two separate requirements.

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[1] *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

[2] *Gizoni*, 502 U.S. at 89. This inquiry is a mixed question of fact and law.

A worker is engaged in maritime employment if:[3]

1. [he/she] is injured on actual navigable waters in the course of [his/her] employment on those waters;[4] or

2. [he/she] is injured while engaged in an essential part of the loading or unloading process of a vessel.[5]

2. Place Within the Coverage of the Act[6]

A place is within the coverage of the Act if the place is actual navigable waters, an area adjoining actual navigable waters, or an area adjoining an area adjoining actual navigable waters and customarily used by an employer in loading, unloading, building or repairing a vessel.[7]

3. Section 905(b) Negligence Charge

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[3]A special charge may be appropriate if reasonable minds could conclude that the plaintiff was engaged in the activities described in 33 U.S.C. § 902(3)(A)-(H). These subsections exclude from the definition of maritime workers certain clerical, recreational, marina and aquaculture workers, employees of suppliers or vendors, suppliers or transporters temporarily doing business on a covered premise and not engaged in work normally performed by the employer, masters or members of the crew of a vessel, and certain persons employed to build, load, unload, or repair certain vessels.

[4]*Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297 (1983); *Great S. Oil & Gas Co. v. Dir., Office of Workers' Comp. Programs*, 401 F. App'x. 964 (5th Cir. 2010).

[5]*Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989), and cases cited therein; *Coastal Prod. Servs. v. Hudson*, 555 F.3d 426, 439 (5th Cir. 2009).

[6]A special charge may be appropriate if reasonable minds could conclude that the plaintiff's employment fits within 33 U.S.C. § 903(d). This section excludes from coverage certain employees injured while working in certain areas of a facility engaged exclusively in building, repairing, and dismantling certain small vessels, unless the facility receives federal maritime subsidies or the employee is not covered by a state worker-compensation law.

[7]33 U.S.C. § 903; *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 431 (5th Cir. 2009).

If you find that Plaintiff [name] was covered by the LHWCA at the time of [his/her] injury, then you must determine whether Plaintiff [name]'s injury was caused by the negligence of Defendant [name], the operator of the vessel [name]. Defendant [name] does not owe Plaintiff [name] the duty to provide a seaworthy vessel. Defendant [name] is liable only if [he/she] was guilty of negligence that was the legal cause of Plaintiff [name]'s injury. [The shipowner owes three duties to longshoremen: (1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship under the active control of the vessel owner, and (3) a duty to intervene.[8]]

4. The Turnover Duty

Negligence is the failure to exercise reasonable care under the circumstances. A vessel operator such as Defendant [name] must exercise reasonable care before Plaintiff [name]'s employer, a [specify type of maritime employment in which employer was engaged in the vessel, such as stevedore], began its operations on the vessel. Defendant [name] must use reasonable care to have the vessel and its equipment in such condition that an expert and experienced [specify type of maritime employment in which employer is engaged on the vessel] would be able, by the exercise of reasonable care, to carry on its work on the vessel with reasonable safety to persons and property. This means that Defendant [name] must warn Plaintiff [name]'s employer of a hazard on the ship, or a hazard with respect to the vessel's equipment, if:

1. Defendant [name] knew about the hazard or should have discovered it in the exercise of reasonable care, and

[8]A proper charge must be crafted in light of the plaintiff's factual allegations. *Kirksey v. Tonghai Mar.*, 535 F.3d 388 (5th Cir. 2008) (citing *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981); *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994)).

2. the hazard was one likely to be encountered by Plaintiff [name]'s employer in the course of its operations in connection with Defendant [name]'s vessel, and

3. the hazard was not known to Plaintiff [name]'s employer and would not be obvious to or anticipated by a reasonably competent [specify type of maritime employment in which employer is engaged on the vessel, such as stevedore or other designated maritime employer] in the performance of the work. Even if the hazard was one that Plaintiff [name]'s employer knew about or that would be obvious to or anticipated by a reasonably competent [specify stevedore or other type of maritime employment in which the employer was engaged on the vessel], Defendant [name] must exercise reasonable care to avoid the harm to Plaintiff [name] if Defendant [name] knew or should have known Plaintiff [name]'s employer would not or could not correct the hazard and Plaintiff [name] could not or would not avoid it.[9]

The standard of care a vessel operator owes to Plaintiff [name] after [his/her] employer began its operations on the vessel is different than the standard

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[9]This sentence does not appear in the *Scindia* decision (see footnote 33) but appears warranted from a number of later lower court decisions. *See, e.g.*, *Pluyer v. Mitsui O. S. K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25 (3d Cir. 1981); *Harris v. Reederei*, 657 F.2d 53 (4th Cir. 1981); *Moore v. M.P. Howlett, Inc.*, 704 F.2d 39 (2d Cir. 1983). The language selected should not conflict with the rule that the shipowner has no duty to anticipate the stevedore's negligence. *See, e.g.*, *Polizzi v. M/V Zephyros II Monrovia*, 860 F.2d 147 (5th Cir. 1988). The Supreme Court has held, for example, that the exercise of reasonable care does not require the shipowner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994), *remanded to* 1995 WL 27104 (E.D. Pa. 1995). In *Howlett*, the Supreme Court dealt with the turnover duty to warn of latent defects in the cargo stow and cargo area, and held that the duty is a narrow one.

of care governing the vessel operator's actions before the employer began its vessel operations.

5. After the Employer Begins Vessel Operations-Duty of Vessel Owner With Active Control of Vessel

If, after Plaintiff [name]'s employer [name] began operations on the vessel, Defendant [name] actively involved itself in those operations, it is liable if it failed to exercise reasonable care in doing so, and if such failure was the cause of Plaintiff [name]'s injuries.

If, after Plaintiff [name]'s employer began operations on the vessel, Defendant [name] maintained control over equipment or over an area of the vessel on which Plaintiff [name] could reasonably have been expected to go in performing [his/her] duties, Defendant [name] must use reasonable care to avoid exposing Plaintiff [name] to harm from the hazards [he/she] reasonably could have been expected to encounter from such equipment or in such area.

6. Duty to Intervene

If, after Plaintiff [name]'s employer [name] began its operations on the vessel, Defendant [name] learned that an apparently dangerous condition existed (including a condition that existed before Plaintiff [name]'s employer began its operations) or has developed in the course of those operations, Defendant [name] vessel owner must use reasonable care to intervene to protect Plaintiff [name] against injury from that condition only if Plaintiff [name]'s employer's judgment in continuing to work in the face of such a condition was so obviously improvident that Defendant [name] should have known that the condition created an unreasonable risk of harm to Plaintiff [name]. In determining whether Plaintiff [name]'s employer's judgment is "so obviously improvident" that Defendant [name] should have intervened,

you may consider that Plaintiff [name]'s employer has the primary duty to provide a safe place to work for Plaintiff [name] and its other employees, and that Defendant [name] ordinarily must justifiably rely on the Plaintiff [name]'s employer to provide its employees with a reasonably safe place to work. In determining whether Defendant [name] justifiably relied on the decision of Plaintiff [name]'s employer to continue the work despite the condition, you should consider the expertise of Plaintiff [name]'s employer, the expertise of Defendant [name], and any other factors that would tend to establish whether Defendant [name] was negligent in failing to intervene into the operations of Plaintiff [name]'s employer.[10]

7. Damages—Loss of Society[11]—Only Available in United States Territorial Waters in a § 905(b) Claim

In addition to the damages that Plaintiff [name] demands, [he/she] seeks damages for the loss of society with [his/her] [wife/husband], [name], which [he/she] claims [he/she] has suffered as a result of [his/her] accident.

The spouse of an injured person may recover damages for loss of society if [he/she] proves by a preponderance of the evidence that [he/she] has suffered the loss of society with [his/her] [wife/husband] and that the loss of society was caused by injuries to [his/her] wife/husband that are attributable to Defendant [name]'s fault.

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[10]*Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981); *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990).

[11]*Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir. 1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992) (a claim for loss of society is only available in a 905(b) claim arising in territorial waters); *Moore v. M/V Angela*, 353 F.3d 376, 383 (5th Cir. 2003); *Sinegal v. Merit Energy Co.*, 2010 WL 1335151 (W.D. La. March 29, 2010); *Nunez v. Forest Oil Corp.*, 2008 WL 2522121 (E.D. La. June 20, 2008).

Loss of society covers only the loss of love, affection, care, attention, comfort, protection and sexual relations the spouse has experienced. It does not include loss of support or loss of income that the spouse sustains. And it does not include grief or mental anguish.

If you find by a preponderance of the evidence that Plaintiff [name] suffered the loss of society with [his/her] [wife/husband], [name] as a result of injuries caused by Defendant [name]'s fault, you may award [him/her] damages for loss of society. If, on the other hand, you find from a preponderance of the evidence that Plaintiff [name] did not sustain loss of society with [his/her] [wife/husband] [name] as a result of injuries attributable to Defendant [name]'s fault, then you may not award [him/her] damages for loss of society.

You may not award damages for any injury or condition from which Plaintiff [name] may have suffered, or may now be suffering, unless Plaintiff [name] has proved by a preponderance of the evidence that the accident proximately or directly caused that injury or condition.

5

RAILROAD EMPLOYEES

5.1 FELA, 45 U.S.C. §§ 51 and 53[1]

Plaintiff [name]'s claim is based on the Federal Employers Liability Act ("FELA"). This is a federal statute that requires railroads, such as Defendant [name], to exercise reasonable care to provide a reasonably safe workplace for its employees.

Plaintiff [name] claims that while [he/she] was employed by Defendant [name], [he/she] suffered an injury caused by Defendant's negligence. Plaintiff [name] claims that Defendant [name] should be required to pay damages because its negligence was a cause of injury to Plaintiff [name]. Plaintiff [name] has the burden of proving this claim by a preponderance of the evidence.

Defendant [name] denies Plaintiff [name]'s claim. Defendant [name] claims that Plaintiff [name] was negligent and that this negligence was a cause of the claimed injury. Defendant [name] has the burden of proving this claim by a preponderance of the evidence. If you determine that both Plaintiff [name]'s negligence and Defendant [name]'s negligence were causes of Plaintiff [name]'s injury or damage, then you will be asked to compare the negligence of both and determine what amount or percentage of fault is attributable to Plaintiff [name].

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[1]The most recent Supreme Court case is *CSX Transportation, Inc. v. Robert-McBride*, 564 U.S. 685 (2011). The most recent Fifth Circuit authority is *Huffman v. Union Pacific Railroad*, 675 F.3d 412, *reh'g en banc denied*, 683 F.3d 619 (5th Cir. 2012). *But see Huffman*, 683 F.3d at 620 (Dennis, J., dissenting from the denial of rehearing en banc).

You are instructed that negligence is the failure to use reasonable care. Reasonable care is the degree of care that a reasonably prudent person would use under like circumstances. The law does not say how a reasonably prudent person should act; that is for you to decide. Negligence may be either doing something that a reasonably careful person would not do under like circumstances, or failing to do something that a reasonably careful person would do under like circumstances.

The fact that an accident or injury may have happened does not mean that it was caused by anyone's negligence. Defendant [name] is not required to guarantee Plaintiff [name]'s safety. The extent of Defendant [name]'s duty is to exercise reasonable care under the circumstances to see that the workplace is reasonably safe. Defendant [name]'s duty is measured by what is reasonably foreseeable under the circumstances. If Defendant [name] has no reasonable ground to anticipate that a particular condition would or might result in a mishap and injury, then Defendant [name] is not required to do anything to correct that condition.

If negligence is proved, Plaintiff [name] must show that it was a cause of the injury for which Plaintiff [name] seeks damages. To be a cause of an injury, the negligence must have played a part, no matter how slight, in bringing about or causing that injury. Negligence may be a cause of injury even though it operates in combination with another's act or with some other cause, if the negligence played any part in causing such injury.

Plaintiff [name] specifically claims that Defendant [name] [describe the specific acts or omissions asserted as Defendant [name]'s negligence].

The parties have stipulated, or agreed, that when Plaintiff [name] was injured, [he/she] was an employee of Defendant [name] performing duties in the course of

that employment, and that Defendant [name] was a common carrier by railroad engaged in interstate commerce. You must consider whether Plaintiff [name] has proven by a preponderance of the evidence that:

1. Defendant [name] was negligent in any one or more of the ways Plaintiff [name] claims; and

2. Defendant [name]'s negligence played any part in causing the injury for which Plaintiff [name] seeks damages.[2]

If Plaintiff [name] does not prove both of these facts by a preponderance of the evidence, you must find for Defendant [name]. If Plaintiff [name] does prove both facts, you must [find for Plaintiff [name]] [consider Defendant [name]'s claim that Plaintiff [name] was also negligent and that this negligence was a cause of, or contributed to, Plaintiff [name]'s injury].

Defendant [name] specifically claims that [identify the acts or omissions asserted as Plaintiff [name]'s negligence]. Defendant [name] has the burden of prov-

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[2]This instruction would be used in the usual situation in which the parties stipulate that the defendant is a common carrier covered by the FELA and that the plaintiff was injured in the scope and course of employment with the defendant. If these issues are disputed, the following instruction would be used:

Plaintiff [name] must prove each of the following facts by a preponderance of the evidence:

1. When Plaintiff [name] was injured, [he/she] was an employee of Defendant [name] performing duties in the course of that employment;

2. at that time, Defendant [name] was a common carrier by railroad engaged in interstate commerce;

3. Defendant [name] was negligent in any one or more of the ways Plaintiff [name] claims; and

4. Defendant [name]'s negligence played any part in causing the injury for which the Plaintiff [name] seeks damages.

ing both of the following facts by a preponderance of the evidence:

1. Plaintiff [name] was negligent; and

2. this negligence played a part in causing the injury for which Plaintiff [name] seeks damages.

If you find that Defendant [name] was negligent and that Plaintiff [name] was negligent — that Plaintiff [name]'s injury was due partly to Plaintiff [name]'s fault — then you must decide to what extent [his/her] injury was caused by [his/her] negligence. This should be fixed as a percentage.

Let me give you an example. If you find that both parties were negligent, and you find that Plaintiff [name]'s own negligence was 10% responsible for the injury or damage, you must fill in that percentage as your finding in the blank provided on the verdict form that you will receive. Of course, by using the number 10% as an example, I do not mean to suggest any specific amount to you. If you find that both parties were negligent, the percentage of Plaintiff [name]'s negligence is for you to decide. You might find any amount between 1% and 99%. But do not make any reduction in the amount of damages that you award to Plaintiff [name]. I will reduce the damages that you award by the percentage of negligence that you assign to Plaintiff [name].[3]

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[3]Under the FELA, the same causation standard applies to a plaintiff's negligence as to the defendant's negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 159–60 (2007).

5.2 Federal Safety Appliance Act, 49 U.S.C. § 20301 *et seq.* (2006) (Recodifying 45 U.S.C. §§ 1–16 (1988))

Plaintiff [name]'s claim is based on the Federal Safety Appliance Act ("FSAA"), a federal statute that requires railroads such as Defendant [name] to keep certain railroad equipment in a prescribed condition. If the equipment is not kept in that condition and an employee is injured, the employee may seek damages under the Federal Employers Liability Act ("FELA").[1] These instructions apply when damages claims are brought under the FELA for violations of the FSAA.

Plaintiff [name] claims that Defendant [name] [describe the specific act[s] or omission[s] asserted as the FSAA violations].

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[1]In addition to a negligence cause of action under 45 U.S.C. § 51, the FELA also provides for certain causes of action not based on negligence. These include actions brought under the FELA for injuries caused by the railroad's violation of the FSAA, 49 U.S.C. § 20301 *et seq.* The FSAA does not create a private cause of action, but employees who allege they have been injured as a result of FSAA violations may sue under the FELA. *See Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166 (1969). In some cases, the same facts that give rise to a claim under the general negligence provisions of FELA may also provide a basis for a related claim under the FSAA. But the elements of a FELA negligence claim are separate from those of an FSAA claim. In a case under the FSAA, proof of the violation supplies "the wrongful act necessary to ground liability under the F.E.L.A." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949). Unlike the FELA, the FSAA makes it unnecessary for the Plaintiff to show that the railroad was negligent. Proof that the FSAA was violated shows negligence as a matter of law. *Urie v. Thompson*, 337 U.S. 163, 189 (1949); *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949). Care on the part of the railroad is, as a general rule, immaterial because the Supreme Court "early swept all issues of negligence out of cases under the Safety Appliance Act." *O'Donnell*, 338 U.S. at 390. If, however, the plaintiff's negligence was the sole cause of the injury or death, then the statutory violation could not have contributed "in whole or in part to the injury" or death. *Beimert v. Burlington N., Inc.*, 726 F.2d 412, 414 (8th Cir. 1984). Claims brought under the general negligence provisions of FELA, and claims brought under the FSAA, should be submitted to the jury in separate instructions.

To succeed in proving [his/her] claim, Plaintiff [name] must prove each of the following by a preponderance of the evidence:

1. Plaintiff [name] [name of decedent], was an employee of Defendant [name];[2]

2. [specify the alleged FSAA violation; for example, in a case based on a violation of 49 U.S.C. § 20302(a)(2), formerly 45 U.S.C. § 4 (1988), this element might read "the grab iron at issue was not secure; and . . . ."];[3] and

3. this condition played a part, no matter how

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[2]In the typical FELA case, there is no dispute about whether the injured or deceased person was an employee acting within the scope of railroad employment when the incident at issue occurred. If there is no dispute and the parties have stipulated this element, this language need not be included. Instead, the instruction would read: "The parties have stipulated, or agreed, that when Plaintiff [name] was [injured/killed], [he/she] was an employee of Defendant [name] performing duties in the course of that employment."

If it is argued that the plaintiff was not acting within the scope of his or her railroad employment at the relevant time, the following should be added to the first element:

1. Plaintiff [name][name of decedent] was an employee of Defendant [name] acting within the scope of [his/her] employment at the time of [his/her] [injury][death] [describe incident alleged to have caused injury or death];

[3]The Secretary of Transportation has promulgated regulations that establish standards for equipment covered under the FSAA. These regulations are in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. A violation of these regulations is a violation of the FSAA and gives rise to damage suits by those injured. *Urie*, 337 U.S. at 191. If the Plaintiff [name]'s case is based on a regulatory violation, the Plaintiff [name] may ask the court to replace this second element with one submitting the regulation-violation theory.

The FSAA requires that the equipment be "in use" when the injury occurs. *See* 49 U.S.C. § 20302(a). The "in use" requirement serves to "exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). Any dispute about whether the equipment was "in use" when the incident occurred is a question of law for the court, not the jury, to decide. *Pinkham v. Me. Cent. R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989). No jury instruction is needed.

small, in bringing about or actually causing [injury to Plaintiff [name]] [death to [name of decedent]].

If Plaintiff [name] has proved all of these elements, then Plaintiff [name] is entitled to recover damages Plaintiff [name] actually sustained as a result of the violation. Defendant [name] is liable for the damages caused by the violation, even though Defendant [name] was not negligent. Plaintiff [name]'s negligence is not a defense and does not reduce [his/her] recovery for any damages caused by any violation of the FSAA.[4] If Plaintiff [name] fails to prove any of these elements, your verdict must be for Defendant [name].

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[4]This instruction may be modified if there is an issue as to whether the plaintiff's negligence was the "sole cause" of the injury. That scenario can defeat recovery in a FELA action predicated on an alleged FSAA violation. The defendant may ask for an instruction stating that if the plaintiff's negligence was the sole cause of the injury, then he or she may not recover under the FELA. The Fifth Circuit has in the past criticized such instructions as unnecessary and confusing. *See, e.g.*, *Almendarez v. Atchison, Topeka & Santa Fe Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970). More recent Fifth Circuit case law, however, indicates that the defendant may ask for such instructions. *See Maldonado v. Mo. Pac. Ry. Co.*, 798 F.2d 764, 767 (5th Cir. 1986) ("Of course, because the FSAA violation must be a causative factor in the Plaintiff [name]'s injuries, the railroad in appropriate circumstances may raise a sole cause defense."). Other circuits provide for such an instruction when the evidence supports it and the defendant requests it. *See Beimert v. Burlington N., Inc.*, 726 F.2d 412, 414 (8th Cir. 1984). If an instruction is given, appropriate language is as follows:

> Defendant [name] is responsible if [describe the alleged Federal Safety Appliance Act violation] played any part, no matter how small, in causing Plaintiff [name]'s injuries. This means that Defendant [name] is not responsible if any other cause, including Plaintiff [name]'s own negligence, was solely responsible.

6

ANTITRUST (15 U.S.C. §§ 1, *ET SEQ.*)

Comment

The antitrust law instructions included in previous editions of Fifth Circuit Pattern Jury Instructions are out of date, and courts and parties should not rely upon them.

The following sources may be helpful in drafting jury charges in antitrust cases:

Kevin F. O'Malley, et al., *Federal Jury Practice Instructions*, ch. 150, Antitrust-Private Action (5th ed. 2001), and Kevin F. O'Malley, et al., Federal Jury Practice Instructions Civil Companion Handbook, vol. 1, ch.1 (2011).

American Bar Association Antitrust Section, Model Jury Instructions in civil Antitrust Cases (A.B.A., Chicago, Ill., 2005). This source contains instructions for claims under Sherman Act § 1 and § 2. Note, however, that this volume has not been supplemented, and there have been developments in the law since 2005. *See, e.g.*, *Pacific Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438 (2009) (price-squeeze claims may not be brought under Section 2 of the Sherman Antitrust Act when the defendant has no antitrust duty to deal with the plaintiff at wholesale level); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (rule of *per se* illegality no longer applies to vertical agreements to fix minimum resale prices) (*overruling Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (possession of a patent does not create a presumption of market power for purposes of analyzing tying claims); *Texaco v. Dagher*, 547 U.S. 1 (2006) (rule of *per se* illegality does not apply to setting of prices by competitors in a joint venture); *see also Verizon Commc'ns Inc. v. Trinko, LLP*, 540 U.S. 398 (2004) (refusing to expand limited exceptions to rule that there is no duty to aid rivals under Section 2 of the Sherman Act; clarifying that proof of a dangerous probability of success is an element of a monopoly leveraging claim).

In addition, the American Bar Association Section on Antitrust Law has compiled antitrust jury instructions that have been used

in trials, which can be accessed at: http://www.abanet.org/antitrust/at-committees/at-trial/jury-instructions.shtml (sign-in required).

7

SECURITIES ACT

7.1 Securities Act[1]—(Rule 10b-5)

Plaintiff [name] claims that Defendant [name] violated the federal securities law, Rule 10b-5, which makes it unlawful to:

1. employ any device, scheme, or artifice to defraud;

2. make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement not misleading; or

3. engage in any act, practice, or course of business that operates or would operate as a fraud or deceit on any person,

in connection with the purchase or sale of any security.[2]

To succeed on this claim, Plaintiff [name] must prove each of the following elements[3] by a preponderance of the evidence:

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[1]This instruction sets out the elements of a "typical private right of action for securities fraud." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). In more complex cases, additional instructions may be necessary.

[2]17 C.F.R. § 240.10b-5; *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 156–57 (2008); *Affco Invs. 2001, LLC v. Proskauer Rose, LLP*, 625 F.3d 185, 192 (5th Cir. 2010).

[3]*Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005); *Affco Invs. 2001, LLC v. Proskauer Rose, LLC*, 625 F.3d 185, 192 (5th Cir. 2010).

1. a material misrepresentation or omission by Defendant [name];

2. made with an intent to deceive, manipulate, or defraud;[4]

3. a connection between the misrepresentation or omission and the purchase or sale of a security;

4. reliance on the misrepresentation or omission;

5. economic loss; and

6. loss causation.

The first element requires a material misrepresentation or omission by Defendant [name]. A "misrepresentation" is a statement that is not true. Forward-looking statements, such as predictions or expressions of opinion, are not representations of material facts so long as they are not worded as fact or guarantees and the person making the statements reasonably believed them at the time they were made. An "omission" is actionable if it omitted to state facts that would be necessary to make other statements by Defendant [name], in light of the circumstances under which they were made, not misleading. A "material" fact is one that a reasonable investor would consider significant in the decision whether to invest, a fact that alters the "total mix" of information available to a reasonable investor. A minor or trivial detail is not material.

To establish the second element, that Defendant [name] acted with an intent to deceive, manipulate, or defraud,[5] Plaintiff [name] must show that Defendant [name] [stated material facts [he/she] knew to be false]

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[4]*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *Goldstein v. MCI WorldCom*, 340 F.3d 238, 245 (5th Cir. 2003).

[5]*Ernst & Ernst*, 425 U.S. at 193 n.12; *Goldstein*, 340 F.3d at 245.

[stated untrue facts with reckless disregard for their truth or falsity] [knew of the existence of material facts that were not disclosed although [he/she] knew that knowledge of those facts would be necessary to prevent [his/her] other statements from being misleading]. Plaintiff [name] does not satisfy this burden of proof merely by showing that Defendant [name] acted accidentally or made a mistake.

To satisfy the fourth element of the claim, reliance, Plaintiff [name] must prove that [he/she] in fact relied on the false statements. If you find that Plaintiff [name] would have engaged in the transaction anyway, and that the misrepresentation had no effect on [his/her] decision, then there was no reliance and your verdict must be for Defendant [name] on this claim. In addition, Plaintiff [name] must prove that [his/her] reliance was justified. [He/she] cannot have intentionally closed [his/her] eyes and refused to investigate the circumstances in disregard of a risk known to [him/her], or a risk that was so obvious that [he/she] should have been aware of it, and so great as to make it highly probable that harm would follow.[6]

If you find that Defendant [name] made an omission or failed to disclose a material fact, you must presume that Plaintiff [name] relied on the omission or failure to disclose. Defendant [name] may rebut, or overcome, this presumption if [he/she] proves, by a preponderance of the evidence, that Plaintiff [name]'s decision would not have been affected even if Defendant [name] had disclosed the omitted facts.[7]

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[6] *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356 (5th Cir. 1987); *Rifkin v. Crow*, 574 F.2d 256 (5th Cir. 1978).

[7] *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 359 (5th Cir. 1987) (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972)). If the plaintiff is relying on a fraud on the market theory, additional instruction may be warranted. In such cases, the complained-of misrepresentation or omission must have actually affected the market price of the

As to the fifth and sixth elements of the claim, economic loss and loss causation, Plaintiff [name] must show that [he/she] actually suffered an economic injury, and that there is a causal connection between the misrepresentation and that economic injury.[8]

If you find for Plaintiff [name] on [his/her] claim, you must then consider the issue of the amount of money damages to award. You should award Plaintiff [name] an amount of money [he/she] shows by a preponderance of the evidence to be fair and adequate compensation for the loss that proximately resulted from Defendant [name]'s wrongful conduct that you have found.

(Insert damages elements as appropriate.)

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stock. *See Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 662 (5th Cir. 2004).

[8]*Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011).

8

RICO

Note

A plaintiff may bring a private civil action under the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging a violation of Title 18 U.S.C. § 1962(a), (b), (c) or (d). The instructions for RICO claims set out in the 2009 Pattern Jury Instructions are not included here because the cases are so rarely tried that there is no recent set of instructions in this circuit the Committee viewed as sufficiently reliable to include in the revised Instructions. For guidance, *see* Eleventh Circuit Pattern Jury Instructions (Civil Cases), Civil RICO General Instruction 5.1 (2005), and 3B Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Fed. Jury Practice & Instructions* §§ 161.01–161.100 (5th ed. 2001 & Supp. 2012).

9

PATENT INFRINGEMENT (35 U.S.C. § 271, *ET SEQ.*)

Comment

The patent infringement instructions included in previous editions of Fifth Circuit Pattern Jury Instructions are out of date, and courts and parties should not rely upon them.

The following sources may be helpful in drafting jury charges in patent cases. In consulting any of these materials, the user should take into account the Leahy-Smith America Invents Act, which was signed into law on September 16, 2011.

Federal Circuit Bar Association, Model Patent Jury Instructions (2010), *available at* http://federalevidence.com/pdf/JuryInst/FBA_Patent_Jury_Instr2010.pdf.

The National Jury Instruction Project, Model Patent Jury Instructions (2009), *available at* http://federalevidence.com/pdf/JuryInst/Nat_Patent_JI_2009.pdf.

American Intellectual Property Law Association, Guide to Model Patent Jury Instructions (2007), *available at* http://federalevidence.com/pdf/JuryInst/AIPLA_Patent_Inst_2007.pdf.

American Bar Association Section of Litigation, Model Jury Instructions: Patent Litigation (A.B.A., Chicago, Ill., 2005).

Seventh Circuit Pattern Jury Instructions (Civil) (2009), Instructions 11.1–11.4, pp. 188–261. Instruction 11.1 provides preliminary instructions, Instruction 11.2 deals with infringement, Instruction 11.3 covers invalidity, and Instruction 11.4 concerns damages.

Northern District of California, Model Patent Jury Instructions (2011), *available at* http://www.cand.uscourts.gov/juryinstructions

10

CIVIL RIGHTS — 42 U.S.C. § 1983

Overview

The body of law dedicated to 42 U.S.C. § 1983 is immense. Small factual differences can dramatically affect the legal standards and jury instructions that apply in a case. For example, the instruction in an inadequate-medical-care case depends on whether the plaintiff is a convicted inmate or pretrial detainee, whether the claim is based on a condition of confinement or an episodic act, and whether the defendant is an individual, supervisor, policymaker, or municipality.

Due to the variety of potential claims and standards, the Committee has elected to provide examples based on the claims that most frequently arise. The instructions are heavily footnoted to highlight when alternatives may be necessary, but the options are not exhaustive. The facts of a given case will dictate whether these or other instructions are appropriate. Separate instructions for issues such as supervisory liability, municipal liability, qualified immunity, and other recurring claims and defenses are also provided, to be inserted into the basic-elements instructions as needed.

10.1 42 U.S.C. Section 1983 (Unlawful Seizure—Unlawful Search—Excessive Force)[1]

Plaintiff [name] claims that Defendant [name] violated [one or more of] the following constitutional right[s]:

1. the constitutional protection from unreasonable arrest or other "seizure";[2]

2. the constitutional protection from unreasonable search of one's home or dwelling; [and/or]

3. the constitutional protection from the use of excessive force during an arrest.

To recover damages for this [these] alleged constitutional violation[s], Plaintiff [name] must prove by a preponderance of the evidence that:

1. Defendant [name] committed an act that violated the constitutional right[s] Plaintiff [name] claims [was] [were] violated;[3] and

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[1]The Fifth Circuit has expressly approved Instructions 10.1 and 10.3, explaining that the instructions on excessive force and qualified immunity "represent an admirable summary, based on Supreme Court and Fifth Circuit precedent, of the elements of a plaintiff's claim that must be proven at trial." *Mason v. Faul*, 929 F.3d 762, 765 (5th Cir. 2019) (per curiam), *cert. denied*, __ S. Ct. __ (2020).

[2]In addition to arrests, the law recognizes other types of stops as "seizures." *See Brendlin v. California*, 551 U.S. 249, 255 (2007) (traffic stop is a seizure); *United States v. Wise*, 877 F.3d 209, 222 (5th Cir. 2017) (*Terry* stop is a seizure).

[3]Whether the defendant was a state actor or acted "under color of law" are obviously essential elements. But these elements are often conceded or established before trial. If so, eliminating reference to them avoids unnecessary confusion. If not conceded, or if the court wishes to include them, then the second element should read as follows: "That in so doing Defendant [name] acted 'under color' of the authority of the State of _____." Further instructions defining these elements are found in Pattern Jury Instruction 10.2.

2. Defendant [name]'s act[s] [was] [were] the cause of Plaintiff [name]'s damages.[4,5]

The first right Plaintiff [name] claims Defendant [name] violated is the Fourth Amendment right to be protected from an unreasonable seizure.[6] Plaintiff [name] claims that the way Defendant [name] [arrested or stopped] [him/her] on [date] violated [his/her] constitutional rights.[7] To establish this claim, Plaintiff [name] must show that the [arrest or stop] was unreasonable.[8]

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[4]In an appropriate case, the court may wish to instruct the jury that actual compensable injury is not necessary and that nominal or punitive damages may be available for the deprivation of a constitutional right. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978). There are also cases in which a nominal-damages instruction would be appropriate but not a punitive-damages instruction. *See Williams v. Kaufman Cty.*, 352 F.3d 994, 1015 (5th Cir. 2003) (observing that punitive damages may be awarded "only when the defendant's conduct is motivated by evil intent or demonstrates reckless or callous indifference to a person's constitutional rights") (citations and internal quotation marks omitted).

[5]If further instruction on this point is necessary, the court may use the following language:

> The plaintiff must prove by a preponderance of the evidence that the act or failure to act by the defendant was a cause-in-fact of the damages plaintiff suffered. An act or a failure to act is a cause-in-fact of an injury or damages if it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damages. The plaintiff must also prove by a preponderance of the evidence that the act or failure to act by the defendant was a proximate cause of the damages plaintiff suffered. An act or omission is a proximate cause of the plaintiff's injuries or damages if it appears from the evidence that the injury or damages was a reasonably foreseeable consequence of the act or omission.

[6]*See Albright v. Oliver*, 510 U.S. 266, 270–71 (1994) (rejecting a Fourteenth Amendment due process analysis applied to malicious prosecution because the Fourth Amendment more specifically addresses the issue); *see also Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 411 & n.22 (5th Cir. 2002) (applying *Albright* to unlawful search claim).

[7]Some cases may present the question whether the plaintiff was actually seized, which invokes additional tests. *See Ware v. Reed*, 709 F.2d 345, 349 n.7 (5th Cir. 1983).

[8]The text of Section 1983 does not expressly state that the defendant's acts must be intentional. That said, the Fifth Circuit has observed: "The Supreme Court and this circuit have long held that Fourth Amend-

(If an unreasonable arrest is alleged, give the following language:)

A warrantless arrest such as the one involved in this case is considered unreasonable under the Fourth Amendment when, at the moment of the arrest, there is no probable cause for the defendant to reasonably believe that a crime has been or is being committed.[9] Probable cause does not require proof beyond a reasonable doubt, but only a showing of a fair probability of criminal activity.[10] It must be more than bare suspicion, but need not reach the 50% mark.[11]

Finally, the reasonableness of an arrest must be judged based on what a reasonable officer would do under the circumstances, and does not consider Defendant [name]'s state of mind. The question is whether a reasonable officer would believe that a crime was, or was being, committed based on the facts available to that officer at the time of the arrest.[12,13,14]

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ment violations occur only through intentional conduct." *Watson v. Bryant*, 532 F. App'x. 453, 457 (5th Cir. 2013). If there is an issue whether the acts were intentional, the court may consider cases like *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) and *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985).

[9]*Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

[10]*Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[11]*United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999).

[12]*Devenpeck*, 543 U.S. at 152; *Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003).

[13]Probable cause is the touchstone of a false-arrest claim. *See Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004) ("To ultimately prevail on his section 1983 false arrest/false imprisonment claim, [plaintiff] must show that [defendant] did not have probable cause to arrest him."). But "[t]o the extent that the underlying facts are undisputed, [the court] may resolve questions of probable cause as questions of law." *Piazza v. Mayne*, 217 F.3d 239, 246 (5th Cir. 2000). This instruction applies when there is a genuine dispute of material fact that precludes a legal ruling on probable cause. *See Harper v. Harris Cty.*, 21 F.3d 597, 602 (5th Cir. 1994) (affirming decision to send probable cause issue to jury and noting that although the issue can be a legal question, "such is not the case where there exist material factual disputes . . . ."). When lack of probable cause has been conceded, the instruction is not necessary. *Ware*, 709 F.2d at 349 n.7.

(If an unreasonable stop is alleged, give the following language:)

A stop such as the one involved in this case is considered unreasonable under the Fourth Amendment if the officer lacked reasonable suspicion that the seized person was committing a crime.[15] "Reasonable suspicion" means the officer can point to specific and articulable facts that reasonably warrant the inference that a particular person is committing a crime.[16] Even if reasonable suspicion exists, a stop must be brief, minimally intrusive, and reasonably related in scope to the justification for its initiation.[17]

The reasonableness of a stop must be judged based on what a reasonable officer would do under the circumstances, and does not consider Defendant [name]'s state of mind.

To help you determine whether Defendant [name] had probable cause to arrest Plaintiff [name], I will now instruct you on the elements of the crime for which [he/she] was arrested. *(Specify state criminal statute for underlying offense.)*

If you find that Plaintiff [name] has proved by a preponderance of the evidence that Defendant [name] lacked probable cause to make the arrest on [date], then

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Other jurisdictions treat this as a mixed question of law and fact that would be decided on special interrogatories.

[14]Differences in context, such as whether the arrest was with or without a warrant, or whether the arrest was inside the home or in a different location, can change the analysis. *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 558 (2004) (discussing need to specify items to be seized); *Kalina v. Fletcher*, 522 U.S. 118, 129–30 (1997) (discussing probable cause for issuing warrant).

[15]*Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 208–09 (5th Cir. 2009) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

[16]*See id*. at 209 (citing *Terry*, 392 U.S. at 21).

[17]*Id*. (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880–81 (1975)).

Defendant [name] violated Plaintiff [name]'s constitutional right to be free from unreasonable arrest or "seizure" [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name] failed to make this showing, then the arrest was constitutional, and your verdict will be for Defendant [name] on the unreasonable-arrest claim.

The second right Plaintiff [name] claims Defendant [name] violated is Plaintiff [name]'s Fourth Amendment right to be protected from unreasonable searches of [his/her] home.[18,19] The Fourth Amendment to the Constitution of the United States protects against "unreasonable searches," and the right to be free from unreasonable government intrusion in one's own home is at the very core of the Fourth Amendment's protection. Warrantless searches of a person's home are presumed to be unreasonable unless: (1) the government obtains consent to search; or (2) probable cause and exigent cir-

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[18]This instruction addresses home searches. Different rules apply in other settings like schools, *see, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370–71 (2009) (applying "reasonable suspicion" standard to searches by school officials); government workplaces, *see, e.g.*, *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010); or vehicles, *see, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) ("[I]n cases where there was probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.' " (emphasis omitted)); and for searches incident to a lawful arrest, *see, e.g.*, *United States v. Curtis*, 635 F.3d 704, 711–12 (5th Cir. 2011).

[19]This instruction does not address seizures pursuant to warrants. *See, e.g.*, *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) (addressing chain of causation with warrants); *Hernandez v. Terrones*, 397 F. App'x. 954, 967 (5th Cir. 2010) (addressing false statements in supporting affidavits).

cumstances justify the search.[20,21] The burden is on Plaintiff [name] to prove that the search was unreasonable.

The first question is whether there was consent to search. A valid consent to search must be freely and voluntarily given and the individual who gives consent must have authority to do so. Silence or passivity cannot form the basis for consent to enter. An occupant's silence, passivity, or other indication of acquiescence to a show of lawful authority is not enough to show voluntary consent.[22] Officers may search only areas for which consent was given, and may not search areas for which no consent was given.[23,24]

If there is no consent, a warrantless search is still permissible if probable cause and exigent circumstances exist. Probable cause for a warrantless search exists

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[20]*Groh*, 540 U.S. at 564; *see also Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008) (citation omitted). There is no need to instruct the jury on both consent and exigent circumstances if one of the exceptions is inapplicable.

[21]Although consent and exigent circumstances are the most frequent exceptions, the court should consider whether the special needs doctrine applies. *See, e.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (permitting exceptions to the warrant and probable-cause requirements for a search when special needs, beyond the normal needs of law enforcement, make those requirements impracticable) (cited in *Illinois v. Caballes*, 543 U.S. 405, 425 (2005)).

[22]*Roe*, 299 F.3d at 402 & n.5; *Gates*, 537 F.3d at 420–21.

[23]*United States v. Solis*, 299 F.3d 420, 436 (5th Cir. 2002).

[24]There are a variety of issues that may require further instruction. For example, if authority is given by someone other than the plaintiff, it may be necessary to give further instructions consistent with *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). If voluntariness is disputed, the jury may need to be instructed on the six nonexclusive factors set out in *United States v. Kelley*:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

981 F.2d 1464, 1470 (5th Cir. 1993).

when the facts and circumstances within an officer's knowledge, and of which [he/she] had reasonably trustworthy information, are sufficient for a reasonable officer to believe that an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched.[25] Whether probable cause exists is based on what a reasonable officer would do under the circumstances and does not consider Defendant [name]'s state of mind.

Exigent circumstances exist when the situation makes the needs of law enforcement so compelling that the warrantless search is objectively reasonable.[26] One such exigency is [specify relevant example of such a circumstance, such as the need to prevent the imminent destruction of evidence].[27,28]

If you find that Plaintiff [name] has proved by a preponderance of the evidence that Defendant [name] conducted an unreasonable search of Plaintiff [name]'s home, then Defendant [name] violated Plaintiff [name]'s constitutional rights [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified immunity-instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name] failed to make this showing, then the search was not

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[25]*Safford Unified Sch. Dist. No. 1*, 557 U.S. at 370–71.

[26]*Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted); *see also United States v. Menchaca-Castruita*, 587 F.3d 283, 289–90 (5th Cir. 2009) (providing nonexhaustive list).

[27]There are, of course, other examples of exigent circumstances, many of which are summarized in *Brigham City*, 547 U.S. at 403. The instruction should list the exigency that best fits the facts of the case.

[28]If exigent circumstances are raised by the evidence, an instruction that the police cannot create the exigency may be appropriate. *Kentucky v. King*, 563 U.S. 452, 460–61 (2011).

unconstitutional, and your verdict will be for Defendant [name] on the unreasonable-search claim.

Finally, Plaintiff [name] claims Defendant [name] violated the Fourth Amendment by using excessive force in making the arrest on [date]. The Constitution prohibits the use of unreasonable or excessive force while making an arrest, even when the arrest is otherwise proper. To prevail on a Fourth Amendment excessive-force claim, Plaintiff [name] must prove the following by a preponderance of the evidence:

1. an injury;[29]

2. that the injury resulted directly[30] from the use of force that was excessive to the need; and

3. that the excessiveness of the force was objectively unreasonable.[31]

To determine whether the force used was reasonable under the Fourth Amendment, you must carefully balance the nature and quality of the intrusion on

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[29]In many cases, a sufficient injury may be undisputed. But with lesser injuries, the court should consider the Fifth Circuit's analysis in cases like *Brown v. Lynch*, 524 F. App'x. 69, 79 (5th Cir. 2013) ("And as long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force.") (citing primarily *Ikerd v. Blair*, 101 F.3d 430, 434–35 (5th Cir.1996); *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)).

[30]In *Johnson v. Morel*, the Fifth Circuit stated that the injury must result "directly *and only*" from the use of excessive force. 876 F.2d 477, 480 (5th Cir. 1989) (emphasis added). That language routinely appears in Fifth Circuit cases. *See, e.g.*, *Hogan v. Cunningham*, 722 F.3d 725, 734 (5th Cir. 2013). Despite this history, the Committee omitted the word "only" because the language does not carry the meaning that a lay juror would give it. In *Dunn v. Denk*, the Fifth Circuit explained that the "direct-and-only" language was not meant to suggest that a plaintiff who was uniquely susceptible to injury could not recover. 79 F.3d 401, 403 (5th Cir. 1996). The court explained that the *Johnson* language merely establishes that "compensation be for an injury caused by the excessive force and not a reasonable force."

[31]*Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011).

Plaintiff [name]'s right to be protected from excessive force against the government's right to use some degree of physical coercion or threat of coercion to make an arrest. Not every push or shove, even if it may later seem unnecessary in hindsight, violates the Fourth Amendment. In deciding this issue, you must pay careful attention to the facts and circumstances, including the severity of the crime at issue, whether [Plaintiff [name]] [the suspect] posed an immediate threat to the safety of the officers or others, and whether [he/she] was actively resisting or attempting to evade arrest.[32,33]

Finally, [as with the other rights I have discussed], the reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on this defendant's state of mind. You must decide whether a reasonable officer on the scene would view the force as reasonable, without the benefit of 20/20 hindsight. This inquiry must take into account the fact that police officers are sometimes forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[34]

If you find that Plaintiff [name] has proved by a preponderance of the evidence that the force used was objectively unreasonable, then Defendant [name] violated Plaintiff [name]'s Fourth Amendment protection from excessive force [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will

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[32]*See generally Graham v. Connor*, 490 U.S. 386, 396 (1989).

[33]This instruction should be revised in a deadly force case. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The "[u]se of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others." *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003).

[34]*See generally Graham*, 490 U.S. at 396.

explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name] failed to make this showing, then the force was not unconstitutional, and your verdict will be for Defendant [name] on the excessive-force claim.

[Insert qualified-immunity instruction (Pattern Jury Instruction 10.3) if appropriate.[35]*]*

[Insert supervisor/municipal-liability instruction (Pattern Jury Instruction 10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress instructions (Pattern Jury Instruction 10.13) if appropriate.]

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[35]The qualified-immunity issue "ordinarily should be decided by the court long before trial . . . ." *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000). But "if the issue is not decided until trial the defense goes to the jury which must then determine the objective legal reasonableness of the officers' conduct." *McCoy*, 203 F.3d at 376 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998)).

10.2 Under Color of Law

(If the parties stipulate that the action was under color of law):

In this case the parties have stipulated [agreed] that Defendant [name] acted "under color" of state law, and you must accept that fact as proved.

(If the parties dispute whether the action was under color of law):

"Under color" of state law means under the pretense of law. An officer's acts while performing [his/her] official duties are done "under color" of state law whether those acts are in line with [his/her] authority or overstep such authority. An officer acts "under color" of state law even if [he/she] misuses the power [he/she] possesses by virtue of a state law or because [he/she] is clothed with the authority of state law. An officer's acts that are done in pursuit of purely personal objectives without using or misusing [his/her] authority granted by the state are not acts done "under color" of state law.[1]

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[1] *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 464 (5th Cir. 2010); *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir. 2002).

10.3 Qualified Immunity[1]

As to each claim for which Plaintiff [name] has proved each essential element, you must consider whether Defendant [name] is entitled to what the law calls "qualified immunity." Qualified immunity bars a defendant's liability even if [he/she] violated a plaintiff's constitutional rights. Qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity provides protection from liability for all but the plainly incompetent government [officers/officials], or those who knowingly violate the law.[2] It is Plaintiff [name]'s burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case.[3]

Qualified immunity applies if a reasonable [officer/

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[1]Instructing a jury on qualified immunity can present difficult—and often fact-based—decisions for the court. The qualified-immunity issue "ordinarily should be decided by the court long before trial . . . ." *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000). But "if the issue is not decided until trial the defense goes to the jury which must then determine the objective legal reasonableness of the officers' conduct." *McCoy*, 203 F.3d at 376 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998)). In most cases in which qualified immunity remains an issue at trial, the court will have found some underlying factual dispute that precluded a pretrial ruling. Sometimes the factual disputes are easy to define and lend themselves to a clean instruction on what constitutes clearly established law (*e.g.*, whether the suspect had a gun). It seems inevitable in those circumstances that the instruction on what constitutes clearly established law may appear to be peremptory. Other cases present more complicated fact patterns that make it difficult to frame the issues and instruct on the clearly established law. There is no way to draft a pattern instruction that covers every scenario. The pattern instruction provides only the basic law and leaves it to the judge to craft a complete instruction that fits the facts of the case. Nevertheless, the Fifth Circuit has expressly approved the language in Instruction 10.3. *See Mason v. Faul*, 929 F.3d 762, 765 (5th Cir. 2019) (per curiam) (upholding jury charge on excessive force and qualified immunity where the questions "were precisely and almost verbatim stated according to the Fifth Circuit Pattern Jury Instruction (Civil) 10.1 and 10.3."), *cert. denied*, ___ S. Ct. ___ (2020).

[2]*Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[3]*Jimenez v. Wood Cty.*, 621 F.3d 372, 378 (5th Cir. 2010) (observing that burden is on plaintiff once defendant raises defense).

official] could have believed that [specify the disputed act, such as the arrest or the search] was lawful in light of clearly established law and the information Defendant [name] possessed.[4] But Defendant [name] is not entitled to qualified immunity if, at the time of [specify the disputed act], a reasonable [officer/official] with the same information could not have believed that [his/her] actions were lawful.[5] [Law enforcement officers/ government officials] are presumed to know the clearly established constitutional rights of individuals they encounter.

In this case, the clearly established law at the time was that [specify what constitutes the clearly established law.[6]]

If, after considering the scope of discretion and responsibility generally given to [specify type of officers/ officials] in performing their duties and after considering all of the circumstances of this case as they would have reasonably appeared to Defendant [name] at the time of the [specify disputed act], you find that Plaintiff [name] failed to prove that no reasonable [officer/ official] could have believed that the [specify disputed act] was lawful, then Defendant [name] is entitled to qualified immunity, and your verdict must be for Defendant [name] on those claims. But if you find that Defendant [name] violated Plaintiff [name]'s constitutional rights and that Defendant [name] is not entitled

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[4] *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

[5] *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (citations omitted).

[6] "[W]hat 'clearly established' means in this context depends largely upon the level of generality at which the relevant legal rule is to be identified. 'Clearly established' for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson*, 526 U.S. at 614–15 (citations omitted and punctuation edited). This does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," but it means "that in the light of pre-existing law the unlawfulness must be apparent." *Wilson*, 526 U.S. at 614–15.

to qualified immunity as to that claim, then your verdict must be for Plaintiff [name] on that claim.

10.4 Liability of Supervisor

Plaintiff [name] is suing Defendant [name of supervisor]. A supervisory officer, like Defendant [name of supervisor], cannot be held liable merely because [his/her] subordinate [officer/official] violated someone's constitutional rights. To prove [his/her] claim against Defendant [name of supervisor], Plaintiff [name] must show that Defendant [name of supervisor]'s conduct caused the denial of [his/her] constitutional rights.[1]

In this case, Plaintiff [name] contends that Defendant [name of supervisor] violated [his/her] constitutional rights by implementing an unconstitutional policy, specifically, by [specify act or omission alleged].[2]

To prevail in [his/her] claim against Defendant [name of supervisor], Plaintiff [name] must prove by a preponderance of the evidence that:

1. a subordinate of Defendant [name of supervisor] violated Plaintiff [name]'s constitutional rights;

2. Defendant [name of supervisor] [specify alleged policy adopted or not adopted];

3. The [alleged adoption/failure to adopt] caused the violation of the Plaintiff [name]'s rights; and

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[1] *Marks v. Hudson*, 933 F.3d 481, 490 (5th Cir. 2019).

[2] Some claims mention acquiescence as a basis for liability under a theory of personal involvement. Although addressed in the *Bivens* context, *Ashcroft v. Iqbal* leaves doubt whether such a claim exists in the § 1983 setting. 556 U.S. 662, 677 (2009). However, the Fifth Circuit has cited with approval case law supporting acquiescence as a theory of liability. *See Turner v. Lt. Driver*, 848 F.3d 678, 696 n.88 (5th Cir. 2017).

4. Defendant [name of supervisor] [adopted the policy/failed to adopt the policy] with deliberate indifference.[3]

For an [officer/official] to act with deliberate indifference, [he/she] must be: (1) aware of facts from which the inference could be drawn that a substantial risk of serious harm or a violation of constitutional rights exists; and (2) must actually draw that inference. Deliberate indifference requires a showing of more than negligence or even gross negligence.[4] Accordingly, for a supervisor to act with deliberate indifference, [he/she] must usually know about a pattern of similar violations.[5] To show deliberate indifference based on a single incident, it must have been apparent or obvious that a constitutional violation was the highly predictable consequence of the particular policy.[6]

[To satisfy the deliberate indifference prong of a failure-to-train claim, Plaintiff [name] must prove that Defendant [name of supervisor] knew or should have known that a particular omission in the training program would cause employees to violate the constitutional rights of members of the public they encounter, but Defendant [name of supervisor] nevertheless chose to retain that program. To prove deliberate indifference in this way, Plaintiff [name] must show a pattern of similar constitutional violations by improperly trained employees. A single incident is generally insufficient to show deliberate indifference unless the actor was provided no training whatsoever.[7]]

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[3]*Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011).

[4]*Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381–82 (5th Cir. 2005).

[5]*Romero v. Brown*, 937 F.3d 514, 523 (5th Cir. 2019).

[6]*Alvarez v. City of Brownsville*, 904 F.3d 382, 391 (5th Cir. 2018).

[7]*Pena v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018).

10.5 Municipal Liability

In addition to [his/her] claims against [officers/officials], Plaintiff [name] is suing [specify municipality sued]. A [city/county] is not liable for the actions of its employees unless the constitutional violation was caused by a [city/county] policy or custom.[1]

To prevail on [his/her] claim against the [city/county], Plaintiff [name] must prove by a preponderance of the evidence that:

1. an official policy or custom existed;

2. a policymaker for the [city/county] knew or should have known about the policy or custom;[2]

3. the policymaker was deliberately indifferent; and

4. the policy or custom was the moving force leading to the constitutional violation.

A "policy" can be a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the [city/county]'s officers.[3]

A "custom" is a persistent, widespread practice of [city/county] officials or employees that, although not formally adopted, is so common and well-settled that it fairly represents [city/county] policy. But to show a custom, Plaintiff [name] must prove that either the [city/county]'s governing body or some official with

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[1] *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002).

[2] Policymaker status is a question of law. *See, e.g.*, *Tharling v. City of Port Lavaca*, 329 F.3d 422, 427 (5th Cir. 2003).

[3] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

policymaking authority knew or should have known about the custom.[4]

For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists or a violation of constitutional rights exists, and [he/she] must also draw the inference.[5]

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[4]*Pineda*, 291 F.3d at 328.

[5]*Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381–82 (5th Cir. 2005).

10.6 First Amendment Retaliation—Public Employees

Plaintiff [name] claims that Defendant [name] violated [his/her] rights under the First Amendment to the United States Constitution. More specifically, Plaintiff [name] claims that Defendant [name] [specify the allegedly adverse action] in retaliation for Plaintiff [name]'s decision to exercise [his/her] First Amendment free-speech right when [he/she] [specify the speech].

The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.[1]

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. Plaintiff [name] suffered an adverse employment action;[2]

2. Plaintiff [name]'s speech motivated[3] Defendant [name]'s decision to [specify action] Plaintiff [name]; and

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[1] *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

[2] Whether the defendant acted "under color of law" is obviously an essential element of First Amendment retaliation. But this element is often conceded. If so, eliminating reference to it may avoid unnecessary confusion. If it is not conceded, or if the court wishes to include it, then the first element should read, "That the actions of Defendant [name] were 'under color' of the authority of the State of _____." Further instructions on this element are in Pattern Jury Charge 10.2.

[3] Defendant's motivation may be based on a factual mistake about Plaintiff's behavior. *Heffernan v. City of Paterson, New Jersey*, 136 S. Ct. 1412 (2016). In *Heffernan*, the United States Supreme Court held that an employee could bring a First Amendment retaliation claim against an employer who took an adverse action against the employee for protected speech that the employer mistakenly attributed to the employee. 136 S. Ct. at 1418.

3. the [specify action] caused Plaintiff [name]'s damages.[4]

If Plaintiff [name] fails to prove any of these elements, you must find for Defendant [name].

(If the parties stipulate that the employment action was adverse):

[The parties have stipulated (agreed) that the [specify action] was "adverse." You must accept that fact as proved.]

OR

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[4]These elements are based on cases such as *Oscar Renda Contracting, Inc. v. City of Lubbock*, 577 F.3d 264, 271 (5th Cir. 2009) (listing these elements). Two points must be noted.

First, the instructions set out the elements of the prima facie case excluding the elements that should be decided as a matter of law before trial. For example, there is a threshold issue under *Garcetti* whether the plaintiff spoke as a citizen or pursuant to official duty. 547 U.S. at 419; *see also Lane v. Franks*, 573 U.S. 228 (2014) (explaining *Garcetti* and noting that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties"). The prima facie case elements listed in summary judgment opinions also include the need to prove that the speech was protected under *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). This is a question of law. *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019). There may be instances, however, in which there are disputes about historical facts that should be submitted to the jury. For example, in *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004), the Fifth Circuit addressed the *Pickering* issues as a mixed law-and-fact question, noting that "the governmental interests at stake in a particular case necessarily depend on the facts of the case." *Id.* at 363. If material historical facts are disputed, the court should consider submitting them to the jury for resolution.

Second, a more frequent articulation of the causation element is that the speech must be a "substantial or motivating factor." *Winn v. City of New Orleans*, 620 F. App'x 270 (5th Cir. 2015). This language is consistent with *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, in which the Supreme Court of the United States observed that causation first requires proof that the speech was a " 'substantial factor' or to put it in other words, that it was a 'motivating factor.' " 429 U.S. 274, 287 (1977). The pattern uses the simple language that the speech must "motivate," but then explains the element consistent with *Mt. Healthy*.

(If the parties dispute whether the employment action was adverse):

[As to the first element—whether the [specify action] was "adverse"—adverse employment actions include discharges, demotions, refusals to hire, refusals to promote, and reprimands.[5] They can also include transfers if they would be equivalent to a demotion. To be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse than the former position, such as being less prestigious or less interesting or providing less room for advancement.[6,7]]

As to the second element, to prove Plaintiff [name]'s speech motivated Defendant [name]'s [specify action], Plaintiff [name] must show the speech was a substantial factor. In other words, Plaintiff [name] must show that [his/her] speech was a motivating factor in Defendant [name]'s decision to [specify action].[8] Plaintiff [name]

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[5] *Juarez v. Aguilar*, 666 F.3d 325 (5th Cir. 2011) (citing *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999)).

[6] *Sharp*, 164 F.3d at 933.

[7] The instruction is based on numerous cases decided by the Fifth Circuit. *See, e.g.*, *Sharp*, 164 F.3d at 933. But in *Burlington North and Santa Fe Railway Co. v. White*, the Supreme Court adopted a different test in the Title VII context. 548 U.S. 53, 68 (2006). To date, the Fifth Circuit has not adopted the *Burlington* standard for adverse employment actions in the First Amendment context. *Johnson v. Halstead*, 916 F.3d 410, 422 n.5 (5th Cir. 2019) ("It is not clearly established whether *Burlington*'s 'materially adverse' standard applies to retaliation for protected speech."). In addition, courts should be aware that the Fifth Circuit has adopted more precise tests depending on the nature of the employee's job. For example, in the educational context, the Fifth Circuit "has held that 'actions such as decisions concerning teaching assignment, pay increases, administrative matters, and departmental procedures, while extremely important to the person who has dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation.' " *DePree v. Saunders*, 588 F.3d 282, 287–88 (5th Cir. 2009) (citing *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997) (citation and internal punctuation omitted)).

[8] *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287.

need not prove [his/her] speech was the only reason Defendant [name] made the decision.[9]

[If you find that Plaintiff [name] has proved each element of [his/her] claim by a preponderance of the evidence, then you must consider whether Defendant [name] would have reached the same decision in the absence of the protected speech.[10] If you find Defendant [name] has proved by a preponderance of the evidence that [he/she/it] would have [specify action] whether or not Plaintiff [name] engaged in protected speech, then you must return a verdict for Defendant [name] and against Plaintiff [name].]

If you find that Plaintiff [name] has proved each of the three elements and that Defendant [name] failed to prove that [he/she/it] would have reached the same decision anyway, then Defendant [name] violated Plaintiff [name]'s First Amendment right to free speech [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified immunity issue; give second if there is such an issue along with the qualified immunity instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name] failed to make this showing, then

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[9]In contrast to prior precedent, those without the ability to make final employment decisions may be found liable. *Sims v. City of Madisonville*, 894 F.3d 632, 641 (5th Cir. 2018). ("*Johnson*'s absolute bar on First Amendment liability for those who are not final decisionmakers is not binding."); *contra Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004) (holding that non-final decisionmakers could not be found liable). To find an individual with retaliatory motives, but who does not have final decision-making authority, liable, there must be a "causal link" between the individual's action and the injury. *Sims*, 894 F.3d at 642; *see Jett v. Dallas*, 798 F.2d 748, 758 (5th Cir. 1986).

[10]*Crawford-El v. Britton*, 523 U.S. 574, 593 (1998) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287); *Oscar Renda Contracting*, 577 F.3d at 271 (noting that Defendant "can respond" to prima facie case with proof that it would have reached same decision).

your verdict must be for Defendant [name] on Plaintiff [name]'s First Amendment claim.

[Insert qualified-immunity instruction (10.3) if appropriate.]

[Insert supervisor/municipal liability instruction (10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress instructions (10.13) if appropriate.]

10.7 Eighth Amendment (Excessive Force)—Convicted Prisoner[1]

Plaintiff [name] claims that Defendant [name] violated [his/her] Eighth Amendment right to be protected from excessive and unnecessary force.

The Eighth Amendment to the Constitution of the United States protects inmates like Plaintiff [name] from cruel and unusual punishment.

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [2]Defendant [name][3] used excessive force against [him/her]; and

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[1]Earlier versions of Instruction 10.7 noted that it could be adapted for pretrial detainees pursuing claims under the Fourteenth Amendment because the Fifth Circuit had applied the same elements to claims under both amendments. *See, e.g., Clark v. Gonzalez*, 129 F.3d 612 (5th Cir. 1997) (per curiam) (unpublished table decision). But in 2015, the United States Supreme Court decided *Kingsley v. Hendrickson*, holding "that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." 135 S. Ct. 2466, 2473 (2015). As such, instructing the jury to consider whether the defendant used force for malicious or sadistic reasons would run afoul of the objective test. *See id.* at 2475 (noting that language of Eighth and Fourteenth Amendments "differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.' " (citation omitted)). Accordingly, a new instruction for pretrial detainees has been added as Instruction 10.10.

[2]The "under color of law" element is usually conceded in the Eighth Amendment context. It is omitted to avoid unnecessary confusion. If the issue is disputed, it should be addressed as the first element. Further instructions defining this element are found in Instruction 10.2.

[3]If the plaintiff alleges bystander liability, an appropriate instruction may be adapted from *Kitchen v. Dallas County*: "Bystander liability may be established where an officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act.' " 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Whitley v. Hanna*, 726 F.3d 631, 646–47 (5th Cir. 2013)), *abrogated on other grounds by Kingsley*, 135 S. Ct. 2466.

2. Plaintiff [name] suffered some harm as a result of Defendant [name]'s use of force.[4,5]

Whether a use of force against a prison inmate is excessive depends on whether the force was applied in a good-faith effort to maintain or restore discipline, or whether it was done maliciously or sadistically to cause harm.[6] If the force was used maliciously or sadistically to cause harm to Plaintiff [name], then it was excessive.

To act "maliciously" means to intentionally do a wrongful act without just cause or excuse, with an intent to inflict injury, or under circumstances that show an evil intent. To act "sadistically" means to inflict pain on a person for one's own pleasure.

In deciding whether the force used was excessive, you must give prison officials wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security

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[4]The Fifth Circuit, like many other circuits, previously included a significant-injury element. Later cases required "some harm," which was defined to mean more than *de minimis* injury. But in *Wilkins v. Gaddy*, the Supreme Court reversed a circuit court decision applying the *de minimis* injury rule. 559 U.S. 34, 37–38 (2010). The Court noted that while *de minimis* force is not actionable, *de minimis* injury and *de minimis* force are not coterminous. *Id.* Courts should be careful not to instruct the jury using a *de minimis* injury standard.

[5]If necessary, these instructions may be modified or limited in wrongful death cases to reflect the state's wrongful death statute. *See Slade v. City of Marshall*, 814 F.3d 263, 264 (5th Cir. 2016) ("[A] plaintiff seeking to recover on a wrongful death claim under § 1983 must prove both the alleged constitutional deprivation required by § 1983 and the causal link between the defendant's unconstitutional acts or omissions and the death of the victim, as required by the state's wrongful death statute." (quoting *Phillips ex rel. Phillips v. Monroe Cty.*, 311 F.3d 369, 374 (5th Cir. 2002))).

[6]*Wilkins*, 559 U.S. at 37 (holding that the "core judicial inquiry" is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992))).

in the prison.[7] In making this determination, you may consider the following nonexclusive factors: (1) the extent of the injury suffered; (2) the need for the application of force; (3) the relationship between the need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response.[8] The extent of injury an inmate suffers may suggest whether the use of the force could reasonably have been thought necessary in the particular situation.[9]

In considering the second element—harm—not every malevolent, harmful, or injurious touch by a prison guard gives rise to a claim under federal law.[10] Only harm caused by excessive force as I have defined it can violate the Constitution. Harm arising from a *de minimis* use of force does not violate the Eighth Amendment unless the use of force is repugnant to the conscience of mankind.[11] A use of force is *de minimis* if it is so minor as to merit disregard. But an inmate like Plaintiff [name] need not show significant injury to establish a constitutional violation.[12]

If Plaintiff [name] has proved both of these elements by a preponderance of the evidence, then you will have found that Defendant [name] violated [his/her] Eighth Amendment right to be protected from cruel and unusual punishment [and your verdict will be for

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[7] *Whitley v. Albers*, 475 U.S. 312, 321–22 (1980) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

[8] *Baldwin v. Stalder*, 137 F.3d 836, 839 (5th Cir. 1998) (citing *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992)). These factors are nonexclusive, and others may be added when appropriate. *See id.* (citing *Rankin v. Klevenhagen*, 5 F.3d 103, 107 n.6 (5th Cir. 1993)).

[9] *Hudson*, 503 U.S. at 7 (citing *Whitley*, 475 U.S. at 321).

[10] *Wilkins*, 559 U.S. at 37.

[11] *Hudson*, 503 U.S. at 10 (quoting *Whitley*, 475 U.S. at 327).

[12] *Bourne v. Gunnels*, 921 F.3d 484, 492 (5th Cir. 2019) ("An inmate need not establish a 'significant injury' to pursue an excessive force claim because '[i]njury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts.' " (quoting *Wilkins*, 559 U.S. at 37–38)).

Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name] failed to make this showing, then the force was not unconstitutional, and your verdict will be for Defendant [name] on this claim.

[Insert qualified-immunity instructions (10.3) if appropriate.]

[Insert supervisor/municipal liability instructions (10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress instructions (10.13) if necessary.]

10.8 Eighth Amendment (Inadequate Medical Care — Convicted Prisoner)[1]

Plaintiff [name] asserts that Defendant [name] violated [his/her] Eighth Amendment right to adequate medical care.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. An [officer/official] violates the Eighth Amendment if [his/her] conduct demonstrates deliberate indifference to a prisoner's serious medical needs.[2]

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [3]Plaintiff [name] was exposed to a substantial risk of serious harm;

2. Defendant [name] displayed deliberate indifference to that risk; and

3. Defendant [name]'s deliberate indifference harmed Plaintiff [name].[4,5]

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[1]Other instructions apply to cases involving medical care of pretrial detainees. *See Hare v. City of Corinth*, 74 F.3d 633, 644–50 (5th Cir. 1996) (en banc); *see also* Instructions 10.11 and 10.12.

[2]*Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006).

[3]The "under color of law" element is usually conceded in the Eighth Amendment context. It is omitted to avoid unnecessary confusion. If the issue is disputed, then the issue should be addressed as the first essential element. Further instructions defining this element are found in Instruction 10.2.

[4]*McCarty v. Zapata Cty.*, 243 F. App'x 792, 794 (5th Cir. 2007) (per curiam) (citing *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003)) ("[P]laintiff must establish resulting injuries."); *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004) (explaining prima facie case).

[5]If the claim is that health care was improperly delayed, then the court should instruct the jury that "[a] delay in medical care violates the Eighth Amendment only if it is due to deliberate indifference and results in substantial harm," *Smith v. Milhauser*, 444 F. App'x 812, 813 (5th Cir.

To satisfy the first element, the illness or injury must be so serious that the failure to treat it posed a substantial risk of serious harm to Plaintiff [name]'s health.[7] This element asks whether, based on all of the circumstances that were present, a reasonable person would view a failure to treat the illness or injury or a failure to provide adequate health care to be a denial of the minimal civilized measure of life's necessities.[8] This inquiry is what a reasonable person would have concluded and does not consider Defendant [name]'s state of mind.

The second element—deliberate indifference—requires proof of egregious conduct.[9] Only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.[10] Plaintiff [name] must prove Defendant [name] knew of and disregarded an excessive risk to Plaintiff [name]'s health or safety. In other words, Plaintiff [name] must prove Defendant [name]: (1) was aware of facts from which the inference could be drawn

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Oct. 14, 2011) (citing *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993)), but also that "[t]he pain suffered during the delay itself . . . can constitute a substantial harm," *Westfall v. Luna*, 903 F.3d 534, 551 (5th Cir. 2018) (per curiam) (citing *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 422 (5th Cir. 2017) (per curiam)). If necessary, these instructions may be modified or limited in wrongful death cases to reflect the state's wrongful death statute. *See Slade v. City of Marshall*, 814 F.3d 263, 264 (5th Cir. 2016) ("[A] plaintiff seeking to recover on a wrongful death claim under § 1983 must prove both the alleged constitutional deprivation required by § 1983 and the causal link between the defendant's unconstitutional acts and omissions and the death of the victim, as required by the state's wrongful death statute." (quoting *Phillips ex rel. Phillips v. Monroe Cty.*, 311 F.3d 369, 374 (5th Cir. 2002))).

[7] *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

[8] *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *Wilson*, 501 U.S. at 298; *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)) (holding that "the deprivation alleged must be, objectively, 'sufficiently serious'; a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.' ").

[9] *Cooper v. Johnson*, 353 F. App'x 965, 968 (5th Cir. 2009) (per curiam) ("A defendant's conduct must rise 'to the level of egregious conduct.' " (quoting *Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006))).

[10] *Farmer*, 511 U.S. at 834 (citing *Wilson*, 501 U.S. at 297).

that a substantial risk of serious harm existed; and (2) actually drew that inference.[11,12] An inmate's mere disagreement with the type or amount of medical treatment [he/she] receives is not sufficient to meet this test.[13,14]

If Plaintiff [name] has proved each of these three elements by a preponderance of the evidence, then you will have found that Defendant [name] violated [his/her] Eighth Amendment right to be protected from cruel and unusual punishment [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name]

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[11]*Calhoun v. Hargrove*, 312 F.3d 730, 734 (5th Cir. 2002) (quoting *Farmer*, 511 U.S. at 837).

[12]In some cases, the following instructions may be appropriate. "[A] prison official's knowledge of a substantial risk of harm may be inferred if the risk was obvious." *Easter*, 467 F.3d at 463 (citing *Farmer*, 511 U.S. at 842–43). However, corroborating evidence is required before a jury may infer that an inmate's use of prison grievance procedures put a prison official on notice that a substantial risk of serious harm existed. *Ball v. LeBlanc*, 792 F.3d 584, 595 (5th Cir. 2015) ("[A] prison administrator who has received an administrative remedy request is not necessarily made aware, without factual corroboration, that there is a substantial risk of serious harm.").

[13]*Gibson v. Collier*, 920 F.3d 212, 216 (5th Cir. 2019) (" '[M]ere disagreement with one's medical treatment is insufficient' to state a claim under the Eighth Amendment." (quoting *Delaughter v. Woodall*, 909 F.3d 130, 136 (5th Cir. 2018))).

[14]Some cases observe that "[t]o make a showing of deliberate indifference, the inmate must submit evidence that prison officials refused to treat him, ignored [his/her] complaints, intentionally treated [him/her] incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *McCarty*, 243 F. App'x at 794 (citing *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)); *see also Delaughter*, 909 F.3d at 138 (distinguishing the failure to provide "a prescribed course of treatment" from an inmate's "subjective opinion of the sufficiency of his medical treatment that is either contradicted or unsupported by medical professionals").

failed to make this showing, then your verdict must be for Defendant [name] on this claim.

[Insert qualified-immunity instruction (10.3) if appropriate.]

[Insert supervisor/municipal liability instruction (10.4) if appropriate.[15]*]*

[Insert standard damages instructions and emotional-distress damages instructions (10.13) if appropriate.]

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[15]In the context of physician supervision of nurses, the Fifth Circuit has held that a plaintiff must prove "that the doctors and wardens failed to supervise or train the subordinate officials" and "that the doctors knew the nurses were disregarding their orders, and the doctors neglected to correct this behavior knowing it posed an actual serious risk to [the plaintiff's] health." *Brauner v. Coody*, 793 F.3d 493, 501 (5th Cir. 2015).

10.9 Eighth Amendment (Conditions of Confinement — Convicted Prisoner)[1,2]

Plaintiff [name] claims that the conditions of [his/her] confinement in [specify jail, prison, or other facility] violated [his/her] Eighth Amendment constitutional right to be protected from cruel and unusual punishment. More precisely, Plaintiff [name] claims that Defendant [name] violated [his/her] Eighth Amendment rights by: [specify alleged unconstitutional conditions of confinement].

To recover damages for the alleged constitutional violation[s], Plaintiff [name] must prove by a preponderance of the evidence that:

1. [3]the prison conditions resulted in an extreme deprivation of the minimal measure of life's necessities; and[4]

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[1]The Eighth Amendment applies to claims made by convicted inmates; the Fourteenth Amendment applies to claims made by pretrial detainees. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *see* Instructions 10.11 and 10.12.

[2]Other factual scenarios may require modified instructions. *See, e.g.*, *DeMarco v. Davis*, 914 F.3d 383, 387–88 (5th Cir. 2019) (access to courts); *Brown v. Taylor*, 911 F.3d 235, 245–46 (5th Cir. 2018) (per curiam) (retaliation); *Butts v. Martin*, 877 F.3d 571, 558–89 (5th Cir. 2017) (retaliation); *Lewis v. Sec'y of Pub. Safety & Corrs.*, 870 F.3d 365, 368–69 (5th Cir. 2017) (Fourth Amendment search); *Davis v. Davis*, 826 F.3d 258, 264–65 (5th Cir. 2016) (free exercise under First Amendment and Religious Land Use and Institutionalized Persons Act); *Wilkerson v. Goodwin*, 774 F.3d 845, 851–59 (5th Cir. 2014) (procedural due process); *Stauffer v. Gearhart*, 741 F.3d 574, 584–86 (5th Cir. 2014) (per curiam) (free exercise under First Amendment).

[3]The "under color of law" element is usually conceded in the Eighth Amendment context. It is omitted to avoid unnecessary confusion. If the issue is disputed, it should be addressed as the first element. Further instructions defining this element are found in Instruction 10.2.

[4]*Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("[E]xtreme deprivations are required to make out a conditions-of-confinement claim.").

2. Defendant [name] acted with deliberate indifference.[5]

As to the first element, it is not enough that the conditions were restrictive or even harsh. This is part of the penalty that criminal offenders pay. You may find that the conditions of Plaintiff [name]'s confinement amounted to an extreme deprivation—and were therefore cruel and unusual punishment—only if they posed an unreasonable risk of serious damage to Plaintiff [name]'s health or safety. In deciding whether Plaintiff [name] has proved an extreme deprivation, you should ask whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.[6]

Deliberate indifference in this context means that the official knows of and disregards an excessive risk to inmate health or safety. The official must: (1) be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; and (2) must draw that inference.[7] Deliberate indifference may be inferred if the risk of harm is obvious.[8,9]

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[5]*Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

[6]*Helling v. McKinney*, 509 U.S. 25, 35–36 (1993). This represents the objective component of the test. *See Hudson*, 503 U.S. at 8–9.

[7]*Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Corroborating evidence is required before a jury may infer that an inmate's use of prison grievance procedures puts a prison official on notice that a substantial risk of serious harm existed. *Ball v. LeBlanc*, 792 F.3d 584, 595 (5th Cir. 2015) ("[A] prison administrator who has received an administrative remedy request is not necessarily made aware, without factual corroboration, that there is a substantial risk of serious harm.").

[8]*Hope v. Pelzer*, 536 U.S. 730, 737–38 (2002) (citing *Farmer*, 511 U.S. at 842) ("We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.").

[9]Although the objective and subjective tests apply in all Eighth Amendment contexts, the wording may be altered depending on the specific claim. For example, in a failure-to-protect context, the Fifth Circuit has noted:

If Plaintiff [name] has proved both of these two elements by a preponderance of the evidence, then you will have found that Defendant [name] violated [his/her] Eighth Amendment right to be protected from cruel and unusual punishment [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified immunity-instruction at Pattern Jury Instruction 10.3*). If [he/she] failed to make this showing, then your verdict must be for Defendant [name] on this claim.

[Insert qualified-immunity instruction (10.3) if appropriate.]

[Insert supervisor/municipal liability instruction (10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress instructions (10.13) if appropriate.]

To prevail on a section 1983 failure to protect claim, prisoner must demonstrate that "he [or she] was incarcerated under conditions posing a substantial risk of serious harm and that prison officials were deliberately indifferent to his [or her] need for protection."

Jones v. Greninger, 188 F.3d 322, 326 (5th Cir. 1999) (quoting *Newton v. Black*, 133 F.3d 301, 308 (5th Cir. 1998)); *see also Arenas v. Calhoun*, 922 F.3d 616, 621 (5th Cir. 2019) ("There is 'no rule of constitutional law [that] requires unarmed officials to endanger their own safety in order to protect a prison inmate.' " (quoting *Longoria v. Texas*, 473 F.3d 586, 594 (5th Cir. 2006))); *Williams v. Hampton*, 797 F.3d 276, 288 (5th Cir. 2015) (en banc) ("[I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." (internal quotation marks omitted) (quoting *Farmer*, 511 U.S. at 842)).

10.10 Eighth Amendment (Excessive Force—Pretrial Detainee)[1]

Plaintiff [name] claims that Defendant [name] violated [his/her] Fourteenth Amendment right to be protected from excessive and unnecessary force.

The Fourteenth Amendment to the Constitution of the United States protects pretrial detainees like Plaintiff [name] from punishment, including excessive and unnecessary force.

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [2]Defendant [name][3] purposely or knowingly used force against him that was objectively unreasonable;[4] and

2. Plaintiff [name] suffered some harm as a result of Defendant [name]'s use of force.[5]

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[1]Earlier versions of the jury instructions did not distinguish between excessive force claims brought by prisoners and those brought by pretrial detainees. But in 2015, the United States Supreme Court decided *Kingsley v. Hendrickson*, holding "that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." 135 S. Ct. 2466, 2473 (2015). Accordingly, this instruction has been added to reflect the change in the law.

[2]If the "under color of law" element has not been conceded, it should be addressed as the first element. Further instructions defining this element are found in Instruction 10.2.

[3]If the plaintiff alleges bystander liability, an appropriate instruction may be adapted from *Kitchen v. Dallas County*: "Bystander liability may be established where an officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act.' " 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Whitley v. Hanna*, 726 F.3d 631, 646–47 (5th Cir. 2013)), *abrogated on other grounds by Kingsley*, 135 S. Ct. 2466.

[4]*Kingsley*, 135 S. Ct. at 2473.

[5]If necessary, these instructions may be modified or limited in wrongful death cases to reflect the state's wrongful death statute. *See Slade v. City of Marshall*, 814 F.3d 263, 264 (5th Cir. 2016) ("[A] plaintiff seeking

To satisfy the first element, Plaintiff [name] must show Defendant [name] purposely or knowingly applied force. That is, Defendant must have intended to [describe the disputed force]. Mere acts of negligence or accidental use of force will not violate the Constitution.[6] However, Plaintiff [name] need not show that Defendant [name] intended to cause harm.[7]

To determine whether the force was objectively unreasonable, you must ask whether a reasonable officer possessing Defendant [name]'s knowledge of the circumstances at the scene would have viewed the force as unreasonable or excessive. This must not be viewed with the 20/20 vision of hindsight, but you are not to be concerned with Defendant [name]'s actual state of mind.

You must also account for the legitimate interests that stem from the need to manage a facility in which individuals are detained, appropriately deferring to policies and practices that in the judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security.[8]

When deciding whether the force was objectively unreasonable or excessive, you may consider the following nonexclusive factors: (1) the relationship between the need for the use of force and the amount of force used; (2) the extent of the plaintiff's injury; (3) any effort made by the officer to temper or to limit the amount of force; (4) the severity of the security problem at is-

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to recover on a wrongful death claim under § 1983 must prove both the alleged constitutional deprivation required by § 1983 and the causal link between the defendant's unconstitutional acts and omissions and the death of the victim, as required by the state's wrongful death statute." (quoting *Phillips ex rel. Phillips v. Monroe Cty.*, 311 F.3d 369, 374 (5th Cir. 2002))).

[6] *Kingsley*, 135 S. Ct. at 2472.

[7] *See id.* at 2475.

[8] *Id.* at 2473 (quoting *Bell v. Wolfish*, 441 U.S. 520, 540 (1979)).

sue; (5) the threat reasonably perceived by the officer; and (6) whether the plaintiff was actively resisting.[9]

If Plaintiff [name] has proved both of these elements by a preponderance of the evidence, then you will have found that Defendant [name] violated [his/her] Fourteenth Amendment rights [and your verdict will be for Plaintiff [name] on this claim] or [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] *(give first bracketed language if there is no qualified immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3).* If Plaintiff [name] failed to make this showing, then the force was not unconstitutional, and your verdict will be for Defendant [name] on this claim.

[Insert qualified immunity instructions (10.3) if appropriate.]

[Insert supervisor/municipal liability instructions (10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress instructions (10.13) if necessary.]

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[9] *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)); see *Cowart v. Erwin*, 837 F.3d 444, 454 (5th Cir. 2016) ("[C]ourts have frequently found constitutional violations in cases where a restrained or subdued person is subjected to the use of force." (quoting *Kitchen*, 759 F.3d at 477)).

10.11 Fourteenth Amendment (Inadequate Medical Care/Conditions of Confinement — Pretrial Detainee)[1,2,3]

Plaintiff [name] claims that Defendant [name] violated [his/her] Fourteenth Amendment right to medi-

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[1]When deciding whether to give Instruction 10.11 or Instruction 10.12, the district court must determine "whether the alleged unconstitutional conduct is a 'condition of confinement' or [an] 'episodic act or omission.' When the alleged constitutional violation is a particular act or omission by an individual that points to a derivative policy or custom of the municipality, we apply the deliberate indifference standard." *Gibbs v. Grimmette*, 254 F.3d 545, 549 n.2 (5th Cir. 2001) (internal citation omitted) (emphasis added). On the other hand, if the allegation is that a condition of confinement violates the Constitution, the proper standard is whether the condition is "reasonably related to a legitimate goal." *Garza v. City of Donna*, 922 F.3d 626, 632 (5th Cir. 2019) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). The Fifth Circuit recently discussed the prerequisites for the use of a conditions-of-confinement theory of liability: "a condition may take the form of 'a rule,' a 'restriction,' 'an identifiable extended condition or practice,' or 'acts or omissions' by a jail official that are 'sufficiently extended or pervasive.' " *Id.* (quoting *Estate of Henson v. Wichita County*, 795 F.3d 456, 468 (5th Cir. 2015)). The Fifth Circuit has also described scenarios that do not establish conditions-of-confinement claims:

> [I]solated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate. Nor can the incidence of diseases or infections, standing alone, imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks. Allegations of insufficient funding are similarly unavailing.

Shepherd v. Dallas Cty., 591 F.3d 445, 454 (5th Cir. 2009). To receive a jury instruction using the reasonable-relationship standard, a plaintiff must show "a pervasive pattern of serious deficiencies in providing for [detainees'] basic human needs." *Id.* In some cases, the plaintiff may proceed on both theories, provided the evidence is sufficient to reach a jury on both. *Shepherd*, 591 F.3d at 453 n.1 ("Further, the district judge is no more required to classify a § 1983 lawsuit than any other case in which multiple theories are pled in the alternative. In the present case, . . . a fact issue existed only on the conditions of confinement claim.").

[2]The same distinction between episodic acts and conditions of confinement applies to failure-to-protect cases. *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) ("[M]edical care and failure-to-protect cases should be treated the same for purposes of measuring constitutional liability.").

[3]If the plaintiff has challenged the fact of detention rather than a specific condition of confinement, Fourth Amendment standards apply if the underlying arrest was not supported by probable cause, *Manuel v.*

cal care while [he/she] was detained at [specify jail, prison, or other facility].

A pretrial detainee who has not been convicted of a crime has a right under the Fourteenth Amendment to the United States Constitution to be protected from impermissible punishment like the denial of or delay in providing certain medical care.[4]

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence:

1. [5]the existence of an identifiable intended condition, policy, or practice of inadequate medical care; and

2. that the condition, policy, or practice resulted in a serious deprivation of Plaintiff [name]'s basic human needs and was not reasonably related to a legitimate governmental objective.[6]

As to the first element, a condition usually results from an explicit policy or restriction. But a pattern may demonstrate an unstated or *de facto* policy. To show such a policy, Plaintiff [name] must show more than isolated instances of inadequate or even negligent medical care. It is likewise not enough to show that Plaintiff [name] suffered from episodic acts or omissions of jail

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City of Joliet, 137 S. Ct. 911, 917–20 (2017), while Fourteenth Amendment procedural due process standards apply if the underlying arrest was lawful, *Jauch v. Choctaw County*, 874 F.3d 425, 429–35 (5th Cir. 2017).

[4]If the condition or policy is unrelated to medical care, the court should replace the reference to a denial or delay in medical care with an instruction that a detainee must be protected from general conditions, practices, rules or restrictions of pretrial confinement that impermissibly punish him or her. *Garza v. City of Donna*, 922 F.3d at 634 (quoting *Hare*, 74 F.3d at 644).

[5]If the "under color of law" element has not been conceded, it should be addressed as the first element. Further instructions defining this element are found in Instruction 10.2.

[6]*Shepherd*, 591 F.3d at 455 n.3 (approving jury charge).

officials. Instead, Plaintiff [name] must show that the disputed acts are indicative of a system-wide problem that has been extended or pervasive. In other words, if Plaintiff [name] relies on an act or omission of a particular jail [officer/official] to prove that Defendant [name] intended the condition or practice, the act or omission must be the result of an established policy, or it must be part of, or typical of, an extended or pervasive practice.[7]

To establish the second element and prove that a condition of confinement constituted impermissible punishment, Plaintiff [name] must prove a pervasive pattern of serious deficiencies in providing for [his/her] basic needs that was not reasonably related to a legitimate governmental objective. Not every denial or delay of medical care imposed during pretrial detention amounts to "punishment" in the constitutional sense. The effective management of a detention facility is a valid objective that may justify imposing conditions and restrictions. Pretrial detainees are not entitled to the best medical care available or to the level of medical care that may be available to persons who are not detained. But a facility must provide for a detainee's basic human needs.[9] To satisfy this element, Plaintiff [name] must prove that the level of medical care provided generally at the [jail, prison, or other facility] was so inadequate that it resulted in a serious deprivation of [his/her] basic human needs, and that the level of care provided was not reasonably related to a legitimate governmental objective.[10]

If Plaintiff [name] has proved both of these ele-

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[7]Similar language was approved in *Shepherd v. Dallas County*, but the committee has streamlined the language. *Id.*; *see Duvall v. Dallas Cty*, 631 F.3d 203, 207–08 (5th Cir. 2011) (per curiam).

[9]*Shepherd*, 591 F.3d at 453–54.

[10]*Shepherd*, 591 F.3d at 455; *see also id.* at 452 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

ments by a preponderance of the evidence, then Defendant [name] violated Plaintiff [name]'s Fourteenth Amendment rights [and your verdict must be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3*). If [he/she] failed to make this showing, then your verdict must be for Defendant [name] on this claim.

[Insert qualified-immunity instruction (10.3) if appropriate.]

[Insert supervisor/municipal liability instruction (10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress damages instructions (10.13) if appropriate.]

10.12 Fourteenth Amendment (Inadequate Medical Care/Episodic Acts—Pretrial Detainee)[1,2,3]

Plaintiff [name] claims that Defendant [name] violated [his/her] Fourteenth Amendment right to medical care while [he/she] was detained at [specify jail, prison, or other facility].

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[1]When deciding whether to give Instruction 10.11 or Instruction 10.12, the district court must determine "whether the alleged unconstitutional conduct is a 'condition of confinement' or [an] 'episodic act or omission.' When the alleged constitutional violation is a particular act or omission by an individual that points to a derivative policy or custom of the municipality, we apply the deliberate indifference standard." *Gibbs v. Grimmette*, 254 F.3d 545, 549 n.2 (5th Cir. 2001) (internal citation omitted) (emphasis added). On the other hand, if the allegation is that a condition of confinement violates the Constitution, the proper standard is whether the condition is "reasonably related to a legitimate goal." *Garza v. City of Donna*, 922 F.3d 626, 632 (5th Cir. 2019) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). The Fifth Circuit recently discussed the prerequisites for the use of a conditions-of-confinement theory of liability: "a condition may take the form of 'a rule,' a 'restriction,' 'an identifiable extended condition or practice,' or 'acts or omissions' by a jail official that are 'sufficiently extended or pervasive.' " *Id.* (quoting *Estate of Henson v. Wichita Cty.*, 795 F.3d 456, 468 (5th Cir. 2015)). The Fifth Circuit has also described scenarios that do not establish conditions-of-confinement claims:

> [I]solated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate. Nor can the incidence of diseases or infections, standing alone, imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks. Allegations of insufficient funding are similarly unavailing.

Shepherd v. Dallas Cty., 591 F.3d 445, 454 (5th Cir. 2009). To receive a jury instruction using the reasonable-relationship standard, a plaintiff must show "a pervasive pattern of serious deficiencies in providing for [a detainee's] basic human needs." *Id.* In some cases, the plaintiff may proceed on both theories, provided the evidence is sufficient to reach a jury on both. *See id.* at 452 n.1 ("Further, the district judge is no more required to classify a § 1983 lawsuit than any other case in which multiple theories are pled in the alternative. In the present case, . . . a fact issue existed only on the conditions of confinement claim.").

[2]A different standard applies to excessive-force claims. *See* Instruction 10.10.

[3]The same distinction between episodic acts and conditions of confinement applies to failure-to-protect cases. *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) ("[M]edical care and failure-to-protect cases should be treated the same for purposes of measuring constitutional liability.").

A pretrial detainee who has not been convicted of a crime has a right under the Fourteenth Amendment to the United States Constitution to be protected from impermissible punishment like denials of, or delays in, providing certain medical care.

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [4]Plaintiff [name] was exposed to a substantial risk of serious harm;

2. Defendant [name] displayed deliberate indifference to that risk; and

3. the deliberate indifference harmed Plaintiff [name].[5,6]

The first element asks whether a reasonable person would view Plaintiff [name]'s illness or injury as suf-

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[4]If the "under color of law" element has not been conceded, it should be addressed as the first element. Further instructions defining this element are found in Instruction 10.2.

[5]*McCarty v. Zapata Cty.*, 243 F. App'x 792, 794 (5th Cir. 2007) (per curiam) (citing *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003) ("[P]laintiff must establish resulting injuries."); *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004) (explaining prima facie case).

[6]If the claim is that health care was improperly delayed, then the court should instruct the jury that "[a] delay in medical care violates the [Fourteenth] Amendment only if it is due to deliberate indifference and results in substantial harm," *Smith v. Milhauser*, 444 F. App'x 812, 813 (5th Cir. 2011) (per curiam) (emphasis added) (citing *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993)), but also that "[t]he pain suffered during the delay itself . . . can constitute a substantial harm," *Westfall v. Luna*, 903 F.3d 534, 551 (5th Cir. 2018) (per curiam) (citing *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 422 (5th Cir. 2017) (per curiam)). If necessary, these instructions may be modified or limited in wrongful death cases to reflect the state's wrongful death statute. *See Slade v. City of Marshall*, 814 F.3d 263, 264 (5th Cir. 2016) ("[A] plaintiff seeking to recover on a wrongful death claim under § 1983 must prove both the alleged constitutional deprivation required by § 1983 and the causal link between the defendant's unconstitutional acts and omissions and the death of the victim, as required by the state's wrongful death statute." (quoting *Phillips ex rel. Phillips v. Monroe Cty.*, 311 F.3d 369, 374 (5th Cir. 2002))).

ficiently serious based on all of the circumstances that existed.[7] This inquiry asks what a reasonable person would conclude and does not consider Defendant [name]'s state of mind.

The second element—deliberate indifference—requires proof of egregious conduct.[8] Plaintiff [name] must prove Defendant [name] knew of and disregarded an excessive risk to Plaintiff [name]'s health or safety. Plaintiff [name] must prove that Defendant [name]: (1) was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed; and (2) actually drew that inference.[9] An inmate's mere disagreement with the type, amount, or timing of medical treatment [he/she] receives is not enough to meet this test.[10,11,12]

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[7]*Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)) (holding that "the deprivation alleged must be, objectively, 'sufficiently serious'; a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.' "

[8]*Cooper v. Johnson*, 353 F. App'x 965, 968 (5th Cir. 2009) ("A defendant's conduct must rise 'to the level of egregious conduct.' " (quoting *Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006))).

[9]*Calhoun v. Hargrove*, 312 F.3d 730, 734 (5th Cir. 2002) (quoting *Farmer*, 511 U.S. at 837). A court must not instruct a jury that a defendant must have had a "subjective intention that harm occur," as the Fifth Circuit has found that standard to be contrary to Supreme Court and Fifth Circuit precedent. *See Garza*, 922 F.3d at 634–36.

[10]*Gibson v. Collier*, 920 F.3d 212, 216 (5th Cir. 2019) (" '[M]ere disagreement with one's medical treatment is insufficient' to state a claim under the Eighth Amendment." (quoting *Delaughter v. Woodall*, 909 F.3d 130, 136 (5th Cir. 2018))).

[11]Some cases observe that "[t]o make a showing of deliberate indifference, the inmate must submit evidence that prison officials refused to treat him, ignored his complaints, intentionally treated him [or her] incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *McCarty*, 243 F. App'x at 794 (citing *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)); *see also Delaughter*, 909 F.3d at 138 (distinguishing the failure to provide "a prescribed course of treatment" from an inmate's "subjective opinion of the sufficiency of his medical treatment that is either contradicted or unsupported by medical professionals").

If Plaintiff [name] has proved each of these three elements listed above by a preponderance of the evidence, then Defendant [name] violated Plaintiff [name]'s Fourteenth Amendment rights [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified-immunity issue; give second if there is such an issue along with the qualified-immunity instruction at Pattern Jury Instruction 10.3*). If [he/she] failed to make this showing, then your verdict must be for Defendant [name] on this claim.

[Insert qualified-immunity instruction (10.3) if appropriate.]

[Insert supervisor/municipal liability instruction (10.4) if appropriate.]

[Insert standard damages instructions and emotional-distress damages instructions (10.13) if appropriate.]

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[12]In the failure to protect context, a court should instruct the jury that "[a]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *Alderson,* 848 F.3d at 420 (quoting *Alton v. Tex. A & M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999)).

10.13 Emotional Distress Damages

To recover compensatory damages for mental and emotional distress,[1] Plaintiff [name] must prove that [he/she] has suffered a specific discernable injury with credible evidence. Hurt feelings, anger, and frustration are part of life and are not the types of harm that could support a mental-anguish award. Evidence of mental anguish need not be corroborated by doctors, psychologists, or other witnesses, but Plaintiff [name] must support [his/her] claims with competent evidence of the nature, extent, and duration of the harm. Damages for mental or emotional distress must be based on the evidence at trial. They may not be based on speculation or sympathy.[2]

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[1]Under the Prison Litigation Reform Act, a plaintiff who was incarcerated or detained at the time suit was filed cannot recover damages for mental or emotional distress unless he or she also shows "physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e); *see Janes v. Hernandez*, 215 F.3d 541, 543 (5th Cir. 2000) (holding that the limitations of the PLRA apply only to suits filed while the plaintiff is a prisoner). This instruction, therefore, is only proper as to such a plaintiff if the evidence has shown physical injury or a sexual act.

[2]*See Brady v. Fort Bend Cty.*, 145 F.3d 691, 718 (5th Cir. 1998) (quoting *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978)); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, 940 (5th Cir. 1996)); *see also Vadie v. Miss. State Univ.*, 218 F.3d 365, 377–78 (5th Cir. 2000).

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EMPLOYMENT CLAIMS[1]

OVERVIEW OF EMPLOYMENT DISCRIMINATION, HARASSMENT, AND RETALIATION CASES: PRETEXT, MIXED-MOTIVE, AND BUT-FOR STANDARDS

In many employment cases, the type of challenge to the employment action is critical to instructing the jury on liability, particularly on causation. Recent Supreme Court decisions have clarified the causation standards for certain Title VII claims and for ADEA claims. The causation standard for other employment claims has received less recent attention and is currently less clear. The jury instructions must follow the most recent case law for the particular statute, facts, and issues presented, and must be tailored to fit each particular case.

The key recent Supreme Court cases[2] that have clarified the causation standard for certain Title VII claims and for ADEA claims are:

1. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003): The causation standard in Title VII discrimination cases under 42 U.S.C. § 2000e-2(m) is whether the plaintiff's protected status was a "motivating factor" in the challenged employment decision.

2. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009): Motivating-factor instructions are not proper in ADEA cases. The causation standard in such cases is whether the plaintiff's

[1]The 2009 Fifth Circuit Labor and Employment Law Pattern Jury Charge was developed by the Fifth Circuit Labor and Employment Law Pattern Jury Charge Advisory Committee, under the guidance of the Honorable Martin L.C. Feldman, United States District Judge for the Eastern District of Louisiana and the Chair of the Committee on Pattern Jury Instructions, Fifth Circuit District Judges Association. This updated version owes a debt to the Committee's hard work.

[2]This chapter does not use the "*id.*" short-citation form because many judges and lawyers cut and paste portions of the instructions into different documents, which would make an unlinked "*id.*" citation confusing. This chapter instead uses a short form with the case name and citation.

age was a "but-for" cause of the challenged employment decision.

3. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013): In Title VII retaliation cases, the plaintiff's protected activity must be a "but-for" cause of the challenged employment decision. Motivating-factor instructions are not proper.

One frequently filed type of action in which the causation standard remains less clear is the Title VII disparate-treatment discrimination claim under 42 U.S.C. § 2000e-2. A plaintiff's claim may arise under § 2000e-2(a), which makes it unlawful for an employer to discriminate "because of" an impermissible factor, or § 2000e-2(m), which makes it unlawful for an employer to discriminate for impermissible reasons even if the employer's motivations for acting also included legitimate reasons.[3]

There are many cases that describe a § 2(a) case as a "pretext" case and a § 2(m) case as a "mixed-motive" case. This use of the labels "pretext" and "mixed-motive," while widespread and long-standing, can be confusing and is not used for § 2(a) or § 2(m) cases in these instructions. More recent decisions have clarified that labeling a Title VII disparate-treatment case as a "pretext case" does not determine the causation standard. Both § 2(a) and § 2(m) allow what the Fifth Circuit has referred to as a "permissive-pretext" instruction.[4] When a plaintiff shows that the employer's proffered reason for the employment decision is a pretext for unlawful discrimination, the jury may, but is not required to, infer discriminatory intent. This can happen under § 2(a) or § 2(m). To avoid confusion between this method of proof and the alternative statutory theories, these instructions refer to "§ 2(a) claims" or "§ 2(m) claims."

As noted above, the law is now settled that § 2(m) claims carry a "motivating-factor" causation standard. Section § 2(a) claims appear to carry a "but-for" causation standard.[5] To determine whether to instruct under § 2(a) or § 2(m), the court

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[3]*See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (stating that § 2(m) "establishe[d] an alternative for proving that an unlawful employment practice has occurred." (citation and quotation omitted)).

[4]*See Ratliff v. City of Gainesville, Tex.*, 256 F.3d 355, 361 (5th Cir. 2001). *But see Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 574 (5th Cir. 2004) (recognizing that *Ratliff* is binding precedent but holding that failure to give permissive pretext instruction is harmless error).

[5]Section 2(m) states that "except as otherwise provided in this subchapter," the motivating-factor test applies when an unlawful motive exists "even though other factors also motivated the practice." Section

must decide whether, given the trial evidence, a reasonable jury could conclude that the employer acted based on a single motivating factor or that the employer acted based on multiple factors, at least one of which is legitimate.

Generally, a court gives a "but-for" causation instruction if it determines that the trial evidence shows that: (1) the claim arises under § 2(a); and (2) the only reasonable conclusion a jury could reach is that discriminatory animus was either the sole cause or played no role at all in the challenged employment action. In these cases, the "same-decision" affirmative defense under 42 U.S.C. § 2000e-2(a)(g)(2) is not available.

A court generally gives the more relaxed "mixed-motive" instruction if it determines that the trial evidence shows that: (1) the claim arises under § 2(m); and (2) the jury could reasonably find that discrimination is one of two or more reasons for the challenged action, at least one of which may be legitimate. Here, the plaintiff has the burden of proving that discrimination was a motivating factor in the challenged action, and the defendant may invoke—if properly raised and supported—the "same-decision" affirmative defense.[6] If so, the defendant has the burden of proving that it would have taken the same action without regard to the discriminatory factor.[7]

The most specific recent Fifth Circuit guidance on this point in

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2(m) does not *appear* to abrogate § 2(a) and its "because of" standard. In *Gross* and *Nassar*, the Supreme Court held that "because of" means "but-for" causation, and applied that standard to claims unaffected by § 2(m). *Gross*, 557 U.S. at 176–77; *Nassar*, 133 S. Ct. at 2533. It is therefore appropriate to provide a "but-for" alternative for claims presented under § 2(a). *Fisher v. Lufkin Indus. Inc.*, 847 F.3d 752, 757 (5th Cir. 2017). This is also consistent with those Fifth Circuit cases applying "but-for" to claims traditionally referred to as "pretext" cases. *See, e.g.*, *Guerra v. N.E. Indep. Sch. Dist.*, 496 F.3d 415, 418 (5th Cir. 2007) (pre-*Gross* ADEA claim explaining that "but for" applies in "pretext" cases). The Committee notes that causation continues to be a subject of judicial scrutiny.

[6] *Garcia v. City of Hous.*, 201 F.3d 672, 675 (5th Cir. 2000) ("[T]o prove a mixed-motive defense the employer should be able to present some objective proof that the same decision would have been made."). Matthew R. Scott and Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Cases to Mixed Motive*, 36 St. Mary's L.J. 395, 401 n.81 (2005).

[7] The plaintiff's burden of proving the "motivating factor" causation standard is, of course, separate from the defendant's burden to prove a "mixed-motive" affirmative defense.

a published opinion appears to be *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), *abrogated in part by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). In *Smith*, the Fifth Circuit stated:

> "At some point in the proceedings, . . . the District Court must decide whether a particular case involves mixed motives." (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989)). As explained by the en banc Ninth Circuit decision in *Desert Palace*, "[o]nce at the trial stage, the plaintiff is required to put forward evidence of discrimination 'because of' a protected characteristic. After hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly. . . . [T]he choice of jury instructions depends simply on a determination of whether the evidence supports a finding that just one—or more than one-factor actually motivated the challenged decision." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856 (9th Cir. 2002) (en banc). Put another way, if the district court has before it substantial evidence supporting a conclusion that both a legitimate and an illegitimate (i.e., more than one) motive may have played a role in the challenged employment action, the court may give a mixed-motive instruction.

Smith, 602 F.3d at 333.

The Committee recognizes that both *Smith* and the case it cites, *Costa v. Desert Palace*, were abrogated or reversed in part by the Supreme Court's opinions in *Nassar* (on Title VII retaliation claims) and *Desert Palace* (on the proper causation standard under § 2000e-2(m)). And both were decided before the more recent cases from the Supreme Court. But the quoted paragraph remains the most recent Fifth Circuit guidance on when to use the causation standards in a Title VII discrimination case. *See also Zamora v. City of Houston*, 798 F.3d 326 (5th Cir. 2015).

Finally, in the 2009 Pattern Jury Instructions, the uncertainty in the case law about when the "but-for" or "motivating-factor" causation standard was appropriate led the Committee to use the statutory generic language "because of" or "on account of" in certain non-mixed-motive instructions. When appropriate under current law, the instructions provide both "but-for" and motivating-factor alternatives in stating the charge elements and the accompanying jury questions. Some instructions continue to use the generic statutory language—because of or on account of—in introducing particular liability theories.

11.1 Title VII (42 U.S.C. § 2000e-2)—Discrimination Based on Race, Color, National Origin, Religion, or Sex (Disparate Treatment)

A. Committee Notes

This charge is for Title VII discrimination cases in which the plaintiff alleges intentional discrimination because of a trait protected by Title VII race, color, national origin, religion, or sex, resulting in an "adverse employment action." An adverse employment action for Title VII discrimination claims based on race, color, national origin, religion, or sex includes only ultimate employment decisions such as hiring, discharging, promoting, demoting, reassigning, or compensating. Title VII does not cover every decision an employer makes that might have some tangential effect on those ultimate decisions. An employment action that does not affect job duties, compensation, or benefits is not an adverse employment action. The Supreme Court recently held, in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1737, 1739 (2020), that Title VII also forbids employers from discriminating against employees because of their sexual orientation or for being transgender, applying a but-for standard.

Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the plaintiff must first make a *prima facie* pleading. The burden of production then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its action. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011). If it does that, "the presumption of discrimination disappears." *Id.* The plaintiff, who always has the ultimate burden, must then "produce substantial evidence indicating that the proffered legitimate nondiscriminatory reason is a pretext for discrimination." *Outley v. Luke & Assoc., Inc.*, 840 F.3d 212, 216 (5th Cir. 2016). The *McDonnell Douglas* burden-shifting framework "is applicable only in a

directed verdict or summary judgment situation," and does not apply in a trial on the merits. *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 575 (5th Cir. 2004) (quoting *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285 (5th Cir. 1986)).

A *prima facie* case requires the plaintiff to allege facts showing that he or she: "(1) is a member of a protected class; (2) was qualified for her position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that others similarly situated were treated more favorably." *Id.*; *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017) (quoting *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004)).

B. Charge

Plaintiff [name] claims that:

(For a § 2(a) case) [he/she] would not have been [specify adverse employment action] but for [his/her] [protected trait].

OR

(For a § 2(m) case) Defendant [employer's name]'s [specify adverse employment action] of Plaintiff [name] was motivated by the Plaintiff [name]'s [protected trait].

The employer, Defendant [name], denies Plaintiff [name]'s claims, and contends [specify contentions].

It is unlawful for an employer to discriminate against an employee because of the employee's [specify protected trait]. An employer may, however [specify adverse employment action] an employee for other reasons, good or bad, fair or unfair.

To prove unlawful discrimination, Plaintiff [name] must prove by a preponderance of the evidence that:

1. Defendant [name] [specify adverse employment action] Plaintiff [name];[1] and

2. **(For a § 2(a) case)** Defendant [name] would not have [specify adverse employment action] Plaintiff [name] in the absence of—in other words, but for—[his/her] [protected trait].

   Plaintiff [name] does not have to prove that unlawful discrimination was the only reason Defendant [name] [specify adverse employment action] [him/her]. But Plaintiff [name] must prove that Defendant [name]'s decision to [specify adverse employment action] [him/her] would not have occurred in the absence of such discrimination.

   OR

   (For a § 2(m) case)[2] Defendant [name]'s [specify adverse employment action] of Plaintiff [name] was motivated by [his/her] [protected trait].

   Plaintiff [name] does not have to prove that

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[1]In many cases, there is no dispute that the plaintiff experienced an adverse employment action. The first element can simply identify the employment action at issue, such as job termination, failure to promote, demotion, or transfer. If there is a factual dispute about whether the challenged action was an adverse employment action, the first element should be adjusted using the definition of adverse employment action set out above, and the jury questions should include this issue.

[2]The defendant may be entitled to a mixed-motive-affirmative-defense instruction. The mixed-motive affirmative defense should be submitted only when properly raised and when there is credible evidence from which a reasonable jury could conclude that a mix of permissible and impermissible reasons factored into the employer's decision-making process. When this defense applies, the standard is whether the defendant shows that it would have made the same decision regardless of the plaintiff's protected status. *See* Pattern Jury Instruction 11.13.

unlawful discrimination was the only reason Defendant [name] [specify adverse employment action] [him/her].[3]

(For either a § 2(a) or a § 2(m) case) If you find that the reason Defendant [name] has given for [specify adverse employment action] is unworthy of belief, you may, but are not required to, infer that Defendant [name] was motivated by Plaintiff's [protected trait].[4]

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[3]If the case raises a cat's paw issue of employer liability, *see* Pattern Jury Instruction 11.7.

[4]See *Ratliff v. City of Gainesville*, 256 F.3d 355, 361 (5th Cir. 2001).

11.1 Pattern Jury Question, Title VII—Discrimination Based on Race, Color, National Origin, Religion or Sex (Disparate Treatment)

JURY QUESTION

Question No. 1[1]

Has Plaintiff [name] proved that

(For a § 2(a) case) [he/she] would not have been [specify adverse employment action] in the absence of—in other words, but for [his/her] [protected trait]?

OR

(For a § 2(m) case) [his/her] [protected trait] was a motivating factor in Defendant [name]'s decision to [specify adverse employment action] [him/her]?[2]

Answer "Yes" or "No."

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[1] If there is a dispute as to whether the plaintiff was subject to an adverse employment action, the first question may be as follows:

Question No. 1

Has Plaintiff [name] proved that Defendant [name]'s decision to [specify challenged employment action] was an "adverse employment action?

Answer "Yes" or "No."

[2] If the defendant is entitled to a mixed-motive-affirmative-defense instruction, *see* Pattern Jury Instruction 11.13.

11.2 Title VII (42 U.S.C. § 2000E-2)—Supervisor Harassment Without Tangible Employment Action (Hostile Work Environment)

A. Committee Notes

This charge is for cases in which the plaintiff seeks to impose vicarious liability on the employer for harassment by a supervisor, whether the harassment contains sexually explicit overtones or is based on race, color, religion, national origin, or gender,[1] and the plaintiff did not experience a tangible employment action. The underlying theory is that an agency relationship aided the supervisor in creating a hostile or abusive work environment.[2] The pretext/motivating-factor distinction is generally not a concern in this type of case.

This charge may be used when the alleged harasser is a supervisor with immediate or successively higher authority over the plaintiff. A supervisor whose conduct can expose the employer to vicarious liability must be one whom the employer has empowered to take tangible employment action against the employee.[3] Supervisory status is not established merely by showing that the in-

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[1]There is often confusion about when the term "sex" and the term "gender" are appropriate. The dictionary distinction is that "sex" generally refers to either of the two forms of individuals distinguished on the basis of reproductive organs and related physical differences, while "gender" generally refers to the association of behavioral, cultural, or psychological traits with a particular sex. Merriam-Webster Unabridged Dictionary, http://unabridged. merriam-webster.com/unabridged/sex (last visited May 2, 2013). *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.")

[2]*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998).

[3]*Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013).

dividual has the ability to direct the employee's tasks or manage the employee's daily work.[4]

A "tangible employment action" is a significant change in employment status, such as hiring, firing, failing to promote, reassigning with significantly different responsibilities, or a decision causing a significant change in benefits.[5]

The employer may assert the *Ellerth/Faragher* affirmative defense. The elements of this affirmative defense are that: (a) the employer exercised reasonable care to prevent and correct promptly the harassing behavior; and (b) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.[6] This defense does not apply in a case involving harassment by a person who is not a direct, or suc-

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[4]If there is a factual dispute about whether the alleged harasser was the plaintiff's supervisor, the following instruction may be used:

> to be a "supervisor," the employer must have empowered the employee to make decisions about Plaintiff [name] that affect a significant change in [his/her] work status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decisions causing a significant change in benefits. It is not enough to have the ability to exercise direction over Plaintiff [name]'s daily work.

Vance, 570 U.S. at 431–32.

If the case involves a defendant employer who concentrates decision-making authority in a few individuals, the instruction may include the following:

> An employer who limits decision-making authority to a few individuals who in turn rely on recommendations by other workers who interact with the employee may be held to have effectively delegated the power to take tangible employment action to the worker on whose recommendations it relies.

Vance, 570 U.S. at 446–47.

[5]*Vance*, 570 U.S. at 429.

[6]*Faragher*, 524 U.S. at 807.

cessively higher, supervisor, or in a case culminating in a tangible employment action.[7]

If the case involves alleged sexual harassment by an employer's "proxy," such as an owner, the employer may be vicariously liable and the *Ellerth/Faragher* affirmative defense does not apply.[8]

B. Charge

Plaintiff [name] claims [he/she] was [sexually harassed] [harassed based on [his/her] [protected trait]] by [his/her] supervisor and that [his/her] employer, Defendant [name], is responsible for the harassing conduct.

Defendant [name] denies the claims and contends that [specify contentions].

It is unlawful for an employer to [sexually harass an employee] [harass an employee because of that employee's [protected trait]].

For Defendant [name] to be liable for [sexual harassment] [harassment based on [protected trait]], Plaintiff [name] must prove by a preponderance of the evidence that [his/her] supervisor, [name], [engaged in sexual harassment] [harassed Plaintiff [name] because of Plaintiff [name]'s [protected trait]] and that the harassment was sufficiently severe or pervasive to:

1. alter the terms or conditions of Plaintiff [name]'s employment; and

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[7] *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383–84 (5th Cir. 2003).

[8] In *Ackel v. National Communications, Inc.*, 339 F.3d 376, 383 (5th Cir. 2003), the court stated: "We read the Supreme Court's opinions in *Faragher* and *Ellerth* . . . [to state] that the employer is vicariously liable for its employees' activities in two types of situations: (1) there is a tangible employment action or (2) the harassing employee is a proxy for the employer."

2. create a hostile or abusive work environment.[9]

To determine whether the conduct in this case rises to a level that altered the terms or conditions of Plaintiff [name]'s employment, you should consider all of the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff [name]'s work performance.[10] There is no requirement that the conduct be psychologically injurious.[11]

Harassment may include extremely insensitive conduct [based on sex] [because of protected trait]. [Although sexual harassment must be based on sex, it need not be motivated by sexual desire.[12]] Simple teasing, offhand comments, sporadic use of offensive language, occasional jokes related to [sex] [protected trait], and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. But discriminatory intimidation, ridicule, [sexual advances, requests for sexual favors if sexual harassment asserted] or other verbal or physical conduct because of Plaintiff [name]'s [protected trait] may be sufficiently extreme to alter the terms and conditions of employment.[13]

In determining whether a hostile or abusive work environment existed, you must consider the evidence from both Plaintiff [name]'s perspective and from the perspective of a reasonable person. First, Plaintiff [name] must actually find the conduct offensive. Next,

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[9]*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986).

[10]*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[11]*Harris*, 510 U.S. at 22.

[12]*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[13]*Harris*, 510 U.S. at 21; *Gardner v. CLC of Pasagoula*, 915 F.3d 320, 325 (5th Cir. 2019); *Lauderdale v. Tex. Dep't of Criminal Justice*, 512 F.3d 157, 163 (5th Cir. 2007) (quoting *Faragher*, 524 U.S. at 788).

you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person. Nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff [name] would find the conduct offensive.[14]

(For a case in which there is a dispute about whether the harasser is the plaintiff's supervisor)

To be a "supervisor," the employer must have empowered the employee to make decisions about Plaintiff [name] that effect a significant change in [his/her] work status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decisions causing a significant change in benefits. It is not enough to have the ability to exercise direction over Plaintiff [name]'s daily work.[15]

(For a case in which the defendant asserts the *Ellerth/Farragher* affirmative defense)

If you find that Plaintiff [name] was [sexually harassed] [harassed because of [his/her] protected trait], then you must find for Plaintiff [name] unless Defendant [name] proves by a preponderance of the evidence that:

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[14] *Oncale*, 523 U.S. at 81.

[15] *Vance*, 570 U.S. at 446–47. If the case involves a defendant employer who concentrates decision-making authority in a few individuals, the instruction may include the following:

> An employer who limits decision-making authority to a few individuals who in turn rely on recommendations by other workers who interact with the employee may be held to have effectively delegated the power to take tangible employment action to the worker on whose recommendations it relies.

Vance, 570 U.S. at 446–47.

1. Defendant [name] exercised reasonable care to prevent and correct promptly the harassing behavior; and

2. Plaintiff [name] unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant [name] or to avoid harm otherwise. If Defendant [name] proves both elements, you must find for Defendant [name].[16]

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[16]*Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The *Ellerth*/*Faragher* instruction is appropriately given only if the affirmative defense is properly raised. *See also E.E.O.C. v. Boh Bros. Const. Co., LLC*, 731 F.3d 444, 462–66 (5th Cir. 2013).

11.2 Pattern Jury Questions, Supervisor Sexual and Other Harassment without Tangible Employment Action (Hostile Work Environment)

JURY QUESTIONS

Question No. 1

Has Plaintiff [name] proved that [he/she] was [sexually harassed] [harassed because of [his/her] [protected trait]] by [his/her] supervisor [name]?

Answer "Yes" or "No."

_____

(For a case in which the *Ellerth/Faragher* affirmative defense is asserted)

If you answered "Yes" to Question No. 1, then answer Question No. 2.

Question No. 2

Has Defendant [name] proved that it exercised reasonable care to prevent and promptly correct the harassing behavior?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3

Has Defendant [name] proved that Plaintiff [name] unreasonably failed to take advantage of or use [specify preventive or corrective opportunities] provided by Defendant [name] or to avoid harm otherwise?

Answer "Yes" or "No."

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11.3 Title VII (42 U.S.C. § 2000E-2)—Supervisor Sexual Harassment with Tangible Employment Action (Quid Pro Quo)

A. Committee Notes

This charge is for cases in which the plaintiff alleges a tangible employment action because he or she rejected sexual advances, requests, or demands by a supervisor with immediate or successively higher authority over the plaintiff.[1] A tangible employment action is a significant change in employment status, such as hiring, firing, demotion, failing to promote, reassignment with significantly different responsibilities, undesirable reassignment,[2] or a significant change in benefits.[3]

Constructive discharge can constitute the tangible employment action that a quid pro quo sexual-

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[1]If there is a factual dispute about whether the alleged harasser was the plaintiff's supervisor, the following instruction may be used:

> to be a "supervisor," the employer must have empowered the employee to make decisions about Plaintiff [name] that effect a significant change in [his/her] work status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decisions causing a significant change in benefits. It is not enough to have the ability to exercise direction over Plaintiff [name]'s daily work.

Vance v. Ball State Univ., 570 U.S. 421, 431–32 (2013).

If the case involves a defendant employer who concentrates decision-making authority in a few individuals, the instruction may include the following:

> An employer who limits decision-making authority to a few individuals who in turn rely on recommendations by other workers who interact with the employee may be held to have effectively delegated the power to take tangible employment action to the worker on whose recommendations it relies.

Vance, 570 U.S. at 446–47.

[2]Whether a reassignment is undesirable should be assessed from an objective standpoint. *See generally*, *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 221 (5th Cir. 1999). If this is a disputed fact, the instructions and jury question should be adjusted.

[3]*Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

harassment claim requires.[4] *See* Pattern Jury Instruction 11.6.

B. Charge

Plaintiff [name] claims [he/she] was [specify tangible employment action], resulting from [his/her] rejection of [supervisor's name] [sexual advances, requests, or demands.]

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify Defendant's contentions].

It is unlawful for an employer to discriminate against an employee because the employee rejects a supervisor's sexual advances, requests, or demands.

For Defendant [name] to be liable for sexual harassment, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [His/her] supervisor [name] made sexual advances, requests, or demands to Plaintiff [name];

2. Plaintiff [name] rejected [his/her] supervisor's sexual advances, requests, or demands;

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[4]*See Green v. Brennan*, 136 S. Ct. 1769, 1776–77 (2016) ("The constructive-discharge doctrine contemplates a situation in which an employer discriminates against an employee to the point such that his 'working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign . . . [w]hen the employee resigns in the face of such circumstances, Title VII treats that resignation as tantamount to an actual discharge.") (quotation omitted); *Johnson v. Halstead*, 916 F.3d 410, 420–21 (5th Cir. 2019); *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 480 (5th Cir. 2008) (stating that a constructive discharge is a tangible employment action in some circumstances).

3. Defendant [name] [specify tangible employment action] Plaintiff [name];[5] and

4. Defendant [name] [specify tangible employment action] Plaintiff [name] because of [his/her] rejection of [his/her] supervisor's sexual advances, requests, or demands.[6]

Plaintiff [name] does not have to prove that [his/her] rejection of the sexual advances, requests, or demands was the only reason Defendant [name] [specify tangible employment action] [him/her]. But Plaintiff [name] must prove that Defendant [name]'s decision to [specify tangible employment action] [him/her] would not have occurred in the absence of [his/her] rejection of those advances, requests, or demands.

If you find that the reason Defendant [name] has given for [specify tangible employment action] is unworthy of belief, you may, but are not required to, infer that Defendant [name] would not have [specify tangible employment action] Plaintiff [name] but for [his/her] rejection of supervisor [name]'s sexual advances, requests, or demands.

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[5]If there is a factual dispute about whether the plaintiff suffered a tangible employment action, the charge should be adjusted using the definition of tangible employment action, and the jury questions should be adjusted accordingly.

[6]It is unusual for a mixed-motive theory of liability to be asserted in the quid pro quo context. These instructions focus on the most common case presentations. In the event a mixed-motive theory is presented, the following instruction may be used:

> Plaintiff [name] claims that Defendant [name]'s [specify tangible employment action] of [him/her] was motivated by [his/her] rejection of supervisor [name]'s sexual advances, requests or demands. Plaintiff [name] does not have to prove that [his/her] rejection of [supervisor's name]'s advances, requests or demands was the only reason Defendant [name] [specify tangible employment action] [him/her].

11.3 Pattern Jury Question, Supervisor Sexual Harassment with Tangible Employment Action (Hostile Work Environment—Quid Pro Quo)

JURY QUESTION

Question No. 1[1]

Has Plaintiff [name] proved that [he/she] would not have been [specify tangible employment action] but for [his/her] rejection of supervisor [name]'s sexual advances, requests, or demands?[2]

Answer "Yes" or "No."

_____

[1]If there is a fact dispute about whether the plaintiff experienced a tangible employment action, the first question could be: "Did Plaintiff [name] suffer a tangible employment action?"

[2]This jury question uses but-for causation. In a mixed-motive case, the question could be adjusted to ask: "Was Defendant [name]'s [specify tangible employment action] of Plaintiff [name] motivated by [his/her] rejection of supervisor [name]'s sexual advances, requests, or demands?"

11.4 Title VII (42 U.S.C. § 2000E-2) Coworker or Third-Party Harassment Without Tangible Employment Action (Hostile Work Environment—Negligence)

A. Committee Notes

This charge is for cases in which the plaintiff seeks to impose liability on an employer based on a negligence theory. This theory requires the plaintiff to prove that the defendant employer knew, or in the exercise of reasonable care should have known, that the plaintiff was being harassed by a coworker or third-party and that the harassment was sexual or contained sexually explicit overtones, or was based on race, color, religion, national original, or gender.[1] Under a negligence theory, if the defendant employer knew or should have known of the harassment, then the defendant had a duty to take prompt remedial action designed to stop it.[2] This charge can be used when the alleged harasser is a coworker or a third-party.[3] When the alleged harasser is a supervisor, vicarious liability for allowing the harassment, not a negligence theory, is appropriate

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[1] *Williamson v. City of Hous.*, 148 F.3d 462, 466 (5th Cir. 1998). This charge is for use in coworker and third-party harassment cases not involving a tangible employment action. No affirmative-defense instruction is provided. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (stating that an employer may be held vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence"). *Faragher*, 524 U.S. at 807. The defense has two parts: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided or to "avoid harm otherwise." *Faragher*, 524 U.S. at 807. The *Faragher* affirmative defense does not apply when the employee complains "of harassment by someone other than a supervisor." *Beckford v. Dep't of Corr.*, 605 F.3d 951, 960-61 (11th Cir. 2010).

[2] *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993).

[3] *Sharp v. City of Hous.*, 164 F.3d 923, 928–29 (5th Cir. 1999).

and Pattern Jury Instruction 11.2 or 11.3 should be used.[4]

B. Charge

Plaintiff [name] claims [he/she] was [sexually harassed] [harassed because of [his/her] [protected trait]] by [harasser's name] and that [his/her] employer, Defendant [name], knew, or in the exercise of reasonable care should have known, of the harassment but did not take prompt remedial action.

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify contentions].

It is unlawful for an employer to fail to take remedial action when the employer knew, or should have known, that a coworker or third-party [sexually harassed an employee] [harassed an employee because of that employee's [protected trait]].

For Defendant [name] to be liable for [sexual harassment] [protected-trait harassment], Plaintiff [name] must prove by a preponderance of the evidence that [harasser's name] [engaged in sexual harassment] [harassed Plaintiff [name] because of Plaintiff [name]'s [protected trait] and:

1. the conduct was sufficiently severe or pervasive to:

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[4]In *Vance*, 570 U.S. at 444–45 & n.13–14, the Court noted that it is confusing for jurors to have instructions on alternative liability theories under which different parties bear the burden of proof. The Court also noted that supervisor status will determine whether the employee has to prove negligence in allowing the harassment or the employer has to prove the *Ellerth*/*Faragher* affirmative defense. Although the Fifth Circuit in *Sharp* examined the plaintiff's claims against her supervisors under a negligence standard, *Sharp* was tried before the Supreme Court's decisions on vicarious liability for supervisor harassment in *Ellerth* and *Faragher*. *Sharp*, 164 F.3d at 929.

a. alter the terms or conditions of Plaintiff [name]'s employment; and

b. create a hostile or abusive work environment;[5] and

2. Defendant [name] knew, or in the exercise of reasonable care should have known, that Plaintiff [name] was being [sexually harassed] [harassed because of the Plaintiff [name]'s [protected trait]]. To make this showing, Plaintiff [name] must prove that:

a. the harassment was known by or communicated to a person who had the authority to receive, address, or report the complaint, even if that person did not do so,[6] or the harassment was so open and obvious that Defendant [name] should have known of it;[7] and

b. Defendant [name] failed to take prompt remedial action designed to stop the harassment.

To determine whether the conduct in this case rises to a level that altered the terms or conditions of Plaintiff [name]'s employment, you should consider all of the circumstances, including: the frequency of the conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with Plaintiff

[5]*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986).

[6]*Williamson*, 148 F.3d at 466–67.

[7]*Sharp*, 164 F.3d at 929.

[name]'s work performance.[8] There is no requirement that the conduct be psychologically injurious.[9]

Harassment may include extremely insensitive conduct [based on sex] [based on protected trait]. [Although sexual harassment must be based on sex, it need not be motivated by sexual desire.[10]] Simple teasing, offhand comments, sporadic use of offensive language, occasional jokes related to [sex] [protected trait], and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. But discriminatory intimidation, ridicule, [unwelcome sexual advances, requests for sexual favors if sexual harassment is asserted], or other verbal or physical conduct because of Plaintiff [name]'s [protected trait] may be sufficiently extreme to alter the terms and conditions of employment.[11]

In determining whether a hostile work environment existed, you must consider the evidence from both Plaintiff [name]'s perspective and from the perspective of a reasonable person. First, Plaintiff [name] must actually find the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person. Nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff [name] would find the conduct offensive.[12]

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[8] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[9] *Harris*, 510 U.S. at 22.

[10] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[11] *Harris*, 510 U.S. at 21.

[12] *Oncale*, 523 U.S. at 81.

"Prompt remedial action" is conduct by the employer that is reasonably calculated to stop the harassment and remedy the situation. Whether the employer's actions were prompt and remedial depends on the facts. You may look at, among other things, the effectiveness of any actions taken.[13]

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[13]*Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989).

11.4 Pattern Jury Questions, Coworker or Third-Party Harassment without Tangible Employment Action (Hostile Work Environment—Negligence)

JURY QUESTIONS[1]

Question No. 1

Did [harasser's name] [[sexually harass] Plaintiff [name]] [harass Plaintiff [name] because of [his/her] [protected trait]]?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then answer Question No. 2:

Question No. 2

Did Defendant [name] know, or in the exercise of reasonable care should Defendant [name] have known, that Plaintiff [name] was being [harassed on the basis of [protected trait]] [sexually harassed]?

Answer "Yes" or "No."

_____

[1]The pretext/mixed-motive debate is not as likely to be a concern in this type of case as it is in the tangible-employment-action case. It would be unusual if either party could credibly claim that an employee was sufficiently harassed to alter terms or conditions of employment in part because of race, color, religion, gender, or national origin and in part because of unprotected factors. The Committee suggests using the "because of" causation standard here.

If you answered "Yes" to Question No. 2, then answer Question No. 3:

Question No. 3

Did Defendant [name] fail to take prompt remedial action?

Answer "Yes" or "No."

_____

11.5 Title VII—Retaliation

A. Committee Notes

This charge is for Title VII cases in which the plaintiff alleges an adverse employment action[1] as retaliation for engaging in activity that is protected by Title VII. An "adverse employment action" is not limited to acts or harms that occur at the workplace. It covers those employer actions that could well dissuade a reasonable worker from making or supporting a charge of discrimination.[2]

Title VII's anti-retaliation provision contains two clauses: the "opposition clause" and the "participation clause." 42 U.S.C. § 2000e-3(a). The opposition clause prohibits retaliation against an employee for opposing any practice made unlawful by Title VII. The participation clause protects activities that occur in conjunction with or after the filing of an EEOC charge.[3] This jury charge addresses each type of claim.

"Protected activity" includes opposing an employment practice that is unlawful under Title VII by making a charge of discrimination, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII. If the claim is for opposing an employment practice, the plaintiff must

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[1]In most cases, whether an employee experienced an adverse employment action will not be disputed. Examples are actions such as firing, denial of promotion, or demotion. If there is a factual dispute, the charge and jury questions should be adjusted accordingly. An "adverse employment action" is one that a reasonable employee would have found "to be materially adverse." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 136 (2012). In the retaliation context, a materially adverse action is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Hernandez*, 670 F.3d at 657.

[2]*Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58–59 (2006).

[3]*Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 520 (5th Cir. 2001); 42 U.S.C. § 2000e-3.

prove that he or she had a reasonable good-faith belief that the practice was unlawful under Title VII.[4]

B. Charge

[4]*Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996). When the employee has opposed an employment practice that is not unlawful under Title VII, the court should instruct the jury that the employee's actions must be based on a reasonable, good-faith belief that the practice opposed actually violated Title VII, even if that belief was ultimately mistaken. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). In *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 237 (5th Cir. 2016), the Fifth Circuit stated that in *Clark County School District*, the Supreme Court did not decide whether a reasonable-belief standard applies to an employee's retaliation claim, because in that case, the Court found that no one could reasonably believe that the incident violated Title VII. The Fifth Circuit held that it is generally settled in the circuit courts that "a plaintiff contending that she was retaliated against for proactively reporting employment discrimination need not show that the discrimination rose to the level of a Title VII violation, but must at least show a reasonable belief that it did." *Rite Way Serv.*, 819 F.3d at 237 (citing 2 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 34.02[2], at 34–40 (2d ed. 2015)). A reasonable, good-faith belief that discrimination occurred requires a subjective belief that the employer's behavior was discriminatory. In addition, the belief must be objectively reasonable in light of the circumstances. If the plaintiff employee engaged in participation-clause activity, that activity is protected under Title VII, and no good-faith inquiry is necessary. *See Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006–07 (5th Cir. 1969) (an employee's basis, or lack of basis, for filing an EEOC complaint is irrelevant in evaluating a retaliation claim); *see also Jones v. Flagship Intern.*, 793 F.2d 714, 725–26 (5th Cir. 1986) (citing *Pettway*). Other circuits agree that the "reasonable, good-faith belief" test does not apply to a retaliation claim based on the participation clause. *See, e.g.*, *Slagle v. Cty. of Clarion*, 435 F.3d 262 (3d Cir. 2006); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000) (stating that the participation clause's protections "are not lost if the employee is wrong on the merits of the charge" or even "if the contents of the charge are malicious or defamatory"); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999) ("The underlying charge need not be meritorious for related activity to be protected under the participation clause."). The Seventh and Second Circuits have held that the "good faith, reasonable" requirement applies in claims brought under both opposition and the participation clauses. *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7th Cir. 2004); *see also Ray v. Ropes & Gray LLP*, 799 F.3d 99 (1st Cir. 2015) (a plaintiff need not reasonably believe in the validity of the underlying charges but leaving it open whether the "good faith" requirement applies to a participation-clause claim); *Cox v. Onondaga Cty. Sherriff's Dep't*, 760 F.3d 139, 148 (2d Cir. 2014) (applying the good-faith requirement in retaliation claims without distinguishing claims based on the opposition clause or the participation clause).

Plaintiff [name] claims that [he/she] was retaliated against by Defendant [name] for engaging in activity protected by Title VII. Plaintiff [name] claims that [he/she] [specify protected activity]. Plaintiff [name] claims that Defendant [name] retaliated against [him/her] by [specify adverse action].

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify contentions].

It is unlawful for an employer to retaliate against an employee for engaging in activity protected by Title VII. To prove unlawful retaliation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. Plaintiff [name] engaged in [specify protected activity];[5]

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[5]If there are factual disputes about whether the plaintiff experienced an adverse employment action or whether he or she engaged in activity protected by Title VII, the charge and jury questions should be adjusted accordingly. Whether activity is protected by Title VII will generally be determined by the court as a matter of law, particularly for participation-clause cases. If there is no dispute or the issues are not contested, the charge may simply specify the adverse action and protected activity at issue. If there are disputes, the charge should be adjusted using the definitions of protected activity and adverse employment action.

If there is a dispute in an opposition-clause case about whether the plaintiff engaged in protected activity, the following instruction may be used:

> For the first element, Plaintiff [name] claims that [he/she] engaged in protected activity when [he/she] [specify opposition clause activity]. That action is "protected activity" if it was based on Plaintiff [name]'s good-faith, reasonable belief that Defendant [name] discriminated against [him/her/another employee] because of [his/her] [protected trait]. To show a good-faith belief, Plaintiff [name] must show that [he/she] honestly believed that Defendant [name] discriminated against [him/her/another employee] because of [his/her] [protected trait]. To show a reasonable belief, Plaintiff [name] must show that a reasonable person would, under the circumstances, believe that Defendant [name] discriminated against [him/her/another employee] because of [his/her] [protected trait]. Plaintiff [name] does not have to prove that Defendant [name] actually discriminated against [him/her/another employee] because of

2. Defendant [name] [specify adverse employment action] Plaintiff [name];[6] and

3. Defendant [name]'s decision to [specify adverse employment action] Plaintiff [name] was on account of [his/her] protected activity.[7]

You need not find that the only reason for Defendant [name]'s decision was Plaintiff [name]'s [protected activity]. But you must find that Defendant [name]'s decision to [specify adverse employment action] Plaintiff [name] would not have occurred in the absence of—but for—[his/her] [protected activity].

If you disbelieve the reason Defendant [name] has given for its decision, you may, but are not required to, infer that Defendant [name] would not have decided to [specify adverse employment action] Plaintiff [name] but for [him/her] engaging in the protected activity.

[his/her] [protected trait]. But [he/she] must prove that [he/she] had a good-faith, reasonable belief that Defendant [name] did so.

[6]If there is a dispute about to whether the plaintiff experienced an adverse employment action, the following instruction may be used:

For the second element, Plaintiff [name] claims that Defendant [name] took an adverse employment action against [him/her] when Defendant [name] [specify action]. You must decide whether [specify action] is an "adverse employment action." An "adverse employment action" is an action that would have made a reasonable employee reluctant to make or support a charge of discrimination. If a reasonable employee would be less likely to complain about or oppose alleged discrimination because [he/she] knew that Defendant [name] would [specify adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

[7]*Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 359–62 (2013).

11.5 Pattern Jury Question, Title VII—Retaliation

JURY QUESTION

Question No. 1[1]

Do you find that Plaintiff [name] would not have been [specify adverse action] but for [his/her] [specify protected activity]?

Answer "Yes" or "No."

_____

[1]The jury question will need to be adjusted if there is a factual dispute about whether the plaintiff engaged in protected activity or whether he or she suffered an adverse employment action.

11.6 Constructive Discharge

A. Committee Notes

This charge is for cases in which the plaintiff resigned from his or her employment and was not discharged but alleges that the resignation was a "constructive discharge."[1] In a Title VII discrimination, harassment, or retaliation case, proof of constructive discharge may satisfy the element of an adverse employment action. Constructive discharge can also be the tangible employment action that a quid-pro-quo sexual-harassment claim requires. A constructive discharge finding may preclude an employer from the benefit of the *Ellerth/Faragher* defense to vicarious liability.[2]

B. Charge

Plaintiff [name] claims that although Defendant [name] did not fire [him/her], [he/she] was constructively discharged.

To prove constructive discharge, Plaintiff [name] must prove by a preponderance of the evidence that

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[1]*Wyatt v. Hunt Plywood*, 297 F.3d 405, 410 n.15 (5th Cir. 2002) (a constructive discharge constitutes a "tangible employment action"). *See also Green v. Brennan*, 136 S. Ct. 1769, 1776–77 (2016) ("The constructive-discharge doctrine contemplates a situation in which an employer discriminates against an employee to the point such that his 'working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign.' . . . When the employee resigns in the face of such circumstances, Title VII treats that resignation as tantamount to an actual discharge.") (quotation omitted).

[2]The Fifth Circuit has stated that "[i]n certain circumstances, a constructive discharge can be considered a tangible employment action that precludes an employer from asserting the *Ellerth/Faragher* defense to vicarious liability." *See Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 480 (5th Cir. 2008).

[his/her] working conditions were so intolerable that a reasonable employee would feel compelled to resign.[3]

"Intolerable working conditions" means more than conditions that are uncomfortable or worse than an employee might prefer. Teasing, making offhand comments, using offensive language, or making [protected trait]-related jokes generally do not make working conditions so intolerable that a reasonable person would feel compelled to resign. Isolated incidents (unless extremely serious) generally do not make working conditions so intolerable that a reasonable person would feel compelled to resign.

In determining whether Plaintiff [name] was constructively discharged, you must consider the evidence from both Plaintiff [name]'s perspective and the perspective of a reasonable person.[4] First, you must look at the evidence from Plaintiff [name]'s perspective and determine whether [he/she] actually felt compelled to resign. Second, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances and determine whether an objectively reasonable person similarly situated would have felt compelled to resign. You cannot view the evidence from the perspective of an overly sensitive person. Nor can you view the evidence from the perspective of someone who is never offended. Rather, you must find that Plaintiff [name] in fact found [his/her] working conditions intolerable and also that a reasonable person in the same or similar circumstances as Plaintiff [name] would find those working conditions intolerable.

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[3] *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 444 (5th Cir. 2011); *see also Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001).

[4] *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207 (5th Cir. 1986) (the inquiry in a constructive-discharge case focuses on both the employee's state of mind and the reaction of a reasonable employee in the employee's position).

To prove constructive discharge, Plaintiff [name] must also prove the existence of an aggravating factor, such as:

(1) demotion;

(2) reduction in compensation;

(3) reduction in job responsibilities;

(4) reassignment to menial or degrading work;

(5) reassignment to work under a substantially younger supervisor;[5]

(6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or

(7) offers of early retirement or continued employment on terms less favorable than the employee's former status.[6]

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[5]*See Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000) (finding this factor was not significant where plaintiff "was not forced to report to a much younger supervisor but to a peer and friend"); *cf. O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) ("[T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.").

[6]*Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 342 (5th Cir. 2005).

11.6 Pattern Jury Question, Constructive Discharge

JURY QUESTION

Question No. 1

Was Plaintiff [name] constructively discharged?

Answer "Yes" or "No."

_____

11.7 Cat's Paw Theory of Employer Liability

A. Committee Notes

A plaintiff may use the "cat's paw" theory to establish that his or her employer's proffered reason for termination is pretextual. This theory creates a basis for employer liability when there is no evidence of discriminatory or retaliatory bias against the plaintiff by the decision-maker, but that decision-maker took into account biased information—such as a negative performance evaluation—provided by the plaintiff's supervisor in deciding to terminate the plaintiff's employment or to take another adverse employment action. Under the cat's paw theory, in Title VII cases involving tangible employment actions, the plaintiff is not required to prove that the employer knew or should have known of the supervisor's discriminatory or retaliatory bias in order to impute that bias to the employer, even though the supervisor did not make the final decision. The cat's paw theory will allow imputation if: (1) the supervisor does an act because of a discriminatory or retaliatory bias against the plaintiff; (2) the supervisor intends that the act will cause the plaintiff to suffer an adverse employment action; and (3) that act causes the ultimate employment action, even if the supervisor did not make the ultimate employment decision. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) (applying "cat's paw" theory to case brought under the Uniformed Services Employment and Reemployment Rights Act).

The Supreme Court has left open the question of whether the cat's paw theory applies to a discriminatory or retaliatory act committed by a subordinate employee, or a plaintiff's coworker, rather than a plaintiff's supervisor. *Staub*, 562 U.S. at 422 n.4 ("We express no view as to whether the employer would be liable if a coworker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employ-

ment decision."); *see also Bissett v. Beau Rivage Resorts Inc.*, 442 F. App'x 148, 154 n. 5 (5th Cir. 2011) (describing the issue as "open"). Despite the Supreme Court leaving open the issue, the Fifth Circuit has consistently held that under the cat's paw theory, a plaintiff's coworker's discriminatory remarks about the plaintiff can be attributed to the supervisor who was charged with making employment decisions, when it is shown that the coworker influenced the superior's decision. *See, e.g.*, *Fisher v. Lufkin Indus., Inc.*, 847 F.3d 752, 758 (5th Cir. 2017) (an employer may be liable if the agent who harbors retaliatory animus is a coworker, rather than a supervisor); *Haire v. Bd. of Sup'rs of La. State Univ.*, 719 F.3d 356, 369 n. 11 (5th Cir. 2013) (stating that an "employer is at fault [when] one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment action.") (citing *Staub*, 131 S. Ct. at 1193; *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 653 (5th Cir. 2004)); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *see also Valderaz v. Lubbock Cty. Hosp. Dist.*, 611 F. App'x 816, 822 (5th Cir. 2015) ("To invoke the cat's paw analysis [in a coworker context], [the plaintiff] must submit evidence to establish two conditions: (1) that his coworkers exhibited retaliatory animus, and (2) that they possessed leverage, or exerted influence, over [the supervisor].").

B. Charge for Supervisor Liability

In this case, the decision to [specify adverse employment action] Plaintiff [name] was made by [name of decision-maker].[1] Plaintiff [name] may show that, even if there is no evidence of [discriminatory] [retaliatory] bias on the part of [name of decision-maker], there is evidence that [name of decision-maker] took into ac-

[1]This instruction will have to be adjusted if there is a factual dispute about who the decision-maker was or whether the decision-maker as well as the immediate supervisor were biased against the plaintiff because of a protected trait or protected activity.

count biased negative information provided by Plaintiff [name]'s supervisor, [name], in deciding to [specify adverse employment action] Plaintiff [name]. Plaintiff [name] is not required to prove that Defendant [name] or [name of decision-maker] knew or should have known of [supervisor's name]'s [discriminatory] [retaliatory] bias. Plaintiff [name] must prove that [his/her] supervisor, [name], performed an act because of [discrimination] [retaliation] against Plaintiff [name], and that act was a proximate cause of the [name of decision-maker]'s decision to [specify adverse employment action] Plaintiff [name].

To succeed on this claim, Plaintiff [name] must prove each of the following by a preponderance of the evidence:

(If supervisory status is in dispute, begin with this element. If there is no dispute as to supervisory status, this element need not be included.)

1. The person Plaintiff [name] alleges was [his/her] supervisor was an individual who Defendant [name] has empowered to take a tangible employment action against Plaintiff [name].[2] Supervisory status is not established merely by showing that the individual has the ability to direct the employee's tasks or manage the employee's daily work.

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[2] *See Vance v. Ball State Univ.*, 570 U.S. 421, 430–31 (2013). If the case involves a defendant employer who concentrates decision-making authority in a few individuals, the instruction may include the following:

> An employer who limits decision-making authority to a few individuals who in turn rely on recommendations by other workers who interact with the employee may be held to have effectively delegated the power to take tangible employment action to the worker on whose recommendations it relies.

Vance, 570 U.S. at 466–67.

(Begin here if there is no dispute about supervisory status):

(For pretext cases)

1. [Supervisor's name] was motivated by Plaintiff [name]'s [specify protected activity] [protected trait] in [specify the act on which the decision-maker relied, such as submitting a negative work evaluation or recommending termination of employment];

2. Supervisor [name] intended that the act would cause Plaintiff [name] to suffer an adverse employment action; and

3. [Name of decision-maker] would not have decided to [specify adverse employment action] Plaintiff [name] but for—in the absence of—[supervisor's name]'s [specify act on which the decision-maker relied].

OR

(For mixed-motive cases)

1. [Supervisor's name] was motivated by Plaintiff [name]'s [specify protected activity] [protected trait] in [specify the act on which the decision-maker allegedly relied, such as submitting a negative work evaluation or recommending termination of employment];

2. [Supervisor's name] intended that the act would cause Plaintiff [name] to suffer an adverse employment action; and

3. [Supervisor name's] act was a motivating factor in [name of decision-maker]'s decision to

[specify adverse employment action] Plaintiff [name].

C. Charge for Coworker Cat's Paw Theory[1]

In this case, the decision to [specify adverse employment action] Plaintiff [name] was made by [name of decision-maker]. Plaintiff may show that, even if there is no evidence of [discriminatory] [retaliatory] bias on the part of [decision-maker name], that [decision-maker name] was influenced or unduly leveraged by Plaintiff's coworker [name], in deciding to [specify adverse employment action] Plaintiff. Plaintiff is not required to prove that Defendant [name] or [decision-maker name] knew or should have known of [coworker name]'s [discriminatory] [retaliatory] bias. Plaintiff must prove, by a preponderance of the evidence, that Plaintiff's coworker(s) [name(s)], due to their [discriminatory] [retaliatory] bias against Plaintiff, unduly influenced or leveraged [decision-maker name] in [specify adverse employment action] Plaintiff, and that their influence or leverage was a proximate cause of the [decision-maker name]'s decision to [specify adverse employment action] Plaintiff.[2]

To succeed on this claim, Plaintiff [name] must prove each of the following by a preponderance of the evidence:

(For pretext cases)

---

[1]Reliance on this charge, and the pattern questions that follow, should be preceded by careful analysis of the most recent case law. As noted, it remains an open question whether the cat's paw theory applies to a discriminatory or retaliatory act committed by a subordinate employee, or by a plaintiff's coworker, rather than by a plaintiff's supervisor. *Staub*, 131 S. Ct. at 1194 n.4. It is also unclear whether the cat's paw theory in the coworker context could apply to a pretext case and a mixed-motive case. *See Bissett*, 442 F. App'x at 154.

[2]*See Fisher v. Lufkin Indus., Inc.*, 847 F.3d 752, 759 (5th Cir. 2017).

1. Plaintiff's coworker(s) [name(s)] exhibited [discriminatory] [retaliatory] animus towards Plaintiff;

2. Due to this [discriminatory] [retaliatory] animus, Plaintiff's coworker(s) [name(s)] exerted influence or leverage over [decision-maker name], with the intent of [decision-maker name] [specify adverse employment action] Plaintiff;

3. But for [name(s) of coworker(s)]'s influence, [decision-maker name] would not have [specify adverse employment action] Plaintiff.

OR

(For mixed-motive cases)

1. Plaintiff's coworker(s) [name(s)] exhibited [discriminatory] [retaliatory] animus towards Plaintiff;

2. Due to this [discriminatory] [retaliatory] animus, Plaintiff's coworker(s) [name(s)] exerted influence or leverage over [decision-maker name], with the intent of [decision-maker name] [specify adverse employment action] Plaintiff;

3. The influence of [name(s) of coworker(s)] was a motivating factor in [decision-maker name] [specify adverse employment action] Plaintiff.

11.7 Pattern Jury Questions, Title VII—Cat's Paw Theory of Employer Liability

JURY QUESTIONS

Question No. 1 (if there is a dispute about supervisory status)[1]

Has Plaintiff [name] proved that [supervisor's name] was a supervisor?

Answer "Yes" or "No."

_____

If you answered Question No. 1 "Yes," then answer Question No. 2.

(For pretext cases)

Question No. 2

Has Plaintiff [name] proved that [supervisor's name] would not have [specify the act on which the decision-maker relied, such as submitting a negative work evaluation or recommending termination of employment] but for Plaintiff [name]'s [specify protected activity] [specify protected trait]?

Answer "Yes" or "No."

_____

If you answered Question No. 2 "Yes," then answer Question No. 3.

[1]If there is no dispute as to supervisory status, this question need not be asked.

Question No. 3

Has Plaintiff [name] proved that [supervisor's name] acted with the intent that Plaintiff [name] would suffer an adverse employment action as a result of [supervisor's name]'s act?

Answer "Yes" or "No."

_____

If you answered Question No. 3 "Yes," then answer Question No. 4.

Question No. 4

Has Plaintiff [name] proved that [name of decision-maker] would not have decided to [specify adverse employment action] Plaintiff [name] in the absence of [supervisor's name]'s [specify act on which the decision-maker relied]?

Answer "Yes" or "No."

_____

OR

(For mixed-motive cases)

Question No. 2

Has Plaintiff [name] proved that [his/her] supervisor, [name], was motivated by Plaintiff [name]'s [specify protected activity] [specify protected trait] when [supervisor's name] [specify the act on which the

decision-maker relied, such as submitting a negative work evaluation or recommending termination of employment]?

Answer "Yes" or "No."

_____

If you answered Question No. 2 "Yes," then answer Question No. 3.

Question No. 3

Has Plaintiff [name] proved that [supervisor's name] acted with the intent that Plaintiff [name] would suffer an adverse employment action as a result of [supervisor's name]'s act?

Answer "Yes" or "No."

_____

If you answered Question No. 3 "Yes," then answer Question No. 4.

Question No. 4

Has Plaintiff [name] proved that [supervisor's name]'s [specify act on which the decision maker relied] was a motivating factor in [name of decision-maker]'s decision to [specify adverse employment action] Plaintiff [name]?

Answer "Yes" or "No."

_____

JURY QUESTIONS FOR EMPLOYER LIABILITY UNDER CAT'S PAW THEORY FOR COWORKER CONDUCT

(For pretext cases)

Question No. 1

Has Plaintiff [name] proved that Plaintiff's coworker(s) [name(s)] exhibited [discriminatory] [retaliatory] animus towards Plaintiff?

Answer "Yes" or "No."

_____

If you answered Question No. 1 "Yes," then answer Question No. 2.

Question No. 2

Has Plaintiff proved that due to this [discriminatory] [retaliatory] animus, Plaintiff's coworker(s) [name(s)] exerted influence or leverage over [decision-maker name] with the intent of [decision-maker name] [specify adverse employment action] Plaintiff?

Answer "Yes" or "No."

_____

If you answered Question No. 2 "Yes," then answer Question No. 3.

Question No. 3

Has Plaintiff proved that but for [name(s) of

coworker(s)]'s influence, [decision-maker name] would not have [specify adverse employment action] Plaintiff?

Answer "Yes" or "No."

_____

(For mixed-motive cases)

Question No. 1

Has Plaintiff [name] proved that Plaintiff's coworker(s) [name(s)] exhibited [discriminatory] [retaliatory] animus towards Plaintiff?

Answer "Yes" or "No."

_____

If you answered Question No. 1 "Yes," then answer Question No. 2.

Question No. 2

Has Plaintiff proved that due to this [discriminatory] [retaliatory] animus, Plaintiff's coworker(s) [name(s)] exerted influence or leverage over [decision-maker name] with the intent of [decision-maker name] [specify adverse employment action] Plaintiff?

Answer "Yes" or "No."

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If you answered Question No. 2 "Yes," then answer Question No. 3.

Question No. 3

Has Plaintiff proved that the influence of [name(s) of coworker(s)] was a motivating factor in [decision-maker name] [specify adverse employment action] Plaintiff?

Answer "Yes" or "No."

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THE ADA AND THE ADAAA

OVERVIEW

A. Types of Claims Covered

This charge is for use in disability cases under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. This charge does not cover cases involving access to public accommodations or to public services. Rather, the charge addresses only cases involving the ADA's employment provisions.

The ADA was amended significantly effective January 1, 2009 by the ADA Amendments Act of 2008 ("ADAAA"). The amendments are not retroactive.[2] The amendments broadened the ADA's definition of "disability," particularly "regarded as" disability. Under the amendments, "regarded as" disability is an "impairment standard" under which "substantial limitation" and "major life activities" are irrelevant.[3] This impairment standard applies to ADA claims that arise before the statutory amendment required proof of disability. Failure-to-accommodate claims are subject to a different standard.[4] This charge includes a separate section on failure-to-accommodate claims.

This charge can be used in both ADA and Rehabilitation Act cases. Because ADA cases can involve a variety of fact situations, some cases may implicate the actual disability prong, while others may implicate all three prongs—actual disability, perceived disability, or a record of a disability. Many of the terms are statutory or derived from the regulations, and many have technical definitions. In many cases, only some of the instructions will apply, depending on the claims and defenses—including any of the

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[2]Because the ADAAA does not apply to claims arising before January 1, 2009, if a case involves such claims, the prior version of this charge should be used.

[3]42 U.S.C. § 12102(3)(A); 29 C.F.R. § 1630.2(g)(1)(iii), (l)(1); 29 C.F.R. § 1630.2(j)(2) ("Whether an individual's impairment 'substantially limits' a major life activity is not relevant to coverage under . . . (the 'regarded as' prong) of this section."); *see also* 29 C.F.R. Part 1630 App. § 1630.2(j), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011) ("In any case involving coverage solely under the 'regarded as' prong of the definition of 'disability' (*e.g.*, cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is 'substantially limited' in any major life activity."); § 1630.2(l), 76 Fed. Reg. at 17014.

[4]42 U.S.C. § 12201(h); 29 C.F.R. §§ 1630.2(o)(4), 1630.9(d).

statutory affirmative defenses—raised by the pleadings and the evidence.[5]

A prima facie case under the ADA requires the employee to show that he or she: has a disability as defined in 42 U.S.C. § 12102(2); is qualified to perform the essential functions of the job with or without reasonable accommodation; and has suffered an adverse employment action on the basis of the disability. 42 U.S.C. § 12112(a). *EEOC v. LHG Grp. Inc.*, 773 F.3d 688, 697 (5th Cir. 2014) (citing *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 853 (5th Cir. 1999)).

B. "Disability"

A "disability" is: (A) a physical or mental impairment that substantially limits one or more of the major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(1).

As amended by the ADAAA, the ADA defines "major life activities" as including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2)(A). A "major life activity" also includes the operation of a major bodily function, including but not limited to the immune system, cell growth, digestion, elimination (bowel and bladder), the nervous system, the brain, the respiratory system, circulation, the endocrine system, and the reproductive system. 42 U.S.C. § 12102(2)(B).

C. "Physical or Mental Impairment"

An impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability. 42 U.S.C. § 12102(4)(C). An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D). Whether an impairment substantially limits a major life activity is determined without regard to the ameliorative effects of such mitigating measures as:

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[5]The ADAAA provides the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(a)); and employment qualification standard, test, or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

1. medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

2. use of assistive technology;

3. reasonable accommodations or auxiliary aids or services (e.g., interpreters, readers, or acquisition or modification of devices); or

4. learned behavioral or adaptive neurological modifications.

42 U.S.C. § 12102(4)(E)(i).

D. "Regarded as Having Such an Impairment"

An individual meets the requirements of being regarded as having an impairment "if the individual establishes that he or she has been subjected to an action prohibited under this [Act] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). However, 42 U.S.C. § 12102(1)(C), the provision that includes "being regarded as having such an impairment" in the definition of disability, does not apply to impairments that are transitory (having an actual or expected duration of 6 months or less) or minor. 42 U.S.C. § 12102(3)(B).

E. Knowledge of the Disability

An employer must have actual knowledge of an employee's disability before the employer may be exposed to liability for discriminating on the basis of that disability.[6] An employer may clearly know of disabilities and other physical limitations. But unlike other discrimination cases, the employee's protected characteristic in a disability-discrimination case may not always be immediately obvious to the employer. Some symptoms are either not apparent or are readily attributable to other causes. Other

[6] *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 417 (5th Cir. 2017); *see also Adeleke v. Dall. Area Rapid Transit*, 487 F. App'x. 901, 903 (5th Cir. 2012) (citing *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 163 (5th Cir. 1996)).

symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer the employer's actual knowledge. An employer may know of disabilities that are not immediately obvious, such as when an employee asks for an accommodation under the ADA and submits supporting medical documentation.

F. A "Qualified" Individual with a Disability

To be protected by the ADA, an individual must be a "qualified individual with a disability." To be a qualified individual, one must be able to perform the job's essential functions with or without reasonable accommodations. 42 U.S.C. § 12111(8).

G. "Essential Functions" of the Job

The term "essential functions" means the fundamental duties of the position the plaintiff holds or for which he or she has applied. The term does not include the position's marginal functions. 29 C.F.R. § 1630.2(n)(1). The EEOC regulations suggest the following considerations in determining the essential functions of an employment position: (1) the employer's judgment as to which functions of the job are essential; (2) written job descriptions prepared to advertise a job or used to interview applicants; (3) the amount of time spent on the job performing the function in question; (4) the consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement, if one exists; (6) the work experience of persons who have held the job; and (7) the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n)(3). A temporary accommodation exempting an employee from certain job requirements does not demonstrate that those job functions are nonessential.

H. "Reasonable Accommodation"

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. A refusal to provide a reasonable accommodation can amount to a constructive discharge.

Although there is no precise test for determining what constitutes a reasonable accommodation, the ADA does not require an accommodation that would cause other employees to work harder, to work longer hours, or to lose opportunities. An accommodation is unreasonable if it imposes undue financial or administrative burdens on the employer's business or if it otherwise imposes an undue hardship on the business operations. 42 U.S.C. § 12112(b)(5)(A). The "undue hardship" defense is discussed below.

The ADA states that "reasonable accommodation" may include: "(A) making existing facilities used by the employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). An employer is not obligated to provide an employee the accommodation he or she requests or prefers. The requirement is for some reasonable accommodation. A reasonable accommodation does not require an employer to give an individual with disabilities preferential treatment in job qualifications.

For more discussion of "reasonable accommodations" under the ADA, *see* Pattern Jury Instruction 11.10.

I. The Interactive Process

Before an employer must make an accommodation for an individual's physical or mental condition, the employer must know that such a condition exists. It is generally the individual's responsibility to request a reasonable accommodation. 29 C.F.R. § 1630 App. 1630.9. Once an individual has made such a request, the ADA and its implementing regulations require that the parties engage in an "interactive process" to determine what precise accommodations are necessary. *See* 29 C.F.R. § 1630.2(o)(3), Part 1630 App. § 1630.9. The employer and the individual must work together in good faith to help each other determine what accommodation is necessary. Several courts have held that an employer's failure to engage in an interactive process, standing alone, is insufficient to expose the employer to liability under the ADA. *See, e.g.*, *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1062 (7th Cir. 2014) ("And while an employer's failure to engage in the interactive process alone is not an independent basis for liability, it is actionable 'if it prevents identification of an appropriate accommodation for a qualified individual.' ") (quoting *Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1039 (7th Cir. 2013)).[7] Although the regulations provide that it "may be necessary" to engage in the interactive process to determine what accommodation is reasonable (or

[7]Fifth Circuit case law suggests agreement with this holding. *See Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 736 (5th Cir. 1999) (cited with approval by *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011)). ("[W]hen an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA.").

may not, for example, if the accommodation is agreed and obvious), failing to engage in the interactive process is not actionable. Failing to do so, however, could lead to failing to accommodate the individual's disability, which does violate the ADA.

J. Statutory Defenses

The ADA provides the following defenses: (1) undue hardship (42 U.S.C. § 2112(b)(5)(A)); (2) direct threat to the health or safety of others in the workplace (42 U.S.C. § 12113(b)); (3) a qualification standard, test requirement, or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)); (4) religious entity (42 U.S.C. § 12113(d)(1)); (5) infectious or communicable disease (42 U.S.C. § 12113(e)(2)); and (6) illegal use of drugs (42 U.S.C. § 12114(a)). The statutory defenses most likely to lead to instruction issues are undue hardship and direct threat. *See* Pattern Jury Instruction 11.12. The burden of proving and pleading these defenses is on the defendant.

K. Procedures and Remedies

Under 42 U.S.C. § 12117, ADA cases generally follow the procedures and remedy schemes from Title VII cases. *See* 42 U.S.C. § 12117 (2012). An EEOC charge and right-to-sue notice typically will be necessary preconditions to an ADA claim. *See* 42 U.S.C. § 2000e-5. Damages under the ADA generally are the same as those available under Title VII. Potential remedies in ADA cases include back pay, compensatory damages, punitive damages, and attorney's fees. *See* 42 U.S.C. § 1981a.

The causation standard in ADA cases may be in flux. The statute precludes discrimination "because of" the employee's disability. Historically, the Fifth Circuit construed this language as allowing a "motivating-factor" test. *See, e.g.*, *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008). But the United States Supreme Court held in *Gross v. FBL Financial Services, Inc*., that the term "because of" found in the AEDA requires "but-for" causation. 557 U.S. 167, 176-77 (2009). Since *Gross*, it appears that circuits considering the issue have applied "but-for" causation to ADA claims. *See, e.g.*, *Lewis v. Humboldt*, 681 F.3d 312 (6th Cir. 2012) (en banc); *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010). Some courts within the Fifth Circuit have likewise rejected the mixed-motives standard in ADA cases. *See, e.g*., *Johnson v. Benton Cty. Sch. Dist.*, 926 F. Supp. 2d 899 (N.D. Miss. Feb. 25, 2013) (holding "the mixed-motive option is no longer available in ADA cases post-*Gross*").

In an unpublished opinion, the Fifth Circuit stated that the

ADEA and ADA adopt "different degree[s] of proof required for showing causation." *Hoffman v. Baylor Health Care Sys.*, 597 F. App'x 231, 253 & n.12 (5th Cir. 2015). "[T]he ADEA does not authorize a mixed-motive[] claim of age discrimination, *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 175 (2009), such that a plaintiff-employee must show that age was the but-for cause of the alleged age discrimination. *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 440 (5th Cir. 2012). In contrast, "[t]he proper causation standard under the ADA is a 'motivating factor' test . . . [i.e.,] 'discrimination need not be the sole reason for the adverse employment decision.' " *Id.* at 253 n.12 (citing *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008)). In *Feist v. Louisiana Department of Justice,* the court examined an ADA *retaliation* claim and held, "In order to avoid summary judgment, the plaintiff must show 'a conflict in substantial evidence' on the question of whether the employer would not have taken the action 'but for' the protected activity." 730 F.3d 450, 454 (5th Cir. 2013) (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (rejecting motivating-factor test for Title VII retaliation cases)). The Fifth Circuit has continued to reference motivating factor after *Gross*. *See Maples v. Univ. of Tex. Med. Branch at Galveston,* 524 F. App'x. 93 (Table), 95 (5th Cir. 2013) (per curiam) (requiring proof that ADHD was a "motivating factor" in dismissal) (citing *Pinkerton*, 529 F.3d at 519); *Adeleke v. Dall. Area Rapid Transit*, 487 F. App'x. 901, 903 (5th Cir. 2012) (holding that motivating factor applies to Title VII and ADA). This has prompted some district courts in this circuit to apply something short of the "but-for" standard. *See, e.g.*, *EEOC v. DynMcDermott Petrol. Operations Co.,* No. 1:10cv510-TH, 2012 WL 506861, at *3 (E.D. Tex. Feb. 15, 2012), *rev'd on other grounds*, 537 F. App'x 437, 2013 WL 3855553 (5th Cir. July 26, 2013) (quoting *Pinkerton*, 529 F.3d at 518).

The committee takes no position on this issue and has instead provided options. The basic charge uses the statutory "because-of" language and provides alternative "but-for" language. If a court wishes to instruct on mixed motives, it may look to charges 11.1 (providing mixed-motives language) and 11.13 (addressing the employer's defense).

The employer may avoid an award of damages or reinstatement by showing that it would have taken the same action in the absence of the impermissible motivating factor. In such cases, the remedies are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i) & (ii).

In addition, the ADA provides a defense if an employer

"demonstrates good faith efforts" to find a reasonable accommodation for the plaintiff employee. *See* 42 U.S.C. § 1981a(a)(3) and Pattern Jury Instruction 11.10. If the jury finds that the employer has made such efforts, the plaintiff cannot recover compensatory or punitive damages. *See* 42 U.S.C. § 1981a(a)(3).

11.8 Discrimination Based on Disability[1]

A. Committee Notes

This charge is for use in ADA or Rehabilitation Act[2] cases in which the plaintiff alleges that the defendant discriminated against him or her because of an actual or perceived impairment or violated provisions of those statutes other than the requirement to provide a reasonable accommodation.[3] The claims can include failing to hire, failing to promote, firing, or demoting the plaintiff.

This charge provides alternatives to be adapted to present the claims and defenses of each case accurately and clearly. "Because of" tracks the statute but does not specify the causation standard. When the plaintiff asserts a mixed-motive claim, the standard set out in Pattern Jury Instruction 11.1 may be used.[4]

B. Charge for Cases Involving Actual Disability Claims

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[1]This charge follows the Fifth Circuit Labor and Employment Pattern Jury Charge, 11.7.1 and 11.7.2 (2009), with changes made to conform to recent case law and the ADAAA. This charge may also be used if disparate impact is asserted under 42 U.S.C. § 12112(b)(6).

[2]Section 501 of the Rehabilitation Act of 1973, applicable to claims by federal-sector employees, also includes an affirmative-action obligation that is not present under § 504 of that Act or under the ADA. *See* 29 U.S.C. § 791(b). This charge does not address that affirmative-action obligation. Section 501 also requires that federal employment be "free from any discrimination" by incorporating that standard used in federal-sector Title VII claims. 29 U.S.C. § 794a(a)(1); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 303 (5th Cir. 1981). It is not yet clear in the Fifth Circuit whether this provides more protection in federal-sector cases than is present under the ADA.

[3]Failure to accommodate is covered in Pattern Jury Instruction 11. 10.

[4]As noted previously, the causation standard for an ADA claim may be in flux. *See* ADA and ADAAA Overview § K. The Committee has taken no position on this issue and has instead provided options, including a "because-of" standard; an alternative "but-for" standard; and cross-references to the mixed-motives charges found in 11.1 and 11.13.

Plaintiff [name] claims that Defendant [name] discriminated against [him/her] because [he/she] had a disability by [specify adverse employment action].[5] Defendant [name] denies Plaintiff [name]'s claims and contends that [he/she] was [specify adverse employment action] because of [specify contention].

It is unlawful for an employer to discriminate against an employee because of the employee's disability. Unlawful discrimination can include [specify adverse employment action] a qualified individual with a disability.[6]

To succeed in this case, Plaintiff [name] must prove each of the following by a preponderance of the evidence:

1. Plaintiff [name] had [specify alleged impairment];

2. Such [specify alleged impairment] substantially limited [his/her] ability to [specify major life activity or activities or major bodily function or functions affected];

3. Defendant [name] knew[7] Plaintiff [name] had [specify alleged disability];

4. Defendant [name] [specify adverse employment action] Plaintiff [name];

5. Plaintiff [name] was a qualified individual who could have performed the essential functions of

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[5]If there is no factual dispute about whether the plaintiff experienced an adverse employment action, specifying the action at issue is usually sufficient. If there is a factual dispute, the charge can be modified using the definition of "tangible employment action" in Pattern Jury Instruction 11.1.

[6]42 U.S.C. § 12112.

[7]This language may need to be modified if there is a factual dispute about whether the defendant knew about the disability or had information that revealed the plaintiff's disability.

[specify job held or position sought] when Defendant [name] [specify adverse employment action] [him/her];[8] and

6. Defendant [name] [specify adverse employment action] Plaintiff [name] because of [his/her] [specify alleged disability].[9] Plaintiff [name] does not have to prove that [his/her] [specify alleged disability] was the only reason Defendant [name] [specify adverse employment action].

If Plaintiff [name] has failed to prove any of these

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[8]The definition of "qualified individual" under 42 U.S.C. § 12111(8) is set out in the introduction to this section. There is often no dispute on whether the plaintiff is a qualified individual able to perform the job's essential functions. If there is a dispute, the following could be included in the charge:

> In determining whether a function is essential, you should consider the following factors: the employer's judgment as to which functions are essential; written job descriptions; the amount of time spent on the job performing the function; the consequences of not requiring the person to perform the function; the terms of any collective bargaining agreement; the work experience of persons who have held the job; the current work experience of persons in similar jobs; whether the reason the position exists is to perform the function; whether there are a limited number of employees available among whom the function is to be distributed; whether the function is highly specialized and the individual in the position was hired for [his/her] expertise or ability to perform the function; and [list other relevant factors supported by the evidence]. You may also consider other factors.

29 C.F.R. § 1630.2(n).

[9]As noted previously, the causation standard for an ADA claim may be in flux. *See* ADA and ADAAA Overview § K. The Committee has taken no position on this issue and has instead provided options, including a "because-of" standard; an alternative "but-for" standard; and cross-references to the mixed-motives charges found in 11.1 and 11.13.

If the law develops to make the use of but-for causation clear, the following instruction may be used:

> 6. Defendant [name] would not have [specify adverse employment action other than failure to accommodate] [him/her] but for Plaintiff [name]'s [specify alleged disability]. It is not necessary that Plaintiff [name]'s disability be the only reason for Defendant [name]'s decision to [specify adverse employment action]. But you must find that that Defendant would not have made the decision in the absence of the Plaintiff [name]'s [specify alleged disability].

elements, then your verdict must be for Defendant [name].

A "disability" is a [physical] [mental] impairment that substantially limits one or more major life activities. In determining whether Plaintiff [name]'s [specify alleged impairment] substantially limits [his/her] ability to [specify major life activity affected], you should compare [his/her] ability to [specify major life activity affected] with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment.[10] [Temporary impairments with little or no long-term impact are not sufficient.][11]

In determining whether an impairment substantially limits a major life activity, you must consider the impairment without regard to the effects[12] of such measures as medication,[13] therapies,[14] or surgery. In doing so, you may consider evidence of the expected course of a particular disorder without medication, therapies, or surgery.[15]

(If the case involves a claim of impairments that are not obvious, such as a mental or psychological disorder, and there is a factual dispute

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[10]This instruction should be given when the plaintiff alleges an actual impairment and there is a factual dispute about whether it is a disability. An impairment is a disability under the ADA only if it substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(1).

[11]This language should be used only if supported by the evidence.

[12]42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi).

[13]42 U.S.C. § 12102(4)(E)(i)(1).

[14]29 C.F.R. § 1630.2(j)(5)(v) (psychotherapy, behavioral therapy, and physical therapy); 29 C.F.R. Part 1630 App. § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011)76 Fed. Reg. 16978, 17009 (Mar. 25, 2011) ("therapies").

[15]29 C.F.R. Part 1630 App. § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

about the employer's knowledge) To prove that Plaintiff [name]'s disability was the reason for the [specify adverse employment action], Plaintiff [name] must prove that the individuals at Defendant [name] who made the decision to [specify adverse employment action] knew of [his/her] disability. You may consider evidence about information learned from communications with Plaintiff [name]. In addition, an employer is presumed to know information in its files or records about its employees. But an employer is not presumed to know information in records that are not in its files. Nor is an employer required to draw conclusions that an individual has a mental or psychological disorder if it is not obvious to an ordinary person.

C. Charge for Cases Involving Claims of Discrimination Based on Having a Record of Impairment or Being Regarded as Having An Impairment

Plaintiff [name] claims that [he/she] was discriminated against because [[he/she] had a record of a disability] [Defendant [name] regarded [him/her] as having an impairment]. Defendant [name] denies Plaintiff [name]'s claims and contends that [he/she] was [specify adverse employment action] because of [specify contentions].[16]

Plaintiff [name] claims that [he/she] could have performed the essential functions of [specify job held or position sought] when Defendant [name] [specify adverse employment action] Plaintiff [name].

It is unlawful to [specify adverse employment action] a qualified individual who [has a record of a dis-

[16]This language may be used if there is no factual dispute about whether the plaintiff experienced an adverse employment action. If there is a dispute, the language may be modified using the definition of "tangible employment action" at Pattern Jury Instruction 11.1.

ability] [is regarded as having an impairment] because[17] the qualified individual

[has a record of a disability] [is regarded as having an impairment].[18]

To succeed in this case, Plaintiff [name] must prove the following by a preponderance of the evidence:

1. Plaintiff [name] could have performed the essential functions of [specify job held or position sought] when Defendant [name] [specify adverse employment action] [him/her];

2. Plaintiff [name] [had a record of a [physical] [mental] impairment that substantially limited one or more major life activities] [was regarded as having a [physical] [mental] impairment];

3. Defendant [name] [knew[19] that Plaintiff [name] had a record of a disability] [regarded Plaintiff [name] as having an impairment];

4. Defendant [name] [specify adverse employment action] Plaintiff [name]; and

5. Defendant [name] [specify adverse employment

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[17]As noted previously, the causation standard for an ADA claim may be in flux. *See* ADA and ADAAA Overview § K. *See also Reed v. Neopost USA, Inc.*, 701 F.3d at 440 (under the ADA, "discrimination need not be the sole reason for the adverse employment decision"). The committee has taken no position on this issue and has instead provided options, including a "because-of" standard; an alternative "but-for" standard; and cross-references to the mixed-motives charges found in 11.1 and 11.13.

The following mixed-motive instruction may be used for a § 2(m) case: Defendant [name]'s [specify adverse employment action] of Plaintiff [name] was motivated by [his/her] [protected trait]. Plaintiff [name] does not have to prove that unlawful discrimination was the only reason Defendant [name] [specify adverse employment action] [him/her].

[18]42 U.S.C. § 12112.

[19]This language may need to be modified if there is a factual dispute about whether the defendant knew or had information that would have provided knowledge about the plaintiff's impairment or disability.

action] Plaintiff [name] because [[he/she] [had a record of] [specify disability]] [was regarded as having [specify impairment]].

[An individual has a record of having a disability if [he/she] has a history of or has been classified as having an impairment that substantially limits one or more major life activities.]

[An individual is regarded as having an impairment if the individual establishes that [he/she] has been subjected to discrimination because of an actual or perceived impairment, whether or not it limits or is perceived to limit a major life activity.]

If Plaintiff [name] has failed to prove any of these elements, then your verdict must be for Defendant [name].

11.8 Pattern Jury Question, Discrimination Based on Disability

JURY QUESTIONS

Question No. 1

Has Plaintiff [name] proved that Defendant [name] [specify adverse employment action] Plaintiff [name] because of [his/her] [[having a record of] [specify disability]] [[being regarded as having] [specify impairment]]?[1]

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[1]If there are factual disputes about whether the plaintiff had a disability or an impairment as alleged, had a record of a disability, or was regarded as having a disability; whether he or she was a qualified individual; or whether he or she experienced the claimed tangible employment action, the following questions could be used:

Question No. 1

[Did Plaintiff [name] have a [disability] [a record of a disability]] [Was Plaintiff [name] regarded as having a disability]?

Answer "Yes" or "No."

_____

If you answered "Yes," then answer Question No. 2.

Question No. 2

Was Plaintiff [name] a "qualified individual?"

Answer "Yes" or "No."

_____

If you answered "Yes," then answer Question No. 3.

Question No. 3

Did Plaintiff [name] experience [specify the alleged adverse employment action]?

Answer "Yes" or "No."

_____

Question No. 4

Was [specify disputed action] an adverse employment action?

Answer "Yes" or "No."

_____

11.9 Harassment Based on Disability (Hostile Work Environment—Negligence)[1]

A. Committee Notes

[1]In *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235–36 (5th Cir. 2001), the Fifth Circuit recognized a cause of action under the ADA for disability harassment. Recent case law in related contexts indicates that *Flowers* remains good law. *See, e.g.*, *Carder v. Cont'l Airlines*, 636 F.3d 172, 178 (5th Cir. 2011) (citing *Flowers* in explaining why the Uniformed Services Employment and Reemployment Act does not create a cause of action based on hostile work environment, as the ADA and Title VII do). *But see Bennett v. Dallas Indep. Sch. Dist.*, 936 F. Supp. 2d 767, 789 (N.D. Tex. 2013) (discussing *Carder* and positing that in November of 2011, Congress amended part of the USERRA and that it might now include a cause of action based on hostile work environment). Although tried shortly after *Faragher* and *Ellerth* were decided, *Flowers* appears to have been tried solely under a negligence theory. The Fifth Circuit's decision addresses only the negligence theory of disability harassment. In *Credeur v. La. Through Office of Att'y Gen.*, 860 F.3d 785 (5th Cir. 2017), the Fifth Circuit reassured that a plaintiff may bring a disability-based harassment claim under the ADA. 860 F.3d at 796. The Court quoted *Flowers*, stating:

> To establish a prima facie case of disability-based harassment, a plaintiff must demonstrate: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action. *Flowers*, 247 F.3d at 235–36. Further, the "harassment must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." *Id.* at 236. In determining whether a work environment is abusive, we consider the entirety of the evidence in the record, including "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Id.* (quoting *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)).

Credeur held that criticism of an employee's work performance, and even threats of termination, do not satisfy the standard for a harassment claim. *Id.* (citing *Kumar v. Shinseki*, 495 F. App'x 541, 543 (5th Cir. 2012)). *Credeur* does not change *Flowers*. In another recent opinion, *Patton v. Jacobs Engineering Grp., Inc.*, 874 F.3d 437 (5th Cir. 2017), the Fifth Circuit cited, but did not analyze, the elements of *Flowers*, because the plaintiff had forfeited his challenge to the district court's findings that "the plaintiff did not show that the defendant knew or should have known of the harassment and failed to take prompt remedial action." Neither *Credeur* nor *Patton* explained the meaning of "based on" in the third element.

This charge is for cases in which liability for harassment based on disability is alleged under a negligence theory. There is little case law on this cause of action. These instructions rely heavily on the Fifth Circuit's leading case on this subject, *Flowers v. South Regional Physician Services., Inc.*[2]

B. Charge

Plaintiff [name] claims that [he/she] was harassed by [harasser's name] based on [his/her] [specify disability].[3]

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify contentions].

It is unlawful for an employer to discriminate against an employee because of the employee's disability. Unlawful discrimination can include harassment.

For Defendant [name] to be liable for harassment based on a disability, Plaintiff [name] must prove by a preponderance of the evidence that [harasser's name] engaged in harassment based on Plaintiff [name]'s disability and:

1. the conduct was sufficiently severe or pervasive to:

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[2]*Flowers*, 247 F.3d at 235–36; *see also Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 509–11 (5th Cir. 2003).

[3]The case law uses "was based on" to state the causation standard for disability-harassment claims. *See, e.g.*, *Gowesky*, 321 F.3d at 509. The mixed-motive alternative is rarely asserted in such cases. If but-for causation is asserted, or if the cases make clear that the but-for causation standard is correct, the charge may be modified as follows:

. . . [he/she] would not have been harassed by [harasser] but for [specify disability].

a. alter the terms or conditions of Plaintiff [name]'s employment; and

b. create a hostile or abusive work environment;[4] and

2. Defendant [name] knew, or in the exercise of reasonable care should have known, that Plaintiff [name] was being harassed based on [his/her] disability. To make this showing, Plaintiff [name] must prove that:

a. the harassment was known by or communicated to a person who had the authority to receive, address, or report the complaint, even if that person did not do so;[5] or

b. the harassment was so open and obvious that Defendant [name] should have known of it;[6] and

c. Defendant [name] failed to take prompt remedial action designed to stop the harassment.[7]

To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff [name]'s employment, you should consider all the circumstances, including the frequency of the conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether

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[4] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986).

[5] *Williamson v. City of Hous.*, 148 F.3d 462, 466–67 (5th Cir. 1998).

[6] *Sharp v. City of Hous.*, 164 F.3d 923, 930 (5th Cir. 1999).

[7] *Flowers*, 247 F.3d at 235–36; *Meritor*, 477 U.S. at 66–67.

it unreasonably interferes with Plaintiff [name]'s work performance.[8]

In determining whether a hostile work environment existed, you must consider the evidence from both Plaintiff [name]'s perspective and from the perspective of a reasonable person. First, you must look at whether Plaintiff [name] actually found the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person, nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff [name] would find the conduct offensive.[9]

If Plaintiff [name] proves [he/she] was harassed because of [his/her] [specify disability], then you must decide whether Defendant [name] is liable. Plaintiff [name] must prove that Defendant [name]: (a) either knew of the harassment or in the exercise of reasonable care should have known of the harassment; and (b) failed to take prompt remedial action.[10]

In determining whether Defendant [name] knew or should have known of the harassment, Plaintiff [name] must prove that: (a) the harassment was known or communicated to a person who had the authority to receive, address, or report the complaint, even if that person

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[8]*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *Flowers*, 247 F.3d at 236.

[9]*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[10]*Shepherd v. Comptroller of Pub. Accounts of Tex.*, 168 F.3d 871, 873 (5th Cir. 1999); *Williamson*, 148 F.3d at 464–66.

did not do so;[11] or (b) the harassment was so open and obvious that Defendant [name] should have known of it.[12]

Prompt remedial action is conduct by the employer that is reasonably calculated to stop the harassment and remedy the situation. Whether Defendant [name]'s actions were prompt and remedial depends on the facts. You may consider, among other things, the effectiveness of any actions taken.[13]

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[11] *Williamson*, 148 F.3d at 466–67.

[12] *Sharp*, 164 F.3d at 930.

[13] *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989).

11.9 Pattern Jury Questions, Harassment Based on Disability (Hostile Work Environment—Negligence)

JURY QUESTIONS

Question No. 1

Was Plaintiff [name] harassed based on [his/her] [specify disability]?[1]

Answer "Yes" or "No."

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If you answered "Yes" to Question No. 1, then answer Question No. 2.

Question No. 2

Did Defendant [name] know, or in the exercise of reasonable care should Defendant [name] have known, that Plaintiff [name] was being harassed based on [his/her] [specify disability]?

Answer "Yes" or "No."

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If you answered "Yes" to Question No. 2, then answer Question No. 3.

[1]The cases use the "based on" language to submit disability-harassment claims. If the case law becomes clear that pretext is used, the question can be modified to ask: "Would Plaintiff [name] have been harassed but for [specify disability]?"

Question No. 3

Did Defendant [name] fail to take prompt remedial action?

Answer "Yes" or "No."

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11.10 Failure to Accommodate a Disability

A. Committee Notes

This charge is for cases in which the plaintiff alleges that the defendant failed to make a reasonable accommodation for the plaintiff's disability that would have permitted the plaintiff to perform the essential functions of his or her job.[1]

B. Charge

Plaintiff [name] claims that Defendant [name] failed to reasonably accommodate Plaintiff [name]'s disability.

Defendant [name] denies Plaintiff [name]'s claims and contends [specify contentions].

The law requires an employer to make reasonable accommodations for an [employee's] [applicant's] disability.

To succeed in this case, Plaintiff [name] must prove each of the following by a preponderance of the evidence:

1. Plaintiff [name] could have performed the essential functions of the [specify job held or position sought] when Defendant [name] [specify adverse employment action] if Plaintiff [name] had been provided with [specify accommodation identified by plaintiff];

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[1] In *Feist v. State of La., Dept. of Justice*, 730 F.3d 450 (5th Cir. 2013), the Fifth Circuit clarified that failure-to-accommodate claims are not limited to accommodations that would have allowed the plaintiff to perform his or her essential job functions. Such claims may also be brought based on the failure to make accommodations that would have enabled a plaintiff who is a qualified applicant with a disability to be considered for the position that he or she desired and that would have him or her to have benefits and privileges of employment available to similarly situated employees without disabilities. *See Feist*, 730 F.3d at 453; 29 C.F.R. § 1630.2(o)(1).

2. Plaintiff [name] had [specify impairment];

3. Such [specify impairment] substantially limited Plaintiff [name]'s ability to [specify major life activity or activities affected];[2]

4. Defendant [name] knew of Plaintiff [name]'s [specify impairment];

5. Plaintiff [name] requested an accommodation;[3]

6. Providing [an] accommodation would have been reasonable; and

7. Defendant [name] failed to provide a reasonable accommodation.[4]

A "disability" is a [physical] [mental] impairment[5] that substantially limits one or more major life activities.[6] In determining whether Plaintiff [name]'s

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[2]This was modified from the 2009 Fifth Circuit Pattern Instruction to remove the reference to regarded-as disability, which is addressed in the separate instructions above.

[3]There are circumstances when an employer is deemed to be on notice. *See, e.g.*, *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735–36 nn.4–5 (5th Cir. 1999). Accordingly, there may be cases for which this element should be omitted or modified.

[4]An employer is not required to provide an employee the accommodation he or she requests or prefers. *Griffin*, 661 F.3d at 224. The employer need only provide some reasonable accommodation. *E.E.O.C. v. Agro Distrib.*, 555 F.3d 462, 471 (5th Cir. 2009); 29 C.F.R. pt. 1630.9 App., § 1630.9.

[5]"Physical impairment" is defined at 29 C.F.R. § 1630.2(h) and in Pattern Jury Instruction 11.8. The charge should only include those portions relevant to the specific allegations and evidence. If there is no dispute that the plaintiff's condition constituted an impairment, or the court finds an impairment as a matter of law, the court may instruct the jury that "the Plaintiff's [identify condition] is a [physical/mental] impairment."

[6]"Major life activities" are defined at 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(i)(1) and in Pattern Jury Instruction 11.8. The charge should include only what is relevant to the specific allegations and evidence. If there is no dispute that the plaintiff's impairment was a disability, or if the court finds a disability as a matter of law, the jury may be instructed accordingly.

impairment substantially limits [his/her] ability to [specify major life activity affected], you should compare [his/her] ability to [specify major life activity affected] with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. [Temporary impairments with little or no long-term impact are not sufficient.[7]]

In determining whether an impairment substantially limits a major life activity, you must consider the impairment without regard to the effects[8] of such measures as medication,[9] therapies,[10] or surgery. In doing so, you may consider evidence of the expected course of a particular disorder without medication, therapies, or surgery.[11]

If an impairment is episodic or in remission, it is still a "disability" if it substantially limited a major life activity when it was active or if it would substantially limit a major life activity when active.[12]

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[7]This language should be used only if supported by the evidence.

[8]42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi).

[9]42 U.S.C. § 12102(4)(E)(i)(1).

[10]29 C.F.R. § 1630.2(j)(5)(v) (psychotherapy, behavioral therapy, and physical therapy); 29 C.F.R. Part 1630 App. § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011)76 Fed. Reg. 16978, 17009 (Mar. 25, 2011) ("therapies").

[11]29 C.F.R. Part 1630 App. § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

[12]42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii). Some types of impairments will often result in a finding that they substantially limit a major life activity. Such impairments include deafness, blindness, an intellectual disability like mental retardation, a partially or completely missing limb, a mobility impairment requiring the use of a wheelchair, cancer, cerebral palsy, diabetes, epilepsy, Human Immunodeficiency Virus (HIV), multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder, or schizophrenia.

A "qualified individual"[13] is one who, with or without reasonable accommodations, can perform the essential functions of the job.[14] The term "essential functions" means the fundamental job duties of the employment position a plaintiff [holds/held] or for which [he/she] has applied. The term does not include the marginal functions of the position.

In determining whether a job function is essential, you should consider the following factors: the employer's judgment as to which functions are essential; written job descriptions; the amount of time spent on the job performing the function; the consequences of not requiring the person to perform the function; the terms of a collective bargaining agreement; the work experience of persons who have held the job; the current work experience of persons in similar jobs; whether the reason the position exists is to perform the function; whether there are a limited number of employees available among whom the performance of the function is to be distributed; whether the function is highly specialized and the individual in the position was hired for [his/her] expertise or ability to perform the function; and [list other relevant factors supported by the evidence]. You may also consider other factors.[15]

The term "accommodation" means making modifications to the work place that allow a person with a disability to perform the essential functions of the job, to attain the level of performance available to similarly situated employees who are not disabled, or to enjoy equal benefits and privileges of employment as are

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[13]"Qualified" also means "that the individual satisfies the requisite skill, experience, education, and other job-related requirements of the employment position the individual holds or desires." 29 C.F.R. § 1630.2(n). There is often no dispute about this part of the definition. If there is a dispute, this language should be included in the instruction.

[14]42 U.S.C. § 12111(8).

[15]29 C.F.R. § 1630.2(n).

enjoyed by similarly situated employees who are not disabled.[16]

A "reasonable" accommodation is one that could reasonably be made under the circumstances. It may include, but is not limited to: (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; or (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies, the provision of qualified readers or interpreters and other similar accommodations for individuals with

[16]29 C.F.R. § 1630.2(o)(1); *see also Feist*, 730 F.3d at 453 (holding that an accommodation need not enable the performance of the individual's essential job functions to be a reasonable accommodation under the ADA).

disabilities.[17] There may be other reasonable accommodations.[18]

Defendant [name] claims that Plaintiff [name]'s requested accommodation would have imposed an undue hardship on Defendant [name].[19] An employer need not provide an accommodation to the known limitations of a qualified employee or applicant if the employer proves that the accommodation would impose an undue hardship on its business operations. The employer has the burden of proving by a preponderance of the evidence that the accommodation would have imposed an undue hardship.

An "undue hardship" is an action requiring the

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[17]Although part-time work and job restructuring may be reasonable accommodations, an employer is not required to offer these accommodations in every case. An employer is not required to restructure a job if that would reallocate the job's essential functions. An employer is not obligated to hire additional employees or reassign existing workers to assist an employee with a disability. The ADA does not require an accommodation that would cause other employees to work harder, work longer hours, or lose opportunities. *See Toronka v. Cont'l Airlines*, 411 F. App'x. 719, 724 (5th Cir. 2011); *Burch v. City of Nacogdoches*, 174 F.3d 615, 621–22 (5th Cir. 1999).

Reassignment to a vacant position may be a reasonable accommodation, but the employer is not required to create a new position as an accommodation. *See Toronka*, 411 F. App'x at 725. An employee seeking reassignment as an accommodation must be "otherwise qualified" for the reassignment position. *See Toronka*, 411 F. App'x at 726. The ADA does not require preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Toronka*, 411 F. App'x at 725. An employer with an established policy of filling vacant positions with the most qualified applicant is not required to assign a vacant position to an employee with a disability who, although qualified, is not the most qualified applicant. *See Toronka*, 411 F. App'x at 725. An employer is not required to "bump" another employee to reassign a disabled position to that position. *See Toronka*, 411 F. App'x at 726 n.7 (citing *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997)). Promotion is not a required accommodation. *Toronka*, 411 F. App'x at 726 n.7.

[18]An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *Griffin*, 661 F.3d at 224. The employer need only provide some reasonable accommodation. *Agro Distrib.*, 555 F.3d at 471.

[19]This is a defense on which the defendant has the burden of proof. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 682 (5th Cir. 1996).

employer to incur significant difficulty or expense. Factors to be considered in determining whether the [specify accommodation] would cause an undue hardship include: (a) the nature and cost of the accommodation; (b) the overall financial resources of [the facility] involved in the accommodation, the number of persons employed there, the effect on expenses and resources, or the impact otherwise on [the facility's] operation; (c) the overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and location of its facilities; and (d) the type of operation of the employer, including the composition, structure, and functions of the workforce, the impact of the [specify accommodation] on [the facility's operation], including the impact on the ability of other employees to perform their duties, and [list other relevant factors supported by the evidence].[20]

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[20]42 U.S.C.A. § 1211(10)(B). This instruction should be modified to include only those factors supported by the evidence.

11.10 Pattern Jury Question, Failure to Accommodate Disability

JURY QUESTION

Question No. 1

Did Defendant [name] fail to reasonably accommodate Plaintiff [name]'s disability?

Answer "Yes" or "No."

_____[1]

[1]Other questions may be appropriate where other elements are disputed.

11.11 ADA—Retaliation

A. Committee Notes

A plaintiff may also allege that he or she suffered an adverse employment action in retaliation for engaging in an activity protected by the ADA. *See, e.g.*, *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999); *see also* Pattern Jury Instruction 11.5. (Title VII—Retaliation). A Title VII retaliation claim requires but-for causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013). After *Nassar*, the Fifth Circuit in *Feist* held that retaliation claims under the ADA also require but-for causation. *Feist v. La., Dep't of Justice*, 730 F.3d 450, 454 (5th Cir. 2013) (citing *Seaman*, 179 F.3d at 301 ("If such a reason is advanced, the plaintiff must adduce sufficient evidence that the proffered reason is a pretext for retaliation. Ultimately, the employee must show that 'but for' the protected activity, the adverse employment action would not have occurred.")).

B. Charge

Plaintiff [name] claims that Defendant [name] retaliated against [him/her] because [he/she] took steps to enforce [his/her] lawful rights under federal law prohibiting discrimination based on disability in the workplace.

The law that prohibits discrimination in the workplace also prohibits an employer from retaliating against an employee because that employee has asserted rights or made complaints under that law.

Plaintiff [name] claims that Defendant [name] [specify adverse employment action] because Plaintiff [name] [specify protected activity].

Defendant [name] denies Plaintiff [name]'s claim and asserts that [specify contentions].

To succeed on [his/her] claim, Plaintiff [name] must prove each of the following facts by a preponderance of the evidence:

1. Plaintiff [name] engaged in protected activity;

2. Defendant [name] [specify adverse employment action] Plaintiff [name];

3. Defendant [name] [specify adverse employment action] Plaintiff [name] on account of [his/her] engaging in protected activity.[1]

You need not find that the only reason for Defendant [name]'s decision was Plaintiff [name]'s protected activity. But you must find that Defendant [name]'s decision to [specify adverse action] Plaintiff [name] would not have occurred in the absence of—but for—[his/her] protected activity.

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[1]The charge and jury question will need to be adjusted if there is a factual dispute as to whether the plaintiff suffered an adverse employment action or whether he or she engaged in protected activity. The definitions of "adverse employment action" and of "protected activity" in Pattern Jury Instruction 11.5 may be used.

11.11 Pattern Jury Question, ADA—Retaliation

JURY QUESTION

Question No. 1

Has Plaintiff [name] proved that [he/she] would not have been [specify adverse employment action] but for [his/her] [specify protected activity]?

Answer "Yes" or "No."

_____

11.12 Defenses to ADA Claim: Business Necessity, Direct Threat, or Transitory and Minor Condition[1]

A. Committee Notes

This charge is for cases in which the defendant claims its actions were job-related and consistent with business necessity, its actions were justified by the direct-threat affirmative defense, or that the plaintiff is not covered by the statute because the disability is transitory and minor. The business-necessity defense applies if the challenged employment action results from applying an across-the-board rule that disqualified the plaintiff.[2] The direct-threat defense applies when the defendant asserts that the plaintiff would have posed a direct threat to the health or safety of the plaintiff or others in the position held or sought as opposed to an exclusion based on an across-the board rule.[3] The transitory-and-minor defense is asserted when the defendant claims that the statute does not apply to a plaintiff alleging a claim under the regarded-as prong because his or her condition did not or will not last more than six months and is minor in nature. The defense that a disability was minor in nature may also

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[1]These are defenses on which the defendant has the burden of proof. *See Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F.3d 209, 213, 219 (5th Cir. 2000) (en banc); 29 C.F.R. § 1630.15.

[2]*EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000).

[3]42 U.S.C. § 12113(a) (describing defenses and terms); 29 C.F.R. § 1630.15(c) (1999) (describing the four elements a defendant must prove to sustain burden). The Fifth Circuit has held that this defense applies when the employer asserts that the plaintiff as an individual poses a safety risk. *Exxon Corp.*, 203 F.3d at 875. On the other hand, if the challenged employment action results from applying an across-the-board rule that disqualifies the plaintiff and others in the same category, the business-necessity defense, not the direct-threat defense, applies.

be asserted when a plaintiff alleges a claim under the actual-disability or record-of-a-disability theories.[4]

B. Charge for Business-Necessity Defense

If you find that Defendant [name] [specify adverse employment action] Plaintiff [name] because of Plaintiff [name]'s [specify disability], then you must find for Plaintiff [name] unless Defendant [name] proves by a preponderance of the evidence that [specify applicable employment standard] was a business necessity. Business necessity is a defense to certain discrimination claims under the ADA.

To establish this defense, Defendant[5] [name] must prove by a preponderance of the evidence that its application of qualification standards, tests, selection criteria, or policies that have [the effect of screening out or otherwise denying a job or benefit to individuals with [specify disability]] [have a disparate impact on individuals with [specify disability]], was:

1. uniformly applied;

2. job-related for the position in question;

3. consistent with business necessity; and

4. cannot be met by a person with [specify disability] even with a reasonable accommodation.[6]

C. Charge for Direct-Threat Defense

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[4]The transitory part of the transitory-and-minor defense applies only to claims under the regarded-as prong. It does not apply to the definition of disability under the actual-disability or record-of-disability prongs, under which the effects of an impairment lasting less than six months can be substantially limiting. 29 C.F.R. § 1630.2(j)(1)(ix).

[5]Business necessity is a defense on which the defendant has the burden of proof. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 682 (5th Cir. 1996).

[6]*See Atkins v. Salazar*, 677 F.3d 667, 681–82 (5th Cir. 2011).

If you find that Defendant [name] [specify adverse employment action] Plaintiff [name] because of Plaintiff [name]'s [specify disability], then you must find for Plaintiff [name] unless Defendant [name] proves by a preponderance of the evidence that Plaintiff [name]'s [employment] [continued employment] [posed] [would have posed] a direct threat to the health or safety of Plaintiff [name] or others in the workplace.

A direct threat means a significant risk of substantial harm to the health or safety of Plaintiff [name] or others in the workplace that could not be eliminated or reduced by a reasonable accommodation.[7]

To prove that Plaintiff [name] posed a direct threat, Defendant [name] must prove that it performed an individualized assessment of Plaintiff [name]'s present ability[8] to safely perform the essential functions of the job.[9]

In determining whether Plaintiff [name] posed a direct threat, you should consider: (i) how long the risk will last; (ii) the nature and severity of the potential harm; (iii) how likely it is that the harm will occur; and (iv) the likely time before the potential harm occurs.[10] Defendant [name] must also prove that no reasonable accommodation could be made that would eliminate or reduce the risk so that it was no longer a significant risk of substantial harm.[11]

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[7]29 C.F.R. § 1630.2(r).

[8]In most cases, the timing of the assessment is not an issue. If that is disputed, the assessment generally measure the plaintiff's ability to work safely at the time of the challenged employment action. 29 C.F.R. § 1630.2(r) (referencing "present" ability).

[9]*Kapche v. City of San Antonio*, 304 F.3d 493, 498 (5th Cir. 2002) (citing 29 C.F.R. § 1630.2(r)).

[10]*Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 763 (5th Cir. 1996) (citing 29 C.F.R. § 1630.2(r)).

[11]29 C.F.R. § 1630.2(r).

D. Defense to Discrimination Claim—Transitory and Minor[12]

(For a claim involving regarded-as disability) If you find that Defendant [name] [specify adverse employment action] Plaintiff [name] because Plaintiff [name] was regarded as having [specify impairment], then you must find for Plaintiff [name] unless Defendant [name] proves by a preponderance of the evidence that the impairment Plaintiff [name] was regarded as having was transitory and minor. It does not matter what Defendant [name] believed. To succeed in this defense, Defendant [name] must prove that the impairment Plaintiff [name] was regarded as having would be both transitory and minor. "Transitory" means the [specify impairment] would last six months or less.

OR

(For a claim involving an actual disability) If you find that Defendant [name] [specify adverse employment action] Plaintiff [name] because of Plaintiff [name]'s [specify disability], then you must find for Plaintiff [name] unless Defendant [name] proves by a preponderance of the evidence that Plaintiff's impairment was minor. It does not matter what Defendant [name] believed. To succeed in this defense, Defendant [name] must prove that Plaintiff [name]'s [specify disability] actually was minor. The duration of the [specify disability] does not matter.

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[12]Although the Fifth Circuit has not directly ruled on this issue, district courts have held that the employer bears the burden to prove that the plaintiff's impairment was transitory and minor as an affirmative defense. *See Dube v. Tex. Health & Human Servs.,* No. SA-11-CV-354-XR, 2011 WL 4017959, at *2 (W.D. Tex. Sept. 8, 2011); *Mesa v. City of San Antonio,* No. SA-17-CV-654-XR, 2018 WL 3946549, at *13 & n.13 (W.D. Tex. Aug. 16, 2018) (explaining that the Fifth Circuit has implicitly agreed with *Dube* and summarizing other circuit decisions (citing *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 230 (5th Cir. 2015)).

11.12 Pattern Jury Question, Defenses to ADA Claim—Business Necessity, Direct Threat, or Transient-and-Minor Condition

JURY QUESTION

Question No. 1 (Business Necessity)

Has Defendant [name] proved that its policy that caused Plaintiff [name] to be [specify adverse employment action] was justified by a business necessity?

Answer "Yes" or "No."

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Question No. 1 (Direct Threat)

Has Defendant [name] proved that Plaintiff [name]'s [employment] [continued employment] would have posed a direct threat to Plaintiff [name] or others in the workplace?

Answer "Yes" or "No."

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Question No. 1 (Transitory and Minor, Regarded-As Claims)

Has Defendant [name] proved that the impairment Plaintiff [name] was regarded as having would be a minor condition lasting six months or less?

Answer "Yes" or "No."

_____

Question No. 1 (Minor, Actual-Disability Claims)

Has Defendant [name] proved that Plaintiff [name]'s [specify disability] was a minor condition?

Answer "Yes" or "No"

_____

11.13 Mixed-Motive Affirmative Defense Instruction (Title VII and ADA)

A. Committee Notes

The court should submit the mixed-motive defense only when properly raised and when credible evidence has been presented from which the jury could reasonably conclude that a mix of permissible and impermissible reasons factored into the employer's decision-making process.[1] If this instruction is submitted, the motivating-factor language from 42 U.S.C. § 2000e-2(m) should be used in place of the because-of causation standard. This instruction and question should be in addition to the other applicable instructions and questions.

This instruction does not apply to an ADEA case, *see Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), a Title VII retaliation case, *see Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2533, or an ADA retaliation case, *see Feist*, 730 F.3d at 454.[2,3]

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[1]*Garcia v. City of Hous.*, 201 F.3d 672, 675 (5th Cir. 2000) ("[T]o prove a mixed-motive defense the employer should be able to present some objective proof that the same decision would have been made."); *see also Machinchick v. PB Power, Inc.*, 398 F.3d 345 (5th Cir. 2005); *Rachid v. Jack in the Box*, 376 F.3d 305, 309–10 (5th Cir. 2004); *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004); Matthew R. Scott and Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Cases to Mixed Motive*, 36 St. Mary's L.J. 395, 401 n.81 (2005).

[2,]The Supreme Court recently held that but-for causation applies to § 1981 claims. *See Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014–15 (2020) ("But, taken collectively, clues from the statute's text, its history, and our precedent persuade us that § 1981 follows the general rule. Here, a plaintiff bears the burden of showing that race was a but-for cause of its injury.").

[3]The Fifth Circuit stated, in an unpublished decision, that the ADEA and ADA adopt the "different degree[s] of proof required for showing causation." *Hoffman v. Baylor Health Care Sys.*, 597 F. App'x 231, 253 & n.12 (5th Cir. 2015). The Fifth Circuit stated that "the ADEA does not authorize a mixed-motive[] claim of age discrimination, such that a plaintiff-employee must show that age was the but-for cause of the alleged age discrimination. In contrast, '[t]he proper causation standard under the

B. Charge

If you find that Plaintiff [name]'s [protected trait] was a motivating factor in the Defendant [name]'s decision to [specify adverse employment action] [him/her], even though other considerations were factors in the decision, then you must determine whether Defendant [name] proved by a preponderance of the evidence that it would have made the same decision even if it had not considered Plaintiff [name]'s [protected trait].

ADA is a 'motivating factor' test . . . [i.e.,] 'discrimination need not be the sole reason for the adverse employment decision." " *Id.* at 253 n.12 (citing *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008)) (citations removed). The committee has provided options, including a "because-of" standard; an alternative "but-for" standard; and cross-references to the mixed-motives charges found in 11.1 and 11.13.

11.13 Pattern Jury Question, Mixed-Motive Defense

JURY QUESTION

Has Defendant [name] proved that it would have made the same decision to [specify adverse employment action] Plaintiff [name] even if it had not considered [his/her] [protected trait]?

Answer "Yes" or "No."

_____

11.14 Title VII and ADA Damages

A. Committee Notes

This charge can be used in Title VII and ADA cases.

1. Compensatory and Punitive Damages

The award of compensatory and punitive damages in a Title VII employment-discrimination action is governed by 42 U.S.C. § 1981a. *See* 42 U.S.C. § 1981a(a)(1), (b)(2). Equitable relief is authorized under 42 U.S.C. § 2000e-5(g).

42 U.S.C. § 1981a(a)(1) authorizes a prevailing plaintiff to receive compensatory damages, which may be awarded for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." § 1981a(b)(3). Compensatory damages do not include "backpay, interest on backpay, or any other type of relief authorized under" 42 U.S.C. § 2000e-5(g). Compensatory damages are capped under 42 U.S.C. § 1981a(b)(3).

42 U.S.C. § 1981a(b)(1) also authorizes a prevailing plaintiff to receive punitive damages if the plaintiff "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Punitive damages are not available against "a government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1).

To recover punitive damages, a plaintiff must impute liability for punitive damages to the employer. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 539 (1999). The plaintiff may establish that an employee of the defendant acting in a "managerial capacity" acted with malice or reckless indifference to the plaintiff's federally protected rights. *Kolstad*, 527 U.S. at 543, 545–46.

"Unfortunately, no good definition of what constitutes a 'managerial capacity' has been found." *EEOC v. Serv. Temps Inc.*, 679 F.3d 323, 336 (5th Cir. 2012) (quoting *Kolstad*, 527 U.S. at 543) (punctuation altered). Generally, a "managerial capacity" employee must be "important, but perhaps need not be the employer's top management, officers, or directors to be acting in a managerial capacity." *Kolstad*, 527 U.S. at 543 (internal quotation marks omitted). "[D]etermining whether an employee" acts in a "managerial capacity" is a "fact-intensive inquiry." *Kolstad*, 527 U.S. at 543. Relevant factors include "the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." *Kolstad*, 527 U.S. at 543.

While the *Kolstad* managerial-capacity test has been firmly rooted, it should be noted that the United States Supreme Court examined agency principles and supervisory status in *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013). It does not appear that the Fifth Circuit—or any other circuit—has examined whether *Vance* impacted the *Kolstad* line of cases. That said, pre-*Vance* cases from the Fifth Circuit mention the ability to make decisions like hiring or firing in their analysis under *Kolstad*. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 285 (5th Cir. 1999) (en banc) (finding managerial capacity and noting that manager had authority to make "personnel decisions regarding Deffenbaugh and others in her department"); *Serv. Temps Inc.*, 679 F.3d at 337 ("[T]he jury could reasonably have found that Ray had the authority to hire and supervise employees and was therefore acting in a managerial capacity."). The committee will continue to use the "managerial-capacity" language, but courts and attorneys should be aware of this issue and may wish to amend these instructions accordingly.

The cap on compensatory damages under 42 U.S.C. § 1981a(b)(3) applies to the award "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuni-

ary losses, and the amount of punitive damages awarded under this section." For each plaintiff, these damages may not exceed:

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

(B) for a respondent with more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) for a respondent with more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) for a respondent with more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3).

A major limit on punitive damages is the Supreme Court's announcement that few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003).

In some cases, a party may bring parallel claims under Title VII and § 1981 or the Equal Protection Clause. Punitive damages are available under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 and are not subject to Title VII's damages cap.

If a plaintiff seeks compensatory or punitive damages, either party may demand a trial by jury. 42 U.S.C. § 1981a(c). The jury would determine compensatory and

punitive damages without being instructed on the statutory caps. The court would then reduce the amount in accordance with the limits in § 1981a, if necessary. 42 U.S.C. § 1981a(c)(2).

2. Back Pay

42 U.S.C. § 2000e-5(g)(1) provides for the award of back pay from the date of judgment back to two years before the date the plaintiff filed an EEOC complaint. Back pay is recoverable up to the date judgment is entered and must exclude interim earnings.

Back pay is more than salary. It includes fringe benefits such as vacation, sick pay, insurance, and retirement benefits.

Back pay is recoverable only through 42 U.S.C. § 2000e-5(g)(1); it is specifically exempted from the definition of compensatory damages under 42 U.S.C. § 1981a(b)(2). Back pay is not limited by the damages cap of § 1981a.

Back pay is considered equitable relief. It is a question for the court, but a jury trial may be appropriate to decide the issue. When legal and equitable issues are tried together and overlap factually, the Seventh Amendment requires that findings necessarily made by the jury in returning its verdict on legal claims are binding on the trial court when it sits in equity. Even if the legal and equitable issues do not overlap, the parties may consent to have the issue tried by a jury or the court may try the issue with an advisory jury. Fed. R. Civ. P. 39(c); *Black v. Pan Am. Labs., L.L.C.*, 646 F.3d 254, 263 (5th Cir. 2011). Pattern Jury Instruction 11.14 allows the jury to decide back pay. If the judge decides not to submit the issue to the jury, the jury may be told that should it find for the plaintiff, the court will award past wages and benefits lost as a result of defendant's wrongful action, and the jury should not make any award for lost pay.

3. Front Pay

"Front pay" covers monetary damages for future lost wages and benefits. Front pay is awarded only when reinstatement is not feasible because a hostile relationship exists between the employer and employee. Front pay is an equitable remedy to be determined by the court at the conclusion of the jury trial, but an advisory jury may be used. *Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 526 (5th Cir. 2001). A recent, unpublished Fifth Circuit opinion held that if a district court submits the front-pay issue to the jury, without the parties' objection and without mentioning the jury's advisory role, the jury verdict will be binding and cannot be set aside by the district court on the theory that it was advisory. *Garza v. Starr Cty.*, 628 F. App'x 887, 889–90 (5th Cir. Oct. 20, 2015)

4. Attorney's Fees

Title VII authorizes the court to award attorney's fees to "the prevailing party." 42 U.S.C. § 2000e-5(k). An attorney's fee award is an issue for the court, not the jury.

5. No Double Recovery

The prohibition on double recovery means that a plaintiff cannot recover additional damages for back pay, for front pay, or compensatory damages for both discrimination and retaliation arising from the same factual basis. *See EEOC v. Waffle House Inc.*, 534 U.S. 279, 297 (2002).

B. Charge

If you found that Defendant [name] violated [Title VII/the ADA], then you must determine whether it has caused Plaintiff [name] damages and, if so, you must determine the amount of those damages. You should not conclude from the fact that I am instructing you on

damages that I have any opinion as to whether Plaintiff [name] has proved liability.

Plaintiff [name] must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not on speculation or guesswork. On the other hand, Plaintiff [name] need not prove the amount of [his/her] losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.[1]

You should consider the following elements of actual damages, and no others: (1) the amount of back pay and benefits Plaintiff [name] would have earned in [his/her] employment with Defendant [name] if [he/she] had not been [specify challenged employment action] from [date of adverse employment action] to the date of your verdict, minus the amount of earnings and benefits that Plaintiff [name] received from employment during that time; (2) the amount of other damages[2] sustained by Plaintiff [name] [list recoverable elements supported by the evidence, such as pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses].[3]

Back pay includes the amounts the evidence shows Plaintiff [name] would have earned had [he/she] [remained an employee of Defendant [name]] [been promoted] [not been demoted] [other applicable circumstance]. These amounts include wages or salary and such benefits as life and health insurance, stock options, and contributions to retirement. You must

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[1] *Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993).

[2] For additional instructions on compensatory damages, see Pattern Jury Instruction 10.12.

[3] This charge does not include front pay—future lost wages and benefits—because they are an equitable remedy for the court to determine. Section 1981a also provides that while a plaintiff may recover for "future pecuniary losses," that does not include "front" or future lost pay. *Pollard v. E.I. duPont de Nemours & Co.*, 532 U.S. 843 (2001).

subtract the amounts of earnings and benefits Defendant [name] proves by a preponderance of the evidence Plaintiff [name] received during the period in question.[4]

(If the defendant asserts and provides evidence that the plaintiff failed to mitigate damages, the following charge should be given.)[5] Defendant claims that Plaintiff [name] failed to mitigate [his/her] damages. Plaintiff [name] has a duty under the law to mitigate [his/her] damages, that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages.

To succeed on this defense, Defendant [name] must prove, by a preponderance of the evidence: (a) that there was substantially equivalent employment available; (b) Plaintiff [name] failed to use reasonable diligence in seeking those positions; and (c) the amount by which

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[4]*Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981).

[5]This charge may be used in conjunction with Charge 15.5. This charge should be used only when the defendant asserts the affirmative defense that the plaintiff failed to mitigate his or her damages. *See Garcia v. Harris Cty.,* No. H-16-2134, 2019 WL 132382, at *2 (S.D. Tex. Jan. 8, 2019) ("Courts have specifically acknowledged that, in the failure to mitigate context, the *Sparks* decision controls over the *West* and other later conflicting decisions.").

Earlier versions of this instruction included the following language: "If Defendant proves that Plaintiff has not made reasonable efforts to obtain work, Defendant does not have to establish the availability of substantially equivalent employment." Authority exists for this instruction. *See Sellers v. Dellgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990); *see also West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003). But recent district court cases have observed that Sellers conflicts with the previously decided *Sparks v. Griffin*, 460 F.2d 433, 443 (5th Cir. 1972), which required that defendant prove that "there were jobs available which appellant could have discovered and for which she was qualified." *See, e.g.*, *Newcomb v. Corinth Sch. Dist.*, No. 1:12-CV-0204-SA-DAS, 2015 WL 1505839, at *7 (N.D. Miss. Mar. 31, 2015) (applying *Sparks* under rule of orderliness); *Buckingham v. Booz Allen Hamilton, Inc.*, 64 F. Supp. 3d 981, 984 (S.D. Tex. 2014) (same). *But see E.E.O.C. v. IESI Louisiana Corp.*, 720 F. Supp. 2d 750, 755 (W.D. La. 2010) (recognizing the *Sparks* "resurgence" but opting to follow the "newer" standard). Given this history, the Committee conclude that this language should not remain in a pattern instruction but that courts and counsel should be aware of the split.

Plaintiff [name]'s damages were increased by [his/her] failure to take such reasonable actions.[6]

"Substantially equivalent employment" in this context means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job [he/she] [lost] [was denied]. Plaintiff does not have to accept a job that is dissimilar to the one [he/she] [lost] [was denied], one that would be a demotion, or one that would be demeaning.[7] The reasonableness of Plaintiff [name]'s diligence should be evaluated in light of [his/her] individual characteristics and the job market.[8]

There is no exact standard for determining actual damages. You are to determine an amount that will fairly compensate Plaintiff [name] for the harm [he/she] has sustained.[9] Do not include as actual damages interest on wages or benefits.

In addition to actual damages, you may consider whether to award punitive damages. Punitive damages are damages designed to punish a defendant and to deter similar conduct in the future.[10]

You may award punitive damages if Plaintiff [name] proves by a preponderance of the evidence that: (1) the individual who engaged in the discriminatory act or practice was acting in a managerial capacity; (2) [he/she] engaged in the discriminatory act or practice while acting in the scope of [his/her] employment; and (3) [he/she] acted with malice or reckless indifference to

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[6] *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999); *Floca v. Homcare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir. 1975).

[7] *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[8] *Sellers*, 902 F.2d at 1193.

[9] Seventh Cir. Pattern Jury Instr. 7.23

[10] *Kolstad*, 527 U.S. at 545–546.

Plaintiff [name]'s federally protected right to be free from discrimination.[11]

If Plaintiff [name] has proved these facts, then you may award punitive damages, unless Defendant [name] proves by a preponderance of the evidence that the [conduct] [act] was contrary to its good-faith efforts to prevent discrimination in the workplace.[12]

In determining whether [employee's name] was a supervisor or manager for Defendant [name], you should consider the type of authority [employee's name] had over Plaintiff [name] and the type of authority for employment decisions Defendant [name] authorized [employee name] to make.[13]

An action is in "reckless indifference" to Plaintiff [name]'s federally protected rights if it was taken in the face of a perceived risk that the conduct would violate federal law.[14] Plaintiff [name] is not required to show egregious or outrageous discrimination to recover punitive damages. Proof that Defendant [name] engaged in intentional discrimination, however, is not enough in itself to justify an award of punitive damages.[15]

In determining whether Defendant [name] made good-faith efforts to prevent discrimination in the

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[11]*Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 n.4 (5th Cir. 1999). As noted above, courts should consider the possible impact of *Vance v. Ball State University*. The Committee takes no position with respect to *Vance's* potential impact on *Kolstad*.

[12]*Kolstad*, 527 U.S. at 545–46; *Deffenbaugh-Williams*, 188 F.3d at 281, 286.

[13]*Kolstad*, 527 U.S. at 543; *EEOC v. Serv. Temps Inc.*, 679 F.3d 323, 336 (5th Cir. 2012) ("In deciding whether an employee serves in a managerial capacity, courts consider 'the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.' " (quoting *Kolstad*, 527 U.S. at 543)); *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

[14]*Kolstad*, 527 U.S. at 536.

[15]*Kolstad*, 527 U.S. at 535.

workplace, you may consider whether it adopted antidiscrimination policies, whether it educated its employees on the federal antidiscrimination laws, how it responded to Plaintiff [name]'s complaint of discrimination, and how it responded to other complaints of discrimination.[16]

If you find that Defendant [name] acted with malice or reckless indifference to Plaintiff [name]'s rights [and did not make a good-faith effort to comply with the law], then in addition to any other damages you find Plaintiff [name] is entitled to receive, you may, but are not required to, award Plaintiff [name] an additional amount as punitive damages for the purposes of punishing the Defendant [name] for engaging in such wrongful conduct and deterring Defendant [name] and others from engaging in such conduct in the future. You should presume that Plaintiff [name] has been made whole for [his/her] injuries by any actual damages you have awarded.

If you decide to award punitive damages, you should consider the following in deciding the amount:

1. How reprehensible Defendant [name]'s conduct was. You may consider whether the harm Plaintiff [name] suffered was physical or economic or both; whether there was violence, intentional malice, or reckless disregard for human health or safety; whether Defendant's [name]'s conduct that harmed Plaintiff [name] also posed a risk of harm to others; whether there was any repetition of the wrongful conduct or there was past conduct of the same sort that harmed Plaintiff [name].

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[16]*Meritor*, 477 U.S. at 72 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Deffenbaugh-Williams*, 188 F.3d at 286. *See also EEOC v. Boh Bros. Const. Co., LLC*, 731 F.3d 444, 467 & n.30 (5th Cir. 2013) (explaining the difference between the *Ellerth/Faragher* affirmative defense and the good-faith defense for punitive damages).

2. How much harm Defendant [name]'s wrongful conduct caused Plaintiff [name] [and could cause [him/her] in the future].[17]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering Defendant [name]'s financial condition, to punish Defendant [name] for its conduct toward Plaintiff [name] and to deter Defendant [name] and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct.][18]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused Plaintiff [name].

(For use in multiple-defendant cases) You may assess punitive damages against any, or all, of the defendants, or you may refuse to impose punitive damages. If punitive damages are imposed on more than one defendant, the amounts for each may be the same or they may be different.

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[17]If no evidence has been introduced as to harm to nonparties, it may be appropriate to add: "You may not consider harm to others in deciding the amount of punitive damages to award."

[18]This language should be used only if there is evidence of fines and civil penalties.

11.14 Pattern Jury Questions, Title VII and ADA—Damages

JURY QUESTIONS

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff [name] for the damages, if any, you have found Defendant [name] caused Plaintiff [name]?

Answer in dollars and cents for the following items and none other:

1. Past pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

$_____

2. Future pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

$_____

3. Wages and benefits from [specify date] to [specify date].

$_____

Question No. 2

Do you find that Plaintiff [name] failed to reduce [his/her] damages through the exercise of reasonable diligence in seeking, obtaining, and maintaining substantially equivalent employment after the date of

[his/her] [specify tangible or adverse employment action]?[1]

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3

How much would Plaintiff [name] have earned had [he/she] exercised reasonable diligence under the circumstances to minimize [his/her] damages?

Answer in dollars and cents, if any.

$_____

Question No. 4

Do you find that Plaintiff [name] should be awarded punitive damages?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 4, then answer Question No. 5:

[1]This question may need modification if the parties dispute whether plaintiff failed to mitigate other categories of damages.

Question No. 5

What sum of money should be assessed against Defendant [name] as punitive damages?

Answer in dollars and cents:

$_____

11.15 Discrimination Based on Age (ADEA Disparate Treatment)

A. Committee Notes

This charge is for ADEA cases in which the plaintiff alleges discrimination because of age, 40 years or older.[1] This charge applies to disparate-treatment cases in which facts material to each element of proof are in dispute, with the exception of whether the plaintiff suffered a tangible employment action.[2] The charge may be modified depending on what issues are factually disputed. If the plaintiff asserts constructive discharge, *see* Pattern Jury Instruction 11.6.[3]

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[1]Under ADEA § 623(f), there are particular defenses available to a defendant that maintains its decision was the result of a bona fide occupational qualification or a bona fide seniority system. In these cases, the jury must be instructed on the elements of the particular defense asserted. These charges do not contain those defensive instructions.

[2]In federal-sector cases, the statute requires that federal employment "personnel actions" be made "free from any discrimination based on age." 29 U.S.C. § 633a(a). It is not yet clear in the Fifth Circuit whether this provides more protection in federal-sector cases than is otherwise present under the ADEA. In *Babb v. Wilkie,* No. 18-882, 2020 WL 1668281, at *2–3 (April 6, 2020), the Supreme Court addressed the phrase "free from any discrimination based on age." The Court held that the statutory language "demands that personnel actions be untainted by any consideration of age." *Id.* at *3. The Court continued: "This does not mean that a plaintiff may obtain all forms of relief that are generally available for a violation of § 633a(a), including hiring, reinstatement, backpay, and compensatory damages, without showing that a personnel action would have been different if age had not been taken into account." *Id.* For those forms of relief, the Court explained, "a plaintiff must show that age was a but-for cause of the challenged employment decision." *Id.* "But if age discrimination played a lesser part in the decision, other remedies may be appropriate." *Id.*

[3]It is unclear whether a cat's paw charge based on *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), may still be used in an ADEA case in the wake of *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), which eliminated the mixed-motive theory in an ADEA case and made clear that the but-for causation standard applies. The Supreme Court in *Staub* applied the cat's paw theory to a claim under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, which requires proof that protected military status "is a motivating factor in the employer's action." *Staub*, 131 S. Ct. at 1190–91 (quoting 38 U.S.C. § 4311(a)). In *Holliday v. Commonwealth Brands, Inc.*, 483 F.

B. Charge

Plaintiff [name] claims [he/she] would not have been [specify tangible employment action] but for [his/her] age.[4]

App'x. 917, 922 n.2 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1272 (U.S. 2013), the Fifth Circuit noted that "[b]ecause the 'motivating factor' phrase is not in the ADEA, and because the Court construed that phrase in recognizing 'cat's paw' liability under USERRA, and finally, because the Court has focused closely on the text of the antidiscrimination statutes in authorizing theories of liability, it could very well be that our prior recognition of 'cat's paw' liability under the ADEA was incorrect." *Holliday*, 483 F. App'x at 922 n.2. In *Zamora v. City of Houston*, 798 F.3d 326 (5th Cir. 2015), the Fifth Circuit clarified this issue, holding that a cat's-paw analysis remains a viable theory of causation in Title VII retaliation claims. The Fifth Circuit found that *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013), and *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), have made clear that the cat's-paw analysis remains viable in the but-for causation context. In *Staub*, the Court "explicitly blessed the use of the cat's paw analysis" in the context of an employment claim requiring that the unlawful animus be a "motivating factor" for the employer's action (there, a USERRA claim). *Zamora*, 798 F.3d at 332. "*Nassar* changed the strength of the causal link—between the supervisor's actions and the adverse employment action—that the plaintiff must establish." *Id.* "*Nassar* says nothing about whether a supervisor's unlawful animus may be imputed to the decisionmaker; it simply requires that the supervisor's influence with the decisionmaker be strong enough to actually cause the adverse employment action." *Id.* This reasoning appears to apply in the ADEA context, and therefore, the cat's paw theory is still applicable even when "but-for" causation is required. *See also EEOC v. DynMcDermott Petrol. Operations Co.*, 537 F. App'x 437, 443–45 (5th Cir. 2013) (per curiam) (using the cat's-paw analysis to assess evidence of but-for causation in an ADEA case).

If a cat's paw charge is appropriately given, the instruction in Pattern Jury Instruction 11.7 may be used as a starting point, though the court should modify it because of the differences in causation standards between Title VII/USERRA (motivating factor) and the ADEA (but-for). At a minimum, a stricter causation standard applies to cat's paw claims under a but-for statute like the ADEA. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335–37 (11th Cir. 2013) (evaluating the cat's paw argument in ADEA context and finding that a different standard applies).

The charge will also have to be adapted if the defense is raised that age is a bona fide occupational qualification reasonably necessary for successful job performance, and that the employer had a reasonable basis to believe that all or substantially all persons over the age qualification would be unable to perform the job safely and efficiently.

[4]The Supreme Court in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), eliminated the mixed-motive theory in an ADEA case and made

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify Defendant's contentions].

It is unlawful for an employer to discriminate against an employee because of the employee's age.

To prove unlawful discrimination, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [he/she] was [specify tangible employment action];

2. [he/she] was 40 years or older when [he/she] was [specify tangible employment action]; and

3. Defendant [name] would not have [specify tangible employment action] but for Plaintiff [name]'s age.

Plaintiff [name] must prove that, in the absence of—but for—[his/her] age, Defendant [name] would not have decided to [specify tangible employment action] [him/her].[5] If you find that Defendant [name]'s stated reason for its [specify tangible employment action] is not the real reason but is a pretext for age discrimination, you may, but are not required to, find that Defendant [name] would not have decided to [specify tangible employment action] Plaintiff [name] but for [his/her] age.[6]

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clear that the but-for causation standard applies. *See* Pattern Jury Instruction 11.15(5).

[5]*Gross*, 557 U.S. 167; *see also Leal v. McHugh*, 731 F.3d 405, 411 (5th Cir. 2013); *Newberry v. Burlington Basket Co.*, 622 F.3d 979, 981–82 (8th Cir. 2010); *Dillon v. W. Publ'g. Corp.*, 409 F. App'x 152, 155–56 (9th Cir. 2011).

[6]*Ratliff v. City of Gainesville, Tex.*, 256 F.3d 355, 359–62 (5th Cir. 2001).

11.15 Pattern Jury Question, Discrimination Based on Age (Disparate Treatment)

JURY QUESTION

Question No. 1

Has Plaintiff [name] proved that, but for [his/her] age, Defendant [name] would not have taken the [specify tangible employment action] against [him/her]?

Answer "Yes" or "No."

_____

11.16 Harassment Based on Age (ADEA Hostile Work Environment)

A. Committee Notes

The Fifth Circuit first recognized a hostile work environment claim under the ADEA in 2011.[1] The Fifth Circuit noted in *Dediol* and earlier cases that the ADEA and Title VII share common substantive features.[2] The following is a starting point, primarily drawn from Pattern Jury Instructions 11.2 and 11.4, as well as the *Dediol* opinion.

A mixed-motive theory of liability is unusual in hostile-work-environment claims. In addition, the Supreme Court's decision in *Gross*, which eliminated the mixed-motive theory in an ADEA discrimination case, may also apply to ADEA harassment cases. That would make the mixed-motive theory inapplicable in an ADEA harassment case. The but-for standard is therefore used, without a mixed-motive alternative. If the plaintiff alleges constructive discharge, refer to Pattern Jury Instruction 11.6.

B. Charge

Plaintiff [name] claims that [he/she] would not have been harassed by [his/her] [supervisor/coworker/third-party][3] but for [his/her] age.

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[1] *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 440–41 (5th Cir. 2011) ("A plaintiff advances such a claim by establishing that (1) he was over the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.").

[2] *Dediol*, 655 F.3d at 440–41; *see also Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309, 312 (5th Cir. 2004).

[3] *Dediol* involved harassment by a supervisor. Title VII case law recognizes a hostile-work-environment claim for alleged harassment by a coworker or third-party as well. *Sharp v. City of Houston*, 164 F.3d 923,

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify Defendant's contentions].

It is unlawful for an employer to discriminate against an employee because of the employee's age. This includes harassment on the basis of age.

For Defendant [name] to be liable for harassment based on age, Plaintiff [name] must prove by a preponderance of the evidence that Plaintiff [name] is over the age of 40 and that [harasser's name] engaged in harassment based on Plaintiff [name]'s age and:

1. the conduct was sufficiently severe or pervasive to:

    a. alter the terms or conditions of Plaintiff [name]'s employment; and

    b. create a hostile or abusive work environment;[4] and

2. Defendant [name] knew, or in the exercise of reasonable care should have known, that Plaintiff [name] was being harassed based on the Plaintiff [name]'s age. To make this showing, Plaintiff [name] must prove that:

    a. the harassment was known by or communicated to a person who had the author-

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928–29 (5th Cir. 1999). *See also Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 321–22 (5th Cir. 2019) (although "[c]laims of sexual harassment typically involve the behavior of fellow employees," "nonemployees can be the source of the harassment"). Because the ultimate focus of Title VII liability is on the employer's conduct, unless a supervisor is the harasser, a plaintiff must show that the employer knew or should have known about the hostile work environment but allowed it to persist. *See Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013).

[4]*Dediol*, 655 F.3d at 441 (quoting *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 771 (5th Cir. 2009)).

ity to receive, address, or report the complaint, even if that person did not do so;[5] or

b. the harassment was so open and obvious that Defendant [name] should have known of it;[6] and

c. Defendant [name] failed to take prompt remedial action designed to stop the harassment.

For Defendant [name] to be liable for harassment, Plaintiff [name] must prove that the conduct was sufficiently severe or pervasive to alter the terms or conditions of Plaintiff [name]'s employment and create a hostile or abusive work environment. To determine whether the conduct in this case rises to a level that alters the terms or conditions of Plaintiff [name]'s employment, you should consider all the circumstances, including: the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff [name]'s work performance. There is no requirement that the conduct be psychologically injurious.

Harassment on the basis of age may include extremely insensitive conduct, but simple teasing, offhand comments, sporadic use of offensive language, occasional jokes related to age, and isolated incidents (unless extremely serious) will generally not amount to discriminatory changes in the terms and conditions of employment. Discriminatory intimidation, ridicule, or other verbal or physical conduct may be sufficiently extreme to alter the terms and conditions of employment.

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[5] *Williamson v. City of Hous., Tex.*, 148 F.3d 462, 466–67 (5th Cir. 1998).

[6] *Sharp*, 164 F.3d at 929.

In determining whether a hostile work environment existed, you must consider the evidence from both Plaintiff [name]'s perspective and from the perspective of a reasonable person. First, you must look at whether Plaintiff [name] actually found the conduct offensive. Next, you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances. You cannot view the evidence from the perspective of an overly sensitive person. Nor can you view the evidence from the perspective of someone who is never offended. Rather, the alleged harassing behavior must be such that a reasonable person in the same or similar circumstances as Plaintiff [name] would find the conduct offensive.

(Use this paragraph for cases alleging vicarious liability based on supervisor harassment with no tangible employment action (the ADEA equivalent of Pattern Jury Instruction 11.2.)) If you find that Plaintiff [name] was harassed on the basis of age, then you must find for [him/her] unless Defendant [name] proves by a preponderance of the evidence that (a) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (b) Plaintiff [name] unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant [name] or to avoid harm otherwise. If Defendant [name] proves both (a) and (b), then you must find for Defendant [name].

(Use the next two paragraphs for cases alleging harassment by coworker/third-party that does not involve vicarious liability (the ADEA equivalent of Pattern Jury Instruction 11.4.)) If you find that Plaintiff [name] was harassed on the basis of age, then you must determine whether [he/she] has proved by a preponderance of the evidence that Defendant [name] knew or should have known of the harassment.

Plaintiff [name] must prove that (a) the harassment was known or communicated to a person who had the authority to receive, address or report the complaint, even if that person did not do so, or (b) that the harassment was so open and obvious that Defendant [name] should have known of it. If you find that Plaintiff [name] has proved both (a) and (b), then you must consider whether Defendant [name] took reasonable and prompt steps to stop the harassment.

Reasonable and prompt action to correct harassing behavior is conduct by the employer that is reasonably calculated to stop the harassment and remedy the situation. Whether Defendant [name]'s actions were reasonable and timely depends on the facts. Among other things, you may look at the effectiveness of any actions taken.

11.16 Pattern Jury Questions, Harassment Based on Age (ADEA Hostile Work Environment)

JURY QUESTIONS

Question No. 1 (For both vicarious and direct liability):

Was Plaintiff [name] subject to harassment that would not have occurred but for [his/her] age?[1]

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 1, then answer Question No. 2:

Question No. 2 (For vicarious liability—the ADEA equivalent of Pattern Jury Instruction 11.2):

Has Defendant [name] proved that it exercised reasonable care to promptly correct any harassment of Plaintiff [name] because of [his/her] age?

Answer "Yes" or "No."

_____

[1]In *Gross*, the Supreme Court eliminated the mixed-motive theory in ADEA discrimination cases. It is likely that this holding extends to ADEA harassment cases, meaning that only the but-for pretext causation standard should be used. *See, e.g., Gloetzner v. Lynch*, 225 F. Supp. 3d 1329, 1346–47 (N.D. Fla. 2016). Additionally, a mixed-motive theory of liability is not commonly asserted in harassment hostile-work-environment claims. The mixed-motive alternative is therefore not included.

If you answered "Yes" to Question No. 2, then answer Question No. 3:

Question No. 3 (For vicarious liability—the ADEA equivalent of Pattern Jury Instructions 11.2)

Has Defendant [name] proved that Plaintiff [name] unreasonably failed to take advantage of or use any preventative or corrective opportunities provided by Defendant [name], or to avoid harm otherwise?

Answer "Yes" or "No."

_____

OR

Question No. 2 (For coworker/third-party harassment that does not involve vicarious liability—the ADEA equivalent of Pattern Jury Instruction 11.4)

Did Defendant [name] know, or in the exercise of reasonable care should it have known, that Plaintiff [name] was being harassed?

Answer "Yes" or "No."

_____

If you answered "Yes" to Question No. 2, then answer Question No. 3:

Question No. 3 (For coworker/third-party harassment that does not involve vicarious liability—the ADEA equivalent of Pattern Jury Instruction 11.4)

Did Defendant [name] fail to take prompt action to stop the harassment?

Answer "Yes" or "No."

_____

11.17 ADEA—Retaliation

The ADEA also proscribes retaliation against employees for engaging in an activity protected by the statute.[1] The ADEA does not authorize liability for a mixed-motive age discrimination claim.[2] The holding in *Gross* has been applied to preclude a mixed-motive ADEA retaliation claim.[3] The jury charge should use the but-for causation standard for an ADEA retaliation claim and not mixed-motive.[4]

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[1] *Gomez-Perez v. Potter*, 553 U.S. 474, 486–87 (2008).

[2] *See Gross*, 557 U.S. at 178.

[3] *See Barton v. Zimmer, Inc.*, 662 F.3d 448, 455–56 (7th Cir. 2011).

[4] *See* Pattern Jury Instruction 11.5; Pattern Jury Instruction 11.11.

11.18 ADEA Damages

A. Committee Notes

Although this charge may be used in ADEA cases, it must be adapted based on the causation standard that applies.

Under the Fair Labor Standards Act, a prevailing plaintiff may be awarded liquidated damages. *See* 29 U.S.C. § 216(b).[1] The ADEA incorporates some of the FLSA's remedial provisions. *See* 29 U.S.C. § 626(b). When there is a finding that an ADEA violation was willful, the plaintiff may be awarded liquidated damages, which is the amount the jury calculates plus an equal amount. Front pay is not included in a liquidated damages award.[2] Rather, a liquidated damages award is limited to double the amount of back pay and benefits.[3]

Back pay encompasses what the plaintiff would have received in compensation but-for the employer's ADEA violation. *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 482–83 (5th Cir. 2007). In general, back pay liability in a wrongful-termination case begins when the discriminatory conduct causes economic injury and ends when judgment is entered. *Palasota*, 499 F.3d at 482–83.

Neither punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985); *Vaughan v. Anderson Reg'l Med. Ctr.*, 849 F.3d 588, 594 (5th Cir. 2017); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 391–92 (5th Cir. 2003).

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[1] *See Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir. 2006).

[2] Front pay is recoverable under the ADEA. *Miller v. Raytheon Co.*, 716 F.3d 138, 148–49 (5th Cir. 2013). Reasonable attorney's fees are also recoverable, but prejudgment interest is not. *Miller*, 716 F.3d at 148-49.

[3] *Lubke*, 455 F.3d at 499.

B. Charge

If you found that Defendant [name] violated the ADEA, then you must determine whether it has caused Plaintiff [name] damages. If so, you must determine the amount. You should not conclude from the fact that I am instructing you on damages that I have any opinion as to whether Plaintiff [name] has proved liability.

Plaintiff [name] must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not on speculation or guesswork. On the other hand, Plaintiff [name] need not prove the amount of [his/her] losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.[4]

You should consider the following elements of damages, and no others: the amounts the evidence shows Plaintiff [name] would have earned had [he/she] [remained an employee of Defendant [name]] [been promoted] [not been demoted] [identify other applicable status] to the date of your verdict, including benefits such as life and health insurance,[5] stock options, or contributions to retirement, minus the amounts of earnings and benefits, if any, that Defendant [name] proves by a preponderance of the evidence Plaintiff [name] received in the interim.[6]

(For cases in which failure to mitigate is asserted) Defendant [name] asserts that Plaintiff [name]

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[4]*Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993).

[5]Damages for lost insurance benefits are recoverable only if the plaintiff shows that he or she actually incurred these expenses by replacing the lost insurance or suffering the insured risk. *Lubke*, 455 F.3d at 499 (citing *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992)).

[6]*Palasota*, 499 F.3d at 482–83; *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981).

failed to mitigate [his/her] damages.[7] To prevail on this defense, Defendant [name] must show, by a preponderance of the evidence: (a) there was substantially equivalent employment available; (b) Plaintiff [name] failed to use reasonable diligence in seeking those positions; and (c) the amount by which Plaintiff [name]'s damages were increased by [his/her] failure to take such reasonable actions.[8]

"Substantially equivalent employment" means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job [he/she] [lost/was denied]. Plaintiff [name] does not have to accept a job that is dissimilar to the one [he/she] [lost/was denied], one that would be a demotion, or one that would be demeaning.[10] The reasonableness of Plaintiff [name]'s diligence should be evaluated in light of [his/her] individual characteristics and the job market.[11]

(For cases in which the plaintiff has submitted sufficient evidence that the violation was willful) Plaintiff [name] asserts that Defendant [name]'s alleged age discrimination was willful.

If you find that Defendant [name] would not have [specify tangible employment action] Plaintiff [name] but for [his/her] age, then you must also determine whether Defendant [name]'s action was willful. To establish willfulness, Plaintiff [name] must also prove

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[7]This instruction should be used only when the defendant asserts the affirmative defense that the plaintiff failed to mitigate his or her damages.

[8]*50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999); *Floca v. Homcare Health Servs., Inc.*, 845 F.2d 108 (5th Cir. 1988); *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir. 1975).

[10]*Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[11]*Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990); *see also Palasota*, 499 F.3d at 482–83.

that, when Defendant [name] [specify tangible employment action] [him/her], Defendant [name] either (a) knew that its conduct violated the ADEA, or (b) acted with reckless disregard for whether [his/her/its] conduct complied with the ADEA.[12] A plaintiff who proves that [his/her] [former] employer acted willfully in violating the ADEA is entitled to additional damages.

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[12] *Thurston*, 469 U.S. at 126.

11.18 Pattern Jury Questions, ADEA Damages

JURY QUESTIONS

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff [name] for the damages, if any, you have found Defendant [name]'s wrongful conduct, if any, caused Plaintiff [name]?

Answer in dollars and cents for the following items, and no others:

Past wages and benefits from [specify date] to [specify date]
$_____

Question No. 2

What sum of money, if paid now in cash, is the amount by which Plaintiff [name]'s damages, if any, could have been reduced through [his/her] reasonable diligence in seeking, obtaining, and maintaining substantially equivalent employment after the date of [his/her] [specify tangible employment action]?

Answer in dollars and cents, if any.

$_____

Question No. 3

Was Defendant [name]'s [specify tangible employment action] willful?

Answer "Yes" or "No."

_____

11.19 Interference With FMLA Leave

A. Committee Notes

This charge is for cases in which the plaintiff alleges that his or her leave rights under the FMLA were interfered with, restrained, or denied.[1]

B. Charge

Plaintiff [name] claims that [he/she] was entitled to time off from work[2] under the FMLA, and that Defendant [name] interfered with, restrained, or denied [his/her] entitlement to that time off.

Defendant [name] denies Plaintiff [name]'s claims and contends that [specify contentions].[3]

It is unlawful for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided by the FMLA.[4] FMLA rights include [requesting or taking leave under the

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[1]To state an interference claim, the employee must show that his or her employer interfered with or denied him or her an FMLA benefit to which he or she was entitled. The employee does not have to allege that the employer intended to deny the right. The employer's motives are irrelevant. In contrast, an FMLA-retaliation plaintiff must prove that his or her employer retaliated because he or she engaged in activity protected by the FMLA. *See Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017) (listing elements to establish a prima facie case of interference); *Acker v. Gen. Motors, LLC*, 853 F.3d 784, 790 (5th Cir. 2017) (to prove FMLA retaliation, the plaintiff must establish a causal link between the protected activity and the adverse action).

There are many terms within the FMLA and its regulations that, in most cases, need not be the subject of a specific instruction. But there may be cases in which specific instructions defining terms are appropriate. *See, e.g.*, 29 C.F.R. §§ 825.113 ("Serious Health concern"); 825.124 ("Needed to Care For"); 825.215 ("Equivalent Position"); 825.217 ("Key Employee").

[2]29 U.S.C. § 2612(a)(1).

[3]Such reasons may include, but are not limited to, that the employee did not give notice of his or her need for leave, or gave untimely or insufficient notice.

[4]29 U.S.C. § 2615(a)(1).

statute] [having the employer maintain certain employment benefits during the leave] [once leave is completed, being restored to the position the employee held when the leave began, or to a position that has equivalent employment benefits, pay, and other terms and conditions].[5]

An employee is eligible to take leave if, when the leave began, [he/she]: (1) had been employed by the employer for at least 12 months; and (2) worked at least 1,250 hours during the previous 12-month period.[6]

If eligible,[7] an employee is entitled to take up to 12 weeks of leave in any 12-month period [specify one or more of the following, as applicable]:

1. because of the birth of the employee's child and to care for that child;

2. because of the placement of a child with the employee for adoption or foster care;

3. to care for the employee's spouse, son, daughter, or parent, if that person had a "serious health condition";

4. because of a "serious health condition" that made the employee unable to perform the functions of [his/her] position; or

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[5]29 U.S.C. § 2612(a)(1) (entitlement to leave); 29 U.S.C. § 2614(a)(1) (restoration to same or equivalent position); 29 U.S.C. § 2614(c)(1) (maintenance of "group health plan" benefits). This listing is not exclusive. Under 29 C.F.R. § 825.220(b), "Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act." The regulations provide several examples of what may constitute interference.

[6]29 U.S.C. § 2611(2)(A) (definition of "eligible employee"). Whether the plaintiff is an "eligible employee" under the FMLA will seldom be in issue at this stage of the proceedings. This paragraph should be omitted where the employee's eligibility is not in issue.

[7]The phrase "if eligible" can be omitted if there is no dispute as to eligibility.

5. because of any qualifying exigency arising out of the fact that the employee's spouse or a son, daughter, or parent is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.[8]

A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either (a) inpatient care in a hospital, hospice, or residential medical care facility, or (b) continuing treatment by a health care provider.[9]

A "health care provider" includes a doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker, so long as the provider is licensed to practice in the state and is performing within the scope of his or her practice.

A "qualifying exigency" arises when an employee's spouse, son, daughter, or parent is on covered active duty in the Armed Forces, or has been notified of an impending call or order to covered active duty. Categories of "qualifying exigencies" include short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, parental care, and additional activities.[10]

An employee is required to give notice to the employer indicating when [he/she] requires FMLA leave.

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[8]29 U.S.C. § 2612(a)(1)(A)-(E). Again, the example may be limited to those applicable in the particular case.

[9]29 U.S.C. § 2611(11). The FMLA regulations give more detailed definitions (for example, a definition of "inpatient care") that may be added to the court's instructions. 29 C.F.R. § 825.114.

[10]29 C.F.R. § 825.126(b)(1)-(9).

(If the need for leave was foreseeable)

1. If the need for leave was foreseeable—that is, the leave was planned or expected—the employee must give the employer at least 30 days' notice before the leave was to begin, except that if the date of the [treatment][birth][placement for adoption or foster care] required the leave to begin in less than 30 days, the employee was required to provide such notice as was practicable.[11]

OR

(If the need for leave was not foreseeable)

2. If the need for leave was not foreseeable—that is, the leave was unplanned or unexpected—the employee must give the employer notice as soon as was practicable under the facts and circumstances. "As soon as practicable" generally means that an employee must give notice within the time prescribed by the employer's usual notice requirements for such leave. In extraordinary circumstances when it is not feasible for the employee to give such notice, someone such as a family member should do so.[12]

To give [his/her] employer proper notice of the need for FMLA leave, an employee is not required to expressly refer to or name the FMLA. The employee need provide the employer only enough information to put it on notice that leave was needed because of [a serious

[11]29 C.F.R. § 825.302 (notice requirements for foreseeable leave).

[12]29 C.F.R. § 825.303(a).

health condition] [birth] [placement for adoption or foster care].[13]

The regulation implementing the FMLA permits employers to condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements. Where an employee does not comply, and no unusual circumstances justify the noncompliance, FMLA-protected leave may be delayed or denied. 29 C.F.R. § 825.302(d); *see also DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 490 (5th Cir. 2018); *Acker v. Gen. Motors, LLC*, 853 F.3d 784, 789 (5th Cir. 2017).

To succeed in this case, Plaintiff [name] must prove by a preponderance of the evidence that [he/she] was entitled to time off from work:

1. **(Choose from one or more of the following, as applicable):** (i) because Plaintiff [name] had a "serious health condition" that made [him/her] unable to perform the functions of [his/her] employment position, (ii) to care for Plaintiff [name]'s spouse, son, daughter, or parent, if that person had a "serious health condition," (iii) because of the birth of Plaintiff [name]'s child and to care for that child, or (iv) because of the placement of a child with Plaintiff [name] for [adoption/foster care];

2. Plaintiff [name] gave Defendant [name] proper notice of the need for time off from work for one or more of these reasons; and

3. Defendant [name] interfered with, restrained, or denied Plaintiff [name]'s entitlement to take time off from work.

If the statutory requirements have been otherwise

[13] *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995); 29 C.F.R. § 825.303 (notice requirements for unforeseeable leave).

satisfied, then it does not matter whether Defendant [name] intended to violate the FMLA. If Defendant [name] denied Plaintiff [name] a right to which [he/she] was entitled under the FMLA, then you should find for Plaintiff [name] on this issue.[14]

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[14]*Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 682 (5th Cir. 2013); *see also Bryant v. Tex. Dep't of Aging & Disability Servs.*, 781 F.3d 764, 770 (5th Cir. 2015) (a plaintiff must at least show that the defendant interfered with, restrained, or denied his exercise or attempt to exercise FMLA rights, and that the violation prejudiced him); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (same).

11.19 Pattern Jury Question—Interference with FMLA Leave

JURY QUESTION

Question No. 1

Did Defendant [name] deny, restrain, or interfere with Plaintiff [name]'s right to leave under the FMLA, or with [his/her] attempt to exercise [his/her] right to leave under the FMLA?

Answer "Yes" or "No."

_____

11.20 Interference with FMLA Benefits or Job Restoration

A. Committee Notes

This charge is for cases in which the plaintiff alleges that the defendant interfered with or denied his or her FMLA rights to maintaining employment benefits and to job restoration after leave.

B. Charge

(For cases alleging denial of group health-plan benefits) Plaintiff [name] claims that Defendant [name] was required to maintain [his/her] group health-plan benefits while [he/she] was on FMLA leave but failed to do so.[1]

OR

(For cases alleging denial of job restoration) Plaintiff [name] claims that [he/she] was entitled to be restored to [his/her] same position of employment, or to an equivalent position, upon [his/her] return from FMLA leave, but Defendant [name] failed to restore [him/her] to such a position.

Defendant [name] denies the claims and contends that [identify contentions].

It is unlawful for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided by the FMLA.[2] FMLA rights include [requesting or taking leave under the FMLA] [having the employer maintain certain employment benefits during leave] [once leave is completed,

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[1] *See* 26 U.S.C. § 5000(b)(1) (defining "group health plan").

[2] 29 U.S.C. § 2615(a)(1); *see also* 29 C.F.R. § 825.220(b) (making it unlawful interference, denial, or restraint of FMLA rights for an employer to violate any FMLA statutory or regulatory provision).

being restored by the employer either to the position the employee held when leave began or to a position with equivalent benefits, pay and other terms and conditions of employment].[3]

An employee is eligible to take leave if, when [his/her] leave began [he/she]: (1) had been employed by the employer for at least 12 months; and (2) worked at least 1,250 hours during the previous 12-month period.[4]

If eligible,[5] an employee is entitled to take up to 12 weeks of leave in any 12-month period [specify one or more of the following, as applicable]:

1. because of the birth of the employee's child and to care for that child;

2. because of the placement of a child with the employee for adoption or foster care;

3. to care for the employee's spouse, son, daughter, or parent, if that person had a "serious health condition";

4. because of a "serious health condition" that made the employee unable to perform the functions of [his/her] position; or

5. because of any qualifying exigency arising out of the fact that the employee's spouse or a son, daughter, or parent is on covered active duty (or has been notified of an impending call or or-

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[3]29 U.S.C. § 2612(a)(1) (entitlement to leave); 29 U.S.C. § 2614(a)(1) (restoration to same or equivalent position); 29 U.S.C. § 2614(c)(1) (maintenance of "group health plan" benefits).

[4]29 U.S.C. § 2611(2)(A) (definition of "eligible employee"). Whether the plaintiff was an "eligible employee" under the FMLA will seldom be in issue. This paragraph should be omitted if the employee's eligibility is not disputed.

[5]The phrase "if eligible" can be omitted if there is no dispute as to eligibility.

der to covered active duty) in the Armed Forces.[6]

While an employee is on FMLA leave, the employer is required to maintain coverage for [him/her] under any group health plan during the leave, under the same conditions coverage would have been provided had the employee not gone on leave.[7]

On [his/her] return from FMLA leave, an employee is entitled to be restored to the position [he/she] held when the leave began, or to an equivalent position. An "equivalent position" is one that is virtually identical to the position the employee held at the time [his/her] leave began, with equivalent employment benefits, pay, and other terms and conditions of employment.[8] An employee is entitled to job restoration even if [he/she] was replaced while on leave or [his/her] position was restructured to accommodate the leave.[9]

An employee's exercise of FMLA leave rights does not entitle [him/her] to greater rights to continued employment or employment benefits than any of [his/her] fellow employees who did not exercise FMLA leave rights. The employer is not required to [maintain group health plan benefits] [restore the employee to the same or an equivalent position] if the employer proves that the employee's [employment/benefits] would have ended

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[6]29 U.S.C. § 2612(a)(1)(A)-(E). Again, the example may be limited to those applicable in the particular case.

[7]29 U.S.C. § 2614(c)(1). If the employee does not return from FMLA leave and the employer has maintained group health benefits during the leave, the employer may recover the premium that it paid to maintain the employee's group health plan benefits, so long as the serious health condition resulting in leave was not the reason for the failure to return, or other circumstances beyond the employee's control were responsible for the failure to return. 29 U.S.C. § 2614(c)(2).

[8]29 U.S.C. § 2614(a)(1). The regulations further define the term "equivalent position." 29 C.F.R. § 825.215(a)-(f).

[9]29 C.F.R. § 825.214.

even if [he/she] had not exercised [his/her] FMLA leave rights.[10]

It does not matter whether Defendant [name] intended to violate the FMLA. If Defendant [name] denied Plaintiff [name] a right to which [he/she] was entitled under the FMLA, then you should find for Plaintiff [name] on this issue.[11]

To prevail, Plaintiff [name] must prove by a preponderance of the evidence that:

(For cases in which denial of group-health-plan benefits is alleged)

While Plaintiff [name] was on leave, Defendant [name] failed to maintain group health-plan benefits for Plaintiff [name] under the same conditions those benefits would have been provided if Plaintiff [name] had not gone on leave.

(For cases in which denial of job restoration is alleged)

1. Plaintiff [name] sought to return to employment with Defendant [name] following FMLA leave; and

2. Defendant [name] failed to restore Plaintiff [name] to the same position [he/she] held at the time FMLA leave began, or to an equivalent position.

If Plaintiff [name] proves that Defendant [name]

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[10]29 C.F.R. § 825.216.

[11]*Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 682 (5th Cir. 2013); *see also Bryant v. Tex. Dep't of Aging & Disability Servs.*, 781 F.3d 764, 770 (5th Cir. 2015) (a plaintiff must at least show that the defendant interfered with, restrained, or denied his exercise or attempt to exercise FMLA rights, and that the violation prejudiced him); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (same).

failed to restore [him/her] to the same or an equivalent employment position, Defendant [name] may nevertheless succeed by proving by a preponderance of the evidence that Plaintiff [name]'s same job, or an equivalent one, would no longer have been available to [him/her] when job restoration was sought because of reasons unrelated to the leave.[12]

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[12]29 C.F.R. § 825.216. This should be omitted if the only issue involves the failure to maintain group health-plan benefits.

11.20 Pattern Jury Question—Interference with FMLA Benefits or Job Restoration

JURY QUESTION

Question No. 1

(For cases in which denial of group health-plan benefits is alleged)

Did Defendant [name] fail or refuse to maintain group health-plan benefits for Plaintiff [name] during [his/her] leave under the same conditions such benefits would have been provided if [he/she] had not gone on leave?

Answer "Yes" or "No."

_____

(For cases in which denial of job restoration is alleged)

Did Defendant [name] fail or refuse to restore Plaintiff [name] to [his/her] same or an equivalent job position on [his/her] return from FMLA leave?

Answer "Yes" or "No."

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11.21 Retaliation

A. Committee Notes

This charge is for cases in which the plaintiff alleges that he or she was retaliated against because he or she exercised or sought to exercise rights under the FMLA. The FMLA makes it unlawful for an employer to discriminate against an individual "for opposing any practice made unlawful" by the FMLA, 29 U.S.C. § 2615(a)(2), and it also makes it unlawful for any person to discriminate against an individual "because" the individual participated in an inquiry or hearing under the FMLA, 29 U.S.C. § 2615(b).

If a plaintiff brings alternative claims for FMLA interference and FMLA retaliation based on the same adverse employment action, Pattern Jury Instructions 11.20 and 11.21 may be merged, but the causation standards should be explained if needed.[1]

B. Charge

Plaintiff [name] claims that [he/she] would not have been [specify adverse employment action] by Defendant

[1]It is unclear whether, in the Fifth Circuit, an FMLA retaliation claim requires but-for causation or whether the motivating-factor standard may be used. *See Ion v. Chevron USA, Inc.*, 731 F.3d 379, 389–90 (5th Cir. 2013) (questioning whether, after the Supreme Court decisions in *Gross* (ADEA) and *Nassar* (Title VII retaliation), FMLA-retaliation claims require the plaintiff to prove but-for causation but expressly declining to decide because the parties had briefed and argued only the mixed-motive standard. *See also Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702, 706 (5th Cir. 2016). Most district court decisions after 2015 apply the mixed-motive standard to FMLA retaliation claims. *See, e.g.*, *Mead v. Lattimore Materials Co.,* No. 3:16-cv-0791-L, 2018 WL 2984862, at *4 (N.D. Tex. June 14, 2018) ("The Fifth Circuit has not yet determined whether the reasoning of *Nassar* applies to FMLA retaliation cases."); *Cathcart v. YP Advert. & Publ'g LLC,* No. 3:16-CV-2084-M, 2017 WL 4298135, at *4 (N.D. Tex. Sept. 27, 2017) (allowing a plaintiff bringing an FMLA retaliation claim to proceed under the mixed-motive standard because the Fifth Circuit has not held otherwise and the employer failed to argue otherwise).

[name] but for [his/her] engaging in [FMLA-protected activity].[2]

Defendant [name] denies the claims and contends that [specify contentions].

It is unlawful for an employer to retaliate against an employee for engaging in FMLA-protected activity.[3]

FMLA-protected activity includes, but is not limited to, [requesting or taking leave] [having the employer maintain certain employment benefits during leave] [once leave is completed, seeking restoration to the position the employee held when leave began or to a position with equivalent employment benefits, pay, and other terms and conditions of employment].[4]

To prevail, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [he/she] engaged in FMLA-protected activity;

2. Defendant [name] [specify adverse employment action] [him/her]; and

3. Defendant [name] would not have [specify adverse employment action] Plaintiff [name] but for [his/her] engaging in FMLA-protected activity.[5]

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[2]In most cases, there will not be a factual dispute about whether the plaintiff experienced an adverse employment action. If there is a dispute, the jury charge and question should be adopted, using the definition of "adverse employment action" at Pattern Jury Instruction 11.5.

[3]29 U.S.C. § 2615(a)(1) and (2). If the employee's eligibility for leave or lack of proper notice to the employer is disputed, paragraphs 4 through 8 of Pattern Jury Instruction 11.19 may be used.

[4]29 U.S.C. § 2612(a)(1) (entitlement to leave); 29 U.S.C. § 2614(a)(1) (restoration to same or equivalent position); 29 U.S.C. § 2614(c)(1) (maintenance of group health-plan benefits).

[5]If a mixed-motive standard is used, the charge could read:

Plaintiff [name] does not have to prove that [his/her] FMLA-protected activity is the only reason Defendant [name] [specify adverse employment action] Plaintiff [name]. But Plaintiff [name] must prove that [he/she] would not have been [specify adverse employment action] in the absence of [his/her] FMLA-protected activity.

If you disbelieve the reason Defendant [name] has given for its decision, you may, but are not required to, infer that Defendant [name] would not have [specify adverse employment action] Plaintiff [name] but for [his/her] FMLA-protected activity.

Plaintiff [name] claims that [his/her] engaging in [FMLA-protected activity] was a motivating factor in Defendant [name]'s decision to [specify adverse employment action] [him/her].

Defendant [name] denies the claims and contends that [specify contentions].

It is unlawful for an employer to retaliate against an employee for engaging in FMLA-protected activity.

FMLA-protected activity includes, but is not limited to, [requesting or taking leave] [having the employer maintain certain employment benefits during leave] [once leave is completed, seeking restoration to the position the employee held when leave began or to a position with equivalent employment benefits, pay, and other terms and conditions of employment].

To prevail, Plaintiff [name] must prove by a preponderance of the evidence that:

1. [he/she] engaged in FMLA-protected activity;

2. Defendant [name] [specify adverse employment action] [him/her]; and

3. Plaintiff [name]'s engaging in FMLA-protected activity was a motivating factor in Defendant [name]'s decision to [specify adverse employment action] [him/her].

Plaintiff [name] does not have to prove that [his/her] FMLA-protected activity is the only reason Defendant [name] [specify adverse employment action] Plaintiff [name]. But Plaintiff [name] must prove that [he/she] would not have been [specify adverse employment action] in the absence of [his/her] FMLA-protected activity.

If you disbelieve the reason Defendant [name] has given for its decision, you may, but are not required to, infer that Defendant [name]'s decision to [specify adverse employment action] Plaintiff [name] was motivated by Plaintiff [name]'s FMLA-protected activity.

11.21 Pattern Jury Question—FMLA Retaliation

JURY QUESTION

Question No. 1

Would Defendant [name] have [specify adverse employment action] Plaintiff [name] but for [his/her] FMLA-protected activity?[1]

Answer "Yes" or "No."

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[1]If a mixed-motive standard is used, the following jury question could be used:

Question No. 1

Was Defendant [name]'s decision to [specify adverse employment action] Plaintiff [name] motivated by Plaintiff [name]'s FMLA-protected activity?

Answer "Yes" or "No."

11.22 FMLA Damages—Lost Wages

A. Committee Notes

The following charge is for use in FMLA cases in which the plaintiff has experienced actual damages in the form of lost wages, salary, employment benefits, or other compensation, because of the FMLA violation.

A prevailing plaintiff under the FMLA is entitled to damages under 29 U.S.C. § 2617(a). The prevailing plaintiff can recover actual damages equal to the amount of "any wages, salary, employment benefits, or other compensation denied or lost" by reason of the employer's violation of the FMLA. § 2617(a)(1)(A)(i)(I). If the prevailing plaintiff incurred no such damages, the plaintiff can recover any actual monetary losses sustained as a direct result of the employer's violation of the FMLA, such as the cost of providing care to an injured family member. § 2617(a)(1)(A)(i)(II). That alternative measure of damages is limited to a sum equal to 12 weeks of the plaintiff's pay, or in a case involving leave to care for a service member under § 2612(a)(3), 26 weeks of the plaintiff's pay. § 2617(a)(1)(A)(i)(II).

The FMLA does not allow recovery for mental distress or the loss of job security. In addition, punitive damages are unavailable under the FMLA.

Liquidated damages equal to the amount of actual damages and interest must be awarded unless the employer "proves to the satisfaction of the court" that the acts or omissions giving rise to the violation were in good faith and that the employer had reasonable grounds for believing that such acts or omissions did not violate the FMLA, in which case the court may award no liquidated damages or award an amount not to exceed the amount allowable under the statute. 29 U.S.C. § 2617(a)(1)(A)(iii). Whether to reduce a liqui-

dated damages award is a question for the judge, not the jury.

The FMLA has been interpreted to authorize jury trials. *See Frizzell v. Sw. Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998) (holding that a request for damages under FMLA triggers a statutory right to a jury trial); *accord Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 681 (8th Cir. 2015). A jury trial is appropriate to decide back pay, but equitable issues such as reinstatement and front pay should be decided by the court. *See* 29 U.S.C. § 2617(a)(1)(B) (permitting a prevailing employee to recover "such equitable relief as may be appropriate, including employment, reinstatement, and promotion").

B. Charge

If you found that Defendant [name] violated the FMLA, then you must determine whether those violations caused Plaintiff [name] damages. If so, you must determine the amount. You should not conclude from the fact that I am instructing you on damages that I have any opinion as to whether Plaintiff [name] has proved liability.

Plaintiff [name] must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not on speculation or guesswork. On the other hand, Plaintiff [name] need not prove the amount of [his/her] losses with mathematical precision, but only with as much certainty and accuracy as the circumstances permit.[1]

You should consider the following elements of damages and no others: any wages, salary, employment benefits, or other compensation denied or lost because of Defendant [name]'s violation of the FMLA, if any.

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[1] *Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993).

Wages, salary, and benefits include the amounts the evidence shows Plaintiff [name] would have earned had [he/she] [remained an employee of Defendant [name] [been promoted] [not been demoted] from [date] to the date of your verdict, including benefits such as life and health insurance,[2] stock options, or contributions to retirement, minus the amounts of earnings and benefits, if any, Defendant [name] proves by a preponderance of the evidence Plaintiff [name] received from employment during that time.[3]

(For cases in which failure to mitigate is asserted)[4] Defendant [name] asserts that Plaintiff [name] failed to mitigate [his/her] damages. To prevail on this defense, Defendant [name] must show, by a preponderance of the evidence: (a) that there was "substantially equivalent employment" available; (b) Plaintiff [name] failed to use reasonable diligence in seeking those positions; and (c) the amount by which Plaintiff [name]'s damages were increased by [his/her] failure to take such reasonable actions.[5]

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[2]Other elements of compensatory damages and consequential damages are not recoverable. *See Nero v. Indus. Molding*, 167 F.3d 921, at 922–32 (5th Cir. 1999). "[T]he correct measure of damages for lost insurance benefits in FMLA cases is either *actual* replacement cost for the insurance, or expenses *actually* incurred that would have been covered under a former insurance plan. The lost 'value' of benefits, absent actual costs to the plaintiff, is not recoverable." *Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir. 2006).

[3]*Jurgens v. EEOC*, 903 F.2d 386, 390–91 (5th Cir. 1990) (quoting *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981)).

[4]This charge may be used in conjunction with Pattern Jury Instruction 15.5.

[5]*Ellerbrook v. City of Lubbock, Tex.*, 465 F. App'x. 324, 337 (5th Cir. 2012); *Vaughn v. Sabine Cty.*, 104 F. App'x 980, 984 (5th Cir. 2004); *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 258 (5th Cir. 1999). District courts have given juries the same instruction that the Fifth Circuit gives for Title VII and ADEA claims, for the "failure-to-mitigate" defense under the FMLA. *See, e.g.*, *Firth v. Don McGrill of W. Hous., Ltd.,* No. H-04-0659, 2006 WL 846377, at *3 (S.D. Tex. Mar. 28, 2006), *aff'd by Firth v. McGill*, 233 F. App'x 346 (5th Cir. 2007) (per curiam); *Newcomb v. Corinth Sch. Dist.*, No. 1:12-cv-204-SA-DAS, at *10 (N.D. Miss. Mar. 31, 2015) (under the FMLA, a defendant may invoke "failure to mitigate" as

"Substantially equivalent employment" means a job that has virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the job Plaintiff [name] [lost] [was denied]. Plaintiff [name] does not have to accept a job that is dissimilar to the one [he/she] [lost] [was denied], one that would be a demotion, or one that would be demeaning.[6] The reasonableness of Plaintiff [name]'s diligence should be evaluated in light of [his/her] individual characteristics and the job market.[7]

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an affirmative defense) (citing *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003) (Title VII and ADEA case)). The Seventh Circuit has imposed the "familiar common law duty of mitigating damages" to FMLA claims. *Franzen v. Ellis Corp.*, 543 F.3d 420, 429–30 (7th Cir. 2008).

Earlier versions of this instruction included the following language: "If Defendant proves that Plaintiff has not made reasonable efforts to obtain work, Defendant does not have to establish the availability of substantially equivalent employment." Authority exists for this instruction. *See Sellers v. Dellgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990); *see also West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003). But recent district court cases have observed that *Sellers* conflicts with the previously decided *Sparks v. Griffin*, 460 F.2d 433, 443 (5th Cir. 1972), which required that defendant prove that "there were jobs available which appellant could have discovered and for which she was qualified." *See, e.g., Garcia v. Harris Cty.,* No. H-16-2134, 2019 WL 132382, at *2 (S.D. Tex. Jan. 8, 2019) ("Courts have specifically acknowledged that, in the failure to mitigate context, the *Sparks* decision controls over *West* and other later conflicting decisions."); *Newcomb v. Corinth Sch. Dist.*, No. 1:12-CV-0204-SA-DAS, 2015 WL 1505839, at *7 (N.D. Miss. Mar. 31, 2015) (applying *Sparks* under rule of orderliness); *Buckingham v. Booz Allen Hamilton, Inc.*, 64 F. Supp. 3d 981, 984 (S.D. Tex. 2014) (same). *But see E.E.O.C. v. IESI Louisiana Corp.*, 720 F. Supp. 2d 750, 755 (W.D. La. 2010) (recognizing the *Sparks* "resurgence" but opting to follow the "newer" standard). Given this history, the Committee concludes that this language should not remain in a pattern instruction but that courts and counsel should be aware of the split.

[6] *Sellers*, 902 F.2d at 1193.

[7] *Sellers*, 902 F.2d at 1193

11.22 Pattern Jury Question—FMLA Damages, Lost Wages

JURY QUESTION

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff [name] for the damages, if any, you have found Defendant [name] caused Plaintiff [name]?

Answer in dollars and cents for the following items and no others:

Wages, salary, employment benefits, or other compensation denied or lost from [date] to [date]:

$_____

Question No. 2

What sum of money, if paid now in cash, is the amount by which Plaintiff [name]'s damages, if any, could have been reduced through [his/her] reasonable diligence in seeking, obtaining, and maintaining substantially equivalent employment after the date of [specify action alleged to be FMLA violation causing lost wages].

Answer in dollars and cents:

$_____

11.23 FMLA Damages—Losses Other Than Wages

A. Committee Notes

This charge is for an FMLA case in which there are no actual wage or benefit losses and no other compensation lost or denied. This instruction should be used when an employee is denied FMLA leave and is required to spend money for an alternative to the leave he or she claims was required under the FMLA.[1]

B. Charge

If you found that Defendant [name] violated the FMLA, then you must determine whether [he/she/it] caused Plaintiff [name] damages and, if so, the amount, if any, of those damages.

Plaintiff [name] must prove [his/her] damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. On the other hand, Plaintiff [name] need not prove the amount of [his/her] losses with mathematical precision, but only with as much definitiveness and accuracy as the circumstances permit.[2]

You may award as damages any actual monetary losses Plaintiff [name] sustained as a direct result of Defendant [name]'s violation of the FMLA, such as the cost of providing care.

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[1] 29 U.S.C. § 2617(a)(1)(A)(ii).

[2] *Lowe*, 998 F.2d at 337.

11.23 Pattern Jury Question—FMLA Damages, Losses Other Than Wages

JURY QUESTION

Question No. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff [name] for the damages, if any, you have found Defendant [name] caused [him/her]?

Answer in dollars and cents:

$_____

11.24 Fair Labor Standards Act (FLSA) (29 U.S.C. §§ 201, *et seq*.)

A. Committee Notes

This charge is for cases in which the plaintiff alleges a violation of the minimum-wage or overtime-pay requirements of the FLSA.

1. Elements of an FLSA Case

To prevail in a FLSA action, the plaintiff must prove: (1) an employment relationship with the defendant; (2) coverage under the FLSA; and (3) a violation of the FLSA.

The FLSA applies only if the plaintiff was an employee of the defendant. If this issue is disputed, the instructions and jury questions should be adapted accordingly. If there is a dispute about whether the plaintiff is an employee or an independent contractor, see Pattern Jury Instruction 11.26. If there is a dispute about whether there were joint employers or a single employer, see Pattern Jury Instruction 11.27.

The plaintiff-employee must also prove FLSA coverage by proving either that he or she is individually covered or that his or her employer is covered as an enterprise. *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir. 1992). To prove individual coverage, the employee must establish that in working for the defendant, he or she was "engaged in commerce or the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a)(1), 212(c). To prove enterprise coverage, the employee must establish that he or she was "employed by an enterprise engaged in commerce that had annual gross sales of at least $500,000.00." 29 U.S.C. § 203(s)(1). For a discussion of these elements, see *Brock v. Cruz*, 357 F. Supp. 3d 581, 586–88 (S.D. Tex. Jan. 2019) ("enterprise"); and *Williams v. Henagan*, 595 F.3d 610, 621 (5th Cir. 2010) ("engagement in commerce").

2. Common Legal Issues

Recurring issues in FLSA cases include the classification of employees as exempt or nonexempt, record keeping, the number of hours worked, and limitations.

a. Classification Issues: Exempt Status

The most common exemptions from the overtime-pay requirement are for employees in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.0; *see also Belt v. EmCare, Inc.*, 444 F.3d 403, 407 (5th Cir. 2006). If the case involves a dispute about whether an employee is exempt from the FLSA's overtime requirement, the jury should be instructed on the elements of the claimed exemption. The elements of the exemptions are at 29 C.F.R. § 541.1 *et seq*. The employer has the burden of proving an overtime-pay exemption. *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016).

In a misclassification case, whether an employee is nonexempt and eligible for overtime is a fact question. Once the fact finder has determined that the employer was misclassified and is due overtime pay, the trial court must determine the regular rate of pay and overtime premium, which are questions of law.[1] Dis-

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[1] *Black v. SettlePou P.C.*, 732 F.3d 492, 496 (5th Cir. 2013); *Ransom v. M. Patel Enters., Inc.*, 734 F.3d 377 (5th Cir. 2013); *see also Singer v. City of Waco, Tex.*, 324 F.3d 813, 823 (5th Cir. 2003) (reviewing *de novo* the district court's determination of the regular rate of pay under the FLSA).

An hourly employee's "regular rate" for the purpose of determining proper overtime is determined by dividing the employee's "total remuneration for employment . . . in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. The regular rate includes all of the employee's compensation except for eight specific types of payments set out in 29 U.S.C. § 207(e).

When an employee is compensated "solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113(a); *Singer*, 324 F.3d at

putes over the number of hours worked and damages are for the jury to decide.

b. Recordkeeping

The FLSA requires employers to "make, keep and preserve records" of an employee's hours. 29 U.S.C. § 211(c). The employee has the burden of proving the hours worked for which he or she was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946), *superseded by statute on other grounds,* 29 U.S.C. § 251. When an employer's records are "inaccurate or inadequate," the employee may satisfy the burden by proving that he or she performed work that was improperly compensated and producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." *Anderson*, 328 U.S. at 687–88; *see also Johnson v. Heckmann Waster Res. (CVR), Inc.*, 758 F.3d 627, 630 (5th Cir. 2014) (citing *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 441 (5th Cir. 2005)).

c. Hours Worked

The FLSA requires that employees be paid for all hours worked. "Work" is broadly defined as " 'physical

824. For overtime claims involving an employee who is paid a constant salary for a specific number of hours, the instruction should be based upon 29 C.F.R. § 778.113(a). For overtime claims involving an employee who is paid a constant weekly salary for fluctuating hours, it may be necessary to instruct on the "fluctuating workweek method." *See Hills v. Entergy Operations, Inc.*, 866 F.3d 610, 614–15 (5th Cir. 2017) (whether an employer and an employee agreed to a fixed weekly wage for fluctuating hours is a question of fact, and the employee has the burden to show that the fluctuating-workweek method is inapplicable) (citation omitted); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1310–11 (11th Cir. 2013); *see also* 29 C.F.R. § 778.114 (explaining how to use the fluctuating workweek method).

or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' " *Bridges v. Empire Scaffold, LLC*, 875 F.3d 222, 225–26 (5th Cir. 2017) (citing *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 516–17 (2014); and *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29–30 (2005)). Typical issues in "off-the clock" cases include whether unpaid and usually unrecorded hours for preparatory and concluding activities ("donning and doffing"), travel, waiting, and rest or meal periods are compensable.

To recover for overtime hours the employee claims he or she worked without proper compensation, the employee must demonstrate that the employer "had knowledge, actual or constructive, that he was working" overtime. *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 964 (5th Cir. 2016) (quoting *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995)). Constructive knowledge exists if an employer "exercising reasonable diligence" would become aware that an employee is working overtime. *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 827 (5th Cir. 1973). But if the "employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207." *Newton*, 47 F.3d at 748.

d. Limitations

The statute of limitations for an unpaid-overtime FLSA claim is generally two years. 29 U.S.C. § 255(a). The limitations period is extended to three years for willful violations. 29 U.S.C. § 255(a). To prove willfulness and obtain the benefit of the three-year limitations period, an employee must establish that the employer "either knew or showed reckless disregard as to whether its conduct was prohibited by the [FLSA]." *Cox v. Brook-*

shire Grocery Co., 919 F.2d 354, 356 (5th Cir. 1990) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

B. Charge

Plaintiff [name] claims that Defendant [name] did not pay Plaintiff [name] the [minimum wage] [overtime pay] required by the federal Fair Labor Standards Act, also known as the FLSA.

Defendant [name] denies Plaintiff [name]'s claims and contends [specify contentions].

It is unlawful for an employer to require an employee covered by the FLSA to work [for less than minimum wage] [more than 40 hours in a workweek without paying overtime].

To succeed on [his/her] claim, Plaintiff [name] must prove each of the following facts by a preponderance of the evidence:

1. Plaintiff [name] was an employee of Defendant [name] during the relevant period;

2. Plaintiff [name] was engaged in commerce or in the production of goods for commerce or employed by an enterprise engaged in commerce or in the production of goods for commerce that had gross annual sales of at least $500,000.00 for [specify year]; and

3. Defendant [name] failed to pay Plaintiff [name] the [minimum wage] [overtime pay] required by law.

Plaintiff [name] must prove by a preponderance of the evidence that [he/she] was an employee [engaged in commerce or in the production of goods for commerce]

[employed by an enterprise engaged in commerce or in the production of goods for commerce].[2]

The term "commerce" has a very broad meaning. It includes any trade, transportation, transmission, or communication among the several states, or between any state and any place outside that state. Plaintiff [name] was engaged in the "production of goods" if [he/she] was employed in producing, manufacturing, mining, handling, or transporting goods, or in any other manner worked on goods or any closely related process or occupation directly essential to the production of goods. [An "enterprise engaged in commerce or the production of goods for commerce" means a business that has employees engaged in commerce or the production of commercial goods for commerce and has annual gross sales of at least $500,000.00.]

(For cases involving a minimum-wage claim)

The minimum wage required by the FLSA during the period involved in this case was $[minimum wage] per hour. In determining whether an employer has paid the minimum wage, it is entitled to a credit for the reasonable costs of furnishing certain noncash items to Plaintiff [name] [unless those costs are excluded from Plaintiff [name]'s wages under the terms of a union contract that applies to Plaintiff [name]], such as meals and lodging for the employee's benefit, if the employee voluntarily accepts them.

(For cases involving an overtime claim)

The FLSA requires an employer to pay an employee at least one-and-one-half times the employee's "regular rate" for time worked over 40 hours in a workweek. A

[2]If there is no dispute about whether the plaintiff was an employee engaged in commerce or employed by an enterprise engaged in commerce, this paragraph and the next one need not be submitted.

"workweek" is a regularly recurring period of seven days or 168 hours. The phrase "hours worked" includes all time spent by an employee that was primarily for the benefit of the employer or the employer's business. If an employee works more than 40 hours in one workweek, the employer must pay the employee the overtime rate of 1.5 times the regular rate for the time [he/she] worked after the first 40 hours. This is commonly known as "time-and-a-half pay" for overtime work.

To calculate how much overtime pay Plaintiff [name] earned in a particular week, multiply [his/her] regular rate of pay by one-and-one-half times the regular rate for all hours worked over 40 in that week.

(For cases involving issues of inadequate records of hours worked)

The law requires an employer to keep records of how many hours its employees work and the amount they are paid. In this case, Plaintiff [name] claims that Defendant [name] failed to keep and maintain adequate records of [his/her] hours and pay. Plaintiff [name] also claims that Defendant [name]'s failure to keep and maintain adequate records has made it difficult for Plaintiff [name] to prove the exact amount of [his/her] claim.

If you find that Defendant [name] failed to keep adequate time and pay records for Plaintiff [name] and that Plaintiff [name] performed work for which [he/she] should have been paid, Plaintiff [name] may recover a reasonable estimation of the amount of [his/her] damages. But to recover this amount, Plaintiff [name] must prove by a preponderance of the evidence a reasonable estimate of the amount and extent of the work for which [he/she] seeks pay.

(For cases involving a contention that the

employer did not know or have reason to believe that the employee worked more than 40 hours in a workweek)

To prevail on a claim for overtime under the Fair Labor Standards Act, a plaintiff must prove, by a preponderance of the evidence, that the employer failed to pay the plaintiff overtime for all hours worked in excess of 40 in one or more workweeks. A "workweek" is a regularly recurring period of seven days or 168 hours. The phrase "hours worked" includes all time spent by an employee that was primarily for the benefit of the employer or the employer's business. An employee's time spent primarily for the benefit of the employer or the employer's business is "hours worked" only if the employer knew or had reason to believe that the employee was doing the work. [When an employer has a policy that an employee is not to work overtime without prior authorization, an employee cannot perform overtime work without the employer's knowledge and contrary to its instructions and then assert a right to be paid.] At the same time, an employer who knows that an employee is working overtime and does not want the work to be done must make reasonable efforts to prevent it. If an employee in fact does overtime work and the employer knows or has reason to believe it, the employer cannot stand idly by and allow the employee to perform the work without proper compensation, even if the employee did not make a claim for the compensation at the time. An employer has the right to require an employee to adhere to its procedures for claiming overtime and an employee has a duty to notify his employer when [he/she] is working extra hours. If the employee fails to notify the employer of the overtime work or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of the statute. If the employer neither knew nor had reason to believe that overtime work was being performed, the time does not constitute "hours worked."

(For cases involving the defendant's contention that the plaintiff was exempt from the FLSA)

In this case, Defendant [name] claims that it is exempt from the FLSA's overtime provisions. To establish that it is exempt, Defendant [name] must prove each of the following facts by a preponderance of the evidence: [specify essential elements of the claimed exemption].[3]

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[3]The exemption elements set out in 29 C.F.R. § 541 may be used as a guideline.

11.24 Pattern Jury Questions, FLSA—Failure to Pay Minimum Wage or Overtime

JURY QUESTIONS

Question No. 1

Has Plaintiff [name] proved that [he/she] was an employee of Defendant [name] during the relevant period?

Answer "Yes" or "No."

_____

If your answer is "Yes," answer the next question. If your answer is "No," do not answer the next question.

Question No. 2

Has Plaintiff [name] proved that [he/she] was engaged in commerce or in the production of goods for commerce or employed by an enterprise engaged in commerce or in the production of commercial goods?[1]

Answer "Yes" or "No."

_____

If your answer is "Yes," answer the next question. If your answer is "No," do not answer the next question.

[1] If there is a dispute about whether the employer had annual gross sales of at least $500,000.00, the jury question should be adapted accordingly. If there is a dispute about employee/independent contractor status or about joint employers, see Pattern Jury Instructions 11.26 and 11.27.

Question No. 3

Has Plaintiff [name] proved that Defendant [name] failed to pay [him/her] the [minimum wage] [overtime pay] required by law?

Answer "Yes" or "No."

_____

If your answer is "Yes," answer the next question. If your answer is "No," do not answer the next question.

(For cases in which the defendant contends that the plaintiff was exempt from the FLSA's overtime requirement)

Question No. 4

Has Defendant [name] proved that Plaintiff [name] was exempt from the overtime-pay requirement as an [administrative] [executive] [specify other] employee?

Answer "Yes" or "No."

_____

If your answer is "Yes," answer the next question. If your answer is "No," do not answer the next question.

(For cases involving allegations of willful violation)

Question No. 5

Has Plaintiff [name] proved that Defendant [name]

knew that its conduct was prohibited by the FLSA or showed reckless disregard for whether the FLSA prohibited its conduct?

Answer "Yes" or "No."

_____

11.25 FLSA Damages

A. Committee Notes

This charge is for use in FLSA cases involving an alleged failure to pay overtime or minimum wage.

The FLSA provides for liquidated damages. The statute states that such damages are to be paid on a finding of an FLSA § 206 or § 207 violation unless 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 Fair Labor Standards Act." 29 U.S.C. §§ 216(b), 260. If the employer makes this showing, "the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216" of the FLSA. 29 U.S.C. § 260. This is a question for the court to determine, not the jury. The jury answers the willfulness question to determine the statute of limitations, not to determine willfulness for the purpose of deciding liquidated damages issues. *Black v. SettlePou, P.C.*, 732 F.3d 492, 501 (5th Cir. 2013) (citing *Singer v. City of Waco*, 324 F.3d 813, 822–23 (5th Cir. 2003)); *see also Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1414–15 (5th Cir. 1990).

When the jury finds that an employer has violated the FLSA and assesses compensatory damages, the district court generally must add liquidated damages in an equal amount. 29 U.S.C. § 216(b) ("Any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."); *Ransom v. M. Patel Enters., Inc.*, 734 F.3d 377, 387 & n.16 (5th Cir. 2013) (citing *Singer*, 324 F.3d at 822–23); *see also Black*, 732 F.3d at 501. The district court has discretion to reduce or deny liquidated damages if the employer " 'acted in good faith

and had reasonable grounds to believe that its actions complied with the FLSA.' " *Black*, 732 F.3d at 501 (quoting *Singer*, 324 F.3d at 822–23); *see also* 29 U.S.C. § 260. A district court must find that an employer acted reasonably and in good faith in violating the FLSA before it may award less than the full amount of liquidated damages. *See Black*, 732 F.3d at 501. If the jury finds that the employer acted willfully, then the court cannot find that the employer acted in good faith, and the court must award liquidated damages. *Singer*, 324 F.3d at 823.

B. Charge

If you find that Defendant [name] violated the FLSA, then you must determine the amount of any damages. You should not conclude from the fact that I am instructing you on damages that I have any opinion as to whether Plaintiff [name] has proved liability.

The amount of damages is the difference between the amount Plaintiff [name] should have been paid and the amount [he/she] was actually paid. Plaintiff [name] is entitled to recover lost wages for the two years before [he/she] filed this lawsuit, unless you find that Defendant [name] either knew or showed reckless disregard for whether the FLSA prohibited its conduct. If you find that Defendant [name] knew or showed reckless disregard for whether the FLSA prohibited its conduct, then Plaintiff [name] is entitled to recover lost wages for three years before the date [he/she] filed this lawsuit. Plaintiff [name] filed this lawsuit on _____.

11.25 Pattern Jury Questions, FLSA Damages

JURY QUESTIONS

Question No. 1

Has Plaintiff [name] proved that [he/she] is entitled to recover damages under the FLSA?

Answer "Yes" or "No."

_____

If your answer is "Yes," answer the next question. If your answer is "No," do not answer the next question.

Question No. 2

Has Plaintiff [name] proved that Defendant either knew its conduct was prohibited by the FLSA or showed reckless disregard for whether its conduct was prohibited by the FLSA?

Answer "Yes" or "No."

_____

If your answer is "Yes," you should award damages for the three-year period from _____ to _____. If your answer is "No," you should award damages for the two-year period from _____ to _____.

Question No. 3

What sum of money would fairly and reasonably compensate Plaintiff [name] for the damages, if any,

you have found Defendant [name] caused Plaintiff [name]? Answer in dollars and cents for the following items and no other:

[specify formula].[1]

$_____

[1]If there is a dispute about whether certain amounts should be included in the regular rate of pay and overtime rate that are used to compute FLSA damages, the jury questions should be adapted accordingly, clarifying the underlying fact disputes that the jury is asked to decide, such as what statutory exclusions may apply.

11.26 FLSA—Employee or Independent Contractor

A. Committee Notes

This charge is for FLSA cases in which there are disputes about whether the plaintiff is an employee or an independent contractor. Such disputes are usually questions of fact for the jury. *See Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1006 (5th Cir. 1998) (Texas law); *McKee v. Brimmer*, 39 F.3d 94, 97 (5th Cir. 1994) (Mississippi law); *Brown v. Cities Serv. Oil Co.*, 733 F.2d 1156, 1161 (5th Cir. 1984) (Louisiana law).

The central issue in determining employee/independent contractor status is "whether the alleged employee so economically depends upon the business to which he renders his services, such that the individual, as a matter of economic reality, is not in business for himself." *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 829 (5th Cir. 2020) (quoting *Thibault v. Bellsouth Telecomms., Inc.*, 612 F.3d 843, 845 (5th Cir. 2010)). Courts use five "non-exhaustive" "economic reality" factors to guide the inquiry: "(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.* (quoting *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)). No single factor is determinative.[1] *Id.* "Rather, each factor is a tool used to gauge the *economic dependence* of the alleged employee,

[1]The Fifth Circuit has adopted a "hybrid economic realities/common law control test" to determine employee/independent contractor status under Title VII. *See Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir. 2013); *Muhammad v. Dall. Cty. Cmty. Supervision & Corr. Dep't*, 479 F.3d 377, 380 (5th Cir. 2007). The "right to control [the] employee's conduct" is the most important component of the hybrid test. *Muhammad*, 479 F.3d at 480; *see also Juino*, 717 F.3d at 434 (courts "should emphasize" the "common law control portion of the test" "over the

and each must be applied with this ultimate concept in mind." *Id.*

B. Charge

It is not always clear whether the law considers someone an "employee," and it is not always clear who the law considers someone's "employer." Some people perform services for others while remaining self-employed as independent contractors.

In this case, you must decide whether Plaintiff [name] was an employee of Defendant [name] or an independent contractor. You should answer this question in light of the economic realities of the entire relationship between the parties and in light of whether Plaintiff [name] economically depended on Defendant [name]. There are a number of factors you must consider, based on all the evidence in the case. The factors are as follows:

1. How much control Defendant [name] has over Plaintiff [name]'s work. In an employer/employee relationship, the employer has the right to control the employee's work, to set the means and manner in which the work is done, and to set the hours of work. In contrast, an independent contractor generally must accomplish a certain work assignment within a desired time, but the details, means, and manner by which the contractor completes that assignment are determined by the independent contractor, normally using special skills necessary to perform that kind of work.

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economic realities portion"). The "hybrid" test results "in a narrower definition of employee than under a true economic-realities test." *Hopkins*, 545 F.3d at 347. The Fifth Circuit explained in *Hopkins* that "it is legally possible to be an employee for purposes of the FLSA and an independent contractor under most other statutes." *Id.* (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)).

2. The relative investments made by Plaintiff [name] compared to Defendant [name]. An independent contractor generally makes a greater investment in his or her work, but an employee's investment is usually less than the employer's investment. For example, an independent contractor usually provides the tools, equipment, and supplies necessary to do the job, but an employee usually does not.

3. How much risk or opportunity Plaintiff [name] has. An independent contractor is generally one who has the opportunity to make a profit or faces a risk of taking a loss. But an employee is generally compensated at a predetermined rate, has no risk of loss, and has social security taxes paid by the employer.

4. The amount of skill and initiative required of Plaintiff [name]. An independent contractor usually has a specialized skill and demonstrated initiative compared to an employee. An independent contractor may have more discretion over his or her daily tasks, and may have to take initiative to find consistent work.

5. The permanency of the relationship between Plaintiff [name] and Defendant [name]. This includes whether Plaintiff [name] worked exclusively for Defendant [name], the total length of the relationship, and whether the work was done on a project-by-project basis. An employee typically works exclusively for one employer, has a long-term relationship, and does not work on a project-by-project basis, while an independent contractor does.

You should consider all the circumstances surrounding the work relationship, and no single factor determines the outcome. An individual who performs

services for pay may be either an employee or an independent contractor but cannot be both at the same time.

11.26 Pattern Jury Question, FLSA—Employee or Independent Contractor

JURY QUESTION

Question No. 1

Has Plaintiff [name] proved that [he/she] was an employee of Defendant [name]?

Answer "Yes" or "No."

_____

11.27 FLSA—Joint Employers

A. Committee Notes

This charge is for FLSA cases in which there is a fact issue about joint employment.

If an employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint-employment relationship may arise. The common situations for finding a joint-employment relationship are:

> (1) where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2(b) (footnotes omitted).[1]

[1]In addition to the regulations, the U.S. Department of Labor has issued several opinion letters emphasizing that the ultimate question is one of economic dependence and suggesting additional factors to review in determining joint employment, including: the power to control or supervise the workers and work; power to hire, fire, or determine the permanency and duration of the relationship; the level of skill; whether the worker's activities are an integral part of overall business operations; where the

B. Charge

In this case, you must decide whether Plaintiff [name] was an employee of Defendant [name] as well as an employee of [name of alleged other employer]. You should answer this question in light of the economic realities of the entire relationship between the parties based on the evidence.

Consider the following factors to the extent you decide that each applies to this case: [specify applicable factors]:

(a) the nature and degree of control over the employee and who exercises that control;

(b) the degree of supervision, direct or indirect, over the employee's work and who exercises that supervision;

(c) who exercises the power to determine the employee's pay rate or method of payment;

(d) who has the right, directly or indirectly, to hire, fire, or modify the employee's employment conditions;

(e) who is responsible for preparing the payroll and paying wages;

(f) who made the investment in the equipment and facilities the employee uses; and

(g) the employment's permanence and duration.

While no single factor is determinative, the extent of the right to control the means and manner of the

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work is performed; the equipment used; who performs payroll for and pays the employees; and similar questions. Wage & Hour Op. Letter (May 11, 2001).

worker's performance is the most important factor.

11.27 Pattern Jury Question, FLSA—Joint Employers[1]

JURY QUESTION

Question No. 1

Has Plaintiff [name] proved that Defendant [name] was [his/her] employer as well as [name of alleged other employer]?

Answer "Yes" or "No."

_____

[1]Fifth Circuit cases that have addressed joint employment provide limited guidance. *See, e.g., Martin v. Bedell*, 955 F.2d 1029, 1035 (5th Cir. 1992); *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983). Recently, the Fifth Circuit held that "[i]n [the] joint-employer context in actions under the FLSA, each employer must meet the economic reality test." *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014) (citing *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012)).

12

TAX REFUNDS

Overview

The following introductory sentence may be appropriate for these instructions: In this case, Plaintiff [name] seeks a refund of taxes that [he/she] has paid.

12.1 Reasonable Compensation to Stockholder—Employee

Plaintiff [name] is entitled to certain tax deductions that are ordinary and necessary business expenses, such as reasonable salaries or other compensation paid for personal services actually rendered. A corporation, however, is not entitled to a deduction for dividends it pays to its shareholders. Dividends a corporation pays to its shareholders are a distribution of profits, not deductible expenses.

The Commissioner of Internal Revenue must disallow any portion of a compensation deduction that the Commissioner believes is (1) not compensation or (2) unreasonable in amount. This prevents a corporation from improperly reducing its taxes by distributing all or some of its profits to its shareholders and calling the distribution something else, like salaries.

You must decide whether Plaintiff [name] may deduct on its federal income tax returns certain amounts it says it paid as salaries for the years involved. To be entitled to the salary deduction claims, Plaintiff [name] must establish each of the following elements by a preponderance of the evidence:

1. that the payments were actually paid as compensation for services rendered and were not a distribution of the profits of the business; and

2. that the payments are reasonable when compared with the personal services actually rendered.

The fact that Plaintiff [name] called the payments salary, compensation or bonus is not determinative.

Reasonable compensation is the amount that is paid for similar services, by similar enterprises, under

similar circumstances, to a qualified person, whether that person is a shareholder of the corporation or not.

In deciding what is reasonable compensation, you may consider all of the following factors:

1. The size, nature and complexity of Plaintiff [name]'s business.

2. The quality and quantity of the services actually rendered by the employee, including the difficulty or simplicity of the work and the responsibility assumed by the employee.

3. The qualifications, experience and background of the employee, including any special training and formal education.

4. Whether or not all of the employee's time was devoted to the business, or whether the employee devoted time to other businesses, interests and activities.

5. The salaries paid to others employed by the Plaintiff [name] and whether and how much stock they owned in the corporation.

6. What a comparable business pays for comparable services.

7. The relationship between the amounts paid to the employee and the employee's shareholdings in Plaintiff [name].

8. The dividend history of Plaintiff [name].

9. Whether the amount paid was set or adjusted after the profits for the year were known.

10. The extent of control which the employee or a member of the employee's family had over the

corporation in setting the amount of the payment.

11. Whether the person or persons setting the amount of the payment did so with a view of avoiding payment of corporate taxes on that amount.

No one factor is controlling. You should make your decision after considering all the evidence.

[Remember that this case does not involve Plaintiff [name]'s right to pay any amount it wishes to any employee it chooses. The only issue is whether all of the amounts that were paid qualify as a tax deduction.]

12.2 Debt v. Equity

A corporation may deduct from its gross income for income tax purposes any amount it pays as interest on money that it has borrowed. However, a corporation may not deduct from its taxable income any dividends it pays to its shareholders. [The fact that the amount paid is taxable to the recipient, either as interest or as a dividend, is irrelevant.]

The Commissioner of Internal Revenue determined that the payments the stockholders made to Plaintiff [name] were investments by them in the corporation's capital and not loans to the corporation. The Commissioner determined that the later payments Plaintiff [name] made to those stockholders were dividend distributions and not interest payments on loans to the corporation. As a result, the Commissioner disallowed the deductions Plaintiff [name] claimed for payments as interest. Plaintiff [name] has the burden of proving that the Commissioner's determination was incorrect.

You must decide whether the stockholders' payments to Plaintiff [name] created a good-faith indebtedness—a true loan—or whether they were made as investment in the capital of the corporation. A person may be both an investor and a creditor in the same corporation but, as I will explain later, status as one or the other is not determined by the label the parties attached to the transactions.

An "investment in capital" is an advance a stockholder makes to a corporation as an investment for the purpose of making a profit. Whether the stockholder makes a profit depends on, and is measured by, the future success of the business. In other words, the stockholder making the advance intends to make an investment and take the risks associated with the venture. The corporation is not committed to repay the money to the stockholder. The stockholder-investor

anticipates a return out of future profits of the enterprise. A return is by no means certain, however, because an investment in capital is similar to any other investment that depends on future profits and earnings.

A "loan" is an advance of money under an agreement that the money will be repaid at some future date. The agreement and obligation to repay must be absolute. Of course, the lender takes the risk that the corporation may not be able to repay the loan; however, the obligation to do so continues to exist without regard to the corporation's financial ability.

The essential difference between a stockholder who makes a capital investment and a creditor who loans money to the corporation is that the stockholder intends to embark on the corporate venture as an owner with all associated risks of loss in order to reach [his/her] goal of making a profit. The creditor does not intend to take such risks insofar as they may be avoided. Instead, the creditor merely lends money to others who intend to take the risks.

There is no single test to determine whether a stockholder's advances to a corporation are considered as loans to the corporation or as capital investments in the corporation. You must consider all the facts of this case and determine the true substance of the transaction. Neither names nor labels are determinative. You must examine the transaction in terms of what the parties intended to accomplish and what they actually accomplished. You should not be misled by the symbols, labels or forms they used.

In determining whether the transaction was a loan or an investment, you may consider the following factors:

1. The presence or absence of a maturity date. The presence of a fixed maturity date indicates

a fixed obligation to repay, a characteristic of a loan. The absence of a fixed maturity date indicates that repayment was in some way tied to the fortunes of the business, which is a characteristic of a stockholder's investment.

2. Whether there is an expectation of payment at maturity. If there is such an expectation, this indicates the existence of a debt. If there is no real expectation of payment at maturity or if there is an unreasonably postponed due date on the note representing the advance, this indicates that the advance was intended to be an investment.

3. Whether the corporation established a sinking fund—that is, a fund in which money is accumulated to pay a loan when it becomes due—; whether the corporation had the notes of the stockholder subordinated to other indebtedness; or whether the corporation prevailed on its stockholders to postpone or forego paying the amounts that they termed principal or interest. Any of these acts would indicate that there was a reasonable expectation of payment at maturity. If the corporation did not establish a sinking fund, or did not have the stockholders' notes subordinated to other creditors, or did not postpone payment of the stockholders' notes, this may indicate that there was no good expectation of payment at maturity.

4. The source of the payments. If repayment is possible only out of corporate earnings, the transaction looks like a contribution of equity capital. If, however, repayment does not depend on earnings, the transaction looks like a loan to the corporation.

5. An increased participation in management. If

the contributors were granted an increased voting power or participation in the affairs of the corporation by virtue of the advance, this indicates that the advance was an investment. If the contributors were not granted any increased voting power or participation in the corporation's affairs by virtue of the advance, this indicates that the transaction was a loan and not an investment in capital.

6. How the corporation treated other creditors. If the corporation paid other creditors on the maturity of the corporation's obligation to them, but the stockholders' advances to the corporation were not so paid, this indicates that the stockholders' advances were capital investments, and not true loans.

7. Whether there was "thin" or inadequate capitalization. Thin capitalization is evidence of a capital contribution where the debt to equity ratio was initially high. As to the debt to equity ratio, if the amount of the debt is much higher, or several times higher, than the amount of capital stock, this would tend to indicate that the advances in question were capital investments. If the amount of debt is more nearly equal to, or is less than, the amount of capital stock, this indicates that the advances represented true indebtedness.

8. If the corporation makes so-called interest payments, but does so only when profits are available, this indicates a capital investment. If regular payments are made, whether profits are available or not, this indicates that the transaction was a loan and not a capital investment.

9. The identity of interests between creditor and stockholder. If stockholder advances are made

in proportion to their respective stock ownership, it looks like an equity capital contribution. A sharply disproportionate ratio between a stockholder's percentage interest in stock and the debt strongly indicates that the debt is a true loan.

10. The corporation's ability to obtain loans from outside sources. If the corporation has the ability to borrow funds from outside sources when an advance by a shareholder is made, then the advance looks like a true loan. If no reasonable creditor would have loaned funds to the corporation at the time of the advance, an inference arises that a reasonable shareholder also would not do so, and the transaction has the appearance of a capital investment.

No single factor or consideration is controlling. Your decision should be made on the basis of all the evidence in the case.

12.3 Employee v. Independent Contractor

The law requires every employer that pays wages to an employee to deduct and withhold a certain amount of taxes from the employee's gross wages. That employer pays those taxes to the federal government for the employee.

If the employer fails to withhold the necessary taxes from the employee's wages, the employer is required to pay the amount that it should have withheld.

Plaintiff [name] has made certain payments to the federal government as taxes deducted and withheld from employee's wages. Plaintiff [name] contends that it was not liable for the amount it paid, and is entitled to a refund on the ground that [name of individual/category of individuals] was/were not its employee(s), but was/were, instead, [an] independent contractor(s). If [name of individual/category of individuals] was/were not [an] employee(s), then Plaintiff [name] is entitled to recover the money. If [name of individual/category of individuals] was/were [an] employee(s), then Plaintiff [name] is not entitled to recover the money it paid.

The sole issue for you to decide is whether, during the time in question, [name of individual/category of individuals] was/were employee(s) of the plaintiff or whether they were independent contractors. There are a number of factors you must take into consideration in making that determination. No one factor is controlling. Your determination should be made from all the evidence in this case.

One of the most important considerations is the degree of control Plaintiff [name] exercised over [name of individual/category of individual]'s work. An employer has the right to control an employee. It is important to determine whether Plaintiff [name] had the right to

direct and control [name of individual/category of individuals] not only as to the results of [his/her/their] work, but also as to the details, manner and means by which those results were accomplished. You must determine whether Plaintiff had the right to control the number and the frequency of breaks, how [he/she/they] performed the work, the type of equipment [he/she/they] could use, and the work schedule. If you find that the Plaintiff had the right to supervise and control those details, and the manner and means by which the results were to be accomplished, this indicates that there was an employer-employee relationship between the Plaintiff and [name of individual/category of individuals]. A finding that the Plaintiff did not exercise such elements of supervision and control over [name of individual/category of individuals] would support a finding that [he/she/they] were independent contractors and not Plaintiff [name]'s employees. It is the right to control and not the actual exercise of control that is important.

Another factor you should consider is whether [name of individual/category of individuals] were carrying on an independent business or whether they regularly worked in the course of Plaintiff [name]'s business. For this purpose, you may consider whether [name of individual/category of individuals] advertised or generally offered their services to others; whether or not they, as individuals or as a group, used a business name in dealing with Plaintiff [name]; whether they listed themselves in any business capacity in city or telephone directories; whether they maintained their own offices; whether they procured necessary licenses for the carrying on of their activities; whether they supplied their own tools or equipment; and any other evidence tending to show that they were carrying on an independent business as individuals or as a group.

Another factor you should consider is the term and duration of the relationship between Plaintiff [name]

and [name of individual/category of individuals]. The relationship of an independent contractor generally contemplates the completion of an agreed service within a stipulated period of time. An employment relationship generally involves a continuous rendering of services for an indefinite period of time.

Another factor you may consider is the manner of payment. An independent contractor generally is one who has the opportunity to make a profit or risk taking a loss; an employee generally does not have the opportunity to make a profit or risk taking a loss. An employee generally is paid on time or piecework or commission basis, while an independent contractor is ordinarily paid an agreed amount—or according to an agreed formula basis—for a given job.

The description the parties give to their relationship is not controlling. You must determine whether the relationship between Plaintiff [name] and [name of individual/category of individuals] is one of employment or of independent contract, taking into account all of the factors I have mentioned to you and all of the evidence in this case.

12.4 Business Loss v. Hobby Loss

The controversy in this case concerns the deductibility of expenses involved in the operation of [name of business or activity]. Plaintiff [name] contends that [he/she] operated [name of business or activity] as a business for profit, and therefore is entitled to a deduction from income tax for the years [specify] for the losses [he/she] sustained in operating [name of business or activity]. The government contends that Plaintiff [name] operated [name of business or activity] for personal pleasure, enjoyment and prestige, that Plaintiff [name] did not have a profit motive in operating [name of business or activity] and that, as a consequence, the Plaintiff [name] is not entitled to deduct the losses that resulted from operating [name of business or activity].

A taxpayer is allowed to deduct all of the ordinary and necessary expenses paid or incurred in carrying on a trade or business. Moreover, if a taxpayer sustained a loss during a particular year, [he/she] may deduct that loss from income derived from other sources, such as Plaintiff [name] has done here. The key words are "trade or business." If expenses or losses occur in a trade or business, they are deducible. If a person is engaged in an activity simply for pleasure or recreation or social prestige and not to make a profit, the expenses incurred in the activity are not deductible. An activity is a trade or business only when a taxpayer enters into the activity with the real expectation of making a profit.

To constitute a business, the activity usually must be carried on regularly and continuously, over a period of time. Generally, a person engaged in a business activity holds [himself/herself] out as selling goods or services and regularly devotes time and attention to that activity. The activity need not be the taxpayer's only occupation or even [his/her] principal occupation. It may

be a sideline, so long as it occupies the time, attention and labor of the taxpayer for the purpose of profit, not as a mere recreation or hobby. In this regard, you may consider Plaintiff [name]'s regular occupation and the amount of income derived from that occupation. You may also compare the character of [his/her] regular occupation with the size and character of the activity in question in this case and the time [he/she] expended on each.

If you find that Plaintiff [name] had a profit motive, then the fact that Plaintiff [name]'s activities were conducted in the face of serious losses, standing alone, does not necessarily mean that those activities were for Plaintiff [name]'s personal pleasure.

If the taxpayer sincerely and in good faith hopes and expects to make a profit from the activity, then the fact that others may believe that there was no reasonable expectation of profit from the activity does not prevent it from being a business.

In determining whether Plaintiff [name] intended to engage in activity for profit, no one factor is controlling. After considering all of the evidence, you must decide whether Plaintiff [name] has proved by a preponderance of the evidence that the activity in question constituted the conduct of a trade or business, or whether Plaintiff [name] engaged in such activity as a hobby or for recreation or other similar purposes and not for profit. [You must determine separately for each of the years involved whether the activity in question was a trade or business conducted for profit. It may be a business one year and not the next, or vice versa. In determining whether the activity was a business in a particular year, you may consider the fact that the activity was or was not a business in a year before or after the particular year you are considering.]

12.5 Real Estate Held Primarily for Sale

Plaintiff [name] claims that [he/she] is entitled to treat the gain from the sale of the properties in question as a capital gain, subject to the lower capital gain tax rate. The government contends that the gain should be taxed at the higher ordinary income tax rates.

You must decide whether or not Plaintiff [name] is entitled to treat the gain from the sale of the properties in question as capital gain.

A gain qualifies for capital gain tax treatment if Plaintiff [name] proves by a preponderance of the evidence both of the following:

1. that Plaintiff [name] held each of the parcels of property for more than six months before the sale; and

2. that Plaintiff [name] did not hold the properties primarily for sale to customers in the ordinary course of a trade or business.

[If the parties agree that Plaintiff [name] held the properties in question for more than six months prior to the sale.] [You must determine whether Plaintiff [name] held the properties in question for more than six months prior to the sale. If [he/she] did not, then you must find that Plaintiff [name] is not entitled to treat the gain as capital gain.] If [he/she] did, then you must decide whether, at the time of the sale, Plaintiff [name] was holding the properties in question primarily for sale to customers in the ordinary course of Plaintiff [name]'s trade or business. "Primarily" means "of first importance" or "principally."

In making your decision, you must carefully scrutinize the circumstances surrounding Plaintiff [name]'s ownership and sale of these properties. While the reason Plaintiff [name] acquired the property is entitled to

some weight, the ultimate question is the reason why Plaintiff [name] held the property at the time of sale. Property that was originally acquired for investment may change in character to property held for sale to customers in the ordinary course of a trade or business. If Plaintiff [name] held the property for investment in the hope that it would appreciate in value without further activity on Plaintiff [name]'s part, this would indicate that the property was a capital asset. However, if Plaintiff [name] held the property in the hope that it could be developed and then resold in the ordinary course of Plaintiff [name]'s trade or business, this would be evidence that it was held primarily for sale. You may consider the following factors in making your decision:

1. The extent to which Plaintiff [name] (or others acting on [his/her/its] behalf) engaged in developing or improving the properties. If there was development or improvement, this would indicate that Plaintiff [name] was holding the properties for sale to customers in the ordinary course of [his/her/its] trade or business.

2. The number, continuity and frequency of the sales. The presence of extensive and continuous sales activity over a period of time would indicate that Plaintiff [name] held the properties in question for sale to customers in the ordinary course of a trade or business. Limited sales on an infrequent basis are evidence that Plaintiff [name] did not hold the properties for sale to customers in the ordinary course of a trade or business.

3. The solicitation of customers. If plaintiff [name] (or others acting on [his/her/its] behalf) actively solicited customers, this would indicate that Plaintiff [name] was holding the properties in

the ordinary course of a trade or business. If Plaintiff [name] advertised the properties for sale, this would be evidence that [he/she/it] was holding the properties for sale to customers in the ordinary course of trade or business. However, if Plaintiff [name] did not actively solicit customers and did not advertise the properties for sale, it is evidence that the properties were not held for sale to customers in the ordinary course of a trade or business.

4. The income Plaintiff [name] derived from the sale of the properties in relation to income from other sources. If a substantial part of Plaintiff [name]'s income was derived from the sales of these properties, this is an indication that the sales activity constituted the conduct of a trade or business. If the income derived was not substantial in relation to income from other sources, this is an indication that the sale of the properties did not constitute a trade or business.

5. The holding period of the property. The shorter the elapsed time between Plaintiff [name]'s acquisition of the properties and the disposition of them, the more reasonable it is to conclude that Plaintiff [name] held the properties for sale to customers in the ordinary course of a trade or business. Conversely, the longer the holding period, the more it appears that Plaintiff [name] held the properties for investment purposes.

These are not exclusive factors. They are guidelines. There may be other factors that you may consider that I have not mentioned. You should bear in mind that no one factor is determinative of the issue before you. In making your decision, you should carefully weigh all of

the evidence.

12.6 Section 6672 Penalty

[Name], a corporation, withheld from the wages and salaries of its employees federal income taxes and social security taxes totaling $[specify]. The corporation failed to pay to the government the amount withheld as required under the law. The corporation then became insolvent and had no funds from which the government could collect the withheld taxes.

The law provides that if a person associated with a corporation, has the duty and responsibility to see that the taxes are paid to the government, and willfully fails to do so, that person is [himself/herself] liable to the government in the form of a penalty for the amount of taxes withheld but not paid. This generally is referred to as the "100 percent penalty" because the amount of the penalty is equal to the amount of taxes that were withheld but not paid. The penalty is merely a means of collecting the taxes withheld and not paid, in order to make the government whole.

The employer, a corporation, can act only through its officers, directors and employees. Every corporation that is an employer must have some person or persons, but at least one, who has the duty or responsibility of withholding and paying the taxes that the law requires the corporation to withhold and to pay to the government. More than one person may be liable for the 100 percent penalty.

The government contends that Plaintiff [name] was one of the persons responsible for collecting and paying to it the taxes that were withheld. The government also contends that [his/her] failure to pay over those taxes was willful. Plaintiff [name] has the burden of proving to you, by a preponderance of the evidence, either that [he/she] was not a person whose duty it was to collect and pay to the government the taxes in question, or

that [he/she] did not willfully fail to collect and pay over such taxes.

The first issue is whether Plaintiff [name] was a responsible person. The term "responsible person" includes any person who is connected or associated with the corporation-employer in such a manner that [he/she] has the power to see that the taxes are paid, or the power to make final decisions concerning the corporation, or the power to determine which of the corporation's creditors are to be paid and when they are to be paid. The term "responsible person" may include corporate officers, employees, members of the board of directors or stockholders. The meaning of the term "responsible person" is broad and is not limited to the person who actually prepares the payroll checks or the tax returns. One may be a "responsible person" although [he/she] is not authorized to draw checks for the corporation, so long as [he/she] has the power to decide who will receive the corporate funds. In other words, the responsible person is any person who can effectively control the corporation's finances or determine which of the corporation's bills should or should not be paid.

If you conclude that Plaintiff [name] was not a responsible person, then you need not consider any other issue, and you must find in favor of Plaintiff [name]. However, if you find that Plaintiff [name] was a responsible person, then you must decide whether Plaintiff [name] acted willfully in the failure to pay the withheld taxes to the government.

The term "willfully" means that the act of failing to pay over the taxes was voluntarily, consciously and intentionally done without reasonable cause. If the responsible person consciously, voluntarily and intentionally used, or caused to be used, the funds that were withheld to pay taxes for some other purpose, then [he/she] has acted willfully. It is not necessary to find that

Plaintiff [name] had bad motives. It must be shown only that Plaintiff [name] made the deliberate choice to use the funds in some way other than to pay the government. If you find that, at a time when withheld taxes were due and owing to the government, Plaintiff [name] used corporate funds to pay suppliers, or employees' net take home salaries, or rent, or any creditor, including Plaintiff [name], or in any way other than paying the government the withheld wages of the employees as their federal income taxes and social security taxes, you must find that Plaintiff [name] acted willfully in failing to see that the withheld taxes were paid. It is no excuse or defense that the responsible person, in good faith, hoped to pay the taxes at a later time, or relied on advice and information furnished by accountants and attorneys.

12.7 Gifts in Contemplation of Death

A gift made by a person within the three years immediately before [his/her] death is presumed to have been made in contemplation of death. Unless Plaintiff [name] establishes by a preponderance of the evidence that the gift by [name of deceased] was not made in contemplation of death, the fair market value of that gift must be included in [name of deceased]'s gross estate for federal estate tax purposes.

The Commissioner of Internal Revenue determined in this case that the gifts were made in contemplation of death, and therefore assessed additional taxes against the estate. Plaintiff [name] challenges the Commissioner's determination.

The term "in contemplation of death" does not refer to the general expectation of death that all of us share. On the other hand, its meaning is not restricted to a fear or belief that death is imminent or near. Rather, a transfer is "in contemplation of death' if it is prompted by the thought of death (although the thought of death may not be the only thing that prompts it). A transfer is prompted by the thought of death if it is made either with the purpose of avoiding death taxes, or if it is made for any other motive associated with death.

The issue is [name of deceased]'s state of mind when the transfer of property was made. Stated another way, you must determine what prompted [name of deceased], at the time of transfer, to make the transfer. You must determine [his/her] motives by considering all of the facts and circumstances surrounding the transfer.

In this connection, you should consider the following questions:

1. What was [name of deceased]'s age at the time

of the transfer? A transfer made by a person in advanced years is more likely to be in contemplation of death than a transfer made by a person who is not advanced in years.

2. What was the cause of [name of deceased]'s death? A transfer made by a person who is in bad health and who knows of the bad health is more likely to be in contemplation of death than a transfer made by a person who is in good health and who knows of the good health.

3. What was the relative value of the property given away? If the value of the property transferred by [name of deceased] is small in comparison to the overall value of his/ her estate, this is an indication that the transfer was not made in contemplation of death. However, if the property transferred had a substantial value and comprised a substantial portion of [name of deceased]'s estate before the transfer, this may be an indication that the transfer was made in contemplation of death.

4. Who was the recipient or donee of the gift? A transfer to a person who would normally have received the property upon the transferor's death is more likely to be in contemplation of death than a transfer to a person who would not normally have received the property upon the transferor's death.

5. Had [name of deceased] made such gifts before? If a person had a history of making gifts, this indicates that the transfer involved was not made in contemplation of death. If [name of deceased] did not have a history of making gifts, the fact that he (she) began making gifts shortly before death is an indication that they were made in contemplation of death.

6. Were the gifts made pursuant to a specific plan? If you find that [name of deceased] made this transfer pursuant to a plan to reduce the amount of taxes that would be due on [his/her] estate, then it is more likely that the transfer was made in contemplation of death. On the other hand, a finding that the transfer was not made in order to reduce taxes does not necessarily mean that it was not made in contemplation of death, since it may still have been a substitute for giving property by will at death.

Each of these factors is relevant in helping your decision, but no single factor is controlling. If you find that Plaintiff [name] has proved by a preponderance of the evidence that a life motive was the dominant motive that prompted [name of deceased] to make the gifts, then Plaintiff [name] has overcome the presumption that the gifts were made in contemplation of death and you should find for Plaintiff [name]. If you find that a death motive was the dominant motive that prompted [name of deceased] to make the gifts, then you must find for the government.

After considering all of the facts and circumstances, you may find that [name of deceased] had mixed motives for making these gifts and that those motives associated with life were evenly balanced by other motives associated with death. If you do, you must find for the government, because Plaintiff [name] has failed to prove to you by a preponderance of the evidence that the transfer was not made in contemplation of death.

13

MISCELLANEOUS FEDERAL CLAIMS

13.1 Automobile Dealers Day-in-Court Act (15 U.S.C. § 1221)

Plaintiff [name] claims that Defendant [name] failed to act in good faith in [terminating/cancelling/not renewing] Plaintiff [name]'s written franchise agreement, violating a federal statute called the Automobile Dealers Day-in-Court Act.[1] To prevail on a claim under the Act, Plaintiff [name] must show a lack of good faith by Defendant [name].[2] This requires a showing that Defendant [name] coerced or intimidated Plaintiff [name].[3] Each party to an automobile franchise agree-

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[1]The ADDCA states:

> An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer[.]

15 U.S.C. § 1222.

[2]*Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 514 (10th Cir. 1976) (The ADDCA "gives to an automobile dealer a federal cause of action against an automobile manufacturer who fails to act in good faith in performing or complying with any of the terms or provisions of the franchise.").

[3]*Cabriolet Porsche Audi, Inc. v. Am. Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985), *cert. denied*, 475 U.S. 112 (1986) ("Case law is clear that a manufacturer fails to act in good faith for purposes of recovery under [the ADDCA] only if its conduct amounts to coercion or intimidation."); *Bob Maxfield, Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1038 (5th Cir. 1981) ("Accordingly, it is well established that actual coercion, intimidation, or threats are an essential element of a cause of action under the Act.").

ment must be free from coercion, intimidation, or threats of coercion or intimidation from the other party.[4]

Plaintiff [name] must prove each of the following by a preponderance of the evidence:

1. that Defendant [name]'s conduct in [terminating/cancelling/not renewing] Plaintiff [name]'s written franchise agreement amounted to coercion or intimidation of, or threats to coerce or intimidate, Plaintiff [name]; and

2. that Plaintiff [name] suffered damages as a result of Defendant [name]'s conduct.

The fact that a dealer has a written franchise agreement with a manufacturer does not give the dealer the right to have the written agreement renewed when it expires. The manufacturer, however, must act in good faith in deciding whether to renew the agreement. This does not prohibit the manufacturer from enforcing reasonable provisions of the contract or from advancing its own business interests by encouraging the dealer to make its operations more efficient or to sell more. The issue is not whether Defendant [name] acted unfairly, arbitrarily, or inequitably in its business relations with Plaintiff [name]. The issue is only whether Defendant [name] failed to act in good faith because its actions toward Plaintiff [name] amounted to coercion or intimidation.

To prove coercion or intimidation, Plaintiff [name] must prove by a preponderance of the evidence that there was conduct on Defendant [name]'s part that

[4]15 U.S.C. § 1221(e) (2006) ("The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.") (emphasis omitted).

resulted in Plaintiff [name]'s [acting] [refraining from acting] against its will. Plaintiff [name] must show that it was coerced in some way into doing something it had a lawful right not to do, or into not doing something it had a lawful right to do. The coercion or intimidation must include a wrongful demand by Defendant [name] that would result in penalties or sanctions if Plaintiff [name] did not comply. The coercion or intimidation, or threatened coercion or intimidation, must be actual. The mere fact that a dealer believes that it has been coerced or intimidated is not sufficient.

If you find in favor of Plaintiff [name], you must then consider damages. You should award Plaintiff [name] an amount of money that will fairly compensate it for the damage the evidence shows it has sustained and is reasonably certain to sustain in the future as a result of the [termination of/cancellation of/failure to renew] the franchise.

(Insert damages elements.)

13.2 Odometer Tampering, Motor Vehicle Information and Cost Savings Act (49 U.S.C. § 32701 *et seq*.)

Plaintiff [name] claims that [Defendant [name]] [Defendant [name]'s agent] violated a federal statute prohibiting tampering with odometers in motor vehicles. An odometer is the instrument the manufacturer places in the vehicle to measure and record the total, actual distance or mileage the vehicle has been driven.

[Plaintiff [name] claims that [Defendant [name]] [Defendant [name]'s agent], with the intent to defraud, changed the vehicle's odometer by [disconnecting/ resetting/altering; specify the alleged conduct covered by the Act] to show a lower number of miles than the vehicle actually had been driven.][1] To succeed on this claim, Plaintiff [name] must prove both of the following by a preponderance of the evidence:[2]

1. [that [Defendant [name]] [Defendant [name]'s agent] changed the vehicle's odometer to show a lower

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[1]This bracketed language should be used when the claim is based on an alleged violation of 49 U.S.C. § 32703(2). If the claim is based on an alleged violation of 49 U.S.C. § 32703(3) or § 32705, this language should be modified, as follows:

§ 32703(3)

Plaintiff claims that Defendant [or its agent], with the intent to defraud, operated the vehicle knowing that the odometer was disconnected or not functional.

§ 32705

Plaintiff claims that Defendant [or its agent], with the intent to defraud, failed to provide an accurate written odometer disclosure statement on the vehicle when it was transferred.

[2]The Fifth Circuit has indicated that preponderance of the evidence is the appropriate standard under this statute. *See Landrum v. T.C. Goddard*, 921 F.2d 61, 63 (5th Cir. 1991) (interpreting 15 U.S.C. §§ 1981, 1991, which was recodified in 1994 at 49 U.S.C. §§ 32701-32711).

number of miles than the vehicle actually had been driven;][3] and

2. that [he/she/it] acted with the intent to defraud someone.

Plaintiff [name] does not have to prove that [he/she] was the specific person intended to be defrauded. Nor does Plaintiff [name] have to prove that [he/she] or anyone else was actually defrauded. Plaintiff [name] must, however, prove that [Defendant [name]] [Defendant [name]'s agent] acted with the intent to defraud someone.[4]

To act with intent to defraud means to act with the intent to deceive or cheat, ordinarily for the purpose of bringing some financial gain to one's self or to another. Intent to defraud may be established through proof that the [change to the odometer reading] [operation of the vehicle knowing that the odometer was disconnected or nonfunctional] [failure to provide an accurate odometer disclosure statement] was done with the specific intent to deceive or with a reckless disregard for the truth as

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[3]This bracketed part of the first element should be used when the claim is based on an alleged violation of 49 U.S.C. § 32703(2). If the claim is based on an alleged violation of 49 U.S.C. § 32703(3) or § 32705, this language should be modified, as follows:

§ 32703(3)

that the Defendant [or its agent] operated the vehicle knowing that the odometer was disconnected or not functional;

§ 32705

that the Defendant [or its agent] failed to provide an accurate written odometer disclosure statement on the vehicle when it was transferred.

[4]*See, e.g.*, *Shipe v. Mason*, 500 F. Supp. 243, 245 (E.D. Tenn. 1978) ("The salient showing was that [the defendant] acted with the intent to defraud, not that anyone was actually defrauded."), *aff'd*, 633 F.2d 218 (6th Cir. 1980); *see also Haynes v. Manning*, 717 F. Supp. 730, 734 (D. Kan. 1989) ("An essential element of plaintiffs' federal odometer statutory claim was that defendants acted with an intent to defraud someone."), *aff'd in part and rev'd in part on other grounds*, 917 F.2d 450 (10th Cir. 1990) (per curiam).

to the vehicle's actual mileage. Mere negligence or carelessness about whether the odometer reading is accurate is not enough to make a defendant liable. Plaintiff [name] must show by a preponderance of the evidence that [Defendant [name]] [Defendant [name]'s agent] either knew that the odometer reading was inaccurate or at least acted with reckless disregard about whether the vehicle's odometer reading was inaccurate.[5]

If a preponderance of the evidence does not support Plaintiff [name]'s claim, then your verdict should be for Defendant [name]. If, however, a preponderance of the evidence does support Plaintiff [name]'s claim, then [he/she] would be entitled to recover either three times the amount of actual damages the evidence shows [he/she] sustained, or $10,000, whichever is greater.[6]

(Insert general instruction on actual or compensatory damages.)

The actual damages are measured by the difference between the amount Plaintiff [name] paid for the vehicle and the fair market value of the vehicle on the date of sale with its actual mileage disclosed and such

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[5]*See, e.g.*, *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1282 (10th Cir. 1998) ("[A] transferor need not have actual knowledge that the odometer statement was false before liability may be imposed. Rather, intent to defraud may be inferred if a transferor lacks such knowledge only because he " 'display[ed] a reckless disregard for the truth' " or because he " 'clos[ed] his eyes to the truth.' " (alterations in the original) (quoting *Haynes v. Manning*, 917 F.2d 450, 453 (10th Cir. 1990) (per curiam)); *Nieto v. Pence*, 578 F.2d 640, 642 (5th Cir. 1978) (holding that recklessness or gross negligence in determining or disclosing actual mileage is enough for the factfinder to infer intent to defraud).

[6]Title 49 U.S.C. § 32710(a) allows a plaintiff to recover three times the amount of actual damages sustained or $10,000, whichever is greater. These instructions may be used to have the jury apply the statutory directive. Another approach is for the jury to be directed simply to determine the amount of actual damages and the court applies the statutory formula. That is recommended in the 8th Circuit Manual of Model Civil Jury Instructions (2019) (Instruction 19.70). The amount was increased from $1,500 to $10,000. *See* 49 U.S.C. § 32710(a), amended by Pub. L. 912–141 (July 6, 2012).

additional sums you find will fairly compensate Plaintiff [name] for any other damages sustained, including [specify appropriate other actual damages].[7]

After you determine Plaintiff [name]'s actual damages, you would then multiply by three and enter the resulting amount on your verdict form. If that calculation results in a figure less than $10,000, then you would enter the sum of $10,000 as Plaintiff [name]'s damages.

(Insert instruction on attorney's fees and costs if appropriate.)[8]

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[7]Title 49 U.S.C. § 32710(a) would permit, for example, an award of such expenses as repair bills for defects that are directly related to the car's higher mileage and overpayment of insurance premiums and licensing fees attributable to the vehicle's inflated value due to the lower mileage reading, provided that these expenses are legitimately attributable to the defendant's acts that violated the statute. *See, e.g.*, *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1388 (D. Neb. 1977) (defining "actual damages" under the odometer-fraud statute to be the meaning commonly applied to fraud cases, i.e., the difference between the amount plaintiff paid and the fair market retail value of the vehicle with number of miles actually traveled, plus such outlays as are legitimately attributable to acts of the defendant), *aff'd*, 578 F.2d 721 (8th Cir. 1978); *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488, 1496 (E.D. Va. 1988) (same); *Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081, 1085 (E.D. La. 1987) (same); *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093, 1095–96 (N.D. Ind. 1986) (same); *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102, 1103–04 (D. Del. 1980) (same); *see also Farmers Co-op. Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 498 (8th Cir. 2009) (" '[A]ctual damages' include (1) the purchase price of the vehicle less its [fair market value] given the vehicle's actual mileage, and (2) any expenses shown to be attributable to the defendant's wrongful acts.").

[8]Title 49 U.S.C. § 32710(b) permits an award of reasonable attorney's fees and costs to a prevailing plaintiff.

13.3 Eminent Domain

This action is brought by the United States under the federal government's power of eminent domain. This term refers to the government's right and power to take private property for public purposes. A lawsuit brought under eminent domain is sometimes called a condemnation proceeding.

The power to take private property for public purposes is essential to the government's independence and its operations. If the government did not have that ability, any landowner could delay or even prevent public improvements, or could force the government to pay a price higher than the fair market value of the property taken. But the government's eminent domain power is subject to the requirement that the property owner be paid "just compensation." That term means the fair market value of the property on the date of the taking. It is your task to decide, based on a preponderance of all the evidence submitted, what the fair market value of the property was on the date of the taking.

"Fair market value" means the amount a willing buyer would have paid a willing seller in an arms-length transaction, when both sides are fully informed about all the advantages and disadvantages of the property, and neither side is acting under any compulsion to buy or sell. Fair market value must be determined at the time of the taking, considering the property's highest and most profitable use, if then offered for sale in the open market, with a reasonable time allowed to find a buyer. The burden is on the property owner to prove, by a preponderance of the evidence, the fair market value of the property on the date of the taking.

The highest and most profitable use of the property is the use for which it was actually and potentially suitable and adaptable. It is not necessarily what the owner was using the property for at the time of the taking.

In some situations, knowledge of the fact that the government plans to take property will cause an increase or decrease in the property's fair market value. In deciding the fair market value, you should not consider the fact that the government had plans to take the land. Instead, you should fix the fair market value on the date of the taking, without regard to any threat or possibility of a taking.

The judgment I will enter on your verdict will provide for the government to pay interest to compensate the landowner, Defendant [name], for any delay in payment caused by the government after the date of taking. You may not consider any delay in payment and may not include any interest or other compensation for delay in your verdict.

(For cases in which the taking involves only part of the property or a partial interest in the property):

When, as in this case, the government takes only [part of the owner's property] [a partial interest in the property], the owner is entitled to both the value of the interest actually taken and to an additional amount equal to any decrease in the fair market value of the owner's interest in the land that was not taken.

You must determine the fair market value of the property [property interest] that was actually taken. This may be determined by subtracting the fair market value of the property that remains after the taking from the fair market value of the whole property immediately before the taking. The difference is the fair market value of the part that was taken.

You must consider whether there was a decrease or increase in the fair market value of the owner's interest in the land as a result of the severance or separation of the interest that was taken. The landowner, Defendant

[name], is entitled to additional compensation for any reduction in the fair market value of the [property/property interest] that was not taken due to the severance or separation from the [property/property interest] that was taken.

On the other hand, the government contends that the portion of the owner's land that was not taken increased in value because of the public improvements involved. Two types of benefits may result from a public improvement: (1) general benefits; and (2) special benefits. General benefits are those that result not only to the property of the defendant landowner, but also to the property in the community generally. Special benefits are those that accrue specifically to a particular piece of land and not to all property in the community. You may not consider any increase in value because of general benefits, but you must consider any increase due to special benefits.

13.4 Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1709)

Plaintiff [name] claims that Defendant [name] violated the Interstate Land Sales Full Disclosure Act. Under that law, a real estate developer is prohibited from using the [internet] [mail] [specify other means of communication used] in interstate commerce for the [sale/lease] of lots in a subdivision unless the developer has furnished the purchaser with a document called a property report before any contract for [sale/lease] is signed.

The property report must inform a buyer about all material facts so that the buyer may make an informed decision whether to enter into an agreement with the seller. The property report must specify [describe the type of information required to be included in a property report under § 1707 that is relevant to the claims].

Plaintiff [name] claims that Defendant [name] [made an untrue statement of a material fact/omitted a material fact that was required to be stated] in the property report. Plaintiff [name] claims that Defendant [name] [describe the statement or omission alleged].

To prevail on [his/her] claim, Plaintiff [name] must prove the following three elements by a preponderance of the evidence:

1. that the property report [contained an untrue statement/omitted a fact required to be stated];

2. that the [untrue statement/omitted fact] was material; and

3. that Plaintiff [name] suffered damages.

If the property report contained a [misstatement/omission], Plaintiff [name] does not need to prove that

Defendant [name] intended to make it or that [he/she] even knew of it. Plaintiff [name] is required only to prove that Defendant [name] made the [misstatement/omission].

A [misstatement/omission] is material if a reasonable investor would have considered it to be important in making the decision to [buy/lease] the property.

If you find that Plaintiff [name] has established [his/her] claim, you must then consider Plaintiff [name]'s damages. You may award only those damages that a preponderance of the evidence establishes are necessary to fairly compensate Plaintiff [name]. Damages may not be awarded or increased for the purpose of punishment. Plaintiff [name] is entitled to be compensated for:

1. the difference between

    a. the amount [he/she] paid [to purchase/to lease] the property, plus the reasonable cost of any improvements [he/she] made to the property, and

    b. the fair market value[1] of the property at the time [he/she] [purchased/leased] it;

2. [less the amount Plaintiff [name] received from reselling the property]; and

3. any fees paid to independent appraisers; and

4. the expense of any travel to and from the property; and

5. reasonable attorney's fees.

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[1]"Fair market value" is defined in Pattern Jury Instruction 13.3.

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[RESERVED]

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DAMAGES

Overview

The model damages instructions included in this section are very general in nature and are not appropriate for every federal-court case. When a state-law claim is brought in federal court, *Erie Railroad Co. v. Tompkins* generally requires that state substantive damages law be applied.[1] For damages instructions tailored to state-law claims, the pattern jury instructions published in that state should be consulted.[2] The damages instructions included here will generally be appropriate for claims arising under federal law when common-law tort damage principles apply.[3]

Some federal claims have specific rules governing damages. For example, see Instruction No. 11.14 of this book for the rules governing damages for claims under Title VII and the ADA. A careful investigation of the relevant statutes and any applicable specialized federal common law is often necessary to determine the particular types of damages that attach to a particular federal claim. These pattern damage instructions are a starting point for crafting instructions that will be appropriate for many claims arising under federal law but will have to be tailored to the facts and law presented in the case.

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[1]304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state... There is no federal general common law.").

[2]Louisiana: Andrea Beauchamp Carroll, Louisiana Civil Jury Instruction Companion Handbook (2018–2019 ed.); H. Alston Johnson III, 18 Louisiana Civil Law Treatise Civil Jury Instructions (3d ed. 2011). Mississippi: Miss. Judicial College, Mississippi Plain Language Model Jury Instructions Civil (2d ed. 2012). Texas: Comm. on Pattern Jury Charges of the State Bar of Tex., Texas Pattern Jury Charges (2018 ed.).

[3]*See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 252-53 (1978) (the "rules [the common law of torts has developed] to implement the principle that a person should be compensated fairly for injuries caused by a violation of his legal rights... provide the appropriate starting point for the inquiry under § 1983...").

15.1 Consider Damages Only If Necessary

If Plaintiff [name] has proved [his/her] claim against Defendant [name] by a preponderance of the evidence, you must determine the damages to which Plaintiff [name] is entitled. You should not interpret the fact that I am giving instructions about Plaintiff [name]'s damages as an indication in any way that I believe that Plaintiff [name] should, or should not, win this case. It is your task first to decide whether Defendant [name] is liable. I am instructing you on damages only so that you will have guidance in the event you decide that Defendant [name] is liable and that Plaintiff [name] is entitled to recover money from Defendant [name].

15.2 Compensatory Damages

If you find that Defendant [name] is liable to Plaintiff [name], then you must determine an amount that is fair compensation for all of Plaintiff [name]'s damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Plaintiff [name] whole—that is, to compensate Plaintiff [name] for the damage that [he/she/it] has suffered. Compensatory damages are not limited to expenses that Plaintiff [name] may have incurred because of [his/her] injury. If Plaintiff [name] wins, [he/she] is entitled to compensatory damages for the physical injury, pain and suffering, and mental anguish that [he/she] has suffered because of Defendant [name]'s wrongful conduct.

You may award compensatory damages only for injuries that Plaintiff [name] proves were proximately caused by Defendant [name]'s allegedly wrongful conduct. The damages that you award must be fair compensation for all of Plaintiff [name]'s damages, no more and no less. [Damages are not allowed as a punishment and cannot be imposed or increased to penalize Defendant [name].] You should not award compensatory damages for speculative injuries, but only for those injuries that Plaintiff [name] has actually suffered or that Plaintiff [name] is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Plaintiff [name] prove the amount of [his/her] losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

(Insert the damage elements that may be compensable under federal or state law. This chapter contains instructions explaining some common elements.)

15.3 Injury/Pain/Disability/Disfigurement/Loss of Capacity for Enjoyment of Life[1]

You may award damages for any bodily injury that Plaintiff [name] sustained and any pain and suffering, [disability], [disfigurement], [mental anguish], [and/or] [loss of capacity for enjoyment of life] that Plaintiff [name] experienced in the past [or will experience in the future] as a result of the bodily injury. No evidence of the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate Plaintiff [name] for the damages [he/she] has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make must be fair in the light of the evidence.

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[1]Not all of these elements of damages are available in all state-law or federal claims which involve personal injury.

15.4 Property Damage

Plaintiff [name] claims damages for the [loss of] [loss of value to] [his/her] personal property. If you find that Plaintiff [name] suffered a total loss of [his/her] personal property, Plaintiff [name] is entitled to recover the fair market value of the property at the time of the incident forming the basis of this lawsuit. If you find that Plaintiff [name] suffered less than a total loss of that property, then the measure of that damage is the difference between the fair market value of the property immediately before [the incident forming the basis of the law suit] and the fair market value immediately after [the incident forming the basis of this lawsuit].

(If market value is not applicable):

You may award as damages an amount equal to the cost of restoring the property to its condition before [the incident forming the basis of this lawsuit].

[You also may take into consideration any loss Plaintiff [name] sustained by being deprived of the use of the property during the time required for its [repair/ replacement].]

15.5 Mitigation of Damages[1]

A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate his/her damages, that is, to avoid or to minimize those damages.

If you find the defendant is liable and the plaintiff has suffered damages, the plaintiff may not recover for any item of damage which he could have avoided through reasonable effort. If you find that the defendant proved by a preponderance of the evidence the plaintiff unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny him recovery for those damages that he would have avoided had he taken advantage of the opportunity.

You are the sole judge of whether the plaintiff acted reasonably in avoiding or minimizing his damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages. However, he is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. The defendant has the burden of proving the damages that the plaintiff could have mitigated. In deciding whether to reduce the plaintiff's damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied his burden of proving that the plaintiff's conduct was not reasonable.

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[1]For claims under Title VII and the ADA, please refer to the mitigation instruction contained in Instruction No. 11.14.

15.6 Nominal Damages

Nominal damages are an inconsequential or trifling sum awarded to a plaintiff when a technical violation of [his/her] rights has occurred but the plaintiff has suffered no actual loss or injury.

If you find from a preponderance of the evidence that Plaintiff [name] sustained a technical violation of [specify or describe applicable right] but that Plaintiff [name] suffered no actual loss as a result of this violation, then you may award Plaintiff [name] nominal damages.

15.7 Punitive Damages[1]

If you find that Defendant [name] is liable for Plaintiff [name]'s injuries, you must award Plaintiff [name] the compensatory damages that [he/she] has proved. You may, [in addition], award punitive damages if you find that Defendant [name] acted with malice or with reckless indifference to the rights of others. One acts with malice when one purposefully or knowingly violates another's rights or safety. One acts with reckless indifference to the rights of others when one's conduct, under the circumstances, manifests a complete lack of concern for the rights or safety of another.[2] Plaintiff [name] has the burden of proving that punitive damages should be awarded [insert appropriate burden of proof here].

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[1]As with each of these pattern damages jury instructions, it is essential to determine what damages rules and elements apply to the particular claim. This instruction is merely a starting point. On the general subject of punitive damages and the guidelines to be considered in fashioning jury charges, see *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). As in federal law, punitive damages under state law are only available in specific causes of action and under specific circumstances. *See, e.g.*, *Ross v. Conoco, Inc.*, 828 So.2d 546, 555 (La. 2002) ("a fundamental tenet of [Louisiana] law is that punitive or other penalty damages are not allowable unless expressly authorized by statute."). Additionally, state law may contain its own standard for the assessment of punitive damages.

[2]Depending on the facts of a particular case, it may be advisable to give a more detailed definition of recklessness, such as the one found in the Restatement (Third) of Torts:

> A person acts recklessly in engaging in conduct if:
>
> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and
>
> (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.
>
> Restatement (Third) of Torts: Liability for Physical and Emotion Harm § 2 (2005).

The purpose of punitive damages is to punish and deter, not to compensate. Punitive damages serve to punish a defendant for malicious or reckless conduct and, by doing so, to deter others from engaging in similar conduct in the future. You are not required to award punitive damages. If you do decide to award punitive damages, you must use sound reason in setting the amount. Your award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. It should be presumed that Plaintiff [name] has been made whole by compensatory damages, so punitive damages should be awarded only if Defendant [name]'s misconduct is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

If you decide to award punitive damages, the following factors should guide you in fixing the proper amount:

1. the reprehensibility of Defendant [name]'s conduct, including but not limited to whether there was deceit, cover-up, insult, intended or reckless injury, and whether Defendant [name]'s conduct was motivated by a desire to augment profit;

2. the ratio between the punitive damages you are considering awarding and the amount of harm that was suffered by the victim or with which the victim was threatened;

3. the possible criminal and civil sanctions for comparable conduct.[3]

As always, care should be taken to tailor punitive damages instructions to the specific claims being tried, especially if state law is the source of those claims.

[3]Only include this factor if evidence regarding criminal and civil sanctions for comparable conduct has been presented at trial.

You may consider the financial resources of Defendant [name] in fixing the amount of punitive damages.

(If there is more than one defendant against whom punitive damages are appropriately sought):

You may impose punitive damages against one or more of Defendants [names] and not others. You may also award different amounts against Defendants [names].