

Faculty of Federal Advocates

***Ad Hoc* Committee**

MODEL EMPLOYMENT LAW JURY INSTRUCTIONS

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TITLE VII – STATUTE INVOLVED

The Plaintiff's claim of discrimination based on [color] [religion] [sex] [national origin] is brought under a federal law known as Title VII of the Civil Rights Act of 1964, as amended, often called Title VII.

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, is designed to assure equality of employment opportunities and ensure that all persons enjoy full and adequate protection against employment discrimination.

Title VII makes it an unlawful employment practice for an employer:

1. To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [his] [her] compensation, the terms, conditions, or privileges of employment, because of such individual's [color] [religion] [sex] [national origin]; or
2. To limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [his] [her] status as an employee because of such individual's [color] [religion] [sex] [national origin].

Notes on Use:

If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, this instruction and the instruction entitled, "Title VII – DISCRIMINATION BASED ON [COLOR] [RELIGION] [SEX] [NATIONAL ORIGIN]" should be given. If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. §1981, the instructions entitled, "[Title VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED" and "[TITLE VII AND/OR 42 U.S.C. 1981] – DISCRIMINATION BASED ON RACE" should be given instead.

Authority:

42 U.S.C. § 2000e-2; H.R. REP. 102-40, 2, 1991 U.S.C.C.A.N. 694, 694, 1991 WL 87020, 1 (purpose).

[TITLE VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED

The Plaintiff's claim of race discrimination is brought under a federal law known as Title VII of the Civil Rights Act of 1964, as amended, often called Title VII; [and also under a federal law known as Section 1981 of the Civil Rights Act of 1991, also known as Section 1981.]

Title VII makes it an unlawful employment practice for an employer:

1. To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [his] [her] compensation, the terms, conditions, or privileges of employment, because of such individual's race; or
2. To limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [his] [her] status as an employee because of such individual's race.

[Section 1981 of the Civil Rights Act of 1991 provides in pertinent part as follows:

- (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.]

For purposes of Section 1981, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the employment relationship.

Notes on Use:

If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. §1981, this instruction and the instruction entitled, "[TITLE VII AND/OR 42 U.S.C. § 1981] – DISCRIMINATION BASED ON RACE" should be given. If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, the instructions entitled, "TITLE VII – STATUTE INVOLVED" and "TITLE VII – DISCRIMINATION BASED ON [COLOR] [RELIGION] [SEX] [NATIONAL ORIGIN]" should be given instead.

Authority:

42 U.S.C. § 2000e-2; 42 U.S.C. § 1981.

TITLE VII – DISCRIMINATION BASED ON [COLOR]
[RELIGION] [SEX] [NATIONAL ORIGIN]

In order for Plaintiff to establish [his] [her] claim for discrimination based on [color] [religion] [sex] [national origin] under Title VII, [s]he must prove the following by a preponderance of the evidence:

1. The Defendant [describe adverse employment action]; and
2. The Plaintiff's [color] [religion] [sex] [national origin] was a motivating factor for the Defendant's action.

If you find that the Plaintiff has failed to prove either or both of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] discrimination claim and in favor of the Defendant. If, on the other hand, you find that the Plaintiff has proved both propositions by a preponderance of the evidence, then you must find in [his] [her] favor and against Defendant.

Notes on Use:

If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, this instruction should be given after the instruction entitled, "Title VII – STATUTE INVOLVED." If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. § 1981, the instructions entitled, "[Title VII AND/OR 42 U.S.C. §1981] – STATUTE INVOLVED" and "[TITLE VII AND/OR 42 U.S.C. 1981] – DISCRIMINATION BASED ON RACE" should be given instead.

Authority:

Elmore v. Capstan, Inc., 58 F.3d 525, 529 (10th Cir. 1995). See also *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

[TITLE VII AND/OR 42 U.S.C. § 1981] – DISCRIMINATION BASED ON RACE

In order for Plaintiff to establish [his] [her] claim for race discrimination under [Title VII and/or Section 1981], [s]he must prove the following by a preponderance of the evidence:

1. The Defendant [describe adverse employment action]; and
2. The Plaintiff's race was a motivating factor for the Defendant's action.

If you find that the Plaintiff has failed to prove either or both of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] discrimination claim and in favor of the Defendant. If, on the other hand, you find that the Plaintiff has proved both propositions by a preponderance of the evidence, then you must find in [his] [her] favor and against the Defendant.

Notes on Use:

If the Plaintiff asserts a claim for discrimination based on race under Title VII and/or 42 U.S.C. §1981, this instruction should be given after the instruction entitled, "[TITLE VII AND/OR 42 U.S.C. § 1981] – STATUTE INVOLVED." If the Plaintiff asserts a claim under Title VII for discrimination based on color, religion, sex or national origin, the instructions entitled, "TITLE VII – STATUTE INVOLVED" and "TITLE VII – DISCRIMINATION BASED ON [COLOR] [RELIGION] [SEX] [NATIONAL ORIGIN]" should be given instead.

Authority:

Elmore v. Capstan, Inc., 58 F.3d 525, 529 (10th Cir. 1995). *See also Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

MOTIVATING FACTOR – DEFINED

The Plaintiff is not required to prove that [his] [her] [insert protected status] was the sole or exclusive motivating factor for the Defendant's decision(s) or that all of the Defendant's stated reasons for [the decision/adverse employment action] were false. The Plaintiff must prove only that [insert protected status] was a motivating factor. That is, [the Plaintiff's [protected status] was a factor that made a difference in the Defendant's decision to [describe adverse employment action.]

In determining whether [protected status] was a “motivating factor” in the Defendant's decision to [describe adverse employment action], you may consider any statements made or act done or admitted by the Defendant, and all other facts and circumstances in evidence indicating state of mind. An improper motive, if it exists, is seldom directly admitted and may or may not be inferred from the existence of other facts.

Notes on Use:

This instruction is to be used in Title VII, § 1981 and ADA cases. The Supreme Court distinguished ADEA cases from Title VII holding that ADEA age discrimination must be proved under a “but-for” test in contrast to race, color, age, national origin, and sex under Title VII, which undergo a “motivating factor” analysis. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Cases supporting the “motivating factor” test include: *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (recognizing a Plaintiff may prevail on a discrimination case even when more than one factor motivated the employer's employment decision); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

Authority:

42 U.S.C.A § 2000e-2(m); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (recognizing a Plaintiff may prevail on a discrimination case even when more than one factor motivated the employer's employment decision); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217 (10th Cir. 2008); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

PRETEXT

The Plaintiff claims that the Defendant's stated reason[s] for its adverse employment action is [are] not the true reason[s], but instead is [are] a pretext (an excuse) to cover up for [race/color/religion/sex/national origin] discrimination. If you do not believe [one or more of] the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that [race/color/religion/sex/national origin] was a factor that made a difference in the Defendant's decision. [The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.]

The Plaintiff may show that the Defendant's stated reason[s] for its decision[s] are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reason[s] is [are] pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that [race/color/religion/sex/national origin] was a factor that made a difference in the employer's treatment of Plaintiff.

Notes on Use:

This instruction should be given when the Plaintiff contends that the Defendant's stated reason(s) for the adverse employment decisions are pretextual. *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002). The enumerated ways for a Plaintiff to show pretext are typical but not exclusive. *See, e.g., Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing

procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities).

See also Matthews v. Euronet Worldwide, Inc., 2008 WL 822461, *4 (10th Cir. 2008) (“[T]o the extent the Defendants’ articulated reasons were subjective in nature, they are supported by objective facts.”); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an “overwhelming disparity”); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) (“Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision.”); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App’x 63, 68 (10th Cir. 2004) (“Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.”); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are “entirely subjective in nature”); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (“[W]hen the Plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.”); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (denying summary judgment where Plaintiff demonstrated that one of many of the Defendant’s stated reasons was pretextual, stating, “It is not simply a question of how many of the Defendant’s reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.”).

CONSTRUCTIVE DISCHARGE

To prove [his] [her] claim of constructive discharge, the Plaintiff must show that the Defendant by its illegal discriminatory acts made or allowed working conditions to become so difficult that a reasonable person in the Plaintiff's position would feel compelled to resign.

Notes on Use:

In appropriate cases, a Plaintiff must show that [he] [she] had no choice but to quit, and the jury may be so instructed. *See also James v. Sears Roebuck & Company*, 21 F.3d 989, 992 (10th Cir. 1994) (“a finding of constructive discharge must not be based only on the discriminatory act; there must also be aggravating factors that make staying on the job intolerable”). *See also, MacKenzie v. City & County of Denver*, 414 F.3d 1266, 1281 (10th Cir. 2005); *Vann v. Southwestern Bell Tel. Co.*, 179 F. App'x 491, 498 (10th Cir. 2006) (“An employee is constructively discharged “when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no other choice but to quit”). A demotion or reassignment to a job with lower pay or lower status may, depending on the aggravating nature of the individual facts and circumstances of the case, be sufficient to support a jury verdict of constructive discharge. *Touchet v. Halliburton Co.*, 78 F.3d 598 (10th Cir. 1996).

Authority:

Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342, 2350 (2004); *Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1229-30 (10th Cir. 2009); *Barone v. United Airlines, Inc.*, 355 F. App'x 169, 107 Fair Empl. Prac. Cas. (BNA) 1798 (10th Cir. 2009) (where transfer to a distant state is alternative, court held that situation presented by employer was effectively no choice); *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 980-81 (10th Cir. 2008);

EEOC v. PVNF, LLC, 487 F.3d 790, 805 (10th Cir. 2007); *Garrett v. Hewlett-Packard Company*, 305 F.3d 1210, 1221 (10th Cir. 2002); *Touchet v. Halliburton Co.*, 78 F.3d 598 (10th Cir. 1996); *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1574 (10th Cir. 1992); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1153 (10th Cir. 1990) (jury could reasonably conclude that the Plaintiff was constructively discharged when he was threatened with termination); *Bragg v. Office of the Dist. Atty.*, 704 F.Supp.2d 1032 (D. Colo. 2009) (basis for constructive discharge claim found where Plaintiff alleged she was subjected to frequent harassing and discriminatory language, persistent sexual advances, and interference in, and disruptions of, her job functions); *Colorado Civil Rights Commission v. State of Colorado*, 488 P.2d 83, 86 (Colo. App. 1971) (a signed statement that a resignation is voluntary does not relieve an employer of liability for constructive discharge if the resignation was in fact involuntary).

BUSINESS JUDGMENT

In reaching your verdict on the Plaintiff's [race] [color] [religion] [sex] [national origin] discrimination claim, you should keep in mind that the law requires only that an employer not discriminate against an employee based on [race] [color] [religion] [sex] [national origin]. The law does not require an employer to use good judgment, to make correct decisions, or even to treat its employees fairly. Therefore, in deciding the Plaintiff's discrimination claim, it is not your function to second-guess the Defendant's business decisions or act as a personnel manager, unless you find that the decisions were motivated, in whole or in part, by [illegal discrimination and/or retaliation or other illegal act]. In evaluating Defendant's asserted business judgment, you must examine whether business judgment was truly employed or whether it was merely used as a pretext or to cover up for [illegal discrimination and/or retaliation or other illegal act].

Notes on Use:

The instruction should be merged with the pretext instruction when warranted by the facts of the case.

Romero v. City of Albuquerque, 190 F. App'x 597, 605 (10th Cir. 2006) ("The courts may not act as a super personnel department that second guesses employers' business judgments. Accordingly, minor differences between a Plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext") citing *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308-09 (10th Cir. 2005).

Authority:

Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1261 (10th Cir. 2001) (juries may not second-guess the business judgment of the employer or question whether the decision was wise, fair or even correct); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999) ("The relevant inquiry is not whether United's proffered reasons were wise, fair or correct, but whether United honestly believed those reasons and acted in good faith upon those beliefs."); *Sanchez v. Philip Morris, Inc.*, 992 F.2d 244, 247 (10th Cir. 1993) (Title VII is not violated by the exercise of erroneous or even illogical business judgment.). *Montana v. First Federal Savings and Loan Assoc.*, 969 F.2d 100, 106 (2nd Cir. 1988) (Court must "look behind" the employer's claim that it merely exercised a business decision in good faith).

STRAY REMARKS

You have heard evidence during the course of the trial regarding certain allegedly discriminatory remarks. [Race] [Color] [Religion] [Sex] [National origin]-related comments referring directly to the Plaintiff may support an inference of discrimination even if the comments were not made in the context of Defendant's [adverse employment action]. However, isolated or ambiguous comments may be too abstract or remote to support a finding of discrimination.

In order to prove discrimination by reference to comments in the workplace, a Plaintiff must demonstrate that a connection exists between the comments made and the Defendant's decision to treat [him] [her] differently.

Notes on Use:

This instruction may not be appropriate where the court has already addressed stray remarks at the summary judgment stage. Additionally, this instruction should be given only when warranted by the evidence, and may not be appropriate in a hostile work environment case. This instruction may be modified as appropriate in cases involving other protected classifications such as age or disability.

Authority:

Plotke v. White, 405 F.3d 1092, 1107 (10th Cir. 2005) ("The Supreme Court has emphasized that courts should not reject a Plaintiff's evidence of additional circumstantial gender-based comments and treatment simply because they 'were not made in the direct context of [the Plaintiff's] termination.'") citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151-53 (2000); *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1479 (10th Cir. 1996); *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 531 (10th Cir. 1994); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994).

MIXED MOTIVE

You have heard evidence that the Defendant's treatment of the Plaintiff may have been motivated by a desire to discriminate [or retaliate] against the Plaintiff. If you find that discrimination [retaliation] was a motivating factor in Plaintiff's [insert challenged employment action], as determined by direct or circumstantial evidence, then Plaintiff is entitled to your verdict even if you find that the [challenged employment action] was also motivated by a non-discriminatory [non-retaliatory] reason.

However, if you find that the Defendant was motivated by both discriminatory [retaliatory] and non-discriminatory [non-retaliatory] reasons, you must decide whether the Plaintiff is entitled to damages. The Plaintiff is entitled to damages unless the Defendant proves by a preponderance of the evidence that the Defendant would have treated the Plaintiff the same even if discrimination [retaliation] had played no role in the employment decision.

Notes on Use:

This instruction can be given in Title VII cases only. The Supreme Court has ruled, based on difference in statutes, that ADEA cases cannot receive an "mixed motive" analysis. *Gross v. FBL Fin. Servs., Inc.*, 447 U.S. 167 (2009).

Authority:

42 U.S.C. § 2000e-2(m); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217 (10th Cir. 2008); *Davey v. Lockheed*, 301 F.3d 1204, 1213-14 (10th Cir. 2002). *See also Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 (10th Cir. 1992).

HOSTILE WORK ENVIRONMENT – ELEMENTS

The Plaintiff has alleged that [he][she] was subjected to a hostile work environment based upon sex in violation of the Title VII of the Civil Rights Act of 1964. In order to prove [his][her] claim of hostile work environment, the Plaintiff must prove each of the following:

1. The conduct complained of was unwelcome;
2. The conduct complained of was offensive;
3. The conduct complained of was sexual [or other protected status] in nature or directed at the Plaintiff because of [his][her] sex;
4. The conduct complained of was sufficiently severe or pervasive to alter the terms and conditions of the Plaintiff's employment by creating an abusive working environment; [and]
5. [The Defendant knew or should have known about the conduct to which Plaintiff claims [he][she] was subjected and failed to implement reasonably prompt and appropriate corrective action.]

Notes on Use:

Depending on the context of the case, the term “a hostile work environment based upon sex” may be changed to “sexual harassment.”

With appropriate modifications, this instruction may also be used in harassment claims based on other protected characteristics. This instruction, however, is based on Title VII, not 42 U.S.C. §1981. Authority supporting the proposition that hostile work environment claims are actionable under other statutes include *Rodriguez v. Loctite P.R., Inc.*, 967 F. Supp. 653, 662-63 (D. Puerto Rico 1997) (ADA case); *Haysman v. Food Lion*, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995) (ADA case). The Tenth Circuit has not expressly recognized a claim for hostile work environment under the ADEA, but has decided a case where the Plaintiff raised the issue before the District Court. See *Holmes v. Regents of the Univ. of Colo.*, 1999 U.S. App. LEXIS 8710, *21 (10th Cir. May 7, 1999) (unpublished). See also *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998) (assuming without deciding that an employee may assert a hostile work environment claim under the ADEA).

Authority:

29 C.F.R. § 1604.11; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1022 (10th Cir. 2001).

HOSTILE WORK ENVIRONMENT – DEFINED

In determining whether a work environment is hostile, you may consider some or all of the following factors:

- The nature and severity of the conduct;
- Whether the conduct complained of was humiliating;
- Whether the conduct complained of was repeated or a single incident;
- Whether the conduct complained of was by a co-worker or a supervisor;
- The effect of the conduct on the Plaintiff's mental or emotional state;
- Whether others joined in the conduct;
- Whether the conduct was directed at more than one person;
- The context in which the conduct occurred;
- Whether the conduct was physically threatening or humiliating or a mere offensive utterance.

Authority:

Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1988); *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993); *O'Shea v. Yellow Tech. Servs.*, 185 F.3d 1093, 1097-98 (10th Cir. 1999); *Penry v. Fed. Home Loan Bank of Topeka*, 1555 F.3d 1257, 1261 (10th Cir. 1998).

REASONABLE PERSON – DEFINED

In determining whether a hostile work environment existed, you must consider the evidence from the perspective of a reasonable person. This is an objective standard, and you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances.

Authority:

Harris v. Forklift Sys., 510 U.S. 17, 21-23 (1993); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 78, 81 (1998); *Andrews v. Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (An “objective standard protects the employer from the ‘hypersensitive’ employee”).

UNWELCOME CONDUCT – DEFINED

“Unwelcome conduct” means conduct that was not solicited or encouraged by the Plaintiff and that was regarded as undesirable by the Plaintiff.

Authority:

See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

SUPERVISOR – DEFINED

Regardless of an employee’s title, he/she is only a “supervisor” when the employer has empowered that employee to take tangible employment actions against the Plaintiff.

Notes on use:

Use this instruction only if there is a dispute about whether the alleged harasser is a supervisor.

“Tangible employment action” is independently defined within the sexual harassment jury instructions and should be used with this instruction.

The Supreme Court clearly intended to establish a bright line rule as to who qualifies as a supervisor in *Vance v. Ball State Univ.*, 570 U.S. ____, 133 S. Ct. 2434 (2013). However, the majority also acknowledged that vicarious liability may be imposed when non-supervisory employees have the power to recommend tangible actions, noting that in some circumstances “the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.” *Id.* at 2452, citing, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

Authority:

Vance v. Ball State Univ., 570 U.S. ____, 133 S. Ct. 2434 (2013).

TANGIBLE EMPLOYMENT ACTION – DEFINED

A “tangible employment action” means a significant change in employment status, such as hiring, firing, layoff, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in wages or benefits.

A tangible employment action is not limited to monetary losses of benefits or wages, but it must be more than a mere inconvenience or minor alteration of job responsibility.

Authority:

Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) (conduct is a tangible employment action if it “constitutes a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

COWORKER HARASSMENT

If you find the Plaintiff has proven that [he][she] was subjected to sexual harassment by co-workers, as opposed to supervisors, you must decide whether the Defendant is responsible for such conduct.

The Defendant is responsible for permitting such behavior if the Plaintiff proves by a preponderance of the evidence that:

1. Management-level employees knew or should have known of the hostile work environment; and
2. The Defendant did not adequately respond to the notice of the hostile work environment.

Notes on Use:

This instruction should be used when the basis for employer liability is the Defendant's negligence in allowing fellow employees to engage in sexual harassment.

Authority:

Adler v. Wal-Mart Stores Inc., 144 F.3d 664, 673 (10th Cir. 1998).

AFFIRMATIVE DEFENSE – SUPERVISOR HARASSMENT

If you find that the Plaintiff has proven that [he][she] was exposed to a hostile work environment by a supervisor, then you must find in favor of the Plaintiff unless the Defendant proves each of the following:

1. The hostile work environment did not result in a tangible employment action;
2. The Defendant maintained an effective complaint procedure which provided employees with reasonable options for reporting unwanted workplace behavior; and
3. The Plaintiff unreasonably failed to use the complaint procedure or otherwise avoid harm.

Notes on Use:

Use this instruction only if no tangible employment action occurred. If there is a genuine issue of material fact on whether a tangible employment action did occur, the instruction defining tangible employment action should be used. If a tangible employment action occurred at the hands of a supervisor, the affirmative defense is not available.

Authority:

Faragher v. Boca Raton, 524 U.S. 775, 807 (1998). *See also Pa. State Police v. Suders*, 524 U.S. 129, 211 (2004).

AMERICANS WITH DISABILITIES ACT (“ADA”) – STATUTE INVOLVED

The Plaintiff has brought this lawsuit under the Americans with Disabilities Act, also called the ADA. The purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The ADA makes it unlawful for an employer to discriminate against a qualified individual because of his or her disability with respect to job application procedures, hiring, advancement of employees, compensation, job training, discharge of employees, and other terms, conditions and privileges of employment.

[The ADA also makes it unlawful to fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee [or applicant] with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.]

Authority:

42 U.S.C. § 12101(b)(1); 42 U.S.C. § 12112(a); 42 U.S.C. § 12112(b)(5).

DISPARATE TREATMENT – ELEMENTS

Under the ADA, it is unlawful for an employer to [insert challenged action] or otherwise discriminate against an employee because of that employee's disability if the employee is qualified to do the job.

In order to prevail on this claim, Plaintiff must prove that:

1. The Plaintiff had a "disability," as hereafter defined;
2. That the Plaintiff was otherwise "qualified," as hereafter defined; and
3. That the Plaintiff's "disability" was a motivating factor in the Defendant's decision to [insert challenged action].

Notes on Use:

The ADA instructions included here are not intended to be all exhaustive. The Committee has elected to focus on the two most prevalent claims that arise under the ADA: disparate treatment and failure to accommodate. It should be noted that the scope of the ADA is much broader and also prohibits discrimination 1) in the utilization of job standards and criteria that have the effect of discrimination; 2) against employees/applicants because of the disability of an individual with who the employee/applicant is known to have a relationship or association; 3) in the use of qualification standards or employee tests that screen out individuals with disabilities; and 4) in the administration of tests concerning employment and the failure to ensure that test results accurately reflect the skills necessary for the position. 42 U.S.C. § 12112(b). These instructions need to be substantially modified if any of the above claims are raised.

Authority:

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g); *Poindexter v. Atchison, Topeka & Santa Fe Railway Co.*, 168 F.3d 1228, 1230 (10th Cir. 1999); *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994); *Selenke v. Medical Imaging of Colo.*, 248 F.3d 1249, 1256 (10th Cir. 2001).

DISABILITY – DEFINED

Plaintiff must prove by a preponderance of the evidence that [he] [she] had a “disability.” A person has a “disability” under the ADA if [he] [she], at the time of the employment decision affecting [him][her],

[insert applicable paragraph]

1. Has a physical or mental impairment that substantially limits one or more of the major life activities of the person [or]
2. Has a record of having a physical or mental impairment that substantially limits one or more major life activities [or]
3. Is believed by the employer to have an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.

Notes on Use:

Paragraph 3 addressing “regarded as” or “perceived” disability claims shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. 42 U.S.C. § 12102(3)(B).

With respect to claims that fall within Paragraph 3, note that many of the following instructions are inapplicable, as identified in each instruction’s Notes on Use.

Authority:

42 U.S.C. § 12102(1) and (3).

PHYSICAL OR MENTAL IMPAIRMENT[S] AND MAJOR LIFE ACTIVITIES – COURT DETERMINATION

The Court has determined that the Plaintiff had the following [mental] [physical] impairment[s]: [insert description of impairments.]

The Court has determined that the major life [activity] [activities] involved in this case [was] [were]: [insert applicable major life activities].

Notes on Use:

This instruction should only be given in an “actual” or “record of” disability case. In such cases, the questions of whether the Plaintiff has a physical or mental impairment within the meaning of the ADA, as well as whether the identified affected activity is a “major life activity,” are questions of law for the Court to decide. *See, e.g., Doebele v. Sprint*, 342 F.3d 1117, 1129 (10th Cir. 2003); *Bristol v. Board of County Comm’rs*, 281 F.3d 1148, 1156-57 (10th Cir. 2002). The EEOC Regulations define mental and physical impairments to be: 1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or 2) any mental or psychological disorder, such as intellectual ability, organic brain syndrome, emotional or mental illness, and learning disabilities. 29 C.F.R. § 1630(h).

The ADA Amendments Act of 2008 clarified what types of activities are “major life activities” under the Act: these include 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); *see also* 29 C.F.R. § 1630(i)(1). A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2)(B). The determination of whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.” 29 C.F.R. § 1630(i)(2).

SUBSTANTIALLY LIMITED – DEFINED

In deciding whether or not the Plaintiff’s [physical] [mental] impairment substantially limited [his] [her] major life [activity] [activities] at the time of the employment decision affecting [him] [her], you may consider the following factors:

1. The condition under which the individual performs the major life activity;
2. The manner in which the individual performs the major life activity; and/or
3. The duration of time it takes the individual to perform the major life activity.

An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the use of mitigating measures such as [medication, medical supplies, equipment, prosthetics, hearing aids, implants, mobility devices, or oxygen therapy equipment] or the [use of assistive technology, reasonable accommodations or auxiliary aids, learned behavioral or adaptive neurological modifications].

Notes on Use:

This instruction should only be given in an “actual” or “record of” disability case, as the question of whether an impairment “substantially limits” a major life activity is not relevant to a “regarded as” claim. 29 C.F.R. § 1630(j)(2).

While the question of whether the identified affected activity is a “major life activity” is a question of law for the Court to decide, the jury must decide if the impairment “substantially limits” the major life activity/activities found by the Court. *See, e.g., Doebele v. Sprint*, 342 F.3d 1117, 1129 (10th Cir. 2003); *Bristol v. Board of County Comm’rs*, 281 F.3d 1148, 1156-56 (10th Cir. 2002). The ADA Amendments Act of 2008, however, makes clear that the determination of whether an impairment “substantially limits” a major life activity should not demand extensive analysis. 29 C.F.R. § 1630(j)(1)(iii). Some impairments will automatically be considered “substantially limiting:” deafness, blindness, intellectual disabilities, cancer, autism, diabetes, epilepsy, HIV, multiple sclerosis, major depression, bipolar disorder, post-traumatic stress disorder, and schizophrenia. 29 C.F.R. § 1630(j)(3).

The Tenth Circuit has held that in order for an employee to prove that he or she was substantially limited in the major life activity of working, he or she must show that he or she was significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *See, e.g., Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1158 (10th Cir. 2002); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994). Thus, in cases involving the major life activity of working, language may be added to this instruction regarding the elements of proof stated above.

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); 29 C.F.R. § 1630(j)(1)(vii).

Authority:

42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630(j)(4); 29 C.F.R. § 1630(j)(1)(ii). *McGeshick v. Principi*, 357 F.3d 1146, 1150 (10th Cir. 2004); *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003); *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1158 (10th Cir. 2002).

QUALIFIED – DEFINED

The term “qualified” means that, at the time of the employment decision affecting [him] [her], the Plaintiff:

1. Satisfied the required skill, experience, education or other job-related requirements for the position [held or desired]; and
2. Could perform the essential functions of the position [held or desired], with or without reasonable accommodations.

Notes on Use:

The determination of whether an individual with a disability is “qualified” should be based on the individual’s capabilities at the time of the employment decision affecting him or her. It may not be based on the employer’s speculation that the individual might become unable to perform the essential function(s) of the position in the future or might cause increased health insurance or workers compensation insurance premiums.

In certain circumstances, the ability of the Plaintiff to safely perform the position may be relevant to whether the Plaintiff could meet the essential functions of the position. *See McKenzie v. Benton*, 388 F.3d 1342, 1355-56 (10th Cir. 2004). *See also Justice v. Crown Cork and Seal Co., Inc.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008). In such cases, the Plaintiff will bear the burden of demonstrating that he or she is not a direct threat, rather than the Defendant, and the instruction should be modified accordingly.

A qualified individual with a disability is not required to accept a proposed accommodation. However, if such individual does not accept a reasonable proposed accommodation that is necessary to enable [him] [her] to perform the essential functions of the position held or desired, and thus cannot perform the essential functions of the position, “the individual will not be considered a qualified individual with a disability.” 29 C.F.R. § 1630.9(d). Where failure to accept a reasonable proposed accommodation is an issue, this instruction should be modified accordingly.

Authority:

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m); *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121, 1127 (10th Cir. 2008), *quoting Tate v. Farmland Industries, Inc.*, 268 F.3d 989, 992-93 (10th Cir. 2001); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004), *quoting Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003); *Hudson v. MCI Telecom. Corp.*, 87 F.3d 1167, 1168 (10th Cir. 1996).

ESSENTIAL FUNCTION[S] – DEFINED

The term “essential function[s]” means the fundamental [duty] [duties] of the position [held] [desired] by Plaintiff at the time of the employment decision affecting [him] [her]. To determine whether a function was essential to the position that Plaintiff [held] [desired], you must consider:

1. The Defendant’s judgment as to whether the function[s] [was][were] essential; and/or
2. Any written description that was in existence before the dispute arose.

In addition to [these][this] factor[s], you may also consider:

1. The purpose of the position;
2. The number of other employees who were available to perform the particular function[s];
3. The degree of expertise or skill required to perform the particular function[s];
4. The amount of time spent performing the particular function[s];
5. The consequences to the Defendant of not requiring Plaintiff to perform the function[s];
6. The terms of the collective bargaining agreement;
7. The work experience of past employees in the position;
8. The work experience of employees in similar positions; and/or
9. Any other factor supported by the evidence.

Notes on Use:

The essential functions inquiry focuses upon whether a job function was essential at the time it was imposed or sought to be imposed upon the Plaintiff. The additional factors that may be considered in determining whether a function was essential will depend upon the factual issues presented by the case. The inquiry is not intended to second guess the employer or require the employer to lower company standards.

Authority:

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n); *Hennagir v. Utah Dep’t of Corrections*, 587 F.3d 1255, 1262 (10th Cir. 2009); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1190-91 (10th Cir. 2003); *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 993 (10th Cir. 2001); *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996), *quoting White v. York Int’l Corp.*, 45 F.3d 357,361-62 (10th Cir. 1995).

MOTIVATING FACTOR – DEFINED

The Plaintiff is not required to prove that [his] [her] [insert protected status] was the sole or exclusive motivating factor for the Defendant's decision(s) or that all of the Defendant's stated reasons for [the decision/adverse employment action] were false. The Plaintiff must prove only that [insert protected status] was a motivating factor. That is, the Plaintiff's [protected status] was a factor that made a difference in the Defendant's decision to [describe adverse employment action].

In determining whether [protected status] was a “motivating factor” in the Defendant's decision to [describe adverse employment action], you may consider any statements made or act done or admitted by the Defendant, and all other facts and circumstances in evidence indicating state of mind. An improper motive, if it exists, is seldom directly admitted and may or may not be inferred from the existence of other facts.

Notes on Use:

This instruction is to be used in Title VII, § 1981 and ADA cases. The Supreme Court distinguished ADEA cases from Title VII holding that ADEA age discrimination must be proved under a “but-for” test in contrast to race, color, age, national origin, and sex under Title VII, which undergo a “motivating factor” analysis. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Cases supporting the “motivating factor” test include: *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (recognizing a Plaintiff may prevail on a discrimination case even when more than one factor motivated the employer's employment decision); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

Authority:

42 U.S.C.A § 2000e-2(m); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (recognizing a Plaintiff may prevail on a discrimination case even when more than one factor motivated the employer's employment decision); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217 (10th Cir. 2008); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

PRETEXT

The Plaintiff claims that the Defendant's stated reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) to cover up for disability discrimination. If you do not believe one or more of the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that Plaintiff's disability was a factor that made a difference in the Defendant's decision. The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that Plaintiff's disability was the factor that made a difference in the employer's treatment of Plaintiff.

Notes on Use:

This instruction should be given when the Plaintiff contends that the Defendant's stated reason(s) for the adverse employment decisions are pretextual. *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002). The enumerated ways for a Plaintiff to show pretext are typical but not exclusive. *See, e.g., Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the

Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities).

See also Matthews v. Euronet Worldwide, Inc., 2008 WL 822461, *4 (10th Cir. 2008) (“[T]o the extent the Defendants’ articulated reasons were subjective in nature, they are supported by objective facts.”); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an “overwhelming disparity”); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) (“Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision.”); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App’x 63, 68 (10th Cir. 2004) (“Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.”); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are “entirely subjective in nature”); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (“[W]hen the Plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.”); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (denying summary judgment where Plaintiff demonstrated that one of many of the Defendant’s stated reasons was pretextual, stating, “It is not simply a question of how many of the Defendant’s reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.”).

REASONABLE ACCOMMODATION

Under the ADA, it is unlawful for an employer to not make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, [or to deny employment opportunities to a job applicant who is an otherwise qualified individual with a disability] unless the employer can prove that the accommodation would impose an undue hardship on the operation of the business.

Notes on Use:

An employer is not required to reasonably accommodate a “regarded as” or “perceived” disability. 42 U.S.C. § 12201(h). In such a case, this instructions, as well as the two subsequent instructions, should not be given.

Authority:

42 U.S.C. 12112(b)(5).

FAILURE TO ACCOMMODATE – ELEMENTS

In order for Plaintiff to prevail on [his] [her] claim that Defendant failed to reasonably accommodate [his] [her] disability, Plaintiff must show:

1. That Plaintiff had a disability;
2. That Defendant knew of Plaintiff's disability;
3. Plaintiff could have performed the essential functions of the job if Plaintiff had been provided with [identify specific accommodations identified];
4. The [specific accommodations requested] were reasonable; and
5. Defendant failed to provide [specific accommodation requested] and unreasonably failed to provide any other accommodation.

Notes on Use:

To facilitate a reasonable accommodation, the ADA envisions an interactive process that requires good faith communication and participation by both parties. “[T]he interactive process must ordinarily begin with the employee providing notice to the employer of the employee’s disability and any resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee’s existing job Once the employer’s responsibilities within the interactive process are triggered by appropriate notice by the employee, both parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations.” *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999). Neither party may create or destroy liability by causing a breakdown of the interactive process. *Albert v. Smith’s Food*, 356 F.3d 1242, 1253, citing *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999).

Authority:

42 U.S.C. § 12112(b)(5); *White v. York Int’l Corp.*, 45 F.3d 357, 361 (10th Cir. 1995).

REASONABLE ACCOMMODATION[S] – DEFINED

“Reasonable accommodation[s]” means any reasonable change in the work environment or in the way things are customarily done in the workplace that enables a qualified individual with a disability to perform the essential function[s] of the job [held or desired] [or to enjoy the same benefits and privileges of employment that are available to others who do not have disabilities.]

A reasonable accommodation may include:

1. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
2. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.

Notes on Use:

This instruction may be modified where appropriate to include other examples of what are, or examples of what are not, reasonable accommodations.

A reasonable accommodation does not include: changing or eliminating essential functions of the position, creating a new position, providing a promotion, assigning another employee to perform an essential function of the position, or accommodations that create an “undue hardship” on the employer. Nor is the employer necessarily obligated to provide the accommodation requested by the employee, if other reasonable accommodations exist that the employer has offered to provide.

Authority:

42 U.S.C. § 12111(9); 29 C.F.R. 1630.2(o); *Hennagir v. Utah Dep’t of Corrections*, 587 F.3d 1255, 1264-65 (10th Cir. 2009); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1122-23 (10th Cir. 2004); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1192 (10th Cir. 2003); *Martin v. Kansas*, 190 F.3d 1120, 1133 (10th Cir. 1999).

AFFIRMATIVE DEFENSE – UNDUE HARDSHIP – DEFINED

It is a defense to a claim of disability discrimination that providing a reasonable accommodation would impose an undue hardship on the operation of the Defendant's business. It is Defendant's burden to prove this defense by a preponderance of the evidence.

"Undue hardship" means an action requiring significant difficulty or expense when considered in light of various factors, including the following:

1. The nature and cost of the accommodation;
2. The overall financial resources of the Defendant;
3. The number of persons employed by the Defendant; and
4. The impact of the [requested] accommodation upon the operations of the Defendant.

Notes on Use:

When appropriate, this instruction may be modified to add additional factors, or eliminate factors, depending upon the facts of the case.

Authority:

42 U.S.C. 12111(10); 29 C.F.R. 1630.2(p); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1334 (10th Cir. 1998), *quoting Der Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1087 (10th Cir. 1997).

AFFIRMATIVE DEFENSE – DIRECT THREAT

The Defendant has asserted that the Plaintiff was [describe employment decision] because [his] [her] employment posed a direct threat to the health or safety of [himself] [herself] [and/or] [others]. Your verdict must be in favor of the Defendant if the Defendant proves by a preponderance of the evidence that:

1. The Plaintiff's [continued] employment posed a significant risk to the health or safety of the Plaintiff and/or others; and
2. Such a risk could not have been eliminated or reduced by [a] reasonable accommodation[s].

The determination of whether a direct threat existed must be based on individualized assessment of the Plaintiff's ability safely to perform the essential function[s] of the position. This assessment of the Plaintiff's ability must have been based on a reasonable medical judgment which, at the time of the employment decision affecting the Plaintiff, relied on the most current medical knowledge, and/or the best available objective evidence. In determining whether a person posed a direct threat, you must consider (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm would occur; and (d) the imminence of the potential harm.

Notes on Use:

This instruction should be used when submitting the affirmative defense of "direct threat," on which the Defendant bears the ultimate burden of proof. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002). This instruction should be used in conjunction with others defining several terms upon which it relies, including those for "disability" and "reasonable accommodation." In certain circumstances, the ability of the Plaintiff to safely perform the position may go to whether the Plaintiff could meet the essential functions of the position. See *McKenzie v. Benton*, 388 F.3d 1342, 1355-56 (10th Cir. 2004). See also *Justice v. Crown Cork and Seal Co., Inc.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008). In such cases, the Plaintiff will bear the burden of demonstrating that he or she is not a direct threat, rather than the Defendant, and the instruction should be modified accordingly.

Authority:

42 U.S.C. §§ 12111(3), 12113(a), (b); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2); *Justice v. Crown Cork and Seal Co., Inc.*, 527 F.3d 1080, 1091-92 (10th Cir. 2008); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); *McKenzie v. Benton*, 388 F.3d 1342, 1353 (10th Cir. 2004).

AGE DISCRIMINATION IN EMPLOYMENT ACT
("ADEA") – STATUTE INVOLVED

The Plaintiff has brought this lawsuit under the Age Discrimination in Employment Act, also called the ADEA. The purpose of the ADEA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals who are 40 years of age or older based on their age.

The ADEA makes it unlawful for an employer to discriminate against an individual who is 40 years of age or older, with respect to his or her compensation, terms, conditions, or privileges of employment, because of his or her age.

Authority:

29 U.S.C. § 623(a)(1)-(2); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277 (10th Cir. 2010); *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

ADEA – ELEMENTS

In order for the Plaintiff to establish a claim of age discrimination, [he][she] must prove by a preponderance of the evidence that [his] [her] employer would not have taken the challenged employment decision but for the Plaintiff's age. This standard does not require Plaintiff to show that age was the sole motivating factor in the employment decision. Instead, an employer may be held liable under the ADEA even if other factors contributed to the employer making the challenged decision, so long as age was the factor that made a difference.

Authority:

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

PRETEXT

The Plaintiff claims that the Defendant's stated reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) to cover up for age discrimination. If you do not believe one or more of the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that age was a factor that made a difference in the Defendant's decision. The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that age was the factor that made a difference in the employer's treatment of Plaintiff.

Notes on Use:

This instruction should be given when the Plaintiff contends that the Defendant's stated reason(s) for the adverse employment decisions are pretextual. *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002). The enumerated ways for a Plaintiff to show pretext are typical but not exclusive. *See, e.g., Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the

Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities). See also *Matthews v. Euronet Worldwide, Inc.*, 2008 WL 822461, *4 (10th Cir. 2008) ("[T]o the extent the Defendants' articulated reasons were subjective in nature, they are supported by objective facts."); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an "overwhelming disparity"); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) ("Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision."); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App'x 63, 68 (10th Cir. 2004) ("Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations."); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are "entirely subjective in nature"); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) ("[W]hen the Plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility."); *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1127 (10th Cir. 2005) (denying summary judgment where Plaintiff demonstrated that one of many of the Defendant's stated reasons was pretextual, stating, "It is not simply a question of how many of the Defendant's reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.)).

ADEA – AGE-RELATED REMARKS

The Plaintiff may prove discriminatory intent under the ADEA, either directly or indirectly, by offering evidence of remarks that are age-related. In considering the weight to place on this evidence, you may consider the following factors:

1. whether the remark(s) [was] [were] close in time to the [adverse employment action] at issue,
2. whether the remark(s) [was] [were] made by an individual with authority over the employment decision at issue, and
3. whether the remark(s) [was] [were] connected to the employment decision at issue.

A single spoken statement referring to age, standing alone, may, but does not necessarily, prove an intent to discriminate. Such a statement, if you believe it occurred, is like any other evidence and you may consider it or reject it in light of all of the facts as you find those facts to be.

Note on Use:

This instruction should be used only where evidence exists of age-related remarks.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2111-12 (2000); *Hare v. Denver Merch. Mart, Inc.*, 255 F. App'x 298, 303 (10th Cir. 2007); *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1251 (10th Cir. 2002); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531-32 (10th Cir. 1994).

ADEA – AGE OF REPLACEMENT

Where the Plaintiff has been replaced in [his] [her] employment position following termination of [his] [her] employment, the fact that the Plaintiff was replaced by another person age 40 or over is irrelevant to the determination of whether discrimination occurred, so long as the Plaintiff's employment was terminated because of [his] [her] age.

Notes on Use:

This instruction should be used only where evidence exists that the replacement employee is over 40 years of age and protected by the ADEA.

Authority:

Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1138 (10th Cir. 2000); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 560 (10th Cir. 1996).

ADEA – REDUCTION IN FORCE

Where, as here, the Plaintiff's employment position has been eliminated due to a reduction in force ("RIF"), you may infer age discrimination if the Plaintiff proves, by a preponderance of the evidence, that the Defendant could have retained him or her, but chose instead to retain a younger employee in a similar position. The Plaintiff is not required to show that [he] [she] is as or more qualified than the employee[s] who [was] [were] retained.

Notes on Use:

This instruction should be used only in cases involving a reduction in force ("RIF").

Authority:

Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988).

ADEA – WILLFUL – DEFINED

If you find that the Defendant discriminated against the Plaintiff on the basis of [his] [her] age, you must now determine whether Defendant's violation was "willful." If you find that the Defendant's violation of the ADEA was "willful," the Court may award additional damages under the law.

A Defendant acts "willfully" if it either knew or showed reckless disregard for whether its conduct was prohibited by the ADEA.

Authority:

29 U.S.C. § 626(b)(7)(b); *Hazen Paper v. Biggins*, 507 U.S. 604, 616 (1993); *Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323 F.3d 1273, 1283 (10th Cir. 2003).

ADEA – AFFIRMATIVE DEFENSE – BONA FIDE OCCUPATIONAL QUALIFICATION

The Defendant has asserted that the employment decision at issue was the result of a *bona fide* occupational qualification. To avoid liability under the ADEA, the Defendant must prove that, as to [the Plaintiff's job][the job sought by the Plaintiff], at the time of the employment decision affecting the Plaintiff, age was a qualification reasonably necessary to the normal operation of the Defendant's business.

A qualification is reasonably necessary to the normal operation of the Defendant's business if it is central to the Defendant's business and

1. there is a factual basis for believing that all or substantially all individuals over age ____ would be unable to safely and efficiently perform the duties of [the Plaintiff's job][the job sought by the Plaintiff], OR
2. there is a factual basis for believing that all or substantially all individuals over the age ____ would be unqualified for [the Plaintiff's job][the job sought by the Plaintiff], OR
3. if it is impossible or highly impractical to deal with individuals over the age of ____ on an individualized basis.

Notes on Use:

In almost all cases where this defense applies, the Defendant must concede that it took age into account in making the employment decision. Use this instruction only where the Defendant asserts that the employment decision was the result of a *bona fide* occupational qualification. The practitioner should consider modifying the instruction consistent with 29 U.S.C. § 623(f)(1) if presented with circumstances where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.

Authority:

29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.6; O'Malley, Grenig & Lee, FED-JI § 173.60 (5th ed. 2001); *Smith v. City of Jackson*, 544 U.S. 228, 233 FN3 (2005); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, (2000); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413-417 (1985).

ADEA – AFFIRMATIVE DEFENSE – BONA FIDE SENIORITY SYSTEM

The Defendant has asserted that the employment decision at issue was the result of a *bona fide* seniority system. To avoid liability under the ADEA, the Defendant must prove that, at the time of the employment decision affecting the Plaintiff,

1. the Defendant used a system whose primary criterion for the fair distribution of available employment opportunities and prerogatives among workers was length of service to the Defendant;
2. the essential terms and conditions of the seniority system have been communicated to all affected employees; and
3. the seniority system can be shown to be applied uniformly to all those affected, regardless of age.

Notes on Use:

In almost all cases where this defense applies, the Defendant must concede that it took age into account in making the employment decision. Use this instruction only where the Defendant asserts that the employment decision was the result of a *bona fide* seniority system.

Authority:

29 U.S.C. § 623(f)(2)(A); 29 C.F.R. § 1625.8; O'Malley, Grenig & Lee, FED-JI § 173.61(5th ed. 2001); *Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir. 1995), *cert. denied* 516 U.S. 1115 (1996).

ADEA – AFFIRMATIVE DEFENSE – BONA FIDE EMPLOYEE BENEFIT PLAN

The Defendant has asserted that the employment decision at issue was the result of a *bona fide* employee benefit plan. To avoid liability under the ADEA, the Defendant must prove that, at the time of the employment decision affecting the Plaintiff:

1. The Defendant had an employee benefit plan that provided for and paid benefits to employees; and
2. The Defendant followed the terms of the employee benefit plan in making the employment decision affecting the Plaintiff.

Notes on Use:

In almost all cases where this defense applies, the Defendant must concede that it took age into account in making the employment decision. Use this instruction only where the Defendant asserts that the employment decision was the result of a *bona fide* employee benefit plan.

Authority:

29 U.S.C. § 623(f)(2)(B); O'Malley, Grenig & Lee, FED-JI § 173.62 (5th ed. 2001).

RETALIATION – STATUTE INVOLVED

The Plaintiff claims that the Defendant retaliated against [him] [her] in violation of a federal statute called [insert Title VII, the ADA, the ADEA, or 42 U.S.C. § 1981]. The purpose of [insert appropriate statute] is to protect the rights of individuals to be free from workplace discrimination and harassment based on [insert protected group]. The anti-retaliation protection in [insert appropriate statute] provides that it is unlawful for an employer to retaliate against an individual because [he] [she] in good faith opposed what she/he believed were discriminatory or retaliatory employment practices or because [he] [she] has made a charge, testified, assisted or participated in any manner in any investigation, proceeding or hearing governed by [insert appropriate statute].

Authority:

42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 634(d) (ADEA); *Roberts v. Roadway Express*, 149 F.3d 1098, 1103 & n.1 (10th Cir. 1998) (§ 1981).

RETALIATION ELEMENTS

To establish a claim of retaliation, the Plaintiff must prove that:

1. Plaintiff [describe facts alleged to constitute protected activity];
2. Defendant took an action that a reasonable employee would have found materially adverse; and
3. Defendant would not have taken the challenged employment decision but for the Plaintiff's protected activity.

If you find that the Plaintiff has proven each of these elements by a preponderance of the evidence, then you must find for the Plaintiff and against the Defendant on this claim. If, on the other hand, you find that the Plaintiff has failed to prove any one or more of these elements by a preponderance of the evidence, then you must find against [him] [her] on this claim and in favor of the Defendant.

Notes on Use:

Whether a Plaintiff's actions constitute protected activities under the various civil rights statutes and whether Plaintiff suffered an adverse action are legal questions for the Court. *Kelley v. City of Albuquerque*, 542 F.3d 802, 821 (10th Cir. 2008) (protected activity is legal question); *Morales-Vallellanes v. Potter, et al.*, 605 F.3d 27, 33 (1st Cir. 2010) (adverse action is legal question); *Gerhart v. Boyerton Area School Dist.*, 2002 WL 31999365 (E.D. Pa. March 4, 2002) (adverse action is legal question); *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 41 (D.D.C. 2004) (protected activity is legal question); *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427, 443 (S.D.N.Y. 2009) (protected activity and adverse action are legal questions). Therefore, in most cases, the Court will not instruct the jury regarding elements (1) and (2), although it may inform the jury of its findings on those issues. The jury may be instructed on elements (1) and (2) where the factual basis for those requirements is in dispute, such as where an employer denies that an employee opposed allegedly discriminatory practices. In the usual case, however, where elements (1) and (2) are not in dispute, element (3) in this proposed instruction is the only instruction that should be given.

As a general rule, the jury is not to be instructed in the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), burden-shifting scheme applicable to retaliation claims. Instead, the jury should be instructed regarding the ultimate question of retaliation and the applicable "motivating factor" standard. 42 U.S.C. § 2000e-2(m) (Plaintiff must prove that improper considerations were "a motivating factor for any employment practice, even though other factors also motivated the practice"); *Messina v. Kroblin Transp. Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) (ultimate question is whether age was a "determinate factor" in the discharge, not the presumptions and burdens inherent in the *McDonnell-Douglas* formulation which drop out of consideration); *Sharkey v. Lasmo*, 214 F.3d 371, 374 (2nd Cir. 2000) (fact finder should determine whether employer was "motivated" by discrimination "without reference to the success of burden-shifting tests that the parties have been required to pass"); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529-30 (10th Cir. 1995) ("motivating factor" does not mean "sole motivating

factor,” rather, opposition to discrimination must be “a reason” and “a factor that made a difference”); *Fisher v. Forest Wood Co., Inc.*, 525 F.2d 972 (10th Cir. 2008) (motivating factor in Title VII retaliation case); *Fye v. Oklahoma Corp. Com’n*, 516 F.3d 1217 (10th Cir. 2008) (motivating factor test in Title VII retaliation case); *Flitton v. Primary Residential Mortg., Inc.*, 238 F. App’x 410 (10th Cir. 2007).

It should also be noted that although the alleged adverse action is often one taken against the Plaintiff by the Defendant employer, a Defendant may be held liable for retaliation committed by Plaintiff’s co-workers if that retaliation is committed with the knowledge and acquiescence of the Defendant employer. *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262-63 (10th Cir. 1998); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985-86 (10th Cir. 1996).

Authority:

The “but for” causation standard adopted for ADEA claims in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) is also applicable to retaliation claims under Title VII. *University of Texas Southwestern Medical Center v. Nassar*, 57 U.S. ____ 2013. The anti-retaliation provisions contained in Title VII, the ADA, and the ADEA are almost verbatim and the same standard has consistently been applied. 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. §623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). See also *Burlington Ne. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (Title VII); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262-63 (10th Cir. 1998) (Title VII); *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1381 (10th Cir. 1994) (Title VII); *Johnson v. Weld County, Colorado*, 594 F.3d 1202 (10th Cir. 2010) (ADA); *Woods v. Boeing Co.*, 355 F. App’x 206 (10th Cir. 2009) (ADEA); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1201 (10th Cir. 2008) (ADEA retaliation); *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007) (ADA retaliation); *Roberts v. Roadway Express*, 149 F.3d 1098, 1103 & 1103 n.1 (10th Cir. 1998) (§ 1981).

TITLE VII/ADA/§ 1981 – RETALIATION – MATERIALLY ADVERSE ACTION

A “materially adverse” action is any action by the employer that is likely to discourage a reasonable worker in the Plaintiff’s position from exercising [his] [her] rights under [insert Title VII, the ADA, the ADEA, or § 1981].

Notes on Use:

Unlike Title VII’s substantive anti-discrimination provision, the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). Petty slights, minor annoyances and simple lack of good manners will not normally be sufficient to show retaliation claim. However, context matters in making this determination. For example, “[a] schedule change ... may make little difference to many workers, but may matter enormously to a young mother with school age children.” *Id.* at 69. Likewise, a reassignment of duties may or may not be retaliatory, depending on the circumstances of the case. *Id.* at 71. “In recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action.” *Jeffries v. State of Kansas, Dept. of Social and Rehabilitation Services*, 147 F. 3d 1220, 1231 (10th Cir. 1998).

Authority:

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S.Ct. 2257, 2268 (1998) (conduct is adverse employment action if it “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”); *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1279-80 (10th Cir. 2010) (holding that Plaintiff suffered an adverse employment action where reassignment led to decrease in benefits and a loss of professional prestige, even though it was not a demotion); *Medina v. Income Support Division*, 413 F.3d 1131, 1137 (10th Cir. 2005) (disciplinary actions short of termination can be considered adverse employment actions if they increase the likelihood that the employee will be terminated or otherwise affect the employee’s future employment prospects.); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10th Cir. 2004) (finding of adverse employment action where negative references would seriously harm future employment prospects); *Stinnett v. Safeway*, 337 F.3d 1213, 1217 (10th Cir. 2003) (finding transfer to be an adverse employment action because even where Plaintiff “maintained her wage

level, seniority, and title... there is evidence that the reassignment resulted in a de facto reduction in responsibility and required a lesser degree of skill); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (evidence that employer had “‘papered’ [Plaintiff’s] file with negative reports including two written reprimands...are the kinds of serious employment consequences that adversely affected or undermined [Plaintiff’s] position, even if he was not discharged, demoted or suspended”); *Jeffries v. State of Kansas, Dept. of Social and Rehabilitation Services*, 147 F.3d 1220, 1231 (10th Cir. 1998) (Plaintiff’s allegation that after she complained, her supervisor would not supervise her and issued threats that her contract would not be renewed at end of year was sufficient to raise a genuine factual dispute as to whether she suffered an adverse employment action in retaliation for her complaint); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) (employer may be liable for retaliatory acts of co-workers); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996) (showing of adverse employment action where employee required to “go through several hoops” in order to obtain severance benefits); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (showing of adverse employment action where employer reported Plaintiff of suspected crime thereby creating risk of humiliation and damage to reputation); *Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324, 329 (10th Cir. 1996) (noting that pattern of retaliation began with Plaintiff being “written up”); *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 799 (10th Cir. 1993) (reassignment may be an adverse employment action when the employee “receives less pay, has less responsibility, or is required to utilize a lesser degree of skill than his previous assignment”), *overruled on other grounds by Buchanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995).

RETALIATION – CAUSATION

In order to prove that Plaintiff's employer would not have taken the challenged employment decision but for the Plaintiff's protected activity, Plaintiff does not need much to show that his/her protected activity was the sole motivating factor in the employment decision. Instead, an employer may be held liable for retaliation even if other factors contributed to the employer making the challenged decision, so long as retaliation was the factor that made a difference.

Authority:

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009); *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277-78 (10th Cir. 2010); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

FREEDOM OF SPEECH

The Plaintiff alleges that the Defendant violated [his] [her] freedom of speech as guaranteed by the First Amendment to the United States Constitution. Freedom of Speech protects the right of public employees to speak out on issues of public concern. In order for the Plaintiff to prevail on [his] [her] claim that [he] [she] was retaliated against in violation of [his] [her] First Amendment rights, the Plaintiff must prove by a preponderance of the evidence that [his] [her] speech [describe where appropriate] was a substantial or motivating factor in the adverse actions [describe where appropriate] taken against [him] [her].

If you find that the Plaintiff has failed to prove [his] [her] claim by a preponderance of the evidence, then you must find against [him] [her] on this claim and in favor of the Defendant.

If you find that the Plaintiff has proved retaliation by a preponderance of the evidence, you may still find for the Defendant if you find that the Defendant has proved that it would have taken the same action against the employee even in the absence of the protected speech.

Notes on Use:

The elements of a claim for violation of the First Amendment's Freedom of Speech in the employment context are: (1) the speech in question was not expressed pursuant to [his] [her] official duties, (2) the subject of [his] [her] speech is a matter of public concern, (3) [his] [her] interest in commenting on the issue outweighs the potential disruptive effect of that speech, and (4) [his] [her] speech [describe where appropriate] was a substantial or motivating factor in the adverse actions [describe where appropriate] taken against [him] [her]. *Brammer-Hoelter, et al. v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202-03 (10th Cir. 2007) (This decision was modified in several unrelated respects in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175 (10th Cir. 2010)); *see also Garcetti v. Ceballos*, 547 U.S. 410 (2006).)

As a general rule, elements (1) through (3) of this instruction are legal questions for the Court to decide and only element (4) and Defendant's affirmative defense are jury questions. *Brammer-Hoelter*, 492 F.3d at 1203. Consequently, in most cases, the jury will only be instructed regarding element (4) and Defendant's defense. However, in certain limited circumstances, the first three elements may turn on resolution of a factual dispute to be decided by the jury, such as deciding precisely what the Plaintiff said, which could affect the analysis of each of the first three steps. *Deutsch v. Jordan*, 618 F.3d 1093 (10th Cir. 2010). *See also Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993).

PROTECTED [ACTIVITY] [ACTIVITIES] – OPPOSITION
(MISTAKEN BUT REASONABLE GOOD FAITH BELIEF)

The Plaintiff's [activity] [activities] in opposing a practice [he] [she] believed is unlawful under [Title VII, ADEA, etc.] is protected activity even though it is based on a mistaken but reasonable good faith belief that [the statute] has been violated.

Notes on Use:

This instruction should only be given in “opposition,” not “participation” cases, as reasonable good faith belief is only required in opposition cases. In addition, this instruction should be given only when there is a triable issue as to whether, at the time the Plaintiff engaged in the opposition activity, [he] [she] had a mistaken but reasonable good faith belief that Title VII (or the ADEA or the ADA) had been violated.

If the practice or action the Plaintiff opposes does not violate the statute, but the Plaintiff engaged in the opposition activity based on a reasonable, good faith mistake of fact or law, then [he] [she] is entitled to protection from retaliation. *Crumpacker v. Kan. Dept. of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003) (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001)).

Obviously, whether or not the Plaintiff's mistake was reasonable and in good faith depends greatly on the facts of a particular case.

However, protected conduct may not be found where, reasonably and in good faith, the Plaintiff is legally wrong about what conduct is protected by the law. For example, sexual favoritism does not violate Title VII. *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997) (rejecting Title VII claim of paramour preference: “Title VII's reference to ‘sex’ means a class delineated by gender, rather than sexual affiliations”). See also *Robben v. Runyon*, No. 98-3177, 2000 U.S. App. LEXIS 1358, *11-12 (10th Cir. Feb. 1, 2000) (unpublished) (affirming summary judgment as to retaliation claim based upon the Plaintiff's expression of concerns about sexual favoritism to a manager's paramour and claimed retaliation for complaints about it).

Authority:

Crumpacker v. Kan. Dept. of Human Res., 338 F.3d 1163, 1171-72 (10th Cir. 2003) (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001)).

PROTECTED [ACTIVITY] [ACTIVITIES] – PARTICIPATION – DEFINED

Protected activities include making a charge [of discrimination, harassment or retaliation], or testifying, assisting or otherwise participating in any manner in [his] [her] own [or someone else's] charge of [discrimination, harassment or retaliation], investigation, proceeding or hearing under [Title VII, ADEA, ADA, etc.].

In this case, the Plaintiff asserts that [he] [she] engaged in the following protected [activity] [activities]: [insert activity or activities].

The Plaintiff must prove that [he] [she] actually participated in [a] protected [activity] [activities], but the Plaintiff does not have to prove that the underlying charge, investigation, proceeding or hearing was successful.

Notes on Use:

This instruction should only be given when the Plaintiff alleges that participation activity (rather than opposition activity) is the basis for the alleged retaliation claim.

It is important to note that even informal, internal complaints to management can be sufficient to invoke the participation clause for purposes of establishing a *prima facie* case of retaliation. In *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998), for example, the Plaintiff delivered a letter to the superintendent of her employer hospital describing the discrimination. *Id.* at 1231. That does not, however, mean that all such complaints will amount to participation activity. In *Shinwari v. Raytheon Aircraft Co.*, 251 F.3d 1337, 2000 U.S. App. LEXIS 12816, *17-18 (10th Cir. 2000), *overruled on other grounds*, *Crumpacker v. Kan Dept. of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003), the Court held the Plaintiff's conclusory and nonspecific allegations of discrimination raised during his performance review did not rise to the level of participation in a protected activity.

Authority:

42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA). *See also* *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253 (10th Cir. 1999), *abrogated on other grounds*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Jeffries v. State of Kansas*, 147 F.3d 1220, 1231 (10th Cir. 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993).

PRETEXT

The Plaintiff claims that the Defendant's stated reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) to cover up for retaliation. If you do not believe one or more of the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that retaliation was a factor that made a difference in the Defendant's decision. The Plaintiff need not disprove every reason stated by the Defendant in order to prove pretext.

The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective; or]

[The [describe adverse action] is closely related in time to Plaintiff's [insert protected activity here]; or]

[INSERT OTHER RELEVANT FACTORS AS APPLICABLE.]

If you find pretext, you may, but are not required to infer that retaliation was the factor that made a difference in the employer's treatment of Plaintiff.

Notes on Use:

This instruction should be given when the Plaintiff contends that the Defendant's stated reason(s) for the adverse employment decisions are pretextual. *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002). The enumerated ways for a Plaintiff to show pretext are typical but not exclusive. *See, e.g., Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

Authority:

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2108-09 (2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005) (use of subjective criterion); *Townsend v. Lumbermens Mutual Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (if jury disbelieves an employer's proffered explanation they may -- but need not -- infer that the employer's true motive was discriminatory); *Selenke v. Med. Imaging of Colo., Inc.*, 248 F.3d 1249, 1261 (10th Cir. 2001) (pretext must be resolved by reference to the person making the decision at the time the decision is made); *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (if at the time of the adverse employment decision the decision maker gave one reason, but at the time of trial gave another reason which was unsupported by the documentary evidence, the jury could reasonably conclude that the new reason was a pretextual after-the-fact justification); *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), overruled on other grounds by *AMTRAK v. Morgan*, 536 U.S. 101 (2002) (the relevant inquiry is limited to whether the decision-maker honestly believed the proffered reasons and acted in good faith upon those beliefs); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1155 (10th Cir. 1990) (disparate enforcement of rules); and *Mohammed v. Callaway*, 698 F.2d 395 (10th Cir. 1983) (disturbing procedural irregularities).

See also Matthews v. Euronet Worldwide, Inc., 2008 WL 822461, *4 (10th Cir. 2008) (“[T]o the extent the Defendants’ articulated reasons were subjective in nature, they are supported by objective facts.”); *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118-19 (10th Cir. 2007) (the existence of subjective factors alone is not considered evidence of pretext; Plaintiff must produce circumstantial evidence in context to show pretext); *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (minor differences in treatment do not show pretext; there must be an “overwhelming disparity”); *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) (“Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision.”); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (strong inference that stated reasons are not pretextual where same decision maker is involved in both positive and adverse employment actions); *Perry v. St. Joseph Reg. Med. Ctr.*, 110 F. App’x 63, 68 (10th Cir. 2004) (“Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.”); *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (pretext typically should be inferred only when the criteria are “entirely subjective in nature”); *Denny v. City of Albany*, 247 F.3d 1172, 1189-90 (11th Cir. 2001) (inconsistencies that do not relate to the decision at issue are not evidence of pretext); *Belgasem v. Water Pik Tech., Inc.*, 457 F. Supp. 2d 12205, 1213 (D. Colo. 2006) (adverse actions with respect to different positions is not evidence of pretext); *Tyler v. Re/Max Mtn. States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (“[W]hen the Plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility.”); *Bryant v. Farmers Ins. Exchange*, 432 F.3d

1114, 1127 (10th Cir. 2005)(denying summary judgment where Plaintiff demonstrated that one of many of the Defendant's stated reasons was pretextual, stating, "It is not simply a question of how many of the Defendant's reasons a Plaintiff has refuted, but rather a question of whether casting doubt on a particular justification necessarily calls into doubt the other justifications.).

In cases of retaliation: *Annett v. Univ. of Kan.*, 371 F.3d 1233 (10th Cir. 2004) (protected conduct closely followed by adverse action may justify an inference of retaliatory motive); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 386 (10th Cir. 1984) (same); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1290 (10th Cir. 2007); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006) (termination occurring within 6 weeks after employer learned employee would take FMLA leave held sufficiently close to show causation). Although courts have allowed close temporal proximity between protected activity and adverse employment action to operate as a proxy for the evidentiary requirement of causation, the absence of close temporal proximity is not dispositive of whether a causal connection exists between protected activity and adverse action. *Marx v. Schnuck Markets*, 76 F.3d 324, 329 (10th Cir. 1996) ("[P]rotected conduct closely followed by adverse action may justify an inference of retaliatory motive...[T]he phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the...complaint and only culminates later in actual discharge."); *Roberts v. Roadway Express*, 149 F.3d 1098, 1104 (10th Cir. Colo. 1998) (upholding finding of retaliation where Plaintiff was terminated almost two years after complaints of discrimination); *See also, Miller-El v. Cockrell*, 537 U.S. 322 (2003).

BACK PAY

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine the amount of back pay that the Plaintiff proved was caused by the Defendant's wrongful conduct.

In determining back pay, you must make several calculations:

First, calculate the amount of pay and bonuses that Plaintiff would have earned had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until today's date.

Then calculate and add the value of the employee benefits (health, life and dental insurance, vacation leave, etc.) that Plaintiff would have received had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until the date of trial.

Then, subtract from this sum the amount of pay and benefits that Plaintiff actually earned from other employment during this time.

Notes on Use:

There is a question as to whether back pay is an issue of fact for a jury determination, or an issue of law for the Court. *Compare Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 527 (10th Cir. 2000), as representative of a case where back pay was determined by a jury; *with Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1236 (10th Cir. 2000) (where back pay was determined by the Court). In cases where a claim is also brought under 42 U.S.C. § 1981, back pay is properly a jury question. *See Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1444 (10th Cir. 1988).

In appropriate cases, this instruction should be followed by an instruction regarding failure to mitigate. The Committee has determined that the question of what, if any, particular collateral sources of income may be deducted from the back pay award (such as unemployment compensation, workers' compensation, etc.) is a question of law for the Court. Once the Court determines what sources may be offset, the question of the amount of the offset should be submitted to the jury.

Authority:

Federal Employment Jury Instructions, § 1:1260; Model Jury Instructions (Civil) Eighth Circuit §5.02 (1998).

COMPENSATORY DAMAGES – ADA AND TITLE VII/SECTION 1981 CASES ONLY

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine an amount that is fair compensation for Plaintiff's losses. You may award compensatory damages for injuries that the Plaintiff proved were caused by the Defendant's wrongful conduct. The damages that you award must be fair compensation, no more and no less.

Insert bold provision only if court determines back pay is not a jury question:

[In calculating damages, you should not consider any back pay or front pay that the Plaintiff lost. The award of back pay and front pay, should you find the Defendant liable on the Plaintiff's claims, will be calculated and determined by the Court.]

You may award damages for any emotional distress, pain, suffering, inconvenience or mental anguish [insert all other claimed damages, such as embarrassment, humiliation, damage to reputation, etc.] that Plaintiff experienced as a consequence of the wrongful conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for setting the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

Insert bold provision if Plaintiff is seeking other consequential damages.

[You may also reimburse the Plaintiff for the value of other out-of-pocket losses or expenses, including expenses for past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and [insert all other quantifiable out-of-pocket expenses sought by the Plaintiff].

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in making an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on speculation or guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

Notes on Use:

Under Title VII and the ADA, the amount of compensatory damages is capped by statute. The elements of compensatory damages that are subject to the statutory cap are (1) future pecuniary losses, and (2) all nonpecuniary losses, which includes emotional distress, anguish, loss of enjoyment of life, embarrassment, reputational damage, adverse effects on credit rating, physical harms caused by distress, etc. The statutory cap does not apply to past pecuniary losses that occurred prior to the date of trial. These losses may include past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and other

quantifiable out-of-pocket expenses. *See also* EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 1992).

Authority:

42 U.S.C. § 1981a.

FAILURE TO MITIGATE

Plaintiff is required to make reasonable efforts to minimize damages. In this case, the Defendant claims that Plaintiff failed to minimize damages because [state the reason, *e.g.*, Plaintiff failed to use reasonable efforts to find employment after discharge.]

It is the Defendant's burden to prove that Plaintiff failed to make reasonable efforts to minimize [his][her] damages. This defense is proven if you find by a preponderance of the evidence that:

1. There were or are substantially comparable position which Plaintiff could have discovered and for which Plaintiff was qualified; and
2. Plaintiff failed to use reasonable diligence to find suitable employment. "Reasonable diligence" does not require that Plaintiff be successful in obtaining employment, but only that [he][she] make a good faith effort at seeking employment.

If the Defendant has proven the above, then you must deduct from any award of back pay the amount of pay and benefits Plaintiff could have earned with reasonable effort.

Notes on Use:

There is authority to support language defining "reasonable diligence" to the effect that, "you may find that Plaintiff failed to use reasonable diligence during periods where Plaintiff was not ready, willing and available for employment," *e.g.*, Plaintiff has enrolled in school. *See Miller v. Marsh*, 766 F.2d 490, 493 (11th Cir. 1985); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267-268 (10th Cir. 1975) *overruled on other grounds*; *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

However, where the Defendant fails to bring forward any evidence supporting the first prong of this instruction, then the Defendant has failed to meet its burden of showing that Plaintiff failed to mitigate damages, and the Plaintiff's status as a full-time student is then irrelevant. *Goodman v. Fort Howard Corp.*, No. 93-7067, 1994 U.S. App. LEXIS 17507, *11 (10th Cir. July 18, 1994) (unpublished).

Those cases stand in contrast to cases wherein the enrollment period is nonetheless recognized as a "reasonable" attempt to mitigate damages: *Bray v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1275-76 (4th Cir. 1985); *Dailey v. Societe Generale*, 108 F.3d 451, 455-57 (2d Cir. 1997); *Smith v. American Serv. Co.*, 796 F.2d 1430, 1431-32 (11th Cir. 1986); *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1307-09 (7th Cir. 1984). Those cases recognize that only "reasonable" efforts to mitigate damages are required, not ultimate success.

Accordingly, the practitioner is encouraged to review these cases, and to determine on a case-by-case basis whether enrollment in school may constitute a failure to mitigate damages.

Authority:

Aguinaga v. United Food & Com. Worker's Intern., 993 F.2d 1463, 1474 (10th Cir. 1993) *citing* 510 U.S. 1072 (1994); *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980).

UNCONDITIONAL OFFER OF EMPLOYMENT

You have heard evidence in this case that Defendant offered to return Plaintiff to work and that Plaintiff rejected that offer. If you find that the Defendant made an unconditional offer of employment (that is, an offer that was not conditioned upon Plaintiff taking any other action or relinquishing any rights) of a job substantially comparable to Plaintiff's former employment and that Plaintiff unreasonably refused that offer, Plaintiff may not recover back pay after the date of the offer, unless special circumstances exist. In considering whether special circumstances exist, you must consider the circumstances under which the offer was made or rejected, including the terms of the offer and Plaintiff's reasons for refusing the offer.

Authority:

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); *Giandonato v. Sybron Corp.*, 804 F.2d 120, 123-124 (10th Cir. 1986).

NOMINAL DAMAGES

If you return a verdict for the Plaintiff, but find that the Plaintiff has failed to prove that [he][she] suffered any damages, then you must award the Plaintiff the nominal amount of \$1.00.

Authority:

See Model Jury Instructions (Civil) Eighth Circuit § 5.23 (1999); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1228 (10th Cir. 2001); *Salazaar v. Encinias*, 2000 U.S. App. LEXIS 32022, *7-8 (10th Cir. Dec. 15, 2000).

PUNITIVE DAMAGES – ADA AND TITLE VII/SECTION 1981 CASES ONLY

If you find that the Defendant intentionally discriminated against Plaintiff, the law allows, but does not require, an award of punitive damages. The purpose of an award of punitive damages is to punish a wrongdoer for misconduct, and also to provide a warning to others.

You may award punitive damages if you find that the Defendant engaged in discrimination with malice or with reckless indifference to the right of the Plaintiff to be free from such intentional discrimination. In order to find the Defendant liable for punitive damages, you must find that the Defendant discriminated in the face of a perceived risk that its actions would violate federal law.

In deciding the amount of punitive damages, you may consider the following:

1. The offensiveness of the conduct;
2. The amount needed, considering the Defendant's financial condition, to prevent the conduct from being repeated; and
3. Whether the amount of punitive damages bears a reasonable relationship to the actual damages awarded.

Where discriminatory acts on the part of the Defendant's managerial employees were contrary to the Defendant's good faith efforts to comply with the law by implementing and enforcing policies and programs designed to prevent unlawful discrimination, you shall not award punitive damages.

Notes on Use:

In appropriate cases, the following language may be added:

“You may infer ‘malice’ or ‘reckless indifference’ on the part of the Defendant where a manager responsible for setting or enforcing policy in the area of discrimination did not respond to complaints, despite knowledge of serious harassment.”

This additional language is supported by *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1244-45 (10th Cir. 1999), *abrogated on other ground*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and is appropriate only in cases where liability for punitive damages is not sought on a vicarious liability basis. This imposition of liability is “premised upon direct liability, not derivative liability, according to the doctrine of *respondeat superior*.” *Deters v. Equifax Credit Info. Serv., Inc.*, 202 F.3d 1263, 1270-72 *10th Cir. 2000).

Authority:

42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

FAMILY MEDICAL LEAVE ACT (FMLA) – STATUTE INVOLVED

The Plaintiff brought this lawsuit under the “Family and Medical Leave Act,” also called the “FMLA.” The purposes of the FMLA are to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.

The FMLA entitles eligible employees to take up to twelve weeks of unpaid leave during any twelve month period for several reasons including:

- the employee’s own serious health condition that makes him unable to perform the functions of his position;
- the birth of a son or daughter and to care for the newborn child;
- the placement with the employee of a son or daughter for adoption or foster care;
- to care for the employee’s spouse, son, daughter, or parent who has a serious health condition.

[Additionally, eligible employees are entitled to up to 26 workweeks of leave to care for a covered service member with a serious injury, illness, or qualifying exigency.]

The FMLA generally gives an employee the right following FMLA leave either to be returned by the employer to the position [he] [she] held when the leave began or to an equivalent position.

Notes on Use:

Two theories of recovery are recognized under the FMLA, 29 U.S.C. § 2615(a). One is an interference theory. *Id.* at § 2615 (a)(1). The other is a retaliation or discrimination theory. *Id.* at § 2615 (a)(2). *See, e.g., DeFreitas v. Horizon Inv. Mgmt. Corp.*, 577 F.3d 1151, 1160 (10th Cir. 2009).

The courts often afford Department of Labor FMLA implementing regulations *Chevron* deference because the Department is charged with administering the statute. *See Wilkins v. Packerware Corp.*, 260 F. App’x 98, 104 (10th Cir. 2008), *citing Hackworth v. Progressive Cas., Ins. Co.*, 468 F.3d 722, 726-27 (10th Cir. 2006).

Authority:

29 U.S.C. § 2612; 29 C.F.R. § 825.112.

FMLA – DEFINITION – COVERED EMPLOYER

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs fifty (50) or more employees for each working day during each of the twenty (20) or more calendar workweeks in the current or preceding calendar year.

Authority:

29 C.F.R. 825.104(a).

FMLA – DEFINITION – COVERED WORK LOCATION

An employee who seeks relief against a covered employer as defined in these instructions must show that [he or she] works in an area where the employer employs fifty (50) or more employees within a seventy-five (75) mile radius.

Authority:

29 C.F.R. 825.110(a)(3).

FMLA – DEFINITION – “ELIGIBLE EMPLOYEE”

An “eligible employee” is one who has been employed by the employer for at least twelve months and has worked at least 1,250 hours during the previous twelve-month period.

Notes on Use:

“Whether an employee has worked the minimum 1,250 hours of service is determined according to principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work.” *See Knapp v. America West Airlines*, 207 F. App’x 896, 898, 2006 U.S. App. LEXIS 29116, *4 (10th Cir. 2006), citing 29 C.F.R. § 825.110(c). In *Knapp*, the court ruled that the employee’s reserve duty time did not count as hours of service for purposes of determining FMLA eligibility although she was compensated for those hours. *Id.* at 899, *9-10.

29 C.F.R. § 825.110 (d) provides that once an employer confirms the employee is eligible for leave, the employer may not retroactively claim the employee was not FMLA eligible. However, the Tenth Circuit declined to apply this section in *Knapp*, 207 F. App’x 896, noting that several other circuits have invalidated this section of the Act. *Id.* at 899.

Authority:

29 U.S.C. § 2611 (2)(A).

FMLA – DEFINITION – INTERMITTENT OR REDUCED LEAVE

The FMLA allows an employee to take leave for a serious health condition on an intermittent or reduced schedule basis.

“Intermittent leave” is defined as leave taken in separate blocks of time due to a single qualifying reason and may include leave periods from an hour or more to several weeks.

Authority:

29 C.F.R. § 2612(b); 29 CFR § 825.202(a) and (b)(1). *Winne v. City of Lakewood*, 436 F. App’x 840 (10th Cir. 2011).

FMLA – DEFINITION – SUBSTITUTION OF LEAVE

The FMLA allows employers to require some types of paid leave be substituted for all or part of the 12 week unpaid leave.

Notes on Use:

If an employer allows employees to substitute paid leave for FMLA leave, the employer must allow all employees the same substitutions. *See Orr v. City of Albuquerque*, 531 F. 3d. 1210, 1216-17 (10th Cir. 2008) (the City allowed non-pregnant employees to use vacation time for FMLA leave but required pregnant employees to use sick leave).

Authority:

29 C.F.R. § 2612 (d).

FMLA – DEFINITION – SERIOUS HEALTH CONDITION

A “serious health condition” is an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments.

Authority:

29 C.F.R. 825.113 (a); 29 C.F.R. 825.115.

FMLA – DEFINITION – “SON OR DAUGHTER”

A “son or daughter” includes a biological child, an adopted child, a foster child, a stepchild, a legal ward or the child of a person standing *in loco parentis*.

Authority:

29 U.S.C. § 2611 (12).

FMLA – DEFINITION – “PARENT”

A “parent” includes any person[s] who stood *in loco parentis* to the employee when the employee was a son or daughter.

Notes on Use:

When this category of family member is involved in the leave at issue, the following language may be helpful to include in the instruction: “Although [Name] is not Plaintiff’s biological parent, he is considered a “parent” under the law because he occupied the same role in Plaintiff’s life that a biological parent would be expected to occupy.”

Authority:

29 U.S.C. § 2611(7).

FMLA – DEFINITION – “QUALIFYING EXIGENCY”

FMLA “qualifying exigencies” include a wide variety of activities intended to help the families of members of the National Guard and Reserve manage the members’ affairs before, during and after the member is on active duty or called to active duty status in support of a contingency operation. Such activities include, but are not limited to: short-notice deployment, child care and school activities, financial and legal arrangements, counseling, and rest and recuperation.

Authority:

29 C.F.R. § 825.126.

FMLA – DEFINITION – NOTICE TO EMPLOYER
(LEAVE FORESEEABLE)

The FMLA requires that employees give timely notice to their employers of the need to take leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. Timely notice as used in these instructions means that the Plaintiff must have notified the Defendant of [his or her] need for leave at least thirty (30) days before the leave was to begin.

Notes on Use:

Examples of situations where the need for leave is foreseeable include an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service member.

Authority:

29 CFR § 825.302(a).

FMLA – DEFINITION – NOTICE TO EMPLOYER
(LEAVE UNFORESEEABLE)

The FMLA requires that employees give timely notice to their employers of the need to take leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. Timely notice as used in these instructions means that the Plaintiff must have notified the Defendant of [his or her] need for leave as soon as practicable after [he or she] learned of the need to take leave.

Notes on Use:

As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. *See, e.g., Wilkins v. Packerware Corp.*, 260 F. App'x 98, 104 (10th Cir. 2008).

Authority:

29 C.F.R. § 825.302(a).

FMLA – RIGHT TO REINSTATEMENT

The FMLA generally gives an employee the right following FMLA leave to be returned to the position held when the leave began or to an equivalent position.

Authority:

29 C.F.R. § 214.

FMLA – REINSTATEMENT – EQUIVALENT POSITION

An equivalent position is one that is almost identical to the employee’s former position in terms of pay, benefits and working conditions, and that involves substantially equivalent skill, effort, responsibility and authority.

Notes on Use:

Although the Tenth Circuit has not construed the definition of “equivalent position,” other circuits have addressed the various factors to consider when determining whether an employee returning from FMLA was reinstated to an “equivalent position.” In *Breeden v. Novartis Pharmaceuticals Corp.*, 646 F.3d 43 (D.C. Cir. 2011), the D.C. Circuit focused on 29 C.F.R. §825.215(f), in affirming summary judgment on Plaintiff’s interference claim alleging her employer failed to reinstate her to an “equivalent position.” The Court noted the Plaintiff’s claim failed because she focused on the “*de minimis*, intangible, and unmeasurable” aspects of the job to which she was reinstated, i.e. less prestige, among other things. The *de minimis* exception states: “[t]he requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to *de minimis*, intangible or unmeasurable aspects of the job.” 29 C.F.R. § 825.215(f). Defense counsel may consider proposing an instruction that addresses this exception in appropriate circumstances. See *Smith v. East Baton Rouge Parish School Board*, 453 F.3d 650 (5th Cir. 2006) (affirming summary judgment for employer and applying *de minimis* exception); *Mitchell v. Dutchmen Mfg.*, 389 F. 3d 746 (7th Cir. 2004) (affirming summary judgment for employer and applying *de minimis* exception) But see also *Breneisen v. Motorola, Inc.*, 512 F.3d 972 (7th Cir. 2008) (holding that issue of material fact existed regarding whether employee’s position on production line was equivalent to the process analyst position he held before taking FMLA leave).

Authority:

29 C.F.R. § 825.215(a).

FMLA – EXCEPTION TO REINSTATEMENT
(EMPLOYMENT UNAVAILABLE AT TIME OF REINSTATEMENT)

An employee is not entitled to reinstatement to the former or an equivalent position following FMLA leave if you find that, for reasons unrelated to the employee's FMLA activity, the employee would not have been employed by the employer when the employee requested reinstatement.

Notes on Use:

This instruction may be used in circumstances where the employee's position is eliminated while on FMLA leave and for reasons unrelated to the taking of such leave. Section § 825.216(a) of the regulations states: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period." The employee is, therefore, not entitled to job reinstatement if the employer can show that the employee would not otherwise have been employed at the time reinstatement was requested.

Authority:

29 C.F.R. § 825.216 (a)(1)

FMLA – EXCEPTION TO REINSTATEMENT
(EMPLOYEE SEEKING REINSTATEMENT IS A “KEY EMPLOYEE”)

The employee is not entitled to reinstatement to the former or an equivalent position following FMLA leave if you find the employee is a “key employee” and the denial of reinstatement is necessary to prevent substantial and grievous economic injury to the employer’s operations.

A “key employee” is an employee who is paid on a salary basis, is eligible to take FMLA leave, and who is among the highest paid ten percent of all the employees employed by the employer within 75 miles of the employer’s worksite.

In determining what constitutes a substantial and grievous economic injury, you may consider whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee.

Notes on Use:

Section 825.217(c)(1) of the FMLA regulations describes the method for determining whether an employee is among the highest paid ten percent. Section 825.217(c)(2) provides that no more than ten percent of the employer’s employees within 75 miles of the worksite may be “key employees.” Further, the term “salaried” as used in the FMLA has the same meaning as it does under the Fair Labor Standards Act. *See* Section 825.217(b), which states: “[t]he term ‘salaried’ means ‘paid on a salary basis,’ as defined in 29 CFR § 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.”

Authority:

29 C.F.R. § 825.217 and 29 C.F.R. § 825.218

FMLA – INTERFERENCE CLAIM – ELEMENTS

In order for the Plaintiff to prove [his] [her] claim that the Defendant interfered with [his] [her] right to take FMLA leave in violation of the FMLA, [he] [she] must prove by a preponderance of the evidence:

1. [He] [she] was entitled to FMLA leave;
2. Some adverse action by the Defendant interfered with [his][her] right to take FMLA leave; and
3. The Defendant's action was related to the Plaintiff's exercise or attempted exercise of [his][her] FMLA rights.

If you find that the Plaintiff has failed to prove one or more of these propositions by a preponderance of the evidence, then you must find against [him][her] on [his][her] interference claim and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proved all these elements by a preponderance of the evidence, then you must find in favor of the Plaintiff.

Authority:

29 U.S.C. § 2615(a)(1); *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 57 F.3d 1151 (10th Cir. 2009) *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002).

FMLA – INTERFERENCE CLAIM – ADVERSE ACTION

In order to satisfy the “adverse action” requirement for purposes of an FMLA interference claim, the Plaintiff must show that [he] [she] was:

- terminated from employment;
- prevented from taking the full 12 weeks of leave guaranteed by the FMLA;
- denied reinstatement following leave; or
- denied initial permission to take leave.

Notes on Use:

In *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1181 (10th Cir. 2006), the Plaintiff cited her termination as the adverse action at issue in her interference case. The Tenth Circuit noted, without deciding, that her employer’s giving her new duties and failure to train her upon her return from FMLA leave (which then culminated in her termination) might have supported such a claim.

Authority:

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1287 (10th Cir. 2007).

FMLA – INTERFERENCE CLAIM – “RELATED TO”

A Plaintiff can prevail on an interference claim if [he] [she] was denied [his] [her] substantive rights under the FMLA for a reason connected with [his] [her] FMLA leave.

Notes on Use:

An FMLA interference claim is based upon an entitlement theory of relief. In such a case, the employee must demonstrate his entitlement to the disputed leave by a preponderance of the evidence and a denial, interference or restraint of this right is a violation regardless of the employer’s intent. *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 57 F.3d 1151, 1159 (10th Cir. 2009); *Bones v. Honeywell Int’l., Inc.*, 366 F.3d 869, 877 (10th Cir. 2004); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2002) (citation omitted).

Unlike an FMLA retaliation claim, where a Plaintiff must show a “causal connection” between the adverse action and the exercise of a right covered by the FMLA, under an interference theory the Plaintiff need only show the adverse action is “related to” the exercise of a right covered by the FMLA.

The requirement that an adverse action be “related to” the exercise of a right covered by the FMLA is most easily satisfied when a termination occurs while the employee is on leave. *See DeFreitas v. Horizon Investment Mgmt. Corp.*, 577 F.3d 1151, 1160. The timing in such cases has significant probative force. *Id.*, citing *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 995, 961 (10th Cir. 2002).

A reason for dismissal that is not sufficiently related to FMLA leave will not support recovery under the interference theory. *See McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (Summary judgment for employer affirmed where employee argued the same illness that led her to take FMLA leave caused her performance problems for which she was dismissed. The fact the leave and the dismissal both, independently, resulted from the same circumstance or event did not satisfy the “related to” requirement.). *See also, Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1009 (10th Cir. 2011) (“even if the FMLA entitles an employee to be absent from work, the employee’s violation of a notice-of-absence policy can constitute ‘[a] reason for dismissal that is unrelated to a request for an FMLA leave’”).

Authority:

29 C.F.R. § 825.216(a); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 995, 961 (10th Cir. 2002).

FMLA – INTERFERENCE – AFFIRMATIVE DEFENSE

If you find that the Defendant interfered with the Plaintiff's right to take FMLA leave, then you must find in the Plaintiff's favor unless you also find that the Defendant proved the adverse action would have occurred regardless of the Plaintiff's [request for] [taking] FMLA leave.

Notes on Use:

See, e.g., Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1287 (10th Cir. 2007) (Employer proved the employee, who was laid off during FMLA leave, would have been dismissed regardless of the employee's request for or taking of FMLA leave). *See also DeFreitas*, 577 F.3d 1151, 1161-62 (10th Cir. 2009), where the court found the employer did not meet this burden.

Authority:

29 C.F.R. § 825.216(a)(1); *DeFreitas v. Horizon Invest. Mgmt. Corp.*, 577 F.3d 1151, 1159-60 (10th Cir. 2009).

FMLA – RETALIATION CLAIM – ELEMENTS

In order for the Plaintiff to prove [his] [her] claim that Defendant retaliated against [him] [her] for taking FMLA leave, [he] [she] must prove:

1. Plaintiff engaged in FMLA protected activity;
2. Defendant took an action that a reasonable employee would have found materially adverse; and
3. A causal connection exists between the Plaintiff's FMLA protected activity and the Defendant's decision to take the materially adverse action against the Plaintiff.

If you find that the Plaintiff has failed to prove one or more of these propositions by a preponderance of the evidence, then you must find against [him][her] on [his][her] retaliation claim and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proved all these elements by a preponderance of the evidence, then you must find in favor of the Plaintiff.

Notes on Use:

The FMLA's retaliation clause is derived from Title VII and is intended to be construed in the same manner. *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006). Therefore, reference to the FFA Model Jury Instructions on Title VII may also be helpful to the practitioner.

Retaliation claims under the FMLA are subject to the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). See *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006).

The Tenth Circuit has questioned, but not decided, whether a mixed motive analysis may be applied to FMLA retaliation claims. See *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987 (10th Cir. 2011).

The timing of the employer's adverse action is typically the distinguishing factor between an interference claim and a retaliation claim. See, *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287-88 (10th Cir. 2007). For example, in a retaliation case, the employee may have successfully taken FMLA leave, returned to work, and then been adversely affected by an employment action based on incidents post-dating her return to work. See, e.g., *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1136-38 (10th Cir. 2003) (Sprint returned Doebele to her prior position after FMLA leave, but soon terminated her for alleged attendance problems following her return). If, however, the employer cites only factors predating the employee's return to work, she may also (or only) pursue an interference claim. *Campbell*, 478 F.3d at 1288 ("Campbell's termination was a foregone conclusion by the time she returned to work" from FMLA leave).

Authority:

29 U.S.C. § 2615(a)(2); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007).

FMLA – RETALIATION – MATERIALLY ADVERSE ACTION

A “materially adverse” action is any action by the employer that is likely to discourage a reasonable worker in the Plaintiff’s position from exercising [his] or [her] rights under the FMLA.

Notes on Use:

In *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006), the Tenth Circuit expressly declared that the Supreme Court’s rejection of its “adverse employment action standard” in favor of a “materially adverse” standard applied equally to FMLA retaliation claims as to Title VII retaliation claims. Therefore, reference to the FFA Model Jury Instructions for Retaliation may be helpful in construing this term.

Authority:

Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

FMLA – RETALIATION CLAIM – CAUSAL CONNECTION

A Plaintiff asserting an FMLA retaliation claim may satisfy the causal connection requirement by demonstrating a very close connection in time between the protected activity and the adverse action.

Notes on Use:

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1290 (10th Cir. 2007); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006) (termination occurring within 6 weeks after employer learned employee would take FMLA leave held sufficiently close to show causation).

Until recently the Tenth Circuit has consistently described the causation requirement in FMLA cases as requiring a “causal connection.” However, in *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987 (10th Cir. 2011), the Tenth Circuit used the “motivating factor” language prevalent in Title VII precedent to describe the causation requirement for that FMLA case. Given that the Tenth Circuit has already recognized FMLA claims should be construed consistently with Title VII precedent, “motivating factor” may be an acceptable substitution for “causal connection.”

See also the FFA Model Jury Instructions for Retaliation claims for additional guidance.

Authority:

Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1290 (10th Cir. 2007); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1172 (10th Cir. 2006).

FMLA – RETALIATION CLAIM – PRETEXT

The Plaintiff claims that the Defendant's reason for its adverse employment action is not the true reason, but instead it is a pretext (an excuse) for retaliation. If you do not believe the reason[s] the Defendant employer offered for [describe adverse action], then you may, but are not required to, infer that retaliation was the factor that made the difference in the Defendant's decision.

The Defendant claims that it had legitimate reasons for [describe adverse employment action]. The Plaintiff, on the other hand, claims that the Defendant's asserted reasons are a mere pretext (excuse) to cover up a retaliatory motive. The Plaintiff may show that the Defendant's stated reasons for its decisions are pretextual (not the true reason) in any of several ways. Some examples of ways (although these are not the only ways) in which you may determine that Defendant's stated reasons are pretext are [insert examples, as applicable]:

[Evidence that any one the of the Defendant's stated reasons for the decisions are false, contradictory, or implausible;]

[Evidence that the Defendant acted contrary to a written or unwritten company policy or an established company practice when [describe adverse action affecting the Plaintiff]; or]

[Evidence that the Defendant did not uniformly enforce its own rules; or]

[Evidence that the Defendant otherwise exhibited disturbing procedural irregularities in dealing with Plaintiff; or]

[The criteria used to evaluate the employee was entirely subjective.]

[The [describe adverse action] is closely related in time to Plaintiff's [insert protected FMLA activity here]]*

If you find pretext, you may, but are not required to infer that retaliation was the factor that made a difference in the employer's treatment of Plaintiff.

Notes on Use:

This instruction should be given when the Plaintiff contends that the Defendant's stated reason(s) for the adverse employment decisions are pretextual. *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002). As in Title VII retaliation cases, pretext in FMLA cases can be shown in any number of ways. *See Orr v. City of Albuquerque*, 531 F.3d 1210, 1215 (10th Cir. 2008). The enumerated ways for a Plaintiff to show pretext are typical but not exclusive. *See, e.g., Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). Additional examples may be used as applicable. The practitioner should research pretext cases as applicable to the context presented because the issue of pretext is a fact specific inquiry.

*In *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006), the Tenth Circuit declared that a Plaintiff relying on proximity in time must also present circumstantial evidence of retaliatory motive in order to satisfy the pretext element.

Authority:

Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006); *Burris v. Novartis Animal Health U.S.*, 309 F. App'x 241, 244 (10th Cir. 2009). *See also* FFA Model Jury Instructions on pretext for other statutory claims.

FMLA – ACTUAL DAMAGES

If you find that the Plaintiff has proven [his][her] claim by a preponderance of the evidence, you should award [him][her] any lost wages and benefits [he][she] would have received from the Defendant if [he][she] had [been granted FMLA leave][been reinstated following FMLA leave][[not been][adverse employment action]]. [You should then reduce this amount by any wages and benefits that the Plaintiff received from other employment during that time [that he would not otherwise have received]]. It is the Plaintiff's burden to prove that [he] [she] lost wages and benefits and their amount. If [he] [she] fails to do so for any period of time for which [he] [she] seeks damages, then you may not award damages for that period of time.

Authority:

29 U.S.C. § 2617(a)(1)

FMLA – ACTUAL DAMAGES – MITIGATION

The Defendant argues that the Plaintiff's claim for lost wages and benefits should be reduced by [describe the reduction]. If you find that (1) the Plaintiff did not take reasonable actions to reduce [his][her] damages, and (2) that the Plaintiff reasonably might have found comparable employment if [he][she] had taken such action, you should reduce any amount you might award the Plaintiff for [lost wages] [benefits] by the amount [he][she] reasonably would have earned during the period for which you are awarding [lost wages] [benefits]. The Defendant must prove both that the reduction should be made and its amount.

Authority:

29 U.S.C. § 2617(a)(1).

FMLA – ACTUAL DAMAGES – WHERE NO LOST WAGES OR BENEFITS

If you find that the Plaintiff has proven [his] [her] claim by a preponderance of the evidence, you should award as damages any actual monetary losses sustained as a result. It is Plaintiff's burden to prove that [he] [she] had monetary losses and their amount.

Notes on Use:

This instruction should be given only if Plaintiff did not lose wages or benefits, such as the cost of care. 29 U.S.C. § 2617(a)(1)(A)(i)(II).

Authority:

29 U.S.C. § 2617(a)(1).

FMLA – GOOD FAITH DEFENSE

If you find that the Plaintiff has proven [his] [her] claim by a preponderance of the evidence, then you must decide whether the Defendant acted in good faith. You must find the Defendant acted in good faith if it has proved that when the Defendant [insert Defendant's act or omission], the Defendant reasonably believed that its actions complied with the FMLA.

Notes on Use:

A prevailing Plaintiff in an FMLA case is entitled to liquidated damages in an amount equal to actual damages plus interest. 29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.401(c). The FMLA allows an employer to avoid liquidated damages if it can show that its act or omission was made in good faith and that it had reasonable grounds for believing it was acting in accordance with the FMLA.

Authority:

29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.401(c).

FLSA – STATUTE INVOLVED

The Plaintiff has brought claim[s] under the Fair Labor Standards Act, also referred to as FLSA. FLSA is a federal law that provides for the payment of [minimum wage for each hour worked] [for the payment of overtime compensation for all hours in excess of forty in one week], among other requirements. The purpose of FLSA is to eliminate the existence of labor conditions which are detrimental to the minimum standard of living necessary for health, efficiency, and general well-being of workers.

[An employer must pay an employee overtime compensation for hours worked in excess of forty in any workweek. Overtime compensation must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked over forty hours in that workweek.]

[An employer must pay at least minimum wage for all hours worked by an employee during each workweek.]

In this case, the Plaintiff claims that the Defendant did not pay the Plaintiff the [minimum wage] [overtime pay] that was required by law. [FLSA contains numerous exemptions and exceptions to these general rules. In this case, the Defendant claims that the following exemptions and/or exceptions apply:_____.]

Notes on Use:

1. In the first and last paragraphs, insert the applicable parenthetical(s).
2. The second and/or third paragraphs should be inserted when applicable.
3. Cases under the FLSA are very fact intensive. As a result, many of these instructions will need to be tailored to fit the facts.

Authority:

29 U.S.C. §§ 202(a), 206, 207.

FLSA – ELEMENTS OF CLAIM FOR OVERTIME PAY

In order for the Plaintiff to establish [his] [her] claim for the Defendant's failure to pay [him][her] overtime pay in violation of the FLSA, [s]he must prove the following by a preponderance of the evidence:

1. Plaintiff was an employee of the Defendant during the period _____; and
2. In the Plaintiff's work for the Defendant, the Plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000]; and
3. Defendant failed to pay the Plaintiff overtime pay for all hours Plaintiff worked, as that term is defined by Instruction No. ____, for the Defendant in excess of forty in one or more workweeks.

["Commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.]

"Overtime pay" means an amount of at least one and one-half times an employee's regular rate of pay, as that term is defined by Instruction No. ____, for all hours worked in excess of 40 in a workweek.

If you find that the Plaintiff has failed to prove one or more of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] claim for overtime pay and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proven all three propositions by a preponderance of the evidence, then you must [find in (his) (her) favor and against the Defendant] [unless the Defendant has proven that [one of] the exemptions to the FLSA applies to Plaintiff].

Notes on Use:

1. Issues in paragraphs 1 and 2 will often be resolved before trial by stipulation of the parties or by pretrial orders.
2. The first element in the list should be used only if employee status or dates of employment are disputed. The test for whether a worker is an employee is the so-called

“economic reality” test that requires consideration of “(1) the degree of control exerted by the alleged employer over the worker; (2) the worker’s opportunity for profit or loss; (3) the worker’s investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work.” *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (citing *United States v. Silk*, 331 U.S. 704, 716 (1947)). See also *Johnson v. Unified Gov’t of Wyandotte County/Kansas City*, 371 F.3d 723, 729 (10th Cir. 2004) (citing *Doty* and *Silk*). The Tenth Circuit also has noted that, “[a]n additional commonly considered factor is the extent to which the work is an integral part of the alleged employer’s business.” *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989). None of the factors is to be considered dispositive; the test is instead based on the totality of the circumstances. *Id.* If employment dates are disputed, insert the date or dates of relevant recovery period.

3. This second element in the list, the appropriate bracketed language, and one or both of the first two bracketed definitions after the list of elements should be inserted only when applicability of the FLSA is in dispute.
4. The language regarding regular rate of pay should be modified to reflect the specific circumstances of the case, based on applicable case law and the Department of Labor guidance published at 29 C.F.R. part 778.
5. In the final paragraph, the first bracketed statement should be used if the Court has held, or Defendant has conceded, that no FLSA exemption applies.
6. If the facts warrant it, the parties may choose to offer the following instruction concerning the non-waiver of rights under the FLSA: “The employee’s right to be paid overtime wages cannot be revoked by his employer or waived by the employee. For this reason, an employer cannot be excused from liability for a violation of the Fair Labor Standards Act even though some or all employees may have consented to be paid for less time than that required by the Fair Labor Standards Act.” *Baker v. Barnard Construction Co., Inc.*, 146 F.3d 1214, 1216 (10th Cir. 1998). An announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee’s right to compensation for work which he is actually suffered or permitted to perform. 29 U.S.C. § 216(c); 29 C.F.R. § 778.316. See *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945).

Authority:

29 U.S.C. § 207 (overtime wages); 29 U.S.C. § 203 (definitions).

FLSA – DEFINITION – WORKWEEK

“Workweek” means a regularly recurring period of seven days or 168 hours, as designated by the employer. [In this case, the parties have agreed that the workweek was from [day of week] at [time] to [day of week] at [time].]

Notes on Use:

1. This instruction is intended for use only when the Court determines that “workweek” should be defined to assist the jury. The bracketed language should be inserted if the parties have so stipulated.

Authority:

29 C.F.R. § 776.4 (and cases cited at n.13).

FLSA – DEFINITION – HOURS WORKED

“Hours worked” means all time spent by an employee that was primarily for the benefit of the employer or the employer’s business. Such time constitutes hours worked if the employer knew or should have known that the work was being performed.

Notes on Use:

1. This instruction is intended for use only when there is a dispute as to whether certain activities constitute hours worked, or there is a dispute as to the number of hours worked. The language should be modified to reflect the specific circumstances of the case based on case law and the U.S. Department of Labor guidance published at 29 C.F.R. part 785.
2. The FLSA does not define “work” but uses the term in its definition of “employ.” *See* 29 U.S.C. § 254. Under the Act, “employ” means “to suffer or permit to work.” 29 U.S.C. § 203(g); *see also* 29 C.F.R. § 785.6. For example, an employee may voluntarily continue to work at the end of a shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, past work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that the employee is continuing to work and the time is working time. 29 C.F.R. §785.11; *see Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951). For an employer to have “suffered” an employee to work and thereby be obligated to pay the employee for that time, it must know or have reason to believe that the employee is working. 29 C.F.R. § 785.11; *see Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951). An employer that has such knowledge cannot passively allow an employee to work without proper compensation, even if the work has not been done at the request of the employer.
3. The Supreme Court in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 598 (1946), stated that there need not be physical or mental exertion at all on the part of the employee and that, when the employee is required to give up a substantial measure of his or her time and effort, the time is hours worked. Accordingly, the workweek typically includes “all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.” *Id.* At 690-91. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes, however, are not considered “hours worked.” An employee is not completely relieved from duty unless the employee is told he or she can cease work until a definitely specified time. For example, a meal period of at least 30 minutes during which employee is completely relieved from duties does not ordinarily constitute hours worked, even if the employee is not permitted to leave the employer’s premises. 29 C.F.R. § 785.19. Additionally, rest or break periods of 20 minutes or less must be included in “hours worked.” 29 C.F.R. §785.18.

4. The FLSA, the U.S. Department of Labor's regulations, and case law impose various qualifications on these rules regarding compensable time. *See, e.g., IBP v. Alvarez*, 126 S.Ct. 514 (2005); 29 U.S.C. §§ 203(o) and 254; 29 C.F.R. § 785.9 (concerning preliminary and postliminary activities and contract and custom); *Mount Clemens Pottery*, 328 U.S. at 692 (the *de minimus* rule); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Pabst et al. v. Oklahoma Gas & Elec.*, 228 F.3d 1128 (10th Cir. 2000); 29 C.F.R. §§ 553.221(c); 785.17 (on-call time); 29 C.F.R. § 785.18 (rest time); 29 C.F.R. § 785.19 (meal time); 29 C.F.R. § 785.18 (sleeping time); 29 C.F.R. § 785.23 (employees residing on employer's premises or working at home); 29 C.F.R. §§ 785.27-785.32 (training time); 29 C.F.R. §§ 785.33-785.41 (travel time).
5. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his own purposes are not "hours worked."

Authority:

Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 598 (1946); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (citing *Anderson* and *Wantock* with approval); 29 U.S.C. §§ 203(g), 254; *see also* 29 C.F.R. pts. 553 & 785.

FLSA – DETERMINING HOURS WORKED

You must determine the number of hours worked by the Plaintiff based on all of the evidence. The Plaintiff bears the burden of proving [he][she] performed work for which [he][she] was not properly compensated. However, the Defendant is legally required to keep accurate records of its employees' hours worked. If you find that the Defendant failed to maintain records of the Plaintiff's hours worked or that the records it kept are inaccurate or inadequate, you must accept the Plaintiff's estimate of hours worked, unless you find it to be unreasonable. Damages may be awarded even though the result is only approximate. The employer cannot complain that the damages lack the precision that would have been possible if the employer had kept the records required by law.

Notes on Use:

1. Use this instruction only when the number of hours worked is in dispute.
2. The FLSA requires employers to “make, keep and preserve such records of the persons employed by him and of wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of the Department of Labor's Wage and Hour Division] as he shall prescribe by regulation or order . . .” 29 U.S.C. § 211(c). The Department of Labor's recordkeeping regulations may be found at 29 C.F.R. § 516. The FLSA does not create a private cause of action against an employer for noncompliance with record-keeping obligations. “The employer cannot complain that the damages lack the precision that would have been possible if the employer had kept the records required by law.” *See Baker v. Barnard Constr. Co.*, 146 F.3d 1214, 1220 (10th Cir. 1998). Instead, the employees are to be awarded compensation on the most accurate basis possible. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The Plaintiff bears the burden of proving the extent of any uncompensated work, but may satisfy that burden by “just and reasonable inference.” *Id.* Once the Plaintiff has produced such evidence of uncompensated work, “the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.” *Id.*

Authority:

See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946); *Baker v. Barnard Constr. Co.*, 146 F.3d 1214, 1220 (10th Cir. 1998); *see also* 29 U.S.C. §§ 203, 254.

FLSA – “REGULAR RATE” OF PAY (GENERAL)

The “regular rate” of pay is the hourly rate actually paid the employee for the normal, nonovertime workweek for which he was employed. The regular rate of pay is determined by dividing the employee’s total compensation for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The regular rate under the Act is a rate per hour.

Notes on Use:

1. Employees may be compensated on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exclusions.
2. Per the regulations which took effect May 5, 2011, if the employee is employed 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. If an employee is hired a salary of \$350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee’s regular rate of pay is \$350 divided by 35 hours, or \$10 per hour. When the employee works overtime the employee is entitled to receive \$10 for each of the first 40 hours and \$15 (one and one-half times \$10) for each hour thereafter. If an employee is hired at a salary of \$375 for a 40-hour week the regular rate is \$9.38 an hour. 29 C.F.R. § 778.113(a).

Authority:

Walling v. Youngerman-Reynolds Hardwood Corp., 325 U.S. 419, 424 (1945) (citations omitted); *Chavez v. City of Albuquerque*, 630 F.3d 1300 (10th Cir. 2011). See 29 U.S.C. §207(e); 29 C.F.R. §§ 778.108, 778.109. See also 29 C.F.R. §§ 778.107-778.122 (principles for computing overtime based on the regular rate); 29 C.F.R. §§ 778.200-778.224 (statutory exclusions).

FLSA – “REGULAR RATE” OF PAY (FLUCTUATING WORKWEEK)

An employee employed on a salary basis (as that term is defined in FLSA – DEFINITION – SALARY BASIS below) may work hours that vary from workweek to workweek. Under those circumstances, the regular rate of pay equals the amount of the salary divided by the total number of hours worked. The FLSA permits the employer to pay such a salary as compensation for whatever hours the employee is called upon to work in a workweek, whether few or many, if the employer and employee have a clear mutual understanding that this is their pay arrangement. Such a pay arrangement does not violate the FLSA if:

1. The regular rate is not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and
2. The employer pays the employee for all hours worked in excess of forty in a workweek at a rate not less than one-half [his] [her] regular rate of pay.

Notes on Use:

1. The regular rate of pay for fluctuating workweeks may apply when an employee works a varied schedule from workweek to workweek. The most common circumstance in which it is used is when an employee has been misclassified as an exempt employee.

Authority:

29 C.F.R. § 778.114(a); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008).

FLSA – ELEMENTS OF CLAIM FOR MINIMUM WAGES

In order for the Plaintiff to establish [his] [her] claim for the Defendant's failure to pay [him][her] minimum wage in violation of the FLSA, [s]he must prove the following by a preponderance of the evidence:

1. Plaintiff was an employee of the Defendant during the period _____; and
2. In the Plaintiff's work for the Defendant, the Plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least \$500,000]; and
3. Defendant failed to pay the Plaintiff minimum wage for all hours worked by the Plaintiff during one or more workweeks.

[The term "commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.] If you find that the Plaintiff has failed to prove either or both of these propositions by a preponderance of the evidence, then you must find against [him] [her] on [his] [her] minimum wage claim and in favor of the Defendant.

If, on the other hand, you find that the Plaintiff has proven all three propositions by a preponderance of the evidence, then you must [find in (his) (her) favor and against the Defendant] [unless the Defendant has proven that [one of] the FLSA exemption[s] applies].

Notes on Use:

1. The first element in the list should be used only if employee status or dates of employment are disputed. Insert the date or dates of relevant recovery period.
2. This second element in the list, the appropriate bracketed language, and one or both of the first two bracketed definitions after the list of elements should be inserted only when applicability of the FLSA is in dispute.
3. In the final paragraph, the first bracketed statement should be used if the Court has held, or Defendant has conceded, that no FLSA exemption applies.

Authority:

29 U.S.C. § 206 (minimum wage); 29 U.S.C. § 203 (definitions).

FLSA – APPLICABLE MINIMUM WAGE RATE[S]

The minimum wage [rate] [rates] applicable in this case [is] [are] as follows:

[July 24, 2007 to July 23, 2008 -- \$5.85 per hour]

[July 24, 2008 to July 23, 2009 – \$6.55 per hour]

[July 24, 2009 to date – \$7.25 per hour.]

You may have heard about other minimum wage rates that may be applicable in certain states or under certain circumstances. You must not consider any minimum wage rates other than those listed above.

Notes on Use:

1. This Instruction is intended for use only when the Plaintiff claims unpaid minimum wage under the FLSA. Select the minimum wage rate(s) applicable to the period of time at issue.
2. If Plaintiff also asserts a claim based upon state law, this Instruction should be modified to clarify which rates apply to the respective claims.
3. Depending on the applicable statute of limitations and the time period in which alleged amounts should have been paid to the Plaintiff(s), more than one applicable minimum wage rate may have to be used.

Authority:

29 U.S.C. § 206(a)(1).

FLSA – MINIMUM WAGE CREDIT FOR BOARD AND LODGING

In determining whether an employer has paid the minimum wage, the employer is entitled to a credit for the reasonable cost it incurred in furnishing board, lodging or other facilities to an employee if the employer regularly provided the board, lodging, or other facilities for the benefit of the employee.

Notes on Use:

1. This instruction is intended for use only when the Defendant claims credit for board and/or lodging. The instruction should be modified to reflect the specific circumstances of the case.
2. “Other facilities,” as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment. 29 C.F.R. § 531.32.

Authority:

29 C.F.R. § 531.29.

FLSA – EXEMPTIONS – GENERAL

In this case, the Defendant claims that the [minimum wage] [overtime pay] law does not apply because the Plaintiff is exempt from these requirements. The exemption[s] claimed by the Defendant [is] [are] [insert applicable exemption(s)]. To establish that the Plaintiff is exempt from the FLSA's [minimum wage] [overtime requirements], Defendant must show the Plaintiff fits plainly and unmistakably within the exemption's terms.

Notes on Use:

1. The exemptions to the FLSA are to be narrowly construed.
2. Generally this issue will be resolved before trial through stipulation of the parties or by pretrial orders.

Authority:

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008); *Reich v. Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993).

FLSA – EXECUTIVE EMPLOYEE EXEMPTION

In order for the Defendant to establish that the Plaintiff was an exempt executive employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. _____) at a rate not less than \$455 per week; and
2. Plaintiff's primary duty was management of [(the enterprise in which the Plaintiff was employed) or (a customarily recognized department or subdivision of the enterprise in which the Plaintiff was employed)]; and
3. Plaintiff customarily and regularly directed the work of at least two or more other fulltime employees or their equivalent; and
4. Plaintiff had authority to hire and fire other employees, or the Plaintiff's suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees were given particular weight.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

“Customarily and regularly” means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Notes on Use:

1. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). This amount is exclusive of board, lodging or other facilities. See 29 C.F.R. § 541.606(b).
2. Generally, “management” includes activities such as interviewing, selecting, and training of employees; setting and adjusting employee rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and

controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

Authority:

29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.101-541.106, 541.700.

FLSA – ADMINISTRATIVE EXEMPTION

In order for the Defendant to establish that the Plaintiff was an exempt administrative employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. _____) at a rate not less than \$455 per week; and
2. Plaintiff's primary duty was the performance of office or non-manual work directly related to the management or general business operations of the Defendant or the Defendant's customers; and
3. Plaintiff's primary duty included the exercise of discretion and independent judgment with respect to matters of significance.

"Primary duty" means the principal, main, major or most important duty that the employee performs.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66, or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). This minimum amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
3. In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for a teacher in the educational establishment where Plaintiff is employed. 29 C.F.R. § 541.600(c). *See* 29 C.F.R. § 541.204(a)(1).
4. Work directly related to management or general business operations includes work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R. § 541.201(b).
5. Factors to consider when determining whether an employee exercises "discretion and independent judgment with respect to matters of significance" include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement

management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R §541.202(b).

Authority:

29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.200-541.204, 541.700(a).

FLSA – LEARNED PROFESSIONAL EXEMPTION

In order for the Defendant to prove that Plaintiff was an exempt learned professional employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. _____) at a regular rate of not less than \$455 per week; and
2. Plaintiff's primary duty was the performance of work requiring advanced knowledge in a field of science or learning.

"Primary duty" means the principal, main, major or most important duty that the employee performs.

"Advanced knowledge" means work that is predominantly intellectual in character, and that requires the consistent exercise of discretion and judgment. Advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605. The salary basis and minimum salary requirements are inapplicable to certain employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304. This amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).
3. "Field of science or learning" includes traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status. 29 C.F.R. § 541.301(c). This instruction should be modified, as appropriate, for employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

Authority:

29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.301, 541.700(a).

FLSA – CREATIVE PROFESSIONAL EXEMPTION

In order for the Defendant to prove that the Plaintiff was an exempt creative professional employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on a salary basis (as defined in Instruction No. ____) at a rate not less than \$455 per week; and
2. Plaintiff's primary duty was performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

"Primary duty" means the principal, main, major or most important duty that the employee performs.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See*, 29 C.F.R. § 541.605.
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). This amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).
3. Recognized fields of artistic and creative endeavor include music, writing, acting and the graphic arts. 29 C.F.R § 541.302(b).
4. The performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor is distinguished from routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and may depend on the extent of the invention, imagination, originality or talent exercised by the employee. 29 C.F.R § 541.302(a) and (b).
5. The following are types of positions that may qualify for the creative professional exemption: actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers; and persons

holding the more responsible writing positions in advertising agencies. 29 C.F.R. §541.302(c).

6. Journalists may satisfy the duties requirement for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent; performing on the air radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator. *See* 29 C.F.R. § 541.302(d).
7. The creative professional requirement generally is not met by a person who is employed as a copyist, as an animator of motion-picture cartoons, or as a retoucher of photographs. 29 C.F.R. § 541.302(c). Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. *See*, 29 C.F.R. § 541.302(d).

Authority:

29 C.F.R. § 541.302.

FLSA – COMPUTER PROFESSIONAL EMPLOYEE EXEMPTION

In order for the Defendant to prove that the Plaintiff was an exempt computer professional employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff was compensated on [(a salary basis as defined in Instruction No. ____ at a rate not less than \$455 per week) or (at a rate not less than \$27.63 per hour)]; and
2. Plaintiff was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field; and
3. Plaintiff's primary duty consisted of at least one of the following:
 - A. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
 - B. The design, development, documentation, analysis, creation, testing, modification of computer systems or programs, including prototypes, based on and related to use or system design specifications;
 - C. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - D. A combination of the aforementioned duties, the performance of which requires the same level of skills.

“Primary duty” means the principal, main, major or most important duty that the employee performs.

Notes on Use:

1. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.
2. The \$455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if Plaintiff is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, or monthly on a salary basis of \$1,971.66. Or \$380 per week, if employed in American Samoa by employers other than the Federal Government. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b). The \$455 per week amount is exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

Authority:

29 CFR 541.400.

FLSA – OUTSIDE SALES EXEMPTION

In order for the Defendant to establish that the Plaintiff was an exempt outside sales employee, the Defendant must prove each of the following by a preponderance of the evidence:

1. Plaintiff's primary duty was obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2. Plaintiff was customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

"Primary duty" means the principal, main, major or most important duty that the employee performs.

"Customarily and regularly" means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Notes on Use:

1. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences. 29 C.F.R. § 541.500.
2. The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" include work normally and recurrently performed every workweek; it does not include isolated or one-time tasks. 29 C.F.R. § 541.701.
3. An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration

(i.e., one or two weeks) should not be considered as the employer's place of business. 29 C.F.R. § 541.502.

Authority:

See 29 C.F.R. §§ 541.500 – 541.503; *Clements v. Serco, Inc.*, 530 F.3d 1224, 1226-27 (10th Cir. 2008).

FLSA – DEFINITION – SALARY BASIS

An employee is paid on a “salary basis” if the employee is regularly paid, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, and the amount is not subject to reduction because of variations in the quality or quantity of the work performed. [An employee is paid on a salary basis even if the employee’s salary is subject to reduction for one or more of the following reasons: (insert permissible deduction(s) at issue)]

Notes on Use:

1. Permissible deductions from an employee’s salary include:
 - A. Deductions when an employee is absent from work for one or more full days for personal reasons other than sickness or disability. 29 C.F.R § 541.602(b)(1).
 - B. Deductions for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation or loss of salary occasioned by sickness or disability. Deductions for full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted their leave allowance. Similarly, an employer may make a deduction from pay for absences of one or more full days if salary replacement benefits are provided under a state disability insurance law or under a state workers’ compensation law. 29 C.F.R §541.602(b)(2).
 - C. While the employer may not make deductions for an employee’s absence occasioned by jury duty, attendance as a witness or temporary military leave, the employer may offset any amounts received by the employee as jury fees, witness fees or military pay for a particular week against the salary for that particular week without loss of the exemption. 29 C.F.R § 541.602(b)(3).
 - D. Deductions for penalties imposed in good faith for infractions of safety rules relating to the prevention of serious danger in the workplace or to other employees. 29 C.F.R § 541.602(b)(4).
 - E. Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees. 29 C.F.R § 541.602(b)(5).
 - F. In the initial and final week of employment, the employer may pay a proportionate part of an employee’s salary for the time actually worked. 29 C.F.R § 541.602(b)(6).

- G. When an employee takes an unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. 29 C.F.R. § 541.602(b)(7).

Authority:

29 C.F.R § 541.602(a).

FLSA – DAMAGES

If you find in favor of the Plaintiff under Instruction No. ____ [and you find against the Defendant under Instruction No. ____], you must award the Plaintiff damages in the amount that the Plaintiff should have been paid, less what the Defendant actually paid the Plaintiff.

[The minimum wage amount that should have been paid is the number of hours worked in each workweek up to 40 hours, times the minimum wage applicable to that workweek, as set forth in Instruction No. ____.]

[The overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times the regular rate for that workweek, times one and one-half, as set forth in Instruction No. ____.]

You must calculate this amount [these amounts] separately [for each Plaintiff] for each workweek.

Notes On Use:

1. Insert the bracketed language in lines 1 and 2 if Defendant has asserted that the Plaintiff is an exempt employee.
2. Insert the second paragraph if the Plaintiff claims damages for a minimum wage violation.
3. Insert the third paragraph if the Plaintiff claims damages for an overtime pay violation.
4. In addition to any award of damages, an employer ordinarily is liable for an additional, equal amount of liquidated damages. 29 U.S.C. § 216(b). Under 29 U.S.C. § 260, such an award of liquidated damages is subject to an exception under which the court, “in its sound discretion,” may but need not decline to award all or a portion of this amount of liquidated damages if the employer “shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that [it] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA].” 29 U.S.C. §260; *Dep’t of Labor v. City of Sapulpa*, 30 F.3d 1285, 1289 (10th Cir. 1994) (holding that even if the trial court finds that the employer acted in good faith and reasonably, it may still award liquidated damages).” Good faith is a subjective test that requires “the employer have an honest intention to ascertain and follow the dictates of [the FLSA].” *City of Sapulpa*, 30 F.3d at 1289 (quotation omitted). Reasonableness “imposes an objective standard by which to judge the employer’s behavior.” *Id.*
5. The issue of whether a violation of the FLSA is willful under 29 U.S.C. § 255 differs in several ways from whether an employer’s violation of the FLSA was in good faith and based on a reasonable belief that its acts or omissions did not violate the FLSA under 29 U.S.C. § 260. First, willfulness affects whether a two- or three-year statute of limitations should be applied, whereas the good faith/reasonable belief standard only affects whether

the court may, in its discretion, decline to award a portion or the full amount of liquidated damages. Second, willfulness is a jury issue; good faith/reasonable belief is a decision for the court. Third, the employee bears the burden of proof in determining whether an employer's actions were willful; the employer bears the burden of proof in determining whether the good faith/reasonable belief standard applies. *Compare* 29 U.S.C. § 255 and 29 U.S.C. § 260.

Authority:

29 U.S.C. §§ 206, 207, 216.

FLSA – DAMAGES (ONLY HOURS WORKED SUBMITTED TO JURY)

If you find in favor of the Plaintiff under Instruction No. ____ [and you find against the Defendant under Instruction No. ____], you must determine the number of hours worked in each workweek, in the way you have been instructed to do in Instruction No. ____.

Notes on Use:

1. Use this instruction only where the parties have agreed or the court determines that the jury will be asked to decide the number of hours worked, but will not be asked to calculate damages. Such an instruction may be appropriate where, for example, the appropriate rate of pay is not in dispute and damages may be calculated as a matter of law once the number of hours worked is determined by the jury.

FLSA – WILLFUL VIOLATION (FOR PURPOSES OF THE STATUTE OF LIMITATIONS)

If you find in favor of the Plaintiff under Instruction No. ____ [and you find against the Defendant under Instruction No. ____], you must determine whether the Defendant's failure to pay [minimum wage and/or overtime] was willful. In order for the Plaintiff to establish that the Defendant's failure to pay [him][her] [minimum wage and/or overtime pay] was willful, [s]he must prove, by a preponderance of the evidence that the Defendant knew that its conduct was prohibited by the FLSA or showed reckless disregard for whether its conduct was prohibited by FLSA.

Notes on Use:

1. The FLSA permits an employee to seek back pay for up to two years before filing a lawsuit. But an employee may seek a third year of back pay if he or she proves that the employer's violations were willful. Therefore, there is no need to include a jury instruction on willfulness unless the Plaintiff seeks back wages for a period in excess of two years.
2. The issue of whether a violation of the FLSA is willful under 29 U.S.C. § 255 differs in several ways from whether an employer's violation of the FLSA was in good faith and based on a reasonable belief that its acts or omissions did not violate the FLSA under 29 U.S.C. § 260. First, willfulness affects whether a two- or three-year statute of limitations should be applied, whereas the good faith/reasonable belief standard only affects whether the court may, in its discretion, decline to award a portion or the full amount of liquidated damages. Second, willfulness is a jury issue; good faith/reasonable belief is a decision for the court. Third, the employee bears the burden of proof in determining whether an employer's actions were willful; the employer bears the burden of proof in determining whether the good faith/reasonable belief standard applies. *Compare 29 U.S.C. § 255 and 29 U.S.C. § 260.*

Authority:

29 U.S.C. § 255; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

**PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION**

November 2011

The Federal Judicial Center is making this document available at the request of the Advisory Committee on Civil Rules, in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the contents as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

INTRODUCTION

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provide a new pretrial procedure for certain types of federal employment cases. As described in the Protocols, their intent is to “encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.” Individual judges throughout the United States District Courts will pilot test the Protocols and the Federal Judicial Center will evaluate their effects.

This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific “pattern discovery” as a possible solution to the problems of unnecessary cost and delay in the litigation process. They also arrived at a consensus that employment cases, “regularly litigated and [presenting] recurring issues,”¹ would be a good area for experimentation with the concept.

Following the conference, Judge Lee Rosenthal convened a nationwide committee of attorneys, highly experienced in employment matters, to develop a pilot project in this area. Judge John Koeltl volunteered to lead this committee. By design, the committee had a balance of plaintiff and defense attorneys. Joseph Garrison² (New Haven, Connecticut) chaired a plaintiff subcommittee, and Chris Kitchel³ (Portland, Oregon) chaired a defense subcommittee. The committee invited the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) to facilitate the process.

¹ Civil Rules Advisory Committee, *Report to the Standing Committee*, 10 (May 17, 2010).

² Mr. Garrison was a panelist at the Duke Conference. He also wrote and submitted a conference paper, entitled *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocated for the adoption of model or pattern discovery tools for “categories of cases which routinely appear in the federal courts” and suggested the appointment of a task force to bring the idea to fruition.

³ Ms. Kitchel serves on the American College of Trial Lawyers Task Force on Discovery and Civil Justice, which produced the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, 268 F.R.D. 407 (2009). As a result of her role on the ACTL Task Force, Ms. Kitchel had already begun discussing possibilities for improving employment litigation with Judge Rosenthal when she attended the Duke Conference.

The group worked diligently over the course of one year. Committee members met at IAALS for valuable in-person discussions in March and July of 2011. Judge Koeltl was in attendance as well, to oversee the process and assist in achieving workable consensus. In addition, committee members exchanged hundreds of emails, held frequent telephone conferences, and prepared numerous drafts. The committee's final product is the result of rigorous debate and compromise on both sides, undertaken in the spirit of making constructive and even-handed improvements to the pretrial process.

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use as a basis for discussion.

The Federal Judicial Center will establish a framework for effectively measuring the results of this pilot project.⁴ If the new process ultimately benefits litigants, it is a model that can be used to develop protocols for other types of cases. **Please note:** Judges adopting the protocols for use in cases before them should inform FJC senior researcher Emery Lee, elee@fjc.gov, so that their cases may be included in the evaluation.

⁴ Civil Rules Advisory Committee, *Draft Minutes of April 2011 Meeting*, 43 (June 8, 2011).

INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

- a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.
- b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
 - i. Class actions;
 - ii. Cases in which the allegations involve only the following:
 - 1. Discrimination in hiring;
 - 2. Harassment/hostile work environment;
 - 3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
 - 4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
 - 5. Violations of the Family Medical Leave Act (FMLA);
 - 6. Violations of the Employee Retirement Income Security Act (ERISA).

If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

- c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

- d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

- a. **Concerning.** The term “concerning” means referring to, describing, evidencing, or constituting.
- b. **Document.** The terms “document” and “documents” are defined to be synonymous in meaning and equal in scope to the terms “documents” and “electronically stored information” as used in F.R.C.P. 34(a).
- c. **Identify (Documents).** When referring to documents, to “identify” means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.
- d. **Identify (Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

- a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.
- b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

- c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.
- d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.
- e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

- a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

- a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.
- b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.
- c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.
- d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.
- e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.
- f. The plaintiff's current resume(s).
- g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.
- h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

- i. Documents concerning the termination of any subsequent employment.
- j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

- a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.
- b. Describe the categories of damages the plaintiff claims.
- c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

- a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

- a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
 - i. The plaintiff and the defendant;
 - ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

- b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.
- c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.
- d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.
- e. The plaintiff's performance evaluations and formal discipline.
- f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.
- g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
 - i. Discipline;
 - ii. Termination of employment;
 - iii. Promotion;
 - iv. Discrimination;
 - v. Performance reviews or evaluations;
 - vi. Misconduct;
 - vii. Retaliation; and
 - viii. Nature of the employment relationship.
- h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.
- i. Job description(s) for the position(s) that the plaintiff held.
- j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.
- k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.
- l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

- m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.
- n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information that Defendant must produce to Plaintiff.

- a. Identify the plaintiff's supervisor(s) and/or manager(s).
- b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.
- c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.
- d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

**PRO SE CLINIC
EMPLOYMENT DISCRIMINATION CLAIM
DRAFT PLAINTIFF-SIDE INTERROGATORIES**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

XOXOXO,

Plaintiff(s),

v.

XOXOXO,

Defendant(s).

PLAINTIFF'S INTERROGATORIES

Under Rule 33 of the Federal Rules of Civil Procedure, Plaintiff directs these interrogatories to Defendant to be answered fully in writing and under oath within thirty days. These Interrogatories are continuing and require supplemental responses as provided by Rule 26(e) of the Federal Rules of Civil Procedure.

The words "me" and "my" refer to the Plaintiff.

The words and "you" and "yours" refer to the Defendant.

The words "Adverse Action" mean [describe the thing you say in your Complaint that the Defendant improperly did, like harassing, firing, demoting, or not hiring you]

The word "Discrimination" means [insert the type of illegal conduct you say in your Complaint that you experienced like (1) gender discrimination; (2) race discrimination; (3) age discrimination; (4) disability discrimination; (5) religious discrimination; (6) national origin discrimination; (7) sexual orientation discrimination; (8) sexual harassment; (9) hostile work environment; and/or (10) retaliation]

Interrogatories:

1. Describe your decision to take Adverse Action against me, by saying when you decided, providing all reasons for the decision, identifying all decision makers, and listing all information or policies you relied on in deciding.

Revised as of July 1, 2022.

This set of discovery requests is provided for informational purposes. If you wish to use these discovery requests, you should tailor them to reflect the facts of your case. You may request help from the FPSC if you need it.

2. Identify all documents supporting your decision to take Adverse Action against me, and for each specify the language supporting your decision.
3. Describe all attempts to notify me of any deficiencies in my performance or conduct during my employment, including any discipline, coaching, counseling, or performance management, whether verbal or written.
4. Identify all others you taken Adverse Action against for the same reason(s) you took the Adverse Action against me.
5. Describe every complaint of or expression of concern made to you about Discrimination, whether formal or informal, verbal or written, internal or external.
6. List and provide contact information for everyone who worked with me during while I was working for you.
7. Identify each person who has taken over my position (or any part of my duties) since I left.
8. Describe all communications you (including but not limited to human resources staff and management officials) had with me about the concerns I raised about issues in the workplace (including but not limited to the concerns I describe in the complaint).
9. Describe any investigation you made into the concerns I raised, including: a) Say what type of investigation you did; b) list the individuals you interviewed; c) list who who did the investigation; d)list all documents you reviewed for the investigation; and e) provide the result of the investigation, including if any discipline, reprimand, warning, or counseling occurred. (If you did not do an investigation, please say so.)
10. Describe every instance of discipline, coaching, counseling, or performance management, whether verbal or written, given to [insert name of person responsible for illegal conduct].
11. Describe each complaint (formal or informal, verbal or written, internal or external) made by anyone about me.
12. Describe all compensation and benefits you provided to me.
13. Identify the person(s) most knowledgeable about my employment.
14. Describe all training you provided to employees related to Discrimination during my employment.

15. Describe all of your policies and procedures, whether verbal or written, related to Discrimination in place during my employment.
16. For every affirmative defense in your Answer: a) describe all evidence upon which you base the affirmative defense; b) state the names, addresses, telephone numbers and email addresses of all persons with knowledge of those facts or evidence; and c) identify all documents and other tangible things which support or relate to your affirmative defense.
17. Describe all efforts you took to preserve documents and communications related to me and my employment
18. Identify each person you intend to call as a witness at trial, either in person, through deposition testimony, or through an affidavit and for each person, provide: a) The witness's full name and address; b) the witness's relationship to you; and c) a summary of his or her expected testimony.
19. List each person who helped to prepare answers to these discovery requests, and for each describe how they helped.

NAME
ADDRESS
PHONE
E-MAIL
Pro Se

CERTIFICATE OF SERVICE

I certify that on **Day, Month, Year**, I served this by putting it in United States mail, first class postage prepaid, addressed to:

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Pro Se

**PRO SE CLINIC
DISCRIMINATION EMPLOYMENT CLAIM
DRAFT PLAINTIFF-SIDE RFPs**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

XOXOXO,

Plaintiff(s),

v.

XOXOXO,

Defendant(s).

PLAINTIFF’S REQUESTS FOR PRODUCTION

Under Rule 34 of the Federal Rules of Civil Procedure, Plaintiff directs the following requests for production to Defendant to be responded to fully within thirty days. These requests for production are continuing and require supplemental responses as provided by Rule 26(e) of the Federal Rules of Civil Procedure.

The words “I” “me” and “my” refer to the Plaintiff.

The words and “you” and “yours” refer to the Defendant.

The words “Adverse Action” mean [describe the thing you say in your Complaint that the Defendant did improperly, like harassing, firing, demoting, or not hiring you]

The word “Discrimination” means [insert the illegal conduct you say in your Complaint you experienced, like (1) gender discrimination; (2) race discrimination; (3) age discrimination; (4) disability discrimination; (5) religious discrimination; (6) national origin discrimination; (7) sexual orientation discrimination; (8) sexual harassment; (9) hostile work environment; and/or (10) retaliation]

Please produce:

1. All documents you relied on in taking Adverse Action against me.
2. All documents relating to the Adverse Action against me.

Revised as of July 1, 2022.

This set of discovery requests is provided for informational purposes. If you wish to use these discovery requests, you should tailor them to reflect the facts of your case. You may request help from the FPSC if you need it.

3. All documents relating to any investigation conducted into any event I describe in the Complaint.
4. All documents related to any complaint made by me or about me.
5. All documents you provided to me or I provided to you any time before I filed my Complaint.
6. My entire personnel or employee file.
7. All supervisors' records and human resources' records (including communications, notes, and files) about me.
8. All documents referencing and/or relating to me and my job performance.
9. All documents supervisors looked at or considered in making performance reviews or appraisals of me.
10. All documents relating to any investigation you conducted in response to concerns I raised.
11. All documents relating to any complaint of Discrimination, whether formal or informal, verbal or written, internal or external.
12. All documents showing your policies, procedures, and training about discrimination in the work place.
13. All documents about assessments of your work culture and environment (including but not limited to issues of diversity, equity, and inclusion and compliance with federal and state anti-discrimination and retaliation laws and regulations).
14. All documents, excluding medical and financial information, comprising the entire personnel files of [insert name of person responsible for Discrimination].
15. All documents relating to any complaint (formal or informal, verbal or written, internal or external) made by anyone about [insert name of person responsible for Discrimination].
16. Produce all documents reflecting discipline, coaching, counseling, or performance management, whether verbal or written, given to [insert name of person responsible for Discrimination].

17. All documents showing compensation or benefits that were available to me during my employment or would have been available to me if my employment had continued to the present.
18. All documents you consulted, relied upon, or referenced in responding to any Interrogatory I submitted.

As appropriate:

19. All documents you provided to or received from any state or federal agency or department about my charge of Discrimination.
20. All documents relating to my filing of a charge of Discrimination with any state or federal agency or department.
21. All job postings (external or internal) for the position(s) you denied me.
22. All documents referencing and/or relating to the credentials of individuals who were you selected for the position(s) you denied me.
23. Produce all documents that reflect any disciplinary action for [list the reason the Defendant gave for doing what it did].
24. All documents including correspondence that contain any jokes or comments related to [gender, sexuality, race, age, disability, religion, national origin].

NAME
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Pro Se

CERTIFICATE OF SERVICE

I certify that on **Day, Month, Year**, I served this by putting it in United States mail, first class postage prepaid, addressed to:

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Pro Se

**PRO SE CLINIC
WAGE AND HOUR EMPLOYMENT CLAIM
DRAFT PLAINTIFF-SIDE INTERROGATORIES**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

XOXOXO,

Plaintiff(s),

v.

XOXOXO,

Defendant(s).

PLAINTIFF'S INTERROGATORIES

Under Rule 33 of the Federal Rules of Civil Procedure, Plaintiff directs these interrogatories to Defendant to be answered fully in writing and under oath within thirty days. These Interrogatories are continuing and require supplemental responses as provided by Rule 26(e) of the Federal Rules of Civil Procedure.

The words "me" and "my" refer to the Plaintiff.

The words and "you" and "yours" refer to the Defendant.

The words "Adverse Action" mean [describe the thing you say in your Complaint that the Defendant improperly did, like harassing, firing, demoting, or not hiring you]

The word "Discrimination" means [insert the illegal conduct you say in your Complaint you experienced like (1) gender discrimination; (2) race discrimination; (3) age discrimination; (4) disability discrimination; (5) religious discrimination; (6) national origin discrimination; (7) sexual orientation discrimination; (8) sexual harassment; (9) hostile work environment; and/or (10) retaliation]

Interrogatories:

1. Describe all compensation and benefits you provided to me.
2. Identify my job titles, specific and primary job duties, and job locations.

Revised as of July 1, 2022.

This set of discovery requests is provided for informational purposes. If you wish to use these discovery requests, you should tailor them to reflect the facts of your case. You may request help from the FPSC if you need it.

3. If you contend that any of my positions were exempt from the overtime provisions of the FLSA, identify the exemption you rely on, describe all tasks I performed that support your contention that my position was exempt, identify the person who determined that my position was exempt, state the date the exemption became effective, and identify all documents you relied on in determining that my position was exempt.
4. If you contend I was exempt from overtime, please describe the basis for that contention, describe all steps you took to verify the contention, and identify all facts, evidence and documents relating to the belief or contention.
5. Describe why you did not willfully violate the Fair Labor Standards Act.
6. Describe why you did not willfully violate the Colorado Wage Act and/or the Colorado Minimum Wage Act (and Wage Order).
7. Explain how your payroll system was managed during the relevant time. Your description should include: a) Computer software and computer systems; b) identification of the department managers; and c) the manner in which you stored and maintained this information.
8. Identify and Describe any contact or communication between you and any governmental agencies (*e.g.*, United States Department of Labor; Colorado Department of Labor and Employment; Internal Revenue Service; Colorado Department of Revenue) relating to your employees or employee pay, wages, pay deductions, overtime, minimum wage, working hours, state or federal taxes, unemployment, worker's compensation or to any actual or purported violation of the Fair Labor Standards Act ("FLSA"), the Colorado Wage Act and/or the Colorado Minimum Wage Act (and Wage Order), state or federal tax laws, or state laws relating to unemployment and/or worker's compensation.
9. For your affirmative defense(s) listed in of your Answer: a) describe and identify all facts and evidence upon which you base the affirmative defense; b) state the names, addresses, telephone numbers and email addresses of all persons with knowledge of those facts or evidence; and c) identify all documents and other tangible things which support or relate to your affirmative defense.
10. Describe all efforts you took to preserve all documents and communications related to Plaintiff and Plaintiff's employment.
11. Identify the person(s) most knowledgeable regarding Plaintiff's employment and the compensation provided by Defendant to Plaintiff to date.
12. Identify each person you intend to call as a witness at trial, either in person, through deposition testimony, or through an affidavit and for each person, provide: a) The

witness's full name and address; b) the witness's relationship to you; and c) a summary of his or her expected testimony.

13. List each person who helped to prepare answers to these discovery requests, and for each describe how they helped.

NAME
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Pro Se

CERTIFICATE OF SERVICE

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**PRO SE CLINIC
WAGE AND HOUR EMPLOYMENT CLAIM
PLAINTIFF-SIDE DOCUMENT REQUESTS**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

XOXOXO,

Plaintiff(s),

v.

XOXOXO,

Defendant(s).

PLAINTIFF’S REQUESTS FOR PRODUCTION

Under Rule 34 of the Federal Rules of Civil Procedure, Plaintiff directs these requests for production to Defendant to be responded to fully within thirty days. These requests for production are continuing and require supplemental responses as provided by Rule 26(e) of the Federal Rules of Civil Procedure.

The words “I” “me” and “my” refer to the Plaintiff.

The words and “you” and “yours” refer to the Defendant.

1. All documents relating to the number of hours I worked for you, including but not limited to, time sheets, payroll stubs, computer logs, and logs from time-tracking software for the relevant period.
2. All manuals, handbooks, policies, procedures, notices, or directives you issued, regarding employee compensation and benefits, including salary or hourly rates, overtime pay, bonus pay, commissions, merit raises, charge-backs, payroll deductions, paid time off, fringe benefits, incentives, health care coverage, disability, pension, expense reimbursement, or other similar forms of compensation or benefits.
3. All documents regarding your policies regarding the compensation of individuals with the same job duties as I have, or who do the same work as I did, during the relevant period.
4. All documents regarding conversations or other communications by either of us regarding my compensation.

Revised as of July 1, 2022.

This set of discovery requests is provided for informational purposes. If you wish to use these discovery requests, you should tailor them to reflect the facts of your case. You may request help from the FPSC if you need it.

5. All documents regarding the job descriptions, job duties, training and educational requirements, job classifications under the Fair Labor Standards Act, and corresponding pay scales for your employees who performed work like I did during the relevant period.
6. All documents regarding the percentage of time I spent on each task or duty in the my job description, and on each task or duty not listed in the my job description, during the relevant period.
7. All documents showing the rate the you charged customers for my work.

NAME
ADDRESS
PHONE
E-MAIL
Pro Se

CERTIFICATE OF SERVICE

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E-MAIL
Pro Se

**CLAIMS AGAINST PUBLIC ENTITIES
AND OFFICIALS
UNDER 42 U.S.C. § 1983**

Prepared and Presented by:

John A. Culver, Esq.
Benezra & Culver, L.L.C.
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Lakewood, CO 80228
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CLAIMS AGAINST PUBLIC ENTITIES AND OFFICIALS UNDER 42 U.S.C. § 1983

I. THE PROTECTIONS OF 42 U.S.C. § 1983

Claims¹ for violation of the federal constitution (and certain statutory violations) are brought under 42 U.S.C. § 1983, which is derived from § 1 of the Civil Rights Act of 1871, and provides that:

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at suit, suit in equity, or other proper proceeding for redress. For the purpose of this section, any act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

II. § 1983 DEFENDANTS

A. The State as a § 1983 Defendant.

By its terms, the Eleventh Amendment prohibits the federal courts from granting both monetary relief (“in law”) and prospective relief (“equity”) against the states. However, because if construed literally the Eleventh Amendment would prohibit federal courts from granting injunctive relief requiring the states to conform to the requirements of the constitution, the U.S. Supreme Court has rejected such a strict interpretation.

¹ Remedies under § 1983 are broad. All legal and equitable relief is available, including back pay, front pay, compensatory damages, punitive damages, and attorney fees and costs. Punitive damages, however, are only available against individual defendants in their individual capacities and not against governmental organizations, which are immune to punitive damages. (City of Newport v. Fact Concerts, 452 U.S. 247 (1981).)

In Ex Parte Young, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment does not deprive the Federal Courts of the power to require State officials to comply with the Federal Constitution. Under Young, State officials may be sued in both their individual and official capacities. Pursuant to an official capacity claim, which is the same as a claim against the State, the plaintiff may only obtain “prospective relief.” Prospective relief has been interpreted to include injunctive relief, and in the employment context, back pay, reinstatement, and sometimes front pay and attorney fees. (See, e.g., Russell v. Dunston, 896 F.2d 664 (2nd Cir. 1990) (order requiring State officials to reinstate plaintiff to medical leave status is prospective in nature); Nix v. Norman, 879 F.2d 429 (8th Cir. 1989) (injunction in form of order requiring defendant to clear plaintiff’s employment record of any false allegations of improper behavior is prospective relief not barred by the Eleventh Amendment); Barnes v. Bosley, 828 F.2d 1253 (8th Cir. 1987) (Eleventh Amendment does not bar prospective award of reinstatement and payment of salary from date of Court’s judgment; fact that district court stayed judgment pending appeal does not change results); Patterson v. Johnson, 787 F.2d 1245 (8th Cir.) (award of salary and other benefits from date to district court judgment until plaintiff is either reinstated or is awarded damages in lieu of reinstatement is prospective relief not barred by the Eleventh Amendment), cert. denied, 479 U.S. 828 (1986).)

B. Individual Defendants in Their Individual Capacities.

1. Direct Liability.

Section 1983 expressly authorizes the imposition of liability upon a person who “subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights” protected by federal law. To be held liable, the individual’s conduct must be the proximate cause of the plaintiff’s injury. (Monell v. Department of Social Services, 436 U.S. 658, 694 (1978) (conduct must be “the moving force of the constitutional violation”); City of Canton v. Harris, 109 S.Ct. 1197, 1203 (1989) (must be a “direct causal link between a municipal policy or custom, and the alleged constitutional deprivation”; liability may be imposed only when identified training deficiency is “closely related to the ultimate injury”; plaintiff must show “that the deficiency in training actually caused” the injury).)

2. Supervisory Liability.

Both governmental entities and individuals may be held responsible under § 1983 for the inadequate supervision of constitutional violations. That is so, even where the supervisor or policy maker with final decision making authority did not specifically engage in the unconstitutional conduct. However, mere negligence with respect to constitutional violations will not give rise to supervisor liability for either municipalities or individuals.

Supervisory officials may be held personally liable for “deliberate indifference” to the existence of unconstitutional conditions or conduct. (See, e.g., Canton, 109 S.Ct at 1197 (deliberate indifference to training of police officers); Meade v. Grubbs, 841 F.2d

1512, 1528 (10th Cir. 1988) (sheriff individually liable “for improperly hiring, training, supervising, and disciplining his deputies”); Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985) (imposing individual liability for supervisor who demonstrated tacit authorization of unconstitutional conduct and failed to take sufficient remedial action).)

In the employment context, “deliberate indifference” is defined as knowledge and acquiescence to unconstitutional conduct by subordinate employees. The deliberate indifference standard may be satisfied “when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm.” (Olsen v. Layton Hills Mall, 312 F.3d 1304, 1318 (10th Cir. 2002); see Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992), cert. denied, 113 S.Ct. 3038 (1993) (recognizing viability of supervisory liability where supervisor knows of illegal sexual harassment and acquiesces to it), citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3rd Cir. 1990) (denying qualified immunity defense to supervisors who acquiesced to acts of sexual harassment); Lankford v. City of Hobart, 73 F.3d 283, 287 (10th Cir. 1996) (following Woodward and Andrews in evaluating supervisors liability for acts of sexual harassment by non-supervisory employees).)

Similarly, governmental entities may be held responsible for deliberate indifference to constitutional violations where it is the governmental entity’s policy making officials that have exhibited that deliberate indifference. As the Harris Court noted:

To establish the existence of a governmental custom [of] failure to receive, investigate or act on complaints of violations of constitutional rights, a plaintiff must prove: (1) the existence of a continuing, wide spread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by governmental entity's policy-making officials after notice to the officials of the misconduct; and (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.

(831 F.2d at 503.)

However, a pattern of misconduct is not always required. "Although a single incident generally will not give rise to liability, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." (Olsen, 312 F.3d at 1318)(internal citations omitted).)

3. The Qualified Immunity Defense.

Governmental employees who are sued in their individual capacities may be entitled to qualified immunity. Pursuant to the dictates of the U.S. Supreme Court's decision in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), [g]overnment officials performing discretionary functions [are generally shielded] . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The key inquiry is the "objective reasonableness" of the official's conduct in light of the legal rules that were "clearly established" at the time the action was taken. (See Melton, 879 F.2d at 727; Wulf v. City of Wichita, 883 F.2d 842, 864 (10th Cir. 1989); Considine v. Adams County, 910 F.2d 695, 702 (10th Cir. 1990).) Qualified immunity for a government

official is not appropriate where “in the light of pre-existing law, the unlawfulness . . . [is] apparent.” (See Anderson v. Creighton, 483 U.S. 635 (1987).)

To defeat qualified immunity, the particular action in question need not have previously been held unlawful. (Anderson, 483 U.S. at 643.) Nor must there even be a strict factual correspondence between the cases establishing the law and the case at hand. (Garcia By Garcia v. Miera, 817 F.2d 650, 657 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988).) Rather, the Tenth Circuit requires only “some but not precise factual correspondence.” (Id., quoting People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 144 (3rd Cir. 1984). See also Johnson v. Martin, 195 F.3d 1208, 1217-20 (10th Cir. 1999) (“We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Instead we merely require the parties to make a reasonable application of existing law to their own circumstances”).) “It is incumbent upon governmental officials ‘to relate established law to analogous factual situations.’” (Garcia, 817 F.2d at 657.)

4. Qualified Immunity and Discovery.

Defendants may attempt to postpone discovery by raising the qualified immunity defense and seeking a stay of discovery based upon that defense. However, if the complaint alleges a violation of clearly established law, Defendants will be allowed discovery concerning, at least, the qualified immunity defense. (See Maxey by Maxey v. Fulton, 890 F.2d (10th Cir. 1989); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988) (“Once the ‘qualified immunity’ defense has

been raised, the court must allow the plaintiff a limited opportunity allowed in Fed.R.Civ.P. Rules 12(b)(6) and 56 to come forward with facts or allegations sufficient to show that the defendant's alleged conduct violated the law and that the law was clearly established when the violation occurred").) Moreover, if the plaintiff has alleged claims for which the qualified immunity defense is inapplicable, such as claims against the governmental entity itself or overlapping statutory claims, discovery should be allowed with respect to those claims, even though they overlap factually. This is so, because in Maxey, the Court held that "qualified immunity does not shield governmental officials from all discovery, but only from discovery which is either avoidable or overly broad."² (See Maxey, 890 F.2d at 282, emphasis added).)

5. Interlocutory Appeals.

Courts of Appeal normally have jurisdiction only over final decisions of the District Courts. (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Timpanogos Tribe v. Conway, et al., 286 F.3d 1195, 1199 (10th Cir. 2002) (citing to 29 U.S.C. § 1291).) While interlocutory review of certain "collateral orders" may be permitted, such review is limited to extraordinary circumstances. The Tenth Circuit has noted that it has "jurisdiction over an extremely narrow class of claims raised interlocutorily. The collateral order doctrine sets a high bar for any interlocutory appeal . . ." (Timpanogos, 286 F.3d at 1200.)

² Of course, the qualified immunity defense is not available to the entity defendants, but only to the individually named defendants. (Owen v. City of Independence, 445 U.S. 622 (1980) (qualified immunity of City officials is not a defense to the City).)

Defendants are entitled to an interlocutory appeal from a trial court's denial of a motion for summary judgment based upon the assertion of qualified immunity or its failure to rule prior to trial. The filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. (See, e.g., Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982); Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985); Mitchell v. Forsyth, 473 U.S. 511 (1985) (interlocutory appeal permitted from denial of qualified immunity defense); Steward v. Donges, 915 F.2d 572, 574-79 (10th Cir. 1990) (same); Workman v. Jordan, 958 F.2d 332, 336 (10th Cir. 1992) (permitting interlocutory appeal based on Court's failure to rule on qualified immunity defense itself prior to trial); Lowe v. Town of Fairland, Oklahoma, 143 F.3d 1378 (10th Cir. 1998) (interlocutory appeal from Court's failure to rule on qualified immunity defense prior to trial).)

However, even where the qualified immunity defense is implicated, interlocutory appeals have been permitted only under limited circumstances.³ For example, in Johnson, the U.S. Supreme Court held that a district court's denial of summary judgment based on qualified immunity was not immediately appealable where its order addressed only a question of the sufficiency of the evidence. (Id. at 313.) In Graham v.

³ Thus, interlocutory appeals from a collateral order are only permitted where the order: "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment." (Johnson v. Jones, 515 U.S. 304, 310-11 (1995), citing to Cohen, 337 U.S. at 541; Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993), quoting Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).) Additionally, in determining whether to permit an interlocutory appeal, prejudice caused by undue delay, as well as the unwise use of appellate resources, must be considered. (Johnson, 515 U.S. at 316-17.)

Gray, 827 F.2d 679, 681-82 (10th Cir. 1987), the Tenth Circuit refused to permit interlocutory review of an order denying a request to stay discovery based on the qualified immunity defense, because it was not an appealable final order even under the collateral order doctrine. (*Id.* at 682; *see also Lugo v. Alvarado*, 819 F.2d 5, 7-8 (1st Cir. 1987) (holding that interlocutory review is not available from order refusing to stay discovery based on qualified immunity)⁴.)

Moreover, the Tenth Circuit has noted that “[b]ecause the district court is divested of jurisdiction to proceed to trial by the filing of a notice of interlocutory appeal raising a double jeopardy or qualified immunity issue, there is the risk that such interlocutory appeals will be subject to abuse.” (*See Steward v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990).) In that vein, the Court further warned in *U.S. v. Hines*, 689 F.2d 934, 936-37 (10th Cir. 1982) that:

The divestiture of jurisdiction rule, applicable even when a defendant files a notice of appeal, should not leave the trial court powerless to prevent intentional dilatory tactics by enabling a defendant unilaterally to obtain a continuance at any time prior to trial by merely filing a motion, however frivolous, and appealing the trial court’s denial thereof.

Pursuant to *Hines* and *Steward*, the potential misuse of interlocutory review can be prevented if the district court “(1) after a hearing and (2) for substantial reasons given, (3) found the claim to be frivolous.” (*See Steward*, 915 F.2d at 576; *Hines*, 689 F.2d at 937.) “Upon such a procedure and an explicit finding that the claim raised on appeal was frivolous, the ‘district court should not be divested of jurisdiction.’” (*Id.*)

⁴ While the *Lugo* Court refused to rule out the possibility that an interlocutory appeal may be permissible from a discovery order based on the qualified immunity defense, its example of such a circumstance was “a § 1983 case for damages only in which the Judge inordinately delays decision on qualified immunity but allows extensive discovery.” (*Id.* at 7-8, fn 3.)

After certification that an interlocutory appeal is frivolous, the case may proceed to trial while the appeal is pending. (See Langley v. Adams County, 987 F.2d 1473, 1477 (10th Cir. 1993) (after certification, both the district court and the court of appeals have jurisdiction to proceed).)

C. Municipalities

A governmental entity may be held liable pursuant to § 1983 for the conduct of officials “whose acts may fairly be said to represent official policy.” (See Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978).) An official policy is (1) a . . . decision that is officially adopted and promulgated by the municipalities’ law-making officers or by an official to whom the law-makers have delegated policy-making authority; or (2) a persistent wide-spread practice of County officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. (See Monell, 436 U.S. at 691; Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984); Bennett v. City of Slydate, 735 F.2d 861, 862 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016 (1985).)

The key inquiry in determining whether a particular employment decision was made pursuant to municipal policy is whether the offending official had “final decision making authority” over the particular subject matter. The answer to that question is to be found in state or municipal law. (See St. Lewis v. Praprotnik, 108 S.Ct. 915 (1988); Pembaur v. Cincinnati, 475 U.S. 469 (1986).)

Importantly, illegal acts by supervisors or managers who have been delegated final decision making authority may subject an entity to liability. For example, in Melton v. Oklahoma City, 879 F.2d 706 (10th Cir. 1989), rev'd on other grounds at 928 F.2d 920 (10th Cir. 1991) (en banc), the Court held that the City was responsible for the Chief of Police's firing of a police officer where the City Charter gave the City Manager final policy-making authority over City employment decisions and where the City Manager approved the firing. The City Manager's ratification of the violation brought the City's actions within the realm of municipal liability. (Id. at 725.)

Custom or Practice are typically more difficult to establish. To establish that conduct was made pursuant to municipal custom, the plaintiff must establish prior examples of the unconstitutional conduct. Such proof requires proof that the illegal conduct was repeated. (See, e.g., Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir.) (for a custom or practice to be attributable to a municipality, "it must be so well settled and wide spread that the policy making officials . . . can be said to have either actual or constructive knowledge of it yet did nothing to end the practice"), cert. denied, 110 S.Ct. 75 (1989); Harris v. City of Pagedale, 821 F.2d 499, 503 (8th Cir. 1987) (to establish custom, plaintiffs must prove the existence of a continuing, wide spread, persistent pattern of unconstitutional misconduct by the governmental entities' employees and tacit authorization of such conduct by the governmental entity's policy making officials).) Additionally, plaintiffs must establish that the unconstitutional custom was the "moving force" behind the constitutional violation. (See, e.g., City of Canton v. Harris, 109 S.Ct. 1197, 1203-06 (1989) (§ 1983 municipal liability may be imposed when the enforcement

of a custom was the “moving force,” “direct causal link,” “closely related,” and “actually caused” the violation of federally protected rights);); Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003)(municipal policy or practice must be the "direct cause" or "moving force" behind the constitutional violation).)

III. PLEADING § 1983 CLAIMS

Fed.R.Civ.P. 8(a)(2) provides that a Complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” For 50 years, Rules 8(a)(2) and 12(b)(6) were interpreted pursuant to the U.S. Supreme Court’s decision in Conley v. Gibson, 355 U.S. 41, 78 (1957), which held that a Complaint could not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim that would entitle him to relief.”

Pursuant to the U.S. Supreme Court’s recent decisions in Bell Atlantic Corp., et al. v. Twombly, et al., 127 S.Ct. 1955 (2007), and Ashcroft, et al. v. Iqbal, et al., 129 S.Ct. 1937 (2009), however, the Conley standard has been abandoned and radically changed.

In Twombly, a case arising under the Sherman Anti-Trust Act, the Supreme Court held that Conley was no longer good law. (127 S.Ct. at 1967.) The Court then held that under Rules 8(a)(2) and 12(b)(6), it was insufficient to simply plead the conclusory elements of a claim. (Id. at 1965.) The Court then adopted a “plausibility” standard for stating a claim under Rule 12(b)(6). (Id. at 1965.) Under that standard, a Complaint must set forth facts “plausibly suggesting” that the plaintiff is entitled to relief.

(Id.) In that regard, the Court distinguished between factual allegations, which are relevant to the 12(b)(6) analysis, and mere conclusions that are not. (Id. at 1965.)

Iqbal arose under 42 U.S.C. § 1983. In that case, the Court rejected the Plaintiff's contention that the Twombly decision was limited to the Sherman Anti-Trust Act and specifically held that Twombly's new plausibility standard applied to cases brought under 42 U.S.C. § 1983 (and, indeed, all Complaints brought in federal court).

IV. CLAIMS AGAINST THE FEDERAL GOVERNMENT

As a general rule, the doctrine of sovereign immunity prohibits all suits against the United States unless it has given consent. (See, e.g., Cohens v. Virginia, 19 U.S. 264 (1821); Library of Congress v. Shaw, 478 U.S. 310 (1986); Block v. North Dakota, 461 U.S. 273 (1983).)

However, sovereign immunity ordinarily will not apply in actions for monetary damages brought against Federal officers and employees in their individual or personal capacity. (See, e.g., Deutsch v. Federal Bureau of Prisons, 737 F.Supp. 261 (S.D.N.Y. 1990), aff'd 2nd Cir. N.Y. 1991). While 42 U.S.C. § 1983 does not authorize suit against the Federal government or its officers and employees in their individual capacity, the right to bring such a suit and seek monetary damages was recognized as part of the Federal common law in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

A plaintiff may establish an actionable Bivens claim when: (1) the plaintiff asserted a constitutionally-protected right; (2) the plaintiff stated a cause of action that

asserted that right; and (3) relief in the form of damages constituted an appropriate remedy. (Davis v. Passman, 442 U.S. 228 (1979).)

A Bivens action is precluded when: (1) Congress has either statutorily prohibited the relief sought or provided an alternative and equally effective remedy as a substitute for recovery directly under the Constitution; or (2) in the absence of such affirmative action by Congress, there are nonetheless “special factors counseling hesitation.” (Schweiker v. Chilickey, 487 U.S. 412 (1988).)