

“Race Discrimination”

It is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to _____ [his/her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, or national origin.

Source of Instruction: Title VII of the Civil Rights Act of 1964, as amended, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1997).

“Protected Class – Status”

An individual is protected from race discrimination under Title VII if _____ [his/her] employer discriminated against _____ [him/her], with respect to the terms and conditions of _____ [his/her] employment, because of _____ [his/her] race, color or national origin.

Source of Instruction: *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

“Employer”

Title VII holds employers liable for violations of the Act. An entity is an “employer” under Title VII if it is a “person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”

Source of Instruction: Title VII of the Civil Rights Act of 1964, as amended, § 701(b), 42 U.S.C. § 2000e(b) (1997).

“Employee”

The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a state government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

Source of Instruction: Title VII of the Civil Rights Act of 1964, as amended, § 701(f), 42 U.S.C. § 2000e(f) (1997).

Standard of Proof

The standard of proof in a claim raised under Title VII of the Civil Rights Act of 1964 is by a preponderance of the evidence.

Source of Instruction: *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Gunby v. Pennsylvania Elec. Co.* 840 F.2d 1108, 1115 (3d Cir. 1988), *cert. den.* 492 U.S.905 (1989)

Prima Facie Case

Plaintiff must establish a *prima facie* case of unlawful discrimination by showing that:

1. _____ [he/she] is a member of a protected class;
2. who performed _____ [his/her] job satisfactorily (or who was qualified for a new position),
3. who suffered an adverse employment action,
4. under circumstances giving rise to an inference of discrimination (or retaliation).

Source of Instruction: *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

Continuing Violation

Under the continuing violation doctrine, allegations of conduct occurring prior to the limitations period are actionable if the complainant can show that they are part of a series of related acts against the complainant. To establish a continuing violation, one or more of the allegedly discriminatory acts must fall within the limitations period.

Source of Instruction: *Hashimoto v. Dalton*, 118 F.3d 671, 678-79 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1803 (1998).

Evidence of Race Discrimination

Plaintiff may prove that _____ [his/her] _____ [insert adverse employment action] was “because of” _____ [his/her] race by showing that _____ [his/her] race played a motivating role in, or contributed to, the employer’s decision.

Plaintiff may prove that the forbidden animus was a motivating factor through presentation of either “direct” or “circumstantial” evidence. This is in addition to the *McDonnell Douglas* indirect or burden-shifting method of proof.

Source of Instruction: *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638-39 (3d Cir. 1993) (“where direct “smoking gun” evidence of discrimination is unavailable, this court has found that the proper inquiry is ‘whether evidence of inconsistencies and implausibilities in the employer’s proffered reasons for discharge reasonably could support an inference that the employer did not act for nondiscriminatory reasons, not whether the evidence necessarily leads to the conclusion that the employer did act for discriminatory reasons.”

Discriminatory Animus – Different Treatment

A plaintiff under Title VII may raise an inference of discriminatory animus by offering evidence comparing himself or herself to similarly situated individuals who are not a member of that protected class, who are treated more favorably.

Source of Instruction: *Morris v. Harris Trust & Savs. Bank*, 867 F.2d 1023, 1026 (7th Cir. 1989); *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir. 1988).

“Qualified for Position”

To be considered “qualified” for a position, Plaintiff must show that _____ [his/her] work was sufficient to meet _____ [his/her] employer’s legitimate expectations.

Source of Instruction: *Bramble v. American Postal Workers Union*, 135 F.3d 21, 25 (1st Cir. 1998) (citing *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)) (applied to ADEA case); *Gunby v. Pennsylvania Elec. Co.* 840 F.2d 1108, 1116 (3d Cir. 1988), *cert. den.* 492 U.S.905 (1989) “where a plaintiff successfully performed the responsibilities of the position, sufficiently met the educational prerequisites, and demonstrated an apt management ability, the plaintiff has met the second prong of his prima facie burden.

“Adverse Employment Action”

An adverse employment action is one that results in discrimination against an individual with respect to _____ [his/her] compensation, terms, conditions or privileges of employment or that limits, segregates, or classifies 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.

Source of Instruction: Title VII of the Civil Rights Act of 1964, as amended, § 703(a), 42 U.S.C. § 2000e-2(a) (1997). *See* § 3:130.

Determining/Motivating Factor

To determine whether the employer intentionally discriminated against the employee under Title VII, you must decide whether race accounted for the employer’s decision to _____ [*insert adverse employment action*]. In other words, you must decide whether the same events would have transpired if the employee had been a different race [*or national origin*], and everything else had been the same.

Source of Instruction: *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994).

‘Mixed Motives’ – Proof of Discriminatory Animus

Plaintiff may prove that race was a “motivating factor” in an adverse employment decision through presentation of “direct evidence” – that is, evidence tied directly to the alleged discriminatory animus.

Source of Instruction: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 258 (1989) (finding that an employer could avoid liability outright by proving it would have made the same decision absent the discriminatory animus). *Price Waterhouse* was partially overruled by the Civil Rights Act of 1991 which amended Title VII to allow an employer to limit the employee’s remedy rather than defeat liability outright by showing it would have made the same decision. *see also Armbruster v. Unisys Corp.*, 32 F.3d 768 n. 17 (3d Cir. 1994)

Same Decision

Once a Title VII plaintiff presents direct evidence that race played a motivating part in an employment decision, Defendant may limit Plaintiff’s recovery by proving, by a preponderance of the evidence, that it would have made the same decision even if it had not taken Plaintiff’s race into account.

The employer may not succeed by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Moreover, the employer will not meet its burden of proof by merely showing that, at the time of the decision, it was motivated only in part by a legitimate reason.

Source of Instruction: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 258 (1989) (finding that an employer could avoid liability outright by proving it would have made the same decision absent the discriminatory animus). *Price Waterhouse* was partially overruled by the Civil Rights Act of 1991 which amended Title VII to allow an employer to limit the employee's remedy rather than defeat liability outright by showing it would have made the same decision.

The Court here explained that the "mixed motives" theory of proof is unlike the burden-shifting model of *McDonnell Douglas/Burdine*, which is used when the plaintiff has no direct evidence of discrimination. Rather, the Court stated that "the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Id.* at 246.

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Legitimate, Nondiscriminatory Reasons

If Plaintiff succeeds in showing a *prima facie* case of retaliation, Defendant must articulate legitimate, nondiscriminatory reasons for its actions.

Source of Instruction: *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 130 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1819 (1997); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995).

Hostile Work Environment

Under a Title VII race discrimination claim, Plaintiff may raise a claim of hostile environment by showing:

1. _____ [he/she] is a member of a protected class

2. _____ [he/she] was subjected to harassment, either through words or actions, based on race;
3. the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment; and
4. there exists some basis for liability on the part of the employer.

Under the third prong, the harassment must be sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive working environment. That is, conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. Likewise, the victim himself or herself must perceive the environment to be abusive, demonstrating that the conduct has actually altered the conditions of the victim's employment.

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – that is, an environment that a reasonable person would find hostile or abusive – is not actionable. Likewise, if Plaintiff does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of Plaintiff's employment, and there is no Title VII violation.

Source of Instruction: *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Comment: *Aman a Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3rd Cir. 1996) held that, to establish a claim for employment discrimination due to an intimidating or offensive work environment, a plaintiff must establish, by the totality of the circumstances, the existence of a hostile or abusive environment which is severe enough to affect the psychological stability of a minority employee. Specifically, a plaintiff must show:

1. that[he/she] suffered intentional discrimination because of race;
2. the discrimination was pervasive and regular;
3. the discrimination detrimentally affected the plaintiff;
4. the discrimination would detrimentally affect a reasonable person of the same race in that position; and
5. the existence of *respondeat superior* liability.

Statements Made in the Workplace

A plaintiff under Title VII may prove discriminatory animus, either directly or indirectly, by offering evidence of remarks that are:

1. race-related;
2. proximate in time to the employment decision at issue;
3. made by an individual with authority over the employment decision at issue; and
4. related to the employment decision at issue.

Source of Instruction: *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 922 (3d Cir.) *cert, denied* 118 S. Ct. 299 (1997)

DAMAGES

General Instruction

If you find that Defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice under Title VII, you may award backpay, payable by the employer responsible for the unlawful employment practice.

In addition, if you find intentional discrimination by Defendant, you may award compensatory and punitive damages to Plaintiff.

Source of Instruction: Title VII of the Civil Rights Act of 1964, as amended, § 706(g)(1), 42 U.S.C. § 2000e-5(g)(1) (1998); Civil Rights Act of 1991, § 1977A, 42 U.S.C. § 1981a (1998).

Backpay

If you find that Defendant engaged in intentional discrimination against Plaintiff, backpay liability under Title VII begins no earlier than two years before Plaintiff filed _____ [his/her] charge with the Equal Employment Opportunity Commission.

[Retaliation claims only]:

If you find that Defendant engaged in unlawful retaliation against Plaintiff, backpay liability begins from the date of the adverse employment action.

Source of Instruction: Title VII of the Civil Rights Act of 1964, as amended, § 706(g)(1), 42 U.S.C. § 2000e-5(g)(1) (1998); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1528 (11th Cir. 1991); See also *Robinson a Southeastern Pennsylvania Transp. Auth.*, 982 F2d 892, 89899 (3rd Cir. 1993). A reduction of an award of backpay by taking into consideration the plaintiff employee's contribution to the decay of the working relationship (a "comparativefault" analysis) is impermissible. "Allowing courts to reduce a backpay award to account for the legitimate considerations [of a mixed motives case] would be extremely speculative and would frustrate the 'make whole' purpose of Title VII"

Compensatory Damages

If you find that Defendant engaged in intentional discrimination or retaliation, you may award Plaintiff compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."

However, compensatory damages shall not include backpay, interest on backpay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964.

Source of Instruction: Civil Rights Act of 1991, §§ 1977A(b)(2) and 1977A(b)(3), 42 U.S.C. §§ 1981a(b)(2) and 1981a(b)(3) (1998), respectively.

Punitive Damages

Plaintiff may recover punitive damages under Title VII against a defendant employer (other than a government, government agency or political subdivision) Plaintiff demonstrates that the defendant engaged in a discriminatory practice with malice or with reckless indifference to _____ [his/her] federally protected rights.

Source of Instruction: Civil Rights Act of 1991, § 1977A(b)(1), 42 U.S.C. § 1981a(b)(1) (1998).

