

4 PJI 3 | PUBLIC EMPLOYEE - EQUAL PROTECTION CLAIM - RACE/SEX DISCRIMINATION - HOSTILE WORK ENVIRONMENT - SUPERVISOR HARASSMENT (SEPARATE LIABILITY FOR PUBLIC BODY AND INDIVIDUAL SUPERVISORS)

In this case, [Plaintiff] claims that [Defendant], while acting “under color” of state law, intentionally discriminated against [Plaintiff] because of [his/her] [race/sex] in violation of [Plaintiff]’s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

[Defendant] denies [Plaintiff]’s claims and asserts that [describe the defendant’s defense].

The Fourteenth Amendment’s Equal Protection Clause prohibits discrimination against public employees on the basis of [race/sex]. It also prohibits creating a [racially/sexually] hostile work environment.

[The law that applies to [Plaintiff]’s claims against [Defendant] is different from the law that applies to [his/her] claim against [City], and you must consider each claim separately.]

First, I will explain the law you must apply to decide [Plaintiff]’s claims against [Defendant].

To succeed on [his/her] claim against [Defendant], [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] was harassed because of [his/her] [race/sex];

Second: [Defendant] intentionally committed acts that created a hostile work environment for [Plaintiff], either personally or by directing others;

Third: [Defendant] had supervisory authority over [Plaintiff] in the terms and conditions of [his/her] employment;

Fourth: [Defendant]’s actions were “under color” of state law; and

Fifth: [Plaintiff] suffered damages because of the hostile work environment.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]



For the first element, [Plaintiff] must show that [he/she] was harassed because of [his/her] [race/sex].

For the second element, [Plaintiff] must show that [Defendant] intentionally committed acts that created a [racially/sexually] hostile work environment either personally or by directing others.

A [racially/sexually] "hostile work environment" exists if:

(a) [Plaintiff] was subjected to [racially/sexually] offensive acts or statements - even if they were not specifically directed at [him/her];

(b) [Plaintiff] did not welcome the offensive acts or statements, which means that [Plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms and conditions of [Plaintiff]'s employment;

(d) a reasonable person - not someone who is overly sensitive - would have found that the offensive acts or statements materially altered the terms and conditions of the person's employment; and

(e) [Plaintiff] personally believed that the offensive acts or statements materially altered the terms and conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms and conditions of [Plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with [Plaintiff]'s work performance.

A "material alteration" is a significant change in condition. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual



flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/sex]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially changes the employment terms and conditions.

[To be used when the parties stipulate that defendants acted “under color” of state law: The parties have agreed that [Defendant] acted “under color” of state law so you should accept that as a proven fact.]

[To be used when the parties dispute whether the defendants acted “under color” of state law: For the third and fourth elements, you must also decide whether [Defendant] had supervisory authority over [Plaintiff] and whether [he/she] acted “under color” of state law.

A government official acts “under color” of law when [he/she] acts within the limits of lawful authority. A government official also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

To find that [Defendant] acted “under color” of state law, you must find that [he/she] had supervisory authority over [Plaintiff] in the terms and conditions of [his/her] employment and that [Defendant] abused or misused that authority by subjecting [him/her] to a hostile work environment because of [his/her] [race/sex].]

Now I will explain the law you must apply to decide [Plaintiff]’s claims against [City].

To succeed on [his/her] claim against [City], [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] was subjected to a hostile work environment because of [his/her] [race/gender];

Second: The hostile work environment was the result of a “policy or custom” of [City]; and



Third: [Plaintiff] suffered damages because of the hostile work environment.

[If there are no individual defendants, insert "hostile work environment" paragraphs here.]

A "policy or custom" includes a:

- (a) rule or regulation enacted, adopted, or ratified by [City];
- (b) policy statement or decision that [City]'s policymakers made; or
- (c) practice or course of conduct that is so widespread that it has acquired the force of law - even if the practice has not been formally approved. You may find that a "policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [City]'s policymaker[s] either knew of it, or should have known of it.

[Policymaker] is [City]'s "policymaker."

If you find in [Plaintiff]'s favor on the elements [he/she] must prove, then you must decide whether [Plaintiff] suffered damages because of the hostile work environment. If the damages would not have existed except for the hostile work environment, then you may find that [Plaintiff] suffered those damages because of the hostile work environment.

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages as a result of the hostile work environment, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [Plaintiff] has proved them by a preponderance of the evidence, and no others:

- (a) net lost wages and benefits to the date of your verdict; and
- (b) emotional pain and mental anguish.



To determine the amount of [Plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [Plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury - tangible and intangible. [Plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates [him/her] for [his/her] claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [Plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [Defendant]. To prove that [Plaintiff] failed to mitigate damages, [Defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [Plaintiff] held with [Defendant] was available, and (2) [Plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [Defendant] shows that [Plaintiff] did not make reasonable efforts to obtain any work, then [Defendant] does not have to prove that comparable work was available.

If you find that [Defendant] proved by a preponderance of the evidence that [Plaintiff] failed to mitigate damages, then you should reduce the amount of [Plaintiff]'s damages by the amount that could have been reasonably realized if [Plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[Punitive Damages: To be used only for individual-capacity claims against individual defendants: [Plaintiff] also claims that [Defendant]'s acts were done with malice or reckless indifference to [Plaintiff]'s federally protected rights, which would entitle [him/her] to punitive damages in addition to compensatory damages. [Plaintiff] must prove by a preponderance of the evidence that [he/she] is entitled to punitive damages. You will only reach the issue of punitive damages if you find that [Plaintiff] has proved the elements of [his/her] claim against [Defendant] and you award [Plaintiff] compensatory damages. You may not assess punitive damages against [City].



If you find for [Plaintiff] and find that [Defendant] acted with malice or reckless indifference to [Plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [Plaintiff] punitive damages as a punishment for [Defendant] and as a deterrent to others.

A person acts with malice if the person's conduct is motivated by evil intent or motive. A person acts with reckless indifference to the protected federal rights of another person when the person engages in conduct with a callous disregard for whether the conduct violates those protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [Defendant]'s financial resources in fixing the amount of such damages. [You also may assess punitive damages against one or more of the individual defendants, and not others, or against more than one individual defendant in different amounts.]]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Plaintiff] was harassed because of [his/her] [race/sex]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [Defendant] intentionally committed acts that created a hostile work environment for [Plaintiff], either personally or by directing others?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.



3. That [individual defendant] had supervisory authority over [Plaintiff] in the terms and conditions of [Plaintiff]'s employment?¹⁰

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That [individual defendant]'s actions were "under color" of state law?

Answer Yes or No _____]

[5. That the hostile work environment was the result of a "policy or custom" of [City]?

Answer Yes or No _____]

[If you answered "No" to both Questions No. 4 and 5, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you answered "Yes" to either Question No. 4 or 5 (or both), go to the next question.]

6. That [Plaintiff] suffered damages because of the hostile work environment?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.¹¹

7. That [Plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____



8. That [Plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

If you did not award damages in response to either Question No. 7 or Question No. 8, this will end your deliberations, and your foreperson should go to the end of this verdict form to sign and date it. If you awarded damages in response to Question No. 7 or Question No. 8 (or both), go to the next question.

9. That punitive damages should be assessed against [individual defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

SO SAY WE ALL.

DATE: _____

Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

Annotations and Comments

I. Cause of Action

Under the Equal Protection Clause of the Fourteenth Amendment, public employees have a constitutional right to be free from sex discrimination and race discrimination in public employment. This right to be free from sex and race discrimination includes the right to be free from a hostile work environment based on race or sex. See, e.g., *Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009) (discussing equal protection racial harassment claims); *Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995) (discussing equal protection sexual harassment claims).



This pattern instruction focuses on Equal Protection claims based on a hostile work environment. For other types of Equal Protection claims, such as discriminatory discharge based on race or gender, this instruction may be adapted to include the elements and explanations from Pattern Instruction 4.5, *infra*.

II. Elements

The definition of a hostile work environment is adapted from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993). *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808-09 (11th Cir. 2010) (en banc); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc). The language defining “hostile work environment” is the same as the language in Pattern Instruction 4.6, *infra* (Title VII Hostile Work Environment) because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). To prevail on an Equal Protection claim, which is brought pursuant to 42 U.S.C. §1983, the plaintiff must also show that the defendant’s actions were under color of state law. *Watkins v. Bowden*, 105 F.3d 1344, 1355 (11th Cir. 1997) (per curiam).

III. Special Liability Questions

Supervisor Liability. Liability in §1983 cases “cannot be premised solely upon a theory of respondeat superior.” *Bryant v. Jones*, 575 F.3d 1281, 1299 (11th Cir. 2009). A supervisor may be held liable under §1983 only “when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.” *Id.* “The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.” *Id.* at 1299-1300 (internal quotation marks omitted). Pattern Instruction 4.3 is to be used in cases where the plaintiff alleges that the supervisor personally participated in creating the hostile work environment. Pattern Instruction 4.4 is to be used in cases where the plaintiff alleges that there is a causal connection between the supervisor’s actions and the constitutional deprivation.

A “‘supervisor’ is not merely a person who possesses authority to oversee plaintiff’s job performance but a person with the power directly to affect the terms and conditions of the plaintiff’s employment.” *Bryant*, 575 F.3d at 1300; see also *Vance v. Ball State Univ., No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013)* (holding that “an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim”).

Pattern Instruction 4.3 assumes that there is no genuine fact dispute whether the harasser is a supervisor with the authority to correct the hostile work environment. If there is a fact dispute on this issue, the instruction should be modified accordingly.



Governmental Liability. A government entity cannot be held liable for the actions of its employees under 42 U.S.C. §1983 based on a theory of respondeat superior. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1307 (11th Cir. 2001) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 n.7 (1978)). “Rather, only deprivations undertaken pursuant to governmental ‘custom’ or ‘policy’ may lead to the imposition of governmental liability.” Id. To prove a “custom, a plaintiff must establish a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a ‘custom or usage with the force of law.’” Id. at 1308 (11th Cir. 2001) (internal quotation marks omitted); accord Monell, 436 U.S. at 690-91 (1978)).

Pattern Instruction 4.3 contains language that is intended to guide the jury through the “policy or custom issue.” The instruction does not define the term “policymaker.” If there is a dispute whether the decisionmaker was a final policymaker, then the instruction should be adapted accordingly. An official is considered a final policymaker if his decisions are insulated from review but not if his decisions are subject to meaningful administrative review. E.g., Doe v. Sch. Bd. of Broward Cnty., Fla., 604 F.3d 1248, 1264 (11th Cir. 2010) (citing Hill v. Clifton, 74 F.3d 1150, 1152 (11th Cir. 1996) and Martinez v. City of Opa-Locka, Fla., 971 F.2d 708, 714-15 (11th Cir. 1992) (per curiam)); see also Maschmeier v. Scott, 269 F. App'x 941, 943-44 (11th Cir. 2008) (per curiam) (defining meaningful review and explaining how to demonstrate that the review was not meaningful).

IV. Remedies

A plaintiff cannot recover punitive damages in a §1983 action against a government entity. E.g., Young Apartments, Inc. v. Town of Jupiter, Fla., 529 F.3d 1027, 1047 (11th Cir. 2008) (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981)) (“In a §1983 action, punitive damages are only available from government officials when they are sued in their individual capacities.”). Therefore, if the case involves claims against a government entity only, then the punitive damages instruction should not be given; if the case involves claims against a government entity and government officials sued in their individual capacities, then the instruction and verdict form should be adapted to clarify that the jury may only consider the issue of punitive damages with regard to the individual defendants.

For additional annotations and comments regarding remedies, please see the Annotations and Comments following Pattern Instruction 4.1, *supra*.

V. When the Case Involves Hostile Work Environment Claims Under More than One Statute

In some cases, a plaintiff will bring a hostile work environment claim under more than one statute based on the same set of facts (Title VII, Equal Protection Clause, and 42 U.S.C. §1981). The jury instruction on these separate claims can be combined because the elements of an Equal Protection hostile work environment claim are the same as hostile work environment claims brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Bryant v. Jones, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). Two issues to consider when combining instructions: (1) statutes of limitations differ, so the instruction and verdict form should take that into account; (2) the availability of punitive damages



differs by statute and type of defendant, so the instruction and verdict form should take that into account.

