

4 PJI 5 | TITLE VII - CIVIL RIGHTS ACT - DISCRIMINATION - DISCHARGE OR FAILURE TO PROMOTE - INCLUDING SAME DECISION DEFENSE

In this case, [Plaintiff] claims that [Defendant] violated the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of their [race/religion/sex/national origin].

Specifically, [Plaintiff] claims that [Defendant] [discharged/denied a promotion to] [him/her] because of [his/her] [race/sex/religion/national origin].

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

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

First: [Defendant] [discharged/denied a promotion to] [Plaintiff]; and

Second: [Plaintiff]'s [race/religion/sex/national origin] was a motivating factor that prompted [Defendant] to [discharge [Plaintiff]/deny [Plaintiff] a promotion].

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

If you find that [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion], you must decide whether [Plaintiff]'s [race/religion/sex/national origin] was a "motivating factor" in the decision.

To prove that [race/religion/sex/national origin] was a motivating factor in [Defendant]'s decision, [Plaintiff] does not have to prove that [his/her] [race/religion/sex/national origin] was the only reason that [Defendant] [discharged [him/her] from employment/denied [him/her] a promotion]. It is enough if [Plaintiff] proves that [race/religion/sex/national origin] influenced the decision. If [Plaintiff]'s [race/religion/sex/national origin] made a difference in [Defendant]'s decision, you may find that it was a motivating factor in the decision.

[Defendant] claims that [Plaintiff]'s [race/religion/sex/national origin] was not a motivating factor in the decision and that [he/she] [discharged/did not promote] [Plaintiff] for [another



reason/other reasons]. An employer may not discriminate against an employee because of the employee's [race/religion/sex/national origin], but the employer may [discharge/decline to promote] an employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]'s reason[s] for the decision [to discharge/not to promote] [Plaintiff], and you find that [Defendant]'s decision was not motivated by [Plaintiff]'s [race/religion/sex/national origin], you must not second guess [Defendant]'s decision, and you must not substitute your own judgment for [Defendant]'s judgment – even if you disagree with it.

[Pretext (optional, see annotations): As I have explained, [Plaintiff] has the burden to prove that [his/her] [race/religion/sex/national origin] was a motivating factor in [Defendant]'s decision [to discharge/not to promote] [Plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [Plaintiff]'s [race/religion/sex/national origin] was a motivating factor in [Defendant]'s decision [to discharge/not to promote] [Plaintiff], you may consider the circumstances of [Defendant]'s decision. For example, you may consider whether you believe the reason[s] [Defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[Cat's Paw (if applicable, see annotations): [Plaintiff] claims that [Defendant]'s decision [to discharge/not to promote] [Plaintiff] was based on the recommendation of [Plaintiff]'s supervisor and that [Plaintiff]'s [race/religion/sex/national origin] was a motivating factor in the supervisor's recommendation. If [Plaintiff]'s supervisor recommended that [Defendant] [discharge/decline to promote] [Plaintiff] and [Plaintiff]'s [race/religion/sex/national origin] motivated the supervisor's recommendation, the supervisor's recommendation can be a "motivating factor" behind [Defendant]'s employment decision – even if the supervisor did not make the ultimate decision to [discharge/decline to promote] [Plaintiff].

But [Plaintiff]'s [race/religion/sex/national origin] can be a motivating factor in [Defendant]'s decision only if you find that [Plaintiff] has proved each of the following by a preponderance of the evidence:



(a) the supervisor acted with the intent to make [Defendant] [discharge/deny a promotion to] [Plaintiff] (which means that the supervisor wanted [Defendant] to [discharge/deny a promotion to] [Plaintiff]), or the supervisor believed that [his/her] actions would cause [Defendant] [to discharge/deny a promotion to] [Plaintiff];

(b) [Plaintiff]'s [race/religion/sex/national origin] was a motivating factor behind the supervisor's actions; and

(c) there was a direct relationship between the supervisor's actions and [Plaintiff]'s [discharge/denial of promotion].]

[Including Affirmative Defense (if applicable, see annotations): If you find in [Plaintiff]'s favor for each fact [he/she] must prove, you must decide whether [Defendant] has shown by a preponderance of the evidence that [he/she/it] would have [discharged/not promoted] [Plaintiff] even if [Defendant] had not taken [Plaintiff]'s [race/religion/sex/national origin] into account. If you find that [Plaintiff] would [have been discharged/not have been promoted] for reasons other than [his/her] [race/religion/sex/national origin], you must make that finding in your verdict.

If you find for [Plaintiff] and against [Defendant] on this defense, you must consider [Plaintiff]'s compensatory damages.]

[Without Affirmative Defense: If you find in [Plaintiff]'s favor for each fact [he/she] must prove, you must consider [Plaintiff]'s compensatory damages.]

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 [discharge/denied promotion], 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 from the date of [discharge/denied promotion] 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: [Plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [Plaintiff] but, instead, to punish [Defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [Plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages, [Plaintiff] must prove by a preponderance of the evidence that [Defendant] acted with either malice or with reckless indifference toward [Plaintiff]'s federally protected rights. Specifically,



[Plaintiff] must show that an employee of [Defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [Plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [Defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [Defendant] acted with malice, [Plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [Plaintiff] anyway. To show that [Defendant] acted with reckless indifference to [Plaintiff]'s federally protected rights, [Plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [Plaintiff] to an award of punitive damages; [Plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [Defendant] acted with malice or with reckless indifference to [Plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [(1) whether [Defendant] engaged in a pattern of discrimination toward its employees]; [(2) whether [Defendant] acted spitefully or malevolently]; [(3) whether [Defendant] showed a blatant disregard for civil legal obligations]; [(4) whether [Defendant] failed to investigate reports of discrimination]; [(5) whether [Defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [(6) whether the person accused of discrimination was included in the employer's decision making process concerning [Plaintiff]'s [discharge] [denied promotion].]



If you find that punitive damages should be assessed against [Defendant], you may consider the evidence regarding [Defendant]'s financial resources in fixing the amount of such damages.]



SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion]?

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 [Plaintiff]'s [race/religion/sex/national origin] was a motivating factor that prompted [Defendant] to take that action?

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 [Defendant] would have [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion] even if [Defendant] had not taken [Plaintiff]'s [race/religion/sex/national origin] into account?

Answer Yes or No _____

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

4. 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 _____ 11



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

5. 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 Nos. 4 or 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 awarded damages in response to Question Nos. 4 or 5 (or both), go to the next question.]

6. That punitive damages should be assessed against [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. Causes of Action

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-2(a). Pattern Instruction 4.5 provides instructions for discharge and failure to promote claims, but it is also intended to be used for any other case in which the plaintiff alleges a discriminatory adverse employment action, including wage discrimination, demotion, or other serious and material change to the plaintiff’s terms and conditions of employment. Pattern Instruction 4.5 may also be used as the starting point for jury instructions in cases in which the plaintiff alleges the adverse employment action of failure to hire, though slight modifications will be required. Pattern Instruction 4.5 may be used for general claims that a hostile work environment culminated in a “tangible employment action,” such as discharge or demotion. Pattern Instruction 4.5 is meant to be used for general disparate treatment claims; for claims where the disparate treatment is allegedly based on the plaintiff’s refusal of unwelcome sexual advances, Pattern Instruction 4.8, *infra*, applies.

Pattern Instruction 4.5 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *infra*, address those claims.

Pattern Instruction 4.5 is intended to be used for all claims under Title VII, including claims of color discrimination. It is rare to have a claim of color discrimination separate from a claim of race discrimination, but the issue does occasionally arise. See, e.g., *Walker v. Sec’y of Treasury*, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (finding that light-skinned black person’s Title VII color discrimination claim for termination by darkskinned black supervisor “stated a claim for relief that cannot be reached by summary judgment”).

Pattern Instruction 4.5 is also intended to be used for claims under the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k), which provides that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. §2000e(k). It further provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” *Id.*

II. Elements and Defenses

A. “Adverse Employment Action”

To prevail on a Title VII disparate treatment claim, the plaintiff must prove that the employer subjected the plaintiff to an “adverse employment action.” Pattern Instruction 4.5 does not define “adverse employment action.” In most cases, the question whether an employer’s decision amounts to an “adverse employment action” will not be disputed because the decision is clearly an adverse employment



action, such as termination, failure to promote, or demotion with pay cut. If there is a fact dispute as to whether an employment action amounts to an “adverse employment action,” the instruction and verdict form should be adapted accordingly. An “adverse employment action” is a “a serious and material change in the terms, conditions, or privileges of employment.” Crawford v. Carroll, 529 F.3d 961, 970-71 (11th Cir. 2008) (internal quotation marks omitted).

B. Causation

Pattern Instruction 4.5 charges that the protected trait (race, sex, religion, national origin, color) must be a “motivating factor” in the employer’s decision. This instruction is based on the statutory language. See 42 U.S.C. §2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). There is Eleventh Circuit precedent approving jury instructions stating that the protected trait must be a “substantial or motivating factor,” e.g., Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999), and the previous version of the pattern instructions used this language. The Committee believes, however, that the addition of the word “substantial” is potentially confusing, and Pattern Instruction 4.5 charges in accordance with the statutory text, which requires only that the protected trait be a “motivating factor” in the employer’s decision.

Pattern Instruction 4.5 applies the “motivating factor” standard to all Title VII disparate treatment claims, not just “mixed motive” claims. The Supreme Court reserved the question of “when, if ever, [42 U.S.C. §2000e-2(m)] applies outside of the mixedmotive context.” Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003). The Committee believes that, as a practical matter, many cases that are submitted to a jury could be construed as “mixed motive” cases, which is why the Committee recommends “motivating factor” language for Pattern Instruction 4.5.

For the employee’s protected trait to be a motivating factor in the employer’s decision, the employer must have been aware of the protected trait. E.g., Lubetsky v. Applied Card Sys., Inc., 296 F.3d 1301, 1305 (11th Cir. 2002). In cases where there is a fact question on this issue, the court may consider adding a special interrogatory on this point.

C. Pretext (In General)

When analyzing employment discrimination claims in the context of pretrial motions, the courts typically employ the framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under that framework, the plaintiff must establish a prima facie case of discrimination. E.g., Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1264 (11th Cir. 2010). Once the plaintiff has made a prima facie case, the employer may articulate a legitimate



nondiscriminatory reason for its action. *Id.* If the employer articulates a legitimate nondiscriminatory reason, then the plaintiff must produce evidence that the employer's proffered reason is pretext for discrimination. *Id.* "The plaintiff can show pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Kragor v. Takeda Pharms. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir. 2012) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). If the decisionmaker's statements can be interpreted as an admission that the proffered reason was a cover-up for discrimination, for example, then a jury may consider the statement and decide whether discrimination was the real reason for the employer's decision. *Id.* at 1308-09.

The Eleventh Circuit has concluded that "it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis" because such an instruction has potential to confuse the jury. *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). Nonetheless, it is not error to instruct a jury that one way a plaintiff may show intentional discrimination is by showing that the employer's stated reasons for its actions were not true and were instead pretext or cover to hide discrimination. *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 974-75 (11th Cir. 2000). It is also not error to refuse to give a pretext instruction. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1196 (11th Cir. 2004).

Pattern Instruction 4.5 includes an optional pretext charge, which instructs the jury that it may consider the circumstances of the employer's decision – including whether the jury believes the employer's proffered nondiscriminatory reason for its decision – in deciding whether the decision was motivated by a protected trait.

D. Pretext (Failure to Promote)

In a failure to promote or failure to hire case where the defendant has presented evidence of a legitimate nondiscriminatory reason for its decision but there is a question of fact as to the relative qualifications of plaintiff and the comparator, the court may consider adding a special interrogatory on the issue. The Eleventh Circuit stated that "'a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race.'" *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (per curiam) (alteration in original) (quoting *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). Rather, "a plaintiff must show that the disparities between the successful applicant's and his own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." *Id.* (internal quotation marks omitted).



E. Cat's Paw

In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Supreme Court approved a “cat’s paw” theory of causation in the context of a case under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §4301 et seq. (“USERRA”). In *Staub*, the plaintiff sought to hold his employer liable for the antimilitary animus of his supervisors, who did not make the ultimate decision to fire the plaintiff but did make unfavorable reports that led to the plaintiff’s termination. The Supreme Court held that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.” *Id.* at 1194 (reversing Seventh Circuit’s grant of judgment as a matter of law for employer because Seventh Circuit incorrectly required decisionmaker to be wholly dependent on advice of supervisors with discriminatory animus; declining to analyze district court’s jury instruction).

At the time of this publication, there have been no Supreme Court or Eleventh Circuit cases that specifically apply *Staub* beyond the USERRA context, but the Committee believes that the reasoning of *Staub* may apply in cases outside the USERRA context – including Title VII cases. USERRA and Title VII discrimination claims turn on whether the discriminatory animus is a “motivating factor” in the employer’s decision. 38 U.S.C. §4311(c)(1); 42 U.S.C. §2000e-2(m).

Pattern Instruction 4.5 includes an optional cat’s paw charge that instructs the jury to consider three elements in determining whether plaintiff’s protected trait was a motivating factor in the defendant’s decision. The optional cat’s paw charge is to be used only in cases where the plaintiff claims that (1) the employer’s decision was based on the recommendation of the plaintiff’s supervisor and (2) the plaintiff’s protected trait was a motivating factor in the supervisor’s recommendation.

F. The “Same Decision” Defense

If the Defendant prevails on a “same decision” defense, the jury should award no compensatory or punitive damages, even though Plaintiff has proven that “race, color, religion, sex or national origin was a motivating factor.” See 42 U.S.C. §2000e-5(g)(2) (B) (providing that in cases where the employer prevails on the “same decision” defense, the court may grant declaratory relief, limited injunctive relief and limited attorney’s fees and costs; this is an issue for the court, not the jury). Accordingly, Pattern Instruction 4.5 instructs the jury that it need not consider the issue of damages if it finds in favor of the defendant on this defense.

III. Remedies

Following the Civil Rights Act of 1991, a prevailing plaintiff in a Title VII action may recover back pay, other past and future pecuniary losses, damages for pain and suffering,



punitive damages (except that no punitive damages may be awarded against government agencies or political subdivisions), and reinstatement or front pay.

A. Compensatory and Punitive Damages

The award of compensatory and punitive damages in a Title VII employment discrimination action is governed by 42 U.S.C. §1981a. See 42 U.S.C. §§1981a(a)(1), (b)(2). Equitable relief is authorized under 42 U.S.C. §2000e-5(g) and is discussed in more detail below.

42 U.S.C. §1981a(a)(1) authorizes a prevailing plaintiff to receive compensatory damages, which may be awarded for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” Id. §1981a(b)(3). Compensatory damages do not include “backpay, interest on backpay, or any other type of relief authorized under” 42 U.S.C. §2000e-5(g). Compensatory damages are capped under 42 U.S.C. §1981a(b)(3), as discussed in more detail below.

42 U.S.C. §1981a(b)(1) also authorizes a prevailing plaintiff to receive punitive damages if the plaintiff “demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” Punitive damages are not available against “a government, government agency or political subdivision.” Id. §1981a(b)(1).

Pattern Instruction 4.5 instructs the jury on the definitions of “malice” and “reckless indifference.” See Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1280 (11th Cir. 2008) (“Malice or reckless indifference is established by a showing that the employer discriminated in the face of the knowledge that its actions would violate federal law.”) (internal quotation marks omitted). Examples of conduct that could support a punitive damages award include: ““(1) a pattern of discrimination, (2) spite or malevolence, or (3) a blatant disregard for civil obligations.” Id. (quoting Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322-23 (11th Cir. 1999)). The mere fact that an employer has an antidiscrimination policy will not insulate the employer from punitive damages; if the employer’s policy is not enforced, the jury could conclude that the employer did not attempt “good faith compliance with the civil rights laws.” Id. at 1281-82.

Pattern Instruction 4.5 also instructs the jury on who must have knowledge of the violations for punitive damages to be assessed against the employer. In the Eleventh Circuit, “punitive damages will ordinarily not be assessed against employers with only constructive knowledge” of the violations. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002); accord Splunge v. Shoney’s Inc., 97 F.3d 488, 491 (11th Cir. 1996). To get punitive damages, a Title VII plaintiff must “impute liability for punitive damages to” the employer. Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 539 (1999). To do this, the plaintiff may establish that an



employee of the defendant acting in a “managerial capacity” acted with malice or reckless indifference to the plaintiff’s federally protected rights. *Id.* at 543, 545-46. Though the Supreme Court did not define “managerial capacity,” the Court suggested that the employee must be “important, but perhaps need not be the employer’s top management, officers, or directors to be acting in a managerial capacity.” *Id.* at 543 (internal quotation marks omitted). The Court stated that “determining whether an employee” acts in a “managerial capacity” “requires a factintensive inquiry” and listed several factors for the courts to review in making this determination: “the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.” *Id.* Even after *Kolstad*, the Eleventh Circuit has continued to require that the conduct be taken or approved by the employer’s “higher management.” *Miller*, 277 F.3d at 1280 (citing *Dudley*, 166 F.3d at 1323). The *Miller* court did acknowledge that what constitutes “higher management” can vary widely from company to company – while a Wal-Mart store manager who is separated from higher management by many layers may not be higher management, a manager at a small company who is separated from the president of the company by only one person could be considered higher management. *Id.* at 1279.

The award of damages is limited by 42 U.S.C. §1981a(b)(3), which provides for a cap on the “sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section.” The damages award shall not exceed, for each plaintiff:

- (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
- (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and
- (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and
- (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

42 U.S.C. §1981a(b)(3).

A major limitation on the recovery of punitive damages is the Supreme Court’s announcement that few awards exceeding a single digit ratio between punitive and

compensatory damages will satisfy due process. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); see also Goldsmith, 513 F.3d at 1283-8418 (discussing Campbell and upholding punitive damages award under 42 U.S.C. §1981 where the ratio of punitive damages to compensatory damages was approximately 9.2 to 1).

In some cases, a party may bring parallel claims under Title VII and §1981 or the Equal Protection Clause. Punitive damages are available under 42 U.S.C. §1981 and 42 U.S.C. §1983 and are not capped by Title VII's damages cap. Goldsmith, 513 F.3d at 1284-85 (upholding punitive damages award of \$500,000 where analogous Title VII cap was \$100,000); Bogle v. McClure, 332 F.3d 1347, 1355, 1362 (11th Cir. 2003) (rejecting argument that Title VII cap should be applied by analogy in cases under 42 U.S.C. §1983 and upholding award of approximately \$17 million where analogous Title VII cap was \$300,000).

If a plaintiff seeks compensatory or punitive damages, either party may demand a trial by jury. 42 U.S.C. §1981a(c). Pursuant to this provision, the jury would determine the appropriate amount of compensatory and punitive damages to be awarded (without being instructed of the statutory caps), and the court would then reduce the amount in accordance with the limitations stated in §1981a if necessary. 42 U.S.C. §1981a(c)(2).

B. Back Pay

42 U.S.C. §2000e-5(g)(1) specifically provides for the award of back pay from the date of judgment back to two years prior to the date the plaintiff files a complaint with the Equal Employment Opportunity Commission. This section also provides that “[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.” Id.; see also Nord v. U.S. Steel Corp., 758 F.2d 1462, 1470-73 (11th Cir. 1985) (stating that the purpose behind Title VII is to “make whole” the complainant, therefore back pay is recoverable up to the date judgment is entered and must exclude interim earnings).

Back pay encompasses more than just salary; it also includes fringe benefits such as vacation, sick pay, insurance and retirement benefits. Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); accord Crabtree v. Baptist Hosp. of Gadsden, Inc., 749 F.2d 1501, 1502 (11th Cir. 1985).

In an “after-acquired evidence” case, where the employer discovers evidence that would have caused it to terminate the employee after it terminates the employee for unlawful reasons, the after-acquired evidence does not bar recovery; it only affects the remedy. Wallace v. Dunn Constr. Co., 62 F.3d 374, 380-81 (11th Cir. 1995) (en banc). In such cases, the calculation of back pay is from the date of the unlawful discharge to the date the defendant discovers evidence of employee misconduct.

See *id.* (authorizing back pay from date of unlawful discharge to date employer discovered evidence that employee lied in her employment application).

Back pay is recoverable only through 42 U.S.C. §2000e-5(g)(1); it is specifically exempted from the definition of compensatory damages under 42 U.S.C. §1981a(b)(2), so it is not limited by the damages cap of §1981a. Cf. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253-55 (1994) (stating that compensatory damages are in addition to “and do not replace or duplicate the backpay remedy” and that back pay is excluded from compensatory damages “to prevent double recovery”).

In the Eleventh Circuit, back pay is considered equitable relief, so it is a question for the court and not the jury. *Brown v. Ala. Dep’t of Transp.*, 597 F.3d 1160, 1184 (11th Cir. 2010). “Of course, when legal and equitable issues are tried together and overlap factually, the Seventh Amendment requires that ‘all findings necessarily made by the jury in awarding [a] verdict to [a party on legal claims] are binding on... the trial court’ when it sits in equity.” *Id.* (quoting *Williams v. City of Valdosta*, 689 F.2d 964, 976 (11th Cir. 1982) (alterations in original)).

Even if the legal and equitable issues do not overlap, the parties may consent to have the issue tried by a jury, or the court may try the issue with an advisory jury. Fed. R. Civ. P. 39(c). Pattern Instruction 4.5 has been prepared to permit the jury to decide the claim for back pay. If the judge decides not to submit the issue to the jury, the jury should be told that should the jury find in favor of the plaintiff, the court will award pay lost as a result of defendant’s discrimination, and the jury should not make any award for lost pay.

C. Front Pay

The award of “front pay” covers monetary damages for future economic loss, and it is only awarded when reinstatement is not feasible “as a make-whole remedy.” *E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000). Front pay is an equitable remedy to be determined by the court at the conclusion of the jury trial. *Id.*; accord *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988).

D. Attorney’s Fees

Title VII explicitly authorizes the court, in its discretion, to award attorney’s fees to “the prevailing party.” 42 U.S.C. §2000e-5(k). The attorney’s fee award is an issue for the court, not the jury.

IV. When the Case Involves Disparate Treatment Claims Under More than One Statute

In some cases, a plaintiff will bring a disparate treatment 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 analysis of disparate treatment claims under Title VII is identical to the analysis under the Equal Protection Clause and §1981 where the facts on which the claims rely are the same.



Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). Three issues to consider when combining instructions: (1) the causation standards may differ, so the instruction and verdict form should take that into account; (2) statutes of limitations differ, so the instruction and verdict form should take that into account; (3) the availability of punitive damages differs by statute and type of defendant, so the instruction and verdict form should take that into account.

Though the Eleventh Circuit has stated that the analysis of claims under Title VII, Equal Protection Clause, and §1981 is “identical,” Crawford, 529 F.3d at 970, there are some important distinctions with regard to the causation standards under the different theories. Title VII claims are subject to a “motivating factor” causation standard. 42 U.S.C. §2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). Under Title VII, if a plaintiff establishes that a protected trait was a motivating factor that caused the employer’s decision and the employer establishes the “same decision” affirmative defense by proving that it would have taken the same action even if it had not considered the protected trait, the plaintiff can still obtain limited relief. 42 U.S.C. §2000e-5(g)(2)(B). In other words, the “same decision” defense is not a complete bar to relief under Title VII. In contrast, though the “motivating factor” standard applies in §1983/Equal Protection cases, the “same decision” defense is a complete bar in §1983/Equal Protection cases. Harris v. Shelby Cnty. Bd. of Educ., 99 F.3d 1078, 1084 n.5 (11th Cir. 1996). By the date of this publication, neither the Supreme Court nor the Eleventh Circuit had addressed whether the reasoning of Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) applies to claims under §1981 such that a “because of” causation standard applies instead of a “motivating factor” standard. Please see the annotation to Pattern Instruction 4.9, *infra*, for more discussion of this issue. If the “because of” standard applies, then the jury should be instructed on that causation standard, and there is no same decision affirmative defense because the plaintiff must show that the protected trait was the reason for the decision. If the “motivating factor” standard applies to §1981 claims, then the “same decision” defense is a complete bar to recovery, just as it is in §1983/Equal Protection cases.

