

4 PJI 6 | TITLE VII - CIVIL RIGHTS ACT - WORKPLACE HARASSMENT BY SUPERVISOR - NO TANGIBLE EMPLOYMENT ACTION TAKEN (WITH AFFIRMATIVE DEFENSE BY EMPLOYER)

In this case, [Plaintiff] claims that [Defendant] violated Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms or conditions of employment because of their [race/religion/sex/national origin]. These statutes prohibit the creation of a hostile work environment caused by harassment because of an employee's [race/religion/sex/national origin].

Specifically, [Plaintiff] claims that [his/her] supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin] and that the harassment created a hostile work environment.

[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: [Plaintiff]'s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin];

Second: The harassment created a hostile work environment for [Plaintiff]; and

third: [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.]

A "hostile work environment" created by harassment because of [race/religion/sex/national origin] exists if:

(a) [Plaintiff] was subjected to offensive acts or statements about [race/religion/sex/national origin] - 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 or 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 or conditions of the person's employment; and

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

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms or 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 conditions. 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/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms or conditions of employment.

If you find that [Plaintiff]'s supervisor harassed [him/her] because of [his/her] [race/religion/sex/national origin], and that the harassment created a hostile work environment, then you must decide whether [he/she] suffered damages as a result. 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.



[Without Affirmative Defense: If you find that [Plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] compensatory damages.]

[Including Affirmative Defense: If you find that [Plaintiff] suffered damages because of the hostile work environment, you must decide whether [Defendant] has established [his/her/its] affirmative defense.

To succeed on its affirmative defense, [Defendant] must prove each of the following facts by a preponderance of the evidence:

First: [Defendant] exercised reasonable care to prevent and promptly correct any harassing behavior because of [race/religion/sex/national origin] in the workplace; and

Second: [Plaintiff] [unreasonably failed to take advantage of preventive or corrective opportunities [Defendant] provided to avoid or correct the harm.] [took advantage of [Defendant]'s preventative or corrective opportunities and [Defendant] responded by taking reasonable and prompt corrective action.]

To determine whether [Defendant] exercised reasonable care, you may consider whether:

(a) [Defendant] created an explicit policy against harassment because of [race/religion/sex/national origin] in the workplace;

(b) [Defendant] communicated the policy to [his/her/its] employees; and

(c) the policy provided a reasonable process for [Plaintiff] to complain to higher management.

[To determine whether [Plaintiff] unreasonably failed to take advantage of a preventive or corrective opportunity [Defendant] provided, you may consider, for example, whether [Plaintiff] unreasonably failed to follow a complaint procedure [Defendant] provided.]

If you find that [Defendant] established [his/her/its] affirmative defense, you must indicate that on the verdict form, and you will not decide the issue of [Plaintiff]'s damages. If you find that [Defendant] did not establish [his/her/its] affirmative defense, you must decide the issue of [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 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 must determine what amount will fairly compensate [him/her] for those 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 [Plaintiff]'s supervisor harassed [Plaintiff] because of [his/her] [race/religion/sex/national origin]?

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 the harassment created a hostile work environment for [Plaintiff]?

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] exercised reasonable care to prevent and promptly correct any harassing behavior in the workplace because of [race/religion/sex/national origin]?

Answer Yes or No _____

If your answer is "Yes," go to the next question.

If your answer is "No," go to Question No. 5.



4. [That [Plaintiff] unreasonably failed to take advantage of the preventive or corrective opportunities [Defendant] provided to avoid or correct the harm.] [That [Plaintiff] took advantage of the preventive or corrective opportunities provided by [Defendant] and [Defendant] responded by taking reasonable and prompt corrective action].

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.]11

5. 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.

6. 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? \$ _____

7. 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. 6 or 7, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 6 or 7 (or both), go to the next question.]



[8. 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. Cause 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). Such disparate treatment can take the form of a “hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned.” *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

Pattern Instruction 4.6 provides instructions for Title VII workplace harassment by a supervisor. Pattern Instruction 4.7 provides instructions for Title VII workplace harassment by a co-worker and may also be used where the alleged harasser is a third party, such as a customer.

A. Not For Tangible Employment Action Cases

Pattern Instruction 4.6 is intended to be used for any Title VII hostile work environment claim where there is no contention that the hostile work environment culminated in a “tangible employment action.” For those claims, Pattern Instruction 4.5, *supra*, or Pattern Instruction 4.8, *infra*, may be used. Pattern Instruction 4.5 is a general disparate treatment charge, and Pattern Instruction 4.8 applies to a subset of “tangible employment action” claims where the disparate treatment is alleged to be based on the refusal of unwelcome sexual advances.

In a case where there is a fact dispute whether the hostile work environment culminated in a tangible employment action, it may be necessary to combine the instructions and to instruct the jury on the definition of “tangible employment action.” “A tangible employment action 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.” *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). In such a case, if the jury finds a tangible employment action, it will not need to consider the affirmative defense available in hostile work environment cases based on a supervisor’s harassment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (“No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140 (2004), the Supreme Court concluded that constructive discharge due to a “supervisor’s official act” is a “tangible employment action,” so the affirmative defense established in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) does not apply. In contrast, constructive discharge due to continuing harassment by a supervisor is not a



“tangible employment action,” so the Faragher defense is available. Suders, 542 U.S. at 140. Please see “Affirmative Defense” section below for more information on the Faragher defense. The elements of a constructive discharge claim are addressed in Pattern Instruction 4.23, *infra*.

B. Retaliatory Hostile Work Environment Cases

The Eleventh Circuit recognized a cause of action for retaliatory hostile work environment under Title VII. Gowski v. Peake, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit in Gowski applied the “severe or pervasive” requirement for a hostile work environment claim that is described in Pattern Instruction 4.6 (and not the “materially adverse action” standard applied to retaliation claims under Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006)), so Pattern Instruction 4.6 may be modified for use in a retaliatory hostile work environment case – the main difference would be that the questions regarding whether protected status motivated the hostile work environment would need to ask whether protected activity motivated the hostile work environment. If there is a fact dispute regarding whether the plaintiff engaged in protected activity, then instructions and interrogatories from Pattern Instruction 4.21, *infra*, should be inserted into Pattern Instruction 4.6.

II. Elements and Defenses

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).

A. Supervisor

Pattern Instruction 4.6 assumes that there is no genuine fact dispute as to whether the harasser is a “supervisor.” If there is a fact dispute on this issue, the instruction should be modified accordingly. “[A]n 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.” Vance v. Ball State Univ., No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013).

B. “Because of” the Protected Trait

The plaintiff must prove that the hostile work environment was because of the protected trait. See Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 809 (11th Cir. 2010) (en banc) (“Although gender-specific language that imposes a change in the terms or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a general civility code.”) (internal quotation marks omitted). “Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on

the basis of sex, even when those insults are not directed at the individual employee.” Id. at 811. Pattern Instruction 4.6 does not elaborate on the “because of” requirement.

C. Affirmative Defense

The Supreme Court recognized an affirmative defense to hostile work environment claims in Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be vicariously liable “for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.” Id. at 807. “The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Id. If the employer exercises reasonable care to prevent and correct harassing behavior and the employee takes advantage of the preventive or corrective opportunities, the employer is still entitled to the affirmative defense if it establishes that it responded to the employee’s complaint with reasonable and prompt corrective action. Nurse “BE” v. Columbia Palms W. Hosp. Ltd. P’ship, 490 F.3d 1302, 1311-12 (11th Cir. 2007). Pattern Instruction 4.6 contains an instruction on the Faragher defense.

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.

