

4 PJI 7 | TITLE VII - CIVIL RIGHTS ACT - WORKPLACE HARASSMENT BY CO-WORKER OR THIRD PARTY - NO TANGIBLE EMPLOYMENT ACTION TAKEN

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 [Harasser] harassed [him/her] because of [his/her] [race/religion/sex/national origin], that the harassment created a hostile work environment for [him/her], and that [Defendant] knew, or in the exercise of reasonable care should have known about, the harassment, but did not take prompt remedial action.

[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: [Harasser] harassed [Plaintiff] because of [his/her] [race/religion/sex/national origin];

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

Third: [Plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment;

Fourth: [Plaintiff]'s supervisor failed to take prompt remedial action to eliminate the hostile work environment; 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.]

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.



In this case, [Plaintiff] claims that [Harasser], [his/her] coworker, created and carried on the hostile work environment.

You can hold [Defendant] responsible for the hostile work environment only if [Plaintiff] proves by a preponderance of the evidence that [Plaintiff]'s supervisor [, or a person with the authority to receive, address, or report a complaint of harassment,] knew, or should have known, of the hostile work environment and permitted it to continue by failing to take remedial action.

To show that a supervisor [, or a person with the authority to receive, address, or report a complaint of harassment,] "should have known" of a hostile work environment, [Plaintiff] must prove that the hostile environment was so pervasive and so open and obvious that any reasonable person in the supervisor's position [, or in the position of a person with the authority to receive, address, or report a complaint of harassment,] would have known that the harassment was occurring.

For the fifth element, if you find that:

- (a) [Harasser] harassed [Plaintiff] because of [his/her] [race/religion/sex/national origin];
- (b) the harassment created a hostile work environment;
- (c) [Plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about the hostile work environment; and
- (d) [Plaintiff]'s supervisor did not take prompt remedial action to eliminate the hostile work environment, 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.

If you find that [Plaintiff] suffered damages because of the hostile work environment, you must decide the issue of [his/her] 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 [Harasser] 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 [Plaintiff]'s supervisor knew, or in the exercise of reasonable care should have known, about 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.

4. That [Plaintiff]'s supervisor took prompt remedial action to eliminate the hostile work environment?

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.

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. E.g., *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

A. Not For Tangible Employment Action Cases

Pattern Instruction 4.7 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 factual dispute as to 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)).



B. Retaliatory Hostile Work Environment Cases¹³

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 4.7 (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 4.7 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 4.7.

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, 808-11 (11th Cir. 2010) (en banc); Mendoza v. Borden, Inc., 195 F.3d 1238, 1245-46 (11th Cir. 1999) (en banc).

A. “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 4.7 does not elaborate on the “because of” requirement.

B. Prompt Remedial Action

An employer may be held liable under Title VII for the harassing conduct of its non-supervisory employees, customers, or other third parties “if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or reasonably should have known.” Beckford v. Dep’t of Corr., 605 F.3d 951, 957-58 (11th Cir. 2010) (finding that prison could be held liable for harassing conduct of inmates). Pattern instruction 4.7 does not define “prompt remedial action.”



C. Affirmative Defense

The Supreme Court recognized an affirmative defense to hostile work environment claims *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Under this defense, an employer may be held 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.

“The Faragher defense is available to employers who defend against complaints of ‘an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the [plaintiff] employee.’” *Beckford v. Dep’t of Corr.*, 605 F.3d 951, 960 (11th Cir. 2010) (alterations in original) (emphasis omitted) (quoting *Faragher*, 524 U.S. at 807). The Faragher defense does not apply where the employee complains “of harassment by someone other than a supervisor.” Id. at 961. Accordingly, Pattern Instruction 4.7 does not contain an affirmative defense instruction.

III. Remedies

Please refer to the annotations and comments for Pattern Instruction 4.5, *supra*.1

