4 PJI 8 | TITLE VII - CIVIL RIGHTS ACT - WORKPLACE HARASSMENT - UNWELCOME SEXUAL ADVANCES -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 and conditions of employment because of the employee's sex. These statutes prohibit sexual harassment that culminates in an adverse tangible employment action.

Specifically, [Plaintiff] claims that [Supervisor] discriminated against [him/her] by making unwelcome sexual advances toward [him/her] and that [Supervisor] took an adverse tangible employment action against [him/her] because [he/she] rejected those unwelcome advances.

[Defendant] denies [Plaintiff]'s claim 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: [Supervisor] made unwelcome sexual advances toward [Plaintiff];
>
> Second: [Supervisor] took an adverse tangible employment action against [Plaintiff];
>
> Third: [Plaintiff]'s rejection of the unwelcome sexual advances was a motivating factor that prompted [Supervisor] to take the adverse tangible employment action; and
>
> Fourth: [Plaintiff] suffered damages because of the adverse tangible employment action;

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

A tangible employment action is a significant change in employment status. If you find that [Supervisor] [describe adverse tangible employment action at issue], you have found that [Supervisor] took an adverse "tangible employment action" against [Plaintiff], and you must decide whether [Plaintiff]'s rejection of [Supervisor]'s unwelcome sexual advances was a motivating factor that prompted [Supervisor] to take the tangible employment action. To prove that [his/her] rejection of [Supervisor]'s unwelcome sexual advances was a motivating factor in [Supervisor]'s decision, [Plaintiff] does not have to prove that [his/her] rejection of the unwelcome

sexual advances was the only reason that [Supervisor] took the adverse tangible employment action. It is enough if [Plaintiff] proves that [his/her] rejection of the unwelcome sexual advances influenced the decision. If [Plaintiff]'s rejection of [Supervisor]'s unwelcome sexual advances made a difference in [Supervisor]'s decision, you may find that it was a motivating factor in the decision.

Unlawful sexual harassment may take the form of unwelcome sexual advances, and it is unlawful for a supervisor to change – or threaten to change – the terms and conditions of an employee's employment to force or coerce, or to attempt to force or coerce, sexual favors from the employee.

A supervisor's demand or threat for sexual favors must be (1) one that a reasonable person would regard as a real or serious effort by the supervisor to gain a sexual favor, and (2) unwelcome to the employee. That means that the employee did not expressly or implicitly welcome or invite the sexual advances, and the employee regarded the supervisor's conduct as undesirable or offensive. [The fact that an employee may have consented to engaging in sex-related conduct in response to a demand or threat does not, by itself, establish that the employee invited or welcomed the conduct. But it is one of the factors you may consider.]

[Including Affirmative Defense (if applicable, see annotations): If you find that [Plaintiff]'s rejection of [Supervisor]'s unwelcome sexual advances was a motivating factor that prompted [Supervisor] to take an adverse tangible employment action, you must decide whether [Supervisor] has shown by a preponderance of the evidence that [he/she/it] would have [describe adverse tangible employment action] [Plaintiff] even if [Supervisor] had not taken [Plaintiff]'s rejection of the unwelcome sexual advances into account. If you find that [Plaintiff] would [describe adverse tangible employment action] for reasons other than [his/her] rejection of [Supervisor]'s unwelcome sexual advances, you must make that finding in your verdict.

If you find for [Plaintiff] and against [Defendant] on this defense, you must decide whether [Plaintiff] suffered damages because of the adverse tangible employment action.]

[Without Affirmative Defense: If you find that [Plaintiff]'s rejection of [Supervisor]'s unwelcome sexual advances was a motivating factor that prompted [Supervisor] to take an adverse tangible employment action, you must decide whether [Plaintiff]

suffered damages because of the adverse tangible employment action.]

If the damages would not have existed except for the adverse tangible employment action, then you may find that [Plaintiff] suffered those damages because of the adverse tangible employment action. If you find that [Plaintiff] suffered damages because of the adverse tangible employment action, you must decide the issue of [Plaintiff]'s 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 adverse tangible employment action, 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 the adverse tangible employment action 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 made unwelcome sexual advances toward [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.

2. That [Plaintiff]'s supervisor took an adverse tangible employment action against [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 rejection of [Supervisor]'s unwelcome sexual advances was a motivating factor that prompted [Supervisor] to take the adverse tangible employment action?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 [Supervisor] would have [describe adverse tangible employment action] [Plaintiff] even if [Supervisor] had not taken [Plaintiff]'s rejection of the unwelcome sexual advances 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.]

5. That [Plaintiff] suffered damages because of the adverse tangible employment 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.

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 sex and other protected traits. 42 U.S.C. §2000e-2(a). An employer may be held liable under Title VII if a supervisor takes a "tangible employment action" (such as discharge or demotion) against the employee because the employee refused to give in to the supervisor's sexual demands. E.g., *Hulsey v. Pride Restaurants, LLC, 367 F.3d 1238, 1245 (11th Cir. 2004)*; accord *Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1311 (11th Cir. 2001)* ("[W]hen a supervisor engages in harassment which results in an adverse 'tangible employment action' against the employee, the employer is automatically held vicariously liable for the harassment."). Pattern Instruction 4.8 addresses this type of disparate treatment claim, which the courts previously referred to as "quid pro quo" claims but now refer to as "tangible employment action" sexual harassment claims. Frederick, 246 F.3d at 1311.

For all other "tangible employment action" disparate treatment claims, Pattern Instruction 4.5, supra, may be used. For cases where the plaintiff's claims are based on a hostile work environment but there is no contention that the hostile work environment culminated in a tangible employment action. Pattern Instruction 4.6 (supervisor harassment), supra, or Pattern Instruction 4.7 (co-worker or third party harassment), supra, may be used.

II. Elements

A. Elements

The elements of a "tangible employment action" sexual harassment claim (also called "quid pro quo" claim) are derived from cases such as *Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227, 1231-32, (11th Cir. 2006)* and *Hulsey v. Pride Restaurants, LLC, 367 F.3d 1238, 1245 (11th Cir. 2004)*. In "tangible employment action" sexual harassment cases, the employer is strictly liable for the supervisor's unlawful conduct. See, e.g., Hulsey, 367 F.3d at 1245 ("An employer is liable under Title VII if it (even unknowingly) permits a supervisor to take a tangible employment action against an employee because she refused to give in to his sexual overtures... regardless of whether the employee took advantage of any employer-provided system for reporting harassment."); *Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1311 (11th Cir. 2001)* ("[W]hen a supervisor engages in harassment which results in an adverse 'tangible employment action' against the employee, the employer is automatically held vicariously liable for the harassment.").

B. "Tangible Employment Action"

A "tangible employment action" is required to prevail on a "tangible employment action" theory. Pattern Instruction 4.8 does not define "tangible employment action." If there is a fact dispute as to whether an employment action amounts to a

"tangible employment action," the instruction and verdict form should be adapted accordingly. "'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)*).

C. Causation

If the employee establishes that the employee rejected the supervisor's unwelcome sexual advances and that the employee suffered a tangible employment action, the employee must still establish that the employee's refusal of the supervisor's unwelcome sexual advances was a motivating factor that prompted the tangible employment action. See, e.g., *Myers v. Cent. Fla. Invs., Inc., 237 F. App'x 452, 455 (11th Cir. 2007)* (per curiam) (affirming summary judgment against plaintiff on tangible employment action theory because plaintiff "failed to offer evidence rebutting" the employer's legitimate nondiscriminatory reason for her termination). In cases where the dispute centers on the causation element, the court may wish to include a modified version of the legitimate nondiscriminatory reason instruction (and the optional pretext instruction) from Pattern Instruction 4.5, supra.

A "tangible employment action" is an adverse employment action such as a termination or a denied promotion. Therefore, Pattern Instruction 4.8 includes the causation language applicable to Title VII disparate treatment claims: "motivating factor," and Pattern Instruction 4.8 also includes an optional "same decision" defense charge. See *Alwine v. Buzas, 89 F. App'x 196, 210-11 (10th Cir. 2004)* (finding no error in district court's "mixed motive" defense instruction on plaintiff's "quid pro quo harassment claim"); cf. *Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003)* (concluding that district court did not abuse its discretion in giving a mixed motive instruction – including the same decision defense – because the plaintiff had presented sufficient evidence for a reasonable jury to conclude that sex was a motivating factor for the employer's decision).

III. Remedies

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